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Administrative Review
POR 7/1/04-6/30/05
Public Document
Office III: The Team

February 5, 2007

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

RE: Certain Pasta from Italy (Period of Review: July 1, 2004, through June 30, 2005)

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

Summary:

We have analyzed the case 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 described 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

Atar, S.r.L.

Comment 1: Whether the Department should continue to find that a particular market situation ("PMS") exists which prevents proper comparison with the export price or constructed export price
Comment 2: Indirect Selling Expenses ("ISE") and Profit
Comment 3: Distributions and Salaries
Comment 4: Allocation of Certain Expenses

Corticella Molini e Pastifici S.p.A. and its affiliate Pasta Combattenti S.p.A.

Comment 5: Whether the Department made certain clerical errors in the margin program

Comment 6: Whether the Department erred in applying the major-input rule

II. Background

On August 8, 2006, the Department of Commerce (the Department) published the preliminary results of the ninth administrative review of the antidumping duty order on certain pasta from Italy. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 71 FR 45017 (August 8, 2006) ("Preliminary Results 9th Review"). The merchandise covered by this review is described in the Federal Register notice issued the same date as this memorandum. The review covers two manufacturers/exporters: (1) Atar, S.r.L. ("Atar") and, (2) Corticella Molini e Pastifici S.p.A. and its affiliate Pasta Combattenti S.p.A. (collectively, "Corticella/Combattenti"). One respondent, Pastificio Antonio Pallante S.r.L./Industrie Alimentari Molisane, S.r.L./Vitelli Foods, LLC ("Pallante"), requested revocation from the order. The period of review (POR) is July 1, 2004, through June 30, 2005. On December 28, 2006, we received case briefs from Atar and Corticella. On January 5, 2007, we received a rebuttal brief from petitioners.[1] On January 16, 2007, at the request of Atar, the Department held a public hearing.

III. Discussion of Interested Party Comments

Atar

Comment 1: Whether the Department should continue to find that a particular market situation ("PMS") exists which prevents proper comparison with export and constructed export price

Atar argues that the Department should calculate normal value ("NV") based on Atar's third country sales to Angola, thereby reversing the Department's finding in the preliminary results of a PMS.

Atar claims that the Department in the preliminary results incorrectly found that a PMS exists in its third country market of Angola, which should be used to calculate NV. Counsel for Atar asserts that U.S. law limits the cases when the Department may find that a PMS exists. These cases, according to Atar, do not include when sales practices differ between a respondent's comparison market and U.S. market or that a particular difference is difficult is to quantify. Atar argues that the Statement of Administrative Action (SAA) H. R. Doc. 103-316 (1994) guides that the Department might find a PMS in the comparison market when a selling practice, e.g., a single sale, prevents proper comparison between the U.S. and comparison markets.

Atar's next argument is that affirmative PMS findings by the Department are rare, under extraordinary circumstances, and unjustified when used to account for differences in

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1 Petitioners are New World Pasta Company; Dakota Growers Pasta Company; and American Italian Pasta Company.

merchandise or circumstances. Atar cites the Comments[2] to the Department's regulations as support for its argument that PMS is a rare departure from the Department's normal practice. Atar cites Chemetals v. United States ("Chemetals"), 138 F. Supp. 2d 1338 (CIT 2001), to support its argument that no record evidence exists to demonstrate that its prices to Angola do not reflect prevailing prices for pasta in Angola. In the alternative, Atar also claims that it has provided record evidence that shows its Angolan sales of pasta represent a regular long-term pattern of trade by Atar and its principle to Africa and Angola before, during, and after the POR. Atar again relies on Chemetals and also cites Alloy Piping Products v. United States ("Alloy Piping"), 201 F. Supp. 2d, 1267 (CIT 2002), to support its claim that its sales to a single customer in Angola are at arm's length and were not made to manipulate prices. Atar also cites Alloy Piping to bolster its assertion that the only differences in terms of sale between the U.S. and Angolan markets, payment terms, do not support a conclusion that its Angolan sales are not representative because the credit adjustment calculation accounts for this difference.

Atar argues that the Department should follow its regulations and precedent and only find PMS when there is a properly filed allegation and when prices cannot be properly compared between two markets. To support its claim that regardless of when Atar's Angolan market was established, the company's sales to Angola are bona fide, Atar cites the Department's decision in Stainless Steel Bar from India; Preliminary Results of New Shipper Antidumping Duty Administrative Review, 61 FR 54774 (October 22, 1996) ("SSB from India 1996"). Atar argues that this case supports its claim because the Department, in rejecting petitioner's allegation, reasoned that even though a substantial portion of a sale shipped outside the POR, the sale was still bona fide. Atar also references Notice of Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 66 FR 18431 (April 9, 2001), to argue that the timing of the development of a comparison market is irrelevant when determining if comparison market prices can be properly compared to U.S. prices. Atar claims that the Department has rendered only a handful of affirmative PMS decisions and these decisions have found clearly defined differences in the U.S. and comparison markets that prevent proper comparison. Atar cites Notice of Preliminary Results of New Shipper Review of the Antidumping Duty Order on Certain Frozen Warmwater Shrimp from Ecuador, 71 FR 34888 (June 16, 2006), where the Department found a PMS because respondent's home market sales were incidental to its primary business of selling to the United States; and Atar also cites Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Live Swine from Canada, 69 FR 61639 (October 20, 2004), where the Department found a PMS because the company's incidental home market sales of substandard and defective swine prevented proper comparison between the home and the U.S. markets. Atar claims these decisions support its argument that its U.S. sales are properly comparable to its Angolan sales.

Atar then argues that facts in this review do not support a PMS determination. Atar argues that the factual record of this proceeding confirms that Atar's sales to Angola do not

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2 "In the Department's view, the criteria of a "particular market situation" and the "representativeness" of prices fall into the category of issues that the Department need not, and should not routinely consider. In this regard, we note that the SAA at 822, through its repeated use of the words "may" and "might," appears to treat the "particular market situation" criterion that is subordinate to the primary criterion of viability..." "The party alleging the existence of a "particular market situation" or that sales are not representative has the burden of demonstrating that there is a reasonable basis for believing that a "particular market situation" exists or that sales are not representative.

constitute a PMS. Atar challenges the Department's preliminary results that stated that Atar consummated a single sale to Angola as evidenced by the long-term sales contract between Atar and Pacific. Atar claims that if the Department reverses its preliminary results, then it cannot conclude that a PMS exists. Atar cites Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China, 69 FR 20594 (April 16, 2004), and accompanying Issues and Decision Memorandum, to support its argument that the Department routinely uses date of invoice as date of sale unless a different date better demonstrates the date that the material terms of sale are established and that a pre-existing contract rarely is sufficient to depart from practice. Atar also cites Magnesium Metal from the Russian Federation: Final Determination of Sales at Less-than-Fair Value, 70 FR 9041 (February 24, 2005).[3] Atar asserts that these cases, as applied to the facts, support its argument that Atar made multiple sales to Angola. In summary, Atar argues the following facts have been established: the price agreement is not a long-term agreement; the price agreement did not fix quantities; no prices are final until the date of invoicing; the price agreement does not specify freight costs, shipping dates or delivery times; the price agreement does not state that parties are bound by the agreement; the price agreement is not in the currency of invoice, which is required by Department's regulations; the invoice price is the final price recorded into Atar's financial systems and for VAT purposes; the price, when converted into euros to be booked into Atar's financial systems using the agreement date as date of sale, would produce a different amount which cannot be tied to Atar's financial records; the practice of converting the dollar- denominated Angolan invoice into euros on the date of invoice is consistent with Atar's practice for its U.S. sales; and, each Angolan shipment requires its own import reflecting the price and quantity for that shipment, not the contract price.

Atar further claims that the Department's PMS determination implies that Angola is not a viable export market for Italian pasta. Atar argues that it has submitted evidence demonstrating that Angola is not an unusual market for pasta exports and is consistent with the Department's acceptance of other relatively small countries as third country markets in past decisions. Atar challenges the Department's reliance on Stainless Steel Bar from India,: Preliminary Results of New Shipper Review, 64 FR 46350 (August 25, 1999)("SSB from India 1998"), on which the Department based its preliminary results. Atar argues that the Department's determination that Angola was not an established market failed to consider the critical factors underlying the SSB from India 1998 and evidence on Atar's longstanding business relationship for food products with Angola and Africa. Atar further contends that the Department's preliminary results determination that radical differences existing between the U.S. and Angolan markets justifying a PMS are unsupported by the record. Atar argues that as a matter of law the differences in selling practices which are quantifiable do not rise to a PMS determination. Atar also argues that its U.S. and Angolan markets are more similar than they are different and that its U.S. and Angolan market positions are similar.

Atar challenges the Department's characterization of differences between the U.S. and Angolan markets. The Department's reference to triangular sales through a third country as a

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3 Atar also cites Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Reviews, 64 FR 12927 (March 16, 1999), and Certain Steel Concrete Reinforcing Bars; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part, 70 FR 67665 (November 8, 2005), and accompanying Issues and Decision Memorandum as supporting this argument.

difference justifying a PMS determination is inconsistent with the Departatment's practice, according to Atar. Atar cites Oil Country Tubular Goods from Argentina; Final Determination of Sales at Less Than Fair Value, 60 FR 33539 (June 28, 1995) ("OCTG from Argentina 1995"), and Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 70 FR 28274 (May 17, 2005), and accompanying Issues and Decision Memorandum at Comment 1, as supporting its argument that the Department routinely compares direct sales in one market with sales through a trading company in another market. Atar also references sales made in POR 8 by another Italian respondent as selling to Italian trading companies that were selling to Africa. Atar contends that the Department's reference to pasta destined for Angola not produced until after the invoices were generated and not shipped until after invoicing is irrelevant to a PMS determination. Atar cites OCTG from Argentina 1995 and Stainless Steel Bar from India: Preliminary Results of New Shipper Review Administrative Duty Administrative Review, 61 FR 54774 (October 22, 1996) ("SSB 1996 NSR"). Atar also claims that differences in payment between the U.S. and the Angolan sales do not support a PMS determination because the credit expense adjustment calculates this difference as the Department determined in SSB 1996 NSR. The fact that Atar made a single sale to a single customer while making multiple sales to multiple customers is a distinction that, according to Atar, does not justify a PMS. Atar asserts that it has a primary customer in each market,and its largest U.S. customer purchases a majority of the subject merchandise Atar ships to the United States. Atar also argues that the fact that Angola is a smaller market than the United States supports its claim that selling to one customer is not unusual. According to Atar, the Department can make an adjustment to account for any differences in merchandise. Further, Atar claims that there is no determination where the Department rejected a comparison market because a respondent only sold a subset of subject merchandise. Atar also cites Notice of Final Determination of Sales and Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 (August 30, 2002), and accompanying Issues and Decision Memorandum at Comment 1c.

