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Administrative Review
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MEMORANDUM TO: Faryar Shirzad
Assistant Secretary
for Import Administration

FROM: Bernard T. Carreau
Deputy Assistant Secretary
for Import Administration

RE: Certain Pasta from Italy (Period of Review: July 1, 2000 through June 30, 2001)

SUBJECT: Issues and Decisions for the Final Results of the Fifth Antidumping Duty Administrative Review

Summary:

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

I. List of Comments:

Pagani

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IAPC

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Garofalo

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II. Background

On August 9, 2002, the Department published the preliminary results of 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 and Intent Not to Revoke in Part: Certain Pasta from Italy, 67 FR 51827 (August 9, 2002) ("Preliminary Results"). The merchandise covered by this review is described in the Federal Register notice issued the same date as this memorandum. The review covers four manufacturers/exporters. The POR is July 1, 2000, through June 30, 2001. We received case briefs from the petitioners[1] and the following respondents: Pastificio Garofalo S.p.A. ("Garofalo"), Italian American Pasta Company ("IAPC"), Pastificio Guido Ferrara S.r.l. ("Ferrara") and Pastificio Fratelli Pagani S.p.A. ("Pagani").

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

III. Discussion of Interested Party Comments

Pagani

Comment 1: Revocation

Pagani maintains that the Department erred in denying its request for revocation because the Department's threshold test for revocation, more specifically, the commercial quantities test, was applied in an arbitrary and capricious manner and ignored the facts on the record. Pagani submits that the Department's verification outline directed Pagani to address the market, business, and economic factors affecting Pagani's sales. According to Pagani, the inclusion of these issues in the verification outline establishes that these issues are material to the issue of revocation. Therefore, it contends that the Department is required to give due weight to the facts adduced concerning the market, business, and economic factors affecting Pagani's sales.

Pagani argues further that its request for revocation was denied based solely on a comparison between quantities Pagani exported before the investigation was commenced and Pagani's exports since the antidumping order was instituted. It notes that the Department should have taken into account the totality of the circumstances, including the issues raised in the verification outline related to the change in the U.S. pasta market. Pagani claims that when the totality of the circumstances are taken into consideration the record establishes that Pagani shipped commercial quantities throughout the post-investigation period. Furthermore, it adds, the decline in tonnage during the past three periods of review does not represent a significant drop in Pagani's production or sales volume, because Pagani was never reliant on the U.S. market.

In conclusion, Pagani asks that the Department reconsider its application of the commercial quantities test in light of the issues raised in the verification outline and addressed at verification. Furthermore, Pagani adds that the totality of the evidence makes it clear that Pagani's shipments to the United States were in commercial quantities, when one considers the following factors: 1) the evolution of the U.S. market subsequent to the issuance of the order; 2) the small role U.S. sales have always had in Pagani's overall commercial activities; and 3) the fact that Pagani's sales to the United States were substantial in absolute terms.

Petitioners state that the Department's determination that Pagani has not shipped commercial quantities of subject merchandise in the past three review periods is supported by substantial and verified evidence and is in accordance with administrative practice and precedent. They note that when comparing the quantity shipped during the period of the original investigation and the quantity shipped during the three most recently completed reviews, Pagani's shipment levels cannot be characterized as having been made in commercial quantities. In addition, petitioners note that the Department's regulations do not instruct the Department to investigate why there were no commercial quantities, just whether there were commercial quantities.

Petitioners rebut Pagani's contention that the Department ignored issues that were included in the verification outline and reviewed during verification. They note that the Department specifically addressed these issues in the preliminary results of this review, and therefore, did not act arbitrarily and inconsistently as Pagani suggests.

Petitioners note that, although it is irrelevant to the Department's determination of revocation, they disagree with Pagani's assertion that Pagani was not reliant on the U.S. market, that loss of U.S. market share had no material impact on Pagani's capacity utilization, and therefore Pagani had no incentive to dump in the U.S. market. They maintain that Pagani's U.S. sales during the period of original investigation were an integral part of its overall marketing strategy and that the U.S. market accounted for a significant amount of Pagani's sales. Furthermore, petitioners state that Pagani provided no evidence that the U.S. market has changed since the imposition of the order.

Department's Position: We rejected Pagani's arguments for revoking the antidumping order, with respect to Pagani, in the Preliminary Results of the instant review for a variety of reasons. After considering the arguments presented in the case and rebuttal briefs, we have not changed our position with regard to those claims.

We disagree with Pagani's claim that market, business, and economic factors adequately explain the sharp decline in Pagani's U.S. sales. As discussed in the Preliminary Results, it is the volume of Pagani's sales that is the focus of the Department's analysis with respect to whether those sales can be considered to be in commercial quantities. Pagani has not submitted any information on the record which would indicate the U.S. consumer market has decreased in size since the imposition of the order, or that Pagani has made any permanent changes in its own business practices in the U.S. market.

Pagani has requested revocation based on the absence of dumping for three consecutive review periods, i.e., the third, forth and fifth reviews of this order.[2] As mentioned above, to consider such a request we must determine, as a threshold matter, whether the company requesting revocation sold the subject merchandise in commercial quantities in each of the three years forming the basis of the request. See 19 CFR 351.222(e)(1)(i)-(iii). After applying the criteria outlined in section 351.222 of the Department's regulations, and after considering the comments of the parties and the evidence on the record, we have determined that one of the Department's requirements for revocation has not been satisfied. Specifically, although we find that Pagani has demonstrated three consecutive years of sales at not less than normal value, we also find that, based on Pagani's U.S. shipment data, its sales to the United States have not been made in commercial quantities during each of the three review periods at issue, in accordance with 351.222(e)(1)(ii). See, e.g., Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil, 65 FR 7497 (February

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[2] Pagani's history of subject merchandise pasta sales is as follows:
Pagani's 3rd POR sales of subject pasta were 2.98% of its POI sales of subject pasta.
Pagani's 4th POR sales of subject pasta were 0.94% of its POI sales of subject pasta.
Pagani's 5th POR sales of subject pasta were 1.06% of its POI sales of subject pasta.

15, 2000); and Pure Magnesium from Canada; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order In Part, 64 FR 12977, 12979 (March 16, 1999).

