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**International Trade Administration**  
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DATE: October 9, 2012

MEMORANDUM TO: Paul Piquado  
Assistant Secretary  
for Import Administration

FROM: Christian Marsh   
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty  
Administrative Review on Certain Orange Juice from Brazil –  
March 1, 2010, through February 28, 2011

Summary

We have analyzed the comments of the interested parties in the 2010-2011 administrative review of the antidumping duty order covering certain orange juice (OJ) from Brazil. As a result of our analysis of those comments, we have made changes in the margin calculations from the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

General Issues

1. Offsetting of Negative Margins
2. Treatment of By-Product Revenue in the Calculation of General and Administrative (G&A) and Financial Expenses

Cutrale Issues

3. Constructed Export Price (CEP) Offset for Cutrale
4. Use of Actual Brix to Calculate the Prices and Quantities for Cutrale's Home Market Sales
5. Inventory Carrying Costs for Cutrale's U.S. Sales
6. Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses
7. Cutrale's Biological Assets



### Fischer Issues

8. Calculation of Fischer's International Freight Expenses to Include Bunker Fuel
9. Ministerial Errors in Fischer's Cost Calculations
10. Loss on Hedge Operations included in the Calculation of Fischer's Financial Expense Ratio
11. Exclusion of Long-Term Interest Income from the Calculation of Fischer's Financial Expense Ratio

### Louis Dreyfus Issues

12. Date of Sale for Louis Dreyfus
13. Classification of Louis Dreyfus' U.S. Sales as CEP Sales
14. Calculation of Louis Dreyfus' Brokerage and Handling Expenses
15. Calculation and Application of Louis Dreyfus' U.S. Indirect Selling Expense Ratio
16. Use of Partial Adverse Facts Available (AFA) for Louis Dreyfus' U.S. Indirect Selling Expenses and Inventory Carrying Costs

### Background

On April 11, 2012, the Department published in the Federal Register the preliminary results of the 2010-2011 administrative review of the antidumping duty order on certain OJ from Brazil. See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination, 77 FR 21724 (Apr. 11, 2012) (Preliminary Results). On July 20, 2012, the Department extended the final results in the current review to no later than October 9, 2012.<sup>1</sup> The period of review (POR) is March 1, 2010, through February 28, 2011.

We invited parties to comment on our preliminary results of review. We received comments from Florida Citrus Mutual and Citrus World, Inc. (collectively, the petitioners), Fischer S.A. Comercio, Industria and Agricultura (Fischer), Louis Dreyfus Commodities Agroindustrial S.A. (Louis Dreyfus), and Sucocitrico Cutrale Ltda. (Cutrale). Based on our analysis of the comments received, we have changed the results from those presented in the preliminary results.

### Margin Calculations

We calculated CEP and normal value (NV) using the same methodology stated in the preliminary results, except as follows:

- We recalculated Cutrale's and Fischer's U.S. inventory carrying costs to base them on a short-term interest rate denominated in U.S. dollars. See Comment 5.

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<sup>1</sup> See Memorandum to Christian Marsh, Deputy Assistant Secretary, AD/CVD Operations, from Blaine Wiltse, Senior Trade Analyst, Office 2, AD/CVD Operations, entitled, "Certain Orange Juice from Brazil: Extension of Deadline for Final Results of Antidumping Duty Administrative Review," dated July 20, 2012.

- We used the cost of production (COP) and constructed value (CV) database accompanying Fischer's April 2012 response in the final results margin calculations. We also corrected a clerical error in the calculation of Fischer's CV. See Comment 9.
- We corrected a clerical error in our calculation of U.S. brokerage and handling expenses for Louis Dreyfus. See Comment 14.
- We based the U.S. indirect selling expense ratio for Louis Dreyfus Citrus Inc. (LDCI) on information Louis Dreyfus provided in its April 2012 response. See Comment 15.

## Discussion of the Issues

### General Issues

#### Comment 1: *Offsetting of Negative Margins*

The respondents argue that the Department should depart from the practice of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as “zeroing”) and provide for offsets for negative margins in its calculations for the final results. Given that on February 14, 2012, the Department eliminated its use of “zeroing” in administrative reviews,<sup>2</sup> the respondents contend that its continued use in this administrative review is unlawful and unjustified. While the respondents acknowledge that the Preliminary Results precede the effective date of the Final Modification for Reviews, the respondents claim that it is unfair for the Department not to cease “zeroing” in the calculations for the final results. Fischer points out that the Final Modification for Reviews is the regulation in place at the time of these final results. According to Fischer, the Court of Appeals for the Federal Circuit (CAFC) has held that the Department's preliminary results are subject to change, especially when these changes are the result of a mathematical calculation.<sup>3</sup> Moreover, Cutrale and Fischer argue that the CAFC in Dongbu Steel Co., Ltd., v. United States, 635 F.3d 1363 (Fed. Cir. 2011) (Dongbu) found the Department's actions to be arbitrary and capricious when it changed in its “zeroing” methodology in investigations between the preliminary and final results of that administrative review, resulting in inconsistent interpretations of section 771(35) of the Tariff Act of 1930, as amended (the Act). Cutrale and Fischer liken the CAFC's decision in Dongbu to the instant case, where the Department has changed its regulations regarding “zeroing” in administrative reviews between the preliminary and final results. Therefore, according to Cutrale and Fischer, the Department should perform its final results margin calculations without “zeroing.”

In any event, Cutrale and Fischer maintain that the CAFC has held in both Dongbu and JTEKT Corp. v. United States, 642 F.3d 1378 (Fed. Cir. 2011) (JTEKT), that the Department's

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<sup>2</sup> See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification, 77 FR 8101 (Feb. 14, 2012) (Final Modification for Reviews).

<sup>3</sup> See NTN Bearing Corp. v. United States, 74 F. 3d 1204, 1208 (Fed. Cir. 1995).

continued use of “zeroing” in administrative reviews, but not investigations, is an impermissible interpretation of section 771(35) of the Act. Consequently, according to Cutrale and Fischer, if the Department continues to apply zeroing in these final results, it must provide a legally adequate basis for this decision.

Moreover, Cutrale points out that the Department issued the Final Modification for Reviews in response to several adverse World Trade Organization (WTO) decisions finding the Department’s practice of “zeroing” in administrative reviews inconsistent with the Antidumping Agreement and the General Agreement on Tariffs and Trade (GATT). According to Cutrale, in issuing the Final Modification for Reviews, the Department has acknowledged that the WTO’s adverse decisions regarding “zeroing” are correct and thus the Department is bringing its “zeroing” practice into conformity with its WTO obligations. Cutrale notes that one such adverse WTO Panel decision involved the order at issue here. See United States – Antidumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil, WT/DS 382/R (Mar. 25, 2011) (WTO OJ Panel Decision). Cutrale asserts that the WTO Panel found, in WTO OJ Panel Decision, that the Department’s application of “zeroing” was improper not only in completed reviews but also in current reviews. Id. Notwithstanding the WTO Panel’s decision, Cutrale notes that the Department has continued to apply zeroing in this administrative review. According to Cutrale, the Department cannot reconcile its admission that its “zeroing” methodology is GATT-inconsistent with its continued application of “zeroing” in reviews with preliminary results dated prior to April 16, 2012. Similarly, Cutrale argues that the Department cannot justify its continued application of “zeroing” here on the grounds that WTO Panel decisions are prospective in nature. Cutrale points out that the reasonable period of time afforded to the United States to comply with the WTO OJ Panel Decision expired on March 17, 2012 (i.e., before the date of the preliminary results). Thus, Cutrale contends the Department’s continued application of “zeroing” here is WTO inconsistent even if the Panel’s decision is applied prospectively.