Atar also challenges petitioners' assertion that the Department examine the totality of the circumstances surrounding the bona fides of Atar's sales to Angola. Atar cites to the differences in the Department's laws and regulations for new shipper reviews and PMS as rebuttal to petitioners' claim. In a new shipper review, the Department is required to evaluate a respondent's sales to determine whether the sales are reflective of normal commercial realities and are a reliable indicator of future activity as determined in Tianjin Tiancheng Pharm Co. v. United States, 366 F. Supp. 2d 1246, 1247-1264 (CIT 2005). In contrast, according to Atar, a PMS analysis requires review of comparison market sales to determine whether the sales were to a bona fide customer at arm's length. Atar further argues that petitioners' "totality of circumstances" analysis is flawed. Atar claims that petitioners' analysis of prices to Angola does not reflect the fact that prices change over time and is without merit. Atar criticizes petitioners' argument that the quantity and number of sales to Angola is suspect by citing to section 773(a)(1)(B)(ii)(II) of the Tariff Act of 1930, as amended ("the Act") and the SAA as requiring that the aggregate quantity of foreign like product in a comparison market exceed five percent of total U.S. sales of foreign like product, which Atar asserts it has met. Atar also claims that there are fewer shipments to Angola because of the import license requirement and to avoid port delays. Atar also characterizes petitioners' claim that significant late payments would terminate a business relationship are baseless and irrelevant under the Department's practice. Atar finally argues that petitioners' claim that invoiced amounts do not tie to Atar's books ignores Atar's

September 21, 2006, submission where Atar corrected a clerical error in its reconciliation and the correct value of sales tied to Atar's books at verification.

Petitioners argue in their rebuttal brief that the Department was correct in determining that a PMS prevents a proper price comparison to Atar's sale in Angola. Petitioners argue that a PMS is supported by the SAA and does not require that a proper comparison be impossible to justify a PMS. Petitioners assert that they have already addressed the issues raised by Atar in their September 13, 2006, PMS rebuttal comments. Petitioners further assert that the SAA empowers the Department to disregard otherwise viable comparison markets in unusual situations.

Petitioners maintain that Atar made only one sale to Angola, during the POR, and the record of evidence supports the determination. Petitioners assert that the invoice date reported as the date of sale is not compelling and that Atar admitted to entering into a short-term agreement at page 16 of its case brief. Petitioners argue that even if prices are converted to U.S. dollars on the date of invoice, the customer incurs no additional risk. In other words, if the customer agrees to pay 1000 euros, he can simply set aside his 1000 euros and convert the amount into dollars when the invoice is printed. Therefore, petitioners assert that there is no uncertainty and cite to Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil; Preliminary Results of Antidumping Duty Administrative Review, 70 FR 17406 (April 6, 2005).

Petitioners argue that the Department has not found that Angola could never be a proper comparison market, citing 19 CFR 351.404(c)(2)(i) and pages 14-16 of Attachment 1 of their rebuttal brief. Petitioners claim that it is not unusual for the Department to scrutinize Angola as a comparison market, because neither Africa nor Angola has ever served as a comparison market. Further, petitioners argue that the Department's cite to SSB from India 1998, where the PMS involved one transaction is on point. Petitioners also argue that additional sales were made after the POR to bolster its claim compared to the facts in SSB from India 1998. In addition, petitioners argue that the general experience of Atar's owner in Africa and Angola does not address whether Angola was an established market for Atar's sales of subject pasta. Petitioners argue that the Antidumping Agreement allows the Department to select only established comparison markets. Finally, petitioners assert that the comparison of the sales in Angola to the U.S. sales are not necessary to finding a PMS.

Petitioners rebut Atar's claim that unusual circumstances, such as use of third-country trading companies, delays in shipment, delayed payment, and single sales are reasons for finding a PMS. Petitioners argue that the Department found that the totality of circumstances was reason to find a PMS. Finally, petitioners argue that, while prices do change over time, the average prices were stable, during 2004-2006. Thus, petitioners assert that Atar's inconsistent pricing implies that a PMS exists.

Department's Position

We disagree with Atar that the Department's preliminary finding of a PMS was not in accordance with the statute, regulation, or Department practice and, for these final results, continue to find that a PMS exists with respect to Atar's single sale to Angola during the POR which prevents a proper comparison to Atar's U.S. sales.

Consistent with sections 773(a)(1)(B)(iii) and 772(a)(1)(C)(iii) of the Act, the Department may decline the use of home market or third country sales as the basis for NV if a PMS in such country prevents a proper comparison with export price or constructed export price.

The Act does not define PMS, but the SAA states that such a situation might exist where a single sale in the market in question constitutes five percent of sales to the United States or where there is government control over pricing to such an extent that home market prices cannot be considered to be competitively set. In citing to a single sale as an example of a situation in which a PMS might exist, the SAA recognizes that a single sale may indicate the absence of an established market for the foreign like product in question. Consistent with SSB from India 1998, absent an established market, the Department has no basis to find that a single sale is indicative of respondent's actual selling practices and prices in the market in question, in or outside of the ordinary course of trade, or otherwise in line with respondent's normal activity in the market in question. As a result, the Department has concluded in this review that reliance on a single sale absent an established market does not permit a proper comparison to U.S. sales.

Atar is correct that U.S. law limits the situations under which a PMS can be found to those in which a proper comparison cannot be made. As stated above, PMS is not defined in the statute, and while the SAA lists several examples, including a single sale, these examples are illustrative and do not preclude the Department from finding a PMS in situations other than the examples listed in the SAA, where market conditions prevent a proper comparison. Indeed, the circumstances under which the Department found a PMS in Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and and Canned Warmwater Shrimp from Ecuador, 69 FR 76913 (December 23, 2004)("Shrimp from Ecuador 2004"), and Notice of Final Determination at Sales at Less than Fair Value: Fresh Atlantic Salmon from Chile, 63 FR 31411 (June 9, 1998) ("Salmon from Chile 1998"), are not specifically referenced in the statute or SAA, yet such circumstances prevented a proper comparison with export price or constructed export price.

Here, the Department finds that the circumstances surrounding Atar's single sale to Angola prevent a proper comparison because: 1) during the POR Atar did not have an established market for the foreign like product in Angola; and 2) the significant differences in the terms and conditions under which the Angolan sale was made would prevent a proper comparison even if an established market existed.

In the case of Atar's sale to Angola, as stated in our preliminary decision memorandum and as stated below, we find that: 1) the sale constitutes a single sale of a commodity product; 2) during the POR Atar did not have an established market in Angola for the foreign like product; and 3) the terms and circumstances under which Atar made the single sale to Angola differ significantly from the terms and conditions under which Atar sells in the U.S. market. Thus, the Department properly concluded that a proper comparison to Atar's U.S. sales is not possible.

Atar cites to several cases to support its conclusion that the Department's finding was not in accordance with the statute and case precedent. We find these cites to be inapposite. In Chemetals, the court stated that a single sale to the United States could be used for calculation purposes because the statute sets no minimum quantity of U.S. sales necessary in order for the Department to conduct a review. The Court cited Silicon Metal from Brazil, 59 FR 42806, (August 19, 1995) and Fresh and Chilled Atlantic Salmon from Norway: Final Results of New Shipper Antidumping Duty Administrative Review, 62 FR 1430, 1432 (January 10, 1997), in which the question before the Department was whether a single sale to the United States constituted a sufficient basis on which to conduct a review. The court did not address the issue before us in this case: whether a single sale in a third country market, in the absence of an established market, is an appropriate basis on which to determine NV and thus serve as a reasonable and proper comparison for numerous sales to the United States. In sum, Atar improperly equates the Court's finding that a single sale to the United States is a sufficient basis upon which to conduct an administrative review to a finding that Atar's single sale to Angola, in the absence of an established market, can properly serve as the basis for NV.

Atar's reliance on SSB from India 1998, is similarly misplaced. The issue before us in this case does not involve a single U.S. sale and whether or not such is a sufficient basis on which to establish a cash deposit rate. Nor is the issue one of bona fides. Rather, the issue before us in this review is whether during the POR Atar had an established market in Angola for its sales of foreign like product such that the Department can determine whether its single sale is indicative of Atar's actual and normal pricing and sales practices in the market in question. Because Atar made no other sales of the foreign like product to Angola either during the POR or at any time prior to its formation in 1999, we find that Atar did not have an established market during the POR and thus the Department cannot determine whether this sale is indicative of Atar's selling practices in the market in question. As such, we conclude that the sale cannot form the basis of a proper comparison to Atar's U.S. sales.

The Department also notes a critical distinction between acceptance of a single sale in the U.S. market for purposes of conducting a review and establishing a cash deposit rate and reliance on a single sale, absent an established market, for purposes of establishing NV. In the case of a single U.S. sale, the margin calculated on that sale will serve as the assessment rate for only that sale under review. The margin on that sale will also serve as an estimate of future duties due in the form of a cash deposit, but all future U.S. sales entered under that cash deposit would be subject to subsequent review. With respect to NV, however, reliance upon a single comparison market sale could result in that sale being determinative of the dumping margin and the final assessment rate for any number of U.S. sales. Because of the Department's 90/60 day comparison window period, a single foreign market sale can potentially be matched to sales to the United States occurring over a six-month period. Accordingly, the Department must have the ability to ensure that NV is indeed based on transactions undertaken by the respondent in accordance with the terms and conditions under which that respondent normally sells in that market. In the case of Atar's single sale to Angola, made significantly different terms and conditions in comparison to Atar's U.S. sales. Absent an established market in Angola for the foreign like product, the Department cannot conclude that the terms and conditions of the sale are indicative of Atar's normal business practices with respect to Angola and thus such sale cannot provide for a proper comparison.

