

**CHAPTER 8:
NORMAL VALUE**

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I. EXPORTING-COUNTRY MARKET OR THIRD-COUNTRY MARKET

References:

The Tariff Act of 1930, as amended (the Act)
 Section 773(a)(1) - selecting exporting-or third-country market
 Department of Commerce Regulations
 19 CFR 351.301(d) - timeliness of market viability allegations
 19 CFR 351.404 - selecting exporting-or third-country market; selecting among
 third-country markets; exceptions
 19 CFR 351.405(a) - constructed value (CV) may be substituted for foreign
 market sales
 Regulation Preambles
 62 FR 27356-27358 (May 19, 1997)
 61 FR 7333-7334 (February 27, 1996)
 SAA
 Section B.2.a - market viability and third-country sales
 Antidumping Agreement
 Articles 2.1 and 2.2 - use of exporting-country or third-country sales
 WTO Antidumping Agreement
 Article 2.2 and footnote 2
 Legislative History
 S. Rep. 103-412 at 67-68
 H. Rep. 103-826 at 82-83

A. The Five Percent Viability Test

Section 773(a)(1)(B)(i) of the Act identifies normal value (NV) as the price at which the foreign like product is first sold for consumption in the exporting country (EC). (See section II of this chapter for a discussion of foreign like product.) However, there are several exceptions to this rule. One exception involves market viability. A market is considered viable if the aggregate quantity of sales of the foreign like product to affiliated and unaffiliated purchasers in the market is five percent or more of the aggregate quantity of sales of subject merchandise to unaffiliated buyers in the United States. (For an example of selection of a third country market where sales in the home market were less than 5% of sales in the United States, see [Purified Carboxymethylcellulose from the Netherlands: Preliminary Results of Antidumping Duty Administrative Review](#), 72 FR 44099, 44102 (August 7, 2007) (unchanged in [Final results](#), 72 FR 70821 (December 13, 2007) and the accompanying [Issues and Decision Memorandum](#)). If the EC's market for the foreign like product is not viable, NV may be based on sales to a viable third-country market¹ or on CV, but the Department has a preference for calculating NV based on sales to a viable third-country market, rather than on CV, in such a situation. See 19 CFR 351.404(f). Nevertheless, the Department may decide to use CV over a viable third-country market in appropriate circumstances (see 19 CFR 351.404(c)(2)(ii)). These instances can arise where third-country prices are determined to be not "representative". Similarly, where an exporter had neither a viable home market nor any third-country markets, the Department has resorted to CV. See [Notice of Preliminary Results of Antidumping Duty Administrative Review: Oil Country Tubular Goods from Argentina](#), 67 FR 57215 (September 9, 2002) (unchanged in [Final Results](#), 68 FR 13262 (March 19, 2003) and the accompanying [Issues and Decision Memorandum](#)). Also, note that in unusual situations, the Department has the discretion to use a number that is less than or greater than five percent to determine viability. See SAA at 821. Finally, regardless of the market chosen to calculate NV, we make comparisons to CV on a transaction by transaction basis in those instances where there is no appropriate price-to-price comparison match within the selected market for a given U.S. sale.

If the EC market is not viable, the respondent's third-country market sales must be analyzed to determine which market is best suited for NV comparison purposes. Upon receipt of the response to section A of the antidumping questionnaire, the Department must decide whether the EC market is viable as soon as possible so we can instruct the respondent how to respond to the NV section(s) of the questionnaire.

A discount is a reduction to the gross price that a buyer is charged for goods. Although the discount need not be stated on the invoice, the buyer remits to the seller only the face amount of the invoice less discounts. Common types of discounts include early payment discounts, quantity discounts, and loyalty discounts (see section XI of this chapter for more information on quantity discounts).

¹ The term "third-country" refers to a country other than the EC or the United States.

Similar to discounts, rebates are reductions in the gross price that a buyer is charged for the goods. We consider rebates to be discounts granted after the delivery of the merchandise to the customer. Unlike discounts, rebates do not result in a reduction in the remittance from the buyer to the seller for the particular merchandise with which the rebate is associated. Rather, a rebate is a refund of monies paid, a credit against monies due on future purchases, or the conveyance of some other item of value by the seller to the buyer after the buyer has paid for the merchandise. When the seller establishes the terms and conditions under which the rebate will be granted at or before the time of sale, the Department reduces the gross selling price by the amount of the rebate. Where rebates are based on aggregate purchases over a fixed period of time, we base the deduction on the level of rebate granted in the most recently completed rebate period. In determining the validity of a claim for a rebate, our practice is to accept adjustments that are not reported on a transaction specific basis “when it was not feasible for a respondent to report the adjustment on a more specific basis, provided that the allocation method that the respondent used does not cause unreasonable inaccuracies or distortions.” See [Antifriction Bearings \(Other than Tapered Roller Bearings\) and Parts Thereof from France et. al.: Final Results of Administrative Review and Termination of Administrative Reviews](#), 62 FR 2081, 2091. (January 15, 1997) ([Antifriction Bearings, 1997](#)). Consistent with this practice, we have disallowed rebates that are instituted retroactively since such rebates could be designed to reduce the comparison market price for the purpose of reducing or eliminating dumping margins. See e.g., [Final Results of Antidumping Duty Administrative Review: Certain Weided Carbon Steel Pipes and Tubes from Korea](#), 52 FR 33460, September 3, 1987.

Only sales to one third-country market may be used as the basis of NV. If there is more than one viable third country market (the same five percent test is applied to each market), the Department generally will use the following criteria (as specified in 19 CFR 351.404(e)) to select a third country for calculating NV: (1) the foreign like product exported to the particular third country is more similar to the subject merchandise exported to the United States than is the foreign like product exported to other countries; (2) the volume of sales to the third country is larger than the volume to other third countries; and (3) such other factors that the Department considers appropriate. It is not necessary for all three criteria to be present in order to justify selection of a particular market. See [Notice of Initiation of Antidumping Duty Investigations: Certain Frozen and Canned Warmwater Shrimp from Brazil, Ecuador, India, Thailand, the People’s Republic of China and the Socialist Republic of Vietnam](#), 69 FR 3876 (January 27, 2004).

Consult with your supervisor if there appears to be any question about whether EC sales should be reported as the basis for NV for your investigation or administrative review, or if it is necessary to select a third-country market for NV reporting purposes.

B. Exceptions to Basing NV on Prices

Once a market is determined as viable, the sales must be examined to determine if they may be used for NV calculations. In doing this analysis, certain exceptions to basing NV on prices in an EC or third-country market (foreign markets) must be considered. These involve situations where like products are not sold in either usual commercial quantities or in the ordinary course of trade. (See section IV of this chapter for more information on the ordinary course of trade.) In addition, the Act provides for “particular market situations” wherein a foreign market fails to permit a proper comparison with U.S. price. Although the Act does not identify these “particular market situations,” several are set forth in the SAA. See SAA at 152. Examples of “particular market situations” include: (1) where a single sale in a foreign market constitutes five percent of sales to the United States; (2) where there are such extensive government controls over pricing in a foreign market that prices in that market cannot be considered competitively set; and (3) where there are differing patterns of demand in the United States and a foreign market. Note that if any of the preceding circumstances eliminate all EC market sales from consideration, then third-country sales could be considered for NV if there is a viable third-country market. See Id.

Also, in addition to the above exceptions, affiliated party sales may be unusable for NV calculations in certain other situations. See section XVII of this chapter for information on when affiliated party sales can be used in determining NV.

C. Sample Viability Calculation

The following is an example of an EC viability calculation for an investigation or administrative review:

There are sales of 11 units of the foreign like product in the EC market and sales of 100 units of subject merchandise to the United States. The EC market is viable ($11/100 = 11$ percent, which is greater than the five percent required for viability). If it is necessary to determine the viability of sales to a third-country market, the same five-percent test is applied.

II. FOREIGN LIKE PRODUCT

References:

- The Tariff Act of 1930, as amended (the Act)
- Section 771(16) - definition of foreign like product
 - Section 773(a)(1)(B)(I) - normal value (NV) must be based on foreign like product
- Department of Commerce (DOC) Regulations
 - Section 351.411 - differences in physical characteristics
- SAA
 - Section B.2.c.(3) - adjustments for physical differences
- Antidumping Agreement

Article 2.4 - allowances for differences in physical characteristics

Article 2.6 - like product definition

Import Administration Policy Bulletin

Policy Bulletin 92.2 of July 29, 1992 - differences in merchandise; 20% rule

A. Types of Comparisons

We confine our comparisons between merchandise sold in the foreign market and merchandise sold in the U.S. to products that either 1) share identical physical characteristics, or 2) to products that are sufficiently similar in physical characteristics to be used for comparison purposes. Section 771(16) of the Tariff Act defines the term “foreign like product” as merchandise produced by the same person in the same country that is in the first of the following categories in respect to which a determination of normal value can be satisfactorily made: A) Subject merchandise and other merchandise which is identical in physical characteristics; B) Merchandise which is the subject of the investigation, like that merchandise in component material or materials and in the purposes for which used, and approximately equal in commercial value to that merchandise; C) Merchandise of the same general class or kind as the merchandise which is the subject of the investigation, like that merchandise in the purposes for which used, and which the administering authority determines may reasonably be compared with that merchandise.

In order to make product comparisons, analysts must acquire substantial technical knowledge about the products, their uses, and process of manufacture. This knowledge can be gathered from submissions by the parties, product literature such as catalogs and brochures, domestic plant tours, and information from a variety of public sources including government agencies and trade associations, internet searches, and consultations with technical experts, usually employees of the Department or other federal agencies. See, e.g., [Final Determination of Sales at Less than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada](#), 68 FR 52741 and the accompanying [Issues and Decision Memorandum](#) at Comment 2 (September 5, 2003) and [Final Determination of Sales at Less than Fair Value: Certain Pasta from Italy](#), 61 FR 30326, 30346 (June 14, 1996) (Pasta From Italy, 1996).

B. Same Manufacturer/Producer Requirement

If resoles of different manufacturers’ products are reported by a respondent, we should ensure that, in determining NV, we confine our comparisons to sales of merchandise produced by the same producer or manufacturer. Because section 773(a)(1)(B)(I) of the Act incorporates, by reference, the definition of foreign like product in section 771(16) of the Act, it precludes our using sales of merchandise produced by persons other than the manufacturer/producer of the particular U.S. sale or sales being analyzed in our calculation of NV. See [Pasta From Italy, 1996](#) and [Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty](#)

[Administrative Review](#), 69 FR 6259, Comment 13 (February 10, 2004) and the accompanying [Issues and Decision Memorandum](#).

C. Identical Merchandise Comparisons

The statute establishes a preference to compare the subject merchandise sold in the United States to merchandise sold in the comparison market that has the same physical characteristics as the subject merchandise. See, e.g. [Certain Hot-Rolled Carbon Steel Flat Products From Thailand; Preliminary Results of Antidumping Duty Administrative Review and Rescission in Part](#), 71 FR 65458, 65461 (November 8, 2006) (unchanged in [Final Results](#), 72 FR 27802 (May 17, 2007), and the accompanying [Issues and Decision Memorandum](#)) and [Carbon and Alloy Steel Wire Rod from Trinidad and Tobago; Preliminary Results of Antidumping Duty Administrative Review](#), 71 FR 65077 (November 7, 2006) (unchanged in [Final Results](#), 72 FR 9922 (March 6, 2007)). However, sales of identical merchandise may not exist in the comparison market. Additionally, as discussed below, the Department excludes certain sales of identical merchandise from consideration for other reasons (e.g., the sales are below cost, not at arm's length prices, or for some other reason outside the ordinary course of trade).

Comparison market sales of identical merchandise cannot be matched to U.S. sales if they are so unusual as to be outside the ordinary course of trade. See section 771(16)(A) of the Act. The term "ordinary course of trade" is defined in section 771(15) of the Act 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." See section 4 of this chapter for a discussion of the ordinary course of trade. Sales of foreign like product may also be excluded by the Department if they meet criteria set out in section 773(b) of the Act (the sales-below-cost test). The sales-below-cost test is discussed in further detail in chapter 9. We may also exclude comparison market sales of identical merchandise as potential comparisons if those sales are made to affiliated parties at non-arm's length prices (as determined by the arm's length test).

Also, the model matching criteria used to identify identical and most similar merchandise may not be exhaustive of all of the physical qualities of the product. Sales of identical merchandise sold in the comparison market are normally identified and defined by the product-specific model matching criteria, as defined in the case and which are detailed in the antidumping questionnaire for that case and period of investigation or review. However, products sold in the U.S. and the foreign markets may possess the same specific attributes in terms of the model matching criteria, but may not actually be physically identical in every respect. The Department, in establishing the model match criteria for a specific case, relies upon criteria which represent those physical differences which also have an effect on prices.

D. Similar Merchandise Comparisons

When it is not possible to make identical product comparisons, we will compare merchandise which is physically similar to the articles sold in the United States. The Department generally requires that all foreign market sales of foreign like products and their complete technical specifications be reported. This allows us to determine which products in the foreign market are most similar to those sold to the United States. Prior to the issuance of our questionnaire we consider the physical characteristics of the merchandise in order to determine which characteristics should be used as the basis for selecting the most similar products. In an investigation, we request comments from both the petitioner and respondents regarding the particular physical characteristics to use for establishing the most similar merchandise and which physical characteristics should be given the most weight in analyzing product similarity. Later in the process, we determine how subcategories within each characteristic should be compared to each other. In a review, model-matching criteria may have been resolved in the prior segment, so this step may not be necessary. Before proceeding with the questionnaire in a review, however, ensure that the product-comparison methodology is clear. If not, a comment period may be appropriate. Based on these comments, we determine the hierarchy of product characteristics that will be used to match products. We include this hierarchical list of product characteristics, known as matching criteria, in sections B and C and/or Appendix V of our questionnaire. While the product comparison methodology used in the investigation is often used in subsequent proceedings, the product comparison methodology may be changed after the initial investigation, or even in later reviews, if the Department finds that there are grounds to make such a change. See e.g., [Notice of Final Results of Antidumping Duty Administrative Review and Decision Not to Revoke in Part: Certain Pasta from Italy](#), 68 FR 6882 (February 11, 2003) (Pasta From Italy, 2003) and the accompanying [Issues and Decision Memorandum](#). See also, [Ball Bearings and Parts Thereof from France, et. al; Final Results of Antidumping Duty Administrative Reviews](#), 70 FR 54711 (September 16, 2005) and the accompanying [Issues and Decision Memorandum](#).

In addition, the Department's questionnaire allows respondents to suggest product characteristics which have not been utilized in past reviews or have yet to be incorporated into the questionnaire. If suggested revisions are made to the Department's model match criteria, we may consider altering our model match criteria. See e.g. [Pasta From Italy, 2003](#) and the accompanying [Issues and Decision Memorandum](#) and [Final Determination of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat From Canada](#), 68 FR 52741 (September 5, 2003) and accompanying [Issues and Decision Memorandum](#). For products that involve orders from multiple countries, revisions to model match procedures can affect the analysis in a number of cases. Therefore, analysts should ensure that everyone is aware of any proposed changes to our model match methodology prior to making case-specific changes to model match procedures.

When similar merchandise comparisons are made, the Department will adjust for any physical differences in the merchandise (DIFMER) that affect the prices of the merchandise. The DIFMER adjustment is calculated to quantify the extent to which physical differences between products affect their prices. Because the Department is not generally able to isolate the direct price effect of physical product differences, the DIFMER adjustment is normally based entirely on differences in the variable cost of production of products. See section 351.411 of the Department's Regulations. DIFMER adjustments are discussed at length in section 11 of this chapter.

The Department generally will not consider merchandise to be similar if the DIFMER adjustment is greater than twenty percent of the total manufacturing cost of the product sold to the United States. When the variable cost difference exceeds twenty percent, we consider that the probable differences in value of the products are so large that they cannot be reasonably compared. See Import Administration Policy Bulletin 92.2 for a further discussion of this issue. The 20-percent guideline may vary to some degree based upon the facts of the particular case and/or the nature of the product involved. Where we determine that the DIFMER is too great, we select a different product as most similar or, if there is no similar match, we use constructed value (CV) for NV.

A foreign market product is similar to a product sold to the United States only if it is sufficiently similar both in terms of the matching criteria and the size of the DIFMER. A product may be deemed not similar on the basis of different physical characteristics even if it meets the 20-percent guideline. In particular, merchandise that is sufficiently complex in construction and made to specification may not be considered similar even if it meets the 20-percent guideline. In [Mechanical Transfer Presses From Japan: Preliminary Results of Antidumping Duty Administrative Review, and Intent to Revoke in Part](#), 63 FR 11211, 11213 (March 6, 1998) (unchanged in [Final Results](#), 63 FR 37331 (July, 10, 1998)), we stated that, although the comparison market was viable, we based NV on CV because we determined that the particular market situation, which required that the subject merchandise be built to each customer's specifications, did not permit proper price-to-price comparisons in either the home market or third countries.

III. DATE OF SALE

References:

The Tariff Act of 1930, as amended (the Act)
None
Department of Commerce (DOC) Regulations
19 CFR 351.401(I) - date of sale
SAA
None
Antidumping Agreement

Article 2.4.1, footnote 8 - date of sale

It is important to resolve the date of sale at the beginning of an investigation or administrative review. The date of sale controls which U.S. and comparison market sales are within the period of investigation (POI) or period of review (POR). Also, establishing the date of sale in an investigation is a key determinate of whether it is appropriate to expand the POI for the investigation so as to consider earlier U.S. sales. See 19 CFR 351.204(b)(1) for the regulations concerning establishing the (POI).

Date of sale analysis is also central in determining whether comparison markets are viable. Moreover, in investigations where there is substantial price volatility, date of sale analysis can provide the basis for dividing the POI into two or more weighted-average-price periods.

Generally speaking, the date of sale is the date on which parties agree upon all material terms of sale. This normally includes the price, quantity, delivery terms and payment terms. The date of sale should reflect the date on which these terms were established. However, in order to simplify the determination of date of sale for both the respondent and the Department, 19 CFR 351.401(i) establishes that the date of sale will normally be the date of the invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business, unless case-specific evidence is presented that the exporter or producer establishes the material terms of sale on some other date. See [Allied Tube and Conduit Corp. v. United States](#), 132 F. Supp. 2d 1087 (CIT 2001) ([Allied Tube](#)). Section 351.401(i) stipulates that "the Secretary normally will use the date of invoice, as reported in the exporter or producer's records kept in the ordinary course of business." Concerning the need to establish a uniform date of sale for all companies, the preamble to the Department's regulations explains: "[a]bsent satisfactory evidence that the terms of sale were finally established on a different date, the Department will presume that the date of sale is the date of invoice." See [Antidumping Duties; Countervailing Duties; Final Rule](#), 62 FR 27296 at 27349 (May 19, 1997).

The presumption that the invoice is the date of sale may be overcome by case-specific information. In [Non-Alloy Steel Pipe from Mexico](#), the Department used the earlier purchase order date as the date of sale. We took this action because there was no evidence on the record that there were any changes to the material terms of sale after the purchase order date. See [Circular Welded Non-Alloy Steel Pipe from Mexico: Final Results of Antidumping Duty Administrative Review](#), 65 FR 37518 (June 15, 2000) and accompanying [Issues and Decision Memorandum](#) at Comment 1 ([Non-Alloy Steel Pipe from Mexico](#)). An example of a situation where invoice date would normally not be employed as the date of sale involves merchandise that requires long lead times for production. 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 38139, 38140, (July 23, 1996). In [Corrosion-Resistant from Canada](#), we used the order-acknowledgment date as the date of sale. We did so because the material terms of sale were established on the order-acknowledgment date. Additionally, in

Corrosion-Resistant from Canada, the Department used contract date as date of sale. These sales occurred under a long-term contract. See [Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review](#), 70 FR 53621 (September 9, 2005) (Corrosion-Resistant from Canada) (unchanged in [Final Results](#), 70 FR 75451 (December 20, 2005)). See also [SEAH Steel Corp. v. United States](#), 25 Ct. Int'l Trade 133 (2001) and [Hornos Electricos De Venez, S.A. v. United States](#), 285 F. Supp. 2d 1353 (CIT 2003).

The Department does not necessarily consider delivery terms to be a controlling element in determining the date of sale. Therefore, changes to delivery terms in themselves do not necessarily alter the Department's date-of-sale analysis. In [Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand](#), 69 FR 76918 (December 23, 2004), and the accompanying [Issues and Decisions Memorandum](#), the Department determined that additional freight expenses passed on directly to the customer did not constitute a change in the material terms of sale. See also [Stainless Steel Bar from India; Final Results of New Shipper Antidumping Duty Administrative Review](#), 62 FR 4029, 4030 (Jan. 28, 1997).

Because of its impact on other aspects of the analysis, the date of sale determination should be made shortly after receipt of the respondent's answer to section A of the antidumping questionnaire. Analysts should consult with your team members and supervisor or PM in establishing date of sale. Upon receipt of answers to sections B and C of the antidumping questionnaire, analysts must ensure that the respondent has included the appropriate transactions in the POI or POR. For additional information on date of sale, See the "Comments" section of the Preamble to the Department's Antidumping Regulations, 62 FR at 27348-49 (May 19, 1997).

IV. ORDINARY COURSE OF TRADE

References:

The Tariff Act of 1930, as amended (the Act)

Section 771(15) - definition of ordinary course of trade

Section 773(a)(1)(B)(I) - requirement to consider ordinary course of trade

Section 773(b)(1)(B) - sales below cost not in the ordinary course of trade

Section 773(e) - constructed value and cost of production

Department of Commerce Regulations

Preamble to Antidumping Duties; Countervailing Duties; Final Rule 62 FR 27296 at 27299 (May 19, 1997)

19 CFR 351.102 - definition of ordinary course of trade

SAA

Section B.3 - sales below cost not in the ordinary course of trade

Section B.4 - types of sales outside the ordinary course of trade

Antidumping Agreement

Article 2.2 - reference to ordinary course of trade

Section 773(a)(1)(B)(I) of the Act directs us to base NV on sales made in the exporting country or third-country market that are in the ordinary course of trade. Section 771(15) of the Act defines “ordinary course of trade” as “[t]he 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.” That is, sales deemed to be outside the ordinary course of trade are to be excluded from the calculation of NV. For example, sales to affiliated parties that we determine to be not arm’s length are outside the ordinary course of trade. See, e.g., [Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands: Preliminary Results of Antidumping Duty Administrative Review](#), 68 FR 68341 (December 3, 2004) (unchanged in [Final Results](#), 70 FR 18366 (April 11, 2005) and accompanying [Issues and Decision memorandum](#)). Also, section 771(15) of the Act specifies that sales disregarded under section 773(b)(1) of the Act, because they were sold at prices below the cost of production, shall be considered to be outside the ordinary course of trade. Consistent with this statutory directive, below-cost sales and sales to affiliated parties are accounted for accordingly in the Department’s standard computer program, and classified as outside the ordinary course of trade as appropriate.

