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

FROM: Gary Taverman
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

RE: Certain Pasta from Italy (Period of Review: July 1, 2006, through June 30, 2007)

SUBJECT: Issues and Decisions for the Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy (2006-2007)

Summary

We have analyzed the case and rebuttal briefs submitted by domestic interested parties and respondents.[1] As a result of our analysis, we have made changes from the preliminary results in the margin calculations. We recommend that you approve the positions described in the Discussion of Interested Party Comments, sections A and B, infra. Outlined below is the complete list of the issues in this review for which we have received comments from the interested parties.

I. Background

The Department of Commerce (the Department) initiated this administrative review of the antidumping duty order on certain pasta from Italy on August 24, 2007, for each of the aforementioned respondents. See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 72 FR 48613 (August 24, 2007). On August 6, 2008, the Department published the preliminary results of this administrative review. See Certain Pasta from Italy: Notice of Preliminary Results of Eleventh Antidumping Duty Administrative Review, 73 FR 45716 (August 6, 2008) (Preliminary Results). This review covers four manufacturers/exporters of the subject merchandise: F. Divella S.p.A. (Divella),

[1] Case briefs and rebuttal briefs were submitted by the following domestic interested parties and respondents: On October 20, 2008, New World Pasta Company, American Italian Pasta Company, and Dakota Growers Pasta Company (collectively, petitioners), and F. Divella S.p.A. and Pasta Zara SpA 1 (Zara 1) and Pasta Zara SpA 2 (Zara 2) (collectively, Zara) (collectively, respondents), filed case briefs. On October 27, 2008, petitioners and respondents filed rebuttal briefs.

Pasta Zara S.p.A. (Zara 1 and Zara 2), Pastificio Di Martino Gaetano & F. lli SrL (Gaetano), and Pastificio Felicetti SrL (Felicetti). Divella and Zara were selected as mandatory respondents.[2]

II. List of Comments

General

Comment 1: Legal Standard for Level of Trade

F. Divella S.p.A.

Comment 2: Home Market Advertising Expenses
Comment 3: Home Market Level of Trade
Comment 4: HANDLH Should be Included in the Home Market Net Price Calculation

Pasta Zara S.p.A.

Comment 5: Treatment of Billing Adjustments
Comment 6: Direct Selling Expenses
Comment 7: Whether Zara's U.S. Sales are CEP or EP
Comment 8: Zara's Home Market Level of Trade
Comment 9: Wheat Code Classification
Comment 10: Calculation of the G&A and Financial Expense Ratios
Comment 11: Treatment of Sales Proceeds with Respect to the Cost of Production

III. Discussion of Interested Party Comments

General

Comment 1: Legal Standard for Level of Trade

Zara and Divella state that the statute, SAA,[3] the preamble to the Department's regulations, and the Department's regulations require that two lines of evidence be considered in the level of trade (LOT) analysis: (1) whether sales at allegedly different LOTs are, in fact, made at different points along the distribution chain; and (2) whether the seller is providing different services, or performing different activities, with respect to the customers at the different LOTs. Thus, Zara and Divella state that LOT analysis is a critical component of making the "fair comparison" mandated by section 773 of the Tariff Act of 1930, as amended (the Act). Zara and Divella also state that the SAA makes it explicit that a proper LOT comparison is critical to a fair calculation. See SAA at 809. Zara and Divella point out that the SAA notes that an LOT adjustment is unnecessary where comparisons between markets can be made at the same LOT. See SAA at

[2] See memorandum to Melissa Skinner, Director Office 3, from Team regarding Selection of Respondents for Individual Review, October 15, 2007.

[3] The Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. DOC. No. 103-316 (1994)(SAA).

829. Zara and Divella argue that in the present case, the Department is able to compare sales between home market sales designated as LOT 1 and sales in the U.S. market at the same LOT. Zara and Divella contend that while neither the statute nor the SAA defines LOT, the preamble to the Department's regulations, and the Department's regulations at 19 CFR 351.412(b)(2),[4] are more explicit. Zara and Divella cite to the comments in the preamble to the Department's regulations to assert that the Department must analyze selling functions to determine whether LOTs identified by a party are meaningful, and that the type of customer will be an important indicator in identifying differences in LOT. Zara and Divella also argue that pursuant to the Department's regulations, substantial differences in selling activities are a necessary, but not sufficient, condition for determining whether there is a difference in the stage of marketing.

Zara and Divella cite to cases decided at the Court of Appeals for the Federal Circuit (CAFC) and the Court of International Trade (CIT) for further evidence of the legal standard for LOT. Zara and Divella also cite to administrative reviews they claim evidence the Department's practice of analyzing LOTs quantitatively and qualitatively. Zara and Divella contend that in Butt-Weld Pipe Fittings,[5] the Department's statement that the respondent had "more home market customers who purchase in smaller volumes . . . and require more individual contact," made it clear that the average volume of individual sales to different LOTs is relevant to a LOT analysis. Zara and Divella argue that the Butt-Weld Pipe Fittings test is essentially an intensity test because the combination of smaller volumes and greater individual customer contact means that the sales to this LOT required a higher intensity of selling activity than sales to other LOTs. Zara and Divella claim that in Pasta Second, the Department found different LOTs between distributors and retailers based on quantitative and qualitative considerations.[6] Zara and Divella argue that Pasta Second also uses an intensity approach that is similar to the Butt-Weld Pipe Fittings case. Zara and Divella contend that by the Department citing the number of sales in Butt-Weld Pipe Fittings, as the appropriate variable, as opposed to the quantity of merchandise sold in Pasta Second, the Department is invoking an intensity analysis. Zara and Divella also contend that in Pasta First, the Department held that wholesalers, distributors and buying consortia, the same types of customers as in Zara and Divella's LOT 1, constituted a LOT most similar to the U.S. LOT.[7]

Petitioners counter that Zara and Divella's citations to the statute, SAA, preamble to the Department's regulations, Department's regulations, and to excerpts from rulings by the CIT and CAFC do not contradict or undermine the Department's findings regarding Zara and Divella's claimed LOTs. Petitioners state that the Department's findings properly focused on an analysis of Zara and Divella's selling functions and levels of selling activity. Moreover, petitioners claim that the SAA states that in examining claims for differences in LOT, the Department will ensure that differences in prices are not based on differences in the quantities purchased in individual sales.

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[4] We believe the intended citation is section 351.412(c)(2).

[5] See Final Results of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 73 FR 1202 (January 7, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

[6] See Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy, 65 FR 7349, 7358-9 (February 14, 2000) (Pasta Second).

[7] See Final Results of Antidumping Duty Administrative Review: Certain Pasta from Italy, 64 FR 6615, 6626 (February 10, 1999) (Pasta First).

Petitioners claim that Zara and Divella's citation to Pasta Second confirms that the Department's LOT analysis must not be based on the quantity of merchandise sold. Thus, petitioners argue that Zara and Divella's claim that their LOTs in the home market based on customers' purchases of different quantities does not provide a basis for finding two different LOTs, i.e., LOT 1 and LOT 2. Therefore, petitioners contend that Zara and Divella's discussion of the legal standard for analyzing claimed differences in LOTs confirms that the Department's analysis in this case was consistent with the Department's practice and regulations and that the Department's LOT findings are correct.

Department's Position

In accordance with section 773(a)(1)(B) of the Act, we determined normal value (NV) based on sales in the comparison market at the same LOT as the export price (EP) and constructed export price (CEP) sales, to the extent practicable. Pursuant to 19 CFR 351.412(c)(1), the NV is based on the starting price of the sales in the comparison market or, when there were no sales at the same LOT, we compared U.S. sales to comparison market sales at a different LOT. When NV is based on constructed value (CV), the NV LOT is that of the sales from which we derive selling, general and administrative (SG&A) expenses and profit. For CEP sales, the U.S. LOT is based on the starting price of the U.S. sales, as adjusted under section 772(d) of the Act, which is from the exporter to the importer.

Consistent with 19 CFR 351.412, to determine whether comparison market sales were at a different LOT, we examined stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated (or arm's-length) customers. If the comparison market sales were at a different LOT and the differences affect price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison market sales at the LOT of the export transaction, we will make an LOT adjustment under section 773(a)(7)(A) of the Act.[8]

For CEP sales, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. We analyze whether different selling activities are performed, and whether any price differences (other than those for which other allowances are made under the Act) are shown to be wholly or partly due to a difference in LOT between the CEP and NV. Under section 773(a)(7)(A) of the Act, we make an upward or downward adjustment to NV for LOT if the difference in LOT involves the performance of different selling activities and is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different LOTs in the country in which NV is determined. Finally, if the NV LOT is at a more advanced stage of distribution than the LOT of the CEP, but the data available do not provide an appropriate basis to determine an LOT adjustment, we reduce NV by the amount of indirect selling expenses incurred in the foreign comparison market on sales of the foreign like product, but by no more than the amount of the indirect selling expenses incurred for CEP sales. See section 773(a)(7)(B) of the Act (the CEP offset provision).