With respect to Atar's argument that it has provided sufficient record evidence of an established market for the foreign like product in Angola, we strongly disagree. First, we find that much of the evidence provided by Atar consists of invoices of pasta and other products which Atar did not produce. As such, these products do not fit the statutory definition of foreign like product and thus are irrelevant to the finding of a PMS with respect to Atar's single sale of foreign like product to Angola. Second, we find that the vast majority of these invoices and lists of sales allegedly undertaken by Atar do not represent sales to Angola. Rather, they represent sales to other markets in Africa, such as Togo, Congo, Kenya, and Somalia. Under the statute, the Department must focus its analysis on the foreign like product in the country at issue. Whether Atar has an established market for other products in markets other than Angola is not at issue in this review.

Nor is the issue whether other Italian manufacturers/exporters have established markets in Angola for imported pasta. We disagree with Atar's statement in its brief that implicit in the Department's preliminary PMS determination is a finding that Angola is not an export market for pasta. Atar's statement misconstrues the Department's preliminary finding. The Department made no finding that there is no market in Angola for imported pasta. In its preliminary finding and for these final results, the Department has found that during the POR Atar, an individual manufacturer/exporter, did not have an established market in Angola for its toll-produced pasta. Indeed, some Italian manufacturers/exporters may have established markets in Angola for their products while others may not. The experience of other producers, however, is not the issue before the Department in this case.

While it may be appropriate in some instances to consider general market conditions in determining whether a PMS exists, e.g., in cases where it is alleged that the entire market in question is export oriented, in the case of a single sale, general market conditions are not likely to inform the decision of whether a PMS exists, as the issue with respect to a single sale is whether the respondent at issue has an established market for its foreign like product such that the single sale can be evaluated in light of respondent's normal selling and pricing practices in the market in question. Further, we note that even in situations where general market conditions have been considered, they constitute only one of several factors on which the Department bases its findings. Indeed, in salmon from Chile, over the course of the proceeding, we found that a PMS existed for certain respondents and not others as the Department properly focuses its analysis on the specific respondent at issue and its activity in the market in question. See Notice of Preliminary Determination of Sales as Less than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon from Chile, 63 FR 2664 (January 16, 1998) and Notice of Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 48457 (August 8, 2000). Thus, as noted above, and contrary to Atar's argument, general market conditions, while in some cases informative, are not dispositive in evaluating the existence of a PMS, particularly in situations involving a single sale[4].

To illustrate the above, we note that in SSB from India 1998, the only case precedent involving a single sale in the context of a PMS analysis, the Department was well aware that a market existed in India for the product at issue, as we had relied upon such market for other respondents in previous segments of the proceeding. In that case, however, as in this case, and all other cases in which the Department has evaluated the existence of a PMS, the Department has properly focused its analysis on the behavior of the specific respondent(s) under investigation/review in reaching its conclusions about whether sales by such respondent(s) could form a proper basis for comparison to U.S. sales.

Regarding record evidence of Atar's actual activity in the Angolan market, such evidence indicates that Atar made sale(s) of pet food and corn flour. We find that pet food and corn meal are not within the definition of foreign like product in this case and thus provide no evidence of an established market for such. Atar also argues that one of its principals sold pasta to Angola approximately 10 years ago while working for another Italian pasta manufacturer. As noted above, however, the Department's analysis is properly focused on Atar's behavior, not the behavior of other companies. The company for which Atar's principal allegedly worked is not subject to this review, nor would its sales be a proper means through which to evaluate Atar's single sale, as any sales to Angola made by such company would be sales of that company and not of Atar.

4We note, however, that in instances involving a single sale, the complete absence of a market of any kind for the foreign like product in the country in question may be relevant, as it would be impossible to conclude that respondent had an established market under such circumstances.

Finally, we find that none of the invoices or sales listings submitted by Atar with respect to its sales of pasta or any other product to any market in the world involve the trading company to which Atar sold for delivery to Angola during the POR. Indeed, while Atar argues that "triangular" sales arrangements are common and even necessary for sales to Africa, Atar submitted numerous invoices and sales listings indicating direct sales by Atar to several African countries. While Atar states that its principal had a longstanding personal and professional relationship with a principal of the trading company at issue, Atar itself states that they did not complete any business transactions prior to the single sale of pasta for delivery to Angola. Thus, the record evidence indicates that not only was Atar's single sale to Angola its first sale to Angola of foreign like product, it was also Atar's first sale of any product to the trading company in question, despite the fact that Atar claims a longstanding professional relationship between the principals of these two companies.

Atar additionally argues that its subsequent sales to Angola, made after the POR, constitute evidence of an established market during the POR. The Department finds that while subsequent sales may speak to the development of a market over time, they do not provide conclusive evidence of an established market prior to their existence. Indeed, in <u>Notice of Preliminary Results of Anditudmping Duty Administrtive Review and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile</u>, 66 FR 18431 (April 9, 2001), the Department noted the establishment of a market over a period of years prior to the Department's decision to rely on that market for comparison purposes. Further, we note that Atar has placed four invoices on the record of this review as evidence of subsequent sales. Atar did not provide the Department with any sales agreement relating to any of these four subsequent shipments. Consequently, the Department cannot determine whether these four invoices constitute one or more sales, as evidence on the record of this review indicates that multiple invoices may be generated for a single sale. Because the record evidence regarding these subsequent transactions is scant and inconclusive, the Department does not find that the record evidence with respect to subsequent sales provides sufficient support for a finding that during the POR Atar had an established market in Angola for the foreign like product.

Atar further argues that there are no substantive differences in the terms and conditions of its single sale to Angola as compared to its U.S. sales. The Department disagrees. In our preliminary finding of a PMS, we noted several distinct differences between Atar's single sale to Angola and its U.S. sales. These differences include: 1) direct versus indirect sales; 2) differences in product mix; 3) significant differences in the timing and sequencing of sale, order, production, invoicing, and shipment; and 4) significant differences in the average payment date for the U.S. and Angolan markets. Atar argues that these differences are easily quantifiable, and thus adjustments can be made in the Department's calculations to account for such differences. Atar further argues that in past cases such differences have not prevented a proper comparison. First, we are aware of no case in which the Department has compared sales made under such significantly different circumstances. We note in particular, as detailed in our preliminary finding, the distinct and significant differences in the timing and manner in which order, production, invoicing, shipment, and payment occur with respect to Atar's single sale to Angola as compared to its numerous U.S. sales. While in general, the Department may be able to quantify and thus adjust for some common differences in terms of sales where such differences are quantifiable, we have no accurate means through which to measure the effect on price of other, much more unusual differences, <u>e.g.</u>, the significant difference in the timing and manner in which order, production, invoicing, shipment and payment occur. As such, we have no means through which to adjust for such differences. This lends to our conclusion that a proper comparison cannot be made between these significantly different types of sales.

Moreover, additional information contained in the verification report further calls into question the conditions under which the Angolan sale took place and further distinguishes this sale from Atar's sale to the United States. Page 7 of the verification report states that, with respect to Atar's sale to Angola, Atar officials transferred title and ownership of the pasta to the Lebanese trading company at the time of invoicing. Atar officials stated that once the invoice was issued the trading company had title and was considered the owner of the goods. As invoicing for this sale occurred prior to production, this statement indicates that Atar: 1) issued a final invoice for a product which had not yet been produced; and 2) transferred title to a product which did not yet exist. As a result, according to Atar's own statements at verification, it is unclear whether Atar ever held title to the finished pasta it allegedly sold. This fact not only constitutes additional evidence that the terms and conditions under which Atar made the single sale to Angola were significantly different than those under which it sold in the U.S. market, but also raises serious concerns about whether Atar is properly considered the producer and seller of the goods delivered to Angola. See 19 CFR 351.401(b).

Furthermore, while Atar argues in its brief that its U.S. sales and its single sale to Angola were more similar than different, and that its sale to Angola was in no way unique or unusual, we note that Atar itself argued to the contrary in several submissions placed on the record prior to the Department's finding of a PMS. For example, in its February 6, 2006, submission, on pages 6 and 7, Atar refers to the "unique requirements for selling product to Angola." Atar also states, "The Angolan sales and invoicing process is significantly different due to the use of a third party trading company and the need for the Angolan importer to obtain a fixed import license prior to entry." Atar further states that the manner in which it sold to Angola "is in strict contrast to the U.S. market for which no special import licenses are required, no pro-forma invoices are necessary, and in the case of Atar, a steady flow of sales orders from its US customers permitted consistent and uninterrupted production from Atar's various suppliers." In its June 30, 2006, submission, pages 5, 9 and 15, Atar refers again to the "unique nature of the Angolan market." It further states that, "General market conditions, terms and conditions of sale and the unique nature of the triangular selling arrangement with Angola, dictate different invoicing and shipping practices between the markets." Finally, Atar states that, "Payment terms for Angola differ from those for the U.S. market due to the unique nature of the triangular sales arrangement." Thus, we find that Atar's own submissions and record statements refute Atar's theory that the terms and conditions under which it sold to Angola are similar to the terms and conditions under which it sells to the United States.

Regarding Atar's argument that its sale to Angola constitutes three distinct sales, rather than a single sale, the Department also disagrees. As noted in our preliminary PMS decision, we find that the essential terms of sale to Angola, i.e., price and quantity, were established in a written "Sale Agreement" dated and signed by Atar and its customer. Contrary to Atar's assertion, the Department does not need to find a sales agreement to be "long term" in order to find that the essential terms are established in such and that the date of such agreement constitutes the most appropriate date of sale. See 19 CFR 351.401(I). With respect to the agreement at issue, there is no documentary evidence that the terms were subject to change; nor did the essential terms change in any way from those specified. Atar is correct that the regulations stipulate that "normally" the Department will use invoice date as date of sale. However, the regulations also provide that where the essential terms are established at an earlier point in time, invoice date may not be the most appropriate date of sale; rather, the earlier date on which the terms are established may properly serve as the date of sale.