We disagree with Pagani's argument that the commercial quantities criterion requires only that there be a *bona fide* commercial transaction (i.e., "any container-load transaction") during a given period. As the Department previously explained in the Preliminary Results, the record evidence unequivocally demonstrates that the volume of such sales was far below the volume of Pagani's sales prior to the imposition of the antidumping duty order, and therefore does not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping. As the record of this case demonstrates, Pagani did not sell the subject merchandise in the United States in commercial quantities in any of the three years cited by Pagani to support its request for revocation. Regardless of whether these sales were *bona fide* commercial transactions, these sales, in the aggregate, are small in quantity when compared to sales amounts prior to the issuance of the order, and do not provide the Department with a reasonable basis to make a revocation determination.

In examining commercial quantities for purposes of revocation, the Department must be able to determine that past margins are reflective of the company's normal commercial activity. See Certain Corrosion- Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Reviews and Determination To Revoke in Part, 64 FR 2173, 2175 (January 13, 1999). Sales by a firm during a POR which, in the aggregate, are of a small quantity, either in absolute terms or in comparison to an appropriate benchmark period (i.e., its sales in a previous year), do not generally provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping. Id. Therefore, because these sales are not reflective of Pagani's normal commercial activities prior to the order, they can offer no basis upon which to make a revocation determination.

IAPC

Comment 2: Unit of Measure Used in Calculation of Foreign Unit Price in Dollars

IAPC argues that the Department failed to convert the constructed value (CV), adjusted normal value (NVADJ), U.S. packing in foreign currency (PACKFGNU), and difference in merchandise adjustment (DIFMER) to a per-pound basis when calculating the foreign unit price in dollars (FUPDOL), thus overstating the margin derived in the Preliminary Results. IAPC argues that the components of U.S. price are either reported or calculated in U.S. dollars per pound. As FUPDOL is compared to U.S. price in the margin calculations, IAPC asserts that the unit of measure of the two prices should match. To correct this error, IAPC contends that the Department should revise its margin calculations so that the components of the FUPDOL calculation are expressed on a per-pound basis.

Petitioners did not comment on this issue.

Department's Position: We agree with IAPC. The components of FUPDOL (i.e., CV, NVADJ, PACKFGNU, and DIFMER) and U.S. price should be expressed in the same unit of measure. To correct this error, we have converted the components of FUPDOL from kilograms into pounds.

Comment 3: Use of Special Charges in the Calculation of U.S. Net Price

IAPC argues that the Department erred when it subtracted special charges from the gross unit price in the calculation of U.S. net price. IAPC states that it reported special charges as both positive and negative values and, therefore, positive special charges should be treated as increases to the U.S. net price, and negative special charges as deductions from the U.S. net price. IAPC argues that the margin calculations of the Preliminary Results do just the opposite. IAPC claims that, because most of the special charges it reported are positive, the Department's error overstates the dumping margin. To correct this error, IAPC asserts that the Department should revise the U.S. net price calculation so that the special charges are added to the U.S. gross price.

Petitioners did not comment on this issue.

Department's Position: We agree with IAPC. Record evidence supports IAPC's contention that the pricing adjustment values were both positive and negative. See e.g., Exhibits 26-31 of IAPC's May 24, 2002 supplemental questionnaire. To correct the error, we have added the special charges to the gross unit price in the calculation of U.S. net price.

Comment 4: Application of Month Identifiers for U.S. and Home Market Sales

IAPC argues that the Department used an inconsistent methodology for applying unique month identifiers (MONTHH and MONTHU) for use in concordance matching. IAPC contends that for the application of the unique month identifiers for home market sales (MONTH), the Department used the calendar month number to identify sales made in the first year of the POR (2000), and added 12 to the calendar month number for sales made in the second year of the POR (2001). IAPC asserts that the Department did not repeat this methodology for the application of the unique month identifiers for U.S. sales (MONTHU). IAPC argues that the Department instead subtracted 6 from the calendar month number for U.S. sales made in the first year of the POR and added 6 onto the calendar month number for U.S. sales made in the second year of the POR.

IAPC contends that the <u>Preliminary Results</u> methodology results in identical sale months having different month identifiers in the home and U.S. market sales data.

Petitioners did not comment on this issue.

Department's Position: We agree with IAPC. The application of unique month identifiers should be consistent across home and U.S. sales. To correct this error, we have revised the margin calculations so that the month identifiers are consistent in the home and U.S. market.

Comment 5: Calculation of Variables Used In CEP Profit

IAPC contends that the Department erred in the calculation of U.S. revenue (REVENU) and U.S. direct selling expenses (SELLEXPU), variables used in the calculation of CEP profit. Specifically, IAPC argues that in the REVENU calculation the Department failed to subtract credit adjustments and special charges for pricing from U.S. gross unit price. IAPC further argues that, with respect to SELLEXPU, the Department failed to add early payment discounts (EARLPYU).

IAPC further contends that in the calculation of the CEP profit the Department incorrectly divided total U.S. revenue (TOTREVU), total selling expenses (TOTSELLU), and total movement expenses (TOTMOVEU) by the conversion factor "0.453515." IAPC argues that because these variables are on a total basis, rather than a per-unit basis, they do not require quantity conversions.

Petitioners did not comment on these issues.

Department's Position: We agree with IAPC. Credit adjustments (CREDADJU) and special charges (SPCPRCU) for pricing are items that impact REVENU, and, thus, should be included in the REVENU calculation. To correct this error, we have included the CREDADJU and SPCPRCU fields in the calculation of REVENU in the manner suggested by IAPC. Similarly, since early payment discounts are a direct selling expense, we have included EARLPYU in the calculation of SELLEXPU.

We also agree with IAPC that the variables of CEP profit used in the <u>Preliminary Results</u> do not require quantity conversions. To correct this error, we have removed the conversion factor (0.453515) from the calculation of CEP profit.

<u>Garofalo</u>

Comment 6: Affiliation between Garofalo and Amato

Petitioners argue that the Department should rely on adverse facts available ("AFA") to determine Garofalo's antidumping duty rate for the final. They argue that, as the Department preliminarily found that Amato and Garofalo were affiliated, Garofalo was required to submit a questionnaire response for Amato. Garofalo did not do so, and even though the Department decided against collapsing the two companies for the purpose of this review, the petitioners assert that, as Garofalo did not provide the required responses, the Department could not have made an informed decision. Therefore they argue that it is within the Department's right to use AFA in the final.