The petitioners maintain that the Department should continue its practice of “zeroing” for the final results. As an initial matter, the petitioners disagree with the respondents that the Dongbu decision mandated a change in the Department’s practice with respect to “zeroing.” Instead, the petitioners contend that the CAFC merely remanded the case to the Court of International Trade (CIT) to provide the Department an opportunity to explain its reasoning regarding its interpretation of section 771(35) of the Act in the context of investigations and administrative reviews. See Dongbu, 635 F.3d at 1373. Moreover, since the Court’s decision in Dongbu, the petitioners note that the Department has provided, and the CIT has upheld, a reasonable explanation of its continued use of “zeroing” in administrative reviews, but not investigations. See Union Steel v. United States, 823 F.Supp.2d 1346, 1360 (CIT 2012) (Union Steel). Therefore, according to the petitioners, the Department’s practice of “zeroing” in administrative reviews, but not investigations, is reasonable and in accordance with the statute. Consequently, the petitioners assert that there is no reason for the Department to cease the practice of “zeroing” for purposes of the final results.

Furthermore, while the respondents cite the WTO OJ Panel Decision as support for their position regarding “zeroing,” the petitioners contend that this decision is not applicable to this

administrative review. The petitioners point out the CAFC holding that WTO reports are without effect under U.S. law “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the Uruguay Round Agreements Act (URAA). See Corus Staal BV v. United States, 502 F.3d 1370, 1375 (CAFC 2007) (Corus II); and NSK, Ltd. v. United States, 510 F.3d. 1375 (CAFC 2007) (NSK). Specifically, the petitioners maintain that the Department can only implement adverse WTO rulings after completing certain implementation procedures, and the United States has not begun to fulfill these procedural requirements in the context of the WTO OJ Panel Decision.

Finally, the petitioners assert that the Department is justified in continuing to apply “zeroing” in this administrative review despite its change in practice set forth in Final Modification for Reviews. According to the petitioners, the Department provided a reasonable explanation for the effective date it chose in the Final Modification for Reviews, and the date of these preliminary results precedes that effective date. Therefore, the petitioners maintain that the Department should not alter its “zeroing” methodology for these final results.

#### Department’s Position:

We have not changed our calculation of the weighted-average dumping margin, as suggested by the respondents, in these final results.

The Final Modification for Reviews makes clear that the Department will apply its revised methodology in antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. Specifically, the Final Modification for Reviews states:

...{T}he Department determines that the modified methodology must apply only in proceedings where the preliminary results have not yet been issued in order to ensure that all parties have ample time to submit any new data and provide comment, and that the Department has adequate time to consider any new data and comments. For all of these reasons, the Department is not persuaded by arguments that it could apply the new method more expeditiously without compromising principles of accuracy, fairness, and due process.

See Final Modification for Reviews, 77 FR at 8111. Therefore, because we completed the preliminary results in this administrative review prior to April 16, 2012, any change in practice with respect to the treatment of non-dumped sales pursuant to the Final Modification for Reviews does not apply here.

Notwithstanding the Department’s revised practice in future administrative reviews, we continue to find that the Department’s methodology of not using non-dumped comparisons to offset dumping is consistent with section 771(35) of the Act for the reasons set forth below.

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise” (emphasis added). The definition of “dumping margin” calls for a comparison of NV and export price (EP)

or CEP. Before making the comparison called for, it is necessary to determine how to make the comparison.

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP (or CEP). Specifically, the statute and regulations provide for three comparison methods: average-to-average, transaction-to-transaction, and average-to-transaction. These comparison methods are distinct from each other, and each produces different results. When using transaction-to-transaction or average-to-transaction comparisons, a comparison is made for each export transaction to the United States. When using average-to-average comparisons, a comparison is made for each group of comparable export transactions for which the EPs (or CEPs) have been averaged together (*i.e.*, averaging group).

Section 771(35)(B) of the Act defines weighted-average dumping margin as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” The definition of “weighted-average dumping margin” calls for two aggregations which are divided to obtain a percentage. The numerator aggregates the results of the comparisons. The denominator aggregates the value of all export transactions for which a comparison was made.

The issue of “zeroing” versus “offsetting” involves how certain results of comparisons are treated in the aggregation of the numerator for the “weighted-average dumping margin” and relates back to the ambiguity in the word “exceeds” as used in the definition of “dumping margin” in section 771(35)(A) of the Act. Application of “zeroing” treats comparison results where NV is less than EP or CEP as indicating an absence of dumping, and no amount (zero) is included in the aggregation of the numerator for the “weighted average dumping margin.” Application of “offsetting” treats such comparison results as an offset that may reduce the amount of dumping found in connection with other comparisons, where a negative amount may be included in the aggregation of the numerator of the “weighted-average dumping margin” to the extent that other comparisons result in the inclusion of dumping margins as positive amounts.

In light of the comparison methods provided for under the statute and regulations, and for the reasons set forth in detail below, the Department finds that the offsetting method is appropriate when aggregating the results of average-to-average comparisons, and is not similarly appropriate when aggregating the results of average-to-transaction comparisons, such as were applied in this administrative review. The Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach described in the average-to-average comparison methodology allows for an overall examination of pricing behavior on average. The Department’s interpretation of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in this administrative review, and to permit offsetting in average-to-

average comparisons reasonably accounts for differences inherent in the distinct comparison methodologies.

Whether “zeroing” or “offsetting” is applied, it is important to note that the weighted-average dumping margin will reflect the value of all export transactions, dumped and non-dumped, examined during the POR; the value of such sales is included in the aggregation of the denominator of the weighted-average dumping margin. Thus, a greater amount of non-dumped transactions results in a lower weighted-average dumping margin under either methodology.

The difference between “zeroing” and “offsetting” reflects the ambiguity the CAFC has found in the word “exceeds” as used in section 771(35)(A) of the Act.<sup>4</sup> The courts repeatedly have held that the statute does not speak directly to the issue of zeroing versus offsetting.<sup>5</sup> For decades the Department interpreted the statute to apply zeroing in the calculation of the weighted-average dumping margin, regardless of the comparison method used. In view of the statutory ambiguity, on multiple occasions, both the CAFC and other courts squarely addressed the reasonableness of the Department’s zeroing methodology and unequivocally held that the Department reasonably interpreted the relevant statutory provision as permitting zeroing.<sup>6</sup> In so doing, the courts relied upon the rationale offered by the Department for the continued use of zeroing, *i.e.*, to address the potential for foreign companies to undermine the antidumping laws by masking dumped sales with higher priced sales: “Commerce has interpreted the statute in such a way as to prevent a foreign producer from masking its dumping with more profitable sales. Commerce’s interpretation is reasonable and is in accordance with law.”<sup>7</sup> The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.”<sup>8</sup> As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner applied by the Department. No U.S. court

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<sup>4</sup> See Timken Co. v. United States, 354 F.3d 1334, 1341-45 (CAFC 2004) (Timken).