While Atar argues that the sales agreement was just a framework agreement and that the terms could be changed at any time prior to invoice, there is no evidence of such on the record of this review. The sales agreement does not state "framework agreement" or "memorandum of understanding;" rather, it is expressly titled, "Sale Agreement." As noted above, no changes to essential terms took place. The quantity specified in the sales agreement is identical to the quantity invoiced and delivered. Atar argues that this quantity was subject to change, citing to a phrase in the agreement which uses the term "about" when referring to cartons. The Department finds, however, that this phrase relates to loading instructions per container, rather than the total quantity sold, as it is included under the heading, "Good loaded on container." Moreover, the record evidence indicates that Atar's customer purchased by container, not by carton.

Atar further argues that the price was not fixed because the USD price, paid by respondent, is not established until invoice date. We disagree with Atar's position that a conversion to USD on invoice date changes the euro price fixed in the sales agreement. The record shows that the euro price established in the sales agreement is the controlling price. The sales agreement specifies that the euro price will be converted into USD on the date of invoice. Atar itself stated that this avoids any exchange risk on its part, as it is thus guaranteed the euro price in the agreement. Further, the customer is well aware at the time of the agreement of the euro price to which it is committed. Under this arrangement, the customer pays in its preferred currency, USD, but both parties commit to a euro price fixed up front in the sales agreement. This euro price does not change though foreign currency exchange rates may fluctuate from day to day.

Regarding Atar's argument that freight costs, shipping dates, or delivery times were not established in the agreement, Atar has not indicated how these items would be considered essential terms of sale, which are normally just price and quantity. With respect to Atar's argument that the Department must use invoice date because that is the date on which Atar books the sale in its record keeping system, we note again the Department's practice to depart from using invoice date, even in instances where that date is used by respondent for record keeping purposes, where a different date in time most appropriately reflects the date on which the essential terms of sale are established and fixed.

Finally, with respect to the sales agreement, we note that Atar itself on several occasions referred to the terms of sale, as established in the agreement, as fixed. For example, in its June 30, 2006, submission, pages 8, 9, and 12, Atar refers to the sales agreement as the document which "sets the price for the single type of cut sold." It further noted that, "Payment terms and price are also set in this agreement as well as shipping terms." Atar further stated that "Since the basic agreement is only for one cut, spaghetti, and only for full cartons, and since basic prices are set in the agreement, significant additional price or quantity negotiations are not necessary." Atar also stated it "negotiates a fixed price" for delivery of pasta during a particular period," and finally, stated that "Prices and all relevant sales terms are contained in the agreement, attached as Exhibit S-10 and are not typically reiterated by the parties." Thus, the Department finds, as noted above, that the essential terms of sales for Atar's sale to Angola were established in the sales agreement, and thus, properly concludes that Atar made a single sale of foreign like product to Angola during the POR.

With respect to Atar's argument that its sale to Angola is a bona fide transaction, the Department notes that it has not reached a finding regarding the bona fides of this particular transaction, nor is it required to do so, as the Department has found that a PMS exists which prevents a proper comparison of Atar's single sale to Angola to its U.S. sales. Contrary to Atar's assertions, a finding of a PMS is not predicated on a finding that sales to the market in question are not bona fide. In this case, the finding of a PMS is based on the totality of the circumstances surrounding Atar's sale of foreign like product to Angola, namely that: 1) during the POR Atar made a single sale to Angola; 2) neither during the POR nor at anytime prior to the POR did Atar have an established market for sales of the foreign like product in Angola; and 3) the terms and conditions under which Atar made its single sale of foreign like product to Angola were significantly different that the terms and conditions under which Atar sold subject merchandise to the United States. As such, we find that a PMS exists with respect to Atar's single sale to Angola which prevents a proper comparison with U.S. sales.

Although the Department has not made a finding of bona fides with respect to either Atar's U.S. sales nor its single sale to Angola, the Department has serious concerns with respect to the overall nature of Atar's operation and its claim to be a producer of pasta under the tolling regulation. While in the new shipper review of Atar and in this current administrative review the Department has accepted Atar's claim to be the producer of subject merchandise and foreign like product under the tolling regulation, after having reviewed the record of this case and Department precedent cited below, we are concerned with respect to this conclusion.

The Department has stated in past cases that the tolling regulation does not purport to address all aspects of an analysis of tolling arrangements. See Static Random Access Memory Semiconductors from Taiwan, 63 FR. 8909 (February 23, 1998)("SRAMS from Taiwan"); Low Enriched Uranium from France, 67 FR. 6680 (February 13, 2002)("LEU from France"); and Polyvinyl Alcohol from Taiwan, 63 FR 6526 (Feb. 9, 1998)(preliminary results) and 63 Fed. Reg. 32,810 (June 16, 1998) (final results) ("PVA from Taiwan"). We have also stated that the Department is not restricted to the four corners of the relevant sales contracts in its analysis of a tolling operation. Id. Rather, the Department reaches its conclusions based on the totality of circumstances surrounding the sales and production operations at issue. Id. In SRAMS from Taiwan, the Department stated that, "The role played by each entity as well as the nature of the product produced are important considerations in identifying the appropriate party as the producer of subject merchandise."

In past cases involving analyses of tolling arrangements, the Department has taken into account a variety of factors, including but not limited to the following: 1) the history of the parties in producing and/or subcontracting for the production of subject merchandise; 2) the timing of and basis for the decision to begin a toll production operation; 3) the existence of production facilities for subject merchandise; 4) the process through which the fundamental character of the good is established; 5) the provision of inputs from the parties at issue; and 6) the overall arrangement through which the purchase and sale of subject merchandise takes place. See LEU from France and PVA from Taiwan. In PVA from Taiwan, the Department found the engagement of an entity directly or indirectly in some aspect of production to be an important consideration in identifying the appropriate party as the producer.

The Department does not have on the record of this review sufficient information to conduct a full analysis of Atar's tolling operation using the criteria outlined above. As a result, the Department intends to fully pursue this issue and analysis in the subsequent, ongoing review of Atar.

Comment 2: Indirect Selling Expenses ("ISE") and Profit

Atar contends that the Department should base Atar's ISE and profit, used to calculate constructed value ("CV") for these final results, on Atar's reported comparison market sales. Atar notes that as a result of the PMS finding, the Department relied on the ISE and profit data of the six respondent companies[5] in Notice of Final Results of Eighth Administrative Review of Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke In Part, 70 FR 71464 (November 29, 2005) ("Final Results 8th Review"), to determine Atar's ISE and profit for the calculation of CV in the Preliminary Results 9th Review. If the Department determines that a PMS exists for purposes of the final results, Atar asserts that section 773(e)(2)(A) of the Act does not prohibit the Department from relying on a producer/exporter's actual ISE or profit data merely because the market may not be viable. Instead, Atar alleges that as long as the producer/exporter's comparison market sales are in the ordinary course of trade, the Department is required to calculate ISE and profit ratios based on those sales. Atar notes that in the SAA at 826, sales not in the ordinary course of trade are defined as sales at below-cost prices, off-quality merchandise, sales to related parties at non-arm's-length prices, or sales with abnormally high profit. Atar concludes that sales rejected due to a PMS finding are not defined to be, and have never been held to be, outside the normal course of trade. Therefore, even if the Department determines that a PMS exists for purposes of the final results, Atar contends that the Department should base ISE and profit on Atar's comparison market sales in accordance with the statute.

Atar asserts that, if the Department decides not to rely on the ISE and profit of Atar's comparison market sales, the most appropriate surrogates are the ISE and profit that Atar realized on its U.S. sales. Atar states that its sales practices are virtually identical in the United States and in Angola. Atar points to Fresh Cut Flowers from Mexico: Final Results of Antidumping Duty Administrative Review and Revocation in Part of Antidumping Duty Order, 61 FR 63822, 63824 (December 2, 1996) ("FCF from Mexico 1996"), where the Department relied on the US selling expenses reported by a respondent as a reasonable method for determining that respondent's home market selling expenses. In the instant case, Atar alleges that it sells relatively large quantities of private label pasta to a limited number of distributors/wholesalers in both the United States and Angola and provides virtually the same selling functions in both markets. Therefore, Atar concludes that it is appropriate to use its U.S. sales as a surrogate for its comparison market sales for purposes of calculating ISE and profit.

Atar asserts that the Department's use of the ISE and profit of the six respondent companies' home market sales from the Final Results 8th Review as surrogates for Atar's ISE and profit on its comparison market sales in the Preliminary Results 9th Review was inappropriate. Atar points to section 773(e)(2)(B)(iii) of the Act to support its claim that the Department must determine the most appropriate profit rate by examining the similarities and differences between the respondent and the company whose ISE and profit is selected as a surrogate. Atar refers to Notice of Final Determination of Sales at Less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 20592 (April 16, 2004). and accompanying Decision Memorandum at Comment 26 ("Television Receivers from Malaysia"), where the Department found that the financial data of seven multinational companies could not

5These six respondent companies were (1) Barilla G.e.R. Fratelli, S.p.A. ("Barilla") (formerly Barilla Alimentare, S.p.A.), (2) Corticella/ Combattenti, (3) Industrie Alimentare Colavita, S.p.A., (4) Pastificio F.lli Pagani S.p.A., (5) Pastificio Antonio Pallante S.r.L. and its affiliate Vitelli Foods LLC, and (6) Pastificio Riscossa F.lli Mastromauro, S.r.L.

be used to calculate a CV profit ratio because these companies bore little similarity to the respondent company. The Department in that case, according to Atar, recognized that the greater the similarity in business operations, products, and customer base, the more likely that there is a greater correlation in the profit experience of the two companies. As such, the Department selected the most appropriate surrogate based on the following four factors: 1) the similarity of the potential surrogate company's business operations and products to the respondent, 2) the extent to which the financial data of the surrogate company reflects sales in the United States as well as the home market, 3) the contemporaneity of the surrogate data to the POI, and 4) the similarity of the customer base. According to Atar, the Department's methodology in the Preliminary Results 9th Review resulted in the application of ISE and profit ratios that bore no relationship to Atar's corporate make-up, selling practices, market presence, or business experience in the instant POR. Atar also noted that during the instant POR it did not provide marketing, advertising, promotional, and inventory-related services that were provided by the six respondent companies in the Final Results 8th Review. Further, Atar asserts that a comparison of the profit rates of certain respondents in the Final Results 8th Review and Preliminary Results 9th Review shows that these rates, along with the ISE rates, are radically different and, as a result, the profit rates of the Final Results 8th Review are not representative of the profit experience of those companies in the Preliminary Results 9th Review. Atar argues further that the Department's reliance on the profit experience of the six respondent companies in the Final Results 8th Review resulted in data that was not contemporaneous with the POR. Atar points to Shop Towels from Bangladesh: Final Results of Antidumping Duty Administrative Review, 61 FR 55957, 55961, 55962 (October 30, 1996) ("Towels from Bangladesh"), where the Department, according to Atar, declined to use an annual report from a textile company in Bangladesh because the information in the report was for the calendar year that ended prior to the POR. Instead, the Department relied on the annual reports for three textile companies in Bangladesh that operated during some or all of the POR.