[8] Zara only has CEP sales and Divella only has EP sales.

In analyzing differences in selling functions, we determine whether the LOTs identified by the respondent are meaningful. See Antidumping Duties; Countervailing Duties, Final Rule, 62 FR 27296, 27371 (May 19, 1997). If the claimed LOTs are the same, we expect that the functions and activities of the seller should be similar. Conversely, if a party claims that LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar. See Stainless Steel Bar from Germany: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 5811 at 5813 – 14, February 3, 2006, (Stainless Steel Bar), unchanged in the Final Results.[9]

The Department's analysis correctly focused on Zara and Divella's selling functions and levels of activity. The Department's findings regarding Zara's claimed LOTs are consistent with the statute, SAA, preamble to the Department's regulations, and the Department regulations. Contrary to Zara's and Divella's assertions, the Department conducted the LOT analysis in accordance with sections 773(a)(1)(B) and (a)(7)(A) of the Act, the SAA, and section 351.412 (c)(2) of the Department's regulations. In the Preliminary Results, the Department stated that an analysis of the selling activities for Zara and Divella in the home market shows that Zara and Divella perform similar selling activities for different customer categories, although some of the activities were at different levels of intensity.

In addition, we found that there is overlap among the channels of distribution for the different customer categories in LOT 1 and LOT 2. The differences in Zara and Divella's selling activities do not rise to a level of substantial differences that would support a finding that there are two LOTs in the home market. See Preliminary Results at 45720; see also Comment 7 for Zara and Comment 2 for Divella, where we have further addressed the Department's findings in the administrative review of cases cited by Zara and Divella.

Zara and Divella's argument that the Butt-Weld Pipe Fittings test is essentially an intensity test because the combination of smaller volumes and greater individual customer contact means that the sales to this LOT required a higher intensity of selling activity than sales to other LOTs is incorrect. In Butt-Welded Pipe Fittings, the Department compared selling functions and their intensity between the home market and the U.S. market in evaluating whether a CEP offset or LOT adjustment was warranted. Neither the CEP offset or LOT adjustment were requested in this administrative review. In Butt-Welded Pipe Fittings, the Department considered both selling functions and their intensity and found that certain functions, such as assumption of credit risk, provision of technical services, and just-in-time delivery arrangements, were only performed in the home market. The statement referenced by Zara and Divella is not a quantity or volume analysis between two claimed LOTs in the home market, rather it is a description of the intensity of selling activities conducted in an LOT analysis between the home market and the U.S. market.

In contrast, in this review neither Zara nor Divella claimed an LOT adjustment or CEP offset. Here, the Department considered both the selling functions and their intensity between the claimed LOTs within the home market for each of the two respondents. Even if one were to analogize an LOT comparison between the home market and the U.S. market with comparing claimed LOTs within the home market, in this administrative review the Department found that

[9] Stainless Steel Bar from Germany: Final Results of Antidumping Duty Administrative Review, 71 FR 42802 (July 28, 2006).

the respondents performed substantially the same selling activities/functions in each of their claimed LOTs. Moreover, the differences in intensity of selling functions for Zara and Divella did not rise to a level of substantial differences that would support a finding that there are two LOTs in the home market. Respondents' contention that in Pasta Second the Department found different LOTs between distributors and retailers based on quantitative and qualitative considerations is also misleading. In Pasta Second, the Department expressly disagreed with Maltagliati (respondent) that the Department's LOT analysis should be based on quantity of merchandise sold, rather than the number of sales, and that the Department's classification and consideration of LOT selling groups and activities was distortive. Thus, these administrative determinations cited by Zara and Divella are inapposite.

F. Divella S.p.A.

Comment 2: Home Market Advertising Expenses

Petitioners argue that the Department should treat F. Divella S.p.A.'s (Divella) home market advertising expenses as indirect selling expenses instead of direct selling expenses. Petitioners maintain that the Department's Antidumping Duty Questionnaire states that direct expenses must be variable and traceable to sales of the merchandise under review.[10] Petitioners assert that the record does not show that the reported advertising expenses are traceable to sales of subject merchandise. Instead, petitioners claim that the advertising campaigns presented by Divella relate to non-subject merchandise as well, in particular refrigerated, frozen, canned, egg, organic pasta as well as other products sold by Divella in the home market such as tomato products and olive oil. Petitioners further assert that Divella did not adequately explain how reported advertising expenses were allocated between subject and non-subject merchandise, nor provide a list of advertising programs Divella engaged in during the period of review (POR). Finally, petitioners argue that the samples of advertising are outside the POR.

Divella argues that its advertising expenses were appropriately reported as direct selling expenses. Divella maintains that the methodology it employed for calculating and reporting advertising expenses is consistent with the Department's previous practice in Pasta from Italy.[11] Divella explained that it records its advertising expenses by cost center, and the cost center for pasta contains advertising expenses for subject merchandise. Divella maintains that it appropriately applied advertising expenses incurred in the POR, as the figures were taken directly from the POR trial balance, as verified by the Department. Divella argues that it did not separate advertising for egg and bulk pasta, as it claims that the total sales for egg and bulk pasta was immaterial during the POR. Further, Divella reasons that other non-scope products, such as tomato products and olive oil, are reported in a different cost center, and thus not included in the calculation of advertising expenses for subject merchandise.

Department's Position

Consistent with Pasta Second, the Department will continue to consider Divella's advertising expenses as direct selling expenses. The SAA states that "Commerce will continue to employ

[10] See The Department's Antidumping Duty Questionnaire at Appendix 1.

[11] See Pasta Second, 65 FR 7349, 7359 (February 14, 2000) at Comment 13.

the circumstance-of-sale adjustment to adjust for differences in direct expenses and differences in selling expenses of the purchaser assumed by the foreign seller, between normal value and both export price and constructed export price." See SAA at 828. The Department's normal practice with regard to determining whether advertising expenses are direct or indirect selling expenses is to apply a two-pronged test: 1) the Department must determine if the advertising expenses are directed at the customer's customer; and 2) the Department must determine if the advertising expenses are related specifically to sales of the subject merchandise.[12]

Divella supplied samples of advertising in the home market in its Sections A – C questionnaire response, dated December 12, 2007, at Exhibit 12. The Department agrees with petitioners that some of the samples of advertising are from outside the POR; however, Divella did supply samples of advertising in the POR. The samples for advertising within the POR are for bronze die cut pasta, weighing 1 pound 1 ounce, which is subject merchandise.[13] Moreover, this advertising is directed at Divella's customer's customer.[14]

The Department verified the calculation of the reported advertising expenses.[15] In the Sales Verification Report, we reviewed the cost center codes that contained subject merchandise and tested the accuracy of the determination of the allocation of in scope and out of scope merchandise.[16] The Department noted no discrepancies in either the reported cost centers or the calculations of the advertising expenses.[17] Consistent with other expenses reported by Divella in the instant case, where Divella allocated an expense over total sales (e.g. handling adjustment), the Department finds that Divella appropriately allocated the reported advertising expenses for the POR to subject and non-subject merchandise.

Comment 3: Home Market Level of Trade

Divella argues that there are two LOTs in the home market; sales to small 'mom and pop' convenience stores and hotel/restaurant/catering customers, constituting one LOT (LOTH 2), and sales to all other customers constituting a different LOT (LOTH 1). Divella contends that the Department should match the sales to all other customers (LOTH 2) to sales to the U.S. for purposes of calculating the final margin. Divella claims that sales to LOTH 2 customers require higher levels of customer service and marketing activities than sales to LOTH 1 customers.

