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

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

DATE: December 27, 2004

SUBJECT: Issues and Decision Memorandum for the Final Determination of the Investigation of Outboard Engines from Japan

Summary

We have analyzed the comments in the case and rebuttal briefs submitted by interested parties in the investigation of outboard engines from Japan. As a result of our analysis, we have made the appropriate changes in the margin calculation. We recommend that you approve the positions we have developed in the Discussion of the Issues section of this memorandum. Below is a complete list of the issues in this investigation for which we have received comments from the parties.

Background

On August 5, 2004, the Department of Commerce (the Department) issued the *Preliminary Determination Notice* in the investigation of outboard engines from Japan.[1] The period of investigation (POI) is January 1, 2003, through December 31, 2003. We invited parties to comment on the *Preliminary Determination Notice*. On November 10, 2004, we received case briefs from

[1] *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Outboard Engines from Japan*, 69 FR 49863 (August 12, 2004) (*Preliminary Determination Notice*).

the petitioner,[2] the domestic interested party,[3] and the respondent.[4] Additionally, we received one collective case brief from the four Japanese producers and/or exporters not selected as mandatory respondents in the investigation.[5, 6] On November 17, 2004, we received rebuttal briefs from the petitioner, Yamaha, and BRP.

List of Comments

1. Class or Kind

2. Powerheads Imported for Repair Purposes

3. Treatment of Non-Dumped Sales

4. Level of Trade (LOT) Adjustment for Yamaha's Sales to Original Equipment Manufacturer (OEM) Customers

5. Surrogate Prices for Yamaha's CEP Sales to Its Affiliated Boat Builders

6. Per-Unit Cap on the CEP Offset

7. Home Market Levels of Trade

8. Adjustments to U.S. Price

9. Reported Home Market Payment Dates

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[2] The petitioner in this investigation is Mercury Marine (Mercury), a division of Brunswick Corporation.

[3] The domestic interested party in this investigation is BRP U.S. Inc. and Bombardier Recreational Products Inc. (collectively, BRP), formerly identified by the abbreviated name "Bombardier."

[4] The respondent in this investigation is Yamaha Motor Company, Ltd.; Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, USA (YMUS) (collectively, Yamaha).

[5] The four Japanese producers and/or exporters not selected as mandatory respondents in this investigation are American Honda Motor Co., Inc. and Honda Motor Co., Inc. (Honda); American Suzuki Motor Corporation and Suzuki Motor Corporation (Suzuki); Tohatsu Corporation, Tohatsu Marine Corporation, and Tohatsu America Corporation (Tohatsu); and Nissan Marine Co., Ltd. (Nissan). The remainder of this memorandum will refer to these companies as the "Other Japanese Parties."

[6] On December 6, 2004, we rejected the case briefs of Yamaha and the Other Japanese Parties because the briefs contained new factual information submitted after the Department's regulatory deadline. Yamaha and the Other Japanese Parties submitted revised case briefs on December 7, 2004.

10. Certain Home Market Sales within the Ordinary Course of Trade

11. Credit Expenses for Export Price Sales

12. Reporting of the REBATE4U Field

13. Minor Corrections Submitted at Verification

14. Application of LOT Adjustment

15. Home Market Consignment Sales

16. Packing Costs

17. Amendment to Scope

18. Yamaha's Standard Cost System

19. Certain Excluded Costs

20. Parent Company G&A Expenses

21. Affiliated Supplier Inputs

Discussion of Issues

Comment 1: Class or Kind

For the preliminary determination, the Department determined that powerheads are not a separate class or kind of merchandise from outboard engines. In their November 10, 2004, case briefs, both Yamaha and the Other Japanese Parties object to this preliminary determination.

Yamaha argues that a reasonable application of the criteria set forth in *Diversified Products v. United States*,[7] on which the Department based the decision for the preliminary determination, demonstrates that powerheads and completed engines constitute separate classes or kinds of merchandise. First, Yamaha contends that there are distinct physical differences between powerheads and outboard engines. Yamaha points out that both the scope of the investigation and the petition establish that an

[7] *See Diversified Products v. United States*, 572 F. Supp. 883,889 (Court of International Trade (CIT) 1983) (*Diversified Products*).

outboard engine comprises three distinct subassemblies: a powerhead assembly, a midsection assembly, and a gearcase assembly. The powerhead, Yamaha asserts, is only one of these three subassemblies; therefore, it is a separate class or kind from completed outboard engines. Claiming that a powerhead without the other two subassemblies cannot be considered an outboard engine, Yamaha disputes the Department's determination that there is no clear dividing line between powerheads and outboard engines.

Yamaha also disagrees with the Department's preliminary determination that the ultimate purchasers of outboard engines and powerheads have different expectations and end uses for the products. Specifically, Yamaha disputes the Department's statement that "both the engine manufacturers and engine repair facilities expect that, after installation, the powerhead will be capable of powering the boat."[8] The key words in this statement, according to Yamaha, are "after installation." Yamaha argues that customers who purchase a powerhead without the two additional subassemblies have expectations and end uses that are very different from customers who purchase completed outboard engines. A powerhead, according to Yamaha, cannot "power" anything without the other two subassemblies.

Finally, Yamaha disputes the Department's subassembly analysis and its references to *Ironing Tables from China*[9] and *LNPP from Germany*[10] in support of this analysis. In both of these cases, Yamaha states, the scope included all of the major subassemblies that compose the product. Yamaha argues that the scope for the outboard engines investigation included only the completed outboard engine and the powerhead, which is only one of the three major subassemblies that compose the finished product. Furthermore, Yamaha asserts that the Department has determined that subassemblies are a different class or kind when the petitioner limits the scope only to certain subassemblies. Yamaha continues to assert that its reference to *Color Picture Tubes* is on point because the Department determined that "a kit and a fully assembled television are a separate class or kind of merchandise from the (color picture tube)."[11] This, according to Yamaha, demonstrates that the Department has found that specific subassemblies are separate classes or kinds when a petitioner has limited the scope of an investigation to capture only certain subassemblies of a larger completed product.

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[8] *See Preliminary Determination Notice*, 69 FR at 49867.

[9] *See Notice of Initiation: Floor-Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 68 FR 44040 (July 25, 2003) (*Ironing Tables from China*).

[10] *See Final Results of Changed Circumstances Review, Revocation of the Antidumping Duty Order, and Rescission of Administrative Reviews: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany*, 67 FR 53996 (April 22, 2002) (*LNPP from Germany (2002)*).

[11] *See Revocation of Antidumping Duty Orders: Color Picture Tubes From Canada, Japan, the Republic of Korea, and Singapore*, 65 FR 20799, 20800 (April 18, 2000) (*Color Picture Tubes*).

In their case brief, the Other Japanese Parties also express their objections to the Department's treatment of powerheads and outboard engines as one class or kind of merchandise. The Other Japanese Parties support Yamaha's argument that a powerhead does not contain a midsection or gearcase assembly, which they claim are the other two assemblies that compose an outboard engine. In addition, the Other Japanese Parties point out that the Department's model matching criteria designated the distinction between powerheads and outboard engines as the first model match characteristic. The Other Japanese Parties also support Yamaha's contention that the buyer of a powerhead as sold, not as installed, purchases the powerhead for fundamentally different purposes than the buyer of a completed outboard engine. Moreover, the Other Japanese Parties state that the petitioner is the ultimate customer for virtually all powerheads sold in the United States and that it purchases these powerheads for subsequent manufacture into outboard engines. The Other Japanese Parties argue that outboard engines, in contrast, are sold to OEMs and boat builders for installation onto boats.

The Other Japanese Parties also contend that the difference between the margins on outboard engines and powerheads demonstrates that there are significant differences between the pricing and selling of outboard engines and powerheads. They argue that this violates the principle expressed in *Badger-Powhatan*[12] that "estimated antidumping duties be as closely tailored to actual antidumping duties as is reasonable." The Other Japanese Parties also argue that this extends greater relief to the domestic industry than that to which it is entitled, as expressed in *NTN Bearings*.[13] The companies contend that the preliminary dumping margins of over 90 percent on powerheads demonstrate that the 22.52 percent deposit rate on powerheads is not closely tailored to the actual level of dumping on these products. As firms that produce primarily complete outboard engines, the Other Japanese Parties argue that the calculation of a single antidumping duty rate for outboard engines and powerheads significantly inflates their deposit rate.

The petitioner argues that the Department should continue to find that outboard engines and powerheads are parts of a single class or kind of merchandise. According to the petitioner, the Department's preliminary decision that the products constitute one class or kind is fully supported by the criteria in *Diversified Products* for the following reasons: First, the petitioner argues that Yamaha erred in its argument that there is a clear dividing line between powerheads and engines because completed engines are defined to consist of three elements (powerhead, midsection, and gearcase assembly) and powerheads lack two of those elements. According to the petitioner, Yamaha mistakenly focused on the opposite ends of a continuum in its analysis. The petitioner states that, according to Yamaha, a powerhead cannot be an outboard engine because it lacks the midsection and gearcase assemblies; thus, a clear dividing line exists between powerheads and engines. Under the same logic, the petitioner states that a powerhead fastened to the midsection assembly alone would be

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[12] *See Badger-Powhatan v. United States*, 10 CIT 241, 250 (1986) (*Badger-Powhatan*).

[13] *See NTN Bearing Corp v. United States*.[13] 74 F. 3d 1204, 1208 (Fed. Cir. 1995) (*NTN Bearings*).

non-subject merchandise because it is more than a powerhead but lacking the gearcase assembly and, thus, not an outboard engine. However, the petitioner contends that along the continuum of subject merchandise from the most basic powerhead to the completely assembled outboard engine, there is no clear dividing line in physical characteristics.

Second, the petitioner argues that Yamaha improperly collapsed two of the *Diversified Products* criteria - the expectations of the ultimate purchaser and the ultimate use of the product. According to the petitioner, the ultimate purchasers are the retail customers that have a single expectation - that the powerhead or engine will propel their boat.

Third, the petitioner counters Yamaha's statement that a powerhead cannot power anything without additional components and, therefore, customer expectations of powerheads and engines cannot be the same. The petitioner acknowledges that a powerhead alone cannot power a boat just as an engine without a propeller cannot power a boat. However, the petitioner contends, no party has stated that an engine without a propeller is a separate class or kind. According to the petitioner, the end use of both the powerhead and the engine is the same - to propel a boat.

Fourth, the petitioner states that there is much greater overlap in channels of trade for powerheads and outboard engines than found by the Department in the preliminary determination. The petitioner claims that Honda, Suzuki, Tohatsu, Yamaha, the petitioner, and Nissan import powerheads into the United States for repair purposes and/or distribution through dealers. The petitioner argues that powerheads and engines follow the same channel of trade from the initial manufacturer to the ultimate purchaser, even if there is an additional step for powerheads.

Fifth, the petitioner contends that in its analysis the Department incorrectly focused on the question of whether the particular powerheads sold by Yamaha to U.S. engine manufacturers were moving in a different channel of trade than powerheads sold by Yamaha as replacement parts. The proper analysis, according to the petitioner, focuses on whether powerheads in general move through the same channel of trade as engines. The petitioner claims that they do, as evidenced by the movement of products imported by the Other Japanese Parties and the petitioner. Therefore, the petitioner contends, there is no clear dividing line between the channels of trade used for all powerheads and all outboard engines, even though the Department found different channels of trade for one type of powerhead versus another type of powerhead.

Additionally, the petitioner states that Yamaha argued that it is the Department's practice to treat subassemblies as a separate class or kind of merchandise from a finished product. In the *Preliminary Determination Notice*, according to the petitioner, the Department explained that there were cases such as *LNPP from Germany* and *Ironing Tables from China* in which the petition included both products and their components, and all were treated as a single class or kind. The petitioner states that Yamaha argues that in *LNPP from Germany (2002)* and *Ironing Tables from China*, the scope explicitly included both the finished product and subassemblies, but the scope in the instant case only

includes the finished product and one subassembly. Essentially, according to the petitioner, Yamaha is asserting that for powerheads and complete engines to be part of the same class or kind, all other components (*e.g.*, midsection and gear case assemblies) would have to be included in the scope.

However, the petitioner states that it defined the scope as narrowly as possible to avoid including products for which no relief was sought. Nevertheless, the petitioner asserts that it was necessary to include powerheads, but no other components, in the scope to prevent circumvention. Citing *LNPP from Germany (1996)*,[14] the petitioner also asserts that the Department has recognized the need to include subassemblies within the scope to prevent circumvention. Likewise, the petitioner asserts that the CIT, in *Gold Star Co. v. United States*,[15] endorsed the concept of including subassemblies within the scope of an antidumping order.[16]

With respect to *Color Picture Tubes*, the petitioner alleges that Yamaha has quoted selectively to support its proposition that a component or subassembly cannot be the same class or kind as the completely assembled good.[17] Yamaha fails to explain, according to the petitioner, that the Department issued separate antidumping orders on color picture tubes (CPTs) and color televisions (CTVs) at different times, covering different subject merchandise from different countries. In the CTV case, argues the petitioner, the scope included complete television receivers capable of receiving a broadcast signal, as well as kits or assemblies that included all parts necessary for assembly into a complete television receiver. The petitioner continues that when separate cases were later brought against CPTs, the existing orders on CTVs were still in effect and the Department was required to determine whether the scope of the CPT investigation and orders would cover CPTs that were imported as part of a television kit. According to the petitioner, the Department determined that fully-assembled televisions were a separate class or kind of merchandise from the CPT because the televisions were already covered by a separate antidumping duty order.[18] Thus, the petitioner argues, the CPT cases do not support Yamaha's argument that if a petition only includes certain subassemblies of a larger completed product then the Department will find that the specific subassembly is a separate class or kind.

The petitioner states that a dumping margin for a particular product is not part of the *Diversified*

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[14] *See Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Parts Thereof, Whether Assembled or Unassembled, from Germany*, 61 FR 38166, 38169 (July 23, 1996) (*LNPP from Germany (1996)*).

[15] *See Gold Star Co. v. United States*, 12 CIT 707, 710-711.

[16] *See* the petitioner's rebuttal brief at 12.

[17] *See Id.* at 13.

[18] *See* the petitioner's rebuttal brief at 15.