The Department may consider other types of sales or transactions to be outside the ordinary course of trade when such sales or transactions have characteristics that are not “ordinary”² as compared to sales or transactions generally made in the same market. See SAA at 164. The statute does not specifically enumerate the circumstances under which sales are outside the ordinary course of trade. However, specific examples of additional types of transactions that we may consider to be outside the ordinary course of trade include:

1. merchandise produced according to unusual product specifications;
2. merchandise sold at aberrational prices; or
3. merchandise sold pursuant to unusual terms of sale.

See id.

Section 771(15) does not establish an exhaustive list of situations wherein sales are outside the ordinary course of trade. However, according to the SAA, Congress intends that we will interpret section 771(15) in a manner that will avoid basing NV on sales which are extraordinary for the market in question, particularly when the use of such sales would lead to irrational or unrepresentative results. See id.

Also, section 351.102 of the Department’s regulations specifies that sales or transactions may be considered outside the ordinary course of trade when “...based on an evaluation of all the circumstances particular to the sales in question, such sales or transactions have characteristics that are extraordinary for the market in question.” Examples of such sales are those involving;

² In [CEMEX, S.A. v. United States](#), 19 CIT 587 (1995), the Court notes that “ordinary course of trade is determined on a case-by-case basis by examining all of the relevant facts and circumstances.”

1. off-quality merchandise or merchandise produced according unusual product specifications;
2. merchandise sold at aberrational prices or with abnormally high profits;
3. merchandise sold pursuant to unusual terms of sale; and
4. merchandise sold to an affiliated party at a non-arm's- length price.

Sample sales, off-specification sales, and sales through atypical sales channels (such as employee sales) are other examples of sale that may be considered as outside the ordinary course of trade and, thus, excluded from calculating NV for investigations and reviews.

In addition to the Act and the Department's regulations, several cases have provided guidance for excluding sales as outside the ordinary course of trade.

In [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Taiwan](#), 67 FR 62104 (October 3, 2002) and accompanying [Issues and Decision Memorandum](#) at Comment 1, the Department determined that it does not rely upon one factor taken in isolation but, instead, considers "all of the circumstances particular to the sale in question." The Department examined all of the following factors in finding that sales of cold-rolled carbon steel flat products were made in the ordinary course of trade:

1. the extent of the difference in physical characteristics;
2. whether the home market sales in question did, in fact, consist of prime merchandise;
3. whether the number of buyers were similar or dissimilar;
4. whether the price and profit differentials were dissimilar; and whether the terms were unusual.

In [Grey Portland Cement and Clinker From Mexico](#), we indicated that the determination as to whether sales "are within the ordinary course of trade" must be based on an analysis comparing the sales in question with sales of merchandise of the same class or kind generally made in the home market." See [Grey Portland Cement and Clinker From Mexico; Final Results of Antidumping Duty Administrative Review](#), 69 FR 77989 (December 29, 2004) and accompanying [Issues and Decisions Memorandum](#) at Comment 7 ([Grey Portland Cement and Clinker From Mexico](#)).

In [Structural Steel Beams From the Republic of Korea](#), the Department cited four factors that indicate whether sales are outside the ordinary course of trade. These four factors were:

1. whether there are different standards and product uses;
2. the comparative volume of sales and number of buyers in the home market;
3. price and price differentials in the home market; and
4. whether sales in the home market consisted of production overruns or seconds.

See [Structural Steel Beams From the Republic of Korea; Final Results of Antidumping Duty Administrative Review](#), 69 FR 7200 (February 13, 2004) and accompanying [Issues and Decisions Memorandum](#) at Comment 1 ([Structural Steel Beams From the Republic of Korea](#)). For further discussion of other circumstances in which the Department has found sales to be outside the ordinary course of trade, see [Preliminary Results of Antidumping Duty Administrative Review: Gray Portland Cement and Clinker From Mexico](#), 71 FR 2909 (September 13, 2005) (unchanged in [Final Results](#) and accompanying [Issues and Decisions Memorandum](#) at Comment 7); [Grey Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review](#), 63 FR 12764 (March 16, 1998) and [Certain Circular Welded Carbon Steel Pipes and Tubes From Thailand; Final Results of Antidumping Duty Administrative Review](#), 61 FR 1328 (January 19, 1996).

Ordinary Course of Trade and U.S. Sales

Please note that ordinary course of trade is an NV concept; there is no equivalent provision for disregarding export price (EP) or constructed export price (CEP) sales. In several cases respondents have argued that selected U.S. sales should be excluded from our calculations because those sales “are outside the ordinary course of trade.” For example, in [Granular Polytetrafluoroethylene Resin from Italy](#), respondent argued that off-spec sales made in the United States were outside the ordinary course of trade, and therefore should be excluded. In response, we noted that the “ordinary course of trade” provision applies only to calculations of NV and is inapplicable to U.S. sales. See [Notice of Final Results of Antidumping Duty Administrative Review: Granular Polytetrafluoroethylene Resin from Italy](#), 68 FR 2007, January 15, 2003 and accompanying [Issues and Decisions Memorandum](#) at Comment 4 ([Granular Polytetrafluoroethylene Resin from Italy](#)). Also, in [Certain Hot Rolled Carbon Steel Flat Products from the Netherlands](#), we indicated that the ordinary course of trade provision applies only to sales made in the home market. See [Notice of 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 Decisions Memorandum](#) at Comment 3 ([Certain Hot Rolled Carbon Steel Flat Products from the Netherlands](#)).³

³ The CIT has affirmed the Department’s interpretation of the Act on this matter. For example, in [Ipsco Inc. v. United States](#) 687 F. Supp. 633, 640-41 (CIT 1988) the CIT held that “if Congress intended to require the administering authority to exclude all sales made outside the ordinary course of trade from its determination of United States price, it could have provided for such exclusion in the definition of United States price, as it has in the determination of foreign market value (now Normal Value).”

V. DISCOUNTS AND REBATES**References:**

The Tariff Act of 1930, as amended (the Act)
 None
 Department of Commerce (DOC) Regulations
 19 CFR 351.102(b)
 19 CFR 351.401(c)
 SAA
 None
 Antidumping Agreement
 Article 2.4 - differences in terms of sale

As directed by 19 CFR 351.401, to arrive at the “starting price” for normal value (NV) we adjust reported gross prices for discounts, rebates and certain post-sale adjustments. (See the “Introduction” section of this chapter for more information on starting prices.) Where discounts or rebates are granted on a transaction-specific basis, they should be reported on that basis. However, as with circumstances of sale adjustments, the Department allows non-distortive allocations when transaction-specific reporting is not feasible. See section 351.401(g)(1) of the Department’s regulations. Circumstances of sale adjustments are discussed in detail later in this chapter. Any allocation, however, should represent the most precise reporting of the discount or rebate permitted by the respondent’s accounting records. Discounts and rebates should be reported separately. Aggregating discounts and rebates should be avoided because such aggregation impedes our ability to determine whether individual discount and rebate programs are appropriate deductions from NV and makes verification of discounts and rebates difficult.

The following calculation reflects a situation involving an adjustment for a discount. The discount or rebate is deducted from the comparison market starting price prior to calculating weighted average NVs. The manner in which we adjust for comparison market (CM) rebates or discounts is similar to the methodology that we use to calculate CEP or EP. (See Chapter 7 of the manual for the manner in which we adjust for discounts and rebates when calculating EP and CEP):

| | |
|--------------------------|--------------------|
| CM Gross Price | 4,000 Euros |
| Discount | - <u>400</u> Euros |
| Price Net of Discount | 3,600 Euros |

The following cases involve various types of discounts and rebates and may help to illustrate our past practice:

In [Certain Cold-Rolled Carbon Steel Flat Products from Belgium](#), the Department denied all early payment discounts in the home market because the respondent failed to demonstrate that it was entitled to such an adjustment. At verification, the Department determined that the respondent had failed to adequately demonstrate that it had properly reported these early payment discounts in the home market database. The respondents had overstated the number of customers who received an early payment discount, and in cases where a customer received such a discount, it was not accurately reported. See [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Belgium](#), 67 FR 62130 (October 3, 2002) and accompanying [Issues and Decision Memorandum](#).

In the [Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products from Brazil](#), 67 FR 62134 (October 3, 2002) and accompanying [Issues and Decision Memorandum](#) at Comment 9, the Department found respondent's allocation methodology for quantity discounts to be reasonable and, accordingly, adjusted NV for these discounts. (See section XI of this chapter for a discussion of the criteria governing our analysis of quantity discounts.)

In [Structural Steel Beams from Luxembourg](#), the Department verified the details of each of the rebates granted under specific rebate programs provided during the period of investigation. In this case, the respondent made revisions in its original rebate calculation which resulted in a more accurate reporting of the rebates paid. The Department accepted the revised rebate information for the final determination. See [Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Luxembourg](#), 67 FR 35488 (May 20, 2002) and accompanying [Issues and Decisions Memorandum](#).

In [Outboard Engines from Japan](#), we accepted Yamaha's reporting of rebate expenses where Yamaha was unable to calculate a sale-specific rebate for each transaction. We did so based on our finding at verification that Yamaha was unable to report accrued rebates on a transaction specific basis. We further concluded that Yamaha's reporting of its actual rebate expense during the POI constituted the most accurate manner possible for reporting rebate expenses. See [Notice of Final Determination at Sales at Less Than Fair Value: Outboard Engines from Japan](#) 70 FR 326 (January 4, 2005) and accompanying [Issues and Decisions Memorandum](#) at Comment 8

In [Structural Steel Beams from Spain](#), we allowed a claim for rebates where the rebates were not recorded in a separate account within the company's accounting system or segregated from other types of issued credit notes. Rather, the rebates were treated within the accounting system as offsets to sales revenue. We were unable to tie the rebate expenses for specific programs directly to the general ledger, because of the limitations of Aceralia's accounting system. Nevertheless, we allowed the claim for rebates based on our finding at verification that Aceralia had not overstated its rebate claim. See [Notice of Final Determination at Sales at Less Than Fair Value: Structural Steel Beams from Spain](#) 67 FR 35482 (May 20, 2002) and accompanying [Issues and Decisions Memorandum](#) at Comment 6.

In [Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom](#), we denied Asahi's claim for home market rebates because we found that the claim causes unreasonable inaccuracies and distortions. We noted that it is our longstanding practice to accept adjustments that are not reported on a transaction specific basis "when it is not feasible for a respondent to report the adjustment on a more specific basis, provided that the allocation method the respondent used does not cause unreasonable inaccuracies or distortions." (This cites [Antifriction Bearings, 1997](#)) We found that Asahi's methodology allocated rebates from sales that "actually incurred rebates to sales that did not incur rebates." We further determined (based upon an examination of rebates to one customer at verification) that this allocation had a significant effect on the overall rebate amount allocated to that customer. Accordingly, we denied Asahi's claim for rebates. See [Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination to Revoke Order in Part](#), 69 FR 55574 (September 15, 2004) and accompanying [Issues and Decisions Memorandum](#) at Comment 22.

VI. PACKING COSTS

References:

The Tariff Act of 1930, as amended (the Act)

Section 773(a)(6)(A) - increase in normal value (NV) for cost of U.S. packing

Section 773(a)(6)(B) - decrease in NV for cost of foreign packing

Section 773(b)(3)© - packing costs added to cost of production (COP)

Section 773(c)(1)(B) - packing costs added to NV for non-market-economy countries

Section 773(d)(3) - packing cost adjustments for multinational corporation comparisons

Section 773(e)(3) - packing costs added to constructed value (CV) Department of Commerce Regulations

19 CFR 351.404©) - adjust NV prices per requirements in the Act

SAA

Section B.2.c.(2) - packing adjustments for NV

Antidumping Agreement

Article 2.2.2 - inclusion of "any other costs" in the COP/CV

Article 2.4 - allowance for "any other differences" that affect price comparability

Adjustments for the difference in packing costs between NV and the U.S. price are made to NV (see sections 773(a)(6)(A) and 773(a)(6)(B)(I) of the Act). To adjust for any differences between U.S. and Comparison Market (CM) packing, we deduct from the CM starting price the packing cost for the CM sale and add the packing cost for sales to the United States to NV. Packing includes materials, labor and overhead costs.

If an allocation of packing costs is necessary, the cost of packing materials should be allocated on the basis of the weight or size of the subject merchandise, rather than upon the sales value of the merchandise. When possible, labor and overhead should be allocated based on the amount of time used to pack the subject merchandise.

When in CEP situations, if there is additional packing done while the merchandise is in the inventory of an affiliated firm in the United States prior to sale to the first unaffiliated purchaser, this additional cost (referred to as “repacking” in our questionnaire) is treated as a direct U.S. selling expense. In accordance with section 772(d)(2)(1) of the Act, this “repacking” is deducted from the CEP, rather than added to NV, because such expenses constitute U.S. selling expenses and constitute a deduction from U.S. price.

The following is an example of a NV packing calculation. The calculation is the same for export price (EP) and CEP comparisons. If “repacking” expenses are included in the total CEP packing charges, they would be removed from U.S. price before adding the U.S. packing expense to the adjusted CM price to arrive at NV. Currency conversions are made at the rates of exchange in effect on the dates of sale for the U.S. transactions in the comparison pool of sales:

Sample Calculation of NV for Comparisons to U.S. Price:

Investigations:

The weighted-average CM packing cost is deducted from the weighted-average CM price to arrive at the net weighted-average CM price.

| | | |
|----------------------|------------------|------------------------|
| Wt-Aver CM Price | 2,000 lira | 24,000 Thai baht |
| Wt-Aver CM Pack Cost | <u>- 50 lira</u> | <u>1,200 Thai baht</u> |
| Net Wt-Aver CM Price | 1,950 lira | 22,800 Thai baht |

Next the net weighted-average exporting country price is converted to a U.S. dollar amount using the weighted-average exchange rate in effect on the dates of U.S. sales within the comparison pool of subject merchandise sales to which the NV will be compared.

| | |
|----------------------------|--------|
| 1,950 lira x 0.000624 = | \$1.22 |
| 22,800 Thai bath x .0250 = | \$570 |

The weighted-average U.S. packing cost (converted from foreign currency) is then added to the net weighted-average CM price to arrive at a weighted-average NV.

| | |
|---|---------|
| Wt-Aver U.S. Pack Cost = 100 lira x 0.000624 = | \$0.06 |
| Wt-Aver U.S. Pack Cost = 2,400 Thai bath x 0.0250 = | \$60.00 |

| | | |
|------------------------|-----------------|---------------|
| Net Wt-Aver CM. Price | \$1.22 | \$570 |
| Wt-Aver U.S. Pack Cost | + <u>\$0.06</u> | + <u>\$60</u> |
| Wt-Aver NV | \$1.28 | \$630 |

Reviews:

In reviews, the transaction specific packing U.S. packing amount (converted from foreign currency) is added to the net weighted-average CM price to arrive at a weighted-average NV. We calculate the Net Wt Average CM Price in reviews in the same manner that we employ for investigations.

| | | |
|---|-------------------|----------------|
| Packing Cost Sale 1 = 90 lira x 0.000624 = | | \$0.056 |
| Packing Cost Sale 2 = 110 lira x 0.000624 = | \$0.0684 | |
| U.S. Packing Cost Sale 1 = 2,200 Thai baht x 0.0250 = | | \$55.00 |
| U.S. Packing Cost Sale 2 = 2,600 Thai baht x 0.0250 = | | \$65.00 |
| Net Wt-Aver CM. Price | \$1.22 | \$570 |
| Packing Cost U.S. Sale 1 | + <u>\$0.056</u> | + <u>\$ 55</u> |
| Wt Aver NV (U.S. Sale 1) | \$1.276 | \$625 |
| Net Wt-Aver CM Price | \$1.22 | \$570 |
| Packing Cost U.S. Sale 2 | + <u>\$0.0684</u> | + <u>\$65</u> |
| Wt Aver NV (U.S. Sale 2) | \$1.2884 | \$635 |

The following case citations relate to commonly encountered packing situations:

In [Silicon Metal From Brazil](#), the Department stated: “Finally, we deducted home market packing costs from, and added U.S. packing costs to the starting price in accordance with sections 773(a)(6)(A) and (B) of the Act.” See [Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review](#), 70 FR 45665 (August 8, 2005) (unchanged in [Final Results](#), 71 FR 7517 (February 13, 2006)) and accompanying [Issues and Decision Memorandum](#).

In [Stainless Steel Bar from France](#) the Department stated: “In accordance with section 772(d)(1) of the Act, we deducted those selling expenses associated with economic activities occurring in the United States, including direct selling expenses (commissions, credit expenses, warranty expenses, other direct selling expenses and repacking expenses). . . .” See [Stainless Steel Bar from France: Preliminary Results of Antidumping Duty Administrative Review](#), 70 FR 17411 (April 6, 2005) (unchanged in [Final Results](#) 70 FR 46482 (August 10, 2005) and accompanying [Issues and Decision Memorandum](#)).

VII. MOVEMENT EXPENSES**References:**

- The Tariff Act of 1930, as amended (the Act)
 - Section 773(a)(6)(B)(ii) - adjustment for movement expenses
- Department of Commerce (DOC) Regulations
 - 19 CAR 351.102(b) - definitions
 - 19 CFR 351.401(e) - adjustments for moving expenses
- SAA
 - Section B.2.c.(2) - adjustments for moving expenses
- Antidumping Agreement
 - Article 2.4 - comparisons normally to be made at an ex-factory level

Section 773(a)(6)(B)(ii) of the Act directs us to adjust NV for movement expenses. Movement expenses include any transportation and other associated expenses (including warehousing) that are incurred by the seller after the merchandise leaves the point of shipment. Other examples of movement expenses include such costs as inland insurance, loading, forwarding, unloading, brokerage, customs duty (third country comparisons only), and handling. For information on how to handle warehousing expenses that occur prior to shipment, see section VIII of this chapter.

We distinguish between movement expenses incurred by manufacturers and movement expenses that are incurred by unaffiliated resellers. When incurred by the producer or manufacturer, we deduct from NV or U.S. price any movement expenses associated with delivery of the merchandise to the customer. See section 773(a)(6)(b)(ii) of the Tariff Act. However, when CM sales involve unaffiliated resellers (i.e., a seller who purchased rather than produced the foreign like product), the adjustment is confined to movement expenses incurred after the goods leave the place of shipment of the reseller. See section 351.401 (2)(e)(1) of the Department's regulations. The difference in treatment is to avoid deduction of expenses which are part of the respondent reseller's acquisition cost.

Where possible, we prefer shipment-specific reporting of any movement expenses. Freight expenses are usually based on the weight or physical volume of the merchandise. When the reporting of actual expenses is impossible, and movement expenses are reported on an allocated basis, our methodological preference is for the allocation based upon the unit weight of the individual products shipped or packed. We will only accept an allocation if we are satisfied that the allocation causes no inaccuracies or distortions. See section 351.401(g)(1) of the Department's regulations. Analysts should ensure that allocated expenses are reported on as specific a basis as permitted by the company's records, and should examine the effect of the allocation on the accuracy of the reported data. If a verification is conducted, the respondent's ability to report allocated expenses on a more specific basis should be examined.

Adjustments for movement expenses for high-inflation economy producers and exporters require special treatment (see section XV of this chapter for information on why a special adjustment is required and how to compute it). Also, where costs for movement expenses are based on affiliated party transactions, it is the Department's practice to test whether they represent arm's length transactions by comparing the affiliated party transactions to transactions to unaffiliated parties, or to the actual costs incurred by the affiliated party. See [Certain Cut-to-Length Carbon Steel Plate From Finland; Final Results of Antidumping Duty Administrative Review](#), 69 FR 2952 (January 20, 1998) at comment 5. If we find that the respondent did not pay arm's length prices, we will adjust the transaction to correspond to movement expenses associated with transactions with unaffiliated parties. Finally, in NME cases, we ask respondents to provide the distances over which the merchandise is shipped. To these distances, we then apply per kilometer charges from a surrogate market economy vendor to calculate NME movement expenses.

A sample calculation for the adjustment from the CM weighted-average price for movement expenses is shown below. (The normal value (NV) calculation is the same for U.S. export price and constructed export price comparisons.)

The weighted-average CM inland freight and insurance are deducted from the weighted-average exporting country price to arrive at a weighted-average price to which other adjustments will be made to arrive at a weighted-average NV (see section VIII of this chapter).

| | | |
|--|-----------|-------------|
| Wt-Aver CM. Price | 500 | Euro |
| Wt-Aver CM. Inland Freight Cost | -7 | Euro |
| Wt-Aver CM. Insurance Cost | <u>-5</u> | <u>Euro</u> |
| Wt-Aver Price Ready for Additional Adjustments | 488 | Euro |

The following citations address the deduction of movement expenses from NV:

In the [Final Determination of Sales at Not Less than Fair Value: Bottle-Grade Polyethylene Terephthalate \(PET\) Resin From Taiwan](#), 70 FR 13454 (March 21, 2005) and accompanying [Issues and Decision Memorandum](#), the Department determined that respondents had not paid arm's-length prices for home market inland freight services, and adjusted the amounts respondents reported to better reflect market prices.

In [Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review](#), 69 FR 19153 (April 12, 2004) and accompanying [Issues and Decision Memorandum](#), the Department determined that home market inland freight expenses were incurred at arm's-length prices and were accepted without making an adjustment.

In [Bottle Grade Polyethylene Terephthalate Resin From Thailand](#), as a minor correction presented at verification, the Department accepted new brokerage and handling expense figures

based on brokerage and handling charges net of the VAT. See [Notice of Final Determination of Sales at Less Than Fair Value; Bottle Grade Polyethylene Terephthalate Resin From Thailand](#), 70 FR 13453 (March 21, 2005) and the accompanying [Issues and Decisions Memorandum](#) at Comment 14.

VIII. DIFFERENCES IN CIRCUMSTANCES OF SALE

References:

- The Tariff Act of 1930, as amended (the Act)
 - Section 773(a)(6)(C)(iii) - other differences in circumstances of sale (COS)
- Department of Commerce (DOC) Regulations
 - 19 CFR 351.401(b) adjustments in general
 - 19 CFR 351.401(g) - allocation of expenses
 - 19 CFR 351.402(b)-calculation of export price and constructed export price
 - 19 CFR 351.410 - differences in COS
- SAA
 - Section B.2.c - adjustments to normal value (NV)
- Antidumping Agreement
 - Article 2.4 - differences in conditions and terms of sale

A. Overview

We attempt to compare U.S. Price and NV on as near as possible to an equivalent basis. We recognize, as COS adjustments, differences in directly related selling expenses, assumed expenses, and other selling expenses associated with sales in the U.S. and comparison market. We refer to these direct expense adjustments as adjustments for differences in COS. Parts B through H of this section contain information on the most common COS adjustments that we encounter in doing a dumping analysis. Check with your supervisor or program manager (PM) if claims are made for other categories of COS adjustments.