Divella points to several differences between LOTH 1 customers and LOTH 2 customers that it contends proves the existence of two LOTs in the home market. Divella maintains that LOTH 1 customers have their own warehousing and distribution facilities that allow them to buy directly from Divella in large orders, whereas LOTH 2 customers require that Divella acts as a distributor or wholesaler, as they lack storage space of their own. Divella argues that it provides additional

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[12] See Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Japan, 64 FR 30574 (June 8, 1999), and accompanying Issues and Decision Memorandum at Comment 5.
[13] See "Verification of the Sales Response of Pasta F. Divella SpA in the Antidumping Administrative Review of Certain Pasta from Italy," dated October 9, 2008 (Sales Verification Report) at Exhibit XI C page 26.
[14] See id.
[15] See id., at page 16.
[16] See id., at pages 4 and 9.
[17] See id.

services to the LOTH 2 customers by breaking palletized goods into smaller units and loading them onto trucks for delivery, which are activities usually done by a distributor or wholesaler. Divella notes that these activities are labor intensive and take place in a specific area within the loading section of its warehouse. Divella argues that LOTH 1 customers are served by full- or half-load trucks, while LOTH 2 customers are served by small trucks. Divella also argues that LOTH 2 customers have dedicated salesmen that take orders and payment, while LOTH 1 customers do not. Divella asserts that its marketing plans and price lists are different for LOTH 2 customers than LOTH 1 customers. Finally, Divella asserts that the Department should consider the intensity of the selling functions to each LOT when making a LOT determination. Divella argues that the selling activities were higher to LOTH 2 customers than to LOTH 1 customers, and thus urges the Department to find that there are two LOTs in the home market.

Petitioners maintain that the Department was correct in finding that Divella has one LOT in the home market. Petitioners argue that, contrary to the SAA, Divella is basing its LOT designations on the quantities Divella's customers purchased on individual transactions. Further, petitioners argue that Divella has not proven that different selling activities occur at the different LOTs. Petitioners contend that in order for sales to be made at different LOTs, the Department's regulations require that they be made at different marketing stages or their equivalent.[18]

Petitioners maintain that Divella has not shown that its selling activities are substantially different between the two LOTs. Rather, petitioners claim that there are overlapping selling activities in all channels of distribution and customer categories. Petitioners further argue that Divella's division of pallets of pasta does not constitute a distinct LOT, but rather a response to a customer inquiry. Additionally, petitioners maintain that the area dedicated exclusively to the LOTH 2 customers is part of Divella's logistics and packing process, and is not a separate selling activity. Petitioners reason that freight costs are not a selling activity, and that the small trucks used by Divella to service LOTH 2 customers is a business decision, not an added service to LOTH 2 customers. Petitioners argue that the Department does not have an intensity test with regard to LOT determinations. Petitioners further claim that Divella's selling functions are the same regardless of the customer category or reported LOT.

Department's Position

The Department agrees with petitioners, and continues to find that there is one LOT in the home market. The Act directs the Department to adjust NV to make due allowance for any difference between the EP or CEP which is shown to be wholly or partly due to a difference in LOT between the EP or CEP and NV.[19] The Department will find that there are different LOTs if sales are made at different marketing stages, or their equivalent.[20]

Divella reported that they sold through three channels of distribution to seven customer categories in the home market.[21] Divella claimed that two customer categories, Dettaglio and

[18] See 19 CFR 351.412(c)(2).
[19] See section 773 (a)(2)(A) of the Act.
[20] See 19 CFR 351.412(c)(2).
[21] See Divella Submission of Questionnaire Response, dated December 12, 2007 (Divella QR Response), at Exhibit 3.

Horeca, constitute a different LOT than the other five customer categories.[22] For the preliminary results, the Department found that the seven customer categories and three channels of distribution were made at the same LOT.[23]

The Department continues to find that Divella reported the same selling activities in all channels of distribution, and customer categories.[24] Although there is a greater intensity of these activities for some of the claimed customer categories, this alone does not demonstrate a substantial difference in selling activities that would form the basis for a different LOT.

Divella reported that it performs the functions of distributor and wholesaler when selling to LOTH 2 customers.[25] Divella argued that having a specific area within the loading section of its warehouse and the differences in costs for breaking down pallets for shipment of individual cartons of merchandise, use of smaller trucks, and increased use of salesmen, demonstrates that it provides extra services to one set of customers over another set of customers. However, the Department finds that, with the exception of the costs for breaking down pallets for shipment of individual cartons of merchandise, each of these activities are a part of the selling activities analyzed in the selling functions chart. Specifically, the selling activities chart analyzes several activities related to the movement of goods from the production facility to the customer.[26] With respect to breaking down pallets, Divella reported packing labor expenses in its questionnaire and supplemental questionnaire responses, including a detailed analysis of packing costs.[27] Thus, the costs for breaking down pallets for shipment of individual cartons of merchandise are accounted for in Divella's reported packing labor expenses. As a result, the Department finds that Divella does not have different channels of distribution that would support finding different LOTs in the home market.

Comment 4: HANDLH Should be Included in the Home Market Net Price Calculation

Divella states that the Department erred when it did not include intra-warehouse movement handing expenses (HANDLH) in the net price calculation for sales in the home market. Divella argues that the Department should include HANDLH in the net price calculation for sales in the home market for the final results.

Petitioners argue that the Department should continue to exclude HANDLH from the calculation of net price in the home market. Petitioners maintain that Divella reported HANDLH as an indirect expense incurred when inventory is moved from the production line to the inventory

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[22] See id., at page 46.

[23] See Calculation Memorandum for F. Divella SpA, dated July 30, 2008, at page 3.

[24] See Divella QR Response, dated December 12, 2007, at Exhibit 3.

[25] See Divella Sections A – C Second Supplemental Questionnaire Response, dated July 3 (Divella Second QR), July 3, 2008, at page 4.

[26] See Calculation Memorandum for F. Divella SpA., dated December 4, 2008, at exhibit 6.

[27] See Divella QR Response, dated December 12, 2007, Exhibit 23; see also Divella Second QR, dated July 3, 2004, at exhibit 6.

warehouse and from the inventory warehouse to the staging area for loading onto trucks for shipment. Petitioners state that the Department's practice is that direct expenses generally must be variable and traceable in the company's financial records to sales of the subject merchandise. Petitioners argue that HANDLH is neither variable nor traceable to sales of subject merchandise, and thus, should be included in the indirect selling expense calculation.

Department's Position

The Department will continue to exclude HANDLH from the calculation of net price in the home market. Divella did not provide any rationale for its argument. The Department considers the original place of shipment to be the factory at which the merchandise was produced. See 19 CFR 351.401(e)(1). The Department does not consider costs incurred in moving merchandise from the production line to a warehouse or loading area that is a part of the production facility as movement charges.[28] Divella reported that "all standard products move from the production line into the inventory warehouse, and then are then moved from the inventory warehouse to the staging areas, from which they are loaded."[29] In the instant case, the Department finds that regardless of whether HANDLH is variable or traceable, because the expense was incurred up to the loading area that is part of the production facility, HANDLH should not be deducted from the selling price to establish normal value.

Zara

Comment 5: Treatment of Billing Adjustments

Petitioners assert that Zara failed to provide documents requested by the Department and failed to provide a basis for the amounts claimed as billing adjustment 1 (BILLADJ1H). Petitioners point out that Zara was also unable to provide documentation at verification to substantiate amounts claimed as BILLADJ1H. Therefore, petitioners argue that the Department should disallow BILLADJ1H amounts claimed by Zara.

Petitioners also argue that Zara's claim that amounts reported in the BILLADJ2H field are not linked to the original invoice in the information system, or are not in a retrievable form, is misleading. According to petitioners, Zara is capable of retrieving these billing adjustments on an invoice-specific basis because Zara's accounting personnel refer to the original invoice in order to determine the amount to adjust each invoice, and that Zara was able to provide the billing adjustment amounts to the Department for specific invoices. Thus, petitioners argue that while Zara is able to link its billing adjustments to specific invoices, it is claiming it cannot do so in order for the Department to allow adjustments in the home market prices that are not related to actual POR sales of pasta subject to review.

Zara submits that it is no longer seeking adjustments for amounts claimed in BILLADJ1H. Regarding the amounts claimed as BILLADJ2H, Zara argues that its methodology is accurate, reasonable and verified. Zara contends that the credit notes do not disclose the invoice to which

[28] See the Department's Antidumping Manual at chapter 7, section III(C)(2)(a), available at http://ia.ita.doc.gov/admanual/index.html.
[29] See Divella Second QR, dated July 3, 2004, at 7.

they are linked in a retrievable form; thus, the information system cannot ascertain the invoice to which a particular credit note of this type is associated. Therefore, Zara reports BILLADJ2H as the total billing adjustments by customer divided by the total net sales to the customer in the POR. Thus, these billing adjustments could include adjustments on non-subject merchandise, and it could include adjustments on sales that occurred before the POR. However, Zara argues that because its methodology is reasonable and was verified, the Department should not reject Zara's methodology as suggested by petitioners.