Products criteria as argued by the Other Japanese Parties because the margin for powerheads was over 90 percent and the margin for engines was 15 percent.[19] According to the petitioner, the Other Japanese Parties argue that the disparity in margins establishes a clear dividing line between engines and powerheads. The petitioner counters that the *Diversified Products* criteria do not consider the intensity with which a particular group of products is being dumped. Moreover, the petitioner argues that the range of margins calculated on various products has no relevance in determining whether in-scope merchandise is a separate class or kind from other in-scope merchandise.

BRP responds that the Department properly evaluated the *Diversified Products* criteria for the preliminary determination, and that Yamaha and the Other Japanese Parties are only reiterating the same arguments that they made prior to the preliminary determination. In response to Yamaha's assertion that a powerhead without the subassemblies of a midsection and a gearcase cannot be an engine, BRP counters that the Department never claimed that a powerhead can be an engine. Although the Department determined that powerheads and outboard engines have different physical characteristics, BRP argues that the Department also determined that those differences are not significant, and that no clear dividing line exists between powerheads and outboard engines. Further, BRP rejects Yamaha's argument that the Department should have examined the end-use criterion of *Diversified Products* by considering whether customer expectations for an outboard engine are the same as those for a powerhead prior to its transformation into an engine. BRP argues that the Department properly found that the ultimate purchasers of powerheads use the product for one purpose: to incorporate them into outboard engines to propel a boat.

BRP also finds that the Department should reject Yamaha's subassembly analysis. It rejects Yamaha's assertion that the scope of the investigation is not "as broad as possible"[20] because powerheads are the only subassembly included in the scope. BRP argues that Yamaha does not explain why a petitioner must establish a scope that is as broad, rather than as narrow, as possible. Further, BRP contests that Yamaha's attempt to tie the *Color Picture Tubes* determination to the instant investigation is hypothetical and not based on facts.

BRP continues by rejecting the Other Japanese Parties' argument that the Department's preliminary determination to treat powerheads and engines as a single class or kind of merchandise runs counter to the Department's obligation to calculate antidumping duty margins as accurately as possible.[21] BRP argues that the determination in *Badger-Powhatan*, cited by the Other Japanese Parties in their case brief, addressed different facts and does not support a change to the Department's preliminary class or

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[19] *See Id.* at 15.

[20] *See* Yamaha's case brief at 10.

[21] *See* Other Japanese Parties' case brief at 4-5.

kind determination. As BRP notes, in *Badger-Powhatan*, the CIT ordered the Department to recalculate the margin in the order because the Department based its calculation on products that the United States International Trade Commission (USITC) determined were not causing injury to the domestic industry.[22] BRP stresses that this is why the CIT found the Department's determination in *Badger-Powhatan* to be in error. BRP finds that *Badger-Powhatan* is consistent with the Department's original class or kind determination in the instant investigation.

Further, BRP refutes the Other Japanese Parties' argument that the Department's class or kind ruling provides the domestic industry with protection beyond that to which the antidumping laws entitle it. Responding to the Other Japanese Parties' reference to *NTN Bearings*, BRP argues that the Department inadvertently included sales to Canadian customers in the underlying final determination for *NTN Bearings*. BRP contends that this was the basis of the CIT's conclusion that the Department failed to "determine dumping margins as accurately as possible"[23] in that proceeding.

Department's Position: First, we disagree with Yamaha's argument that a powerhead is a separate class or kind of merchandise from an outboard engine because it lacks two of the three subassemblies of a completed outboard engine. As we noted in the *Preliminary Determination Notice*,

> (The scope) does not, however, define a limit for the maximum number of additional parts which can be added to the powerhead before it ceases to be properly categorized as a powerhead and becomes an outboard engine.[24]

For example, under Yamaha's argument, a powerhead attached to a midsection assembly would be non-subject merchandise because it is not a complete outboard engine, although it is no longer only a powerhead. This is why we also stated, "{T}he Department looks for a clear dividing line between product groups, not merely the presence or absence of physical differences,"[25] in making a class or kind determination. There is no clear dividing line between a powerhead and a complete outboard engine. The range of components, including a midsection, that can be added to a powerhead makes it impossible to establish a "clear dividing line" between outboard engines and powerheads.

In *Funai Electric*,[26] the CIT upheld the Department's determination that a combination of a television

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[22] *See Badger-Powhatan,* 10 CIT at 241.

[23] *See NTN Bearings,* 74 F. 3d. at 1204, 1208.

[24] *See Preliminary Determination Notice*, 69 FR at 49867.

[25] *See Id.*

[26] *See Funai Electric Co. v. United States*, 713 F. Supp. 420 (CIT 1989) (*Funai Electric*).

and video cassette recorder was properly included in the scope of the order on television receivers. We note that all products in this case were treated as a single class or kind of merchandise. In its decision regarding the application of *Diversified Products*, the CIT stated, "In physical terms the television portion of importation is prominent."[27] In addition to the physical appearance of the merchandise, physical characteristics also refer to the physical composition and physical capability of merchandise. The physical composition of a powerhead enables it to produce the energy needed to power a complete outboard engine. Other parts of the complete engine channel that energy into a usable form to move and steer a boat. The scope of this investigation states, "Outboard engines are comprised of (1) a powerhead assembly, or internal combustion engine..."[28] The scope language uses the term "internal combustion engine" and "powerhead" interchangeably. The internal combustion engine, or powerhead, portion of an outboard engine provides the energy needed to move a boat, which is a prominent function of a complete outboard engine. The physical characteristics of the powerhead enable it to produce this energy. Therefore, we continue to find that physical characteristics are similar between complete outboard engines and powerheads.

Second, we also reject Yamaha's argument that the ultimate purchasers of powerheads and outboard engines have different expectations and end uses for the products. The ultimate purchaser of a powerhead is the consumer who purchases a complete outboard engine or a replacement powerhead to attach to the other components of a complete outboard engine. Engine manufacturers and repair shops are only intermediate customers; they have no use for a powerhead other than to assemble it into a complete outboard engine. As we stated in the *Preliminary Determination Notice*, powerheads in this case have only one use – to propel a boat after being incorporated into a complete outboard engine.[29] Therefore, we continue to reject Yamaha's argument that the ultimate expectations for customers of powerheads and outboard engines are different.

The same reasoning applies to the ultimate end uses of the product. Yamaha states, "Without a gearcase, the powerhead cannot 'power' anything; all it can do is make noise. Without a midsection, it might power some things, but it cannot power a boat."[30] These statements demonstrate that the only end use for a powerhead is to combine it with a midsection and gearcase assembly to power a boat. Powerheads are not used as the power source for any type of equipment other than an outboard engine. As the petitioner notes, an outboard engine without a propeller cannot propel a boat, although no party has argued that an outboard engine without a propeller is non-subject merchandise. Similarly, an outboard engine without a midsection and gearcase assembly cannot propel a boat. When

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[27] *See Id.*

[28] *See Preliminary Determination Notic*e, 69 FR at 49864.

[29] *See Id. at* 49867.

[30] *See* Yamaha case brief at 7.

combined with a midsection and gearcase assembly, however, a powerhead provides the power to propel a boat. Therefore, we continue to find that the ultimate end use for powerheads and outboard engines is the same.

For the preliminary determination, we concluded that powerheads and engines are sold in different channels of trade. We continue to find that the sale of the powerhead from one manufacturer to another is a separate step in the sale of completed outboard engines. Therefore, the intermediate sale of a powerhead to an outboard engine manufacturer constitutes a channel of trade separate from the sale of an outboard engine to a dealer, distributor, or OEM. As noted by the petitioner, however, when viewed as a continuum, the channels of trade for complete outboard engines and powerheads are similar. Powerheads produced in Japan are first sold to an OEM, which further manufactures the powerhead into a completed outboard engine. The completed outboard engine is then sold to an OEM boat manufacturer or dealer that attaches the engine to a boat. With the exception of the additional step for the sale of the powerhead to an OEM, we note that powerheads and outboard engines follow a similar channel of trade. For instance, record evidence indicates that the petitioner buys certain completed engines from Yamaha.[31] The record evidence indicates that these engines follow the same channel of trade as sales of powerheads to the petitioner. Therefore, although we continue to conclude that the channels of trade for powerheads and outboard engines are not identical, we do note that the channels are similar when viewed as a continuum.

Concordant with the preliminary determination, we also continue to disagree with Yamaha's contention that it is the Department's practice to treat subassemblies of finished products as a separate class or kind.[32] The petitioner in this investigation defined the scope in a manner so as to seek relief only for the imports that it believes are injuring its industry. Where relief is sought from dumped imports that include subassemblies, the Department has included these subassemblies within the same class or kind of merchandise.[33]

Finally, we reject the Other Japanese Parties' argument that the alleged difference between the dumping margins on outboard engines and powerheads warrants treating powerheads and outboard engines as separate classes or kinds of merchandise. A difference in the margins on products included within the same class or kind is not a factor in a *Diversified Products* analysis. Therefore, we have continued to treat powerheads and completed outboard engines as a single class or kind for the final determination.

Comment 2: Powerheads Imported for Repair Purposes

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[31] *See, e.g.*, Yamaha's Section A response, dated May 18, 2004, at A-25.

[32] *See Preliminary Determination Notice*, 69 FR at 49867.

[33] *See LNPP from Germany (1996)*, 61 FR at 38169.

In their case brief, the Other Japanese Parties state that the Department should exclude from the scope powerheads that are imported into the United States solely for repair purposes. They disagree with the Department's preliminary determination that "attempting to exclude certain powerheads from the scope of the investigation based on usage would cause significant administrability problems for Customs and Border Protection (CBP), should an antidumping duty order ensue."[34] They refer to *Softwood Lumber from Canada (2004)*,[35] in which lumber products contained in single family home packages or kits were excluded if they included an importer certification of the end use of the product.

The petitioner contends that the Department was correct in its preliminary decision to reject the Other Japanese Parties' request to exclude from the scope powerheads imported for repair on the basis of end use. According to the petitioner, the powerheads were described in the petition and the Department correctly included them in the scope regardless of their end use. The petitioner contends that the Other Japanese Parties continue to argue for an end-use certificate to exclude powerheads even though the Department found that such a process would create administrative problems for CBP. The Other Japanese Parties' reference to the home kit exclusions in *Softwood Lumber from Canada (2004)* is not relevant to the instant investigation, according to the petitioner, because the petitioner in that case agreed with the exclusion. Furthermore, the petitioner argues certification requirements in *Softwood Lumber from Canada (2004)* included a description of end use, contents, customer, and other information to prevent circumvention.

BRP also contends that the Department should not reverse its preliminary determination that powerheads imported for repairs are within the scope of the instant investigation. BRP states that the Department addressed these arguments explicitly in its *Preliminary Determination Notice*, but found no overarching reason to modify the scope of the investigation.

Department's Position: We agree with the petitioner and BRP. As discussed in detail below, in Comment 17, the Department grants ample deference to the petitioner in defining the product for which it seeks relief. We note that the petitioners in *Softwood Lumber from Canada (2004)* approved of the exclusion request. In the instant investigation, the petitioner is against the proposed exclusion. The Department's practice is to allow petitioners to define the scope because petitioners have close knowledge of the products for which they seek relief.

Further, we continue to maintain our position from the preliminary determination that excluding powerheads intended for repair from the scope would cause significant administrability problems for

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[34] *See Preliminary Determination Notice*, 69 FR at 49865.

[35] *See Certain Softwood Lumber Products from Canada: Final Results of Countervailing Duty New Shipper Review*, 69 FR 4489 (January 30, 2004) (*Softwood Lumber from Canada (2004)*).

CBP.[36] We note that the excluded products in *Softwood Lumber from Canada (2004)*, in addition to being accompanied by an end use certification, contained components that differentiated them from the subject merchandise. The Other Japanese Parties have identified no characteristics of powerheads imported solely for repair purposes that distinguish these powerheads from other subject merchandise. Therefore, for the final determination, we will continue to include powerheads imported for repair purposes in the scope of the investigation.

Comment 3: Treatment of Non-Dumped Sales

In its case brief, Yamaha objects to the Department's practice of "zeroing," which precludes negative antidumping margins on certain product control numbers (CONNUMs) from offsetting the positive antidumping margins on other CONNUMs. It contends that the World Trade Organization (WTO) Appellate Body, in *US - Softwood Lumber*,[37] determined that the practice violates Article VI of the General Agreement on Tariffs and Trade (the WTO Antidumping Agreement). The company argues that the Department must comply with its obligations under the WTO Antidumping Agreement by eliminating zeroing in the instant case. Yamaha cites the "Charming Betsy Doctrine," which results from the 1804 *Charming Betsy* Supreme Court case.[38] Under this doctrine, Yamaha states, U.S. law must be interpreted to conform to international agreements unless the law explicitly conflicts with an international agreement. Yamaha argues that zeroing does not conflict with U.S. law because it is only an administrative practice of the Department.

The petitioner argues that, despite the WTO's decision in *US - Softwood Lumber*, the Department should continue to treat non-dumped sales in accordance with its standard practice for the final determination of this investigation because the WTO's ruling is only applicable to that investigation. Morever, the petitioner contends that even if the decision to terminate zeroing is implemented in future investigations, there is no requirement to forego the practice in this investigation. The statute at 19 USC 3533(f)(3)(2000), argues the petitioner, is clear that the United States Trade Representative must consult with the appropriate congressional committees to determine whether to implement a WTO decision.[39] Also, according to the petitioner, under 19 USC 3533(g)(1)(2000), certain actions must take place prior to an agency change in practice due to a WTO decision, and Yamaha has not argued that these requirements have been met with respect to the practice of zeroing. Furthermore, the petitioner argues that the *Charming Betsy* doctrine cited by Yamaha in support of terminating zeroing

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[36] *See Preliminary Determination Notice*, 69 FR at 49865.

[37] *See Appellate Body Report, United States - Final Dumping Determination on Softwood Lumber from Canada at 183, WT/DS264/AB/R (August 11, 2004) (US - Softwood Lumber).*

[38] *See Alexander Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (*Charming Betsy*).

[39] *See Id.* at 21.

is trumped by the Uruguay Round
Agreement, which sets forth procedural mandates that are more relevant to modern trade agreements.