<sup>5</sup> See PAM, S.p.A. v. United States, 265 F. Supp. 2d 1362, 1371 (CIT 2003) (PAM) (“{The} gap or ambiguity in the statute requires the application of the Chevron step-two analysis and compels this court to inquire whether Commerce’s methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.”); Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138, 1150 (CIT 1996) (Bowe Passat) (“The statute is silent on the question of zeroing negative margins.”); Serampore Indus. Pvt. Ltd. v. U.S. Dep’t of Commerce, 675 F. Supp. 1354, 1360 (CIT 1987) (Serampore) (“A plain reading of the statute discloses no provision for Commerce to offset sales made at {less than fair value} with sales made at fair value. Commerce may treat sales to the United States market made at or above prices charged in the exporter’s home market as having a zero percent dumping margin.”).

<sup>6</sup> See, *e.g.*, Koyo Seiko Co. v. United States, 551 F.3d 1286, 1290-91 (CAFC 2008) (Koyo 2008); NSK, 510 F.3d at 1379-80; Corus II, 502 F.3d at 1375; Corus Staal BV v the Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (Corus I); Timken, 354 F.3d at 1341-45; PAM, 265 F. Supp. 2d at 1370 (“Commerce’s zeroing methodology in its calculation of dumping margins is grounded in long-standing practice.”); Bowe Passat, 926 F. Supp. at 1149-50; Serampore, 675 F. Supp. at 1360-61.

<sup>7</sup> See Serampore, 675 F. Supp. at 1361 (citing Certain Welded Carbon Steel Standard Pipe and Tube From India; Final Determination of Sales at Less Than Fair Value, 51 FR 9089, 9092 (Mar. 17, 1986)); see also Timken, 354 F.3d at 1343; PAM, 265 F. Supp. 2d at 1371.

<sup>8</sup> See Timken, 354 F.3d at 1343.

has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales.<sup>9</sup>

In 2005, a panel of the WTO Dispute Settlement Body found that the United States did not act consistently with its obligations under Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 when it employed the zeroing methodology in average-to-average comparisons in certain challenged antidumping duty investigations.<sup>10</sup> The initial WTO Dispute Settlement Body Panel Report was limited to the Department’s use of zeroing in average-to-average comparisons in antidumping duty investigations.<sup>11</sup> The Executive Branch determined to implement this report pursuant to the authority provided in Section 123 of the Uruguay Round Agreements Act (URAA) (19 U.S.C. § 3533(f), (g)) (Section 123).<sup>12</sup> Notably, with respect to the use of zeroing, the Panel found that the United States acted inconsistently with its WTO obligations only in the context of average-to-average comparisons in antidumping duty investigations. The Panel did not find fault with the use of zeroing by the United States in any other context. In fact, the Panel rejected the European Communities’ arguments that the use of zeroing in administrative reviews did not comport with the WTO Agreements.<sup>13</sup>

Without an affirmative inconsistency finding by the Panel, the Department did not propose to alter its zeroing practice in other contexts, such as administrative reviews. As the CAFC recently held, the Department reasonably may decline, when implementing an adverse WTO report, to take any action beyond that necessary for compliance.<sup>14</sup> Moreover, in Corus I, the CAFC acknowledged the difference between antidumping duty investigations and administrative reviews, and held that section 771(35) of the Act was just as ambiguous with respect to both proceedings, such that the Department was permitted, but not required, to use zeroing in antidumping duty investigations.<sup>15</sup> In light of the adverse WTO Dispute Settlement Body finding and the ambiguity that the CAFC found inherent in the statutory text, the Department abandoned its prior litigation position – that no difference between antidumping duty investigations and administrative reviews exists for purposes of using zeroing in antidumping proceedings – and departed from its longstanding and consistent practice by ceasing the use of zeroing. The Department began to apply offsetting in the limited context of average-to-average

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<sup>9</sup> See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II, 502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

<sup>10</sup> See Panel Report, United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/R (Oct. 31, 2005) (EC-Zeroing Panel).

<sup>11</sup> See EC-Zeroing Panel.

<sup>12</sup> See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006); and Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Change in Effective Date of Final Modification, 72 FR 3783 (Jan. 16, 2007) (collectively, “Final Modification for Investigations”).

<sup>13</sup> See EC-Zeroing Panel at 7284, 7291.

<sup>14</sup> See Thyssenkrupp Acciai Speciali Terni S.p.A. v. United States, 603 F.3d 928, 934 (CAFC 2010).

<sup>15</sup> See Corus I, 395 F.3d at 1347.

comparisons in antidumping duty investigations.<sup>16</sup> With this modification, the Department's interpretation of the statute with respect to non-dumped comparisons was changed within the limited context of investigations using average-to-average comparisons. Adoption of the modification pursuant to the procedure set forth in section 123(g) of the URAA was specifically limited to address adverse WTO findings made in the context of antidumping investigations using average-to-average comparisons. The Department did not change its practice of zeroing in other types of comparisons, including average-to-transaction comparisons in administrative reviews.<sup>17</sup>

The CAFC subsequently upheld the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations while recognizing that the Department limited its change in practice to certain investigations and continued to use zeroing when making average-to-transaction comparisons in administrative reviews.<sup>18</sup> In upholding the Department's decision to cease zeroing in average-to-average comparisons in antidumping duty investigations, the CAFC accepted that the Department likely would have different zeroing practices between average-to-average and other types of comparisons in antidumping duty investigations.<sup>19</sup> The CAFC's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type.<sup>20</sup> The CAFC acknowledged that section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make average-to-transaction comparisons where certain patterns of significant price differences exist.<sup>21</sup>

The CAFC also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of average-to-transaction comparisons and zeroing.<sup>22</sup> In summing up its understanding of the relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the CAFC acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that "{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist."<sup>23</sup>

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<sup>16</sup> See Final Modification for Investigations.

<sup>17</sup> Id., at 77724.

<sup>18</sup> See U.S. Steel Corp. v. United States, 621 F.3d 1351, 1358-59 (Fed. Cir. 2011) (U.S. Steel).

<sup>19</sup> Id., at 1363 (stating that the Department indicated an intention to use zeroing in average-to-transaction comparisons in investigations to address concerns about masked dumping).

<sup>20</sup> Id., at 1361-63.

<sup>21</sup> Id., at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations); see also section 777A(d)(1)(B) of the Act.

<sup>22</sup> See U.S. Steel, 621 F.3d at 1363.

<sup>23</sup> Id. (emphasis added).

We disagree with the respondents that the CAFC's decisions in Dongbu and JTEKT require the Department to change its methodology in this administrative review. These holdings were limited to finding that the Department had not adequately explained the different interpretations of section 771(35) of the Act in the context of investigations versus administrative reviews, but the CAFC did not hold that these differing interpretations were contrary to law. Importantly, the panels in Dongbu and JTEKT did not overturn prior CAFC decisions affirming zeroing in administrative reviews, including SKF v. United States, 630 F.3d 1365 (CAFC 2011) (SKF), in which the Court affirmed zeroing in administrative reviews notwithstanding the Department's determination to no longer use zeroing in certain investigations. Unlike the determinations examined in Dongbu and JTEKT, the Department, in these final results, provides additional explanation for its changed interpretation of the statute subsequent to the Final Modification for Investigations – whereby we resolve the ambiguity in section 771(35) of the Act differently for certain investigations (when using average-to-average comparisons) and administrative reviews. For all these reasons, we find that our determination is consistent with the holdings in Dongbu, JTEKT, U.S. Steel, and SKF.