In addition, petitioners state that Garofalo failed to disclose certain information relating to events occurring before the POR. Some of this information was discovered at verification, and petitioners think that other similar information, as well as information pertaining to the POR, has not been reported. This issue involves business proprietary information and, thus, cannot be fully summarized on the public record. For a more specific discussion of this information see the February 3, 2003 Memo to Melissa G. Skinner, Director, Office of AD/CVD Enforcement VI, "Whether to Collapse Garofalo and Amato in the Final Results" (Final Affiliation Memo). Petitioners recognize that the Department will only collapse the sales data of the two companies if there is the potential for manipulation of prices or production, but argue that the Department did not have the information it needed to determine whether that potential exists in this case. Petitioners point out that Garofalo bears the burden of compiling a complete an accurate record and, therefore, any unanswered questions must be resolved against Garofalo's interests.

Petitioners outline a variety of reasons why the potential for manipulation of prices or production exists. First, they point to identical production facilities, noting that neither Amato nor Garofalo would require significant time to retool to produce the other's goods. Secondly, petitioners refer to certain transactions between Amato and Garofalo. They argue that these transactions provide the potential for manipulation as well as the circumvention of the antidumping order by Amato. Finally, petitioners cite past cases to establish the three factors the Department uses to determine whether the potential for manipulation of price or production exists, for example <u>Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review: Gray Portland Cement and Linker From Mexico</u>: 67 FR 57379, 57380 (Collapsing) (Sept. 10, 2002). These three factors are: the level of common ownership; the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and whether operations are intertwined. In addition, the petitioners cite to <u>Structural Steel Beams from the Republic of Korea: Preliminary Results of Antidumping Duty Administrative Review</u>, 67FR57574 (September 11, 2002), where they claim the

Department used a half-brother relationship as a pretext for proving affiliation. They conclude by recommending that the Department collapse Amato and Garofalo for purposes of the final determination.

Garofalo disagrees with all portions of petitioners' argument. First, Garofalo states that the Department correctly determined not to collapse Garofalo and Amato. It notes that the Department must find a significant potential for manipulation, and that this potential does not exists for reasons such as the lack of shared board members, the lack of intertwined company operations, and its small purchases from Amato which are consistent with those from other suppliers.

Garofalo argues that it disclosed, in a timely manner, information pertaining to the issue of whether to collapse Garofalo and Amato. Garofalo maintains its assertion that the two companies are not affiliated. With respect to petitioners' claims that it failed to report necessary information, Garofalo saw no need to address the collapsing issue until it became clear that the Department might consider the two companies affiliated. In addition, Garofalo notes that it responded to petitioners' comments on the subject within eight days after they were filed, while petitioners took five months to make their first comments. In response to petitioners' assertion that Garofalo did not disclose certain information relating to events occurring before the POR, Garofalo states that the Department's questions specifically sought information concerning the POR. For a more thorough discussion of this issue, see the February 3, 2003 memorandum to Melissa G. Skinner, Director, Office of AD/CVD Enforcement VI, "Whether to Collapse Pastificio Garofalo S.p.A. and Pastificio Antonio Amato in the Final Results," of which a public version is on file room B-099 of the main Commerce building. Furthermore, respondents contend that the regulation addressing "significant transactions between affiliated producers" that the Department uses as a criterion for collapsing refers to meaningful economic transactions as opposed to conditions that the petitioners find to be suspicious. See section 351.401(f)(1) of the Department's regulations.

Department's Position:

In our analysis of this issue, we applied the following legal standard:

Section 351.401(f)(1) of the Department's regulations states that in an antidumping proceeding, the Department "will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the [Department] concludes that there is a significant potential for the manipulation of price or production." Paragraph two of that section goes on to state that in identifying a significant potential for manipulation, the Department may consider:

- The level of common ownership;

- The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

- Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between affiliated producers.

In the Preliminary Results, we found that Garofalo and Amato were affiliated, but that significant potential to manipulate products or prices did not exist to justify collapsing the two companies. See the July 31, 2001 Memorandum to Melissa G. Skinner, Director, Office of AD/CVD Enforcement VI, "Whether to Collapse Garofalo and Amato in the Preliminary Results" (Preliminary Affiliation Memo), of which the public version is on file in room B-099 of the main Commerce building. No new evidence has been placed on the record since the Preliminary Results that would alter the Department's determination that Garofalo and Amato are affiliated.

With respect to the issue of whether to collapse the two companies pursuant to 19 CFR 351.401(f)(1), the petitioners submitted a new argument based upon certain information discovered at verification. Petitioners have argued that this new information demonstrates that collapsing these companies is necessary. Although some related information, not previously supplied to the Department, was discovered at verification, this information pertained to events that transpired prior to the POR. Because of the proprietary nature of this information which cannot be fully summarized, the Department's analysis of the information is set forth in the Final Affiliation Memo.

As discussed in the Final Affiliation Memo, although the petitioners' new argument implicates the first two criteria of 19 CFR 351.401(f)(2), based on the record facts and our interpretation of those facts, we have determined that neither criterion has been satisfied. With respect to the third criterion, the points raised by petitioners pertaining to similar production facilities and certain transactions between Amato and Garofalo are issues that we thoroughly examined before the Preliminary Results. No new facts were presented since then. We know that these types of ties are typical between pasta producers in Italy. Garofalo's relationship with Amato, in this respect, is no different than its relationships with other local pasta companies. Thus, the third criterion of 19 CFR 351.401(f)(2) is similarly not satisfied.

As a result of our analysis, the Department does not find sufficient evidence supporting a finding of a significant potential for the manipulation of prices or production. As the Department has determined that petitioners' arguments do not warrant a change in its position, and no other new information has been presented that would justify such a change, we continue to determine that the companies should not be collapsed pursuant to section 351.401(f)(1) of the Department's regulations.

Comment 7: Exclusion of Home Market Sales Outside the Course of Ordinary Trade

Petitioners argue that the Department should exclude some of Garofalo's home market sales which petitioners argue are outside the course of ordinary trade. First, petitioners assert that the Department may deem sales which are below cost as outside the course of ordinary trade and exclude these sales from the home market sales database. See Statement of Administrative Action, accompanying H.R. 5110 (H. Doc. No. 103-316) (1994) (SAA) at 832. Petitioners further state that, as Garofalo has defined its pricing practice as being based on market economy principles, Garofalo's prices should be set to cover its costs plus a profit margin. Petitioners argue that as there are some sales with negative normal values in the home market, these sales are outside the ordinary course of trade as defined by Garofalo itself.