The petitioner continues that the CIT, in *SNR Roulements v. United States*,[40] determined recently that the Department's use of zeroing methodology to calculate dumping margins is in accordance with U.S. law. According to the petitioner, *SNR* signifies that zeroing is still permissible in LTFV investigations, and the Department may not change its zeroing practice in response to the WTO decision unless the procedures prescribed by the URAA are followed.[41]

BRP responds that the United States informed the WTO Dispute Settlement Body that it needed a reasonable period of time to comply with its ruling. BRP also points out that the final outcome of the WTO ruling will be affected by pending arbitration between the United States and Canada. Therefore, BRP asserts that it would be premature for the Department to change its practice in response to the WTO Appellate Body's determination.

Department's Position: We agree with the petitioner and BRP. As we have discussed in prior cases, our methodology is consistent with our statutory obligations under the Act. *See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 FR 50408 (October 3, 2001), and accompanying Issues and Decision Memorandum at Comment 1; *Final Results of Administrative Antidumping Review: Certain Welded Carbon Steel Pipes and Tubes from Thailand* 69 FR 61649 (October 20, 2004), and accompanying Issues and Decision Memorandum at Comment 7; and *Notice of Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada* 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8. Furthermore, the CIT has also consistently upheld the Department's treatment of non-dumped sales. *See, e.g., SNR; Corus Engineering Steels, Ltd. v. United States*, Slip Op. 03-110 at 18 (CIT 2003) (*Corus*); *Timken Co. v. United States*, 354 F. 3d 1334, 1341 (January 26, 2004) (*Timken 2004*) at 1341; and *Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States*, 926 F. Supp. 1138, 1150 (1996) (*Bowe Passat*) at 1150. Finally, the U.S. Court of Appeals for the Federal Circuit in *Timken 2004* has affirmed the Department's methodology as a reasonable interpretation of the statute.

Yamaha also asserts that the WTO Appellate Body ruling in *U.S.-Softwood Lumber* renders the Department's interpretation of the statute inconsistent with its international obligations. However, with regard to *U.S.-Softwood Lumber*, in implementing the Uruguay Round Antidumping Agreement (URAA), Congress made clear that reports issued by WTO panels or the Appellate Body "will not

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[40] *See SNR Roulements v. United States*, Slip Op. 04-100 (CIT August 10, 2004), 18-26 (*SNR*).

[41] *See Id.* at 17.

have any power to change U.S. law or order such a change." *See Statement of Administrative Action (SAA*) at 660. The *SAA* emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . . " *Id*. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. *See* 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); *see also*, *SAA* at 354 ("After considering the views of the Committees and the agencies, the Trade Representative **may** require the agencies to make a new determination that is "not inconsistent" with the panel or Appellate Body recommendations..." (Emphasis added)).

On September 27, 2004, the U.S. Trade Representative (USTR) indicated to the WTO Dispute Settlement Body that the United States intends to implement a decision consistent with the recommendations and rulings of the Dispute Settlement Body with respect to the Antidumping Softwood Lumber investigation.[42] However, no decision has yet to be issued by the United States as to the specifics of the analysis which will result from that decision. Accordingly, Yamaha is premature in arguing the form which the government's new analysis might take, or the effect this new analysis might have, if any, on other investigations or administrative reviews. Thus, for all the reasons stated herein, the Department has continued to calculate the cash deposit rate in accordance with its standard practice.

Comment 4: Level-of-Trade Adjustment for Yamaha's Sales to Original Equipment Manufacturers (OEMs)

Yamaha rejects the Department's decision not to grant a level-of-trade (LOT) adjustment to Yamaha's OEM sales in the United States. The company notes that the *Preliminary Determination Notice* contains the following statement:

> Yamaha identified three channels of distribution, claiming that these constituted a single level of trade: (1) sales by YMUS to OEM boat builders; (2) sales by YMUS to dealers; and (3) sales by G3 to dealers.[43]

Yamaha contends that the Department's statement contradicts its Section C questionnaire response, in which Yamaha claimed that constructed export price (CEP) sales to OEMs and CEP sales to dealers

[42] *See <http://www.wto.org/english/news_e/news04_e/dsb_27sep04_e.htm>*.

[43] *See Preliminary Determination Notice*, 69 FR at 49871.

constitute two separate levels of trade.[44] Yamaha contends that sales to OEMs are much less remote from the factory, meaning that the Department must adjust normal value (NV) to account for this difference. Yamaha states that section 773(a)(7) of the Tariff Act of 1930 (the Act), section 351.412(b) of the Department's regulations, and Article 2.4 of the WTO Antidumping Agreement all require a fair comparison of the prices in the foreign market and the U.S. market. Yamaha's position is that the Department's practice of granting no adjustment for differences in LOT where there is no home market LOT identical to that in the U.S. is wrong. The company claims that the Department has determined that its home market sales to distributors are not at the same LOT as sales to OEMs in the U.S. It also claims that the record demonstrates that OEM sales constitute an LOT less remote from the factory than CEP sales to dealers. Therefore, Yamaha maintains that its CEP sales to OEMs warrant a further adjustment.

The petitioner claims that Yamaha's argument that matches of CEP sales to home market OEM sales require an LOT adjustment and CEP offset is wrong and should be rejected by the Department. The petitioner contends that a CEP offset is made in lieu of an LOT adjustment, satisfying the statute and the WTO AD agreement. Unlike Yamaha, the petitioner argues that section 773(a)(7)(A) of the Act requires either an LOT adjustment or a CEP offset, and section 773 (a)(7)(A)(ii) limits LOT adjustments to normal value to situations where there are patterns of price differences between LOTs. Therefore, according to the petitioner, Yamaha is incorrect in arguing that the statute requires the Department to make an LOT adjustment for all price-to-price comparisons across different LOTs. The petitioner also cites 19 CFR 351.412(b)(2) and 351.412(d) to support its argument that the Department has no regulatory basis to make an LOT adjustment to normal value if the CEP LOT does not exist in the home market. Finally, the
petitioner cites three cases from the CIT in which the court ruled that a CEP offset is appropriate in situations where an LOT adjustment cannot or should not be made.[45]

BRP states that the Department based its determination on the selling functions reported by Yamaha, not on the way in which Yamaha labeled its distribution channels. BRP points out that the Department's *Preliminary Determination Notice* stated that very few selling activities are associated with Yamaha's U.S. sales.[46] It contends that Yamaha ignores the statute's requirement that any granting of an LOT adjustment is dependent on a demonstrated "pattern of consistent price differences in the country in which normal value is determined," as stated in section 773(a)(7)(A)(ii) of the Act. BRP argues that Yamaha has not claimed that the record includes any information demonstrating these

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[44] *See* Yamaha's Section C response, dated May 3, 2004, at page 27.

[45] *See, e.g., NTN Bearing Corp. Of America v. United States*, 248 F. Supp. 2d 1256, 1282 (CIT 2003), *NSK Ltd. v. United States*, 217 F. Supp. 2d 1291, 1303 (CIT 2002), and *Torrington Co. V. United States*, 146 F. Supp. 2d 845, 876-877 (CIT 2001).

[46] *See Preliminary Determination Notice*, 69 FR at 49871.

price differences. BRP contends that the regulations instruct the Department to determine whether there is a "pattern of consistent price differences" by considering two groups of prices in the country in which NV is determined: 1) the price at the LOT of the export price (EP) or CEP; and 2) the price at the LOT at which NV is determined.[47] It argues that the Department already determined that no home market LOT corresponds to Yamaha's CEP sales. Therefore, BRP concludes that the Department acted in accordance with the statute by finding that it was unable to find a "pattern of consistent price differences."

Furthermore, BRP argues that the statute provides that a CEP offset will only be granted when "the data available do not provide an appropriate basis to determine under paragraph (A)(ii) a level of trade adjustment."[48] BRP notes that section 773(a)(7)(A)(ii) of the Act establishes the prerequisite that the data available demonstrate a consistent pattern of price differences. As the Department has determined that it could not find a pattern of price differences, BRP concludes that it is inappropriate to grant Yamaha an LOT adjustment. BRP posits that the Department would act contrary to the statute by either granting Yamaha an LOT adjustment when the data do not show a consistent pattern of price differences, or by granting Yamaha an LOT adjustment and a CEP offset.

Department's Position: We disagree with Yamaha and have continued to find that Yamaha's OEM sales, and all other CEP sales, require no further adjustment for LOT differences beyond the application of the CEP offset.

In conducting our LOT analysis of CEP sales, we consider only the selling activities reflected in the price after the deduction of U.S. selling expenses pursuant to section 772(d) of the Act. If, after the deduction of expenses, we find that CEP sales are made at a different LOT from home market sales, we may grant an LOT adjustment when we cannot match to the same LOT if the difference in LOT is demonstrated to affect price comparability. *See* section 773(a)(7)(A) of the Act. However, if after the deduction of expenses, we find that "data available do not provide an appropriate basis to determine .... a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined...." *See* section 773(a)(7)(B) the Act. This adjustment is otherwise known as the CEP offset.

In this case, we considered the selling activities of Yamaha's CEP sales after the deduction of U.S. selling expenses. Our analysis indicated that, regardless of whether the CEP sales were made to OEMs or retailers, there were few selling activities to examine after the deduction of U.S. expenses. *See Preliminary Determination Notice* at 49871. While selling activities may differ for OEM and dealer sales in the United States, these activities do not factor into our analysis as the expenses

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[47] *See* 19 C.F.R. 351.412(d)(1).

[48] *See* section 773(a)(7)(B) of the Act.

associated with them have been deducted in arriving at the CEP. After their removal, there is no basis to conclude that the CEP sales are at different LOTs. Our findings are consistent with Yamaha's May 18, 2004, Section A response at A-58, where the respondent states that the impact of deducting U.S. selling expenses "is the virtual elimination of all selling expenses - direct and indirect - involved in YMUS's resale price." We found no evidence at verification to contradict this statement or our findings for the preliminary determination.

Therefore, given that Yamaha's CEP sales to OEMs and dealers have few or no associated selling activities in the context of our analysis, we find that all CEP sales are at a single LOT and less advanced than the home market LOTs. We are unable to make an LOT adjustment because there is no data available to quantify price differences between the appropriate LOTs. Accordingly, we continue to grant a CEP offset in calculating NV for these sales and find that no further adjustment is necessary to account for differences in LOTs. We note that, unlike the guidelines for EP sales, the statute contains a specific provision associated with CEP sales, in the form of the CEP offset, to account for differences in LOTs when an LOT adjustment cannot be made. *See* Comment 14.

Comment 5: Surrogate Prices for Yamaha's CEP Sales to Its Affiliated Boat Builders

As Yamaha notes, the Department preliminarily determined that Yamaha's sales to its affiliated U.S. boat builders, C&C and Skeeter, satisfied the "special rule" in accordance with section 772(e) of the Act and 19 CFR 351.402(c)(2). Yamaha contends that the Department should not have used the prices charged by Yamaha Motor Corporation, USA (YMUS) to C&C and Skeeter in the overall margin calculation. The company argues that these are sales between affiliated parties. Requiring Yamaha to report the price of these transactions, according to Yamaha, is inconsistent with the statute, the Department's regulations, and the Department's practice. As Yamaha states, section 772(e) of the Act directs the Department to use the price of either identical merchandise or other merchandise sold to an unaffiliated person when calculating the CEP price for further manufactured sales that meet the special rule. The company notes that the Department, in *Silicon Metal from Brazil*,[49] stated that it must begin with the prices paid by an unaffiliated party in applying a surrogate margin to transactions covered by the special rule.

Yamaha believes that its sales to its other affiliated U.S. boat builder, G3, serve as the appropriate surrogate to apply to its sales to C&C and Skeeter. First, Yamaha points out that G3 sold a greater quantity of boats than C&C and Skeeter combined, meaning that G3 has a sufficient number of sales to serve as a reasonable basis for comparison. Second, in contrast to YMUS's other CEP sales, Yamaha claims that G3's sales are also boat package sales. Third, Yamaha states that G3 sells these boat packages at the same LOT and through the same channel of distribution - dealers - as sales by C&C and Skeeter. In addition, Yamaha claims that this parallels the Department's treatment of the situation

[49] *See Silicon Metal from Brazil: Final Results of Antidumping Duty Administrative Review*, 67 FR 6488 (February 12, 2002) (*Silicon Metal from Brazil*).

in *TRBs from Japan (1997)*.[50] In *TRBs from Japan (1997)*, the Japanese producer had two affiliates, one of which used the subject merchandise in the manufacture of automobiles. The second affiliate sold the subject merchandise as replacement parts for automobiles. As Yamaha explains, the Department used the weighted average dumping margins calculated on sales of identical or other subject merchandise sold by the second affiliate as a proxy for the merchandise further manufactured by the first affiliate.

The petitioner agrees with Yamaha that for the preliminary determination the Department inappropriately used sales to Skeeter and C&C in the calculation of the dumping margin. The petitioner contends that section 772(e) of the Act and section 351.402(c)(3) of the regulations require that the Department use unaffiliated sales in determining the CEP for further manufactured sales that satisfy the "special rule." However, according to the petitioner, Yamaha is incorrect in arguing that the Department should only use margins on G3 sales to unaffiliated customers as a proxy for further manufactured sales. The petitioner asserts that there is no requirement that the Department base its surrogate dumping margins on sales that are within the same channel of distribution, same LOT, or to the same customer as the further manufactured sales. The only stipulation of section 772(e) of the Act, argues the petitioner, is that the Department use margins associated with sales of subject merchandise to unaffiliated parties. Therefore, the petitioner contends that the Department should base its margin for further manufactured sales made by Skeeter and C&C on the margin for all U.S. sales of subject merchandise made to unaffiliated parties.

The petitioner states that Yamaha's argument for using G3's sales as a surrogate should be rejected because G3's boat-engine package sales are fundamentally different from the Skeeter and C&C package sales. Additionally, the petitioner argues that Yamaha requested reporting exemptions under the special rule with the understanding that all of Yamaha's unaffiliated sales would be used to determine surrogate margins. Now, according to the petitioner, Yamaha is attempting to change the conditions of its earlier request in order to lower its margin by arguing that G3 sales only should be used as a proxy for the further manufactured transactions.