Section 351.410 of our regulations governs our adjustments for differences in COS (which are specified by section 773(a)(6)(C)(iii) of the Act). COS adjustments consist of the following items: 1) direct selling expenses such as commissions, credit expenses, and warranties which result from and bear a direct relationship to the particular sale⁴ in question; 2) assumed expenses, which are selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses; and 3) a reasonable allowance for other selling expenses when commissions are paid in one market under consideration but not the other market under consideration. (In accordance with 19 CFR 351.410 (e), the amount of such allowance for other

⁴Warranties are included even though the expense can not be tied to a particular sale because of the lapse of time between sale and expense. It is inescapable that had there been no sales, there would have been no warranty expense. Therefore, the Department recognizes the direct relationship between warranty expenses and sales.

selling expenses is limited to the amount of indirect selling expenses incurred in the one market or the amount of commission allowed in the other market, whichever is less.) In determining what allowances will be made for COS expenses, we consider the cost of the differences to the exporter or producer but, if appropriate, we may also consider the effect of such differences on the market value of the merchandise. See the SAA at 151-161 for additional explanations of EP, CEP and NV calculations, including COS adjustments.

We consider all expenses beyond “direct” selling expenses to be indirect or non-variable expenses. These expenses are incurred regardless of whether sales are made and are not linked to a particular sale. It is extremely important to properly identify direct and indirect selling expenses. The classification of individual expenses will substantially affect the outcome of our comparisons of U.S. price to NV (see part H of this section and section IX of this chapter for more information on indirect selling expenses and how they are accounted for in our margin calculations). Also, please note that, in the calculation of NV, it is the Department’s practice to treat specific selling expenses as indirect expenses unless an interested party establishes that the expense is direct in nature. (See e.g., [Final Determination of Sales at Less Than Fair Value: Live Swine From Canada](#), 70 FR 12181, (March 11, 2005) and accompanying [Issues and Decision Memorandum](#) at Comment 6, wherein Petitioner argued that respondent’s advertising expenses should be treated as indirect unless respondent can demonstrate that those advertising expenses were directly related to sales of the subject merchandise and were variable in nature.) Similarly, any interested party claiming an adjustment must establish the claim to our satisfaction. See [Fujitsu General Ltd. v. United States](#), 88 F. 3d 1034, 1040 (Fed Cir. 1996). Also, no claimed adjustment can be double counted in our calculations. See 19 CFR 351.401(b).

1. COS Adjustment Scenarios

The following dumping comparison scenarios illustrate the manner in which adjustments for COS are made. These examples are taken from calculations in investigations, which typically involve weighted-average U.S. prices and expenses. For purposes of illustration, all of the COS adjustments (except for commissions - see part H of this section) that are explained in this section are included for each scenario. No additions are made for weighted-average U.S. packing costs (see section VI of this chapter for information on how to make a packing cost adjustment). Note that most COS adjustment situations that you will encounter will only involve some of these categories of adjustments. It is also conceivable that an individual expense category only pertains to the NV, EP, or CEP sales. Finally, the present computer programming effects the following results, but does so by first working with individual sales transactions.

EP Scenario

When comparing EP to NV, we make the adjustments for differences in COS by deducting weighted-average expenses incurred on sales of the like product in the Comparison Market (CM) from weighted-average CM prices for sales of like product. We then add the weighted-average

COS expenses incurred on the sales in the U.S. in the subject merchandise comparison pool to the weighted-average CM price after it is converted to U.S. dollars. Conversion to U.S. dollars is made at the weighted-average exchange rates in effect for the dates of sale of the merchandise in the U.S. subject merchandise. This calculation results in the weighted- average NV.

The following calculation illustrates this procedure starting with the weighted-average CM price:

Wt-Aver CM Price

- Wt-Aver CM Credit Cost
- Wt-Aver CM Advertising Cost
- Wt-Aver CM Technical Services Cost
- Wt-Aver CM Pre-Shipment Warehousing Cost
- Wt-Aver CM Warranties Cost
- Wt-Aver CM Royalties Cost
- = Adjusted Wt-Aver CM Price

The adjusted weighted-average CM price is converted to U.S. dollars. Next, the weighted-average U.S. COS amounts are added to the adjusted weighted-average CM price to arrive at the weighted-average NV:

Adjusted Wt-Aver CM Price

- + Wt-Aver U.S. Credit Cost
- + Wt-Aver U.S. Advertising Cost
- + Wt-Aver U.S. Technical Services Cost
- + Wt-Aver U.S. Pre-Shipment Warehousing Cost
- + Wt-Aver U.S. Warranties Cost
- + Wt-Aver U.S. Royalties Cost
- = Wt-Aver NV

CEP Scenario

In comparisons involving CEP, we first calculate the CEP by deducting from the weighted-average U.S. sales price, among other expenses, both 1) weighted-average direct expenses and 2) assumed expenses for selling activities in the United States incurred in selling the product in the U.S. subject merchandise. (In administrative reviews we use individual U.S. sales rather than weighted-average U.S. sales). Except for the fact that these expenses are incurred for selling activities occurring in the United States, they are the same types of expenses for which COS adjustments to NV are made. We then determine the amount of any COS adjustments to NV based on this calculated CEP.

As with EP comparisons, we deduct the weighted-average CM COS expenses from the weighted-average CM price for sales in the like product comparison pool. Also, as we do for EP

comparisons, we may add certain U.S. selling expenses to NV. The SAA at 158 and Section 351.402(b) of the Department's regulations make clear that for CEP comparisons direct and assumed expenses related solely to a sale to an affiliated U.S. importer are not deducted from the U.S. price, but will be added to NV as a COS adjustment. However, we often find that there are few, if any, such expenses for CEP comparisons. This results in the weighted-average NV. The following sample calculation illustrates this procedure starting with the weighted-average U.S. sales price. First, we calculate the CEP (based on expenses for selling activities in the United States):

Wt-Aver U.S. Sales Price

- Wt-Aver U.S. Credit Cost
 - Wt-Aver U.S. Advertising Cost
 - Wt-Aver U.S. Technical Services Cost
 - Wt-Aver U.S. Pre-Shipment Warehousing Cost
 - Wt-Aver U.S. Warranty Cost
 - Wt-Aver U.S. Royalty Cost
 - Other Expenses (see chapter 7)
 - Allocated Profit (see chapter 7)
- = Wt-Aver CEP

Then we calculate COS adjustments to NV:

Wt -Aver CM Price

- Wt-Aver CM Credit Cost
 - Wt-Aver CM Advertising Cost
 - Wt-Aver CM Technical Services Cost
 - Wt-Aver CM Pre-Shipment Warehousing Cost
 - Wt-Aver CM Warranty Cost
 - Wt-Aver CM Royalty Cost
- = Wt-Aver NV

Finally, if the producer or exporter incurred any direct or assumed expenses related solely to the sale to its U.S. affiliate, these would be added to NV.

Constructed Value (CV) Scenario

We also make adjustments for differences in COS when the NV is based on CV. See e.g., [Certain Oil Country Tubular Goods from Mexico, Preliminary Results of Antidumping Duty Administrative Review and Partial Rescission](#), 70 FR 24517, 24519 (May 10, 2005) (unchanged in [Final Results](#), 70 FR 60492 (October 18, 2005), and accompanying [Issues and Decision Memorandum](#). Accordingly, if we are using selling expenses incurred on sales of the foreign like product that pass the cost test to calculate CV, we calculate the weighted-average COS expenses to deduct from the CV based on those sales of the foreign like product. When we use CV because there are no sales in the home or third-country market at prices above COP, we may

not have information for COS adjustments. In these situations, check with your supervisor or PM to determine how to calculate COS adjustment amounts that will be deducted from the CV.

The following sample calculation illustrates the adjustment procedure for a CV when U.S. EP sales are involved:

Unadjusted CV (materials, labor, selling and general and administrative expenses (SG&A), profit, and U.S. packing expense)

- Wt-Aver CM Credit Cost
- Wt-Aver CM Advertising Cost
- Wt-Aver CM Technical Services Cost
- Wt-Aver CM Pre-Shipment Warehousing Cost
- Wt-Aver CM Warranty Cost
- Wt-Aver CM Royalty Cost
- = CV adjusted for CM COS expenses

- + Wt-Aver U.S. Credit Cost
- + Wt-Aver U.S. Advertising Cost
- + Wt-Aver U.S. Technical Services Cost
- + Wt-Aver U.S. Pre-Shipment Warehousing Cost
- + Wt-Aver U.S. Warranty Cost
- + Wt-Aver U.S. Royalty Cost
- = CV(NV)

Note that the adjustment of the CV for EP weighted-average COS amounts follows the same procedure used in calculation of a NV in an EP price-to-price situation, i.e., the U.S. COS amounts are added to the CV after the CV is adjusted for CM COS amounts (see the EP price-to-price example above).

The following sample calculation illustrates the adjustment procedure for CV when U.S. CEP sales are involved:

Unadjusted CV

- Wt-Aver CM Credit Cost
- Wt-Aver CM Advertising Cost
- Wt-Aver CM Technical Services Cost
- Wt-Aver CM Pre-Shipment Warehousing Cost
- Wt-Aver CM Warranty Cost
- Wt-Aver CM Royalty Cost
- = CV(NV)

Note that, in general, no further adjustments are made to the CV to arrive at NV. As is the case in U.S. CEP price-to-price comparisons, most U.S. direct and assumed expenses are for selling activities in the United States and are deducted from the starting price in calculating CEP. Few, if any, are related solely to the sale to a U.S. affiliate. See the CEP price-to-price example above.

2. Adjustments for Actual or Allocated COS Expenses

Examples of various types of COS expense categories and our treatment of these categories are discussed in parts B through H below. These examples cover the expenses which are generally incurred for EP, CEP, and NV sales. Other categories of COS expenses may need to be adjusted for based on the specific practices of the industry subject to the proceeding. We prefer that claims for adjustments be based on actual costs incurred on individual sales made during the period of investigation (POI) or period of review (POR). We will, however, allow companies to allocate these POI or POR expenses when transaction-specific reporting is not feasible, providing that the allocation methodology used does not cause inaccuracies or distortions (see Chapter 7, section III. For more information on the allocation of expenses; also see 19 CFR 351.401(g)).

The following sample calculations illustrate calculations for actual and allocated COS expenses:

Actual Expenses

| | |
|---|---------------------------------|
| Unit price | \$100.00 |
| Quantity sold in one sales transaction | 5,000 pieces |
| Bank charges related to processing a letter of credit for this sale | \$12,575.00 |
| Total sales value for this sale | \$500,000.00 |
| Ratio of bank charges to total sales value = | $\$12,575/\$500,000 = 0.02515$ |
| Actual bank charges on a per-unit basis = | $\$100 \times 0.02515 = \2.52 |

Allocated Expenses

| | |
|---|----------------------------------|
| Unit price for sale on May 12, 1996 to customer A | \$92.55 |
| Unit price for sale on August 16, 1996 to customer B | \$96.45 |
| Quantity of units sold to customer A on May 12, 1996 | 6,000 pieces |
| Quantity of units sold to customer B on August 16, 1996 | 10,000 pieces |
| Total bank charges related to the above two sales | \$19,750.00 |
| Total sales value for the above two sales | \$1,519,800.00 |
| Ratio of total bank charges to total sales = | $\$19,750/\$1,519,800 = 0.0130$ |
| Allocated bank charges on a per-unit basis for customer A = | $0.0130 \times \$92.55 = \1.20 |
| Allocated bank charges on a per-unit basis for customer B = | $0.0130 \times \$96.45 = \1.25 |

B. Credit Expenses

1. Overview

Differences in credit costs encompass one of the most commonly encountered COS adjustments. Normally, there is a period of time between the shipment of merchandise to a customer and payment for the merchandise. The period of time usually varies in the respective markets. The Department adjusts for credit costs to account for the opportunity cost associated with the loss of the use of the monies in both the U.S. and CM.

The imputation of credit cost reflects the time value of money, and should correspond to a figure reasonably calculated to account for such value during the gap period between shipment and payment. If actual expenses are unavailable, we impute the cost of credit. Note that an adjustment for imputed credit expense is made even in the absence of respondent being compelled to borrow funds to finance its accounts receivable. Set forth below is the formula that we use to calculate CM and U.S. credit expenses, our methodology for determining the collection period, a summary of our practice for determining the interest rate used in the calculation of credit expenses, and case citations relevant to the adjustment for credit.

2. Formula for Calculating Credit

The formula that we use to calculate both home market and U.S. credit expenses is:

$$CE = SP * CD * (STIR / 365)$$

where CE represents Credit Expense,

SP represents the starting price for calculating credit expenses (In CV situations, the SP is represented by the unadjusted CV.),

CD represents collection days, and

STIR represents the short-term interest rate.

Please note that adjustments for credit are made regardless of the basis of Normal Value. This includes CV calculations. To calculate the CM credit expenses applicable to CV, if using the average age of accounts receivable and short-term interest rate applicable to the respondent, we apply our standard formula. The average age of accounts receivable is normally derived from respondent's financial statements. (For a discussion of the calculation of CM credit expenses in the calculation of CV, see, e.g., [Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers from Malaysia](#), 69 FR 20592 (April 16, 2004) (CTVs from Malaysia) and accompanying [Issues and Decisions Memorandum](#) at Comment 17. Note that in cases where the sales are paid prior to shipment we use the same formula as we do when

payment is made subsequent to shipment. In circumstances where payment is made prior to shipment, the formula generates addition of a negative credit expense amount to NV (*i.e.*, a subtraction). Sample calculation for CM and U.S. imputed credit COS adjustments follow:

CM Sale

| | |
|------------------|------------------|
| Date of shipment | October 1, 2004 |
| Date of payment | January 22, 2005 |
| Number of days | 113 |
| Interest Rate | 10.5% per year |
| Price per unit | 250,000 yen |

Calculation:

$$113/365 \times .105 \times 250000 = 8126.71 \text{ yen per unit}$$

U.S. Sale

| | |
|------------------|------------------|
| Date of shipment | October 10, 2005 |
| Date of payment | October 31, 2005 |
| Number of days | 21 |
| Interest rate | 3% per year |
| Price per unit | \$1500.00 |

Calculation:

$$21/365 \times .03 \times 1500.00 = \$2.59 \text{ per unit}$$

3. Starting Price

The starting price is generally the unadjusted, gross, U.S. or CM price. When freight to the customer is included in the terms of sale (regardless of whether freight expenses are included in the sales price or are invoiced separately), we calculate imputed credit on both the starting price and the freight. See *e.g.*, [Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Duty Administrative Review](#), 69 FR 19153 (April 12, 2004) and accompanying [Issues and Decisions Memorandum](#) at Comment 9. Also, the starting price normally includes the full amount invoiced to the customer, that is, the sale price less any discounts or price adjustments granted at the time of sale. See *e.g.*, [Certain Preserved Mushrooms from India: Final Results of Review](#), 68 FR 41303 and accompanying [Issues and Decision Memorandum](#) at Comment 7. Thus if the seller incurred and paid for the expense, we include within the U.S. or CM starting price rebates or future offsets received by the customer against the starting price. See, *e.g.*, [CTVs from Malaysia](#) at Comment 12.

4. Credit Days

Credit Days represent the number of days between shipment of the merchandise and the receipt of payment. In determining the number of days payment is outstanding, where possible, we consider the actual payment date rather than the payment terms agreed to in the terms of sale. This is because payment is often made later than provided for in the terms of sale. See e.g., [CTVs from Malaysia](#) at Comment 11.

Imputed credit costs are calculated by dividing the number of days between shipment and payment by 365, then multiplying by the interest rate and unit price. (If a respondent uses 360 as the credit base rather than 365 days, we divide the number of days by 360.) Our preference is to obtain credit information on a sale-by sale basis. However, where sale-specific reporting imposes too great a burden on a respondent, we accept calculation of the collection period based on the average number of days for which each customer's payments were outstanding. We perform such a calculation on the basis of an analysis of respondent's accounts receivable turnover in the U.S. or the CM. See, e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Outboard Engines From Japan](#), 70 FR 326 ([Outboard Engines](#)) (January 4, 2005) and accompanying [Issues and Decisions Memorandum](#) at Comment 9. Also, where a respondent is unable to report transaction-specific dates of payment, we have accepted estimates of the date of payment based upon our finding at verification that such estimates were "conservative". See [Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from Spain](#), 67 FR 35482 (May 20, 2002) and accompanying [Issues and Decisions Memorandum](#) at Comment 9. Finally, for sales upon which the respondent has yet to receive payment, we have used the last day of verification to represent the date of payment for both CM and U.S. sales. See e.g., [Notice of Final Determination of Sales at Not Less Than Fair Value: Structural Steel Beams from Italy](#), 67 FR 35481 (May 20, 2002) and accompanying [Issues and Decisions Memorandum](#) at Comment 9 and [Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Administrative Review](#), 69 FR 74495 (December 14, 2004) and accompanying [Issues and Decisions Memorandum](#) at Comment 1. We have also used the due date for filing new factual information to represent the payment date for all transactions in which the respondent has yet to receive payment if no verification was conducted. See e.g., [Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago](#), 70 FR 12468 (March 15, 2005) and accompanying [Issues and Decisions Memorandum](#) at Comment 3.

5. Short Term Interest Rate

Our preference is to base credit expenses upon the actual, contractual, short-term cost of credit incurred by the respondent in either the CM or the United States. See [Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania: Final Results of Antidumping Duty Administrative Review and Final Determination Not to Revoke Order in Part](#), 70 FR 7237 (February 11, 2005) ([Seamless Pipe](#)) and accompanying [Issues and Decisions](#)

[Memorandum](#) at Comment 15. We calculate credit expense based upon the weighted average borrowing rate realized by the respondent. [See e.g., Policy Bulletin 98.2](#). Moreover, we make no offset to the average borrowing rate for short-term interest income. This is because the deposits that generated the income are normally not a requirement for receiving the loan. [See Seamless Pipe](#) at Comment 16. Similarly, we have excluded overdraft charges from the short-term interest rate calculation where the respondent was unable to link the overdraft expense to obtaining short-term financing. [See Notice of Final Determination of Sales at Less than Fair Value; Certain Cold Rolled Carbon Steel Flat Products from France](#), 67 FR 62114 (October 3, 2002) and accompanying [Issues and Decisions Memorandum](#) at Comment 7.

If the respondent borrowed from an affiliated party, we compare the affiliated-party interest rate to the rate charged by unaffiliated lenders. If the respondent borrowed only from unaffiliated parties, we base the short-term interest rate upon other publicly available information. [See e.g., Notice of Final Determination of Sales at Less Than Fair Value; Silicomanganese from Venezuela](#), 67 FR 15533 (April 2, 2002) ([Silicomanganese from Venezuela](#)) and accompanying [Issues and Decisions Memorandum](#) at Comment 3.

If the respondent made no short-term borrowing in the currency of the transaction, we will use publicly available information to establish a short-term interest rate applicable to the currency of the transaction. [See e.g., Certain Cut-to Length Plate from Sweden; Final Results of Antidumping Duty Administrative Review](#), 61 FR 15772 (April 9, 1996) at Comment 14. Moreover, our calculation of credit expenses should conform with “commercial reality.” [See e.g., Policy Bulletin 98.2](#) citing [LMI-La Metalli Industriale, S.p.A. v. United States](#), 912 F.2d 455 (Fed. Cir. 1990) ([LMI](#)). Selection of an interest rate that reflects “commercial reality” continues to be controlling precedent in our calculation of credit expenses. [See e.g., Stainless Steel Sheet and Strip in Coils from Taiwan Final Results of Antidumping Duty Administrative Review](#), 70 FR 7715, (February 15, 2005) accompanying [Issues and Decisions Memorandum](#) at Comment 6. As established by [LMI](#), we use short-term interest rates for the currency of the transaction in computing imputed credit expenses. [See LMI](#) at 461, which specifies that credit costs are to be computed, “...on the basis of usual and reasonable commercial behavior.” Also, as noted in [Outboard Engines](#) at Comment 11, it is our practice to match the denomination of the short-term interest rate to the currency in which the sales are denominated. [See also Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review](#), 69 FR 6259 (February 10, 2004) accompanying [Issues and Decisions Memorandum](#) at Comment 7, wherein we indicate that our first choice in determining interest rates is to use the short-term rates actually experienced by the respondent in borrowing funds in the currency in which the sale was invoiced. In [Silicomanganese from Venezuela](#), because the respondent invoiced home market sales in U.S. dollars and made no short-term borrowing during the POI, we used a dollar-denominated Federal Reserve Board rate to represent respondent’s short-term interest rate. [See Silicomanganese from Venezuela](#) at Comment 7 (upheld by the CIT in [Hornos Electricos de Venezuela v. United States](#), 285 F. Supp. 2d 1353 (CIT 2003)).

For foreign currency transactions, we will establish interest rates on a case-by-case basis using publicly available information, with a preference for published average short-term lending rates. Common proxies include the short-term interest rates published in International Financial Statistics, a publication of the International Monetary Fund and certain foreign short-term interest rates published by the Federal Reserve. See e.g., Notice of Final Results of the Seventh Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke in Part, 70 FR 6832 (February 9, 2005) and accompanying Issues and Decisions Memorandum at Comment 26.

C. Advertising and Sales Promotion

Most advertising and sales promotion expenses (henceforward referred to as advertising expenses) are not adjusted for as COS adjustments because they are considered indirect in nature. However, at times advertising expenses are considered “assumed” by the producer or exporter on behalf of its customer. This possible distinction is recognized explicitly by the Department’s regulations (see 19 CFR 351.410(d)). In this is the case, a COS adjustment may be warranted. Some examples of types of assumed advertising expenses are consumer advertising costs paid for totally by the producer, and cooperative consumer advertising which is paid for jointly by the producer and first unrelated purchaser and aimed at customers of the first purchaser.

The Department has indicated that it will treat advertising expenses as a COS adjustment if two criteria are met:

- 1) the advertising was directed at the customer’s customer; and
- 2) the expenses associated with the advertising were related specifically to sales of subject merchandise.

See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada, 70 FR 12181 (March 11, 2005) and accompanying Issues and Decision Memorandum at Comment 6; Certain Welded Stainless Steel Pipe From Taiwan: Final Results of Antidumping Duty Administrative Review and Determination To Revoke Order in Part, 65 FR 39267 (June 26, 2000) and accompanying Issues and Decision Memorandum at Comment 4; Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR 30574, 30581 (June 8, 1999); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 62 FR 2081, 2102 (January 15, 1997) (Antifriction Bearings, 1997); and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review, 56 FR 31692, 31725 (July 11, 1991).