Zara claims that given the large number of transactions in its database, it is impossible to construct a database manually in which billing adjustment credit notes are linked to invoices. Also, given the small size of the adjustment, it is impractical to manually retrieve this information. Furthermore, Zara argues that billing adjustments are analogous to warranties, and although the Department's Antidumping Manual is silent on the issue of billing adjustments, its comments that warranty expenses are included as direct expenses even though the expense cannot be tied to a particular sale is applicable to billing adjustment credit notes. Zara also cites to a case in support of its claim that a respondent may use an allocation methodology for reporting this type of expense provided that the methodology is reasonable.[30]

Zara also claims that the margin program in the Department's preliminary calculations contain an error because it adds the home market billing adjustment when calculating the net price. Zara states that it reported home market billing adjustments as positive figures when the billing adjustment reduced the price; therefore, Zara asserts that the Department should subtract the reported home market billing adjustments in calculating the net price.

Petitioners counter that Zara failed to substantiate the amounts reported in BILLADJ1H and it also failed to demonstrate that BILLADJ2H related to sales of the pasta subject to review. Thus, petitioners argue that the Department should disallow all of Zara's claimed billing adjustments.

Department's Position

In the final results of this review, we are disallowing the amounts reported in BILLADJ1H. Zara was unable to provide documentation at verification to tie the discounts to the relevant invoices and to substantiate the amounts claimed as BILLADJ1H. Moreover, Zara no longer seeks an adjustment for this amount.

Regarding the amounts reported in the BILLADJ2H field, we agree with Zara that it was unduly burdensome to tie the billing adjustments to the respective invoices, that the amounts were relatively small, and that the methodology used was as stated in the questionnaire response. The Department's practice is to link billing adjustments, like other transactions, to expenses and revenues as directly as possible to specific transactions to increase the accuracy of the methodology. In accordance with 19 CFR 351.401(g), the Department may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the

[30] Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products from Japan, 58 FR 37154 (July 9, 1993), and accompanying Issues and Decision Memorandum at Comment 16.

Department is satisfied that the allocation method used does not cause inaccuracies or distortions. In determining whether an allocation method is distortive we look for patterns where expenses for one customer, product, or type of transaction are significantly higher or different than those for other customers, products, or types of transaction. For example, if one customer had very high billing adjustments and these were allocated over sales to all customers, it could be distortive. In this case, in reviewing these adjustments at verification, we found no unusual or outstanding patterns which would make the allocation method distortive. See Zara's Verification Report.[31] Thus, because we find that Zara's methodology for allocating the amounts reported in the BILLADJ2H field is reasonable and not distortive, we will continue to allow these billing adjustments.

Further, we agree with Zara that in calculating the preliminary margin, the Department inadvertently added the BILLADJ2H to the home market gross unit price. We have now corrected the error by deducting BILLADJ2H from the home market gross unit price.

Comment 6: Direct Selling Expenses

Petitioners assert that the Department understated the amount of the U.S. direct selling expenses that should be subtracted from the prices for Zara's U.S. sales. Petitioners state the Department apparently mistook the calculation of a factor as a percentage factor, instead of as a percent to be applied to the gross unit price. Therefore, petitioners state that the Department should correct this programming error.

Zara did not comment on this issue.

Department's Position

In calculating the U.S. direct selling expenses for the accounting/consulting services performed on behalf of Zara USA, we inadvertently applied a factor by moving the decimal point to the gross unit price instead, of the applying the calculated percent to the gross unit price. We have corrected this error in the margin program for these final results.

Comment 7: Whether Zara's U.S. Sales are CEP or EP

Zara contends that the Department's preliminary determination to treat Zara's sales to the United States on a CEP basis rather than an EP basis is erroneous in light of AK Steel,[32] and Corus Staal.[33] Zara states that in AK Steel, the Court explained that the location of the sale and the identity of the seller are critical to distinguishing between EP and CEP sales, and that the Court further explained in Corus Staal that neither a sale nor an agreement to sell occurs until there is mutual assent to the material terms (price and quantity).

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[31] See Memorandum to the File through Melissa G. Skinner, "Verification of the Sales Response of Pasta Zara SpA (Zara) in the Antidumping Administrative Review of Certain Pasta from Italy," dated October 10, 2008, at page 18 (Zara Verification Report).

[32] AK Steel v. United States, 226 F .3d 1361 (Fed. Cir. 2000) (AK Steel).

[33] Corus Staal BV v. United States, 502 F .3d 1370 (Fed. Cir. 2007)(Corus Staal).

Zara asserts that Zara and the arm's length U.S. customer mutually assent to the price and quantity terms before the goods are shipped from Italy to the United States. Zara claims that the act of startimg production against the order constitutes the offeree indicating assent to an offer. Thus, according to Zara, the contract is created by the acceptance of the offer. Hence, Zara argues that its U.S. sales were made on an EP basis. Furthermore, Zara claims that the placement of the order and the acceptance of the order constitute a binding contract under the 1980 United Nations Convention on the International Sale of Goods (CISG), to which the United States is a party and which supplies the applicable law with respect to the interpretation of the contracts at issue.

Zara states that in cases similar to the present case, under authority of AK Steel, the Department has repeatedly held that the sales were EP rather than CEP.[34] Specifically, Zara claims that in Rebar from Turkey, the Department stated that the respondent's (ICDAS) affiliated U.S. importer was a "paper" company that acted as the importer of record, had no employees or business premises in the United States, and was not involved in the sales process. Accordingly, the Department determined that ICDAS's sales were EP sales. Zara asserts that Zara USA's fact pattern is similar. Zara asserts that Zara USA is a "paper company" that acts as the importer of record, has no physical assets or employees, and is not involved in the sales process. Zara also asserts that Zara USA's expenses consist solely of brokerage and handling, customs fees, accounting expenses and bank charges. Moreover, Zara argues that in the present case, as in Rebar from Turkey, the sales agreement and the invoice for the sale to the unaffiliated U.S. customer are made in Italy, and the goods were shipped directly from Italy to the unaffiliated U.S. customer. Therefore, Zara's U.S. sales were concluded outside the United States.

Zara claims that in Thai Pineapple, as well as in the present case, the U.S. affiliate is not involved in the sales process and never takes possession of the merchandise. According to Zara, the role of the U.S. affiliate consists merely of issuing invoices to the unaffiliated U.S. customers; receiving payments from the U.S. customers; paying brokerage and handling expenses incurred in the United States; and paying U.S. import duties, fees and antidumping duties. Zara also claims that in the present case, as in Thai Pineapple, the sales are made between Zara and the unaffiliated U.S. customer before importation into the United States. Thus, Zara argues that its sales are also EP sales.

Finally, in support of Zara's argument that its U.S. sales are EP sales, Zara cites to Warmwater Shrimp. Zara states that in Warmwater Shrimp the Department determined that the respondent's sales were EP sales because all significant and relevant sales activities occurred in the foreign country and no meaningful activities were conducted within the United States. Zara argues that in this present case, no significant and relevant sales activities occurred in the United States. Zara argues further that the activities of issuing invoices on Zara USA letterhead, collecting the

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[34] Canned Pineapple Fruit from Thailand: Final Results of Antidumping Duty Administrative Review, 66 FR 52744 (October 17, 2001) (Thai Pineapple), and accompanying Issues and Decision Memorandum at Comment 16; Steel Reinforcing Bars from Turkey: Final Results Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part, 70 FR 67665 (November 8, 2005) (Rebar from Turkey), and accompanying Issues and Decision Memorandum at Comment 22; and Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 72 FR 52070 (September 12, 2007) (Warmwater Shrimp), and accompanying Issues and Decision Memorandum at Comment 4.

payments from U.S. customers, and payment of U.S. customs duties by GCC were ministerial functions. Thus, Zara again argues that the Department's finding in the present case should be consistent with the Department's determination in Warmwater Shrimp.

Regarding title transfer, Zara claims that the shipping terms on which the merchandise is sold in the United States only deals with the passage of risk of loss, and is a somewhat {sic} different concept than the passage of title/ownership of the merchandise.[35] Zara argues that the locus of passage of title alone cannot determine whether a sale is EP or CEP because in a sale with "delivered duty paid" terms from a foreign exporter to an unrelated U.S. importer, the title presumably passes after customs clearance in the United States. Therefore, according to Zara, it must be an EP sale since there is no U.S. entity in existence. Hence, Zara concludes that passage of title is, at most, a secondary issue.

Petitioners counter that record evidence does not support Zara's assertions that the sales contract is consummated between Zara and the U.S. customer with no involvement by Zara USA, or that the date of sale occurs before the pasta is entered into the United States. Petitioners argue that in accordance with the ruling in Corus Staal, the U.S. sales should be treated as CEP sales. Petitioners also counter that if the purchase order acceptance date is the correct date of sale, then Zara has submitted an incorrect U.S. sales database because Zara reported its U.S. sales based on the date the invoice was issued by Zara USA.