BRP also notes that the Department appears to have used the prices from Yamaha to its affiliated boat builders, not the surrogate prices of sales to unaffiliated customers, in its margin calculation. BRP argues that the most reasonable basis for determining CEP for YMUS's sales to Skeeter and C&C is to use the prices of identical subject merchandise sold by YMUS to unaffiliated OEMs. The company argues that Yamaha's proposal to base the margin for these sales on a surrogate margin of G3's sales to unaffiliated dealers is flawed. First, BRP contends that G3, unlike Skeeter and C&C, does not sell boat engine packages. Referring to Yamaha's case brief, BRP notes that Yamaha states, "the majority of G3 engines are not physically rigged to a boat leaving it to the dealer to

[50] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan: Preliminary Results of Antidumping Duty Administrative Reviews,* 67 FR 47452 (September 9, 1997) (*TRBs from Japan (1997)*).

determine the type of engine to rig to a particular boat."[51] Second, BRP states that G3 reported its sales to unaffiliated dealers. The company contends, however, that the Department stated its intention to apply proxy sales for sales from YMUS to Skeeter and C&C, which are sales from YMUS to OEMs. BRP posits that Yamaha has sufficient sales to unaffiliated OEMs to use as a surrogate. Third, BRP requests that the Department reject Yamaha's claims on the similarities of sales by G3 and Skeeter if it chooses to create a proxy for sales by Skeeter and C&C to their dealer customers. BRP argues that G3's dealer customers determine which engines will ultimately be paired to certain boats, and that G3's dealer customers appear to be free to sell stand-alone engines to the final customer. This, according to BRP, distinguishes G3 sales from sales by Skeeter and C&C.

Department's Position: We agree with all interested parties that the appropriate surrogate prices to use in determining the CEP for Yamaha's further manufactured sales are prices to unaffiliated parties. In determining whether Yamaha's further manufactured sales by Skeeter and C&C satisfied the "special rule" under section 772(e) of the Act, we determined that Yamaha had a sufficient quantity of sales to unaffiliated parties to serve as a reasonable basis of comparison.[52] Section 772(e) of the Act provides that the Department will use one of the following prices to determine CEP if there is a sufficient quantity of sales to provide a reasonable basis of comparison:

> (1) The price of identical subject merchandise sold by the exporter or producer to an unaffiliated person.
>
> (2) The price of other subject merchandise sold by the exporter or producer to an unaffiliated person.

In determining surrogate prices that serve as an appropriate basis of comparison, the statute does not require the Department to determine CEP for further manufactured sales by analyzing the channel of distribution, customer type, or other characteristics of sales of further-manufactured merchandise. The statute only speaks of the merchandise that will serve as an appropriate basis of comparison.

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[51] *See* BRP's rebuttal brief at 16, *referring to* Yamaha's case brief at 22.

[52] *See* Memorandum to Gary Taverman, Director, Office 5; from Shane Subler, International Trade Compliance Analyst, Office 5; dated April 27, 2004*; Re: Reporting of Sales by the Affiliated U.S. Boat Companies of Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, USA (Further Manufacturing Analysis Memorandum).*

We do not agree that the surrogate prices for further manufactured sales by Skeeter and C&C should be based solely on sales by G3. First, Yamaha has distinguished sales of boat-engine "packages" by Skeeter and C&C from sales by G3. In its case brief, Yamaha notes, "{I}t is true that the majority of G3 engines are not physically rigged to the boat leaving it to the dealer to determine the type of engine to rig to a particular boat."[53] Further, Yamaha argues that G3's sales are the most appropriate surrogate because all three companies sell boats and engines through the same channel of distribution. Even if Yamaha's sales to Skeeter and C&C shared identical selling characteristics (*e.g.*, channel of distribution, type of sale, end customer) as sales to G3, the statute would not require the Department to use only G3's sales to determine CEP for the further manufactured sales. Because the statue prioritizes physical characteristics, we also do not agree that the surrogate prices should be based solely on sales by YMUS to OEMs, as BRP proposes.

As stated in our *Further Manufacturing Analysis Memorandum*, we found that Yamaha had a sufficient quantity of sales of subject merchandise to unaffiliated customers to serve as a reasonable basis of comparison.[54] We find that it is possible to base the surrogate prices on the sales of identical subject merchandise sold to unaffiliated customers, which is an option identified in section 772(e) of the Act. Therefore, for the final results, we have determined the CEP for the further manufactured sales of Skeeter and C&C by using the CEP of identical subject merchandise sold to unaffiliated U.S. customers. We have identified the identical subject merchandise on a control number (CONNUM)-specific basis.

Comment 6: Per-Unit Cap on the CEP Offset

Yamaha notes that section 773(a)(7)(B) of the Act provides that the Department will grant a CEP offset when it is unable to account fully for differences in LOT between U.S. CEP sales and normal value. Yamaha states that the statute caps the amount of this offset to the amount of indirect selling expenses incurred on sales in the United States. Yamaha disputes the Department's convention in this proceeding and others to interpret the cap on the CEP offset as a per-unit cap. It believes that this convention is not required by section 773(a)(7)(B) and violates other parts of the statute and the requirements of the WTO Antidumping Agreement. Yamaha points to the language of section 773(a)(7)(A) of the Act, which requires that "the price (used to determine normal value)...shall also be increased or decreased to make due allowance for any difference...in LOT between the constructed export price and normal value." In addition, Yamaha cites the language of section 773(a), which states that a "fair comparison" will be made between CEP and normal value. The company argues that the Department's per-unit cap on the CEP offset neither makes "due allowance" for the difference in LOT nor provides for a "fair comparison" between CEP and normal value.

[53] *See* Yamaha case brief at 22.

[54] *See Further Manufacturing Analysis Memorandum* at 4.

Yamaha's position is that the Department must comply with the language of the statute by limiting the amount of the CEP offset to the total amount of indirect selling expenses incurred in the United States, not the per-unit amount. As support, Yamaha refers to the language of Article 2.4 of the WTO Antidumping Agreement, which requires a "fair comparison" between export price (EP) and normal value and "due allowance" to account for differences in LOT. Citing the *Charming Betsy* doctrine, Yamaha argues that the Department must also change its interpretation to conform to its international obligations.

The petitioner argues that the Department should reject Yamaha's contention that the CEP offset set forth by 773(a)(7)(B) is not a per-unit amount, but rather an absolute nominal value. According to the petitioner, Yamaha bases its legal argument on the assertion that the term "per-unit" does not appear in the statute. The petitioner asserts that Yamaha's argument suggests that no language in the Act refers to a per unit amount, which would be impossible when referring to the usage of the word "price" in sections 772(a), 772(b), and 773(1)(A) of the Act. The petitioner also contends that it is impossible that only specific language in section 773(a)(7)(B) does not refer to a per-unit amount because this would mean that the CEP offset would be on a different basis than amounts discussed in other sections of the Act. The petitioner further supports its argument by quoting language from the SAA at 830, where it describes indirect selling expenses being deducted from constructed CEP, which could only be done on a per-unit basis.

The petitioner claims that Yamaha is incorrect in its contention that a per-unit amount does not make due allowance for all differences in LOT and fails to make a fair comparison between prices in two markets. The petitioner counters by stating that section 773(a)(7)(A) of the Act mandates an LOT adjustment only in situations where there are different levels of trade and those differences are quantifiable. Taking issue with Yamaha's "fair comparison" argument, the petitioner states that as long as the Department follows the statutory mandate at section 773(a) of the Act, it will engage in fair comparisons.

In agreement with the petitioner, BRP argues that Yamaha has inappropriately extended the "due allowance" provision of section 773(a)(7)(A) of the Act, which concerns LOT adjustments, to the CEP offset. BRP argues that section 773(a)(7)(B) provides a separate basis for calculating a CEP offset when the available data do not allow the Department to make an LOT adjustment. BRP argues that Yamaha has provided no statutory basis for its assertion that the "total amount of indirect selling expenses deducted in the home market not exceed the total amount of indirect selling expenses deducted in the U.S."[55] Further, BRP argues that Yamaha's proposed method would increase the amount of the CEP offset as the home market price increases, thereby creating a lower dumping margin simply as a result of the higher indirect selling expense offset. Finally, BRP asserts that Yamaha has

[55] *See* Yamaha's case brief at 29.

failed to demonstrate that the Department's standard methodology to calculate a CEP offset does not result in a "fair comparison" of normal value to CEP, as provided by section 773(a) of the Act.

Department's Position: We disagree with Yamaha. It is the Department's long-standing practice to grant the CEP offset on a per-unit basis and cap the CEP offset by the per-unit amount of U.S. indirect selling expenses.[56] We have continued this practice for the final determination of this investigation.

Section 773(a)(7)(B) of the Act states the following in its provision for the CEP offset:

> normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 772(d)(1)(D).

The SAA at 830 provides more clarity by stating that the CEP offset "will be 'capped' by the amount of indirect selling expenses deducted from the constructed export price under section 772(d)(1)(D)."

While the statute and the SAA do not make use of the term "per-unit," it is clear that the language does not refer to aggregate measures in its description of the CEP offset. CEP and normal value are always calculated on a per-unit basis; therefore, any deduction or addition to normal value must be on the same basis. Likewise, with regard to the cap on the CEP offset, the SAA (and the statute) refers to an amount "deducted" from the CEP. As with the adjustments to normal value, such deductions, and therefore the cap to the CEP offset, must be on a per-unit basis because the CEP is calculated on a per-unit basis. Therefore, based on the relevant provisions in the statute and the SAA, we have followed our normal practice of granting and capping the CEP offset on a per-unit basis.

Comment 7: Home Market Levels of Trade

As the petitioner notes, for the preliminary determination, the Department determined that Yamaha's home market sales to dealers and distributors constituted separate levels of trade. In its case brief, the petitioner argues that the Department should collapse these distribution channels into a single LOT. The petitioner bases its claim on Yamaha's submitted information on its home market selling functions and the Department's findings at verification. First, the petitioner cites *Roller Chain from Japan*,[57] in which the Department explained that differences in selling functions alone are not sufficient to establish

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[56] We note that the Department's *Antidumping Manual* at 44 describes the CEP offset and cap as per-unit calculations. *See* the Import Administration website at http://ia.ita.doc.gov/admanual/admanual_ch08.pdf .

[57] *See Roller Chain, Other Than Bicycle, From Japan: Final Results of Antidumping Duty Administrative Review, and Determination Not To Revoke in Part* (December 4, 1996) (*Roller Chain from Japan*).

different LOTs. Second, the petitioner states that the *Preamble* to *Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27371 (*Preamble*), establishes that claims regarding differences in selling functions must be substantiated by record evidence. It also claims that the *Preamble* identifies differences in the amount of selling expenses between two groups of sales as a factor in determining levels of trade. Third, the petitioner references *Brass Sheet and Strip from Canada*[58] as precedent for the Department to look for differences in selling functions and differences in the amount of selling expenses when determining whether different LOTs exist. The petitioner contends that the record shows no evidence of different LOTs for Yamaha's home market sales.

In support of its argument, the petitioner points out that Exhibit A-1 of Yamaha's second supplemental questionnaire response[59] identifies a close correlation between the number of selling functions for home market sales to dealers and distributors. Furthermore, the petitioner notes that a difference in the intensity that Yamaha performed a certain selling function for dealers and distributors played a significant role in the Department's preliminary LOT determination. The petitioner contends, however, that the Department based this finding on Yamaha's subjective estimate of the intensity at which Yamaha offers the selling function to dealers and distributors. Moreover, the petitioner argues that the Department found nothing at verification to support Yamaha's estimate. The petitioner refers to 19 CFR 351.412(c)(2), which states, "Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing," in the Department's LOT analysis. The petitioner claims that Yamaha's reported selling expenses and its reported home market selling functions demonstrate that there is no difference between the marketing stages of sales to dealers and distributors. Therefore, the petitioner argues that the Department, in accordance with 19 CFR 351.412(c)(2), must collapse Yamaha's home market sales to dealers and distributors into a single LOT.

BRP concurs that Yamaha's home market sales to dealers and distributors constitute a single LOT. Referring to 19 CFR 351.412, BRP also argues that differences in selling activities are a necessary, but not sufficient, condition for determining that separate LOTs exist. BRP acknowledges that the Department found that Yamaha performed certain selling activities at a greater degree for dealers. However, the company argues that Yamaha did not base its reporting of these functions on any verifiable information, but on the subjective evaluation of a Yamaha employee. BRP asserts that this is no basis for the Department to conclude that Yamaha's home market sales to dealers and distributors constitute two LOTs.

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[58] *See Brass Sheet and Strip from Canada; Final Results of Antidumping Duty* Administrative Review, 62 FR 16759, 16760 (April 8, 1997) (*Brass Sheet and Strip from Canada*).

[59] *See* Yamaha's second supplemental questionnaire response, dated July 22, 2004, at Exhibit 2nd Supp. A-1.

BRP notes that in the *Preliminary Determination Notice*, the Department cited the language of *Pipe and Tube from Turkey*, which stated, "inventory maintenance is a principal selling function" and "the additional responsibilities of maintaining merchandise in inventory also gives rise to related selling functions that are performed."[60] In *Pipe and Tube from Turkey*, the Department found that there were two levels of trade in the home market. BRP contends that the respondent company in *Pipe and Tube from Turkey* had more selling functions at one LOT than the other. Most importantly, BRP argues, one of the additional selling functions within this LOT was an inventory maintenance function that was not present in the other LOT. BRP notes that the Department found that this inventory maintenance function gave rise to other related selling functions within this LOT. In contrast to *Pipe and Tube from Turkey*, BRP argues, the record of the instant investigation does not support Yamaha's claimed differences in the intensity of its inventory services offered to dealers and distributors. The company also argues that there is no evidence to demonstrate that Yamaha's inventory services give rise to other selling functions that are unique to distributors or dealers.

In addition, BRP argues that Yamaha's chart showing the average level of inventory held by dealers and distributors is insufficient to demonstrate the intensity of its inventory services. The company argues that this information is unverified and does nothing to quantify the level of inventory services that Yamaha provided. Finally, BRP cites *Stainless Steel from Italy*,[61] in which the Department found that the respondent only conducted inventory maintenance for warehouse sales, but did not conduct the service for direct sales. The Department did not find, however, that this was sufficient to separate the two channels of distribution into two levels of trade.