With respect to the first prong of the test, whether advertising was directed at the customer's customer, the Department has rejected claims that advertising expenses should be treated as a COS expense when it was not evident that the advertising was targeted at customer's customers. See, e.g., [Antifriction Bearings, 1997](#); and [Notice of Final Results of Antidumping Duty Administrative Review: Certain Pasta From Italy](#), 65 FR 7349 (February 14, 2000), ([Pasta From Italy, 2000](#)) at Comment 13.

With respect to the second prong of the test, whether the expenses associated with the advertising were related specifically to sales of subject merchandise, the Department has noted consistently in recent years that the nature of the advertising should be specific to subject merchandise, and not general in nature. For different types of examples of this issue of specificity, see [Certain Welded Stainless Steel Pipe From Taiwan: Final Results of Antidumping Duty Administrative Review and Determination To Revoke Order in Part](#), 65 FR 39267 (June 26, 2000) and accompanying [Issues and Decision Memorandum](#) at Comment 4; [Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Taiwan](#), 64 FR 30592 (June 8, 1999) at Comment 11; [Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Germany](#), 64 FR 30710 (June 8, 1999), at Comments 7 and 8; [Grey Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review](#), 64 FR 13148, 13169 (March 17, 1999) at Comment 16; and [Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon From Chile](#), 63 FR 31411, 31424 (June 9, 1998), at Comment 14.

When there has been ambiguity regarding the nature of the advertising expenses, the Department has found it reasonable to treat such expenses as indirect expenses. For example, in [Stainless Steel Bar From Germany: Final Results of Antidumping Duty Administrative Review](#), 69 FR 32982 (June 14, 2004) ([Stainless Steel Bar From Germany](#)) and accompanying [Issues and Decision Memorandum](#) at Comment 2, the Department indicated that the presumption is that advertising expenses are indirect expenses unless information exists on the record suggesting otherwise. In [Antifriction Bearings \(Other Than Tapered Roller Bearings\) and Parts Thereof From France, Germany, Italy, Japan, Romania, Sweden, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews](#), 64 FR 35590, 35624 (July 1, 1999) ([Antifriction Bearings, 1999](#)) at Comment 11.A.7, the Department indicated that it assumed that the advertising expenses were indirect expenses because respondent characterized them that way and because the Department "did not find it necessary to subject this response to additional verification."

To avoid such ambiguities, one should actively seek specific examples of the advertisements if they have not been provided by the respondent in its initial questionnaire response when considering whether or not advertising expenses should or should not be treated as COS adjustments. Another type of assumable expense involves sales promotional materials. These materials often take the form of free give-away merchandise supplied by the exporter to be given

away to its customers' customers. Examples of give-away merchandise would be athletic bags, t-shirts, and key chains.

Sample calculations for comparison market and U.S. assumed advertising expenses follow. In both calculations only the portion of advertising aimed at secondary purchasers of the product is allowable as a COS adjustment. The remainder of the advertising expenses would be considered indirect selling expenses.

Comparison Market Sales

| | |
|--|---------------|
| Total EC advertising costs claimed | 100,000 Euros |
| Portion determined aimed at secondary purchasers | 40,000 Euros |
| Units sold = 1,000 | |

| | |
|----------------------------------|--------------|
| Allowable COS adjustment amount= | 40,000 Euros |
|----------------------------------|--------------|

Calculation:

| | |
|---------------------------|-------------------|
| 40,000 Euros/1,000 units= | 40 Euros per unit |
|---------------------------|-------------------|

U.S. Sales

| | |
|--|-----------|
| Total U.S. advertising costs claimed | \$150,000 |
| Portion determined aimed at secondary purchasers | \$ 75,000 |
| Units sold | 15,000 |

| | |
|---------------------------------|-----------|
| Allowable COS adjustment amount | \$ 75,000 |
|---------------------------------|-----------|

Calculation:

| | |
|-------------------------|-----------------|
| \$75,000/15,000 units = | \$5.00 per unit |
|-------------------------|-----------------|

Such COS adjustments are treated like direct selling expenses in the Department's calculations. See the appropriate illustrative dumping comparison scenario in part A of this section to determine how to make a COS adjustment for advertising.

In the following cases the Department addressed the issue of whether to make COS adjustments for various advertising and promotional expenses:

In [Pasta From Italy, 1996](#) one respondent reimbursed its customer for U.S. advertising expenses directed at tertiary-level unaffiliated purchasers. See [Pasta From Italy, 1996](#) at Comment 4. The respondent requested that this expense be treated as a indirect selling expense. The

Department rejected the respondent's request, and ruled that this type of advertising qualified for a COS adjustment. Also in [Pasta From Italy, 1996](#), the Department accepted one respondent's classification of advertising expenses related to banners shown publicly at sporting events and on television as direct selling expenses because such advertising is typically directed at the customer's customers. However, the Department rejected the respondent's classification of promotional expenses for sports trophies, calendars, and pens because these expenses were not deemed to be directed at the customer's customers. *Id.* at comment 4.

In [Color Picture Tubes from the Republic of Korea](#), the Department allowed a COS adjustment for sample newspaper and magazine advertisements directed solely at the customer's customer--in this case, the retailer or wholesaler of the color televisions containing the color picture tubes. See [Final Determination of Sales at Less Than Fair Value: Color Picture Tubes from the Republic of Korea, 52 FR 44186 \(November 18, 1987\) \(Color Picture Tubes from the Republic of Korea\)](#).

In other cases we did not include an advertising expense related to non-subject merchandise in the calculation of indirect selling expenses. See [Notice of Final Determination of Sales at Not Less Than Fair Value: Bottle-Grade Polyethylene Terephthalate \(PET\) Resin From Taiwan, 70 FR 13454 \(March 21, 2005\)](#) and the accompanying [Issues and Decision Memorandum](#) at Comment 5.

In [Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Japan, 64 FR 30574 \(June 8, 1999\)](#), with regard to determining whether advertising expenses were direct or indirect selling expenses we applied a two-pronged test: 1) whether the advertising was directed at the customer's customer; and whether the expenses were related specifically to sales of subject merchandise. In the instant case, we agreed with respondent that the reported advertising expenses were direct, but also noted that because respondent could not confirm that certain advertising activities were only related to sales of the merchandise under review in the home market, the costs associated with those specific advertising activities were allocated to both U.S. and home market sales. See also [Notice of Final Determination of Sales at Less Than Fair Value: Live Swine From Canada, 70 FR 12181 \(March 11, 2005\)](#) and the accompanying [Issues and Decision Memorandum](#) at Comment 6.

In [Stainless Steel Bar From Germany: Final Results of Antidumping Duty Administrative Review, 69 FR 32982 \(June 14, 2004\) \(Stainless Steel Bar From Germany\)](#), we indicated that the Department's presumption is that advertising expenses are indirect expenses unless information exists on the record suggests otherwise. See, [\(Stainless Steel Bar From Germany\)](#) and the accompanying [Issues and Decision Memorandum](#) at Comment 2.

In [Greenhouse Tomatoes From Canada](#), the Department re-allocated U.S. advertising expenses to U.S. sales of all commodities rather than limiting the allocation to U.S. sales of subject merchandise (as it had done in the preliminary determination). We further indicated that the

basis for our decision was that we confirmed at verification that the reported U.S. advertising expenses were incurred with respect to the full range of the respondent's U.S. sales. [Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada](#), 67 FR 8781 (February 26, 2002) and accompanying [Issues and Decision Memorandum](#) at Comment 2.

In [Stainless Steel Bar From Italy](#), the Department characterized advertising expenses associated with respondent's attendance of a technology conference in Houston as direct expenses rather than indirect expenses because the respondent sold through distributors and respondent's participation in the conference could be viewed as sales promotion for its customer's customer, even though respondent argued that the conference included not only "indirect" customers but also "direct" customers and competitors. [Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy](#), 67 FR 3155 (January 23, 2002), and accompanying [Issues and Decision Memorandum](#) at Comment 19.

In [Certain Welded Stainless Steel Pipe From Taiwan](#) the Department (citing [Grey Portland Cement](#)) stated that it "generally includes advertising as a direct selling expense when it is assumed by the seller on behalf of the buyer and directed toward the product under investigation." The Department determined that not all of the reported advertising expenses were related to subject merchandise, and that they were in any case extremely small, so the Department continued to treat them as an indirect selling expense. See [Certain Welded Stainless Steel Pipe From Taiwan: Final Results of Antidumping Duty Administrative Review and Determination To Revoke Order in Part](#), 65 FR 39367 (June 26, 2000), and accompanying [Issues and Decision Memorandum](#) at Comment 4. See also [Grey Portland Cement and Clinker From Mexico: Final Results of Antidumping Duty Administrative Review](#), 65 FR 13943, 13944 (March 15, 2000) ([Grey Portland Cement and Clinker From Mexico 2000](#)), and accompanying [Issues and Decision Memorandum](#) at Comment 12c.

In [Circular Welded Non-Alloy Steel Pipe and Tube From Mexico](#) the Department agreed that respondent's methodology for allocating negative advertising expenses to negative (net of discounts and credit memos) price sales was flawed (overall allocation methodology used net price as a basis for the allocation, hence negative advertising expense calculated if the price net of discounts and credit memos was negative), but did not recalculate because the reported negative advertising expenses were "so small." See [Circular Welded Non-Alloy Steel Pipe and Tube From Mexico: Final Results of Antidumping Duty Administrative Review](#), 65 FR 37518 (June 15, 2000) and accompanying [Issues and Decision Memorandum](#) at Comment 5.

In [Grey Portland Cement and Clinker From Mexico 2000](#), the Department stated that for advertising expenses to be considered direct expenses, they should be incurred or assumed by the seller on behalf of the buyer (citing section 351.410(d)), noting that the expense is the cost to advertise to the customer's customer (citing the Department's questionnaire). We also stated that, in addition, the advertising must be directed toward the specific product under investigation (citing [Roller Chain, Other Than Bicycle, From Japan, Final Results of Antidumping Duty](#)

Administrative Review, 58 FR 52264 (October 7, 1993). See Grey Portland Cement and Clinker From Mexico 2000 and the accompanying Issues and Decision Memorandum at Comment 21.

In Pasta From Italy, 2000 and the accompanying Issues and Decision Memorandum at Comment 13, the Department treated respondent's home market advertising expenses associated with an international food exhibition as direct expenses because the verification report stated that "all advertising included as a direct expense appeared to be targeted" at respondent's "customer's customer" and because the exhibition, open to the public, was attended by respondent's customers' customers.

In Pasta From Italy, 2000, the Department reclassified in-store demonstration expenses as direct selling expenses because the record evidence indicated that they were aimed at the respondent's customers' customer, and that assumption of the advertising expense to customers' customers is treated as a direct expense, citing Antifriction Bearings, 1997 at Comment 5. See Pasta From Italy, 2000 at Comment 21.

In Antifriction Bearings, 1999, the Department indicated that its presumption was that advertising expenses were indirect expenses because respondent had characterized them that way and because the Department had not found any evidence to suggest otherwise. See Antifriction Bearings, 1999 at Comment 11.A.7.

In Stainless Steel Sheet and Strip in Coils From Japan, the Department (citing Antifriction Bearings, 1997) referenced the two prong test for determining advertising expense to be direct – that it be incurred on products under review, and that it be assumed on behalf of the customer. The Department concluded that at verification the respondent had provided sufficient documentation that the advertising expenses related to subject merchandise and targeted the customer's customer, so the Department in its final determination reclassified the expenses as direct, as the respondent had originally reported them in its response. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Japan, 64 FR 30574 (June 8, 1999) (Stainless Steel Sheet and Strip in Coils From Japan) at Comment 5. See also Antifriction Bearings, 1997 at Comment 5.

In Stainless Steel Sheet and Strip in Coils From Taiwan, the Department reclassified reported advertising expenses associated with a "sample book," with advertising in local newspapers and in Metal Bulletin, and in company brochures as indirect because at verification the Department found that the respondent did not know whether or not its distributor customers had shown the "sample book" to their customers, that the advertisements were general in nature and offered a variety of information about the company, and that (citing Stainless Steel Plate in Coils from South Africa) such general information in advertising do not represent expenses incurred on behalf of its customers. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From Taiwan, 64 FR 30592 (June 8, 1999) (Stainless Steel Sheet and Strip in Coils From Taiwan) at Comment 11. See also Final Determination of

[Sales at Less Than Fair Value: Stainless Steel Plate in Coils from South Africa](#), 64 FR 15459, 15469 (March 31, 1999) ([Stainless Steel Plate in Coils from South Africa, 1999](#)).

In [Stainless Steel Sheet and Strip in Coils From Germany](#), the Department, referencing [Grey Portland Cement and Clinker from Mexico](#) and [Fresh Atlantic Salmon from Chile](#), stated that the Department normally considers as direct selling expenses those expenses that result from, and bear a direct relationship to, the particular sales in question. The Department clarified that, in most cases, for an advertising expense to qualify as direct expenses, it must also be assumed on behalf of a customer and must be associated specifically with sales of subject merchandise. In this case, the Department concluded that the expenses pertained to stainless steel in general (as opposed to subject merchandise specifically), that they are not directly related to particular sales of subject merchandise, and there was no record evidence that the activities in question gave rise to expenses assumed by the respondent on behalf of its customers. See [Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From Germany](#), 64 FR 30710 (June 8, 1999) at Comment 8. See also [Grey Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review](#), 64 FR 13148, 13169 (March 17, 1999) at Comment 16. See also [Fresh Atlantic Salmon from Chile](#), 63 FR 31411, 31424 (June 9, 1998) at Comment 14.

In [Stainless Steel Plate in Coils From South Africa](#), the Department determined that brochures were general in nature and targeted to customers rather than customers' customers, and it determined that a rugby stadium box was used mainly to entertain customers, rather than respondent's customers' customers, so these were treated as indirect expenses. However, the Department found that expenses associated with a squash tournament should be treated as direct expenses because most of the participants in the tournament represented mining companies and other end users of its product (the respondent's customers' customers). See [Stainless Steel Plate in Coils from South Africa, 1999](#) at Comment 7.

D. Technical Services

Technical service claims usually involve the use of an industrial material that is incurred in a manufacturing process or is associated with the operation of machinery. Such claims normally arise for services involving sales to industrial users. Where technical services are rendered as part of a sales agreement, all, or some portion of them, may constitute COS expenses. Many claims, however, relate to services provided for purposes of determining new uses for a product or somehow relate to future sales. Such services are considered to constitute goodwill or sales promotion. As such the expenses are not considered directly related to the sales under consideration, and are not allowable as a COS adjustment.

We treat the variable-expense component of technical service claims separately from the fixed component of technical service expense. The allowable variable costs are usually travel expenses and contracted services provided by unrelated technicians. As these expenses would

not have been incurred if the sales in question had not been made, we consider these expenses direct selling expenses. In contrast, salaries of technicians employed by the exporter usually would not be allowed as a COS adjustment because these costs are usually fixed costs incurred whether or not the sales are made. Therefore, salaries and other fixed components of technical services usually constitute indirect selling expenses. (See section IX of this chapter to determine how to treat indirect selling expenses in the calculation of NV.)

Sample calculations for determining the differences between CM and U.S. technical services expenses are shown below. In each instance, the portion of the claimed expenses that is allowed as a COS adjustment covers variable expenses only, i.e., travel and material expenses. As previously explained, expenses for salaries are not allowed as a COS adjustment because they are usually indirect in nature and the expense would be incurred regardless of whether the sale was made.

CM Sales

| | |
|--|------------------|
| Total technical service expenses claimed | 500,822.00 pesos |
| Breakdown of expenses claimed: | |
| Salaries | 250,000.00 pesos |
| Travel | 200,000.00 pesos |
| Materials used | 50,822.00 pesos |
| Units sold = | 40,000 |

| | |
|---|------------------|
| Allowable COS adjustment amount is for travel and materials used | 250,822.00 pesos |
|---|------------------|

Per unit technical services expense in this scenario is 6.27 pesos per unit, i.e., 250,822 pesos/40,000 units.

U.S. Sales

| | |
|--|-------------|
| Total technical service expenses claimed | \$20,000.00 |
| Breakdown of expenses claimed: | |
| Salaries | \$13,000.00 |
| Travel | \$ 7,000.00 |
| Units sold = 20,000 | |

| | |
|--|-------------|
| Allowable COS adjustment amount is for travel expenses only | \$ 7,000.00 |
|--|-------------|

Per unit technical services expense in this scenario is \$0.35 per unit, i.e., \$7,000/20,000 units.

The following case citations relate to technical services:

We allowed a technical service claim for expenses associated with helping a customer solve product related problems. See Final Determination of Sales at Less Than Fair Value: Calcium Aluminate Cement, Cement Clinker, and Flux from France, 59 FR 14136 (March 25, 1994).

The Department verified that the technical service expenses claimed were non-variable and would have been incurred regardless of whether any particular sale would have been made. Therefore, we treated the expenses in both markets as indirect selling expenses. See Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from the Netherlands, 53 FR 23431 (June 22, 1988).

We found that expenses incurred by respondent's technical service department in the home market related to pre-sale technical assistance, sample analysis, and warranty claims for sales to unaffiliated customers in the United States. Because the technical service expenses were associated with economic activity occurring in the United States, the Department adjusted the U.S. price for these expenses (treated as indirect selling expenses). See Stainless Steel Sheet and Strip in Coils from Italy: Final Results of Antidumping Duty Administrative Review, 70 FR 7472 (February 14, 2005) and accompanying Issues and Decision Memorandum at Comment 3. The Department was unable to verify that respondent's reported technical services expenses incurred in the home market were directly related to sales of the foreign like product. Accordingly, we denied the respondent's claim for a COS adjustment to NV for technical service expenses. See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not To Revoke Order in Part, 68 FR 35623 (June 16, 2003) and accompanying Issues and Decision Memorandum at Comment 4.

In Brass Sheet and Strip from Italy, the Department disallowed the portion of the respondent's technical service claim attributable to salaries because salaries would have been paid regardless of whether a sale was made, and therefore were indirect selling expenses.⁵ We also disallowed the portion of the respondent's technical service claim related to the amortization of laboratory machinery and related equipment because we considered these expenses to be fixed. Only that portion of the home market technical service claim reflecting travel expenses for customer service was allowed as a direct adjustment. See Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from Italy, 52 FR 816, 816 (January 1, 1987).

In Color Picture Tubes from Japan, the Department determined that the travel-expenses portion of the reported home market technical service expenses qualified as a COS adjustment and determined that the salaries for the respondent's technicians should be treated as indirect

⁵ See Antifriction Bearings, 1999 for additional discussion of the Department's treatment of salaries and benefits expense components of reported technical service expenses (SNR France).

expenses. See [Color Picture Tubes from Japan: Final Results of Antidumping Duty Administrative Review](#), 62 FR 34201, 34202-34203 (June 25, 1997) and accompanying Issues and Decision Memorandum at Comment 1 and 2.

E. Warehousing

COS adjustments for warehousing represent differences in pre-shipment costs incurred at the place of production (or, in the case of a reseller, the place of shipment). We will make a COS adjustment for warehousing only if the expenses are determined to be directly related to the sales under consideration. We consider warehousing expenses to be directly related to the sales under consideration when the respondent can establish that it holds specific merchandise in inventory exclusively for a particular customer. In contrast, depending upon the circumstances under which the expense was incurred, pre-shipment warehousing expenses that cannot be classified as direct selling expenses may be classified as indirect selling expenses. See section IX of this chapter for information on how to treat indirect selling expenses in the calculation of NV.

See also section VII of this chapter for information on adjustments for warehousing expenses occurring after the merchandise leaves the place of production/shipment.

A sample calculation for a CM COS adjustment for differences in pre-shipment warehousing expenses is shown below. The total amount of the claim is allowable because all merchandise is designated for individual purchasers as it is placed in pre-shipment warehouse inventory. If the merchandise is placed in pre-shipment general inventory, these expenses would be considered indirect selling expenses.

CM Sales

| | |
|--|----------------------|
| Total pre-shipment warehousing expenses claimed | 1,000,000 pesos |
| Breakdown of warehoused merchandise set aside for specific customers | |
| Like product | 40,000,000 pesos |
| Other products | 20,000,000 pesos |
| Units sold | 5,000 |
| Allowable COS adjustment amount | 1,000,000 pesos |
| Calculation: | |
| $40,000,000 / 40,000,000 + 20,000,000 \times 1,000,000 =$ | 667,000 pesos |
| $667,000 \text{ pesos} / 5,000 \text{ units} =$ | 133.4 pesos per unit |

See the appropriate illustrative dumping comparison scenarios shown in part A of this section to determine how to make a COS adjustment for warehousing expenses.

The following example illustrates our treatment of warehousing expense:

In Stainless Steel Bar From Italy, the Department (citing Brass Sheet and Strip from West German and Hussey Copper, Ltd. v. United States) found certain pre-sale warehousing expenses to be direct in nature because respondent was able to establish that these expenses could be tied to sales of specific products to certain customers, and because these customers required respondent to maintain specific levels of inventory of certain specialized products. See Final Determination of Sales at Not Less Than Fair Value: Stainless Steel Bar From Italy, 59 FR 66921, 66928 (December 28, 1994). See also Brass Sheet and Strip from West German; Final Results of Antidumping Administrative Review, 56 FR 60087, 60090 (1991) and Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 421 (CIT 1993).

F. Warranties

COS adjustments for differences in warranty expenses are allowed provided that they are directly related to the sales under consideration. These expenses usually are based on the cost of repairing or replacing a defective item. A warranty claim may include movement expenses for returning defective merchandise.

Note: If a claim for warranty costs includes after sale services, the non-variable expenses connected with the servicing would be treated as indirect selling expenses. This is because these services would have been incurred whether or not the individual sale made and are, therefore, not direct in nature. These types of expenses would probably include the salaries of service personnel if they are employed by the exporter. See section IX of this chapter to determine how to treat indirect selling expenses in the calculation of NV.

Because warranty expenses may be incurred during the POI or POR for sales that took place before the POI or POR, and because warranty claims for merchandise sold during the POI or POR may not be paid until after the end of the period, we often base our calculation of per-unit warranty costs on a weighted-average of the annual amounts for warranty expenses for the three⁶ most recently completed fiscal years. The historical granting of warranties can be used to establish a link to the sales under consideration in the absence of explicit warranty terms. If the POI or POR expenses appear to be aberrational, we generally use this three -year average. However, where it reflects a consistent historical pattern of experience and is not otherwise

⁶On occasion the Department has used a historical period other than three years to calculate warranty expenses. For example, in Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (February 10, 2004) and the accompanying Issues and Decision Memorandum at Comment 6, we calculated warranty expense using a historical average of five years.

distortive, actual POR or POI warranty information (or warranty information from the most concurrent fiscal year) may be used. Where possible, we consider historical or actual data on a model-by-model basis. Where the respondent does not record warranty expenses on a model-specific basis in the normal course of business, we allow these expenses to be reported on a customer-specific basis. We then allocate the total value of credit memos issued to the customer for warranties during the POI or POR to sales to that customer by calculating the ratio of credits to total sales value for that customer and multiplying by the gross unit price of each sale.