Garofalo states that petitioners' argument on this point is actually a request for the Department to conduct a modified cost test. In addition, it states that petitioners should have discussed this issue at an earlier date, either attached to four earlier comments petitioners made concerning Garofalo's submissions or in separately filed comments. Raising the issue in a timely fashion would have allowed Garofalo to provide additional evidence to refute the claim that certain sales with low normal value were outside the course of ordinary trade. Also, Garofalo points to the established procedure for the filing of an allegation of sales below cost, where petitioners are required to file such an allegation within 20 days of the filing of the relevant section of the respondents' questionnaire. See 19 CFR 351.301(d)(2). Finally, respondents argue that the action sought by petitioners is even more stringent than that employed under a typical cost allegation, as petitioners want all sales below cost thrown out. However, under a typical cost allegation, below cost sales are only thrown out if "the volume of such sales represents 20 percent or more of the volume of sales under consideration for the determination of normal value. . ." Section 773 (b)(2)(C)(i) of the Act.

Department's Position: We agree with Garofalo. Although petitioners claimed that they were not making a cost allegation, their request for removal of below cost sales is effectively just that. Petitioners had sufficient time to file a cost allegation. See section 351.301(d)(2) of the Department's regulations. They failed to do so in a timely fashion. Therefore, the Department did not consider the request to disregard the sales in question, and included these sales in the home market database for this final determination.

Comment 8: Garofalo's Product Classification

Petitioners argue that there is no reason to classify certain pasta types separately based on quality of semolina used in production. They allege that Garofalo has not submitted enough information to determine whether certain types of semolina have higher acquisition costs than others. Petitioners cite several observation numbers which show that pricing differences based on the type of semolina do not exist. In addition, petitioners state that Garofalo refused to answer two questions which pertained specifically to the differences between types of semolina. Furthermore, petitioners cite Garofalo's statement that there is no difference in the production process for pasta made from either wheat type to justify any distinction. Finally, petitioners point to the fact that portions of the product code do not reflect the use of a different type of wheat when the semolina type is different.

Garofalo states that there is a substantial difference in acquisition cost for the different types of semolina. It also states that it answered all questions which the Department required it to answer on issues pertaining to the differences in quality of semolina. In addition, Garofalo takes issue with petitioners' claim that Garofalo's data indicate that pricing differences based on the type of semolina do not exist. Garofalo explains that petitioners' arguments on this issue are based on select observations that are not representative of Garofalo's overall sales. Garofalo also notes that, in general, the Department gives respondents substantial discretion in reporting their data.

Department's Position: We agree with Garofalo, and did not change the wheat code to reclassify certain products produced by Garofalo. The additional expense of an input in the creation of a unique product does justify a separate classification. There is adequate information on this record which attests to the quality of the different types of semolina used. See e.g. May 24th Supplemental Questionnaire Response, Question 28. Finding no deficiency in the information presented to us by Garofalo, the Department continues to use wheat types as reported by Garofalo.

Comment 9: Bank Charges for U.S. Sales

Petitioners claim that the Department should apply partial adverse facts available in reference to some bank charges Garofalo incurred on transactions pertaining to certain U.S. sales. Petitioners justify this course of action by stating that Garofalo failed to report these charges and that, as they apply only to certain U.S. sales, Garofalo benefitted by not reporting them. They argue that this information amounts to factual information submitted after the deadline, and ask the Department to apply a 3 Lira per KG charge for each U.S. sale.

Garofalo contends that the Department correctly chose not to apply partial adverse facts available in the preliminary determination, but incorrectly refused to accept the information pertaining to these charges as presented at verification. Garofalo argues that new information can be accepted at verification when the information makes minor corrections to information previously on the record. As the Department does not specifically ask for bank charges, and as these charges are so small in nature, Garofalo argues that the submission of these charges at verification does not constitute a submission of new information, but rather constitutes the correction of an inadvertent mistake discovered during preparation for verification. As Garofalo presented the information at the outset of verification, and in accordance with the Department's regulations, it asserts that these charges should have been accepted. Since these charges were not accepted, Garofalo agrees with the Department's decision not to adjust for these charges due to their insignificant size.

Department's Position: The Department disregarded the bank charges that were discovered during verification. Garofalo brought these charges to our attention; however, the charges in question are very small in relation to the unit prices. These charges were reviewed at verification, and no discrepancies were found. See the July 22, 2002 Memorandum to James Terpstra, Program Manager, Office of AD/CVD Enforcement VI, "Verification of the Sales Response of Pastificio Lucio Garofalo" (Garofalo Verification Report), of which the public version is on file in room B-099 of the main Commerce building. Section 777A(a)(2) of the Act permits the Department when determining the export price, constructed export price, or normal value to "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise." According to 19 CFR 351.413, "an insignificant adjustment is "any individual adjustment having an ad valorem effect of less than 0.33 percent..." In this instance, due to the insignificant effect of the inclusion of these charges on the export price sales, the Department has continued to disregard Garofalo's unreported bank charges.

Comment 10: U.S. International Freight

Petitioners have cited five observations where the terms of sale indicate international freight charges should apply to the sale, but such charges are not reported. Petitioners state that in its May 17, 2002, response to the Department's supplemental questionnaire, Garofalo refused to revise its reporting of international freight for U.S. sales. Petitioners state that because of Garofalo's failure to report the required expenses, the Department should apply partial adverse facts available and assign the highest international freight rate reported by Garofalo to the sales in question.

Garofalo, noting that all of the sales in question are on one invoice, argues that it had already explained on the record that in certain instances the terms of sale would be modified. In these cases the correct price was charged, but the terms of sale were not updated in its database. It further argues that this information was included in the May 17, 2002, supplemental questionnaire response, and Garofalo states that the freight reported is correct.

Department's Position: When reviewing all freight charges for Garofalo's sales, we found no discrepancies between reported freight and actual freight. See Verification Report. Even though the terms of sale do not match the reported freight for the invoice in question, Garofalo addressed this issue on the record in a timely fashion. In light of this information, and because the Department noted no discrepancies with its freight costs at verification, the Department sees no reason to change its treatment of this invoice. We have continued to use the freight cost as reported by Garofalo.