In addition, BRP contends that Yamaha's reporting of indirect selling expenses further separates the LOT analysis for Yamaha from *Pipe and Tube from Turkey*. In *Pipe and Tube from Turkey*, BRP notes, per-unit indirect selling expenses were higher for one LOT than for the other. BRP also cites *Koyo Seiko*,[62] in which the CIT upheld the Department's determination to grant a respondent's request to designate its home market sales at two levels of trade, as support for its argument. The

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[60] *See* Memorandum to the File from James Kemp and Shane Subler through Constance Handley, *Re: Analysis Memorandum for Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, USA* (*Preliminary Analysis Memorandum*), August 5, 2004, at 4-5; citing *Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Welded Steel Pipe and Tube from Turkey*, 63 FR 35190 (June 29, 1998) (*Pipe and Tube from Turkey*).

[61] *See Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy*, 68 FR 47032 (August 7, 2003) (*Stainless Steel from Italy*).

[62] *See Koyo Seiko Co. Ltd. V. U.S.*, 26 CIT, 24 ITRD (BNA) 1202 (2002) (*Koyo Seiko*).

Department's determination in *Tapered Roller Bearings from Japan*, on which *Koyo Seiko* is based, stated:

> In order to determine if a respondent's expenses demonstrably varied according to LOT, additional narrative and quantitative evidence must exist which demonstrates that the respondent either performed different activities/functions to a different degree when selling to each LOT{,}such that the amount of expenses incurred for the sale of the identical merchandise to different LOTs would vary.[63]

BRP contends that Yamaha's indirect selling expense factor calculation demonstrates that there is no evidence that Yamaha performed different selling activities for the dealer and distributor channels. Therefore, BRP argues, the Department has no basis for separating the dealer and distributor channels into two separate LOTs.

BRP cites other determinations to support its position. First, BRP cites *Slater*,[64] in which the Department determined that the respondent's home market channels of distribution constituted a single LOT. Even though there were differences in warehousing and inventory activities between the two channels, BRP notes, the Department determined that the other selling functions employed in the two channels were similar. The CIT ruled that the Department's determination "is supported by substantial evidence and is in accordance with the law."[65] Finally, BRP cites *Hoogovens Staal BV v. U.S.*,[66] in which the Department found that the respondent's sales through two separate channels of distribution constituted two LOTs. One factor in the Department's underlying determination was that the respondent provided technical services at a higher level of intensity to one of the distribution channels. The CIT found that this "is not substantial evidence that there were substantial differences in the technical services performed" between the two channels. BRP asserts that Yamaha has provided no verifiable or quantified evidence on its selling functions to home market dealers and distributors. Therefore, in accordance with *Hoogovens*, BRP contends that the Department must designate Yamaha's home market sales to dealers and distributors as a single LOT.

Yamaha counters that the Department correctly designated its home market sales to dealers and distributors as separate LOTs. First, the company argues that examining the relative degree of selling

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[63] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews and Termination in Part*, 63 FR 20585 (April 27, 1998) (*Tapered Roller Bearings from Japan*).

[64] *See Slater Steel Corp. v. United States*, 27 CIT, Slip Op. 03-162 (2003) (*Slater*).

[65] *See Id.* at 13.

[66] *See Hoogovens Staal BV v. United States*, 25 CIT 344, 346 (2001) (*Hoogovens*).

functions is an essential part of any LOT analysis. Yamaha refers to *Cold-Rolled Steel from the Netherlands*,[67] in which the Department stated that the critical element in determining whether to establish different LOTs is an analysis of the degree to which the respondent performs different selling functions for each distribution channel. Yamaha argues that the CIT upheld this principle in *Corus*.[68] As quoted by Yamaha, the CIT's decision in *Corus* noted that the Department's practice is to examine the weight and intensity of a respondent's selling functions, in addition to the number of selling functions. The decision also noted that there may be circumstances in which the significance of one or two indirect selling functions outweighs the significance of the rest. Yamaha counters that the citations in BRP's case brief, most notably its reference to *Koyo Seiko*, were all instances in which the Department analyzed the degree of selling functions between channels of distribution.

Yamaha contends that the petitioner and BRP neglected to consider the intensity of selling functions for each channel of distribution. Yamaha notes that in *Pipe and Tube from Turkey*, in which the Department designated the respondent's home market distribution channels as two LOTs, the Department found that the respondent provided more intensive customer support to one channel of distribution over the other. Yamaha also asserts that BRP's reliance on *Hoogovens* is misguided because the CIT in that case did not base its decision on the intensity of selling functions.

Yamaha contends that the verification information on the intensity of its selling functions supports the Department's finding that the two channels constitute separate LOTs. First, countering the arguments of the petitioner and BRP, Yamaha argues that the Department's interview conducted with its sales manager follows the Department's practice in other investigations. Second, Yamaha also notes that it performed the vast majority of its selling functions at a different intensity for dealers and distributors. Yamaha compares these results to *Cutting Tools from Japan*,[69] in which the Department found two separate LOTs. In this case,
Yamaha argues, the respondent performed the same thirteen selling functions at both LOTs. Only four of these functions, however, differed in intensity between the two LOTs. Third, Yamaha argues that its inventory chart shows the average inventory held by its dealer and distributor customers, thereby establishing the frequency at which Yamaha must maintain inventory for customers at each LOT.

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[67] *See Cold-Rolled Carbon Steel Flat Products From the Netherlands: Amended Final Results of Antidumping Duty Administrative Review*, 63 FR 13204 (March 19, 1998) (*Cold Rolled Steel from the Netherlands*).

[68] *See Corus Engineering Steels Ltd. v. United States*, No. 02-00283, slip op. 03-110 at 16-17 (CIT August 27, 2003) (*Corus*).

[69] *See Professional Electric Cutting Tools From Japan; Preliminary Results of Antidumping Duty Administrative Review*, 63 FR 30706 (June 5, 1998) (*Cutting Tools from Japan*).

Finally, Yamaha contends that it provides other selling functions, such as advertising and rebates, at different intensities to dealers and distributors. It notes that the Department verified these fields.

Yamaha also argues that the petitioner and BRP are requesting that the Department quantify differences in selling expenses for each home market LOT. Yamaha finds no basis for this in the statute or in Department precedent. Citing *Pasta from Italy*[70] and *Cement and Clinker from Mexico*,[71] Yamaha states that the Department's primary method of determining the existence of different LOTs is by identifying differences in selling functions based on type and degree. Yamaha cites *TRBs from Japan (1998)*[72] as support for its position that the Department typically finds two or more LOTs without any quantification of the selling expenses incurred at each LOT. Citing section 773(a)(7)(a) of the Act, Yamaha argues that the only quantitative basis in an LOT analysis is the difference in the prices of the merchandise at each LOT, which relates to quantifying an LOT adjustment or CEP offset. Yamaha claims that it has established the difference between its prices charged to home market dealers and distributors. Furthermore, Yamaha contends that its sales process does not allow it to separate its home market selling expenses incurred for sales to dealers and sales to distributors. Contrary to the position of the petitioner and BRP, Yamaha argues that quantified differences in selling expenses between LOTs is only one factor used to determine the presence of separate LOTs.

Yamaha also finds that BRP's references to *Koyo Seiko* do not support BRP's claim that Yamaha must quantify differences in its selling expenses between LOTs. Yamaha contends that the Department's decision in *Koyo Seiko*, affirmed by the CIT, only established that a respondent must justify an LOT-specific allocation of indirect selling expenses with quantified evidence. It claims that the CIT did not pass judgment on the Department's finding that multiple LOTs were present in the respondent's home market, even though the respondent failed to quantify differences in selling expenses at each LOT. Yamaha asserts that a respondent does not have to provide an exact quantification of indirect selling expenses by LOT to justify the presence of separate LOTs.

Additionally, Yamaha contests BRP's argument that inventory maintenance is not always a critical factor in the Department's LOT analysis. Yamaha refers to *Pipe and Tube from Turkey*,[73] *Stainless*

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[70] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy*, 61 FR 30326, 30330-31 (June 14, 1996) *(Pasta from Italy).*

[71] *See Gray Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review*, 62 FR 17148, 17155-58 (April 9, 1997) *(Cement and Clinker from Mexico).*

[72] *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Final Results of Antidumping Duty Administrative Reviews*, 63 FR 20585, 20608 (April 27, 1998) *(TRBs from Japan (1998)).*

[73] *See Pipe and Tube from Turkey* at 35193.

Steel Bar from Italy,[74] and *Stainless Steel Bar from Germany*[75] as instances in which the Department considered inventory maintenance as an important factor in its LOT analysis. Further, the company argues that BRP's reference to *Stainless Steel Sheet and Strip in Coils from Italy* is not applicable to the instant investigation. In that case, Yamaha notes, most of the respondent's selling functions were identical in two channels of distribution. Although the inventory maintenance function was not identical between the two channels, Yamaha argues that the Department did not find two separate LOTs because the difference in the inventory function did not outweigh a consideration of the other identical selling functions. Yamaha contends that it has established substantial differences in selling activities between the two proposed LOTs. Further, Yamaha rejects BRP's argument that it performs no additional selling functions related to inventory maintenance. It claims that its Section A response lists three such functions: sales forecasting, strategic/economic planning, and retail tracking. Finally, the company notes that the inventory-related selling functions set forth in *Pipe and Tube from Turkey* were not even listed as separate sales functions by the Department or the respondent.

Citing *Brass Sheet and Strip from Canada*,[76] *Pipe and Tube from Turkey, Emulsion Styrene-Butadene Rubber from Mexico*,[77] *Stainless Steel Bar from Germany*, and the *Preamble* at 27,371, Yamaha argues that the Department's LOT analysis must consider factors such as class of customer, level of selling expenses, chain of distribution, and sales process. Yamaha contends that BRP's reference to *Slater*, in which the court upheld the Department's decision to find a single LOT in the home market, is not applicable to the Department's LOT analysis for Yamaha. Although inventory and warehousing functions for the respondent in *Slater* differed between the channels of distribution, Yamaha posits that factors other than selling functions were more important in the Department's LOT analysis. For the instant investigation, Yamaha argues that factors such as its distribution process, sales process, and categories of customers for each sales channel demonstrate that home market sales to dealers and distributors constitute separate LOTs.

Department's Position: We disagree with the petitioner and BRP, and have determined that there are two levels of trade in the home market - one for dealers and one for distributors. We based our

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[74] *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy,* 67 FR 3155 (January 23, 2003) (*Stainless Steel Bar from Italy*).

[75] *See Stainless Steel Bar from Germany: Final Results of Antidumping Duty Administrative Review*, 69 FR 32982 (June 14, 2004) (*Stainless Steel Bar from Germany*).

[76] *See Brass Sheet and Strip From Canada; Final Results of Antidumping Duty Administrative Review,* 62 FR 16759, 16760 (April 8, 1997) *(Brass Sheet and Strip from Canada).*

[77] *See Notice of Final Determination of Sales at Less Than Fair Value: Emulsion Styrene-Butadene Rubber From Mexico*, (64 FR 14872) (March 29, 1999) (*Emulsion Styrene-Butadene Rubber from Mexico*).

decision on an examination of Yamaha's chain of distribution and the differences in the intensity of selling functions for dealers and distributors. The Department's full analysis of this issue is outlined in the *Final Analysis Memorandum* because the discussion contains proprietary information.[78] *See Final Analysis Memorandum* at page 7.

Comment 8: Adjustments to U.S. Price

The petitioner points out that the Department, at verification, found that Yamaha paid during the POI an amount for Retail Reserve rebates that differed from the amount which it accrued during the POI for this rebate. The petitioner believes that the Department should revise Yamaha's reported REBATE1U amounts to account for the accrual value of this rebate during the POI. It argues that this is likely to be a fair indication of the total amount of Retail Reserve rebates that the company will ultimately pay on engine sales during the POI.

BRP claims that Yamaha used an incorrect methodology to report its rebates, discounts, and price adjustments on U.S. sales. It argues that the Department instructed Yamaha to report all of its adjustments to POI sales, both those adjustments that it has already paid and those that remain to be paid. BRP also contends that Yamaha's accounting system would have allowed the company to download accrual information directly into its response. At verification, BRP argues, the Department found that Yamaha understated its reported amount for the Retail Reserve rebate by reporting the value of rebates paid during the POI instead of the value of rebates accrued during the POI.

BRP contends that accrual values are a more accurate measure of Yamaha's adjustments to U.S. price during the POI. The company notes, however, that Yamaha has not submitted any accrual information to the Department for the majority of fields that it reported. Citing the *Antidumping Manual*, BRP argues that the Department uses historical price adjustment levels, or the level of rebates paid on prior period sales, in its calculation of rebates.[79] BRP argues that this does not match Yamaha's reporting methodology. Further, BRP argues that modifying Yamaha's U.S. price adjustments is especially important because, as it contends, the Department at verification found evidence of potential unreported incentives. The company refers to the *Sales Verification Report*,[80] in which the Department noted that

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[78] *See Memorandum from James Kemp and Shane Subler, International Trade Compliance Analysts, through Constance Handley, Program Manager, to the File, RE: Final Determination Analysis Memorandum for Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, USA*, December 27, 2004 (*Final Analysis Memorandum)*.

[79] *See Antidumping Manual*, Chapter 8, at 11.

[80] *See* Memorandum to the File from James Kemp and Shane Subler, International Trade Compliance Analysts, Office 1 to Susan Kuhbach, Office Director, Office 1, *Verification of the Sales Response of Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Motor Corporation, USA* (*Sales Verification Report*), at 49 and 50.

G3 credited its customers' parts accounts for the values of certain rebates. BRP finds that Yamaha may have not fully reported its U.S. price adjustments, which it contends provides further incentive for the Department to modify the price adjustments that Yamaha did report. To modify these price adjustments, BRP proposes that the Department use the highest level of any reported price adjustment (amount of adjustment divided by gross unit price) and apply that rate to all U.S. sales. At a minimum, BRP requests that the Department increase the amount of each price adjustment by a factor based on the difference between the accrued and paid amount of each adjustment.

Yamaha responds that using the accrued amount of these rebates would distort the level of rebates that relate to POI sales. It argues that the *Sales Verification Report* demonstrated that it was impossible to calculate a sales-specific rebate for every sale or to determine the exact amount of rebate to be paid in the future on these sales.[81] Yamaha cites *Softwood Lumber from Canada (2002)*[82] and *Cold-Rolled Steel from France*[83] as instances in which the Department used actual expenses over accrued expenses. Furthermore, Yamaha claims that BRP's reference to the Department's *Antidumping Manual* concerns only home market rebates, not rebate payments in the U.S. market. Yamaha also adds that its accrual amounts are based on its level of field inventory, even though it never sells all field inventory at the retail level in a given year.