Sample calculations for COS adjustments for differences in warranties expenses are shown below. In these examples, expenses covering the past three calendar years are used. The technicians' salaries are not allowable as COS adjustments because the producer pays these salaries even if sales are not made. The salaries would be considered indirect selling expenses.

Comparison Market Sales

Total claimed warranty expenses 1.2% of sales value for the past three calendar years

Breakdown of expenses:

Replacement costs 0.9% of sales value for the past three calendar years

Salaries of technicians 0.3% of sales value for the past three calendar years

Allowable COS expenses 0.9%

Calculation for COS adjustment:

Unit price = 275 Euros

Per-unit allowance = $275 \times 0.009 = 2.475$ Euros

U.S. Sales

Total claimed warranty expenses 1.1% of sales value for the past three calendar years

Breakdown of expenses:

Replacement costs 1.1% of sales value for the past three calendar years

Salaries of technicians None

Allowable COS expenses 1.1%

Calculation for COS adjustment:

Unit price = \$10.50

Per-unit allowance = $\$10.50 \times 0.011 = \0.1155

See the appropriate illustrative dumping comparison scenarios shown in part A of this section to determine how to make a COS adjustment for warranty expenses.

The following case citations provide examples of the Department's treatment of warranty expenses:

In Grain-Oriented Electrical Steel From Italy, the Department determined that payments made after the end of the POR should not be included in the calculation of customer-specific warranty expense ratios. Information about the model of the rejected merchandise and the quality of the merchandise would have to be retrieved manually by examination of each credit memo. The Department concluded that the imposition of this additional burden on the respondent was not warranted. See Grain-Oriented Electrical Steel From Italy: Final Results of Antidumping Administrative Review, 66 FR 14887 (March 14, 2001) and accompanying Issues and Decision Memorandum at Comment 6.

In Honey From Argentina, because we did not believe that Respondent's customer-specific allocation methodology took into account the fact that warranty expenses are not predictable at the time of the sale, the Department recalculated Respondent's warranty expenses by allocating the total reported expenses for warranty claims in each market over the total quantity of sales made by ACA in each market. See Honey From Argentina: Notice of Preliminary Determination of Sales at Less Than Fair Value, 66 FR 24108 (May 11, 2001) (unchanged in Final Results, 66 FR 50611 (October 4, 2001)).

In Certain Pasta From Turkey, the Department stated that because warranties typically extend over a period of time that is longer than the POR and complete information for the reviewed sales is not available at the time the questionnaire response is received, we generally base our calculation of per-unit warranty costs on a weighted-average of the annual amounts for warranty expenses for the POR or the three years prior to the POR. See Certain Pasta From Turkey: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order in Part, 67 FR 298 (Jan. 3, 2002) and accompanying Issues and Decision Memorandum at Comment 2.

In Stainless Steel Plate in Coils From the Republic of Korea, the Department found that because POSCO paid substantial warranty claims for stainless steel products sold in the United States during the two year period prior to the POR, the actual POR warranty expenses are unrepresentative of the actual warranty expenses POSCO is likely to pay for sales during the POR based on its historical record of warranty claims. Therefore, we made an adjustment for warranty claims for the POR by dividing the total stainless steel warranty claims reported in SVE 41, which was for fiscal years 1997, 1998, and 1999, by the total U.S. stainless steel sales value reported for the corresponding time period. See Stainless Steel Plate in Coils From the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 66 FR 64017 (Dec. 11, 2001) and accompanying Issues and Decision Memorandum at Comment 7.

In [Final Results of Antidumping Duty Administrative Review: Certain Preserved Mushrooms From Indonesia](#), 66 FR 36754, “Warranty Expenses” Comment 10, (July 13, 2001), we noted that while the company did not keep separate warranty records for each transaction, they were accounted for on a per-ounce basis in the U.S. sales listing for the subject merchandise. We allowed an allocation of these expenses because the company used a reasonable allocation methodology.

G. Royalties

Royalty expenses represent the costs associated with selling merchandise produced under license from another company. Such licenses involve merchandise which is subject to patent or trademark restrictions. The royalties are paid pursuant to agreements, and are usually product specific. When analyzing a claim for royalty expenses, we consider the terms of the royalty agreement. We treat payments that are directly related to the sales under consideration as direct selling expenses, accounting for them as a COS adjustment.

Sample calculations for CM and U.S. royalty expenses are shown below. In both instances, the claims are fully allowable because both payments were dependent upon the sale of the merchandise. On the other hand, had the royalty agreements specified a flat-fee payment at the beginning of the year (independent of the actual volume of sales), we would consider the royalty expenses to be indirect selling expenses. (See section IX of this chapter for information on how to handle indirect selling expenses.)

1. CM Sales

The royalty agreement calls for a five-percent payment based on the Euro 10.00 sales price of the product. The claim for a COS adjustment is for the full five- percent amount. The allowable COS adjustment amount for the royalty is Euro 10.00 x 0.05 = Euro 0.50 per unit. Using this example, we would deduct from our normal value calculation Euro 0.50 per unit to adjust for royalty expenses.

2. U.S. Sales

The royalty agreement calls for a flat fee of \$0.50 for every item sold. The claim for COS adjustment is the full \$0.50 per unit. The allowable COS adjustment amount for the royalty is \$0.50 per unit. Using this example, we would add to our normal value calculation Euro 0.50 per unit to adjust for U.S. royalty expenses.

IX. Commissions

References:

The Tariff Act of 1930, as amended (the Act)
Section 772(d)(1)(A)
Department of Commerce Regulations
Sections 351.410(c), and 351.410(e)
SAA
Section B.2.c.(4) - CEP offset
Antidumping Agreement
Article 2.4- differences in conditions and terms of sale

Commissions are payments to parties (selling agents) who facilitate a sale. Commissions compensate selling agents for providing services relating to the sale of merchandise. The commission amount is usually set forth in an agreement between the manufacturer and the selling agent. The treatment of commissions is one of the most complex areas of our analysis, and often requires additional scrutiny. See section 772(d)(1)(A) of the Act, sections 351.410(c) and 351.410(e) of the Department's regulations, and section B.2.b.(2) of the SAA for the treatment of commissions.

A. COS Adjustments for Commissions

Section 351.410(c) directs the Department to make COS adjustments to normal value for commissions.⁷ The question of whether and how to make a COS adjustment for claimed commissions depends on a number of considerations, but three important factors are 1) whether the alleged commission is a bone fide commission and the alleged selling agent was acting as an agent of the producer or other principal seller rather than as an independent reseller; 2) whether the commission can be tied to sales of subject merchandise or foreign like product; and 3) in the case of commissions to related parties, whether the commission was at arm's length.

B. Determining Whether the Commission is a Bone Fide Commission; Distinguishing Selling Agents from Resellers and Employees

The Department must determine whether the alleged commission is a bone fide commission (as opposed to some other type of payment). In making this determination, we consider whether the claimed commission is related directly to the sale(s) in question (rather than to other transactions). To do this, the Department normally examines any commission agreements, as well as sales invoices and any other documents related to the sale of the merchandise. The Department may consider other factors, such as the nature of other business relationships between the selling agent and the producer/exporter and the specific circumstances of the

⁷ Section 772(d)(1)(A) of the Act governs adjustments to CEP for commissions.

commissioned sale.

Integral to the determination of whether an alleged commission was a bone fide commission is the determination of whether, with respect to the particular sale in question, an agency relationship existed between the producer, exporter, or affiliated reseller and the alleged selling agent. In agency relationships, the agent acts for the benefit of the principal seller and, outside the context of its role as agent, does not act on its own behalf in the specific transaction. See [Certain Hot-Rolled Carbon Quality Steel Products From Brazil: Final Results of Antidumping Duty Administrative Review and Termination of the Suspension Agreement](#), (Hot Rolled from Brazil) 67 FR 6226 (February 11, 2002) and accompanying [Issues and Decisions Memorandum](#) at Comment 1. Selling agents may be employees of a producer, exporter, or affiliated reseller⁸, affiliated companies⁹, or independent individuals or firms who assist in selling the merchandise. Selling agents can perform a variety of functions. Often selling agents operate according to a formal agreement of some kind, in which the terms of commissions or other compensation are set forth. Selling agents may also act as agents for other persons, or conduct related business on their own behalf. Moreover, selling agents and producers may conduct other business with each other as parties in other transactions. See [LMI-LA Metali Industriale S.p.A. v. United States](#), 912 F.2d 455 (Fed. Cir. 1990) ([LMI](#)). The services provided by a selling agent can vary from a limited role in facilitating communication between buyer and seller to substantial involvement of the sales agent in many aspects of the sales transaction. Additionally, selling agents may find prospective customers and provide extensive selling services, or selling agents may simply act as facilitators. Selling agents may also have varying degrees of authority with regard to conducting negotiations, and may or may not take physical possession of the merchandise. However, selling agents generally do not take legal title to the merchandise in the transaction, and are not normally liable for reimbursing the producer or other principal seller for inability to sell the merchandise. However, selling agents may be liable to the principal seller for loss or damage of the merchandise. Finally, the Department also considers whether the relationship between the principal seller and the agent reflects a bona fide business relationship as opposed to a fraudulent scheme undertaken to thwart or circumvent the antidumping law. See, e.g., [Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews and Final Rescission and Partial Rescission of Antidumping Duty Administrative Reviews](#), 71 FR 54269 September 14, 2006 and accompanying [Issues and Decisions Memorandum](#) at Comment 1.

The determination of whether the alleged selling agent was acting as an agent or as an independent reseller in a transaction depends on a number of considerations. We consider these factors in their totality. Normally, in order for a fee or payment to a selling agent to be classified as a commission, an agency relationship must exist. That is, the selling agent must truly be an

⁸ The treatment of commissions paid to employees is discussed in section 5.

⁹ The treatment of commissions paid to related parties is discussed in section 5.

agent of the manufacturer, exporter, or other affiliated reseller (the principal to the transaction, in whose service the agent acts). However, the agency relationship need not be permanent, and may exist only for the purpose of the transaction in question. In addition, an agency relationship is generally established by a written agreement. However, the lack of a written agreement is not determinative as agency agreements need not be reduced to writing. In [Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products From Brazil: Final Results of Antidumping Duty Administrative Review and Termination of the Suspension Agreement](#), 67 FR 6226, February 11, 2002 ([Hot Rolled from Brazil](#)), the Department noted a number of criteria which may be used to determine whether an agency relationship exists: “To determine whether a seller is acting as an agent under the control of the foreign manufacturer...the Department has previously focused on a range of criteria including, (1) the foreign producer's role in negotiating price and other terms of sale; (2) the extent of the foreign producer's interaction with the U.S. customer; (3) whether the agent/reseller maintains inventory; (4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; and (5) whether the agent/reseller further processes or otherwise adds value to the merchandise.” See [Hot Rolled from Brazil](#) and accompanying [Issues and Decisions Memorandum](#) at Comment 1.

In [Hot Rolled from Brazil](#), we also noted that “[o]ther factors typically examined to distinguish an independent seller from a manufacturer’s agent include whether (1) the reseller can fix the price at which it sells without accounting to the manufacturer for the difference between that price and the price paid to the manufacturer; (2) the reseller deals, or has the right to deal, in the goods of other suppliers, and (3) the reseller deals in its own name and does not disclose the supplier.”¹⁰ See [Hot Rolled from Brazil](#) and accompanying [Issues and Decisions Memorandum](#) at Comment 1. However, the above mentioned criteria are in no way exhaustive of those that the Department might consider. Also, the analysis of whether a bona fide commission was paid and whether a relationship constitutes an agency relationship is fact-driven and case specific. See [Hot Rolled from Brazil](#) and accompanying [Issues and Decisions Memorandum](#) at Comment 1.

C. Determining whether the Commission related directly to the sale of subject merchandise or foreign like product

A COS adjustment will only be made for commissions that are related to sales of subject merchandise or foreign like products. However, if it can be demonstrated that 1) the respondent is unable to report commissions for subject merchandise or foreign like product separately and 2) that the commissions have been allocated consistently, commissions related to other products as well as subject merchandise may be allocated across sales of both subject and non-subject merchandise (or foreign like product). The determination of whether the alleged commission can be tied directly to sales of subject or foreign like product often depends on such considerations as

¹⁰Note, however, that the specific issue at hand in [Hot Rolled from Brazil](#) was not related directly to COS adjustments for commissions, but was associated with establishing affiliation for the purpose of requiring respondents to report the downstream sales of a U.S. reseller.

the specific nature of the alleged commission and the completeness and consistency of documentation and other information that parties provide. See, e.g., [Notice of Final Determination of Sales at Less Than Fair Value: Certain Ball Bearings and Parts Thereof From the People's Republic of China](#), 68 FR 10685 (March 6, 2003) and the accompanying [Issues and Decision Memorandum](#) at Comment 19.

D. Commissions Paid to Affiliated Parties

1. Determining Whether a Selling Agent is Affiliated

In determining whether a selling agent is affiliated, the Department examines whether parties meet the requirements for affiliation under section 771(33) of the Act (see the discussion of affiliation in chapter 17).

In [Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete from Japan](#), 62 FR 24394 (May 5, 1997) at Comment 2, the Department found agents and principals to be affiliated parties, because a principal is in the position to exercise control over its agent. The Department applied similar reasoning in [Hot Rolled from Brazil](#) and accompanying [Issues and Decisions Memorandum](#) at Comment 1; and [Stainless Steel Wire Rods from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review](#), 69 FR 29923 (May 26, 2004) at Comment 3.

2. Treatment of Affiliated Party Commissions

The Department normally treats commissions paid to affiliated companies and those paid to unaffiliated agents differently. We will normally make a COS adjustment for commissions paid to unaffiliated parties, provided those commissions are bona fide commissions and can be tied directly to sales of subject merchandise or foreign like product. However, we will not usually make a COS adjustment for the reported value of commissions paid to affiliated parties unless the respondent is unable to report the selling expenses of its affiliated selling agent, and then only if the commission can be determined to be at arm's length. Instead, we normally make adjustments for commissions paid to affiliated parties by using the affiliated-party selling agent's selling expenses as a surrogate for commissions. See, e.g., [Notice of Final Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils From France](#), 71 FR 6269 (February 2, 2006) and the accompanying [Issues and Decision Memorandum](#) at Comment 1, [Notice of Final Determination of Sales at Less Than Fair Value: Purified Carboxmethylcellulose from the Netherlands](#), 70 FR 28275 (May 17, 2005) and the accompanying [Issues and Decision Memorandum](#) at Comment 2, and [Notice of Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Wire Rod From Spain](#), 65 FR 60905, 60907 (October 13, 2000) (unchanged in [Final Results](#), 66 FR 10988 (February 1,

2001). We also make commission offsets when using this surrogate amount just as we offset adjustments for actual commissions. See section 7 below for a discussion of commission offsets.

3. At-Arm's-Length Determinations for Affiliated Party Commissions

To determine whether commissions paid to affiliated parties are at arm's length, we undertake the following analysis, as appropriate:

- 1) We will compare the commissions paid to the affiliated selling agent to those paid by the respondent to any unaffiliated selling agents.
- 2) In cases where there is not an unaffiliated sales agent, we will compare the commission earned by the affiliated selling agent on sales of the respondent's merchandise to commissions earned by the affiliated selling agent on sales of merchandise of unaffiliated sellers or manufacturers.

We will also examine the nature of the agreements or contracts between the manufacturer/exporter and selling agent which establish the framework for payment of commissions and for service rendered in return for payment. This is to ensure that both affiliated and unaffiliated agents perform approximately the same services for the commission. If we find the commissions to be at arm's length and directly related to the sale, we will make an adjustment for these commissions. See e.g., Final Determination of Sales at Less Than Fair Value: Coated Groundwood Paper from Belgium, Finland, France, Germany and the United Kingdom, (Coated Groundwood Paper), 56 FR 56359 (November 4, 1991).

An important case illustrating the Department's practice with regard to determining whether commissions are at arm's length, is the Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion Resistant Carbon Steel Flat Products, and Certain Cut-To-Length Carbon Steel Plate From Germany, 58 FR 37136, July 9, 1993. Here the Department clarified that in determining whether a commission was at arm's length, the commission rate in question may not be compared to commission rates paid on sales in other countries.

The question of whether respondents have the burden of establishing that commissions are *not* at arm's length was raised in Outokumpu Copper Rolled Products v. United States, 850 F. Supp. 16, (CIT, 1994) (Outokumpu) and in Brass Sheet and Strip From the Netherlands; Final Results of Antidumping Duty Administrative Review, 61 FR 1324 (January 19, 1996) (Brass Sheet and Strip From the Netherlands). In Outokumpu, the Department determined that respondents have the burden of establishing that commissions are made at arm's length but that the Department should not require respondents to establish that commissions are not at arm's length. There, the Department determined that it will presume that commissions are not at arm's length, unless respondents are able to present evidence establishing the contrary. The Court of International

Trade found that the Department had acted reasonably. In [Brass Sheet and Strip From the Netherlands](#), the Department clarified that respondents do not have a burden of proving that related-party commissions are not at arm's length. There, citing [Outokumpu v. United States](#), the Department stated: "Because we presume that related party transactions were not at arm's length, we do not require the respondent to prove that they were not at arm's length."

The level and type of selling services provided is considered before comparing the commissions paid to related and unrelated selling agents. The Department may choose not to rely on comparison of commission rates if a different level or type of selling services were provided by selling agents. In [Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review](#), 65 FR 41303 (July 11, 2003), we found that we could not establish whether commissions paid were at arm's length, because the only unrelated party commissions to which affiliated party commissions could be compared were commissions paid to selling agents for which a different level of selling services were provided.

For further discussions of at-arm's-length determinations regarding commissions, see [Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Bar From Italy](#), 67 FR 3155 (January 23, 2002) and the accompanying [Issues and Decision Memorandum](#) at Comment 5 (Stainless Steel Bar From Italy); [Notice of Final Determination of Sales at Less than Fair Value: Structural Steel Beams From South Korea](#), 65 FR 41437 (July, 5, 2000) (Structural Steel Beams From Korea) and the accompanying [Issues and Decision Memorandum](#) at Comment 21; [Certain Internal-Combustion Industrial Forklift Trucks From Japan; Final Results of Antidumping Duty Administrative Review](#), 62 FR 34216 (June, 25, 1997) (Forklifts From Japan); and [Roller Chain, Other Than Bicycle, From Japan; Final Results of Antidumping Duty Administrative Review](#), 61 FR 64328 (December 4, 1996).

4. Affiliated Party Commissions Found Not to be at Arm's Length

Where affiliated party commissions have been found not to be at arm's length and the respondent has been unable to report the selling expenses of the affiliated party's agent, we have classified the alleged commissions as indirect selling expenses and adjusted for them accordingly. See, e.g., [Stainless Steel Bar From Italy](#) and the accompanying [Issues and Decision Memorandum](#) at Comment 5; [Structural Steel Beams From Korea](#) and the accompanying [Issues and Decision Memorandum](#) at Comment 21; and [Forklifts From Japan](#) at 34224-34225.

E. Commission Offsets

Where there are commissions paid in one market and no commissions paid in the other market, we offset the commissions incurred in the market that has commissions. This commission offset may never exceed the amount of other selling expenses (indirect selling expenses, including imputed inventory carrying costs) incurred in the market without commissions. See section

351.410(e) of the Department's regulations for the regulations covering the treatment of commission offsets.

The commission offset rule is easy to apply when one U.S. sale is compared to one CM sale. However, we generally make comparisons involving averages of multiple sales in at least one market, and, within each averaging group, there can be commissions on all sales, on some sales, or on no sales. This section deals with how we apply the commission offset rule using weighted-average commissions and weighted-average indirect selling expenses.

1. The Use of Indirect Selling Expenses in the Calculation of Commission Offsets

Before considering how commission offsets are calculated, it is important to understand how we treat indirect selling expenses. For AD purposes, indirect selling expenses consist of actual indirect selling expenses usually kept on a company's financial records plus imputed inventory carrying costs. Indirect selling expenses used as commission offsets are: indirect selling expenses associated with sales in the comparison market and indirect selling expenses associated with U.S. sales, excluding those deducted from CEP. Where U.S. price is based on CEP, indirect selling expenses incurred on economic activity in the U.S. market ("CEP indirects") are deducted from CEP and are not used to offset CM commissions.

CEP indirects and other indirects are treated differently in AD calculations. While CEP indirects are deducted in CEP computations, other indirects are not deducted in CEP, EP, or CM net price calculations. It is our practice to use these other indirects not previously deducted from the net prices for commission and CEP offset calculations.

2. Weight-Averaged Sales Values

In investigations and reviews, we normally weight-average sales values for each CM product. Moreover, in investigations, we normally weight-average sales values for each U.S. product. Because the Department's regulations direct us to grant a commission offset only for CM or U.S. sales that have no commission, a difficulty arises where weight-averaged CM values (or U.S. values in an investigation) are used to calculate normal value. To account for situations where weight-averaged CM or U.S. values are used, the Department makes an adjustment no greater than the difference between the U.S. and weighted-average CM amount of per-unit commissions. To ensure that the commission offset granted does not exceed the total amount that would be granted for each CM or U.S. sale as taken individually, the Department's practice has been to use only the indirect selling expenses incurred on the sales that did not have commissions (offset indirect selling expenses) for use in the commission offset.

To apply the commission offset for weight-averaged values, we first create a commission offset indirect selling expense variable in the computer program. This variable has a value equal to zero for each sale with a commission and a value equal to the indirect selling expenses, including inventory carrying costs, for each sale with no commission. Next, the program weight averages

commissions and commission offset indirect selling expenses for each CM product (and each U.S. product in investigations) by total sales quantity. If every CM or U.S. sale has a commission, then the commission offset indirect selling expense variable will be zero, and no commission offset will be made. However, if only some or none of the CM or U.S. sales have commissions, some offset indirect selling expenses will be available for a commission offset.