The Department's interpretation of section 771(35) of the Act reasonably resolves the ambiguity inherent in the statutory text for multiple reasons. First, outside of the context of average-to-average comparisons,<sup>24</sup> the Department has maintained a long-standing, judicially-affirmed interpretation of section 771(35) of the Act in which the Department does not consider a sale to the United States as dumped if NV does not exceed EP. Pursuant to this interpretation, the Department treats such a sale as having a dumping margin of zero, which reflects that no dumping has occurred, when calculating the aggregate weighted-average dumping margin. Second, adoption of an offsetting methodology in connection with average-to-average comparisons was not an arbitrary departure from established practice because the Executive Branch adopted and implemented the approach in response to a specific international obligation pursuant to the procedures established by the URAA for such changes in practice with full notice, comment, consultations with the Legislative Branch, and explanation. Third, the Department's interpretation reasonably resolves the ambiguity in section 771(35) of the Act in a way that accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department's Final Modification for Investigations to implement the WTO Panel's limited finding does not disturb the reasoning offered by the Department and affirmed by the CAFC in several prior, precedential opinions upholding the use of zeroing in average-to-transaction comparisons in administrative reviews as a reasonable interpretation of section 771(35) of the Act.<sup>25</sup> In the Final Modification for Investigations, the Department adopted a possible construction of an ambiguous statutory provision, consistent with the Charming Betsy doctrine,

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<sup>24</sup> The Final Modification for Reviews adopts this comparison method with offsetting as the default method for administrative reviews; however, as explained above, this modification is not applicable to these final results.

<sup>25</sup> See, e.g., SKF USA, Inc. v. United States, 537 F.3d 1373, 1382 (CAFC 2008); NSK, 510 F.3d at 1379-1380; Corus II, 502 F.3d at 1372-1375; and Timken, 354 F.3d at 1343.

to comply with certain adverse WTO dispute settlement findings.<sup>26</sup> Even where the Department maintains a separate interpretation of the statute to permit the use of zeroing in certain dumping margin calculations, the Charming Betsy doctrine bolsters the ability of the Department to apply an alternative interpretation of the statute in the context of average-to-average comparisons so that the Executive Branch may determine whether and how to comply with international obligations of the United States. Neither Section 123 nor the Charming Betsy doctrine require the Department to modify its interpretation of section 771(35) of the Act for all scenarios when a more limited modification will address the adverse WTO finding that the Executive Branch has determined to implement. Furthermore, the wisdom of the Department's legitimate policy choices in this case – i.e., to abandon zeroing only with respect to average-to-average comparisons – is not subject to judicial review.<sup>27</sup> These reasons alone sufficiently justify and explain why the Department reasonably interprets section 771(35) of the Act differently in average-to-average comparisons relative to all other contexts.

Moreover, the Department's interpretation reasonably accounts for inherent differences between the results of distinct comparison methodologies. The Department interprets section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of an average-to-average comparison and the result of an average-to-transaction comparison.

The Department may reasonably interpret section 771(35) of the Act differently in the context of the average-to-average comparisons to permit negative comparison results to offset or reduce positive comparison results when calculating “aggregate dumping margins” within the meaning of section 771(35)(B) of the Act. When using an average-to-average comparison methodology the Department usually divides the export transactions into groups, by model and level of trade (i.e., averaging groups), and compares an average EP or CEP of transactions within one averaging group to an average NV for the comparable merchandise of the foreign like product.<sup>28</sup> In calculating the average EP or CEP, the Department averages all prices, both high and low, for each averaging group. The Department then compares the average EP or CEP for the averaging group with the average NV for the comparable merchandise. This comparison yields an average result for the particular averaging group because the high and low prices within the group have been averaged prior to the comparison. Importantly, under this comparison methodology, the Department does not calculate the extent to which an exporter or producer dumped a particular sale into the United States because the Department does not examine dumping on the basis of

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<sup>26</sup> According to Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804), “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.” The principle emanating from the quoted passage, known as the Charming Betsy doctrine, supports the reasonableness of the Department's interpretation of the statute in the limited context of average-to-average comparisons in antidumping duty investigations because the Department's interpretation of the domestic law accords with international obligations as understood in this country.

<sup>27</sup> See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 665 (CAFC 1992).

<sup>28</sup> See, e.g., section 777A(d)(1)(A)(i) of the Act.

individual U.S. prices, but rather performs its analysis “on average” for the averaging group within which higher prices and lower prices offset each other. The Department then aggregates the comparison results from each of the averaging groups to determine the aggregate weighted-average dumping margin for a specific producer or exporter. At this aggregation stage, negative, averaging-group comparison results offset positive, averaging-group comparison results. This approach maintains consistency with the Department’s average-to-average comparison methodology, which permits EPs above NV to offset EPs below NV within each individual averaging group. Thus, by permitting offsets in the aggregation stage, the Department determines an “on average” aggregate amount of dumping for the numerator of the weighted-average dumping margin ratio consistent with the manner in which the Department determined the comparison results being aggregated.

In contrast, when applying an average-to-transaction comparison methodology, as the Department does in this administrative review, the Department determines dumping on the basis of individual U.S. sales prices.<sup>29</sup> Under the average-to-transaction comparison methodology, the Department compares the EP or CEP for a particular U.S. transaction with the average NV for the comparable merchandise of the foreign like product. This comparison methodology yields results specific to the selected individual export transactions. The result of such a comparison evinces the amount, if any, by which the exporter or producer sold the merchandise at an EP or CEP less than its NV. The Department then aggregates the results of these comparisons – *i.e.*, the amount of dumping found for each individual sale – to calculate the weighted-average dumping margin for the period of review. To the extent the average NV does not exceed the individual EP or CEP of a particular U.S. sale, the Department does not calculate a dumping margin for that sale or include an amount of dumping for that sale in its aggregation of transaction-specific dumping margins.<sup>30</sup> Thus, when the Department focuses on transaction-specific comparisons, as it did in this administrative review, the Department reasonably interprets the word “exceeds” in section 771(35)(A) of the Act as including only those comparisons that yield positive comparison results. Consequently, when using transaction-specific comparisons, the Department reasonably does not permit negative comparison results to offset or reduce other positive comparison results when determining the “aggregate dumping margin” within the meaning of section 771(35)(B) of the Act.

Put simply, the Department interprets the application of average-to-average comparisons to contemplate a dumping analysis that examines the pricing behavior, on average, of an exporter or producer with respect to the subject merchandise, whereas under the average-to-transaction comparison methodology the Department continues to undertake a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach applied in the context of aggregating the results of the average-to-average comparisons allows for a reasonable examination of pricing behavior, on

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<sup>29</sup> See, *e.g.*, section 777A(d)(2) of the Act.

<sup>30</sup> As discussed previously, the Department does account, however, for the sale in its weighted-average dumping margin calculation. The value of any non-dumped sale is included in the denominator of the weighted-average dumping margin while no dumping amount for non-dumped transactions is included in the numerator. Therefore, any non-dumped transaction results in a lower weighted-average dumping margin.

average. The average-to-average comparison method inherently permits non-dumped prices to offset dumped prices before the comparison is made. This offsetting can reasonably be extended to the next stage of the calculation where average-to-average comparison results are aggregated, such that offsets are: 1) implicitly granted when calculating average export prices; and 2) explicitly granted when aggregating averaging-group comparison results. This rationale for granting offsets when using average-to-average comparisons does not extend to situations where the Department is using average-to-transaction comparisons because no offsetting is inherent in the average-to- transaction comparison methodology.