Comment 11: Warranty Expenses Offset

Petitioners have indicated that the revenue generated from the sale of returned merchandise has not been deducted from the warranty expense. They claim that this results in the deduction of the gross warranty expense from home unit prices as opposed to the deduction of the net warranty expense. They cite the questionnaire to point out the Department's requirement that warranty expenses be reported net of any reimbursement received from the customer or unaffiliated supplier. Arguing that the revenue from the sale of returned merchandise is similar to the reimbursement received from the customer or unaffiliated supplier, petitioners request that the Department determine a ratio, based on the sale of returned pasta to total sales, and deduct this percentage of the warranty expenses reported by Garofalo.

Garofalo states that the method in which it reported its warranty expenses is consistent with the Department's past practice, citing the retraction by the Department of the question pertaining to net warranty expenses in the supplemental questionnaire, as well as other cases in which revenue generated from the sale of scrap materials was treated as an offset to material costs. See May 17, 2002 Supplemental Questionnaire at 42. In addition, Garofalo mentions that the treatment of its warranty expenses is consistent with the scrap revenue reported by the other companies subject to this review. Finally, it notes that petitioners failed to cite any Department precedent which might support their argument.

Department's Position: Garofalo does not distinguish returned pasta from scrap pasta. Therefore, the Department cannot accurately calculate the revenue generated from the sale of returned pasta. The Department recognized this in retracting the question in the supplemental questionnaire which requested the reporting of warranty expenses net of revenue from the sale of returned pasta. The Department has continued to deduct gross warranty expenses from unit prices, as reported by Garofalo.

Comment 12: Programming Errors

Petitioners mention several programming errors which they argue must be corrected. They first contend that the Department used month data, as well as CONNUMs, to match Garofalo's sales to affiliated and unaffiliated customers. They state that the Department typically only uses month data as a key when hyper-inflation is an issue, and, as this is not the case in Italy, we should remove month data from all instances in the affiliated party program where it is used for matching purposes. In addition, petitioners noted that the Department inadvertently subtracted freight revenue from the home market price, as opposed to adding it. They request that this problem be corrected. Finally, petitioners note that sales of pasta made by manufacturers other than Garofalo were removed from the home sales database, but not from the United States (US) sales database. To be consistent, they request that the Department remove sales of pasta by other manufacturers from the US sales database.

Garofalo did not comment on this issue.

Department's Position: We agree with petitioners and these issues have been corrected. See Final Calculation Memo.

Comment 13: Home Market Commissions

Garofalo claims that home market commissions were not deducted in the calculation of home market net price in the preliminary margin program. It cites two other instances, one in the same program, and one in the "Affiliated Party Test" program. It further states that this mistake has caused us to overstate the margin.

The petitioners have not commented on this issue.

Department's Position: We agree with Garofalo and made the correction. See Final Calculation Memo.

Comment 14: Appropriate Handling of Entries from Certain Importers

Garofalo argues that in the draft liquidation instructions released with the Preliminary Results, no language is included to liquidate entries of Garofalo's subject pasta of importers who did not import dumped merchandise. They request that the Department ensure that entries from any such importer be liquidated at a zero assessment rate.

The petitioners did not comment on this issue

Department's Position: We calculate importer specific rates based on the information provided to us by the respondent in question. In the Preliminary Results all importers reported by Garofalo imported the subject merchandise at dumped prices, so no language was included to address this circumstance. We calculated these rates correctly in the Preliminary Results, and have continued to do so, including any appropriate language, for the Final Determination.

Comment 15: Offset of Export Subsidies

Garofalo states that the Department added a calculated amount to export price to offset subsidies. It goes on to state that the Department should instead, for cash deposit purposes, use the methodology practiced in antidumping duty investigations. This methodology involves subtracting the export subsidy amount directly from the calculated dumping margin. Garofalo claims that there is no difference in the reasoning behind the determination of cash deposit rates between investigations and reviews. Furthermore, the respondent argues that the calculated export subsidy rate assumes the same level of subsidization for each entry into the United States. This rate implies that all sales have received an identical benefit. Garofalo goes on to argue that this rate applies to all sales, but, in reviews, the Department is not adequately taking it into account. This is because the Department only applies this rate to the margin on dumped sales, effectively ignoring the subsidy rate on sales where no dumping has been determined to occur. Garofalo suggests that the Department apply the export subsidy offset to the average cash deposit rate to remedy this problem, as is the Department's practice in investigations.

Petitioners disagree with this course of action. They argue that the Department has only deviated from the regulations in previous cases where administrability is an issue, specifically investigations which have a concurrent countervailing duty (CVD) investigation for the subject merchandise. They add that Garofalo does not have a company-specific CVD rate, nor are they being reviewed for one in the current CVD review. In addition, they point out that the current CVD review has a different period of review. Due to these differences the petitioners assert that there is no justification for deviating from the standard methodology used to adjust for the export subsidy rate, and that the Department should continue to calculate the margin as in the Preliminary Results.

Department's Position: We agree with petitioners that the Department should continue to use the same calculation methodology applied in the Preliminary Results. According to section 772(c)(1)(C) of the Act, the Department adds to the Export Price (EP) "the amount of any countervailing duty imposed on the subject merchandise to offset an export subsidy." As petitioners have pointed out, none of the reasons that typically require the methodology used in investigations apply to Garofalo. Specifically, Garofalo does not have a company-specific CVD rate, nor is it being reviewed for a new company specific rate. Because there is not a concurrent CVD review of Garofalo, its CVD rate will not change after the issuance of the CVD final results of review. Because none of the conditions above have been met, the Department will treat Garofalo as it would any other company participating in an antidumping administrative review. See Notice of Final Results of Antidumping Duty Administrative Review: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Singapore, 56 FR 31759 (July 11, 1991) at 31761. Therefore, the Department will continue to add the export subsidy to the export price to calculate the dumping margin.

Ferrara

Comment 16: The Department's Application of Facts Available

Ferrara argues that the Department's selection of the highest net price line item (NETPRIH) as facts available to compare sales of two tricolor short cut sales that do not have a match in the home market database constitutes adverse facts available, because that choice is guaranteed to produce the highest possible margin. Ferrara's two tricolor short-cuts are products with a relatively high variable cost of manufacturing (VCOM) because of the costly addition of tomato and spinach powder for coloration. Ferrara states that the Department did not allege that it sold below cost, so the company was not asked to submit a cost response. Ferrara explains that therefore, cost of production and constructed value information, which the Department would normally have used for the two U.S. sales without a match in the home market, were not reported.