Atar suggests that if the Department decides not to rely on Atar's own U.S. sales experience as a surrogate for its ISE, then the Department should rely on the ISE of the two respondents in the Final Results 8th Review whose sales practices more closely resemble the manner in which Atar conducts business (i.e., small number of large quantity sales to a limited customer base). In Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (September 27, 2001), and accompanying Issues and Decision Memorandum at Comment 8 ("Magnesium from Israel"), Atar notes that the Department decided to base the respondent's profit on the financial statements of one surrogate company, rather than weight average the financial statements of the three surrogate companies on the record of that proceeding because the surrogate company appeared to have the most similar production process and product mix and the customer base appeared to be the most similar to the respondent's.

Atar argues that the surrogate companies used for Atar's profit do not have to be the same as those companies used as surrogates for Atar's ISE. Atar relies on Certain Fresh Cut Flowers from Columbia: Final Results of Antidumping Duty Administrative Review, 63 FR 31724, 31731 (June 10, 1998), to support its argument that there is no requirement that selling, general and administrative ("SG&A") expenses and profit be drawn from the same source (i.e., from the same surrogate company). In regard to the selection of surrogate companies for purposes of calculating profit, Atar suggests that if the Department does not to rely on Atar's profits on its U.S. sales, the Department should rely on the publicly available information that Atar placed on the record of the instant review. Atar counters the Department's concern, outlined in the Preliminary Results 9th Review, that the financial statements of the four companies located in Italy that were placed on the record by Atar prior to the Preliminary Results 9th Review did not include information about those companies' home market sales. Atar notes that it provided the necessary, publicly available, home market profit information with respect to two of those financial statements. Therefore, Atar asserts, the Department should follow its own precedent (see Notice of Preliminary Results of New Shipper review of the Antidumping Duty Order on Certain Pasta from Italy, 70 FR 9921 (March 21, 2005)) and Towels from Bangladesh) and base Atar's profit rate on this publicly available information. Atar also references Notice of Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from Portugal, 67 FR 60219 (September 25, 2002), and accompanying Issues and Decision Memorandum at Comment 5, where the Department obtained publicly available information from a company in the comparison market, noting that this company was similar to the respondent in business operations and products produced and that it had home market sales and an international component reflective of the respondent. Atar suggests that, as an alternative to the two financial statements it placed on the record, the Department can rely on the publicly ranged data provided by the other respondent in the instant review. Atar points out that in Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from Thailand, 69 FR 34122 (June 18, 2004), and accompanying Issues and Decision Memorandum at Comment 4 ("Bags from Thailand"), the Department relied on the ranged public data from another respondent in that case to calculate CV selling expenses and profit for the respondent in question.

Atar argues that, if the Department uses the profit information from the Final Results 8th Review, the Department should limit Atar's profit to the profit realized by the two respondent companies in the Final Results 8th Review whose ISE and profit experience are in similar proportion to Atar's ISE and profit experience. Further, Atar alleges that the Department must calculate these respondent companies' profit rates based on all sales, above and below cost. Atar argues that the profits realized by the six respondent companies in the Final Results 8th Review was limited to profits realized on their above-cost sales. According to Atar, in SKF USA Inc. V. United States, 263 F.3d 1369, 1373-1383 (Fed. Cir. 2001) ("SKF v. United States"), the Federal Circuit ruled that the use of the methodologies set forth in section 773(e)(2)(B)(i) of the Act (alternative (B)(i)) and section 773(e)(2)(B)(iii) of the Act (alternative (B)(iii)) required the inclusion of below-cost sales in the CV profit calculation because these methodologies do not require that the sales be made "in the ordinary course of trade." Atar also points to Floral Trade Council v. United States, 23 CIT 20, 26-33 (CIT 1999) ("FTC v. United States"), where the court stated that Congress intentionally permitted sales at alternative (B)(iii) to be below cost.

Atar concludes that, if the Department does not use the publicly available information on the record on the instant case for purposes of calculating CV in the instant review and instead relies on the ISE and profit information from the Final Results 8th Review, the Department must exclude the data for Barilla in its ISE and profit rate calculations. Atar asserts that, because the Department calculated a weighted-average profit rate of the six respondents in the Final Results 8th Review rather than a simple-average profit rate, Barilla's sales accounted for the majority of the profit rate. Barilla, according to Atar, is an inappropriate surrogate because of the differences in Barilla's sales practices, the selling functions Barilla performs and Barilla's customer base. Atar notes that the Department, in Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order in

Part: Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 70 FR 42303, 42307 (July 15, 2005), determined that Barilla home market sales are made at a different, and more advanced, stage of marketing than that level of trade of the constructed export sales. Further, Atar notes that Barilla sells a well-recognized, nationally and internationally branded and trademarked product under its own name. Conversely, Atar states that it sells private-label pasta to small individual customers and does not undertake any sales or marketing efforts for these private-label brands. Atar concludes that the Department's practice is to calculate CV relying on data at the same level of trade as a company's sales to the United States (see e.g., Certain Frozen and Canned Warmwater Shrimp from Brazil: Preliminary Determination of Sales at Less Than Fair Value, 69 FR 47081, 47807 (August 4, 2004), Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 11045, 11047 (March 7, 2003), and Certain Preserved Mushrooms from India: Preliminary Results of Antidumping Duty Administrative Review, 67 FR 10371, 10375 (March 7, 2002)). Therefore, the Department should not rely on Barilla's ISE and profit data as a surrogate for Atar's ISE and profit rates.

Atar notes that if the Department determines that a PMS does not exist and calculates NV for these final results based on Atar's sales prices to Angola, section 773(e)(2)(A) of the Act directs the Department to calculate CV based on the actual expenses and profits incurred and realized by Atar in connection with the production and sales of the foreign like product, in the ordinary course of trade, for consumption in the foreign country.

Petitioners refute Atar's argument that it is appropriate to use its U.S. sales as a surrogate for its comparison market sales for purposes of calculating ISE and profit. According to petitioners, the statute does not permit the Department to rely on a company's U.S. experience for purposes of calculating NV. Moreover, petitioners argue that such reliance on a company's U.S. sales experience is tantamount to using U.S. price as NV. In regard to surrogate companies, petitioners assert that the Department's practice is to use all the companies in a surrogate pool for purposes of providing surrogate values in the absence of usable actual information. Petitioners refute Atar's arguments that the Department's practice is to select from the surrogate pool only those companies that have greater similarity to the respondent company. Further, petitioners object to Atar's inference that a company's ISE and profit are directly correlated to its corporate make-up, selling practices, market presence, or business experience.

Petitioners also argue that Atar's reference to the publicly available, home market profit information should not be allowed as that information was new factual information that Atar presented in an untimely manner at verification. Petitioners contend that the publicly available home market profit information should be rejected by the Department and returned to Atar. Moreover, petitioners contend that Atar's suggestion that the Department rely on the publicly ranged data provided by the other respondent in the instant review is a violation of the Department's policy which is intended to shield such data from disclosure of parties not under administrative protective order.

Finally, petitioners refute Atar's argument that the Department should not rely on Barilla's ISE and profit data as the Department's practice is to use all the companies in a surrogate pool for purposes of providing surrogate values in the absence of usable actual information. Petitioners conclude that, for purposes of the final results, the Department should calculate ISE and profit in the same manner as it did for the Preliminary Results 9th Review.

Department's Position

We have calculated ISE and profit for these final results in the same manner as we calculated ISE and profit in the Preliminary Results 9th Review.

In the instant case, the Department has determined that because a PMS exists, a proper comparison can not be made between an NV based on Atar's sale to Angola and Atar's sales to the United States. Therefore, because CV is a proxy for NV, we find that we cannot rely on Atar's sale to Angola to determine CV profit. Since price is equal to cost plus profit, to base CV profit on the sale to Angola in effect would result in us constructing the Angolan sale price. As a result, we cannot determine CV ISE and profit under section 773(e)(2)(A) of the Act (the preferred method), which requires comparison market sales by the respondent to be used as the basis for ISE and profit. Atar argues that the SAA's definition of "sales in the ordinary course of trade" does not include those sales to a market that the Department has determined is not viable and, as such, the Department should rely on the preferred method to determine ISE and profit. However, because the Department has found that Atar's sale to Angola cannot be used to determine NV, the Department can not apply the preferred method.

In situations where selling expenses and profit cannot be calculated under the preferred method, section 773(e)(2)(B) of the Act sets forth three alternatives. The SAA states that "section 773(e)(2)(B) does not establish a hierarchy of preference among these alternative methods." See SAA at 840. The first alternative, alternative (B)(i), states that SG&A expenses as well as profit may be calculated based on actual amounts incurred by the specific exporter or producer being examined in the investigation or review in connection with the production and sale for consumption in the foreign country of merchandise that is in the same general category as the subject merchandise. The second alternative, at section 773(e)(2)(B)(ii) of the Act (alternative (B)(ii)), states that SG&A expenses and profit may be calculated based on the weighted average of actual amounts incurred and realized by other exporters or producers that are subject to the investigation or review in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country. The third alternative, alternative (B)(iii), allows the Department to use any reasonable method to determine SG&A expenses and profit, as long as the result is not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" (i.e., the profit "cap").