In sum, on the issue of how to treat negative comparison results in the calculation of the weighted-average dumping margin pursuant to section 771(35)(B) of the Act, for the reasons explained, the Department reasonably may accord dissimilar treatment to negative comparison results depending on whether the result in question flows from an average-to-average comparison or an average-to-transaction comparison. We note that neither the CIT nor the CAFC has rejected the above reasons. In fact, the CIT recently sustained the Department's explanation for using zeroing in administrative reviews while not using zeroing in certain types of investigations.<sup>31</sup> Accordingly, the Department's interpretations of section 771(35) of the Act to permit zeroing in average-to-transaction comparisons, as in the underlying administrative review, and to permit offsetting in average-to- average comparisons reasonably accounts for the differences inherent in distinct comparison methodologies.

Regarding the WTO OJ Panel Decision cited by Cutrale finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement, the CAFC has held that WTO reports are without effect under U.S. law, "unless and until such a {report} has been adopted pursuant to the specified statutory scheme" established in the URAA. See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to trump automatically the exercise of the Department's discretion in applying the statute. See 19 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g). The statutory scheme makes clear that it is within the discretion of the Executive and Legislative Branches, following the required procedures, to determine whether and how to respond to WTO dispute settlement findings under U.S. law. The Department used this specified procedure for changing its zeroing practice in the context of average-to-average comparisons in administrative reviews. The Final Modification for Reviews provides for application of the revised methodology when making average-to-average comparisons in all antidumping duty administrative reviews where the preliminary results are issued after April 16, 2012. We completed the preliminary results of this administrative review prior to April 16, 2012.

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<sup>31</sup> See Union Steel, 823 F. Supp.2d at 1360 (affirming Commerce's explanation) (appeal pending); Grobst & I-Mei Industrial (Vietnam) Co. v. United States, Ct. No. 10-002381, Slip. Op. No. 12-100, at 23 (CIT 2012) (affirming Commerce's explanation); Far Eastern New Century Corp. v. United States, Ct. No. 11-000415, Slip. Op. No. 12-110, at 7 (CIT 2012) (affirming Commerce's explanation).

Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the U.S. sales transactions examined in this review are found to exceed NV, the amount by which the price exceeds NV will not offset the dumping found in respect of other transactions.

Comment 2: *Treatment of By-Product Revenue in the Calculation of G&A and Financial Expenses*

In accordance with the Department's practice, Cutrale and Fischer reported their G&A and financial expense ratios as percentages of their costs of goods sold (COGS) net of by-product revenue.<sup>32</sup> Louis Dreyfus, however, reported these ratios as a percentage of gross COGS (*i.e.*, COGS unadjusted for by-product revenue). Therefore, in the preliminary results, the Department recalculated the ratios reported by Louis Dreyfus as a percentage of net COGS and then applied these ratios to cost of manufacture (COM) stated on the same basis (*i.e.*, net of by-product revenue).<sup>33</sup>

Cutrale and Louis Dreyfus argue that the Department's practice of deducting by-product revenue from COGS when calculating G&A and financing expenses is distortive. Specifically, these respondents argue that they incur G&A and financial expenses to sell by-products and thus their G&A and financial expense ratios must be computed over the COGS of all products (including by-products). According to the respondents, by failing to allocate G&A and financing costs to by-products, the Department has created skewed ratios whereby the numerators and denominators do not contain the same elements. The respondents claim that these ratios are by definition arithmetically incorrect.

Louis Dreyfus illustrates its position using an example of a hypothetical company that produces both motorcycles and automobiles; in this example, Louis Dreyfus posits that the Department must determine the G&A and financial expenses related to motorcycles (the hypothetical subject merchandise). Louis Dreyfus asserts that it would be incorrect for the Department to deduct the cost of sales for automobiles from the denominator of the G&A and financial ratios while including total G&A and financing expenses in the numerators; however, Louis Dreyfus claims that this is exactly what the Department has done here when it deducted by-product revenue from

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<sup>32</sup> See the Memorandum to the File, from Blaine Wiltse, Senior Analyst, entitled, "Calculation Adjustments for Sucocitricon Cutrale Ltda. for the Preliminary Results," dated March 30, 2012 (Cutrale Calculation Memo), at Attachment 1, citing to Cutrale's January 18, 2012, supplemental D response at Exhibit SD-9; see also the Memorandum to the File, from Hector Rodriguez, Analyst, entitled, "Sales and Cost Calculations Performed for Fischer S.A. Comercio, Industria, and Agricultura (Fischer) for the Preliminary Results in the 2010-2011 Antidumping Duty Administrative Review of Certain Orange Juice from Brazil," dated March 30, 2012 (Fischer Calculation Memo), at 2, citing to Fischer's December 30, 2011, supplemental D response at Exhibit 7.

<sup>33</sup> See the Memorandum to Neal M. Halper, Director, Office of Accounting, from LaVonne Clark, Senior Accountant, entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Louis Dreyfus Citrus Inc. and Louis Dreyfus Commodities Agroindustrial S.A.," dated March 30, 2012, at 1 and Attachment 1.

total COGS, and thus the Department has greatly overstated the amount of G&A and financial expenses applied to OJ.

Further, Cutrale and Louis Dreyfus disagree that that the Department's previously-stated rationale for this calculation – that it is appropriate to exclude by-product revenue from the denominator of the ratios because the COM to which the ratios are applied also excludes this revenue – provides sufficient justification to continue a flawed methodology. According to the respondents, COGS and COM are not the same because the former includes the cost of all products while the latter relates only to subject merchandise. For the foregoing reasons, the respondents argue that the Department should recalculate their G&A and financial expense ratios as percentages of gross COGS.

The petitioners note that the Department's practice is to reduce the COGS denominators used in the calculations of the G&A and financial expense ratio by revenue from sales of by-products, and they point out that the Department has consistently followed the same methodology in all previous administrative reviews of this order.<sup>34</sup> The petitioners argue that the Department, when calculating these ratios, must ensure that the COGS denominator is on an equivalent basis to the COM to which the ratios are applied. As support for their assertions, the petitioners cite to Lemon Juice from Argentina: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances, 72 FR 20820, 20824 (Apr. 26, 2007) (Lemon Juice from Argentina);<sup>35</sup> Notice of Final Determination of Sales at Less than Fair Value: Live Cattle from Canada, 64 FR 56738, 56756 (Oct. 21, 1999) (Live Cattle from Canada); and Certain Steel Concrete Reinforcing Bars from Turkey: Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082 (Nov. 7, 2006) (2004-2005 Rebar from Turkey), and accompanying Issues and Decision Memorandum at Comment 10. Thus, the petitioners conclude that the Department should continue to recalculate Louis Dreyfus' G&A and financial expense ratios for purposes of the final results and to make no changes to Cutrale's ratios.

#### Department's Position:

In calculating the COP of the merchandise under consideration, the statute directs the Department to add to COM an amount for G&A and financial expenses. See section 773(b)(3)(B) of the Act. The Department's practice is to determine the COP of the merchandise under consideration by calculating G&A and financial expense ratios and multiplying these ratios by the COM of the investigated product. See, e.g., Certain Orange Juice From Brazil: Final Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke

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<sup>34</sup> As support for this statement, the petitioners cite Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 74 FR 40167 (Aug. 11, 2009) (2007-2008 OJ from Brazil), and accompanying Issues and Decision Memorandum at Comment 6; and Certain Orange Juice from Brazil: Final Results and Partial Rescission of the Antidumping Duty Administrative Review, 73 FR 46584 (Aug. 11, 2008) (2005-2007 OJ from Brazil), and accompanying Issues and Decision Memorandum at Comment 8.