Ferrara contends that it is unlawful for the Department to apply adverse facts available to Ferrara, a wholly cooperative respondent, and that the Department's use of facts available is required by law to be neutral in effect. As opposed to an instance where adverse facts available are warranted (i.e., the respondent fails to act to the best of its ability to comply with the Department's requirements), where the respondent fully answers all of the Department's questions and is fully cooperative, there is no cause or legal justification to penalize the respondent. Therefore, any gaps in the record must be filled by "non-adverse facts available." Ferrara supports this by citing to two cases – Nippon Steel Corp. v. United States, Slip Op. 01-122 at 3-4, 2001 WL 1230595, *1 (CIT, October 12, 2000) and Krupp Thyssen v. United States, Slip Op. 01-84 at19-20, 2001 WL 812167, *10 (CIT, July 9, 2001) – in which the Court of International Trade (CIT) remanded determinations to the Department with instructions to apply neutral facts available, overturning the Department's determinations of adverse facts available because evidence did not support such adverse inferences.

Ferrara underscores the adverse effect of the Department's choice of domestic sales for comparison purposes. Ferrara argues that the Department's choice of fusilli bucati, a specialty long cut, to compare to tricolor fusilli is indefensible because the production throughput rate for fusilli bucati is approximately half that of tricolor fusilli. This highlights the high cost involved in producing fusilli bucati, Ferrara's most exotic specialty product. Ferrara also points out the vast difference in selling price between specialty long cuts and short cuts.

Ferrara also states that the line item of the database that yielded the highest net price is highly anomalous because there was only one sale to that particular customer during the POR, the invoice is one of four in the home market database that were not paid as of the date of the Preliminary Results, the quantity of product purchased was very small, several different shapes with very small quantities were purchased, and there was no freight cost because the customer picked up the order at Ferrara's factory.

As neutral facts available, Ferrara submits that the Department should have compared the U.S. tricolor short cuts to domestic non-tricolor short cuts and used the difference in merchandise adjustment (DIFMER) as an adjustment on a facts available basis. Ferrara states that, ordinarily, the Department selects the comparison product by using a hierarchy based on the physical characteristics of the products, and shape has the highest priority. Thus, the exported short cut would be compared with a domestic short cut. Ferrara states that because the exported short cut has both enrichment and coloring additives, and no home market short cut has either, the Department should match the tricolor short cut with domestic non-enriched non-tricolor short cut (CONNUMH 51111). Ferrara contends that the only reason this match was not implemented in the Preliminary Results was because the DIFMER exceeded 20 percent. Ferrara suggests that neutral facts available consists of comparing CONNUMU 51221 to CONNUMH 51111, then applying the calculated DIFMER even though it is greater than 20 percent. Ferrara cites Import Administration Policy Bulletin 92.2 (July 29, 1999) which states the DIFMER cap is "a guideline and not an inflexible rule."

Petitioners state that Ferrara agrees that information for these two sales was not provided; as such, there is a gap in information requiring a facts available determination with respect to the sale of tricolor shells and tricolor fusilli. Petitioners disagree with Ferrara that the Department is required to apply neutral facts available; petitioners argue that the Department enjoys substantial discretion when selecting facts available, citing as support AK Steel Corp. v. United States, 988 F. Supp. 594, 605 (CIT 1997) and NTN Bearing Corp. v. United States, 924 F. Supp. 200, 206 (CIT 1996), aff'd, 127 F.3d 1061 (Fed. Cir. 1997). Petitioners argue that this substantial discretion still applies despite factually-specific statements from the CIT containing explicit instructions concerning various remand redeterminations, such as were cited by Ferrara in its case brief. Petitioners allege that the cases cited by Ferrara, Nippon Steel Corp. v. United States, Slip op. 01-122 at 3-4, 2001 WL 1230595, *1 (CIT 2001) and Krupp Thyssen Nirosta GmbH v. United States, Slip op. 01-84 at 19-20, 2001 WL 812167, *10 (CIT 2001) involve court review of *adverse* facts available determinations, and not the selection of facts available, so they are of little relevance in this current review. Petitioners argue that it is impossible to state, as Ferrara claims, what would be expected if there were no gaps in the record, and that what constitutes "neutral" to one party may not be "neutral" to another. Therefore, petitioners assert, it is the Department's proper role as "master of the dumping law" to select facts that best serve the need at hand.

Petitioners believe that the use of the highest NETPRIH in the home market weight-average dataset as facts available is reasonable and justified by record evidence. Petitioners point out that, according to the record, tricolor pasta is unusual and costs more to produce. Petitioners argue that the Department, in choosing Ferrara's fusilli bucati pasta NETPRIH, appropriately chose a product that is similarly unusual and that costs more to produce. Petitioners assert that using the lower-cost source that Ferrara suggests would potentially understate the missing data, skewing the dumping analysis for those sales, and that, as the Department has no way of gauging the true margin of dumping since necessary information is missing, the Department reasonably exercised its substantial discretion by selecting the highest NETPRIH.

Department's Position: We continue to believe that the use of the highest NETPRIH in the home-market weight-average dataset as facts available to match two U.S. sales of tri-color pasta is in accordance with law, and is reasonable based on record evidence. We disagree with respondents that this constitutes an adverse inference. The <u>Statement of Administrative Action</u> accompanying the Uruguay Round Agreements Act, H.R. Rep. 103-826, at 656, 869 (1994) states:

> Section 776(a) generally will require Commerce to reach a determination by filling gaps in the record due to deficient submissions or other causes. Therefore, neither Commerce nor the Commission must prove that the facts available are the best alternate information. Rather, the facts available are information or inferences which are reasonable to use under the circumstances. . . .where Commerce uses the facts available to fill gaps in the record, proving that the facts selected are the best alternative facts would require that the facts available be compared with the missing information, which obviously cannot be done.

Ferrara states that it did not report the cost of production or constructed value data that normally would be used to make a match for those sales with no domestic product match because Ferrara was not asked to submit a cost response. On the second page of the cover letter of the questionnaire sent to Ferrara, dated August 28, 2001, we stated:

> You are not requested to respond at this time to section D (Cost of Production/Constructed Value). However, if the petitioners subsequently make a timely allegation, and we determine, that your sales prices in the comparison market may be below the cost of production, we will initiate an investigation of sales below cost and will request that you respond to Section D. Additionally, ***you are requested to respond to the constructed value portion of section D with respect to products or models sold in the United States for which you had no sales of comparable merchandise in the comparison market.*** If you believe that you might need to respond to section D, please contact the official in charge on the cover sheet to the questionnaire. (Emphasis added).