The following example illustrates the treatment of weighted-average indirect selling expenses in the calculation of commission offsets:

The two CM sales below are weight averaged to find normal value (in our example sales quantity is equal to one unit for both sales). When the sales are weight averaged, offset indirect selling expenses are calculated using only those indirect selling expenses incurred on the sale without commissions. In our example, \$10 of indirect selling expenses and inventory carrying costs per unit are available to offset U.S. commissions:

| Total Commission | Total ISEs | Offset ISEs | | |
|------------------|------------|-------------|------------|------------|
| CM SalesProduct | Quantity | (COMMISH) | (INDSELLH) | (INDCOMMH) |
| 1 A1 | 1 | 10 | 10 | 0 |
| 2 A1 | 1 | 0 | 20 | 20 |

CM Wt-Avg:

| | | | | |
|----|---|---|----|----|
| A1 | 2 | 5 | 15 | 10 |
|----|---|---|----|----|

3. Commission Offset Calculations

If CM commissions are greater than U.S. commissions, then the commission offset, which will be added to NV, will be set equal to the lesser of a) the amount that CM commissions exceed U.S. commissions, or b) U.S. offset indirect selling expenses, sometimes referred to as “surrogate commissions”. Again, for CEP sales, the U.S. offset indirect selling expenses do not include those indirect selling expenses deducted from CEP; they only include indirect selling expenses incurred in the EC for U.S. sales that are not associated with economic activities in the United States. If U.S. commissions are greater than CM commissions, then the commission offset, which will be deducted from NV, will be set equal to the lesser of a) the amount that US commissions exceed CM commissions, or b) CM offset indirect selling expenses, sometimes referred to as CM “surrogate commissions.” If U.S. and CM commissions are equal, or if all weighted-average CM sales and all U.S. sales being compared have commissions, then the commission offset will be zero.

4. Sample Offset Calculations

See the examples at the end of the CEP offset chapter for examples illustrating how we account for commission offsets in our calculations.

X. ADJUSTING NORMAL VALUE BY THE CEP OFFSET (THE INDIRECT SELLING EXPENSE ADJUSTMENT)

References:

The Tariff Act of 1930, as amended (the Act)

Section 773(a)(7)(B) - constructed export price (CEP) offset

Department of Commerce Regulations

19 CFR 351.412(d) - CEP offset

SAA

Section B.2.c.(4) - CEP offset

Antidumping Agreement

Article 2.4 - adjustments for comparisons at equivalent level of trade

Section 773(a)(7)(B) of the Act and section 351.412 (f) of the Department's regulations govern the CEP offset. The CEP offset is an adjustment made to normal value (NV), and is made only in limited instances. To grant a CEP offset, we must establish 1) that NV is at a more advanced level of trade than the level of trade of the CEP sales and 2) that despite the fact that the party cooperated to the best of its ability, the available data do not allow for a level of trade adjustment. See the section of this chapter on level of trade adjustments.

Commission offsets and CEP offsets are interrelated. CEP offsets are used to adjust for differences in the level of trade between the U.S. and comparison markets and are applied to normal value. Where U.S. commission offsets and CEP offsets are granted, the combined amount of both the commission offset and the CEP offset may not exceed the total amount of indirect selling expenses, including inventory carrying costs, incurred in the comparison market. That is, we use the remaining indirect selling expenses after the commission offset for the calculation of the CEP offset. Thus, the CEP offset granted will not exceed the amount, if any, by which the comparison market indirect selling expenses exceed the amount of U.S. commissions paid. The purpose of capping the total amount of the commission offset and the CEP offset at the amount of indirect selling expenses incurred in the CM is to avoid the double deduction of CM indirect selling expenses. See Section 351.410(e) of the Department's regulations.

The effect of the CEP offset is to reduce NV by the amount of indirect selling expenses, including inventory carrying costs, which the respondent incurs on sales of the foreign like product in the comparison market. The amount of the CEP offset adjustment cannot exceed the amount of indirect selling expenses, including inventory carrying costs, deducted from CEP

under section 772 (d)(1)(D) of the Act. See the discussion of CEP deductions in Chapter 7. However, the pool of indirect selling expenses available for the CEP offset are reduced by the amount of indirect selling expenses used to offset U.S. commissions, as noted above. Indirect selling expenses are selling expenses that the seller would incur regardless of whether particular sales were made but that reasonably may be attributed, in whole or in part, to such sales. While common examples of direct selling expenses include credit expenses, commissions, and the variable portions of guarantees, warranty, technical assistance, and servicing expenses, common examples of indirect selling expenses include salespersons' salaries and product liability insurance. The Department also classifies the fixed portion of expenses, such as salaries for employees who perform technical services or warranty repairs, as indirect selling expenses.

In order to grant the CEP offset, the respondent must demonstrate that although it has cooperated to the best of its ability, the available data do not permit a determination on whether the LOT difference affects price comparability. See e.g. [Grain-Oriented Electrical Steel From Italy: Final Results of Antidumping Administrative Review](#), 66 FR 14887 (March 14, 2001) and accompanying [Issues and Decision Memorandum](#) at Comment 3.

As noted above, the CEP offset adjustment is derived by (1) computing the weighted-average of each type of per-unit indirect selling expense reported for the foreign like product sales being compared to CEP sales, (2) summing these weighted averages, (3) converting this sum to a U.S. dollar amount using the average exchange rate in effect for sales in the U.S. sales comparison pool during the period of investigation (POI) or, in a review, the exchange rate in effect on the date of sale of the CEP sale being compared, and (4) comparing this U.S. dollar amount to the total weighted-average indirect selling expense for the CEP sales. The CEP offset adjustment is equal to the lesser of : A) the total weighted-average indirect selling expense for the foreign like product sales, less any indirect selling expenses applied as a commission offset; and B) the total weighted-average indirect selling expenses deducted from the CEP.

The CEP offset and the commission offset is interrelated. The CEP offset is limited to the amount of those indirect selling expenses, including inventory carrying costs deducted from CEP. Limiting the CEP offset in this way caps the total amount of indirect selling expenses deducted from NV under the commission offset and the CEP offset at the amount of CEP indirect selling expenses deducted from the CEP sale. This limit is referred to as the "CEP offset cap." See the discussion of commission offsets in the "differences in the circumstances of sale" section of this chapter.

For example, assume the following weighted-average amounts for indirect selling expenses in an investigation in which NV in the comparison market is at a more advanced level of trade than the level of trade of the CEP. The data in this case does not allow for a level of trade adjustment, so a CEP offset is warranted:

Weighted-average per-unit indirect selling expenses incurred in the CM on like product sales:

| | |
|-------------------------------------|-------------------|
| inventory carrying costs | 500 euro |
| indirect advertising | 500 euro |
| technicians' salaries | 2,500 euro |
| product liability insurance premium | 1,700 euro |
| warehousing | 3,000 euro |
| salespersons' salaries | <u>5,500 euro</u> |

| | |
|---|--------------------|
| total weighted-average CM indirect selling expenses | <u>13,700 euro</u> |
|---|--------------------|

| | |
|--|-------------------|
| less: the amount of weighted average indirect CM selling expenses applied as an offset to U.S. commissions | <u>1,000 euro</u> |
|--|-------------------|

| | |
|---|--------------------|
| equals: weighted-average indirect CM selling expenses and inventory carrying costs available for the CEP offset | <u>12,700 euro</u> |
|---|--------------------|

Weighted-average per-unit U.S. indirect selling expenses deducted from CEP:

| | |
|----------------------------|----------------|
| inventory carrying costs | \$ 500 |
| indirect advertising | \$ 500 |
| technician's salaries | \$2,000 |
| product liability premiums | \$1,500 |
| pre-sale warehousing | \$3,250 |
| salesperson's salaries | <u>\$1,250</u> |

| | |
|---|----------------|
| total weighted-average, CEP indirect selling expenses | <u>\$9,000</u> |
|---|----------------|

| | |
|--|----------------|
| weighted-average indirect CM selling expenses available for the CEP offset expressed in U.S. dollars | \$9,080.50 |
| CEP offset deduction (The lesser of \$9080 and \$9000) | <u>\$9,000</u> |

If the weighted-average exchange rate for the POI is 0.715 U.S. dollars per euro, then the total weighted-average foreign market indirect selling expense expressed in U.S. dollars is \$9,080.50

(12,700 x 0.715 = \$9,080.50). However, the CEP offset adjustment to NV is limited or “capped” by the total weighted-average indirect selling expense deducted from the CEP. In this example the “cap” is \$9,000 which is less than the total weighted-average EC indirect selling expense of \$9,080.5. Therefore, the per-unit CEP offset deduction is \$9,000.

The following are instances in which the Department has dealt with issues concerning CEP offsets:

In [Pasta From Italy, 1996](#), the Department denied one respondent’s request for a CEP offset adjustment because the respondent’s CEP and the respondent’s sales in Italy were at the same level of trade. See [Pasta From Italy, 1996](#), at Comment 7.

In [Cold Rolled Carbon Steel Flat Products from South Africa](#), because the Department found the CEP level of trade to be similar to the home-market level of trade, we determined a CEP-offset adjustment was not warranted. See [Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From South Africa](#), 67 FR 62136 (October 3, 2002) and accompanying [Issues and Decision Memorandum](#) at Comment 1.

In [Stainless Steel Sheet and Strip in Coils From France](#), the Department found that home market sales were made at a more advanced LOT than CEP and that a CEP offset was warranted because we were unable to quantify the LOT adjustment in accordance with section 773(a)(7)(A) of the Act. Therefore, the Department could not calculate a LOT adjustment and applied a CEP offset for the final results. See [Stainless Steel Sheet and Strip in Coils From France: Final Results of Antidumping Administrative Review](#), 70 FR 7240 (February 11, 2005) and the accompanying [Issues and Decision Memorandum](#) at Comment 1.

In [Stainless Steel Sheet and Strip in Coils from Mexico](#), the respondent argued that a circumstance of sale adjustment should be made to NV to further adjust for indirect selling expenses not permitted by the CEP offset cap. The Department determined that a circumstance of sale adjustment for indirect selling expenses in excess of the CEP offset cap is not permitted by the Act. See [Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review](#), 70 FR 73444 (December 12, 2005) and the accompanying [Issues and Decisions Memorandum](#) at Comment 9.

The following illustrates the adjustment for commissions offsets and remaining offset indirect selling expenses in our calculations:

We offset CM commissions when CM commissions are greater than U.S. commissions. To effect this offset, we use U.S. indirect selling expenses, including inventory carrying costs, not deducted from CEP. (That is, we use as the offset U.S. indirect selling expenses not incurred for economic activity in the U.S.). The offset is limited to those indirect selling expenses attributed to U.S. sales for which no commission was reported (weight-average offset indirect selling

expenses). In this example, because no CM indirect selling expenses were used to offset commissions, all CM indirect selling expenses are available for a CEP offset.

To summarize, if weighted-average CM commissions are greater than weighted-average (if applicable) U.S. commissions then:

commission offset = lesser of: (U.S. offset indirect selling expenses or (weighted-average CM commissions - weighted-average U.S. commissions))

and,

CEP offset = lesser of weight-average CM indirect selling expenses or weighted average U.S. indirect selling expenses deducted from CEP.

We offset U.S. commissions if U.S. commissions are greater than CM commissions. To affect this offset, we use CM indirect selling expenses, including inventory carrying costs. The offset is limited to those indirect selling expenses attributed to CM sales for which no commission was reported. The amount used as a commission offset is deducted from total CM indirect selling expenses to determine the amount available for a CEP offset.

To summarize, if U.S. commissions are greater than weight-average CM commissions then:

commission offset = lesser of : (CM commissions offset indirect selling expenses or (weighted-average U.S. commissions - weighted averaged CM. commissions))

and,

CEP offset = lesser of: (weighted-average CM indirect selling expenses - commission offset) or U.S. indirect selling expenses deducted from CEP.

Finally, if the commissions in both markets are equal, or all sales compared have commissions, we do not make a commission offset. Because no offset was made, all CM indirect selling expenses are available for a CEP offset.

XI. DIFFERENCES IN QUANTITIES

References:

The Tariff Act of 1930, as amended (the Act)
 Section 773(a)(6)(C)(I) - adjustments for differences in quantities
 Department of Commerce (DOC) Regulations
 19 CFR 351.409 - adjustments for differences in quantities
 SAA

Section B.c.(3) - adjustments for differences in quantities
Antidumping Agreement
Article 2.4 - allowances for differences in quantities

A. Adjustment Criteria

Section 773(a)(6)(C)(I) of the Act provides that normal value (NV) may be adjusted to reflect the differences in quantities sold between the comparison market and the U.S. market. Whether to grant a quantity discount adjustment depends more on the pricing behavior of the individual exporter or producer than on whether other firms in the industry engage in similar behavior. Section 351.409 of the Department's regulations lists the requirements normally required to qualify for a quantity adjustment. In brief, where an exporter or producer granted quantity discounts of at least the same magnitude on twenty percent or more of sales of the foreign like product for the relevant country during the period examined (or for a more representative period) or if the exporter or producer demonstrates that the discounts reflect savings specifically attributable to the production of the different quantities, the Department will make a deduction for quantity discounts from NV.

The existence of a price list that includes a quantity discount, or the lack of such a discount, will not in and of itself determine the eligibility of a respondent for this adjustment. Also, if a level of trade adjustment is claimed in addition to the quantity discount adjustment, the latter adjustment will not be granted unless the respondent demonstrates that the effect on price comparability due to differences in quantities is separate from that due to differences in levels of trade.

As previously indicated, the respondent must demonstrate either that: 1) the respondent consistently granted discounts based on quantity for at least twenty percent of its sales of the foreign like product or 2) the discounts are directly related to cost savings attributable to producing in larger quantities. Because few respondents are able to demonstrate actual cost savings attributable to selling in larger quantities, the Department rarely grants a quantity discount adjustment. When a respondent fails to satisfy the conditions necessary to obtaining a quantity discount, we calculate NV based on a weighted-average price that includes all sales in the averaging group. We also adjust our NV calculations for all specific discounts that are associated with those sales.

The Department's criteria in granting the quantity discount adjustment are clarified in the Final Determination of Sales at Less Than Fair Value: Brass Sheet and Strip from the Netherlands, 53 FR 23431, 23433 (June 22, 1988), where we rejected a quantity discount claim because the alleged quantity discounts were not granted on a uniform basis, but rather were part of the Dutch company's customer-specific sales negotiations.

In several recent cases, the Department has reiterated that it is the responsibility of respondents to either demonstrate that they have granted quantity discounts on at least twenty percent of their sales, or to demonstrate specific cost savings attributable to selling in large quantities:

In the [Final Determination of Sales at Less than Fair Value: Stainless Steel Butt Weld Pipe Fittings from Italy](#), 65 FR 81830, 81831 (December 27, 2000) and accompanying [Issues and Decision Memorandum](#) at Comment 3, respondent claimed a quantity adjustment in conjunction with a level of trade adjustment. The Department determined that there were two levels of trade in the home and U.S. markets and, accordingly, granted appropriate level of trade adjustments. Respondent failed to demonstrate that the effect on price comparability due to differences in quantities is separate from that due to differences in the level of trade, which precluded the respondents from a differences in quantity adjustment.

In [Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from Germany](#), 67 FR 3159 (January 23, 2002) and accompanying [Issues and Decision Memorandum](#) at Comment 1, the Department did not make a quantity adjustment because we did not find that the respondent had a uniform policy with regard to quantity discounts and decided not to examine whether such a policy existed with regard to certain sub-sets of HM sales. The Department also found that the respondent had not granted quantity discounts on at least 20 percent of HM sales.

In the case of [Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Canada](#), 64 FR 17324, 17328-17329 (April 9, 1999), we did not grant a quantity discount because the respondent could not establish the correlation of quantities and prices. Moreover, in that case, we found that the respondent did not grant any quantity discounts but rather effectively imposed a surcharge on smaller orders.

Similarly, in the case of [Final Results of Antidumping Duty Administrative Reviews and Determination Not to Revoke in Part: Certain Corrosion-Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate from Canada](#), 66 FR 3543 (January 16, 2001) and accompanying [Issues and Decision Memorandum](#) at Comment 3, we rejected a quantity discount claim because the respondent failed to: 1) establish a correlation between the price differences and the quantities sold; and 2) demonstrate that it granted discounts of a least the same magnitude on 20 percent or more of its sales of subject merchandise in the home market during the POR.

In contrast, in [Final Determination of Sales at Less than Fair Value: Brass Sheet and Strip from the Federal Republic of Germany](#), 52 FR 822 (January 9, 1987), an adjustment for differences in quantities sold was allowed on all home market sales because the Department found that at least 20 percent of these sales received a quantity discount on a uniform basis during the six-month period of investigation (POI).

B. Sample Calculation

When a quantity discount is granted during the POI or period of review (POR), every sale used to calculate NV has a deduction made for the quantity discount.

The following example illustrates how the adjustment works:

| CM sales over the POI/POR | No. of units | Gross price per unit | Quantity discounts | Net price per unit |
|---------------------------|--------------|----------------------|--------------------|--------------------|
| 1 | 10 | \$1.00 | 10% | \$0.90 |
| 2 | 2 | 1.00 | 0% | 1.00 |
| 3 | 3 | 1.00 | 0% | 1.00 |
| 4 | 10 | 1.00 | 10% | 0.90 |
| 5 | 5 | 1.00 | 0% | 1.00 |

Assume the manufacturer maintains a quantity discount price schedule to which it strictly adheres. The schedule calls for a \$1.00 gross price with a quantity discount of 10 percent for purchases in quantities of 10 units or greater. The transactions to the United States each involve 10 units or more; CM sales 1 and 4 provide as comparable a sale quantity level as possible to the U.S. sale. All sales are made at the same level of trade.

Conclusion: As sales 1 and 4 in the CM represent 67 percent of sales by number of units sold, the company has demonstrated that over 20 percent of sales received the discount during the POI or the POR. Further, the discounts were applied according to a consistent price policy, and were of the same magnitude. Consequently, the company has satisfied the quantity discount adjustment criteria. In such a scenario, we would calculate CM price as follows by applying a 10% quantity discount to each home market sale:

| Sale | Calculation |
|------|-----------------------|
| 1 | price-10% = net price |
| 2 | price-10% = net price |
| 3 | price-10% = net price |
| 4 | price-10% = net price |
| 5 | price-10% = net price |

Weighted-average price = Total price divided by number of units = \$27/30 = \$0.90 per unit.

Section 351.409(b)(2) of the Department's regulations require that the seller demonstrate to the Department's satisfaction that the discount is warranted on the basis of savings which are specifically attributable to the production of the different quantities involved. We consider differences in the direct cost of manufacture in quantifying a cost based adjustment. For

example, we would consider the cost savings attributable to the purchase of raw materials at a discount due to the quantity purchased. Finally, while the respondent may make claims for differences in the cost to produce different quantities based on theoretical cost studies, the Department places greater weight on evidence that cost adjustment claims relate to actual savings on direct manufacturing costs.

Claims that additional setup time is required for shorter runs do not normally form the proper basis for an adjustment. The reason for this is that most manufacturers will arrange their production schedules to obtain the greatest possible efficiency in setting up production runs. Thus, when a manufacturer has two orders of the same product, it will normally produce the quantity needed to fill both orders at the same time.

19 CFR 351.409(e) ensures that there is no double-counting between the quantity discount adjustment and a level of trade (LOT) adjustment. Thus, where we make a LOT adjustment, we will not also make a quantity adjustment unless the respondent satisfactorily isolates the price comparability effect of difference of quantities from the effect of differences in LOT.

XII. DIFFERENCES IN MERCHANDISE

References:

- The Tariff Act of 1930, as amended (the Act)
 - Section 773(a)(6)(C)(ii) - differences in merchandise (DIFMER)
- Department of Commerce (DOC) Regulations
 - 19 CFR 351.411 - differences in physical characteristics
- SAA
 - Section B.2.c.(3) - DIFMER
- Antidumping Agreement
 - Article 2.4 - differences in physical characteristics
 - Article 2.6 - like product definition
- Import Administration Policy Bulletin
 - Policy Bulletin 92.2 of July 29, 1992 - DIFMER; 20% rule

A. The Difference in Merchandise Adjustment

Where identical products are not sold in the U.S. and the comparison market or otherwise cannot be compared, we will compare the subject merchandise sold in the United States to the foreign like product sold in the comparison market that is most similar in physical characteristics. Section 773(a)(6)(C)(ii) of the Act provides for an adjustment to normal value (NV) for differences in the physical characteristics of similar (i.e., non-identical) products. Where similar products are compared, a “difference in merchandise adjustment” (DIFMER) is made, if appropriate, to normal value to account for the differences in the physical characteristics of the merchandise sold in the United States and the comparison market.

The DIFMER adjustment is made to the comparison market price and normally encompasses the net difference in the variable manufacturing costs that are incurred in producing products with differing physical characteristics. The adjustment is based on actual physical differences in the products, and is calculated on the basis of direct manufacturing costs. Direct manufacturing costs are composed of three components: 1) materials, 2) labor and 3) variable factory overhead. See, e.g., [Final Results of Antidumping Duty Administrative review: Brass Sheet and Strip from Canada](#), 62 FR 16771 (April 8, 1997), [Pasta From Italy, 1996](#), and [Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan](#), 61 FR 14065 (March 29, 1996). Note, however, the Department does not normally compare products for which the DIFMER adjustment is more than 20 percent of the total cost of manufacture of the U.S. product. The purpose of this guideline is to prevent the comparison of U.S. products to CM products that are too dissimilar to render a meaningful comparison. See section D, below for a description of the twenty percent DIFMER guideline.

B. Market Value Versus Physical Characteristics as the Basis for Calculating the DIFMER Adjustment

Section 351.411(b) of the Department's regulations directs it to consider differences in variable costs associated with the physical differences in the merchandise but, where appropriate, to consider differences in market value. Because observed differences in cost are often the most practical way the Department has to identify and quantify price differences attributable to physical differences, the Department generally bases DIFMER adjustments on observed differences in cost. See Policy Bulletin 92.2. Although there is nothing in the statute or the regulations to preclude the Department from basing the DIFMER adjustment upon differences in the market values of the merchandise, we do not normally use differences in market prices as the basis of the DIFMER adjustment. See, e.g., [Final Determination of Sales at Less Than Fair Value: Greenhouse Tomatoes From Canada](#), 67 FR 8781 (February 26, 2002) and accompanying [Issues and Decisions Memorandum](#) at Comment 6 ([Greenhouse Tomatoes From Canada](#)) and [Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Malaysia](#), 69 FR 34128 (June 18, 2004) and accompanying [Issues and Decisions Memorandum](#) at Comment 5 ([Polyethylene Retail Carrier Bags From Malaysia](#)). In large part, this is because market values are often governed by many factors beyond the physical characteristics of the merchandise. Also, determining which physical characteristics may or may not affect market value is not normally possible. See, e.g., [Greenhouse Tomatoes From Canada](#). The Department explained why we would not to base DIFMER adjustments on market values in the following cases:

In [Greenhouse Tomatoes From Canada](#), the Department determined that it did not have an accurate means of measuring the physical differences between similar products. We also rejected using market value as a DIFMER adjustment because we could not determine which physical characteristics may or may not affect market prices and because the respondent did not submit sufficient information to support the propriety of using market value as the basis of the

DIFMER adjustment. Therefore, we only matched sales of subject merchandise to home-market sales of identical type, color, size, and grade.