In the instant case, because there is only one other respondent in the current review, the Department determined that alternative (B)(ii) cannot be used because relying on that respondent's reported ISE and profit would reveal the business-proprietary nature of that information. We did not rely on Corticella's publicly ranged ISE and profit, as suggested by Atar, because Corticella did not provide publicly ranged ISE and profit values. Further, we did not rely on Corticella's publicly ranged sales and cost data to determine profit because the use of the publicly ranged data may result in a 20-percent[6] difference from Corticella's actual profit. We do not consider a publicly ranged profit figure that may differ from the actual experience by up to 20 percent to be a reasonable alternative. In contrast, the manner in which ISE and profit were calculated in the Preliminary Results 9th Review, using reported sales and cost data, provides a representative calculation of ISE and profit for purposes of calculating CV. In regard to Atar's reliance on Bags from Thailand, we note that in that case, no alternative ISE and profit

6 A 20-percent difference could result from using a publicly ranged sales price that is 10 percent higher than the actual price and a publicly ranged cost that is 10 percent lower than the actual cost.

information was available on the record. In contrast, alternative and more precise information is available on the record of the instant case.

The Department could not rely on alternative (B)(i), because Atar does not produce any merchandise other than the subject merchandise. Therefore, the Department had to resort to alternative (B)(iii) to determine Atar's ISE and profit for purposes of calculating CV. In consideration of a reasonable method under alternative (B)(iii), we looked to a methodology that most closely simulates the preferred method. The Department's methodology used in the Preliminary Results 9th Review closely simulates alternative (B)(ii) in that it relies on data of sales of the foreign like product in the foreign country in the normal course of trade, the only difference being that the methodology used is based on respondents of the preceding review rather than respondents of the current review. The Department finds that this methodology, a version of alternative (B)(ii), most closely simulates the preferred method in that it focuses on sales of the foreign like product in the foreign country in the ordinary course of trade.
For purposes of these final results, we have continued to use the weighted-average ISE and profit derived from the respondents in the immediately preceding administrative review, Final Results 8th Review. The Department has determined that this methodology most closely simulates the requirements of alternative (B)(ii) and consequently, the preferred method, in that the weighted-average ISE and profit amounts from the Final Results 8th Review represent actual amounts incurred and realized in connection with the production and sale of the foreign like product, in the ordinary course of trade, for consumption in the foreign country. We acknowledge that the respondents to the Final Results 8th Review are not the exporters or producers being examined as prescribed by alternative (B)(ii). However, because we are not able to use Atar's comparison market sale or the data of the other respondent in the instant case, we resorted to the respondents' data from the immediately preceding review. We also acknowledge that the data from the Final Results 8th Review is not contemporaneous with the POR. The Department recognizes that markets change over time and the more current the data, the more reflective it will be of the market in which the respondent is operating. See Magnesium from Israel and Television Receivers from Malaysia. However, in the instant case, we note that the profit rate experience from the Final Results 8th Review period (i.e., July 1, 2003, through June 30, 2004) reflects the time period immediately prior to the instant review. Atar argues that its analysis of Corticella's profits in the current review as compared to the preceding review (see Atar's case brief at p. 56) is evidence that the profit data from the Final Results 8th Review should not be used. We disagree. We find that relying on a comparison of one producer's profits from year to year is not necessarily conclusive to the profit results of an industry or market as a whole. Moreover, there is no substantive information on the record to suggest that the ISE and profit rate experience from that period is so different from the instant period to render those rates distortive. Therefore, we have determined that the use of the weighted-average ISE and profit amounts from the Final Results 8th Review is in accordance with the statute, representative of Atar's ISE and profit experience, within the meaning of the profit cap as required by alternative (B)(iii), and not distortive.

In regard to Atar's arguments that the Department should rely on Atar's sales to the United States for ISE and profit, we note that CV serves as a proxy for NV for comparison to the U.S. sales value. We do not want to construct an NV based on data from U.S. sales because, in effect, we would be constructing a U.S. sales price to compare to U.S. sales prices. In regard to Atar's reference to FCF from Mexico 1998, we note that the Department in that case resorted to using the U.S. sales data because the U.S. selling expenses incurred by the respondent were "the only remaining alternative on the record for determining selling expenses." In the instant case, alternative information is available on the record; therefore, we have not relied on Atar's U.S. sales to determine ISE and profit.

We do not consider it appropriate for the Department to rely on the financial statements of four Italian companies, submitted by Atar to the Department on February 2, 2006, to calculate the CV profit. At verification, Atar presented a revised profit ratio calculation based on two of those financial statements. Atar revised its calculation of the surrogate profit ratio to supposedly exclude export sales from the calculation in an attempt to satisfy the requirement of profit incurred on sales in the foreign country. Contrary to petitioners' allegation, the information used in Atar's revised profit calculation was not new information but rather information from the explanatory notes to the financial statements. We noted at verification that these notes were included in Atar's February 2, 2006, submission (see Cost Verification Report at pages 35-36). In regard to the two financial statements examined at verification, we noted that these financial statements did not provide specific home market profit information. Atar, in its calculations, allocated these companies' world-wide profits to their home market sales based on the proportion of the value of home market sales to the total value of all sales (see id). This methodology assumes that profit was incurred at the same rate by all sales in all markets. Because the Department has determined that the methodology followed in the Preliminary Results 9th Review more closely simulates alternative (B)(ii) and consequently, the preferred method, in that it relies on sales of the foreign like product in the foreign country in the normal course of trade, rather than just relying on data from producers of the same general class of merchandise for world-wide sales during the POR, we have continued rely on the respondents' data from the Final Results 8th Review.

In regard to Atar's argument that the Department, under alternative (B)(iii), must determine the appropriate ISE and profit by examining the similarities and differences between the respondent and the company whose ISE and profit is selected as a surrogate, we note that the use of the respondent's data from the Final Results - 8th Review addresses Atar's concerns. The Department's practice of weighing a number of factors in determining the most appropriate profit rate under (B)(iii) is specific to the facts and circumstances present in Magnesium from Israel and Television Receivers from Malaysia. In these cases, the options available for the CV profit calculation were all less than ideal. For example in Magnesium from Israel, none of the numerous companies whose financial statements were on the record were producers of magnesium. Similarly, in Television Receivers from Malaysia, none of the financial statements being proposed were from television producers in the foreign market. The Department uses these factors to determine which of the financial statements of potential surrogate producers provide data that is representative of the respondent. These factors include: (1) The similarity of the potential surrogate companies' business operations and products to those of respondent; (2) the extent to which the financial data of the surrogate companies reflect sales in the United States as well as the home market; (3) the contemporaneity of the surrogate data with the POR; and (4) the similarity of the customer base. In this case, we did not need to resort to financial statements for companies in the same general industry as respondent like we did in Magnesium from Israel and Television Receivers from Malaysia. The Department's focus in Magnesium from Israel and Television Receivers from Malaysia was to evaluate the similarities between the producers or exporters of the same general class of merchandise to the respondents in these cases because the Department was relying on financial statement data that was not specific as to the selling expenses and profit realized on the foreign like product. Therefore, because the financial statement data was not specific to the foreign like product, the Department applied its practice of analyzing other factors, as listed above, to ensure a reasonable level of similarity between the selling expense and profit experience of the exporters or producers and the selling expenses and profit experience of respondent in regard to the subject merchandise. The methodology we have chosen in the instant case relies on the respondents' specific foreign like product experience of the directly preceding review and, as such, is similar to the respondent's selling expense and profit experience in regard to the subject merchandise. Therefore, because we are not relying on financial statement data, it is not necessary to perform the analysis the Department performed in Magnesium from Israel and Television Receivers from Malaysia. Because the Department was able to rely on a methodology that closely simulates alternative (B)(ii), which does not direct us to only include some of the exporters or producers that were subject to the proceeding, we included all of the respondents from the Final Result 8th Review in the weighted-average ISE and profit calculation. Similarly, in regard to Atar's arguments concerning Barilla, we note that alternative (B)(ii), the alternative the Department has most closely simulated for these final results, allows the Department to rely on the data from other respondents to the proceeding without analyzing the similarity of selling practices.

Finally, in regard to Atar's reliance on SKF v. United States and FTC v. United States for its argument that any reasonable method under alternative (B)(iii) does not require the Department to rely on sales in the ordinary course of trade, we note that the Department's preference under alternative (B)(iii) is to closely simulate the preferred method which requires that the sales of the foreign like product be in the ordinary course of trade. Therefore, in accordance with the preferred method, we have only included the respondents' above-cost sales in the Final Results 8th Review. Further, we note that the preamble to the Department's regulations at 19 CFR 351, 62 FR 27296 (May 19, 1997), states that with respect to the alternative profit methods authorized by section 773(e)(2)(B) of the Act, the Department believes that the absence of any ordinary-course-of-trade restrictions under alternative (B)(i) is a clear indication that the Department normally should calculate profit under this method on the basis of all home market sales, without regard to whether such sales were made at below-cost prices. However, the same cannot be said of alternative (B)(iii), which provides for the use of "any other reasonable method" in determining CV profit.
The SAA at 841 makes it clear that, given the absence of any comparable standard under the prior statute, it would be inappropriate to establish methods and benchmarks for applying this alternative. Thus, depending on the circumstances and the availability of data, there may be instances in which the Department would consider it necessary to exclude certain home market sales that are outside the ordinary course of trade in order to compute a reasonable measure of profit for CV under the third alternative method.

Comment 3: Distributions and Salaries

In the Cost Verification Report, the Department stated that the issues that arose during verification concerning distributions and salaries were: 1) whether or not the distributions should be considered compensation for the shareholders, 2) whether or not to include a cost for the services provided by a particular shareholder and how to value that cost, and 3) whether or not the salary paid to a shareholder who is also an employee reflects an arm's-length transaction between affiliated parties. See pages 3 and 4 of the Cost Verification Report.