Petitioners contend that Zara ignores critical distinguishing facts between the cases it cites and the present case. Petitioners state that in Rebar from Turkey, the Department's explanations show that the invoices to the U.S. customers were issued from Turkey, the date of sale occurred prior to U.S. entry of merchandise, and that payment preceded entry. Petitioners argue that these conditions are absent from the present case because the invoices are issued by Zara USA, the date of invoice is the date of sale, and there is no evidence that payment occurred prior to U.S. entry of the merchandise.

Petitioners state that in Thai Pineapple the Department explained that it verified that all of the activities that were carried out on paper by the U.S. affiliate, including invoicing to the U.S. customer and receipt of payment from the U.S. customer, were conducted in Thailand, and that the merchandise was sold before importation. Petitioners argue that the sales process in this instant case is different from the sales process in Thai Pineapple because, Zara USA in New York issued the invoices to the U.S. unaffiliated customer and Zara reported the invoice date as the date of sale.

Petitioners also argue that the Warmwater Shrimp case is not similar to the present case because the issuance of the invoices by Zara USA and receipt of payments are meaningful sales activities that are conducted inside of the United States. Petitioners argue that the record evidence shows that the date of sale is based on Zara USA's invoice and, in accordance with AK Steel, Zara's U.S. sales are properly classified as CEP sales. Thus, petitioners contend that none of the cases cited by Zara lends support to its claims that its U.S. sales are EP sales.

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[35] INCO terms as published by the International Chamber of Commerce.

Department's Position

The Department's preliminary determination that Zara's sales to the United States were on a CEP basis is consistent with the statute, SAA, AK Steel and Corus Staal. Pursuant to section 772(a) of the Act, "the term 'export price' means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c) of this section." Pursuant to section 772 (b) of the Act, and the SAA at 819, the term "CEP" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

In AK Steel, the CAFC explained that CEP sales can be made by either the foreign producer/exporter or the foreign producer/exporter's U.S. affiliate, while EP sales "can only be made by the producer or exporter of the merchandise" (i.e., sales "made by a U.S. affiliate can only be CEP").[36] Moreover, the CAFC stated in AK Steel that:

> Commerce does not require a cumbersome test, examining the activities of the affiliate, to determine whether or not the U.S. affiliate is a seller, when the answer to that question is plain from the face of the contracts governing the sales in question. If Congress had intended the EP versus CEP distinction to be made based on which party set the terms of the deal or on the relative importance of each party's role, it would not have written the statute to distinguish between the two categories based on the location where the sale was made and the affiliation of the party that made the sale.[37]

Thus, the analysis the Department undertakes to determine whether a sale is properly classified as EP or CEP is: 1) the identity of the seller to the first unaffiliated U.S. customer; and 2) the location of the sale to the first unaffiliated U.S. customer.[38] Subsequent to AK Steel, the Federal Circuit further clarified that "AK Steel does not stand for the proposition that all sales by foreign sellers to unaffiliated U.S. customers should be considered EP transactions. . . . The statute, moreover, is clear on that point: EP treatment is limited to transactions that occur between a seller outside the United States and a buyer inside the United States, before the date of importation." See Corus Staal, 502 F.3d at 1377 (emphasis added).

First, the sales reported by Zara cannot be EP sales because the sales occurred after the date of importation. The invoices identifying Zara USA as the seller of subject merchandise are issued after importation. See Zara's August 4, 2008, questionnaire response at Exhibit 1. Because section 772(a) of the Act defines the term "export price" as "the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation. . . , " sales that

[36] See AK Steel at 1370-1371.

[37] See AK Steel at 1372.

[38] See AK Steel at 1370: "the critical difference between EP and CEP sales is whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate." See also id at 1371: "The location of the sale and the identity of the seller are critical to distinguishing between {EP and CEP}."

occur after the date of importation, such as the sales at issue here, cannot by definition be EP sales, and must necessarily be classified as CEP sales.

Second, the sales reported by Zara are CEP sales because they were made in the United States by Zara USA. Zara stated in its questionnaire response that Zara sells to Zara USA, and Zara USA sells to an unaffiliated U.S. customer, who pays Zara USA. See Zara's April 8, 2008, questionnaire response at pages 39-41. Accordingly, by Zara's own admission, Zara USA makes the first sale to an unaffiliated customer in the United States. In Corus Staal, the CAFC stated "{a}s the material terms of the sale or agreement to sell were not fixed until the final invoice, Commerce could properly conclude that the final invoices determined when a sale or agreement to sell first occurred."[39] The invoice issued to the first unaffiliated customer identifies Zara USA as the seller of subject merchandise, and the terms of sale are not finalized prior to the issuance of the invoice. See Zara Verification Report at page 6. In addition, Zara USA serves as importer of record and it transfers title to the first unaffiliated purchaser in the United States. See id; see also Zara's Case Brief dated October 17, 2008, at page 11. Therefore, in accordance with AK Steel and Corus Staal, we find that the subject merchandise is first sold in the United States to an unaffiliated U.S. customer, and thus treating these sales as CEP sales is warranted.

[39] See Corus Staal, 502 F .3d 1370 (Fed. Cir. 2007) at page 6.

In the Preliminary Results,[40] the Department found that, with respect to Zara's sales involving Zara USA, the first sale of subject merchandise to an unaffiliated party occurred in the United States through Zara USA, Zara's U.S. affiliate, and thus the CEP methodology was appropriate. See Preliminary Results at 45717 - 45718. For the final results, we have continued to classify these sales as CEP sales because record evidence demonstrates that Zara USA, rather than Zara, concludes the first sales to unaffiliated customers in the United States. Specifically, the record indicates that the essential terms of such sales are fixed and finalized upon issuance of invoice to the unaffiliated U.S. customer. Such invoices demonstrate that Zara USA, not Zara, is the entity making the sale. See Zara's April 8, 2008, questionnaire response at page 39.

Upon review of the cases cited by Zara, it appears that the Department previously employed two different approaches in determining whether a sale is EP or CEP. In the most recent cases, the identity of the seller was apparent from the invoices issued to the unaffiliated customer. Such invoices identified the seller of the goods as the U.S. affiliate of a foreign producer/exporter, and the Department concluded that such sales constituted CEP sales regardless of how the selling function were distributed. See e.g., Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical circumstances,73 FR 40485 (July 15, 2008) (Tires). In three determinations cited by Zara, however, the Department discussed selling functions. We believe that it is important to be consistent in our approach and clarify our practice. Following the rulings in AK Steel and Corus Staal,[41] where the Federal Circuit invalidated the functions-driven "PQ test," we believe it is unnecessary to focus on the functions of the foreign parent and its U.S. subsidiary or engage in an in-depth analysis of such functions in order to identify the seller, when the seller can be clearly identified in the documents effectuating the sale (e.g., the contract controlling the sale or, in the absence of a contract, the invoice setting the final terms of sale). Accordingly, we believe that the Department's approach in Tires is more appropriate in light of the Federal Circuit decisions. Thus, in this case, it is unnecessary for the Department to conduct an analysis of the functions or activities performed by Zara USA in the sales process in order to determine whether to treat such sales as EP or CEP, as the identity of the seller is apparent from the invoices. The record demonstrates that invoices sent to the unaffiliated U.S. customer identify Zara USA as the seller of the subject merchandise and the customer has paid the amount indicated in the invoices to Zara USA. See Zara's December 12, 2007, questionnaire response at Exhibit 7. Accordingly, consistent with AK Steel and Corus Staal, we will not attempt to re-characterize a sale transaction between two U.S. companies into an EP sale through the function-driven approach advocated by Zara.

Finally, we agree with Zara that the passage of the title/ownership of the merchandise is not, in and of itself, dispositive, but is a factor to be considered pursuant to AK Steel. The Department finds that Zara USA is identified as the seller of the goods, as evidenced on invoices issued to the first unaffiliated customers. As stated in AK Steel, if the sales contract is between two entities in the United States, and executed in the United States and title will pass in the United States, it cannot be said to have been a sale "outside the United States"; therefore the sale cannot be an EP sale. See AK Steel at 1374. Under the terms listed on the invoices from Zara USA to the

[40] See Certain Pasta from Italy: Notice of Preliminary Results of Eleventh Antidumping Duty Administrative Review, 73 FR 345716 (August 6, 2008) (Preliminary Results).