The Department requested this information, and it was Ferrara's responsibility to provide the information. Though we did no note this omission in our supplemental questionnaire, Ferrara had sufficient opportunities to provide this information, yet it was never provided. In such a situation, according to section 776(a)(1) of the Act, the Department may use facts otherwise available for the sales in question. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 65 FR 5580-5581 (February 4, 2000). Accordingly, the Department has determined that the use of the highest NETPRIH in the home market weight-average dataset is reasonable to compare the two sales of tri-color pasta. Furthermore, it does not constitute adverse facts available, but is a reasonable estimate based on the data available to the Department.

While the Department recognizes why the respondent purports that the use of the highest NETPRIH appears to be adverse, we maintain that since the subject merchandise sales at issue are sales of a tricolor pasta (a product which includes additional costs for additives), use of the highest NETPRIH as a substitute for the missing data is both reasonable and appropriate, based on the information available to the Department. The Department disagrees with respondents that the line speed differential between the tri-color pasta and the product selected as facts available is dispositive as evidence against using it as a basis for facts available. There is no evidence on the record that the cost differential for tricolor additives is not, in fact, higher than the cost differential for line speed. Further, we disagree with respondents that shape should define the selection of facts available for the missing data. Shape constitutes only one-fifth of the Department's model match criteria for Ferrara. The products at issue, tri-color shells and tri-color fusilli, are a specialty pasta with a high variable cost of manufacture (VCOM). Accordingly, the Department selected a product with attributes similar to those of tri-color pasta: a specialty pasta with a high VCOM. We feel this comparison more accurately reflects the costs of producing tri-color pasta than comparing the sales to domestic non-tricolor pasta, which does not incur the same costs (namely, the high cost of the coloring agents spinach and tomato powder) as the tri-color pasta. Therefore, for our final determination, we are continuing to set the normal value to compare the two sales of tri-color pasta to equal the highest NETPRIH in the home market weight-average dataset, as described in the July 31, 2002, memorandum to James Terpstra, Program Manager, Office of AD/CVD Enforcement VI, "Analysis Memorandum for Pastificio Guido Ferrara s.r.l." (Ferrara Calculation Memo) at 3-4, of which the public version is on file in room B-099 of the main Commerce building.

Comment 17: Product Matching Criteria

In the Preliminary Results the Department included the type of extruding die (i.e., bronze versus Teflon) as a fifth product characteristic in its product matching methodology for Ferrara to further differentiate types of pasta produced by Ferrara. Petitioners contend that this distinction is contrary to law, is not supported by record evidence, and is a strategy designed by Ferrara to facilitate significant and improper cost shifting.

Petitioners argue that matching criteria must be based on commercially significant physical differences, as defined under section 771(16) of the Act (19 USC 1677(16)). Petitioners state that product matches may not be constructed by reference to the equipment used to produce the merchandise.

Petitioners further argue that Ferrara has not provided evidence that there are physical differences distinguishing pasta extruded through bronze dies from pasta extruded through Teflon dies. Ferrara has only claimed that Teflon-produced pasta results in a smoother surface, but has not substantiated this claim. Petitioners contend that Ferrara's argument that there are physical differences centers primarily around supposed cost differences. Petitioners further state that the Department need only match those physical characteristics that are commercially significant, and die type does not result in significant physical differences. Petitioners cite to Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 427-28 (CIT 1993) and NTN Bearing Corp. v. United States, 924F. Supp. 200, 210-11 (CIT 1996) to support their contention that the Department looks at primary characteristics in the model match. Petitioners also point to SKF U.S.A. v. United States, 263 F.3d 1369, 1382 (Fed. Cir. 2001) in arguing that the Department may not maintain different definitions of the foreign-like product for different companies.

Petitioners claim that Ferrara's desire to distinguish between bronze- and Teflon-die pasta is driven by a desire to shift costs. Although Ferrara has claimed throughout this proceeding that its costs, which Ferrara notes were verified in the previous administrative review, are substantially the same, petitioners state that the alleged cost difference between bronze- and Teflon-die pasta is exaggerated because of a change in the company's cost input reporting methodology. Petitioners contend that Ferrara's data indicates that it has substantially increased the costs allocated to packing overhead, apparently in an effort to exaggerate the cost differences between Teflon-die and bronze-die pasta. Petitioners allege that since Ferrara is aware of the importance of packing costs, Ferrara has reason to emphasize them to create a high cost differential between its bronze-die and Teflon-die pasta.

Petitioners claim Ferrara has not substantiated its costs in the instant administrative review. Petitioners allege that Ferrara did not provide information the Department specifically requested, but pointed to a verification report from a previous review. Petitioners allege that there is no record evidence available to demonstrate the line speeds achieved for different pasta cuts and types, instead relying on a spreadsheet of theoretical line speeds that are contradicted by other evidence on the record, such as throughput rates and production recipes. Petitioners argue that the Department should amend the drying line speeds to reflect the data presented, rather than on the theoretical values reported.

Petitioners assert that there are minimal cost differences between Teflon-die pasta and bronze-die pasta, arguing that Ferrara focused on differences in individual costs as opposed to the total variable costs, and that the company excluded raw material costs in its discussion of costs. Petitioners argue that if raw materials are included and fixed costs are excluded, the difference between the variable unit costs of Teflon-die and bronze-die pasta are not substantial enough to support the distinction between the two products. Petitioners maintain that for the foregoing reasons, the Department should revise its product matching criteria to eliminate the distinction between Ferrara's Teflon-die and bronze-die pasta.

Ferrara asserts that Ferrara's product matching criteria are correct. Ferrara points out that this issue was considered in the 1999/2000 administrative review of Pasta from Italy, where the Department initially rejected Ferrara's claim for a 5-digit CONNUM, but ultimately agreed to add the fifth criterium. Ferrara cites to Comment 2 of the Issues and Decision Memorandum in the 1999/2000 administrative review of Pasta from Italy to show the Department's reasoning. Ferrara maintains that though each review stands on its own merits, there is no material difference in the facts between the present review and the previous review, and there has been no change in the law.