Atar argues that the distributions paid to its shareholders clearly constitute corporate dividends because the dividends were the distribution of retained earnings to Atar's shareholders in proportion to shareholders' capital. Further, Atar notes that the record evidence shows that Atar has historically issued dividends. Atar alleges that the Department has consistently held that corporate dividends do not constitute compensation. In Stainless Steel Sheet and Strip in Coils from Taiwan; Final Results and Partial Recession of Antidumping Duty Administrative Review, 71 FR 7519 (February 13, 2006), and accompanying Issues and Decision Memorandum at Comment 7, the Department, according to Atar, rejected the suggestion that corporate dividends be classified as ISE because the dividends in question were a distribution of retained earnings and the respondent in question historically issued dividends. See also Foam Extruded PVC and Polystyrene Framing Stock From the United Kingdom; Final Determination of Sale at Less Than Fair Value, 61 FR 51411 (October 2, 1996), in regard to historically issued dividends. Atar points to Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 70 FR 7344 (December 12, 2005), and accompanying Issues and Decision Memorandum at Comment 5 ("SSSS from Mexico"), where the Department stated that dividends are distinct from profit sharing. In SSSS from Mexico, the Department stated that dividends are a distribution of profits rather than a legal obligation that benefits employees and that dividends convey ownership rights whereas profit sharing does not. See also Greenhouse Tomatoes from Canada; Final Determination of Sales at Less Than Fair Value, 67FR 8781 (February 26, 2002). Atar also notes that in Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada, 70 FR 12181, 12185 (March 11, 2005) ("Swine from Canada"), and accompanying Issues and Decision Memorandum at Comment 67, the Department stated that distributions recorded in a company's normal books as dividends are to be recognized as dividends rather than period expenses (i.e., compensation).

Atar asserts that the Department cannot analyze the reasonableness of the actual compensation paid to its employees who are also the shareholders of the company. According to Atar, section 773(e)(1) of the Act requires the Department to rely on the actual compensation paid to these employees rather than calculate some sort of alternative salary amount because Atar's normal books and records are in accordance with Italian generally accepted accounting principles ("GAAP") and reasonably reflect the costs associated with the production of the merchandise. Further, Atar states that the Department's practice is to accept the actual compensation paid to corporate executives and employees. In the instant review, Atar notes that one of the employees in question did not receive a salary from Atar because he is a "pensioner" who is receiving a pension under Italian law. According to Atar, this employee would incur a significant reduction in his pension if he received compensation for the work he performed on behalf of Atar. Therefore, this employee decided to forego a salary from Atar and instead increase his capital stake in Atar. Atar concludes that the Department's suggestion of including a cost for the services provided by this shareholder is not in accordance with the law and is inconsistent with the Department's practice.

Finally, Atar asserts that the Department's suggestion that the shareholders' salaries be examined because of the shareholders' affiliation with Atar would result in a unprecedented standard where the Department would be required to examine payments to all corporate employees in all cases. For a particular shareholder in question, Atar stated that this shareholder's compensation reflected the shareholder's experience and conformed with the minimum wage packages required by Italian law.

Petitioners argue that the compensation of Atar's shareholders acting as employees is a critical component of production costs and shareholder distributions, if excluded from consideration, would present an opportunity for respondents to mask costs in situations where shareholders play a critical role in a company's operations. Therefore, petitioners assert that the Department should, consistent with its practice (see Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review, 69 FR 77195, 77198 (December 27, 2004) ("Honey from Argentina")), conduct an analysis to determine the reasonableness of compensation paid by Atar to its shareholders.

Department's Position

We agree with Atar that the distributions to its shareholders are dividends and, as such, were properly excluded from the reported costs. However, we disagree with Atar in regard to the services provided by Atar's shareholders and for purposes of these final results have conducted an analysis to determine if the value of the compensation paid fairly reflects the value of the services provided.

Section 773(f)(1)(A) of the Act states that costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the merchandise. In the instant case, Atar's normal books and records (i.e., general ledger) are consistent with Italian GAAP.

At verification, we examined Atar's distributions to its shareholders and noted that the distributions were classified in Atar's general ledger as dividends (see Cost Verification Report at exhibit 5). Because these distributions are dividends, rather than period expenses (i.e., expenses related to the production and sale of the merchandise), we have determined, consistent with our practice (see Swine from Canada at Comment 67), that these distributions were properly excluded from Atar's reported costs.

We disagree with Atar that the statute mandates that we must rely on the values recorded in Atar's normal books and records for those shareholders who provided services to Atar or were employed by Atar during the POR in the margin analysis. Section 773(f)(2) of the Act (transactions-disregarded rule) specifically states that a transaction between affiliated parties may be disregarded if the amount representing the element of value does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded and no other transactions are available for consideration, the statute then directs the Department to determine the value of the transaction based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

In the instant case, a particular shareholder was not compensated for services provided to Atar during the POR (see Cost Verification Report at page 4). This shareholder is an affiliated party within the context of section 771(33)(E) of the Act (see Memorandum from LaVonne Clark to Neal Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Atar S.r.l. for the Antidumping Duty Ninth Administrative Review of Certain Pasta from Italy," dated February 5, 2007 (Final Cost Calculation Memo), for further detail). As noted in Atar's case brief at page 67, this shareholder elected, as a result of pension laws within Italy, to forgo compensation for the services the shareholder provided in order to maintain receipt of pension payments. The election of not receiving compensation does not negate the value of the services the shareholder provided. As noted in Atar's February 2, 2006, submission on page 8, the shareholder in question is the principal of Atar and performs such functions as pursuing customers and arranging sales transactions. Therefore, consistent with the Department's practice (see e.g., Honey from Argentina and Swine from Canada at Comment 67) , we have disregarded this transaction (i.e., the zero value) because it does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. Further, because no other transactions are available for consideration, we have determined the value of this shareholder's services based on the information available as to what the amount would have been if this transaction had occurred between persons who are not affiliated.

To determine the value of this transaction as if it had occurred between unaffiliated persons, we looked to publicly available information. We searched the International Labor Organization's website (http://laborsta.ilo.org) and noted that hourly wage rates are not provided for Italy (i.e., annual indices are provided but not wage rates). We conducted an extensive search of wage rates in Italy, via the World Wide web, but were not able to obtain any publicly available wage rate data specific to Italy. Further, we were not able to rely on Corticella's data because its reported data was not specific to the annual wages paid per person. We note that in the Cost Verification Report, the Department specifically identified the issue of valuing the stockholder's compensation for purposes of these final results (see p. 4). However, neither Atar nor petitioners provided comments on how the Department should value the stockholder's compensation. Therefore, in order to value the compensation, we looked to the only available information on the record, the value of the dividends received by this shareholder related to FY 2004. The Department's intent is to use the value of the dividends, for purposes of valuing the shareholder's compensation, because we have no other information on the record on which we can rely. We emphasize that we are not including the dividends, as such, in the CV calculations. Instead, we are using the value of the dividends received by the shareholder for FY 2004 as a surrogate for this shareholder's FY 2004 salary. As such, we have increased Atar's G&A and ISE for this value consistent with Atar's reported G&A and ISE allocations. See Final Cost Calculation Memo .

In regard to the other shareholder in question, we find that this particular shareholder, an employee of Atar, was also an affiliated party within the context of section 771(33)(E) of the Act during FY 2004, the year which Atar relied upon to report its G&A expenses (see Final Cost Calculation Memo for further detail). Because we find that this shareholder was an affiliated party, we have applied the transactions-disregarded rule to determine if the compensation paid to the shareholder in FY 2004 was at an arm's-length value. As such, we performed a similar analysis to this shareholder as was described above. From our comparison, we determined that the compensation paid was an arm's-length transaction. Therefore, we have not made any adjustments to this shareholders wages for purposes of these final results. See Final Cost Calculation Memo.

Comment 4: Allocation of Certain Expenses

In the Cost Verification Report, the Department noted that certain expenses (i.e., electricity, phone, mobile phone, and gas expenses) were classified as direct selling expenses and that it may have been more appropriate for Atar to allocate these expenses as G&A expenses and ISE as these expenses are not directly linked to certain sales.

Atar asserts that the Department's statement that these expenses were classified as direct expenses is incorrect. Atar maintains that these expenses were included in Atar's reported

ISE. Therefore, Atar concludes that any increase to G&A expenses as a result of a reclassification by the Department of these expenses, as proposed in the Cost Verification Report, must be accompanied by the same reduction to Atar's ISE.

Petitioners did not comment on this issue.

Department's Position

We agree with Atar that the expenses in question were included in Atar's reported ISE. In the reported reconciliation of its financial statements to its reported costs, Atar listed these expenses as direct selling expenses (see Cost Verification Report at exhibit 5). However, as noted by Atar in its case brief, these expenses were included in Atar's reported costs as ISE rather than direct expenses (see Sales Verification Report at exhibit 20). Because the expenses were included in ISE, we have made no adjustment for these final results.

Corticella/Combattenti

Comment 5: Whether the Department made certain clerical errors in the margin program

Respondent Corticella/Combattenti argues that the Department made three clerical programming errors in its margin program. First, respondent states that the Department incorrectly coded the missing payment dates when calculating credit expense in the home market. Second, respondent asserts that the Department used the wrong field to identify gross unit price in the margin program. Third, respondent contends that the Department improperly calculated the subsidy adjustment in the margin program. As a result, respondent maintains that the Department should correct these three clerical programming errors for the final results.

Petitioner did not comment on this issue.

Department's Position:

The Department agrees with the respondent on the three clerical programming errors made in its margin program. The Department is correcting these errors for the final results. See the company-specific calculation memorandum.

Comment 6: Whether the Department erred in applying the major-input rule

Corticella/Combattenti argues against the Department's application of the major-input rule by claiming that, in the two previous reviews, the Department did not apply the major-input rule. Corticella argues that it has relied on the Department's acceptance of the transfer price between its affiliated supplier and Corticella and Combattenti in its setting of the export price's value. Corticella believes that it is a respondent's right to rely on the Department's decisions in previous reviews of the same company. Corticella supports this claim by citing Shikoku Chemicals Corp. v. United States, 795 F. Supp. 417 (CIT 1992) ("Shikoku"). In that ruling, Corticella cites a portion of the ruling which can be summarized in three points: 1) It is not realistic to expect respondents to constantly review data in order to determine an improved method of calculation of minute cost adjustments, 2) Commerce must be bound by its prior actions, and 3) Adherence to prior methodologies is required for the sake of practicality and fairness. Corticella also cites Anshan Iron & Steel Company, v. United States, 2003 CIT Lexis 109; Slip Op. 2003-83 (July 16, 2003) ("Anshan"). In that ruling, Corticella cites a portion which can be summarized as stating that the Department has the liberty of discarding one methodology in favor of another if the new methodology results in a more accurate dumping margin. However, that liberty has two restrictions: 1) the Department may not alter a methodology where a respondent has relied on an old methodology used in previous reviews, and 2) the Department must explain why the change is in accordance with the law and supported by substantial evidence.