[41] All three determinations cited by Zara were made prior to the Federal Circuit's ruling in Corus Staal.

unaffiliated U.S. customer, title/ownership of the goods and risk of loss are transferred to the unaffiliated U.S. customer with the issuance of the invoices; therefore the sale cannot be an EP sale. See Zara's December 12, 2007, questionnaire response at Exhibit 7.

Comment 8: Zara's Home Market Levels of Trade

Zara argues that the Department erred in finding a single LOT. Zara contends that there are two LOTs in the home market; LOTH 1 customers who consistently buy in multiple-pallet quantities, and LOTH 2 customers who consistently buy in less-than-full-pallet quantities. Zara discusses differences between LOTH 1 and LOTH 2 customers to argue that there are two LOTs in the home market.

Zara explains that the Italian food distribution has become largely "flattened," and as a consequence, Zara functions as an old-fashioned distributor or wholesaler for its LOTH 2 customers in the home market. Zara also explains that the functions of distributors and wholesalers have been eliminated from the distribution channel for LOTH 1 customers, because they have their own warehouses and distribution facilities. Zara contends that in selling to LOTH 1 customers, Zara acts in a manner in which a traditional manufacturer makes its first sale into the channel of distribution; selling in truckload quantities to customers that have their own warehouses and distribution systems. However, in selling to LOTH 2 customers, Zara acts in the manner in which a traditional distributor or wholesaler sells to its retailer customers; breaking down full-pallet quantities as received into its warehouse into small deliveries made by means of small trucks. Thus, Zara argues that with respect to the LOTH 2 customers, Zara occupies a different position in the chain of distribution from that which it occupies in its service to LOTH 1 customers, and that the preamble to the Department's regulations makes it clear that a LOT is a marketing stage.

Petitioners counter that Zara's arguments ignore the preamble to the Department's regulations, which require associated selling functions with more remote LOTs, and which states that each remote level must be characterized by an additional layer of selling activities, amounting in the aggregate to substantially different selling functions. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27371 (May 19, 1997). Thus, petitioners contend that Zara's claims about marketing stages and positions in the chain of distribution do not justify a finding of different LOTs unless they are characterized by substantial differences in selling functions, and the limited information Zara submitted on its selling functions does not show additional layers of selling activities for its claimed LOTH 2 sales as compared to its claimed LOTH 1 sales.

Zara provided charts that it claims prove that there are clear and substantial differences in the channels of distribution for LOTH 1 and LOTH 2 customers. Zara asserts that in analyzing channels of distribution by LOTs for LOTH 1 and LOTH 2 in chart 1 shows almost all LOTH 1 sales are delivered by Zara's trucks, while one-third of LOTH 2 sales are delivered by Zara trucks, with most of the remainder sold ex-works. Thus, Zara argues that the Department's Calculation Memorandum is wrong in stating that there is no difference in the channels of distribution as between LOTs.

Zara contends that chart 2 - advertising expenses, and chart 3 - distribution of free pasta, show higher level of expenses for LOTH 2 customers than LOTH 1 customers; chart 4 - rebate

expenses show Zara's rebate expense is incurred with respect to LOTH 1 customers and no rebates for LOTH 2 customers; chart 5 - early payment discounts incurred with respect to LOTH 1 customers and none for LOTH 2 customers; chart 6 - distribution of freight cost is higher for LOTH 2 customers than for LOTH 1 customers; chart 7 – distribution of sales show that virtually all sales to LOTH 2 customers are made by Zara 1, while for Zara 2 only 0.02 percent of its sales are to LOTH 2 customers. According to Zara, this difference in chart 7 underscores that the sales to LOTH 2 customers are highly localized within the seller's catchment.

Zara concludes that charts 1 through 7 establish that, aside from the very clear qualitative differences in LOTs arising from the differences in logistics, salesmen's activities, and payment practice, there are quantitative differences that are reflected in the databases submitted and verified in the review. However, Zara argues that none of these quantitative differences have been considered in the Department's Calculation Memorandum for Zara.

Furthermore, Zara asserts that the differences between LOTH 1 and LOTH 2 customers, as shown in the charts, are clear and compelling. Zara contends that in the present case, the differences in selling functions apply to all customers within the respective LOTs and are consistently performed differentially within each separate level. Thus, Zara argues that the Department's regulations and precedents compel the conclusion that sales to LOTH 2 customers are at a different LOT than LOTH 1 customers. Zara claims that the Department acknowledges Zara's difference in intensity of selling activities by LOTH in its Calculation Memorandum for Zara, but erred in its conclusion that the differences are not consistent and substantial. Moreover, Zara argues that the Department's Calculation Memorandum for Zara does not provide any analytical support for this assertion.

Zara reported in footnote 5 to its LOT comments in its case brief, dated October 17, 2008, that it claims two additional LOTs in the home market. Zara states that LOTH 3 consists of sales to employees and persons associated with the company and LOTH 4 consists of companies that are principally suppliers but that purchase pasta on occasion. Zara contends that sales to LOTH 4 customers should be dropped from the calculation because they were outside the ordinary course of business.

Petitioners counter that Zara's chart 1 undermines Zara's claims regarding LOTs because it shows that Zara provided a higher level of sales activity for its LOTH 1 sales than for its LOTH 2 sales. Thus, according to petitioners, this chart contradicts Zara's claims that its LOTH 2 sales required additional layers of selling functions. Petitioners contend that chart 2 data does not reflect differences in LOT because LOTH 1 customers who sell Zara brand pasta receive the same benefit from advertisements for Zara brand pasta that LOTH 2 customers receive. Therefore, all customers who sell Zara brand pasta receive the same benefit from Zara's advertising expenses.

Petitioners also counter that Zara's chart 3 does not indicate a difference in LOTs because Zara provides free pasta to customers at both of its claimed LOTs. Petitioners argue that the difference is based on the customers' status rather than the LOT claimed by Zara. Petitioners also argue that the data in Zara's charts 4 and 5 show that Zara provides a higher level of selling activities to its LOTH 1 customers than its LOTH 2 customers, and that LOTH 2 customers are

not "more remote" and do not experience substantially more selling functions than LOTH 1 customers. Regarding Zara's chart 6, petitioners contend that although arranging delivery is a selling function, the cost incurred to deliver the merchandise is not a selling function. Petitioners counter that the data in Zara's chart 7 are not selling functions, but are production functions. Petitioners argue that it is immaterial to the customer which plant Zara uses to fill its orders and Zara's decision on which plant to use for specific sales is not a selling function. Moreover, petitioners contend that Zara's data show that both of its plants produce pasta for both of Zara's claimed LOTs.

Petitioners contend that Zara's argument that the Department failed to provide analytic support for its decision to reject Zara's LOT is absurd. Petitioners state that on the contrary, the Department explained that it examined Zara's claimed selling functions and claimed levels of activity and that this analysis shows that Zara performs similar selling activities for different customer categories. Petitioners argue that the conclusion by the Department of a higher level of intensity for LOTH 1 is confirmed by Zara's charts 1, 4, and 5.

Petitioners argue that the information submitted by Zara does not provide any basis for a finding of different LOTs for Zara home market sales. Therefore, the Department should continue to find that Zara's home market sales are at the same LOT.

Department's Position

The Department continues to find that Zara does not have different marketing stages or their equivalent that would support a finding of different LOTs in the home market. In the home market, Zara sold directly to customers using three channels of distribution: ex works, delivery by Zara's trucks, and delivery by common carrier.[42] Zara claimed that three channels of distribution and 14 customer categories constituted two LOTs.[43] Zara reported six customer categories as LOTH 1 and the remaining eight customer categories as LOTH 2.

In accordance with section 351.412(c)(2) of the Department's regulations, the Department will determine that sales are made at different LOTs if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Contrary to Zara's assertion, the Department did analyze Zara's LOTs in the selling activity chart and narrative that were submitted on the record, and verified. The Department examined the range of selling activities in LOTH 1 and LOTH 2 in the Zara's selling functions chart. An analysis of the selling activities for Zara shows that it performs similar selling activities for different customer categories, although some of the activities were at different levels of intensity. Moreover, some selling activities within the claimed LOTH 1 are at a higher level of intensity while other selling activities are at a lower level of intensity than the same selling activities in the claimed LOTH 2.[44]

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[42] See Zara's Questionnaire Response, dated December 12, 2007, at pages 8 and 9.
[43] See id., at pages 31- 32.
[44] Id., at 45720.