Ferrara claims that it has made a thorough record in this review as to why the Department should include a fifth product matching characteristic representing die type. Ferrara disagrees with petitioners' claim that the difference between bronze- and Teflon-die pasta is an issue of equipment rather than physical characteristics. Ferrara cites to the first administrative review of Pasta from Italy, which discussed the use of separate CONNUMs to distinguish bronze die pasta, where the deciding factor was the dramatic difference in line speeds. Ferrara claims that the difference in die type in this case is a shorthand for a group of physical differences that results in differences in cost of production because of differing throughput rates. Ferrara argues that while bronze- and Teflon-die products use the same production lines, they differ with respect to line speeds, drying times, and packing costs. Ferrara claims that the packing cost differential is so severe that to include both die types in one CONNUM would result in a gross distortion of the packing cost. Ferrara argues that the Department should keep the five-digit CONNUM to avoid these distortions. Ferrara dismisses petitioners' claim that Ferrara adds a fifth digit to the CONNUM with the purpose of shifting costs as absurd, and asserts that petitioners' cost analysis is erroneous and misleading. Ferrara also asserts that it has substantiated its costs in the present review, but that production records, packing records, or maintenance records would not conclusively show production speed, because there is no source for actual packing line speed other than what has been provided. Ferrara asserts that petitioners err when advising the Department to revise Ferrara's reported costs and packing costs to reflect petitioners' own estimates; the Department is aware of the types of documentation available from Ferrara, and Ferrara has provided all the information available to it.

Ferrara contends that petitioners' assertion that production line and drying line speeds can change considerably from period to period is not true - unless equipment or production recipes change, neither of which occurred in this present review. Ferrara explains that its use of theoretical line speeds for production labor and overhead costs and packing line speeds for packing labor and costs is consistent with other respondents' methodologies in every other review of this product. Ferrara argues that throughput rates are the means by which total labor and overhead expenses are differentially absorbed among various products, so it is clear that Ferrara's labor and overhead expense is accounted for in its entirety. Ferrara also argues that throughput rates are consistent with production recipes, and that the packing cost differential between long and short cuts arises from differences in packing material costs, which differ substantially between Teflon- and bronze-die products. Ferrara argues that though petitioners may find examples where the cost difference between Teflon- and bronze-die pasta is not substantial, what drives the determination is whether there are distortive articles. Ferrara concludes that since there are distortive examples, both products cannot be included in a single CONNUM. Ferrara argues that for the foregoing reasons, the Department should continue to adopt a 5-digit CONNUM in its final analysis.

Department's Position: We agree with Ferrara that the physical and cost differences, as well as the difference in throughput rates and packing line speed, between bronze- and Teflon-die pasta warrant separate treatment. We agree with Ferrara that this issue was thoroughly considered in Ferrara's previous review. <u>See</u> page 4 of the January 3, 2002, memorandum to Richard W. Moreland, Acting Assistant Secretary, for Import Administration, "Issues and Decision Memorandum for the Fourth Antidumping Duty Administrative Review; Final Results of Review," which is on file in room B-099 of the main Commerce building. We also agree with Ferrara that in past reviews where there has been substantial evidence on the record that demonstrated physical and cost differences, as well as the difference in throughput rates, the Department was justified in assigning separate product-control numbers to different types of pasta. <u>See</u> <u>Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta from Italy</u>, 64 FR 6615 (February 10, 1999); and <u>Certain Pasta from Turkey: Final Results of Antidumping Administrative Review</u>, 65 FR 77857 (December 13, 2000). Ferrara has sufficiently substantiated its costs. Moreover, these costs were verified by the Department. Thus, the record in this case adequately supports this finding, which is consistent with our decision in the previous review. Accordingly, we continue to use Ferrara's five-digit CONNUMs, which account for the differences between bronze-die pasta and Teflon-die pasta for purposes of model matching in this review.

Comment 18: CVD Adjustment

Petitioners state that the Department increased the export price for Ferrara's U.S. sale by the amount of the countervailing duties paid that were attributable to an export subsidy. Petitioners believe the Department should not add the CVD amount to the export price. Petitioners state three reasons in support of this: 1) the terms of sale for Ferrara's U.S. sales were cost and freight, so U.S. duties and fees were not included in the starting price; 2) the record indicates that Ferrara was not the importer of record for any U.S. sales , and therefore did not incur the cost of the countervailing duties. Petitioners therefore ask the Department not to add an amount for countervailing duties to the export price for Ferrara's U.S. sale in its final analysis.

Ferrara argues first that petitioners err in stating that because the CVD offset was not included in the starting price, the Department should not add the cost of countervailing duties. Ferrara argues that the CVD offset is to be applied unconditionally, regardless of whether it is included in the starting price. Second, Ferrara claims that petitioners err in stating that the CVD offset depends on whether the exporter incurs the costs of the countervailing duties. Ferrara argues that there is no requirement that the exporter incur the countervailing duty costs, and that the CVD offset fulfills United States obligations under the WTO, and applies regardless of whether the exporter and importer are the same. Ferrara concludes that petitioners' argument that Ferrara is not entitled to a CVD offset is incorrect, and asks that the Department continue to apply the CVD offset in its final analysis.

Department's Position: The CVD offset is to be applied regardless of whether it is included in the starting price, and there is no requirement that the exporter incur the costs of the countervailing duties. Petitioners cite no authority for their assertions. The basic theory underlying this provision is that in parallel AD and CVD reviews, if the Department finds that a respondent received the benefits of an export subsidy program, it is presumed the subsidy contributed to lower-priced sales of subject merchandise in the U.S. market by the amount of any such export subsidy. Thus, the subsidy and dumping are presumed to be related, and the imposition of duties against both would in effect constitute "double-application" of duties. Section 772(c)(1) of the Act therefore requires that the Department factor the affirmative subsidy determination into the AD calculations to prevent this "double-application" of duties. See Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet and Strip From India 67 FR 34899 (May 16, 2002) and accompanying Decision Memorandum at comment 1. Here, Ferrara is subject to both a CVD and AD order. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy 61 FR 30326 (June 14, 1996) (Certain Pasta From Italy) and Final Affirmative Countervailing Duty Determination: Certain Pasta from Italy 61 FR 30287 (June 14, 1996). Accordingly, for our final results, we are continuing to add an amount for countervailing duties to the export price for Ferrara's U.S. sales.

Recommendation

Based on our analysis of the comments received, we recommend adopting all of 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 ____________

Faryar Shirzad
Assistant Secretary
for Import Administration

Date