Yamaha explains that the Retail Reserve rebate is only generated on sales for which the ultimate retail customers, not Yamaha's dealer and OEM customers, register warranties on an outboard engine. The company notes that there is time between Yamaha's sale to its customer and the time that the ultimate customer registers a warranty. As the company explains, it accrues a rebate liability for the sale to its immediate customer, although the payment of the rebate is dependent on the sale to the final customer. In addition, Yamaha claims that it accrues the rebate after the initial sale even though many of the sales will ultimately never be eligible for the rebate. Therefore, the company asserts that it accrues a rebate liability that is the potential amount that the company could incur on all POI sales, although it never pays all of the accrued amount. Yamaha contends that basing its rebate amounts on its accrued liabilities would overstate the true amount of rebate that is applicable to POI sales.

Yamaha argues that it reported all rebates paid during the POI, regardless of when it sold the merchandise tied to the rebate. Responding to BRP's claim that the amount paid understates the rebate liability, Yamaha notes that its Retail Reserve rebate payments during the POI amount to 95.8 percent of the maximum potential value of Retail Reserve rebates on POI sales. As many of the company's

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[81] *See Id.* at 46.

[82] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 FR 15539 (April 2, 2002) (*Softwood Lumber from Canada (2002)*).

[83] *See Notice of Preliminary Determination of Sales at Not Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From France*, 67 FR 31204 (May 9, 2002) *(Cold-Rolled Steel from France).*

sales will not receive any Retail Reserve rebate payments, Yamaha contends that this is a conservative measure of its actual retail rebate expenses on POI sales. The company notes that the same methodology applies the REBATE3U and REBATE5U fields as well.

Yamaha also responds to BRP's allegation that Yamaha's practice of crediting its customers' parts accounts demonstrates that Yamaha may not be reporting certain back-end rebate programs. Yamaha notes that the Department verified sales in which Yamaha credited a customer's parts account as a form of rebate payment. Further, Yamaha also claims that the Department randomly selected accounts from Yamaha's chart of accounts to demonstrate that Yamaha fully reported all rebates and price adjustments to customers.

Department's Position: We agree with Yamaha. Optimally, Yamaha would report to the Department an accrued expense amount that accurately reflects what the company will pay to its customers for POI sales. The company's accounting practices and sales programs, however, do not allow this. As we noted on page 46 of the *Sales Verification Report*, "The vast majority of sales made in 2003 were not registered until well after the initial sale. Accordingly, YMUS could not calculate a sales-specific rebate for every transaction in the database." Further, as Yamaha explained in its Section A response, the company accrues a rebate expense for many engine sales that will not qualify for an actual rebate.[84] As a result, Yamaha's accrued expenses do not accurately reflect the company's actual expenses related to POI sales.

Evidence from verification demonstrates that Yamaha's reporting of actual payments for its U.S. price adjustments is the most accurate possible measure of the true liability that YMUS incurred for its sales during the POI. As we explained on page 59 of the *Sales Verification Report*, Yamaha officials reported that the company, in compliance with Generally Accepted Accounting Principles (GAAP), accrues a value for anticipated expenses prior to the time that it incurs actual expenses. For example, for the first advertising field (ADVERT1U), we verified in detail the steps by which Yamaha accrues an expense amount in its books and records and adjusts this accrual based on its amount of actual expenses.[85] Information in CEP Exhibit 34 of the *Sales Verification Report* demonstrates that Yamaha uses the same accounting process for the Retail Reserve rebate. Furthermore, this exhibit contains information directly from Yamaha's accounting records corroborating its statement that YMUS captured 95.8 percent of its maximum potential liability on all sales during the POI. Therefore, we find that Yamaha's amount of Retail Reserve rebate payments during the POI serves as a reasonable proxy for the actual amount of Retail Reserve rebate expenses that the company will incur on sales during the POI.

We disagree with BRP that Yamaha's practice of crediting its customers' parts accounts justifies an additional adjustment to Yamaha's reported rebate fields. We verified the rebate fields in which

[84] *See* Yamaha's Section A response at Exhibit A-68.

[85] *See* page 59 and CEP Exhibit 42 of the *Sales Verification Report.*

Yamaha credited its customers' parts accounts for the value of the rebates and found that Yamaha accurately reported these credits as rebates. In addition, in CEP Exhibit 7 of the *Sales Verification Report*, we examined the detail of a customer's accounts receivable (A/R) activity for one month of the POI. Upon examining certain transactions in this activity, we found no evidence of any unreported price adjustments. Therefore, no information on the record of this investigation indicates that Yamaha failed to report additional adjustments to price.

The petitioner and BRP are requesting that we apply, at a minimum, facts otherwise available to Yamaha's reported rebates by using a value that is higher than what Yamaha reported. Section 776 of the Act states that the Department will apply the facts otherwise available in reaching a determination if:

> (1) necessary information is not available on the record, or
>
> (2) an interested party or any other person
>
> > (A) withholds information that has been requested by the administering authority or the Commission under this title,
> >
> > (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782,
> >
> > (C) significantly impedes a proceeding under this title, or
> >
> > (D) provides such information but the information cannot be verified as provided in section 782(I).

We do not find that Yamaha's reporting of the REBATE1U field, or any of its other fields that are accrual-based, warrants application of facts otherwise available. BRP contends that the necessary accrual information on Yamaha's reported price adjustments is not on the record. As explained, however, we find that Yamaha's reporting of its actual POI payments is the most accurate measure possible of its true liability for POI sales. Therefore, we do not find that accrual information is necessary for Yamaha's reported price adjustments. Yamaha has also provided timely responses to our requests for information and has not impeded the proceeding. Finally, we verified Yamaha's reporting of its price adjustments, including its accrual-based accounts and the steps by which the company adjusts these accounts in its books and records. Therefore, for the final determination, we will continue to use Yamaha's reported amounts for its rebate fields and other fields that are accrual-based.

Comment 9: Reported Home Market Payment Dates

The petitioner points out that the Department could not verify Yamaha's payment dates or payment terms and asserts that this casts doubt on the validity of Yamaha's home market credit expenses. It cites section 776(a)(2)(D) of the Act, which states that the Department may apply facts otherwise available if it is unable to verify certain information from an interested party; and section 776(b), which states that the Department may use an adverse inference if an interested party has not cooperated to the best of its ability. The petitioner insists that the correct date of payment and payment terms are integral to the credit calculation, but that the Department was not able to verify this information as reported by Yamaha. Further, the petitioner contends that Yamaha had sufficient time to report payment dates that were verifiable by the Department. Therefore, the petitioner requests that the Department apply adverse facts available to Yamaha's reported home market credit expenses.

BRP agrees that Yamaha did not demonstrate that it received full and final payment from any customer. Therefore, BRP suggests that Yamaha's reported prices may not be at all reflective of the actual payments that Yamaha received from its customers. As a result, BRP argues the Department should use adverse facts available to measure all of Yamaha's claimed home market price adjustments.

Yamaha responds that its customers pay against a summary monthly invoice, not against individual sales listed on the invoice. This, according to Yamaha, makes it impossible for the company to determine the exact payment date for home market sales. The company maintains that it should not be punished for issuing monthly invoices as a standard business practice.
Although the Department did not verify payment on individual engine sales, Yamaha argues that the Department did verify that Yamaha received full payment for the overall monthly invoices reviewed in the sales traces. Further, Yamaha points out that the Department verified the payment of actual rebates to home market customers. Yamaha argues that it does not make rebate payments to customers that are behind on payments, meaning that it was receiving full payments from these customers. Finally, Yamaha cites *Industrial Belts from Japan*,[86] in which the Department accepted the respondent's customer-specific allocation methodology that was based on an average number of credit days. For these reasons, Yamaha argues that the Department should accept its submitted home market imputed credit expenses.

Department's Position: We agree with Yamaha. As detailed in Comment 8 of this memorandum, Section 776(a) of the Act states the conditions under which the Department may use facts otherwise available in reaching a determination. We do not find that Yamaha's reporting of its home market payment dates meets any of the conditions listed under section 776(a). Early in the proceeding, Yamaha stated that it issues monthly invoices to its customers.[87] We observed at verification that

[86] *See Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, from Japan: Final Results of Antidumping Duty Administrative Review*, 58 FR 30018 (May 25, 1993) (*Industrial Belts from Japan*).

[87] *See* Yamaha's rebuttal brief at 39, referring to Yamaha's Section A response at A-85.

immediate payment in full was not required for each invoice, making it impossible to directly link payments to invoices.[88] Therefore, we do not find that Yamaha has withheld information, failed to provide information, or significantly impeded the proceeding.

In addition, we find that Yamaha's weighted-average methodology of calculating dates of payment is both reasonable and based on verifiable information. In its Section B response, Yamaha explained its weighted-average payment date calculation and tied it to the times and methods by which most of its customers make payments.[89] Furthermore, we verified that Yamaha's methodology comported with its submitted information on payment dates and shipment dates for specific sales. As the *Sales Verification Report* states, "For cash, check, direct deposit, and end user financing, we confirmed that the payment date was calculated as stated in the Section B response at page B-25."[90] Finally, although it was not possible to verify that Yamaha received full payment on any particular sale, we verified that Yamaha received payment for the total value of one of the invoices selected in the sales traces. We traced this amount through the accounts receivable sub-ledger and monthly balance sheet.[91]

We do not find that Yamaha's methodology of calculating its payment dates meets any of the conditions for the application of facts otherwise available. Therefore, the information also does not warrant the application of adverse facts available, as requested by the petitioner and BRP. For the final results, we will continue to base Yamaha's home market credit expenses on the payment date methodology set forth in its Section B response.[92]

Comment 10: Certain Home Market Sales within the Ordinary Course of Trade

The petitioner argues that Yamaha's sales receiving a certain discount are outside the ordinary course of trade. It requests that the Department exclude these sales from the final margin calculation. The petitioner contends that the Department's verification findings and Yamaha's description of the discount in its questionnaire responses indicate that these sales are outside the ordinary course of trade. As support for its contention, the petitioner cites *Carbon Steel Flat Products from Korea (2004)*[93] and

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[88] *See Sales Verification Report* at 15.

[89] *See* Yamaha's Section B response at B-22.

[90] *See Sales Verification Report* at 15.

[91] *See Id.*

[92] *See* Yamaha's Section B response at B-52.

[93] *See Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of Antidumping Duty Administrative Review and Antidumping Duty New Shipper Review*, 69 FR 54101, 54106 (September 7, 2004) (*Carbon Steel Flat Products from Korea (2004)*).

Cold-Rolled Steel Flat Products from Korea (1997).[94]

Yamaha counters that the petitioner has offered no legal or factual basis for its position. The company argues that discounting prior model-year merchandise is a normal business practice; therefore, there is no basis for excluding these sales as outside the ordinary course of trade. Citing the Department's determination in *Carbon Steel Flat Products from Korea (2001)*,[95] Yamaha contends that the Department has maintained that the statute provides no basis for excluding obsolete model-year merchandise from the calculation of normal value solely because the merchandise is sold at lower prices. In addition, even for sales with discounts not attributable to the model year of the merchandise, Yamaha argues that the Department has no basis for excluding these sales from the calculation of normal value. Yamaha maintains that the merchandise still passed the Department's cost test under section 773(b)(2)(c) of the Act, meaning that there is no basis to conclude that the sales are outside the ordinary course of trade.

Department's Position: We agree with Yamaha. Section 771(15) of the Act defines ordinary course of trade as

> the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind. The administering authority shall consider the following sales and transactions, among others, to be outside the ordinary course of trade:
>
> **(A)** Sales disregarded under section 773(b)(1).
> **(B)** Transactions disregarded under section 773(f)(2).

Subsection A of this definition provides that sales will be excluded from the ordinary course of trade if they are below the cost of production of the product. The sales in question have passed the Department's cost test for specific control numbers (CONNUMs), so this is not a basis for excluding the merchandise from the calculation of normal value. Subsection B of this definition deals with sales to affiliated parties. No party has argued that this is a basis for excluding the sales in question.

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[94] *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews*, 62 FR 18404 (April 15, 1997) (*Cold-Rolled Steel Flat Products from Korea (1997)*).

[95] *See Notice of Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 66 FR 3540 (January 16, 2001) (*Carbon Steel Flat Products from Korea (2001)*).

In *Murata*,[96] the CIT quoted with approval the Department's notice in *Pipe and Tube from India*, which stated,

> The Department, in determining whether home-market sales are in the ordinary course of trade, does not rely on one factor taken in isolation but rather considers all the circumstances particular to the sales in question.[97]

Both the petitioner and Yamaha cited different administrative reviews of *Steel Flat Products from Korea*. In the 1997 review, the Department determined that merchandise labeled as "obsolete" was outside of the ordinary course of trade;[98] in the 2001 review, the Department included sales of merchandise labeled as "obsolete" in its calculation of normal value.[99] This demonstrates that the Department will consider not only one factor, such as whether the merchandise is "obsolete," in determining whether certain sales are outside the ordinary course of trade.

Considering all circumstances particular to Yamaha's sales in question, we find that there is insufficient evidence to conclude that these sales are outside of the ordinary course of trade. We know that the sales received the specified discount and that many were of prior model-year merchandise. These two facts alone, however, are not sufficient to determine that the sales were outside of the ordinary course of trade. For example, we note that the verification documents indicate that Yamaha sold these engines to the same dealer customers that purchased other Yamaha engines. This suggests that the engines follow the same course of trade as other engines. Further, there is no indication that the merchandise was in any way defective. Therefore, for the final determination, we have continued to include these sales in the calculation of normal value.

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[96] *See Murata Mfg.. Co.., Ltd., and Murata Erie North America, Inc., v. United States*, 820 F. Supp. 603, Slip Op. 93-53 (CIT 1993) (*Murata*).

[97] *See Certain Welded Carbon Steel Standard Pipes and Tubes From India, Final Results of Antidumping Duty Administrative Reviews*, 56 FR 64753, 64755 (December 9, 1993) (*Pipe and Tube from India*).