The Department does not find Zara's argument that because it functions as an old-fashioned distributor or wholesaler for its LOTH 2 customers, and incurred cost differences for storing, packaging and transportation for less-than-full-pallet quantities, to be persuasive. The Department finds that, with the exception of the costs for breaking down pallets for shipment of individual cartons of merchandise, each of these activities are part of the selling activities analyzed in the selling functions chart. Finally, the Department finds that the costs for breaking down pallets for shipment of individual cartons of merchandise should be accounted for in Zara's reported packing labor expenses.

We agree with petitioners' conclusion that data provided in Zara's charts do not show substantial differences in the selling functions. Regarding Zara's argument that the advertising expenses for LOTH 1 and LOTH 2 show a different LOT, the Department finds that these are direct expenses that are deducted from NV, and therefore, cannot establish different LOTs. The Department also finds that the distribution of freight costs is not a selling function, and that these costs are deducted from the home market price. See Calculation Memorandum for Zara, dated July 30, 2008. The SAA states that the Department will ensure that expenses previously deducted from NV are not deducted a second time through a LOT adjustment. See SAA at 830.

Finally, we disagree with Zara's contention that sales to LOTH 4 customers should be dropped from the final margin calculation because they were outside the ordinary course of business. Zara did not demonstrate that these sales were not made in the ordinary course of business. Therefore, we have not removed these sales from the final margin calculation.

Comment 9: Wheat Code Classification

Petitioners argue that Zara ignored the instructions in the Department's questionnaires on wheat code classification, and instead manipulated the wheat type codes to exclude Zara's higher-priced home market sales from the Department's product matching and dumping margin calculations. Petitioners state that 100 percent durum semolina is one of the Department's model match characteristics and that Zara admits that both superior semolina and normal semolina are made from 100 percent durum semolina. Thus, petitioners assert that Zara should have used this wheat type code for both superior semolina and normal semolina for its home market sales. Moreover, petitioners argue that Zara's claims that superior semolina has a higher protein and carbohydrate content than normal semolina are physical characteristics of semolina, and not model matching characteristics for pasta.

Petitioners cite to cases where the Department previously rejected similar attempts by respondents to alter wheat codes to reduce or eliminate dumping margins. Petitioners assert that consistent with its practice, the Department's should not allow Zara's manipulation of the wheat codes used for product matches. See e.g., Certain Pasta from Turkey: Final Results of Antidumping Duty Administrative Review, 70 FR 6834 (February 9, 2005) (Certain Pasta from Turkey), and accompanying Issues and Decisions Memorandum at Comments 3 and 7; see also Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 70 FR 6832 (February 9, 2005) (Certain Pasta from Italy Seventh), and accompanying Issues and Decisions Memorandum at Comment 21. Thus, petitioners posit that the Department must collapse the three wheat type codes in Zara's home market sales database, and collapse the product control numbers in Zara's

cost of production database, to reflect the wheat codes in the Department's antidumping questionnaire.

Zara counters that it did not manipulate the wheat type codes as argued by petitioners. Zara contends that the Department did not specifically request that Zara collapse its wheat type codes and that it explained the differences between high-protein semolina and blended semolina/semolato in its questionnaire response. Zara states that during the cost verification, the verifiers examined and confirmed that Zara had included its small quantity of pasta made from whole-wheat semolina in the cost reporting for pasta made from normal semolina. Zara argues that it collapsed normal and whole wheat semolina in its final reporting and that it used additional codes as permitted by the Department.

Zara claims that petitioners' cost-difference analysis is fallacious, and does not reflect the updated wheat codes provided in the second supplemental response. Zara also claims that petitioners have misstated the unit prices, in particular for the net price of the superior semolina product and by so doing petitioners have masked the impact of the superior and blended sales. Zara counters that petitioners do not explain why the physical characteristics of semolina are irrelevant to the wheat product characteristic. According to Zara, while protein content is a characteristic of semolina, it is also a characteristic of pasta, and makes a material difference in the cost of raw material.

Zara states that there is case precedent for finding a difference of 25 percent from the benchmark to be a significant difference for purposes of differentiating physical characteristics; in the present case, Zara asserts that the high-protein semolina is nearly 35 percent more costly than normal semolina. See Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta from Italy, 64 FR 6615, 6623 (February 10, 1999).

Zara responds that petitioners' reference to Certain Pasta from Turkey and Certain Pasta from Italy Seventh is unavailing for several reasons. Zara contends that in Certain Pasta from Turkey, respondent Tat claimed a difference as to gluten and ash content. However, a review of the documents showed that all brands of Tat's pasta had the same potential for ash and gluten content. Zara further contends that the circumstances of the present case differ because Zara does not mill semolina, and the differences in semolina type are observable from purchase records, cost accounting and marketing, and in the Italian pasta identity legislation. Zara also contends that the Department's cost verifiers established that the company used its recipes for the production (i.e., Zara's differentiation among semolina types was accurate and maintained in the ordinary course of business).

Regarding Certain Pasta from Italy Seventh, Zara counters that the Department denied PAM's claim for a different wheat type because PAM calculated the cost difference on total difference in the cost of manufacture (COM), which was also influenced by throughput differentials since the putative superior semolina pasta was produced with bronze dies that require a slow extrusion rate. Zara contends that it has shown that the difference in its semolina cost is over 30 percent and that this difference exists regardless of throughput rates or any other costs. Therefore, the logic in the case cited by petitioners is not applicable to Zara.

Department's Position

Section 771(16) of the Act defines how the Department finds comparable merchandise in the foreign market. Section 771(16)(A) of the Act requires us to first search for identical merchandise, and section 771(16)(B) and (C) of the Act explains how the Department finds the most comparable merchandise if there is no identical merchandise. In the Preliminary Results, the Department accepted the separate wheat code for "semola superior" as reported by Zara. In the less-than-fair-value (LTFV) phase and in previous reviews of this order, the Department has accepted and denied respondent-specific claims for modifications to model match criteria based on the given circumstances in each segment. In the original investigation, the Department laid out the following standard:[45]

> At the respective verifications, each of these respondents established that different wheat (i.e., semolina) qualities existed and that these were measured by ash and gluten content. It was primarily these characteristics which were used to select semolina for pasta production. We verified that physical differences exist and that the cost of the highest grade of semolina is materially more than that of the lowest grade. We found these quality differences reflected in semolina costs and pasta prices. We found that they are commercially significant and an appropriate criterion for product matching.

Based on this standard, the Department added an "other" wheat code category in the questionnaire that allows respondents to claim separate treatment for certain semolina inputs. As noted above, we have applied the above standard on a company-specific basis on several occasions.[46] Petitioners correctly identify instances where we have denied parties' requests for separate treatment for certain types of semolina (wheat codes); however, there are also instances where we have allowed separate treatment.[47] Both parties have argued that there is a specific percentage cost difference rule that we have applied in deciding whether to grant or deny separate wheat codes. However, we have never articulated a specific numerical standard in the proceedings where we have made a finding, either in the underlying investigation or in Certain Pasta from Italy Sixth and Seventh.

We recognize the need to be consistent in our decisions regarding separate wheat codes to articulate a clear and comprehensive standard based on industry-wide commercial standards. We also recognize, however, that adopting any specific standard could affect many parties. Accordingly, in order to allow interested parties to comment on this general issue, in the succeeding review of pasta from Italy, already underway, we intend to solicit comment from interested parties with respect to the appropriate standards and criteria to be applied in differentiating among wheat codes. Based on such comments, we will make any necessary

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[45] See Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy, 61 FR 30326, 30346 (June 14, 1996) (Pasta: Final Determination).

[46] See also Notice of Final Results of the Sixth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 69 FR 6255 (February 10, 2004) (Certain Pasta from Italy Sixth)

[47] See e.g., Certain Pasta from Italy Seventh, where the Department accepted separate wheat code classifications for Ferrara and PAM.

changes and/or clarifications to the model match criteria for pasta to apply to all future respondents.

In accordance with section 771(16)(C) of the Act, we have determined that substantial evidence supports finding that wheat codes reported by Zara result in reasonable comparisons. For purposes of this review, we have based our decision on the evidence placed on the record by Zara with respect to cost differences attributable to significant differences in physical characteristics (i.e., ash and gluten (protein) content) for "semolina superior." In so doing, we considered the following factors: where there is "commercially significant ash and protein content differences" we have allowed a separate wheat code; where "slight cost and ash and protein content differences were presented, we find that these differences are not commercially significant" and we disallowed a separate wheat code.[48] Zara's questionnaire response, and verification exhibits, show the following: 1) that "semolina superior" has a higher protein (gluten) and ash content than other types of semolina used to produce pasta; 2) "semolina superior" is 30 percent more expensive than other types of semolina used to produce pasta; and 3) pasta produced using "semolina superior" is priced separately from, and higher than, pasta produced from other types of semolina.[49] Based on record evidence provided by Zara, and in line with previous Departmental decisions regarding separate wheat codes, for purposes of this review, we find the differences in ash and gluten content for Zara's "semolina superior" a sufficient basis upon which to allow reporting of a separate wheat code for such pasta. As noted above, however, we intend to review this issue in the succeeding administrative review and develop a uniform methodology to be applied in prospective reviews.