<sup>35</sup> This investigation was suspended before the Department issued its final determination. See Suspension of Antidumping Duty Investigation: Lemon Juice from Argentina, 72 FR 53991 (Sept. 21, 2007).

Antidumping Duty Order in Part, 75 FR 50999 (Aug. 18, 2010) (2008-2009 OJ from Brazil), and accompanying Issues and Decision Memorandum at Comment 9; 2007-2008 OJ from Brazil at Comment 6; 2005-2007 OJ from Brazil at Comment 8; Notice of Final Determination of Sales at Less Than Fair Value: Certain Frozen and Canned Warmwater Shrimp From Ecuador, 69 FR 76913 (Dec. 23, 2004) (Shrimp from Ecuador), and accompanying Issues and Decision Memorandum at Comment 29; and Live Cattle from Canada, 64 FR at 56756. The purpose of the ratios is to allocate all G&A and financial expenses (*i.e.*, the numerators of the ratios) to the cost of all products. To make the ratios arithmetically correct, the denominator must be on the same basis as the cost to which the ratios are applied. Because the product-specific cost to which the ratios are applied has been reduced by the by-product revenue, the denominator of the ratios (the total cost of all products) must likewise be reduced by the by-product revenue.<sup>36</sup> *Id.*

In the preliminary results, we subtracted the total by-product revenue from the COGS denominator of the G&A and financial expense ratios in order to keep the denominator of the ratios on the same basis as the COM to which the ratios were applied. That is, because we subtracted the by-product revenue from the total COM of OJ in calculating the product-specific cost, we must reduce the denominator of the ratios by total by-product revenue. Calculating ratios which do not include by-product revenue as an offset in the denominator and applying them to the COM that has been reduced by by-product revenue is arithmetically incorrect because the denominator does not reflect by-product revenue while the COM to which the ratios are applied does. If the denominator does not reflect the same basis to which the ratio is applied (*i.e.*, per-unit COM), then an over- or understatement of G&A and financial expenses will result. In order to correctly allocate the total G&A and financial expenses incurred by a company to all products, the ratios must be calculated using a COGS figure that has been reduced by total by-product revenue. *See, e.g.*, 2008-2009 OJ from Brazil at Comment 9; 2007-2008 OJ from Brazil at Comment 6; and 2005-2007 OJ from Brazil at Comment 8.

Contrary to Cutrale and Louis Dreyfus' assertions, the ratio calculations would be skewed and unbalanced if the revenues from the sales of by-products were not removed from the COGS denominator used in the calculation of the ratios. Furthermore, by adjusting the COGS denominator by the by-product revenue the Department is being consistent with the methodology it has employed in all prior segments of this review and in other cases with similar fact patterns.<sup>37</sup> Moreover, it was also recently upheld by the CIT, where the Court found that deducting by-product revenue from the denominator of a respondent's G&A and financial expense ratio calculations was consistent with the Department's past practice, ensured that these

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<sup>36</sup> The respondents' example of a company that produces both motorcycles and cars is off point. First, a car is not a byproduct of motorcycle production. As such, if we were to determine the cost of producing a motorcycle, we would not allow a respondent to reduce its reported product-specific motorcycle COM by the sales revenue of cars. Thus, there would be no reason to deduct the revenue for car sales from the company-wide COGS denominator of the G&A and financial expense ratios.

<sup>37</sup> *See, e.g.*, Lemon Juice from Argentina, 72 FR at 20824; 2004-2005 Rebar from Turkey at Comment 10; 2008-2009 OJ from Brazil at Comment 9; 2007-2008 OJ from Brazil at Comment 6; 2005-2007 OJ from Brazil at Comment 8; Live Cattle from Canada at Comment 2; and Shrimp from Ecuador at Comment 29.

ratios were arithmetically correct, and produced more accurate results.<sup>38</sup> Therefore, for these final results we have not departed from our normal methodology, used in the preliminary results of this segment of the proceeding as well as the final results of the previous reviews of this order, and have continued to reduce the G&A and financial expense ratios' COGS denominator by net by-product revenue.

Comment 3: CEP Offset for Cutrale

In the preliminary results, we analyzed the selling functions Cutrale performed to make sales in the home market and to its U.S. affiliate, Citrus Products Inc. (CPI). Based on this analysis, we determined that Cutrale's sales to the U.S. and home markets were made at the same level of trade (LOT) during the POR. Therefore, we did not grant Cutrale either an LOT adjustment or a CEP offset in our calculations for the preliminary results. See Preliminary Results, 77 FR 21729-30.

Cutrale objects to the Department's denial of its CEP offset claim, arguing that the record evidence shows that its sales in the home market are at a more advanced LOT than its sales to its U.S. affiliate. Cutrale notes that it sells OJ in the home market to individual soft-drink bottlers which purchase it by the truckload and consume it directly in the manufacture of soft drink products. In contrast, Cutrale states that for its U.S. sales to CPI, CPI stores the merchandise in large tanks at storage facilities and then breaks the product into truckload quantities which are resold to unrelated customers for use in manufacturing juice products. This, Cutrale argues, demonstrates that CPI acts as a national distributor for Cutrale's sales of OJ in the United States. Because its home market sales are directly from the manufacturer to the end-use customer, Cutrale maintains that these sales are at a more advanced stage of distribution than sales to a national distributor like CPI, which must resell the product to the end-use customer. Cutrale argues that this difference satisfies the statutory requirement for a CEP offset.

According to Cutrale, the Department must calculate CEP by determining the price at which Cutrale would have sold to CPI if CPI were not Cutrale's affiliate. Cutrale argues that, in so doing, the Department must take into consideration the fact that Cutrale does not perform any selling functions to make its sales to the United States via CPI. Specifically, Cutrale asserts that it does not contact U.S. customers, negotiate prices, store products, arrange for delivery, pay claims for defective products, follow-up or provide quality assurance, or blend the product to suit the customer's needs. Cutrale states that all of these functions are performed entirely by CPI in the United States. Further, Cutrale states that CPI merely directs it to supply subject merchandise based on what the overall demands of the U.S. market are likely to be on a quarterly and monthly basis, and Cutrale arranges for shipments to be delivered to CPI to fulfill its needs. Therefore, Cutrale asserts that its role in the U.S. sales process is limited to processing orders from CPI.

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<sup>38</sup> See Sucocitrico Cutrale Ltda. and Citrus Products Inc., v. United States, Court No. 10-00261, Slip Op. No. 2012-71, at 14 (CIT 2012) (Cutrale).

Cutrale contrasts this with the situation in its home market, where it claims that it performs significant selling functions, including finding and meeting with customers, and negotiating prices and contract terms. Cutrale contends that it is responsible for obtaining and maintaining its customers in its home market and these customer contacts are essential to its home market sales. Therefore, Cutrale argues that its contacts with its home market customers represent a significant selling function that it performs in its home market. Additionally, Cutrale notes that it has two employees who are responsible for maintaining regular contact with its home market customers. Cutrale points out that the salaries of these employees are an example of indirect selling expenses that it does not incur on its CEP sales.