In [Polyethylene Retail Carrier Bags From Malaysia](#), the Department explained that while the Act requires the Department to account for and adjust for any differences attributable to physical differences, section 351.411(b) of the Department's regulations directs it to consider differences in variable costs associated with the physical differences in the merchandise. However, in this case, the Department could not calculate DIFMERs based on the respondent's reported costs for resin because those reported costs reflected cost differences that were due to differences in the source of the resin used in production, not differences in the products' physical characteristics. Therefore, we applied the average POI per-unit resin cost to all bags for the DIFMER calculation, isolating differences in costs of production that were attributable to physical differences.

In the following cases, the Department articulated its freedom to use market value as the basis for the DIFMER adjustment in certain limited circumstances:

In [Polyvinyl Alcohol From Taiwan: Final Results of Antidumping Administrative Review](#), 63 FR 32810, 32816 (June 16, 1998) the Department explained that we have the discretion to adjust for physical differences based on value. However, in that particular case, the information on the record did not support a value-based DIFMER adjustment.

Citing extenuating circumstances, the Department used market value to calculate DIFMERs in [Final Determination of Sales at Less Than Fair Value: Nepheline Syenite From Canada](#), 57 FR 9237 (March 17, 1992) ([Canadian Nepheline](#)). However, in that case we indicated that, while as a matter of policy and procedural preference we would have preferred to seek additional information regarding cost, it was too late to request further cost of production data. Because there was substantial evidence on the record showing differences in the physical characteristics of respondent's products, and because each of these physical differences had been shown to have an impact on the market value of these products, the Department held that there was sufficient evidence to support the appropriateness of using market value. Therefore, the Department based the DIFMER adjustment upon differences in the market values of the products. However, we further indicated that the DIFMER adjustment and the twenty percent DIFMER guideline each had a very small impact on the overall margin.

C. The DIFMER Calculation

To calculate the DIFMER adjustment, the variable manufacturing costs of the U.S. and comparison market prices are compared. If the variable manufacturing costs are less for the U.S. product, a deduction is made from NV. If the variable manufacturing costs are less for the CM product, an addition is made to NV. Note that any adjustment for DIFMER must relate to actual differences in the physical characteristics of the merchandise. We do not consider differences in

the cost of production when the products being compared have identical physical characteristics. Moreover, while products may have identical comparison criteria, as defined by Appendix V of the antidumping questionnaire, they are not necessarily identical in all physical characteristics. Similarly, adjustments cannot be made for DIFMERs based on 1) the fact that the exporter is charged different prices for its inputs depending on the destination of the finished product or 2) the fact that the domestic and exported products are produced in different facilities with differing production efficiencies. Also, if the economy of the comparison market had high inflation during the period of investigation or review, adjustments may have to be made in the calculation of DIFMER. See section XV of this chapter for information on how to compute DIFMER adjustments in high inflation situations. An example of the calculation for an export price (EP) DIFMER adjustment is shown below -- the calculation is the same for constructed export price (CEP) transactions:

CM Sales

| | | | |
|------------------------------------|---------|------------------------------|--------|
| Wt-Aver CM price converted to US\$ | \$5.00 | Wt-Aver EP | \$5.50 |
| Variable Cost Of Manufacture | \$3.00 | Variable Cost Of Manufacture | \$2.96 |
| DIFMER = \$3.00 - \$2.96 | \$0 .04 | | |
| Wt-Aver NV | \$ 4.96 | Wt-Aver EP | \$5.50 |

In this example, the variable manufacturing costs are \$3.00 for the comparison market product and \$2.96 for the U.S. product. Because the variable manufacturing costs are less in the United States, a \$0.04 deduction is made from NV. If the costs were greater for the U.S. product, an addition would be made to NV.

D. The Twenty Percent DIFMER Guideline

To assess whether there is a reasonable basis for comparing merchandise, we use the twenty percent DIFMER guideline in the following manner.

| | | | |
|---|------------|--------------------------------------|----------|
| CM Sales | U.S. Sales | | |
| Ex works, CM price | 30 Pesos | Ex works, U.S. price | \$13.00 |
| Variable manufacturing costs of CM product: | product: | Variable manufacturing costs of U.S. | |
| materials | 14 Pesos | materials | 13 Pesos |
| labor | 2 Pesos | labor | 1 Peso |
| direct factory overhead | 3 Pesos | direct factory overhead | 2 Pesos |

| | | | |
|--|----------|---|----------|
| Total variable manufacturing cost of CM product | 19 Pesos | Total variable manufacturing cost of U.S. product | 16 Pesos |
| Non-variable manufacturing costs of U.S. product | | | 4 Pesos |
| Total manufacturing cost of U.S. product | | | 20 Pesos |
| Calculation of DIFMER: | | | |
| Variable manufacturing cost of CM product | | | 19 Pesos |
| Variable manufacturing cost of U.S. product | | | 16 Pesos |
| DIFMER | | | 3 Pesos |

In the above example, the variable manufacturing costs of the U.S. product are less than the costs of the comparison market product. However, we only make comparisons between products which can reasonably be compared (see section II of this chapter for a further discussion of this topic). Sales of products in the CM with a DIFMER exceeding 20 percent of the total cost of manufacture of the product exported to the United States will normally not be used in determining NV. Total manufacturing costs are the variable costs of manufacturing plus the non-variable or fixed manufacturing costs of the product. Any use of products with a DIFMER exceeding 20 percent must be noted and fully explained. See Policy Bulletin 92.2 for information for a more detailed explanation of the 20- percent guideline.

Applying this twenty percent guideline to our example above, we divide the DIFMER of 3 Pesos by the U.S. product's total cost of manufacturing of 20 Pesos for a result of 15 percent. Insofar as there is less than a 20-percent difference in variable manufacturing costs, we conclude that the comparison market product is sufficiently similar to the U.S. product that it can be used for comparison purposes with a DIFMER adjustment. Accordingly, we deduct 3 Pesos from the comparison market price of 30 Pesos to account for the smaller variable manufacturing costs of the U.S. product to arrive at an NV of 27 Pesos as reflected in the following calculation:

| | | |
|------------------------|-------------|----------|
| CM price before DIFMER | | 30 Pesos |
| DIFMER | (- 3) Pesos | |
| NV | 27 Pesos | |

E. 20-Percent DIFMER Guideline Issues

In [Top-of-the-Stove Stainless Steel Cooking Ware From the Republic of Korea: Final Results and Rescission, in Part, of Antidumping Duty Administrative Review](#), 67 FR 40274 (June 12, 2002), ([Cooking Ware From the Republic of Korea](#)), and accompanying [Issues and Decision Memorandum](#) at Comment 2, we summarized the Department's position on the comparison of

product sales and how the 20 Percent DIFMER guideline should be viewed. First, the Department noted section 771(16) of the Act directs the Department to select home market comparison merchandise which is, preferably, physically identical to merchandise sold in the United States. If identical comparison merchandise is unavailable, we may then select merchandise which is similar in component material and in the purposes for which used, after adjusting for any differences in the physical characteristics of the comparison merchandise (the so-called DIFMER adjustment). 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 Revocation in Part](#), 65 FR 11767 (March 6, 2000), and accompanying [Issues and Decision Memorandum](#) at Comment 1.

In [Cooking Ware From the Republic of Korea](#), the Department noted that the Act is silent as to the precise manner in which similar and identical merchandise is to be identified. Because the antidumping statute does not detail the methodology that must be used in determining what constitutes “similar” merchandise, the Department has broad discretion, implicitly delegated to it by Congress, to apply an appropriate model match methodology to determine which home market models are properly comparable with U.S. models under the statute. See, e.g., [Koyo Seiko Co., Ltd., et al. v. United States](#), 66 F. 3d 1204, 1209 (Fed. Cir. 1995). The Courts have upheld the Department's broad discretion in setting model match methodologies, provided that the methodologies used are reasonable. See, [Koyo Seiko Co. v. United States](#), 932 F. Supp. 1488, 1491 (CIT 1996); [NSK, Ltd., v. United States](#), 919 F. Supp. 442, 445 (CIT 1996). In addition, the Department disagreed with the argument that the Department's model matching methodology in [Cooking Ware From the Republic of Korea](#) was in conflict with the policy explained in Policy Bulletin 92.2.

F. Weighting Issues

A number of cases have examined issues concerning the programming of the DIFMER calculation including whether differences in VCOM are more or less important than differences in level of trade and contemporaneity. Section 773(a)(1)(B)(I) of the Act instructs us that the normal value shall be based on prices “to the extent practicable, at the same level of trade” as the U.S. sale while section 773(a)(1)(A) of the Act instructs us that the normal value shall be based on prices “at a time reasonably corresponding to the time” of the U.S. sale. When faced with a choice of two or more models among which we must select using our model-matching methodology, we will normally take into account differences in level of trade and contemporaneity before considering differences in cost in selecting the most-similar CM model. In [Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews](#), 70 FR 54711, (September 16, 2005) and the Accompanying [Issues and Decision Memorandum](#) at Comment 2, ([Ball Bearings](#)) the Department acknowledged, however, that we have accorded more weight in some proceedings to the differences in the VCOM than we have to differences in level of trade

and contemporaneity. In other proceedings, we have accorded more weight to differences in level of trade and contemporaneity than we have to the differences in VCOM. In [Ball Bearings](#), we stated our intended practice across all antidumping proceedings. There, the Department found that it is appropriate to place more weight on level-of-trade and contemporaneity concerns than on differences in costs. While using the differences in costs is a valid methodology for resolving ties between two or more models where there are no differences in the physical characteristics for which we account in our model-matching methodology, we determined that level of trade and contemporaneity are more important to our model-matching methodology.

G. Rounding Issues

Occasionally, rounding errors may result in the presence of DIFMERS, despite the fact that the subject merchandise and foreign like product being compared have identical model-matching characteristics. For example, in [Cooking Ware From the Republic of Korea](#), the respondent incorrectly listed variable and fixed costs to different numbers of decimal places in the U.S. and CM. To adjust for this error, the Department modified its calculation program by rounding the respondent's reported DIFMER values to three decimal places. Without this adjustment, the program resulted in tiny rounding differences in the reported variable cost of manufacture (VCOM) values manifesting themselves as very small DIFMER percentages in comparisons between the identical products. The analyst should be aware of the potential for these types of calculation errors.

XIII. DIFFERENCES IN LEVEL OF TRADE

References:

- The Tariff Act of 1930, as amended (The Act)
- Section 773(a)(1)(B)(I) - requirement for comparisons at the same level of trade
- Section 773(a)(7)(A) - explanation of LOT
- Section 773(a)(7)(B) - constructed export price (CEP) offset for LOT
- Department of Commerce Regulations
- 19 CFR 351.412 - LOTs; adjustments for differences in LOTs; CEP offset
- 19 CFR 351.414(d)(2) - LOT and price averaging groups
- SAA
- Page 159 - LOT adjustments
- Page 172 - LOT and price averaging
- Antidumping Agreement
- Article 2.4 - requirement to compare sales at the same LOT
- Article 2.4.2 - requirement to consider LOT when comparing prices

We perform level of trade (LOT) analyses in all investigations and reviews. Moreover, we perform such analyses whether or not any interested party requests such analysis. Thus, respondents must provide LOT information regardless of whether a LOT adjustment would

increase or decrease the dumping margin. Also, the effect of a LOT adjustment may vary between periods of review, favoring the respondent in one period while raising the margin in a subsequent review.

In the antidumping questionnaire, respondents are asked to report and justify the different LOTs according to the selling functions performed and services offered to each class of customers. We ask the respondent to separate customers into phases of marketing to which a unique set of selling functions/services apply, and to provide a consolidated, detailed narrative analysis of the selling functions and services provided to each of these unique customer classes. Different channels of distribution may constitute different LOTs, but it is also conceivable that the LOT could be the same if there is no significant difference in the selling functions performed.

Moreover, under current law, nominal differences in customer categories do not in themselves establish a difference in LOT. This is in contrast to the pre-1994 practice in which the LOT was often defined as the customer category, *e.g.*, end users or original equipment manufacturers (OEMs), wholesalers or distributors, and retailers, without regard to specific selling functions performed. Customer categories may still be considered as the basis for different LOTs if the Department determines that significant differences in selling functions exist among them.

Section 773(a)(1)(B) of the statute requires that normal value (NV) shall be based to the extent practicable on comparison market sales at the same level of trade as the export price (EP) or CEP. Section 773(a)(7)(A) adds that, if comparisons are made between sales at different LOTs, an adjustment may be made based on price differences between the two LOTs in the comparison market. Section (A) states that differences in LOTs for which adjustments may be made involve the performance of different selling activities and a demonstrated effect on price comparability in the country in which NV is determined.

The Department's regulations at section 351.412©)(2) provide the following additional guidance in identifying LOTs:

The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.

In the case of EP transactions, LOT will be determined based on the starting price, while for CEP, LOT will be determined based on the starting price as adjusted under section 772(d) of the Act. NV LOT is based on the starting price or constructed value. Starting price is, in most instances, the gross price less all discounts and rebates. See the SAA at 159.

When U.S. sales cannot be compared to home market or third-country sales at the same LOT (either because there is no LOT in the foreign market comparable to the U.S. LOT, or there is a lack of contemporaneity of sales at the same LOT), the Department will calculate NV based on sales at a different LOT. In such instances we make appropriate adjustments for differences affecting price comparability. When comparisons are made between EP or CEP and NV at different LOTs, and there is a pattern of consistent price differences between sales made at those different LOTs in the comparison market, a LOT adjustment will be made in accordance with 19 CFR 351.412(e), which prescribes that:

The Secretary normally will calculate the amount of a LOT adjustment by:

- (I) Calculating the weighted-averages of the prices of sales at the two levels of trade identified in paragraph (d), after making any other adjustments to those prices appropriate under section 773(a)(6) of the Act [*i.e.*, movement expenses, packing expenses, circumstances of sale, *etc.*] and this subpart;
 - (ii) Calculating the average of the percentage differences between those weighted-average prices;
- and
- (iii) Applying the percentage difference to normal value, where it is at a different level of trade from the export price or constructed export price (whichever is applicable), after making any other adjustments to normal value required by section 773(a)(6) of the Act and this subpart.

Under special circumstances as described in 19 CFR 351.412(f), the Department may make a CEP offset using indirect selling expenses in the home or third-country market. The offset can only be applied where the respondent has successfully established that there is a difference in LOT, the HM or third-country LOT is more remote from the factory than the U.S. LOT, and, while the respondent has cooperated to the best of its ability, the available data do not permit a determination on whether the difference affects price comparability. Consult your team leader and program manager if it appears that this type of an adjustment is warranted.

ILLUSTRATIVE EXAMPLES OF LOT ANALYSES

In [Canned Pineapple Fruit From Thailand: Notice of Preliminary Results and Preliminary Determination To Revoke Order in Part](#), 69 FR 18524 (April 8, 2004), the respondent reported six specific customer categories and one channel of distribution for its comparison market, and eight specific customer categories and two channels of distribution for the U.S. market. In the comparison market, the respondent claimed and the Department concurred that all of its sales to unaffiliated comparison market customers were at the same LOT because these sales are made through the same channel of distribution and involved the same selling functions. In the U.S. market, the primary channel of distribution reported is sales through an affiliated reseller for its

U.S. sales. However, we found that all CEP sales occurred at the same LOT. In contrast, the NV prices included a number of selling expenses attributable to selling activities performed by the respondent in the comparison market, such as inventory maintenance, warehousing, delivery, order processing, advertising, rebate and promotional programs, warranties, and market research. Accordingly, we concluded that CEP is at a different LOT from the NV LOT. Additionally, we determined that the respondent's CM sales involved significantly more selling functions than did the respondent's U.S. EP sales. Therefore, we concluded that Respondent's NV sales are made at a different, and more remote, level of trade than its EP sales. Nonetheless, we were unable to make a LOT adjustment for EP sales because there was 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 levels of trade in the comparison market. Therefore, a LOT adjustment was not possible for comparisons of EP sales to comparison market sales.

In [Stainless Steel Butt Weld Pipe Fittings From Korea: Preliminary Results of Antidumping Duty Administrative Review](#), 70 FR 10982 (Mar. 7, 2005), the respondent indicated that its U.S. subsidiary performed many of the same selling functions on the respondent's CEP sales that the respondent performed on its home market sales. The respondent also indicated that there was one LOT for CEP and that the CEP LOT was different than the home market LOT. We compared CEP sales to home market sales. Based on our analysis of the record evidence on selling functions performed for the CEP LOT and the home market LOT, we determined the CEP and the starting price of home market sales represented different stages in the marketing process, and were thus at different LOTs. Therefore, when we compared CEP sales to home market sales, we examined whether an LOT adjustment may be appropriate. In this case, the respondent sold at one LOT in the home market; thus, there was no basis upon which to determine whether there was a pattern of consistent price differences between LOTs. We did not have the information which would allow us to examine pricing patterns of the respondent's sales of other similar products, and there were no other respondents or other record evidence on which such an analysis could be based. Because the data available did not provide an appropriate basis for making an LOT adjustment and the LOT of home market sales was at a more advanced stage than the LOT of the CEP sales, we determined that a CEP offset was appropriate. We based the amount of the CEP offset on the amount of home market indirect selling expenses, and limited the deduction for home market indirect selling expenses to the amount of indirect selling expenses deducted from CEP. We applied the CEP offset to NV, whether based on home market prices or CV.

In [Stainless Steel Bar from France: Preliminary Results of Antidumping Duty Administrative Review](#), 70 FR 17411 (April 6, 2005), the respondent claimed five channels of distribution. According to the respondent, these five channels constituted three distinct levels of trade in the home market. In determining whether separate LOTs existed in the home market, we compared the selling functions performed across all channels of distribution. Based on this analysis, we found that all home market sales were made at the same LOT. Finally, we compared the CEP LOT to the home market LOT and found that the selling functions performed for home market

customers were either performed at a higher degree of intensity or were greater in number than the selling functions performed for the U.S. customer. Therefore, we concluded that the respondent's home market sales were at a more advanced LOT than its U.S. sales. As home market and U.S. sales were made at different LOTs, we could not match CEP sales to home market sales at the same LOT. Moreover, as we found only one LOT in the home market, it was not possible to make an LOT adjustment to home market sales because such an adjustment is dependent upon our ability to identify a pattern of consistent price differences between the home market sales on which NV is based and home market sales at the LOT of the export transaction. Furthermore, we had no other information that provided an appropriate basis for determining an LOT adjustment. Because the data available did not form an appropriate basis for making an LOT adjustment, but the home market LOT was at a more advanced stage of distribution than the CEP LOT, we made a CEP offset to NV.

In [Extruded Rubber Thread From Malaysia; Preliminary Results of Antidumping Duty Administrative Review](#), 66 FR 56057 (Nov. 6, 2001), we compared the selling functions performed for home market sales with those performed with respect to the CEP transaction, which excludes economic activities occurring in the United States. We found that all of the respondents performed essentially the same selling functions in their sales offices in Malaysia for both home market and U.S. sales. Therefore, the respondents' sales in Malaysia were not at a more advanced stage of marketing and distribution than the constructed U.S. level of trade, which represents a F.O.B. foreign port price after the deduction of expenses associated with U.S. selling activities. Because we found that no difference in level of trade exists between markets, we did not grant a CEP offset.

In [Honey From Argentina: Preliminary Results of Antidumping Duty Administrative Review](#), 69 FR 77195 (Dec. 27, 2004), the respondent reported two LOTs in the third-country market corresponding to differing channels of distribution: (1) sales to packers and (2) sales to importers. The Department determined that differing channels of distribution, alone, do not qualify as separate LOTs when selling functions performed for each customer class are sufficiently similar. See 19 CFR 351412(c)(2). We found that the respondent's selling functions provided to customers in the reported channels of distribution in the third-country and U.S. markets were virtually the same, varying only by the degree to which warranty services were provided. We found that the varying degree of warranty services alone was insufficient to establish the existence of different marketing stages. Thus, we determined there is only one LOT for the respondent's sales to all markets.

XIV. HIGH INFLATION ECONOMIES

References:

- Import Administration Policy Bulletin
- Policy Bulletin 94.5 of March 25, 1994 - Difference in merchandise adjustment (DIFMERs) in hyperinflationary economies

“High inflation” is a term used to refer to a high rate of increase in price levels. Investigations and administrative reviews involving exports from countries with highly inflationary economies require special methodologies for comparing prices and calculating CV, COP and DIFMERs. Our procedures for calculating CV, COP and Difmer are discussed in chapter 9. An overview of when the Department determines economies to be in a state of high inflation, and how the Department accounts for high inflation in its price-to-price comparisons is set forth below.

When an economy is experiencing high inflation, the value of the country’s currency is rapidly deteriorating, resulting in each local currency unit having substantially less real value over time. A greater nominal amount of the currency is required to purchase a product at a later point in time than was needed at an earlier point in time. Minor price fluctuations are normal and do not normally have a significant effect on our margin calculations. However, high increases in prices during the POI/POR can lead to distorted results. Even if real costs remain constant, because of the decline in the currency’s value, the cost of the inputs used to produce the product under investigation or review would be expressed at a lower nominal value at the beginning of the POI/POR than at the end. Similarly, the price to home market customers purchasing the same domestic like product will be expressed at a lower nominal value at the beginning of the POI/POR than at the end of the POI/POR. If the inflation rate in the country under investigation or review will likely distort the margin calculation with respect to costs and prices, a modified questionnaire should be used.

The standard questionnaire asks whether the annual inflation rate in the country under investigation or review exceeded 25 percent during the relevant period. The Department generally uses inflation statistics (e.g., the wholesale price index) published by the International Monetary Fund. See e.g. [Certain Steel Concrete Reinforcing Bar from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part](#), 69 FR 64731 (November 8, 2004) ([Steel Concrete Reinforcing Bar from Turkey](#)) and Accompanying [Issues and Decision Memorandum](#) at Comment 2. If the annualized rate of inflation exceeds the 25 percent threshold, the Department will determine that the associated country experienced high inflation during the POI or POR. In deciding whether to apply the high inflation methodology, we base our calculations on the annualized rate of inflation over the relevant reporting period. See, e.g., [Ferrosilicon From Brazil; Final Results of Antidumping Duty Administrative Review](#), 61 FR 59407 (November 22, 1996) at Comment 1, where we decided not to treat Brazil as a high-inflation economy because the Brazilian inflation rate was less than 25 percent. For other cases where we have applied the 25 percent inflation threshold see [Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon-Quality Steel Plate Products from Indonesia](#), 64 FR 73164 (December 29, 1999) at Comment 1 ([Steel Plate Products from Indonesia](#)); [Silicomaganese from Brazil: Final Results of Antidumping Duty Administrative Review](#), 69 FR 13813 (March 24, 2004) ([Silicomaganese from Brazil](#)) and the accompanying [Issues and Decision Memorandum](#) at Comment 4; [Certain Pasta from Turkey; Notice of Preliminary Results of Antidumping Duty Administrative Review](#),

69 FR 47876 (August 6, 2004) (Certain Pasta from Turkey) (unchanged in Final Results, 70 FR 6834 (February 9, 2005)); Steel Concrete Reinforcing Bar from Turkey and the accompanying Issues and Decision Memorandum at Comment 2; and Light Rectangular Pipe and Tube from Turkey; Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 69 FR 19390 (April 13, 2004) (Light Rectangular Pipe and Tube from Turkey) (unchanged in Final Results, 69 FR 53675 (September 2, 2004)). Moreover, we clarified in Steel Plate Products from Indonesia that if the rate of inflation is determined to be at least 25 percent for the POI or POR as a whole, we use our high inflation methodology for the entire POI or POR. In such instances, the high-inflation methodology is used even if the rate of inflation is less than 25 percent for one or more individual months of the POI or the POR.