Comment 10: Calculation of the G&A and Financial Expense Ratios

Petitioners argue that in the preliminary margin calculations, the Department calculated the G&A and financial expense ratios using the cost of sales (COS) in the denominator, which included packing costs, rather than using Zara's (i.e., both Zara 1 and Zara 2) COM in the denominator, exclusive of packing. Accordingly, the petitioners assert that the Department then incorrectly applied the G&A and financial expense ratio calculations, using the COS including packing, to a COM exclusive of packing.

According to petitioners, it is the Department's practice to exclude packing costs from the COM denominator used in calculation of the G&A and financial expense ratios, citing Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty administrative Review, 73 FR 7710 (Feb. 11, 2008) and accompanying Issues and Decision Memorandum at Comment 12 (SSSS from Mexico). In SSSS from Mexico, the Department states that, "It is normal practice to exclude a company's packing expenses from its financial expense rate calculation." Further, to support their argument that the Department uses a denominator that is calculated on the same basis as the G&A and financial expense ratios, the petitioners cite to Pasta Second at Comment 17. According to petitioners, in Pasta Second, the Department calculated the respondent's G&A expense ratio by adding U.S. packing cost to the revised cost of manufacture before calculating CV. Thus, if the Department applies the G&A and financial

[44] See Zara's December 12, 2007 questionnaire response at 27-29 and Exhibit 6 and 7.

[49] See Zara's July 1, 2008 second supplemental questionnaire response at 3, and Exhibit 6 and 7.

expense ratios to Zara's reported COM, then the Department should also calculate Zara's G&A and financial expense ratios using COM as the denominator in the calculation.

Zara contends that the COS denominator used in calculating the G&A and financial expense ratios are exclusive of packing and points to its section D questionnaire where it shows that the G&A and financial expense ratios are calculated using a COS denominator "less packing."[50] Zara also cites to other information on the record in this proceeding including the second supplemental cost response,[51] the supplemental section D response[52] and Cost Verification Report,[53] where it is evident that the COS does not include packing costs. Additionally, Zara asserts that the petitioners' comparison between the COM and COS amounts in their case brief lacks compatibility. Zara argues that the petitioners attempt to compare COS less packing for the calendar year to COM for the POR and, therefore, there is no reason to expect that these figures would be the same. As such, according to Zara, petitioners' failure to acknowledge these differences eliminates the merit of their argument.

Department's Position:

We disagree with the petitioners that the Department should adjust Zara's reported G&A and financial expense ratios. While we agree that it is the Department's practice to exclude packing costs from the COS denominator used in the G&A and financial expense ratios, we find that Zara has already excluded packing costs from the COS denominator. As evidenced in Zara's supplemental questionnaire responses and the cost verification report, Zara's COS denominator is net of packing expenses. Thus, consistent with the Preliminary Results, we calculated the G&A and financial expense ratios using Zara's COS net of packing.

Concerning the petitioners' claim that Zara's G&A and financial expense ratios are applied to COM, and thus the denominator used to calculate the ratios should be based on COM, we disagree. See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews 67 FR 55780 (August 30, 2002) and accompanying Issues and Decision Memorandum at Comment 35 (Bearings). In Bearings the Department stated, "{it} is logical to use the COGS amount as the denominator in calculating the G&A expense ratio because G&A expenses are incurred for those products sold during a period that were manufactured in the current as well as prior periods. Because we consider G&A expenses as period expenses and extract them directly from the financial statements for the period that corresponds most closely to the POR, the G&A expense ratio should be calculated based on expenses (i.e., COGS) that are also reflected in the financial statements for the same period." Thus, consistent with Department's practice, in these final results, we continue to use the COS denominator, exclusive of packing, in the calculation of the

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[50] See Zara's section D questionnaire response, dated February 15, 2008, at exhibit 17.

[51] See Zara's supplemental questionnaire response, dated May 27, 2008, at page13.

[52] See Zara's supplemental section D questionnaire response, dated April 16, 2008, at exhibit 23.

[53] Memorandum to file dated August 8, 2008 to Neal M. Halper Director Office of Accounting from Christopher J. Zimpo through Taija A. Slaughter, "Verification of the Cost Response of Pasta Zara SpA in the Anitdumping Duty Administrative Review of Certain Pasta from Italy," pages 26 (G&A ratio) and 29 (financial expense ratio) (Cost Verification Report).

G&A and financial expense ratios. Although Bearings only addresses the methodology for deriving the G&A expense ratio, the same reasoning applies to the reported financial expense ratio.

Petitioners cite Pasta Second to support their argument that COM should be used in the denominator for calculating the G&A and financial expense. However, that case is distinguishable from the instant review. The issue addressed in the Pasta Second was whether packing should be included in the G&A expense ratio calculation because packing was included in the COM. In this proceeding, unlike in Pasta Second, packing costs are not included in COM, or in the COS denominator used to derive the G&A and financial ratios.

Comment 11: Treatment of Sales Proceeds with Respect to the Cost of Production

Petitioners argue that there is no basis for Zara to claim that the sales proceeds for materials such as eggs and tomato powder should be used as an offset to cost of production (COP) of pasta. Further, the petitioners assert that it is inappropriate for Zara to claim an offset to the COP for labor costs associated with "time spent on non-productive activities" (i.e., capital asset improvements). Moreover, the petitioners assert that the labor costs incurred to build or improve capital assets should be capitalized in the value of the assets.

In support of their argument, petitioners refer to Zara's supplemental questionnaire response, dated May 27, 2008 at page 4, where the company explained that proceeds from the sale of materials, such as eggs and tomato powder, are a reduction to the cost of materials. Petitioners assert that proceeds from the sale of eggs or egg additives relate directly and exclusively to non-subject merchandise, and therefore, there is no basis for a reduction in the COP of subject pasta.

Zara contends that petitioners' issues were specifically addressed in the Department's cost verification report and in Zara's second supplemental section D response. See id. According to Zara, the sales proceeds must be "netted against" the purchases because it must account for only the cost of materials used in the production process. As for the "increase in assets," Zara agrees with the petitioners that labor costs associated with construction of physical assets should be capitalized and included as depreciation expense in the future periods. Zara asserts that the adjustments made in calculating COM for the merchandise under consideration were fully verified, and as a methodological matter, consistent with the Department's past practice for deriving the reported COM. Zara acknowledges egg pasta is not subject merchandise, and that like the re-sale of semolina, should not be included in the COM of finished pasta. As a result, Zara states that they properly reduced company-wide COM for those costs not associated with manufacturing subject pasta COM.

Department's Position:

We disagree with petitioners. As evidenced in the verification exhibits and Zara's second supplemental questionnaire response, the company-wide COM includes the purchases of eggs,

egg mix and tomato powder.[54] In addition, the reported company-wide COM includes the sales revenue of egg, egg mix and tomato powder. As it is not appropriate to include the purchases of egg, egg mix and tomato powder in the reported COM, it is also not appropriate to include the proceeds from their sale. By definition, raw material costs for merchandise under consideration do not include purchases and sales activities for raw materials related solely to non-subject merchandise. Thus, in order to calculate a COM for merchandise under consideration exclusive of the sales proceeds offset and cost of the purchases in question, it is necessary to adjust the company-wide COM by increasing the COM by the sales proceeds that originally reduced COM and reduce the COM for the cost of purchases of egg, egg mix and tomato powder. This is precisely the adjustment ("netted against") Zara is referring to in its response to the Department's supplemental section D questionnaire, noted above.

With respect to non-productive labor costs associated with building new or improving currently existing assets, Zara is not reducing its COM for these expenses. At verification, we reconciled total reported company-wide COM to the trial balance and to the financial statements for the POR. We then reconciled the reported company-wide COM to reported COM for merchandise under consideration for the POR.[55] We examined each of the reconciling items in these reconciliations and did not find any reductions to COM for non-production labor or any other costs associated with "time spent on non-production activities" in Zara's calculation of subject COM. Therefore, for the final results, we have not made any adjustments to COM for the labor costs in question.

[54] Cost Verification Report at CVE-11 and Zara's supplemental questionnaire response, dated May 27, 2008, at Exhibit 3.
[55] Cost Verification Report at pages 8-15.

IV. 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)