Corticella also argues that application of the major-input rule is discretionary and that the Department is not required by law to apply the major-input rule in all cases. Corticella points to the specific language in the statute which states, with regard to the application of the major-input rule, "the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2)." See Section 773(f)(3) of the Act. Corticella argues that the Department used its discretion by not applying the major-input rule in the seventh and eighth reviews and to use its discretion in a different manner in the ninth review is a change in a methodology upon which Corticella has previous relied.

Corticella also argues that, if the Department were to apply the major-input rule in the final results, it should modify the way it determines market price. Corticella argues that the Department incorrectly calculated a market price in the application of the major-input rule by including prices Combattenti paid to a certain unaffiliated supplier in the weighted-average price paid to unaffiliated suppliers. Corticella argues that the Department's regulations elaborate on the determination of market price by stating it is "the amount usually reflected in the sales of the major input in the market under consideration." See 19 CFR 351.407. Corticella singles out the word "usual" and argues that the Department failed to consider whether the transactions between a certain unaffiliated supplier and Combattenti were usual. Corticella argues that the Department stated in the Preliminary Results that it only considered whether those transactions were "at arm's-length market transaction." That is, Corticella draws a distinction between "usually" and "arm's-length market transaction." Corticella argues that the prices paid to a certain unaffiliated supplier do not reflect "market transactions" because Combattenti never went to the market looking for semolina from this supplier. Rather, Corticella argues that this supplier effectively only contracted tolling services from Combattenti and Corticella and that purchase price of semolina was tied to and inseparable from the transaction. Corticella adds that in fact Combattenti had no decision-making authority whatsoever in the determination of price for the semolina. Corticella argues that a comparison of the prices it pays to the unaffiliated supplier in question for semolina and prices it pays to other unaffiliated suppliers reveals clearly that the prices paid to the unaffiliated supplier in question is unusual. Corticella adds that it does not matter what this unaffiliated supplier charges Combattenti for semolina because the sales price of pasta is made of two components: the price charged for semolina and a conversion fee. Considering this and the fact that the Department has discretion in applying the major-input rule, Corticella argues that it would be "capricious" and "arbitrary" to include prices paid to the certain unaffiliated supplier for semolina in the calculation of a market price.

Finally, Corticella considers the purchase of semolina from and subsequent sale of pasta to the certain unaffiliated supplier to be in essence one transaction. Corticella compares this transaction to the type of transactions contemplated in the FASB's Emerging Issues Task

Force ("EIFT") Issue No. 04-13 Abstract at 2, paragraph 4 (2005). In this Abstract, the EITF recommends that purchases and sales transactions with the same "counter-party" that are entered into in contemplation of one another should be combined for purposes of applying Opinion 29. Corticella also points that APB Opinion 29 requires that non-monetary transactions be valued at quoted market prices.

Petitioners did not comment on this issue.

Department's Position:

In the preliminary results, we calculated the average purchase price Corticella and Combattenti paid for semolina, for the purposes of applying the major-input rule from all unaffiliated suppliers to determine a market price for semolina and compared that market price to the transfer price paid by Combattenti to the affiliated supplier and the affiliated supplier's cost of production ("COP"). We found that the market price was higher than the transfer prices and the affiliated supplier's actual COP. Therefore, we adjusted both Corticella and Combattenti's costs accordingly. See Preliminary Results 9th Review).

Section 773(f)(3) of the Act, the major input rule, states that "in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2). Section 773(f)(2) of the Act, Transactions-Disregarded Rule, states that transactions between affiliated persons "may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration."

The basic purpose of the antidumping statute is to determine current margins as accurately as possible. Rhone Poulenc, Inc. And Rhone Poulenc Chimie de Base, S.A. v. United States, 899 F.2nd 1185, 1191 (Fed. Cir. 1990). We agree with Corticella that the language in the statute allows the Department discretion in invoking the major-input rule and transactions-disregarded rule. However, Corticella has not demonstrated any abuse of that discretion. It is undisputed that the prices paid to Corticella's affiliated supplier are significantly lower than the prices paid to unaffiliated suppliers, i.e., market prices. Accordingly, the Department reasonably exercised its discretion in excluding such prices and based its calculations on actual market prices paid for the input in the effort to advance the goal of calculating the margin as accurately as possible.

The Shikoku ruling does not forbid the Department from applying the major-input rule in this case. In Shikoku, the respondent challenged the final results of the fifth and sixth reviews of Cyanuric Acid and its Chlorinated Derivatives from Japan. See Cyanuric Acid and its Chlorinated Derivatives from Japan: Final Results of Antidumping Duty Administrative Reviews, 56 FR 19338, 19341 (April 21, 1991). Specifically, the respondent offset its home market sales price with re-packing expenses. In the fifth and sixth reviews, the Department altered the calculation of re-packing expenses used in the previous four reviews of that order. The result was a diminished offset to home market sales. The respondent was up for revocation in the fifth and sixth reviews. The Department had given no notice in prior reviews of flaws with the methodology. The new methodology resulted in a margin barely above de minimis, mandating an additional three years of administrative reviews for the respondent.

The facts, in the instant case, are not comparable with those of Shikoku. First, the issue in Shikoku was whether a minor alteration in a calculation was justified after accepting the old calculation for four reviews. The issue in the instant case is whether or not to follow the explicit language of the statue. In Shikoku, the court said that the Department did not "clearly" demonstrate that the new calculation of re-packing expenses was more accurate, but acknowledged that it was "likely that there was a marginal increase in accuracy" resulting from the new calculation. The court also stated that the new calculation was not "a breakthrough in methodology which would reveal significant and heretofore undiscovered dumping." See Shikoku, page 421. The court also reasoned "If the original error was more significant, perhaps fairness to petitioners in antidumping investigations would warrant correction at even this late date." See Shikoku, page 422. Second, in Shikoku, the change in methodology was based on information obtained for the first time at verification. The court stated "this was simply a decision on the part of a verifier to ask for detailed cost information not previously sought, presumably because the verifier thought he could come closer to a calculation of actual expenses of granular production." See Shikoku, page 421. In the instant case, the data needed to apply the major-input rule was provided in response to the Department's standard questionnaire and had been on the record months before the preliminary results. See Corticella's October 31, 2005, Questionnaire Response at exhibit 21. Third, in Shikoku, the Department afforded no notice to the respondent of its preferred methodology. In the instant case, Corticella cannot claim lack of notice because the Department repeatedly applied the major-input rule with respect to other respondents under the same order. See Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy, 65 FR 7349, 7352 (Feb 14, 2000), 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 (Feb 10, 2004), and accompanying Issues and Decision Memorandum at Comment 32, and Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta from Italy, 64 FR 6615, 6622 (Feb 10, 1999). Fourth, in Shikoku, the court determined that the respondent had established proof of reliance on the Department's methodology. The court stated "The record contains evidence that plaintiff adjusted their prices in accordance with methodology consistently applied by Commerce in an attempt to comply with United States antidumping law." See Shikoku, page 420. In the instant case, Corticella provided no evidence establishing such reliance. Accordingly, Corticella's reliance on both Shikoku and Anshan is unavailing. Even if Corticella could establish reliance, which it did not, its expectation that the Department would not apply the major-input rule in this proceeding is unreasonable - as explained above, the Department repeatedly applied the major-input rule in this proceeding. Fifth, in Shikoku, the respondent was up for revocation and a marginal increase in accuracy did not outweigh potential harm from an unexpected retroactive change in the methodology. In the instant case, Corticella is not up for revocation.

Even though the Department may have overlooked the fact that the transfer prices paid to affiliates were below the market price in the eighth review, the Department's application of the major-input rule in the preliminary results of the ninth review does not represent a change from one calculation methodology to another. As stated earlier, the Department applied the major-input rule to other respondents in this proceeding and Corticella cannot claim exemption from the major-input rule simply because of an agency's oversight in the previous segment. By its nature, i.e., the comparison of market price, transfer price and cost in a given period, adjustments for major-input and transactions disregarded rules do not apply in each segment of the proceeding (i.e., the transfer price may exceed market prices and cost in one segment but not the next).

Although the Shikoku court found that the Department should not change its methodology in the final hour, "more recent case law upholds a new methodology, if found reasonable." See Hangzhou Spring Washer Co., LTD. v. United States, 387 F. Supp. 2nd 1236 (CIT 2005). Here, as more fully explained above, the Department's adjustment to unaffiliated transactions to reflect market prices was reasonable and resulted in a more accurate dumping margin calculation. For these reasons, we continue to apply the major-input rule in evaluating the transfer price between Corticella and Molini Certosa.

Corticella argues that purchases of semolina from a certain unaffiliated supplier are directly related to sales of pasta to the same unaffiliated semolina supplier and are essentially one transaction outside the normal course of business. However, we believe that this is not consistent with the facts on the record. Those facts are of a business proprietary nature. For further details regarding those facts, see the Department's "Cost of Production and constructed Value Calculation Adjustments for the Final Results-Corticella" (COP Memorandum)(February 5, 2007). Therefore, we reject the argument that the two transactions can be viewed as one transaction outside the normal course of business.

In deciding whether to exclude prices paid to the unaffiliated supplier in question, the Department must determine whether information is on the record which shows that those prices are unusual. A similar requirement, relating to calculating an average profit rate for CV, was upheld by the CIT. See Mitsubishi Heavy Industries, Ltd. v. United States, 15 F. Supp. 2nd 807, 829 (CIT 1998). In that ruling, the CIT held that the Department was correct in requiring that credible information must exist which supports that certain home market sales had abnormally high profit rates (other than numeric amounts) before excluding those sales from the calculation of profit for CV purposes. Prior to the preliminary results of this review, the Department sent a questionnaire regarding the nature of the transactions between Combattenti and the unaffiliated supplier in question. See the Department's March 10, 2006, Supplemental Section D Questionnaire. Corticella responded to that questionnaire March 30, 2006. Since the preliminary results, Corticella has not submitted any new data regarding these purchases. The record evidence fails to show how these purchases are unusual and deserve to be treated as an exception in considering market prices. Therefore, we continue to include the purchase price paid to a certain unaffiliated supplier in the calculation of market price for the purposes of enforcing the major input rule.

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 ___________

David M. Spooner
Assistant Secretary
for Import Administration

Date