Finally, Cutrale argues that the Department must not base its decision on whether selling expenses in either the U.S. or the home market are significant in and of themselves, but rather whether there are “substantial differences” between the services offered in the two markets. Cutrale contends that the Department’s preliminary findings are not supported by substantial evidence and should be reversed in the final results.

The petitioners maintain that a CEP offset is not warranted for Cutrale for the final results. According to the petitioners, Cutrale has failed to demonstrate significant changes in its U.S. and home market selling functions from those reported in the original investigation and prior administrative reviews, where the Department determined that Cutrale was not entitled to a CEP offset.<sup>39</sup> The petitioners contend that, as in the prior segments, Cutrale’s argument is contrary to the Department’s regulations at 19 CFR 351.412(c)(2), which state that, in order for the Department to find that sales are made at different levels of trade, “substantial differences in selling activity are necessary, but not sufficient, condition for determining that there is a difference...” Further, the petitioners note that Cutrale’s claim that it performs no selling activities in the United States is contrary to the Department’s findings in the previous segments of this case.

Regarding Cutrale’s home market, the petitioners maintain that the Department reasonably concluded that the selling functions performed by Cutrale for U.S. and home market customers do not differ significantly. The petitioners also contend that Cutrale’s claim for a CEP offset contradicts its statement that “there are no significant differences in the sales process between the 2009-2010 period {where the Department found that Cutrale was not entitled to a CEP offset} and that in the current POR.” Regarding Cutrale’s claim that contacting its home market customers should be considered a significant selling function, the petitioners argue that this only seems significant when compared to U.S. customer contact (*i.e.*, Cutrale has a U.S. affiliate

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<sup>39</sup> See, e.g., Certain Orange Juice From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part, 76 FR 19315 (Apr. 7, 2011) (2009-2010 OJ from Brazil Preliminary Results), unchanged in Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, Determination Not To Revoke Antidumping Duty Order in Part, and Final No Shipment Determination, 76 FR 50176 (Aug. 12, 2011) (2009-2010 OJ from Brazil); 2008-2009 OJ from Brazil at Comment 7; 2007-2008 OJ from Brazil at Comment 2; 2005-2007 OJ from Brazil at Comment 5; and Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil, 71 FR 2183 (Jan. 13, 2006) (OJ from Brazil Investigation), and accompanying Issues and Decision Memorandum at Comment 10.

whose business it obviously cannot lose). Moreover, the petitioners contend that, if the Department were to accept Cutrale's argument, then a CEP offset would be warranted in every case where a foreign producer sells through a U.S. affiliate, which would be contrary to the Department's regulations under 19 CFR 351.412(c)(2). Consequently, the petitioners assert that the Department should continue to deny a CEP offset for Cutrale in the final results.

Department's Position:

Consistent with our determinations in previous segments of this proceeding,<sup>40</sup> we continue to find that a CEP offset is not warranted for Cutrale for the final results. The Department's regulations at 19 CFR 351.412(c)(2) outline the Department's policy regarding differences in the LOTs as follows:

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. (emphasis added)

In the preliminary results, we analyzed Cutrale's reported data and found that Cutrale performed the following functions for its U.S. sales: sales forecasting, order input/processing, freight and delivery, packing, provision of quality guarantees, and maintaining inventory at the port of exportation. We then organized these functions into the following four categories for analysis: 1) sales and marketing; 2) freight and delivery; 3) inventory maintenance and warehousing; and 4) warranty and technical support, and we found that Cutrale performed functions in each of these categories. See Preliminary Results, 77 FR at 21729-30. In the home market, Cutrale performed the same selling functions as it did in the U.S. market,<sup>41</sup> and it also employed direct sales personnel, performed some advertising, and provided limited after-sales services. Accordingly, we found that Cutrale also performed home market selling functions in each of the four categories noted above. Id.

Because all sales in the U.S. market and the home market were made through single distribution channels and the selling activities did not differ within these channels, we determined that there was one LOT in each market. Finally, we analyzed the differences between the markets and found that:

. . . the differences were limited to the following activities: (1) Cutrale performed limited, general image advertising in the home market; (2) Cutrale entered orders into the company's computer system for home market sales based on orders placed by customers, while it generated sales documents for sales to its U.S.

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<sup>40</sup> See, e.g., 2009-2010 OJ from Brazil Preliminary Results, 76 FR at 19319, unchanged in 2009-2010 OJ from Brazil; 2008-2009 OJ from Brazil at Comment 7; 2007-2008 OJ from Brazil at Comment 2; 2005-2007 OJ from Brazil at Comment 5; and OJ from Brazil Investigation at Comment 10.

<sup>41</sup> We found that Cutrale maintained an inventory at the factory for home market sales, rather than at the port of exportation.

affiliate based on a general shipping schedule; (3) Cutrale has direct sales personnel assigned to servicing its home market customers while employing an export sales office whose staff is assigned to service all export market customers, including U.S. customers; (4) Cutrale provided limited technical assistance and after-sale services to home market customers during the POR; and (5) Cutrale provides quality guarantees directly to its home market customers, while it provides similar guarantees for its U.S. sales through its U.S. affiliate.

Id.

Based on this analysis, we found that the selling functions Cutrale performed during the POR differed between the markets but that the difference was not substantial. As a result, we found that a CEP offset was not warranted. Id.

Concerning Cutrale's arguments, we disagree that a difference in the level of distribution in and of itself qualifies a respondent for a CEP offset. Under 19 CFR 351.412(c)(2), the Department must find "substantial differences in selling activities" (emphasis added) between markets before making such an adjustment. Moreover, the granting of CEP offset claims solely on the basis of the existence of a distributor in one of the markets, without performing any analysis would clearly be contrary to Congressional intent:

Commerce will carefully investigate whether a level of trade adjustment should be made to increase or decrease normal value. However, if a respondent claims an adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment.

Commerce will require evidence from the foreign producers that the functions performed by the sellers at the same level of trade in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the allegedly different levels of trade. Nominal reference to a company as a "wholesaler," for example, will not be sufficient. On the other hand, Commerce need not find that the two levels involve no common selling activities to determine that there are two levels of trade. Because level of trade adjustments may be susceptible to manipulation, Commerce will closely scrutinize claims for such adjustments. For example, a sales subsidiary created merely to perform the role of a *de facto* sales department is not an appropriate basis for adjustment.

See Statement of Administrative Action, accompanying the URAA, H.R. Rep. No. 103-316, 870 (1994), at section B.2.c.(4) of the Agreement On Implementation Of Article VI (emphasis added). Therefore, we continue to find that a detailed analysis of Cutrale's claimed selling activities related to its home market and U.S. sales is necessary in order to determine whether a CEP offset is warranted. Upon concluding this analysis, which is summarized above and set forth in more detail below, we find that Cutrale's claims do not meet the Department's regulatory

guidelines or statutory requirements for a CEP offset. Accordingly, we have continued to deny Cutrale's claim for a CEP offset for purposes of the final results.