[98] *See Cold-Rolled Steel Flat Products from Korea (1997)*, 62 FR at 18441.

[99] *See Carbon Steel Flat Products from Korea (2001)* Issues and Decision Memorandum at Comment 13.

Comment 11: Credit Expenses for EP Sales

Yamaha reported its credit expenses for EP sales using the same rate that it applied to home market sales. The petitioner argues that the Department's questionnaire directed the company to use a dollar-denominated interest rate, and that the Department's practice is to require this. Therefore, the petitioner argues that Yamaha should use a dollar-denominated interest rate for credit expenses on EP sales.

Yamaha responds that the selling activities for its EP sales occurred in Japan, meaning that the Department should continue to use the Japanese interest rate in calculating the credit expense for these sales. Yamaha also contends that if the Department uses a U.S. interest rate, it should use YMUS's weighted-average short-term interest rate used for CEP sales.

Department's Position: We disagree with the petitioner and have continued to calculate credit expense for EP sales denominated in yen using a short-term borrowing rate incurred on loans of the same currency. We find that the petitioner's interpretation of Import Administration's Policy Bulletin No. 98.2 is inappropriate for this issue. The bulletin clearly states that the Department's policy is "to use a short-term interest rate tied to the currency in which the sales are denominated."[100] Therefore, for EP sales denominated in Japanese yen, we have calculated credit expense using the Japanese yen short-term borrowing rate reported by Yamaha. Likewise, for EP sales denominated in U.S. dollars, we have used the U.S. dollar interest rate revised at verification. *See* the *Final Analysis Memorandum* at #9.

Comment 12: Reporting of the REBATE4U Field

The petitioner notes that Yamaha's actual rebate payments to two customers did not match the company's reported rebates in its submitted database. The petitioner requests that the Department increase these amounts to reflect the actual payments made to these customers.

Department's Position: We agree with the petitioner and have recalculated REBATE4U based on the per-unit amounts corrected at verification. *See* the *Final Analysis Memorandum* at #25.

[100] *See* Import Administration Policy Bulletin No. 98.2, "Imputed Credit Expenses and Interest Rates" (February 23, 1998), as published on the ITA website at http://ia.ita.doc.gov.policy/bull98-2.htm .

Comment 13: Minor Corrections Submitted at Verification

During the CEP verification, Yamaha submitted minor corrections to its reported technical service and credit expense fields. The petitioner points out that the Department did not require Yamaha to submit new data to reflect these minor corrections, although it requested data for minor corrections to other fields. The petitioner requests that the Department make the appropriate changes to the fields in question, as outlined in the minor corrections letter submitted at the beginning of the CEP verification.

Department's Position: We agree with the petitioner and have recalculated technical services (TECHSERU) and credit expenses (CREDIT1U & CREDIT3U) to reflect the minor corrections presented by Yamaha at the beginning of the CEP verification. *See* the *Final Analysis Memorandum* at #9.

Comment 14: Application of LOT Adjustment

The petitioner alleges that the Department made a clerical error by designating all sales as LOTU 2 in the U.S. market. According to the petitioner, this designation causes an LOT adjustment to be made for sales to Mercury, even though the Department's intention, as stated in the *Preliminary Determination Notice* at 49870, was not to make an LOT adjustment for these sales.

BRP argues that the Department's *Preliminary Determination Notice* states that the Department granted an LOT adjustment on certain Yamaha sales to Puerto Rico, but did not grant an LOT adjustment on any sales to Mercury. BRP contends, however, that the Department's *Preliminary Analysis Memorandum* shows that the Department granted this adjustment in the margin calculation. BRP argues that the Department must not grant an LOT adjustment to Yamaha's EP sales to Mercury because it found no comparable home market LOT.

Furthermore, BRP points out that the Department, in both the *Preliminary Determination Notice* and the *Preliminary Analysis Memorandum*, stated that Yamaha's CEP sales are not comparable to either of Yamaha's home market LOTs. BRP notes that in the *Preliminary Analysis Memorandum*, however, the Department stated that it designated all of Yamaha's EP sales to the petitioner as LOT=2. This designation, according to BRP, has a substantial impact on the LOT adjustment. BRP argues that section 773(a)(7)(B) of the Act provides that the Department will grant a CEP offset when NV is established at a more advanced LOT than the CEP LOT, but the data available do not provide an appropriate basis to determine whether the difference in price comparability warrants an LOT adjustment. It contends that the Department cannot maintain that all CEP sales are entitled to a CEP offset and also maintain that it can quantify an LOT adjustment for EP sales to the petitioner. It argues that the Department must find that Yamaha's EP sales to the petitioner are comparable to a home market LOT if it grants Yamaha an LOT adjustment for those sales. Further, BRP disagrees with the Department's explanation that designating all of Yamaha's U.S. sales as LOT=2 was necessary to

create a basis for calculating CV selling expenses. BRP argues that there are other options for calculating CV selling expenses that would not distort the margin calculation.

Yamaha responds that BRP misunderstood the Department's treatment of the different LOTs in the U.S. market. It contends that although the Department nominally designated CEP and EP sales as LOT=2 to facilitate certain calculations, it treated each LOT differently. To demonstrate this, Yamaha points out that the Department adjusted normal value for CEP sales by the CEP offset, although it did not make a similar adjustment for EP sales.

Department's Position: We agree with the petitioner and BRP. At the preliminary determination, we did not intend to calculate an LOT adjustment for Yamaha's EP sales made to Mercury. We stated, "{F}or Yamaha's U.S. sales to Mercury, there was no comparable level of trade in the home market. Therefore, we were not able to make a level of trade adjustment." *See Preliminary Determination Notice* at 49871. However, due to a clerical error in the program, we calculated an LOT adjustment for certain EP sales that were made to Mercury.[101]

The statute at section 773(a)(7)(A) allows for an LOT adjustment when the difference in LOTs:

> (i) involves the performance of different selling activities; and
> (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In this case, Yamaha's EP sales to Mercury have no corresponding LOT in the home market. As a result, there are no data on the record that would allow the Department to establish whether there is a pattern of consistent price differences between sales at different LOTs in the comparison market. Therefore, the Department cannot make an LOT adjustment for the sales made to Mercury.

In the preliminary determination margin program, we set LOT equal to 2 for all U.S. sales so that (1) sales in the U.S. market would match to the closest LOT in the home market and (2) CV selling expenses would merge with the U.S. sales database. While this programming is not in error, we inadvertently excluded additional programming to ensure that sales to Mercury matching to LOT 3 did not receive an LOT adjustment. We have added the necessary programming language for the final determination. *See Analysis Memorandum* at 7.

Comment 15: Home Market Consignment Sales

[101] EP sales to Puerto Rico matching to LOT 3 properly received an LOT adjustment.

In its Section A response, Yamaha explained that it makes a portion of its home market sales on consignment.[102] BRP asserts that this should not affect the Department's LOT analysis for dealers and distributors because no evidence on the record, other than Yamaha's statements, indicates that the company provided this service.

The petitioner did not comment on this issue.

Department's Position: We disagree with BRP. At Yamaha's offices in Japan, we performed a comprehensive verification of the respondent's sales processes and found no evidence to contradict Yamaha's description of its consignment sales as explained in the Section A questionnaire response. Therefore, we have considered home market consignment sales to dealers, as reported by Yamaha, in our LOT analysis. *See* Comment 7 above.

Comment 16: Packing Costs

BRP notes that Yamaha identified its reported packing costs for certain sales to the petitioner as a minor error at verification. As the company states, the Department found that Yamaha incurred packing revenue that was the same for all sales. BRP requests that the Department include these findings at verification in its final margin calculation.

Department's Position: We agree with BRP. At verification, we found that the reported packing expense for certain sales was incorrect because it did not account for packing revenue realized on those sales. Therefore, we have recalculated packing expense for the sales in question to include an offset in the amount of packing revenue received by Yamaha. *See Final Analysis Memorandum* at #7.

Comment 17: Amendment to Scope (Post-Briefing)

On November 17, 2004, the petitioner submitted a request that the Department exclude certain powerheads from the scope of the investigation. On November 23, 2004, Yamaha submitted comments on the petitioner's request.[103] The petitioner submitted a response to these comments on November 30, 2004.

Yamaha agrees with the petitioner's request to exclude the powerhead models requested by the petitioner. Yamaha, however, states that the Department should exclude all powerheads from the scope, not only those requested by the petitioner. Yamaha argues that the petitioner's request to only

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[102] *See* Yamaha's Section A response at pages A-40 and A-65.

[103] On December 6, 2004, we rejected Yamaha's comments because they contained new factual information submitted after the Department's regulatory deadline. The date of Yamaha's revised submission is December 7, 2004.

exclude certain powerheads from the scope shows that the petitioner is admitting that powerheads should not have been included in the scope of the investigation from the outset. Yamaha argues that petitioners should not be able to "gerrymander" the scope to satisfy their import needs. Citing *Mitsubishi Electric*,[104] Yamaha argues that the Department, not the petitioner, has the ultimate responsibility to define the scope. Further, Yamaha argues that the petitioner's assertion that there is no clear dividing line in physical characteristics between powerheads and outboard engines demonstrates that the petitioner's request to only exclude certain powerheads is arbitrary and based on the petitioner's whim. If the Department decides to accept the petitioner's request, Yamaha argues that it must also accept that powerheads are a separate class or kind of merchandise.

Citing *Softwood Lumber from Canada (2002)* and *Spring Table Grapes*,[105] the petitioner argues that the Department's practice is to accept the scope described in the petition. Furthermore, citing *Stainless Steel Hollow Products from Japan*,[106] the petitioner argues that the Department gives "ample deference to the petitioners on the definition of the product for which they seek relief." The petitioner argues that the Department will generally not change the petitioner's scope definition except to clarify the language or address administrability problems, which the petitioner states are not present in this investigation. The company also argues that Yamaha has provided no legal basis or case precedent for the Department to reject the petitioner's request. It contends that Yamaha's argument that a specific exclusion request requires a general exclusion has no legal basis and is contrary to Department precedent. Finally, the petitioner rejects Yamaha's argument that the request demonstrates that powerheads and outboard engines are a separate class or kind of merchandise. The petitioner contends that Yamaha's argument would require the Department to find that any distinction between products identified for product comparison purposes would compel a class or kind distinction.

Department's Position: We agree with the petitioner. The petitioner defines the scope of the petition based on the products for which it seeks relief. As stated in *Softwood Lumber from*

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[104] *See Mitsubishi Electric Corp. v. United States*, 898 F.2d 1577, 1582 (Fed. Cir. 1990) (*Mitsubishi Electric*).

[105] *See Initiation of Antidumping Duty Investigations: Spring Table Grapes From Chile and Mexico*, 66 FR 26831, 26832-26833 (May 15, 2001) (*Spring Table Grapes*).

[106] *See Notice of Final Determination of Sales at Less Than Fair Value: Circular Seamless Stainless Steel Hollow Products From Japan*, 65 FR 42985 (July 12, 2000) (*Stainless Steel Hollow Products from Japan*) (citing *Eckstrom Indus., Inc. V. United States*, 27 F. Supp. 2d. 217, 233 (CIT 1998)).

Canada (2002), "{T}he Department generally should not use its authority to define the scope of an investigation in a manner that would thwart the statutory mandate to provide the relief requested in the petition."[107] In *Spring Table Grapes*, the Department stated,

> To the extent (the petitioner) can establish that the covered imports are dumped and the cause of material injury, it is entitled to relief under the statute, notwithstanding the fact that it may have excluded from the scope other products which may or may not also be the subject of injurious dumping...It is also appropriate that the Department not force the petitioner to seek duties on products against its will.[108]

Therefore, in light of the Department's practice, we accept the petitioner's request to exclude only the specified powerheads from the scope of the investigation. We have removed sales of these powerheads from the final antidumping duty calculation.

In addition, we disagree with Yamaha's contention that excluding the specified powerheads from the scope demonstrates that powerheads are a separate class or kind of merchandise. The *Spring Table Grapes* decision also stated,

> In other words, absent some overarching reason to the contrary, the fact that application of the "Diversified Products" criteria reveals that a particular product which is excluded from the scope could be considered within the same class or kind will not normally result in including that product in the coverage of the investigation for reasons discussed above: to the extent the petitioners are not interested in seeking trade relief against a particular product, the Department should not require them to do so.[109]

This is the situation in the instant investigation. The Department analyzed the *Diversified Products* criteria and determined that powerheads and engines constitute a single class or kind of merchandise. *See* Comment 1 of this memorandum. Although the Department is treating powerheads and engines as a single class or kind, this does not mean that the Department must include all products that could conceivably fit within this class or kind in the scope. Therefore, for the final determination, we have continued to treat powerheads and completed outboard engines as a single class or kind of merchandise.

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[107] *See Softwood Lumber from Canada (2002) and* accompanying *Issues and Decision Memorandum for the Antidumping Duty Order of Certain Softwood Lumber Products from Canada* at Comment 49.

[108] *See Spring Table Grapes*, 66 FR at 26833.

[109] *See Id.* at footnote 3.

Comment 18: Yamaha's Standard Cost System

The petitioner alleges that Yamaha's submitted costs are inaccurate because it reported from its standard cost system standard product costs from a time period outside the POI. The petitioner contends that standard cost systems that have not been recently updated may be inaccurate due to changes that may have occurred in the production process or material costs, and systems that have been updated very recently may also be inaccurate to the extent that they do not reflect the experience of the product costs during the POI. The petitioner cites the May 3, 2004, response to the Department's Section D questionnaire and the cost verification report to support its claim that Yamaha used standard costs outside of the POI to derive reported costs. The petitioner asserts that the Department should adjust Yamaha's submitted costs to correct this inaccuracy.

The respondent argues that the petitioner misunderstands Yamaha's cost accounting system and, as the Department verified, Yamaha's cost accounting system adequately accounts for all product-specific costs on a contemporaneous basis. Yamaha asserts that it tracks the standard unit costs for each of its specific models of outboard motors in the normal course of business and then adjusts those costs monthly and semiannually to an actual unit cost based on actual costs incurred during the accounting period. Yamaha contends that the Department reviewed many documents produced in the ordinary course of business that supported the reasonableness and accuracy of Yamaha's standard cost system. The respondent alleges that the petitioner confuses Yamaha's historical product-specific standard costs used in the actual cost build-up with Yamaha's component-specific standard costs that it continually overwrites. Yamaha contends that at verification the Department reviewed the standard "bill of materials" for three models the Department chose randomly not to determine the standard cost used for the actual cost build-up of product specific costs, but instead to assess the logic and methodology behind Yamaha's standard cost system.