When the Department determines inflation to have a distortive effect on our analysis, we generally make our price-to-price, price-to-CV and price-to-COP comparisons over shorter periods of time during which inflation will have a less distortive effect. For example, when inflation exceeds 25 percent per year, we limit our comparisons to CM sales to sales within the same month as the U.S. sale to which they will be compared. In investigations, this means we weight average prices on a monthly basis. For COP and CV, we generally compute a monthly cost that is based on the weighted average of all monthly costs as indexed for inflation over the POI/POR. This methodology is illustrated below under “calculation of cost of production and constructed value.” EC sales, U.S. sales, COP and CV are stated in nominal currency of approximately the same value when they are compared to each other.

In high inflation cases, identification of the date of sale is particularly critical, because it affects whether, and to what extent, inflation-related adjustments must be made when comparing the U.S. price to other prices and/or to the CV. While sales comparison periods based on the month of the U.S. sale have been the norm in past cases, the determination of the proper comparison period should be reviewed for each case. Sales comparison periods may be influenced by the pattern of inflation observed during the POI/POR. Comparisons across periods of greater than one month may be non-distortive if the inflationary trend is low for certain months within the POI/POR. You should discuss the circumstances of your specific case with your Program Manager in order to establish a reasonable basis on which to determine the appropriate averaging or comparison period.

For administrative reviews, we normally compute a weighted-average NV for each model during each month of the POR. Each U.S. sale is matched to a CM monthly weighted average from the 90/60 day window associated with the month of the U.S. sale (see Chapter 6, section IV on the mechanics of the 90/60 guideline). When there is high inflation, it can be distortive to match U.S. sales to CM sales outside of the month at issue; thus, matching U.S. sales to CM sales within the same month generally alleviates the distortive effects of inflation.

Notably, the Department calculates the LOT percentage on a monthly basis in high-inflation cases, but calculates the LOT percentage over the entire POR. See [Final Results of the Antidumping Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey](#), 69 FR 48843 (August 11, 2004) and accompanying [Issues and Decisions Memorandum](#) at Comment 2.

XV. AFFILIATED PARTIES

References:

- The Tariff Act of 1930, as amended (the Act)
 - Section 771(33) – Affiliation
 - Section 773(f)(2) - Collapsing
 - Section 773(f)(3) - Major Input Rule
- Department of Commerce (DOC) Regulations
 - Section 351.102(b) – Control
 - Section 351.401(f)(1) - Collapsing
 - Section 351.401(f)(2) - Transactions Disregarded Rule
 - Section 351.403(d) - Downstream Sales
 - Section 351.403©) - The “Arm’s Length” test

A. Determining Affiliation

Many antidumping cases involve transactions between affiliated parties. The existence of affiliated-party transactions can affect which sales data the Department collects and analyzes, and also has a bearing upon COP and CV calculations. According to section 771(33) of the Act, the Department determines affiliation using the following criteria:

- (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants;
- (B) Any officer or director of an organization and such organization;
- (C) Partners;
- (D) Employer and employee;
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, five percent or more of the voting stock or shares of any organization and such organization;
- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person;
- (G) Any person who controls any other person and such other person. (Often in cases, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person).

To determine affiliation between companies, the Department must find at least one of the criteria above is applicable to the respondent. As defined by section 771(33) of the Act, a person shall be considered to control another person if the person is legally or operationally in a position to

exercise restraint or direction over the other person. Section 351.102(b) of the Department's regulations provides that in finding affiliation based on control, the Department will, among other factors, consider (i) corporate or family groupings; (ii) franchise or joint venture agreements; (iii) debt financing; and (iv) close supplier relationships. In determining whether control exists, the Department does not require evidence of the actual exercise of control by one party over another party. Rather, we focus upon one party's ability to control the other. See [Antidumping Duties; Countervailing Duties; Final Rule](#), 62 FR 27296, 27297-98 (May 19, 1997) (Final Rule).

For a discussion of a finding of affiliation in the home market, see, e.g., [Silicomanganese from Brazil: Final Results of Antidumping Duty Administrative Review](#), 70 FR 19418 (April 13, 2005) and the accompanying [Issues and Decision Memorandum](#) at Comment 1 (affiliation of respondents and certain home market customers under section 771(33)(F) of the Act) and [Certain Cut-to-Length Carbon-Quality Steel Plate Products from the Republic of Korea: Final Results and Rescission in Part of Antidumping Duty Administrative Review](#), 69 FR 26361 (May 12, 2004) and the accompanying [Issues and Decision Memorandum](#) at Comment 1 (affiliation between a respondent and a home-market trading company under section 771(33)(F) of the Act). For an example of a case regarding affiliation between the respondent and its affiliated U.S. reseller, see, e.g., [Honey from the People's Republic of China: Final Results and Final Rescission, In Part, of Antidumping Duty Administrative Review](#), 70 FR 38873 (July 6, 2005), and the Accompanying [Issues and Decision Memorandum](#). For more information regarding affiliation between the respondent and a U.S. reseller, see Chapter 7 (EP/CEP).

B. Collapsing Affiliated Parties

In certain circumstances the Department will treat two or more affiliated producers as a single entity. In essence when "collapsing" firms for purposes of calculating a dumping margin, we treat the "collapsed" entities as a single entity and calculate one dumping margin that is applicable to each of those "collapsed" entities. In accordance with section 351.401(f)(1) of the Department's regulations, the Department will collapse two or more affiliated producers in an antidumping proceeding if: 1) the producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities; and 2) the Department concludes that there is a significant potential for the manipulation of price or production. Pursuant to section 351.401(f)(2), in identifying significant potential for the manipulation of price or production, the factors that the Department may consider include: a) the level of common ownership; b) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and c) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers. See, e.g., [Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review](#), 70 FR 45682 (August 8, 2005), unchanged in [Final Results](#), 70 FR

73729 (December 13, 2005) and the accompanying [Issues and Decision Memorandum](#), and [Certain Preserved Mushrooms From the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review](#), 70 FR 54361 (September 14, 2005) and the accompanying [Issues and Decision Memorandum](#) at Comment 9. For a discussion of the collapsing of exporters and affiliated persons in the context of a nonmarket economy, see Section V. of Chapter 10 (Affiliation and Single Entity Determinations).

C. Affiliated Party Sales

1. Reporting of downstream sales

The location of the affiliated party in the sales process in the exporting- or third-country market determines which transactions we require a respondent to report (i.e., either sales the affiliated reseller(s), or sales to the next unaffiliated customer). Pursuant to section 351.403(d) of the Department's regulations, when sales of the foreign like product are made through an affiliated company, we require that the affiliated company report the resales of the product to its first unaffiliated customer unless (1) the sales account for less than five percent of the total value (or quantity) of the exporter's or producer's sales of the foreign like product or (2) the sales were made at a price comparable to the price at which the exporter or producer sold the foreign like product to an unaffiliated customer (i.e., made at arm's length). For example, in [Stainless Steel Sheet and Strip in Coils from France: Final Results of Antidumping Administrative Review](#), 70 FR 7240 (February 11, 2005) and the accompanying [Issues and Decision Memorandum](#) at Comment 4, the Department excused the respondent from reporting affiliated party resales because sales of the foreign like product to affiliated parties during the POR accounted for less than five percent of total sales of the foreign like product.

In some circumstances, the Department may decide that a percentage higher than five percent is a more appropriate benchmark for excusing respondents from reporting downstream sales. (See, e.g., [Stainless Steel Sheet and Strip in Coils from Germany; Notice of Preliminary Results of Antidumping Duty Administrative Review](#), 70 FR 45682 (August 8, 2005), unchanged in [final results](#), 70 FR 73729 (December 13, 2005) and the accompanying [Issues and Decision Memorandum](#)). The Department usually does not require respondents to report both sales to the affiliate and the downstream sales by the affiliate. See Final Rule at 27356.

2. The Arm's Length Test

In accordance with section 351.403(c) of the Department's regulations, we include home market or third-country affiliated party sales in our analysis only if the respondent's sales are made at "arm's length." To be "at arms length," the prices of the affiliated-party transactions must be comparable to the prices at which the respondent sold identical merchandise to unaffiliated parties. In determining whether affiliated party transactions are made at arm's-length prices, we generally compare the respondent's reported prices to affiliated parties with the respondent's

prices to unaffiliated parties at the same level of trade. In making such a comparison, the Department has established a range into which the ratio of affiliated prices to unaffiliated prices must fall in order for sales by the exporter or producer to an affiliate to be included in the normal value calculation. For affiliated party sales to be considered in the normal value calculation, prices to an affiliate must be, on average, between 98 percent and 102 percent, inclusive, of prices to unaffiliated customers. If affiliated party prices are, on average, less than 98 percent or more than 102 percent of unaffiliated party prices, then we reject them. For instance, in [Stainless Steel Sheet and Strip in Coils from Mexico](#), the Department disregarded sales to one affiliated home market customer because these sales did not pass the arm's-length test. See [Stainless Steel Sheet and Strip in Coils from Mexico; Notice of Final Results of Antidumping Duty Administrative Review](#), 70 FR 73729 (December 13, 2005) ([Stainless Steel Sheet and Strip in Coils from Mexico](#)) and the accompanying [Issues and Decision Memorandum](#) at Comment 2. In establishing the 98/102 percent band, the Department aims to prevent distortion of normal value based on sales between affiliates which could be unreasonably high-priced or low-priced due to the affiliation. Instead, the ratio is set up to capture only those sales between affiliates which are made in the ordinary course of trade. See [Antidumping Proceedings: Affiliated Party Sales in the Ordinary Course of Trade](#), 67 FR 69187 (November 15, 2002).

If there are no comparable sales to unaffiliated parties to use as an arm's-length benchmark, there is no basis for comparison. Therefore, in such situations, we generally will disregard the reported sales to affiliated parties for margin calculation purposes. In situations where sales made through the affiliated party constitute all or a significant percentage of home market sales, the Department calculates normal value based on the sales price made by the affiliate to the first unaffiliated party.

D. Other Affiliated Party Transactions

Treatment of transactions between affiliated parties in COP/CV situations is discussed in chapter 9. In some cases, we find expenses paid to affiliated suppliers of services. These types of situations involve, among others, freight expenses, insurance expenses, or commissions. As for COP/CV, we try to establish whether the prices paid for these services are at arm's length. See e.g., [Certain Steel Concrete Reinforcing Bars from Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination to Revoke in Part](#), 70 FR 67655 (November 8, 2005) and accompanying [Issues and Decision Memorandum](#) at Comment 10.

XVI. TAXES

References:

The Tariff Act of 1930, as amended ("the Act")
Section 773(a)(6)(B)(iii) - Deduction of Taxes
SAA

Section B.2.c.(2) - Deductions for Indirect Taxes
 Antidumping Agreement
 Article 2.4 - Differences in Taxes
 Policy Alert – August 17, 1998 Brazilian Antidumping Investigations -- Treatment of VAT-
 Type Taxes in Calculating CV

Section 773 (a)(6) of the Act requires the deduction from normal value of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise. However, such taxes are to be deducted only to the extent that such taxes are added to or included in the price of the foreign like product. This change from previous legislation in effect prior to the URAA amendments to the Act (under which the amount of the tax “included in” the home market or third country price was added to USP) is intended to ensure dumping margins that are tax-neutral.

Treatment of Consumption Taxes, Including Value-added Tax (VAT):

The SAA clarifies that home-market consumption taxes are to be deducted from normal value only to the extent that they have been “added to or included in the price” of the foreign like product. See SAA at B.2.c.(2): “The requirement that the home-market consumption taxes in question be “added to or included in the price” of the foreign like product is intended to insure that such taxes actually have been charged and paid on the home market sales used to calculate normal value, rather than charged on sales of such merchandise in the home market generally. It would be inappropriate to reduce a foreign price by the amount of the tax, unless a tax liability had actually been incurred on that sale.”

The following sample calculation illustrates the adjustment required for indirect taxes for sales in the EC. When normal value is based on third-country sales this adjustment is usually not necessary as the taxes usually only apply to domestic sales in the exporting country.

EC Sales

| | |
|---|------------------|
| Weight-averaged EC price | Euro 6.50 |
| Less included weight averaged consumption tax | <u>Euro 1.00</u> |
| Weight-averaged EC price, net of taxes | <u>Euro 5.50</u> |

U.S. Sales

There is no need for an adjustment as any necessary EC internal consumption taxes are made to NV.

One type of tax that analysts will frequently encounter is the VAT. In some countries, including Australia, Canada, New Zealand, and Singapore this tax is known as the “goods and services

tax” or GST; and in Japan it is known as the “consumption tax.” VATs differ from sales taxes in that businesses are able to recover VAT on the goods and services that they buy as inputs to the goods or services that they sell to their customers. In this way, the total tax levied at each stage in the economic chain of supply is a constant fraction of the value added by a business to products and services.

In the following cases the Department discussed issues related to VATs and other consumption taxes:

In Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom, the Department made no adjustment for the VAT as no VAT was included in the CM prices that were reported by the respondent. See Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom: Preliminary Results of Antidumping Administrative Review, 61 FR 20225 (May 6, 1996) (unchanged in Final Results, 61 FR 56514 (November 1, 1996).

In Silicon Metal from Brazil, the Department indicated that where respondent prices were exclusive of VAT, we made no adjustment for VAT in our calculation of NV. However, where home market prices were reported inclusive of VAT, we deducted VAT from the gross selling price. See Silicon Metal from Brazil, Preliminary Results of Antidumping Administrative Review and Notice of Intent to Revoke Order in Part, 66 FR 40980, 40986 (August 6, 2001) (unchanged in Final Results, 67 FR 6488 (February 12, 2002), and the accompanying Issues and Decision Memorandum.

XVII. CURRENCY CONVERSIONS

References:

- The Tariff Act of 1930, as amended (the Act)
 - Section 773A - currency conversions
- Department of Commerce (DOC) Regulations
 - 19 CFR 351.415 - currency conversions
- Regulation Preambles
 - 61 FR 7351, February 27, 1996
 - 62 FR 27376, May 19, 1997
- SAA
 - Section B.3.7 - currency conversions
- Article VI of the GATT 1994
 - Article 2.4.1 - currency conversions
- Office of Policy Bulletin
 - Policy Bulletin 96-1 - Import Administration exchange rate methodology
- WTO Antidumping Agreement,
 - Article 2.4.1

Legislative History

Senate Report S. 103-412, November 22, 1994, p. 76.

House Report H. 103-826, October 3, 1994, p. 95.

To perform its dumping calculations, the Department must ultimately convert values into the same currency. Accordingly, one of the final steps in calculating NV is the conversion of the net price or CV from foreign currency into a U.S. dollar amount. This is necessary because the export price (EP) or constructed export price (CEP) is usually expressed in dollars, while NV is generally expressed in a foreign-denominated currency.

A. General Rule

The Department's regulations require that currency conversions be based on the exchange rate in effect on the U.S. date of sale. (See 351.415(a) of the Department's regulations.) The appropriate exchange rates can be found on the Import Administration website at www.ia.ita.doc.gov/exchange/index.html. The exchange rates listed on the IA website are not necessarily the actual exchange rates in effect at the time; rather, they incorporate adjustments mandated by the statute that are meant to smooth out fluctuations. Also, for investigations, the exchange rates we use take into account any "sustained movement" in foreign currency values. Therefore, the website lists two exchange rates, one for investigations and one for administrative reviews. In performing antidumping calculations, analysts should ensure that they use the exchange rates specifically compiled for either an investigation or an annual review, as they incorporate different adjustments.

The legal requirements for exchange rates are described in Policy Bulletin 96-1, the main provisions of which are summarized below. Note that instructions set forth in this policy bulletin are reflected in the exchange rates listed on the Import Administration website.

B. Summary of Departmental Practice

"Normal" or "Fluctuating"

The basis for the "official" exchange rates the Department uses in its antidumping calculations are the actual daily exchange rates collected by the New York Federal Reserve Bank and the Dow Jones Business Information Service. Using these independent, third-party sources, the Department examines each daily rate to determine whether it is "normal"¹¹ or "fluctuating" based on a "benchmark"¹² rate. Actual daily rates classified as "normal" are the official

¹¹ Whenever the actual daily rate varies from the benchmark rate by more than two-and-a-quarter percent, the actual daily rate is classified as "fluctuating." If the rate is within two-and-a-quarter percent, the actual daily rate is classified as "normal."

¹² The "benchmark" is a moving average of the actual daily exchange rates for the 40 reporting

exchange rates to be used for that day. However, when an actual daily rate is classified as “fluctuating,” the “benchmark” rate is the official exchange rate to be used. The effect of using benchmark rates in such situations is to smooth out these currency fluctuations. 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, 54107 (September 7, 2004) (unchanged in [Final Results](#), 70 FR 12443 ((March 14, 2005), and the accompanying [Issues and Decision Memorandum](#)). Because the Department uses actual daily exchange rates unless the exception described above applies, respondents should always know what exchange rate will apply in an antidumping proceeding.

“Sustained Movement”

The Department classifies a long-term exchange rate appreciation as a “sustained movement” if, for eight consecutive weeks (“the recognition period”), the weekly average of actual daily values exceeds the weekly average of benchmark values by more than five percent. When there has been a “sustained movement” increasing the value of a foreign currency in relation to the dollar, respondents in an investigation are given 60 calendar days to correct their prices. The 60-calendar-day grace period begins on the first day after the recognition period. The official rate in effect on the last day of the recognition period will be the official rate for that period in the investigation. During the eight-week recognition period, the Department continues to classify each daily rate as “normal” or “fluctuating” and to substitute the “benchmark” rate for the actual daily rate when the daily rate is “fluctuating”.

When a foreign currency has decreased in value in relation to the dollar, there is no adjustment required for a sustained movement, and the official rate generated by the Department will normally apply to currencies depreciating against the dollar. However, in both investigations and administrative reviews, whenever the decline in the value of a foreign currency is so precipitous and large as to reasonably preclude the possibility that it is only fluctuating, the lower actual daily rates will be employed from the time of the large decline. See e.g., [Notice of Preliminary Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube from Turkey](#), 69 FR 18049, 18052 (April 6, 2004) (unchanged in [Final Results](#), 69 FR 48843 (August 11, 2004).

days immediately prior to the date of the actual daily exchange rate to be classified. The terms “reporting days” or “reported days” refers to the days on which the New York Federal Reserve publishes exchange rates, which are Monday through Friday, excluding holidays.

C. Summary of Decision Rules

Our procedures for collecting exchange rates are summarized below:

1. We will use the actual daily exchange rate unless the actual daily rate “fluctuates” or varies by more than two-and-a-quarter percent from the benchmark rate. If the daily rate is classified as fluctuating then we will use the benchmark rate as the official exchange rate.
2. In investigations, if a sustained movement has occurred and the foreign currency has increased in value in relation to the U.S. dollar, we will continue to use the official rate from the last day of the recognition period for 60 days following the end of the recognition period. On the 61st day, we would return to comparing the actual daily rate to the benchmark rate.
3. Whenever the decline in the value of a foreign currency is so precipitous and large as to reasonably preclude the possibility that it is only fluctuating, we will use actual daily rates from the start of the decline.

D. Other Discussion and Sample Calculations

See section XIV of this chapter for a discussion of the effect of currency conversion in high-inflation-economy investigations or reviews.

Sample calculations throughout this chapter include illustrations of the mechanics of currency conversion.

XVIII. EXPORTATION FROM AN INTERMEDIATE COUNTRY

References:

- The Tariff Act of 1930, as amended (the Act)
 - Section 773(a)(3) - exportation from an intermediate country
- Department of Commerce (DOC) Regulations
 - None
- SAA
 - Section B.9 - intermediate country sales
- Antidumping Agreement
 - Article 2.5 - exportation from an intermediate country

For merchandise shipped through an intermediate country, section 773(a)(3) of the Act stipulates that normal value (NV) be based on the value (i.e., prices or constructed value) for the merchandise in the intermediate country. However, NV can be based on sales prices in the country of origin if any of the following conditions are met: A) the producer knew at the time of

the sale that the merchandise was destined for exportation; B) the subject merchandise is merely transhipped through the intermediate country; C) sales of the foreign like product in the intermediate country do not meet the market viability requirements of section 773(a)(1)(c) of the Act ; or D) the foreign like product is not produced in the intermediate country. See sections 773(a)(3)(A-D) of the Act. Also, the Department has applied the NME methodology to exporters in market economies in some cases where we determined that NME suppliers of the market economy exporters had knowledge of the ultimate destination of the subject merchandise.

In the following cases, the Department has addressed the question of whether to base NV on prices or constructed value in the intermediate country or in the country of origin.

In Silicomanganese from Kazakhstan, merchandise of Kazakh origin was shipped to ports in Lithuania (a market economy) before it was shipped to the United States. Respondents argued that the Department should use a market economy NV calculation. Pursuant to section 773(a)(3)(A) of the Act (the transshipment provision), the Department rejected the argument, stating that “to establish normal value in a third country in a case such as this when a trading company merely acquires merchandise shipped through a third country by the producer would undermine Congress’ intent to have the NME provisions apply to imports of merchandise produced in NME countries, where prices and costs are not based on market principles.” Subsequently, the Department determined that NV should be based on the value of the merchandise in Kazakhstan (the country of origin), and applied the NME methodology. See, Notice of Final Determination of Sales at Less Than Fair Value: Silicomanganese From Kazakhstan, 67 FR 15535 (April 2, 2002) and the accompanying Issues and Decisions Memorandum at Comment 2.

In Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People’s Republic of China; Preliminary Results of Antidumping Administrative Review and Partial Termination of Administrative Review, 62 FR 36764 (July 9, 1997), pursuant to section 773(a)(3)(A) of the Act (the producer knowledge provision), the Department applied the NME methodology to two Hong Kong companies in calculating NV, even though Hong Kong is considered a market economy country, because the companies’ suppliers in the People’s Republic of China knew at the time of the sale that the subject merchandise was destined for exportation. Thus, the Department concluded that even if a company is located in a market economy, the Department may still apply the NME methodology if the companies’ suppliers in the NME had knowledge of the ultimate destination of the subject merchandise.