Department's Position: We agree with Yamaha that its response methodology was reasonable and reflected contemporaneous costs. For response purposes Yamaha reported actual per-unit product costs from its normal books and records. Yamaha determined these actual product costs first by adjusting the total fiscal year-end standard costs (*i.e.*, total of the standard costs from when products were produced during the fiscal year) of each product to actual costs using a year-end variance between total standard costs of all products and total actual costs incurred during the fiscal year. The total actual costs of each product were then divided by the product's total production quantity during the fiscal year to arrive at an actual per-unit cost which was used for reporting purposes. The materials component of Yamaha's standard product costs are updated monthly while other processing costs were updated semi-annually. Yamaha does not retain the monthly detail of its continuously over-written standard costs; however, it does retain the total summarized standard costs for each of its products according to five major cost categories (*e.g.*,
materials, processing, etc). We tested available detail behind these summarized costs for sample products at cost verification exhibits 15, 19, 20 and 21.

As part of our cost verification agenda and at the petitioner's request in its pre-verification comments we tested Yamaha's standard cost system (*see Verification Report of the Cost of Production Data Submitted by Yamaha Motor Company, Ltd., Yamaha Marine Company, Ltd., and Yamaha Kumamoto Products Company, Ltd. (Cost Verification Report),* dated October 29, 2004, at pages 7, 8, and 12-14) and found that Yamaha's standard costs captured product costs in an accurate manner. We note that in its pre-verification comments the petitioner did not express concerns regarding the contemporaneity of standard costs nor did it request specific related testing.

The petitioner cites Yamaha's Section D response where an explanation is given for Yamaha's response methodology for reporting certain powerheads in its cost database. These powerheads represent a small percentage of total subject merchandise. Some powerheads as defined in this case included subassemblies of outboard motors that Yamaha did not consider finished goods in its normal books and records. Because Yamaha calculates actual product costs (which were used to report costs for the dumping analysis) only for its finished goods and not for these subassemblies, it was necessary for them to use an alternative approach to report costs for these powerheads. Yamaha used the detailed standard costs for subassemblies at March 2004 because they were the standard cost detail closest to the POI that were available. The standard costs for these subassemblies were then adjusted by the variance between actual and standard costs for powerheads that were considered finished goods to approximate actual costs for reporting purposes. We again found this methodology to be reasonable and contemporaneous with the POI given the constraints imposed by the records kept in Yamaha's normal cost accounting system.

Comment 19: Certain Excluded Costs

The petitioner argues that certain costs reflected in Yamaha's financial statements, which were excluded from reported costs, should be included in accordance with the Department's longstanding practice.

The respondent asserts that the costs in question were appropriately omitted from reported costs. Yamaha contends that it does not apply an adjustment for these costs in its normal cost accounting methodology when calculating model-specific costs, and therefore did not include the adjustment when reporting costs. Yamaha argues that, as the Department verified, the costs in question included three categories of items, and if the Department disagrees with Yamaha and decides to make an adjustment for these costs, the Department should only adjust the cost database by an amount attributable to one of the items. Yamaha then suggests a methodology for the adjustment if one is made.

Department's Position: We agree with the petitioner that the costs in question should be included in reported costs because the costs are incurred as a normal part of the manufacturing process. These costs were included in the fiscal year-end 2004 income statement which was used to calculate the general and administrative (G&A) expense ratio. However, we cannot address the specifics of this issue in this public forum as a meaningful discussion is only possible by means of reference to business proprietary information. We have therefore addressed the issue further in the proprietary version of the

Cost of Production and Constructed Value Calculation Adjustments for the Final Determination memorandum (*COP and CV Calculation Memorandum*) dated December 24, 2004, from James Balog to Neal Halper.

Comment 20: Parent Company G&A Expenses

The petitioner asserts that the Department should include the total amount of G&A expenses incurred by the respondent's parent company (*i.e.*, Yamaha Motor Corporation (YMC)) when calculating the G&A ratio. The petitioner claims that the record is clear and the respondent admits that YMC performs activities related to the production and sale of subject merchandise. The petitioner points out that even though YMC performs activities related to the production and sale of subject merchandise and YMC's cost of goods sold (COGS) includes costs related to subject merchandise, YMC has wrongly assigned a portion of its G&A expenses exclusively to non-subject merchandise.

The petitioner refers to the Department's questionnaire which instructs the respondent to base reported G&A expenses on the amounts incurred by the company manufacturing subject merchandise plus an amount for administrative services performed on the company's behalf by its parent company. The petitioner states that when the parent company serves as both a manufacturer of non-subject merchandise and a parent company, it is sometimes appropriate to separate the G&A costs incurred at the parent company level between those costs attributable to the parent company administrative functions performed on behalf of the subsidiary and those costs attributable to the parent company's manufacturing operations for non-subject merchandise. The petitioner argues that the appropriateness of separating G&A expenses in this way, however, hinges upon whether the manufacturing (or COGS) portion of the parent component relates exclusively to non-subject merchandise. The petitioner alleges that if the parent company performs any production or selling-related activities with respect to subject merchandise, then isolating any portion of parent-level G&A expenses becomes inappropriate as those costs relate to the company as a whole which includes both subject and non-subject merchandise. The petitioner alleges that because YMC is involved in the production and sale of subject merchandise and its COGS includes amounts related to subject merchandise, the exclusion of certain G&A costs is inconsistent with the Department's longstanding practice of computing G&A expenses based on the ratio of total company-wide G&A expenses divided by COGS. The petitioner cites *Silicomanganese From India*[110] to support its explanation of the Department's longstanding practice regarding reporting of G&A expenses.

Yamaha claims that it correctly accounted for parent company G&A expenses and that no adjustment regarding its reporting of G&A expenses should be made. The respondent points out that the petitioner admits that it is sometimes appropriate to separate the costs incurred at the parent company attributable

[110] *See Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination*, 67 FR 15531, 15533 (April 2, 2002) (*Silicomanganese from India*).

to the parent company administrative functions performed on behalf of the subsidiary from total G&A expenses at the parent company level. Yamaha then alleges that the case cited by the petitioner to support its arguments involves only the producing entity of the company in question and does not address the issue of G&A incurred by a parent company that does not manufacture the subject merchandise.

Yamaha cites *Color Television Receivers from Malaysia*[111] in support of its claim that the Department's longstanding practice in cases involving a subsidiary manufacturing company and a parent company (which is also a manufacturer of non-subject merchandise) is to allocate only a proportional share of G&A expenses of the parent company for services provided to the subsidiary. Further, the respondent claims that the Department instructed Yamaha in the Section D questionnaire to include in its reported G&A expenses *only* an amount for administrative services performed on the respondent company's behalf by its parent company or other affiliated party.

Yamaha argues that according to the Department's practice and its questionnaire instructions, it was appropriate for Yamaha to exclude those YMC administrative expenses that were already fully performed by administrative departments at Yamaha Marine Company, Ltd. (YMEC) and those expenses that related solely to the parent company's manufacture of non-subject merchandise. Yamaha alleges that at verification the Department thoroughly examined the YMC functions and expenses that Yamaha excluded from the YMC G&A figures.

Lastly, the respondent claims that the petitioner agrees that Yamaha can exclude certain parent company functions, but that the petitioner offers no specific information as to which expense items it believes Yamaha inappropriately excluded in YMC's G&A expenses. Yamaha contends that it fully answered the Department's questions at verification and provided the Department with documents that show the reasonableness of Yamaha's specific exclusions from YMC G&A expenses and without any specifics to support the petitioner's objections the Department cannot evaluate the merits of the petitioner's claims.

Department's Position: We agree with Yamaha that the G&A expense ratios in the instant case were calculated correctly according to the Department's practice. We disagree with the petitioner that the entire amount of YMC's G&A expenses should be included when calculating the parent company component of the G&A expense ratios. Including the entire amount would result in Yamaha reporting more parent company G&A expenses than was attributable to the subject merchandise.

It is the Department's practice to calculate the G&A expense ratio based on a respondent company's (*i.e.*, the producer of subject merchandise) unconsolidated financial statements plus a portion of the parent company's G&A expenses if the parent performed administrative services on behalf of the

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[111] *See Notice of Final Determination of Sales at not less than Fair Value*: *Certain Color Television Receivers from Malaysia*, 69 FR 20592, 20594 (April 16, 2004) (*Color Television Receivers from Malaysia*).

respondent. In the instant case the respondent calculated three separate G&A ratios, one for each of the two respondents in this case (*i.e.*, YMEC and Yamaha Kumamoto Products Co., Ltd. (YKP)) and one reflecting the parent company G&A that was attributable to YMEC and YKP (*i.e.*, services provided to or for YMEC and YKP, plus a proportionate amount of Yamaha corporate G&A). *See* cost verification exhibit 24. YMC is in the business of manufacturing motorcycles and automobile engines, not outboard motors. It is the respondent companies YMEC and YKP that produce outboard motors. Thus, it is inappropriate to allocate all of YMC's G&A costs to outboard motor production activity (*see Cost Verification Report* at section V.A.B.). Therefore, we find that the respondent appropriately accounted for and reported G&A expenses, and thus no adjustment is deemed necessary.

Comment 21: Affiliated Supplier Inputs

The petitioner alleges that information submitted by Yamaha indicates that the Department should revise Yamaha's transactions with affiliated suppliers to reflect the higher of transfer price, cost of production, or market value. The petitioner claims that Yamaha did not supply the market value or cost information for all of the products for which the Department requested comparison information. The petitioner suggests that the Department use the comparison information for the products that the respondent did provide comparable market value information to calculate an overall adjustment to costs.

Yamaha claims that no element of Yamaha's reported costs constitutes a major input. The respondent further argues that even if the Department found that an element of reported costs did constitute a major input, there is substantial information on the record that the parts supplied by affiliates reflect market prices. Yamaha asserts, therefore, that there is no reason to adjust the cost database for affiliated supplier inputs.

Yamaha cites *LNPP from Japan*[112] as support for its claim that an input is generally considered to be "major" if it is an essential component of the subject merchandise and accounts for a significant percentage of the total cost of materials, labor, or overhead. The respondent contends that the Department has made no finding in this case that any particular element of Yamaha's cost of manufacturing constitutes a major input. Yamaha points out that the petitioner does not argue that any particular part in an outboard motor constitutes a major input. Yamaha alleges that during the questionnaire process it provided detailed information on affiliated suppliers that showed that purchases from affiliates were relatively insignificant as a percentage of total cost of goods sold. Yamaha contends that it provided transfer prices and comparable parts prices for 30 inputs that YMEC purchased from the top three affiliated suppliers and that of those inputs aluminum and power tilt and trims (PTT) together constituted the largest single portion of the parts purchased from affiliated suppliers. Yamaha claims that this information showed these inputs were a relatively insignificant

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[112] *See Final Determination of Sales at Less Than Fair Value*: *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled From Japan*, 61 FR 38319, 38162 (July 23, 1996) (*LNPP from Japan*).

percentage of total cost of goods sold, had no discernable effect on cost, and could not greatly skew cost which, the respondent alleges, was what the major input rule was intended to prevent.

Finally, the respondent contends that even if the Department found that these inputs were major inputs, the Department examined many specific transactions that confirmed that YMEC purchased aluminum from YMC at above-market prices. Additionally, Yamaha claims that the Department extensively reviewed the types and prices of PTT products YMEC purchased and paid to affiliated and unaffiliated suppliers and found that the companies did not sell directly comparable products. Further, Yamaha claims that the product differences account for any differences in prices paid between the affiliated and unaffiliated companies. Yamaha contends that in actuality the Department's findings at verification show that Yamaha is paying generally more for PTTs acquired from affiliated suppliers than for PTTs acquired from unaffiliated
suppliers.

Department's Position: We agree with the respondent that none of the inputs from affiliates should be considered major inputs. We agree with the petitioner that in accordance with section 773(f)(2) of the Act adjustments to transactions with affiliates are appropriate in some circumstances in this case.

The manufacture of outboard engines is unique in that outboard engines consist of hundreds of individual parts, none of which emerge as dominant inputs. During the case, we considered that transactions with affiliates when looked at in the aggregate may be of concern because some affiliates supplied a numerous assortment of parts to the respondent. Therefore, in a letter sent to Yamaha dated June 21, 2004, we requested that for the three largest affiliated suppliers the respondent provide a chart that included the ten items from each of the suppliers that constituted the largest purchases in terms of value. We also requested that Yamaha report the total value of inputs purchased from all affiliates. At verification we tested Yamaha's response to these requests.[113] From our analysis, we learned that Yamaha purchased the majority of its inputs from non-affiliates and that the aggregate amounts from the affiliates that supply the largest quantities of parts and services did not cumulatively raise to the levels we normally associate with a major input.

In terms of section 773(f)(2) of the Act, for purposes of the final determination, we collapsed YMEC and YKP. *See* page 1 of the *COP and CV Calculation Memorandum*. Thus, for purposes of calculating cost, transactions between YMEC and YKP were valued at the transferring entity's COP. We tested transactions with other affiliates to ensure such transactions occurred at market prices. However, we note that because the parts for an engine are necessarily unique, market prices of specific or comparable parts were not always available. In such cases we looked to the COP of the supplier as a surrogate for market value. In addition, because of the large quantity of parts supplied by affiliates and the fact that only a few individual parts were significant in terms of value, we only looked at the largest suppliers. We tested the reported costs (*i.e.*, transfer price) for the top ten parts in terms of

[113] *See Cost Verification Report* at section IV.A.5 and exhibit 17.

value supplied to YMEC from each of its top two affiliated suppliers and to YKP from its top affiliated supplier. We note that these suppliers account for substantially more than half of the value of parts supplied by affiliates to YMEC and YKP. We adjusted only those affiliated suppliers tested by the overall percent to which transfer prices occurred at less than arm's-length prices. *See* adjustment 1 of the *COP and CV Calculation Memorandum* for further detail of our adjustments.

Agree_____ Disagree_____ Let's Discuss_____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

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Date