As to the specifics of our analysis, in Exhibit SA-3 of its September 15, 2011, supplemental questionnaire response, Cutrale provided a chart showing the following nine selling functions for its sales in the home market: sales forecasting, advertising, packing, inventory maintenance, direct sales personnel, technical assistance, after-sales service, guarantees, and order input processing. Cutrale described performing these selling functions at various activity levels. Specifically, Cutrale labeled its home market sales forecasting as "continuous," its advertising as "general," its packing as "extensive," its inventory maintenance as "sufficient," and its direct sales personnel, technical assistance, after-sales services, guarantees, and order input processing as "yes" and "provided during the POR."<sup>42</sup> For its U.S. sales to CPI, Cutrale reported three selling functions: packing, labeled as "minimal"; guarantees, labeled as "yes"; and order input processing, labeled as "only to receive orders." *Id.*

After examining Cutrale's descriptions of its home market and U.S. market selling functions in its questionnaire responses, as well as reviewing the Department's previous determinations,<sup>43</sup> we find that Cutrale's actual selling experience in both markets differs from that which is reflected in the selling functions chart that Cutrale prepared for the Department. While we concur with Cutrale's description that it performed its provision of guarantees equally in the home and U.S. markets,<sup>44</sup> we disagree that Cutrale did not also perform many of the other selling functions it claimed in the home market when making its U.S. sales. Specifically, with regard to sales forecasting, Cutrale states that it periodically negotiates a price understanding, which concerns sales forecasting, market growth, and product usage, with its home market customers and makes periodic sales calls to these customers.<sup>45</sup> However, Cutrale also states that it does not negotiate

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<sup>42</sup> See Cutrale's September 15, 2011, supplemental section A response at Exhibit SA-3.

<sup>43</sup> In its September 15, 2011, submission, Cutrale acknowledged that there "are no significant differences in the sales process between the 2009-10 period and that in the current POR," although Cutrale continued to argue that it was entitled to a CEP offset. See Cutrale's September 15, 2011, supplemental section A response at 1. We note that the Department found that a CEP offset was not warranted for Cutrale in the final results of the 2009-2010 administrative review and Cutrale did not contest this determination. See 2009-2010 OJ from Brazil Preliminary Results, 76 FR at 19319, unchanged in 2009-2010 OJ from Brazil. Furthermore, Cutrale made similar statements in each of the two reviews preceding the current segment, and each time the Department found that a CEP offset was not warranted for Cutrale in the final results. See 2009-2010 OJ from Brazil Preliminary Results, 76 FR at 19319, unchanged in 2009-2010 OJ from Brazil; 2008-2009 OJ from Brazil at Comment 7 (where the Department's rationale in denying a CEP offset for Cutrale was upheld at the CIT; see Cutralé at 8-11); and 2005-2007 OJ from Brazil at Comment 5.

Despite that the facts are largely the same between the 2007-2008, 2008-2009, 2009-2010, and 2010-2011 administrative reviews, we have analyzed the facts contained within the current administrative review to determine whether a CEP offset is warranted. In light of Cutrale's statements that there were "no significant differences" in the sales process/activities that it performed between the current and prior reviews, we have relied on the Department's last verification findings (*i.e.*, during the 2008-2009 review) as an additional source of information on these processes.

<sup>44</sup> See Preliminary Results, 77 FR at 21729.

<sup>45</sup> See Cutrale's May 26, 2011, section A questionnaire response at 16; and Cutrale's September 15, 2011,

individually with most of its home market customers; rather it negotiates long-term supply-purchase agreements which are updated periodically to adjust prices and quantities based on market conditions.<sup>46</sup> This description is similar to that which Cutrale provided for its U.S. sales; as noted in Cutrale's response to the Department's supplemental section A questionnaire, Cutrale ships subject merchandise to CPI pursuant to a shipping schedule which is agreed to by both parties and updated periodically.<sup>47</sup> Moreover, this description is consistent with the information provided by Cutrale in previous segments of this proceeding; for example, in 2008-2009 OJ from Brazil, we found that Cutrale generates a sales projection for CPI once a year, which is adjusted on a quarterly basis, as part of its selling functions for U.S. sales.<sup>48</sup> Thus, the information on the record demonstrates that Cutrale makes sales pursuant to long-term agreements or their equivalent in both markets and does not engage in extensive sales forecasting activities to sell to its home market customers, nor are its sales forecasting activities substantially different in its home and U.S. markets. In light of this evidence on the record, we disagree with Cutrale's assertion that its efforts in its home market to find customers and negotiate terms with them are so significant and its U.S. activities so insignificant, that this alone entitles Cutrale to a CEP offset.

Similarly, with respect to inventory maintenance, although Cutrale reported that it performs "none" for its U.S. sales, Cutrale has failed to account for the inventory maintenance services that it provides at the port, prior to export, to make its sales to the United States. Cutrale also reported that it incurred warehousing expenses in Brazil for its U.S. sales. These facts are consistent with the Department's previous finding that Cutrale provides similar inventory maintenance services for its U.S. and home market customers by "maintaining separate storage tanks at the port for its FCOJM and NFC shipments to the United States, and maintaining an inventory of OJ products for its home market customers."<sup>49</sup>

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supplemental section A response at 11.

<sup>46</sup> See Cutrale's May 26, 2011, section A questionnaire response at 20-24.

<sup>47</sup> See Cutrale's September 15, 2011, submission at 7 and 12.

<sup>48</sup> See 2008-2009 OJ from Brazil at Comment 7, citing to Memorandum to the File from Elizabeth Eastwood, Senior Analyst, entitled, "Verification of the Sales Response of Sucocitraco Cutrale Ltda. (Cutrale) in the 2008-2009 Antidumping Duty Administrative Review of Certain Orange Juice from Brazil," dated February 25, 2010 (Cutrale Verification Report), at 7-8, stating, "Regarding sales forecasting and strategic and economic planning in the home market, company officials stated that Cutrale's home market sales manager estimates what sales will be made from year to year, based on historical sales data. According to company officials, five times a year Cutrale's home market sales manager makes sales projections based on conversations with Cutrale's customers, either over the phone or based on in-person meetings. Company officials stated that these projections take limited time to perform because of the sales manager's knowledge of the home market. Regarding sales forecasting and strategic and economic planning for sales to the United States, company officials stated that Cutrale and CPI generate a sales projection together once a year based on CPI's sales history from the previous year. Based on this projection, company officials explained that they prepare a shipping schedule, which is adjusted on a quarterly basis, to ensure that a sufficient volume of juice is delivered to the United States to meet CPI's needs."

<sup>49</sup> See 2008-2009 OJ from Brazil at Comment 7, citing to Cutrale Verification Report at 8-9; see also 2007-2008 OJ from Brazil at Comment 2.

Additionally, we find that while Cutrale employs direct sales personnel assigned to servicing its home market customers, the record indicates that Cutrale also employs an export sales office whose staff is responsible for servicing Cutrale's export market customers, including its U.S. customers.<sup>50</sup> Therefore, we continue to find that Cutrale also performs sales forecasting, inventory maintenance, and employment of direct sales personnel as selling functions in the U.S. market, and these functions do not differ substantially between markets.

As for packing services and order input processing, we disagree that Cutrale's provision of these services in the home market was substantially different than the services it provided to sell in the United States. Specifically, in its selling functions chart, Cutrale described its home market packing services as "extensive," while stating that its U.S. packing services were "minimal." However, the record demonstrates that: 1) Cutrale's packing in the home market was limited to placing OJ in drums with liners, an activity that does not require substantial amounts of materials or labor; and 2) Cutrale made sales packed in drums to its customers in both markets during the POR.<sup>51</sup> Cutrale's characterization of the same packing activities as "extensive" and "minimal" equates the frequency of performing the activity with the activity itself, but the record evidence demonstrates that Cutrale performs the same types of packing activity in both markets. Similarly, Cutrale diminishes its U.S. market order input processing services by characterizing these as, "only to receive orders." Yet, as we noted in the Preliminary Results and found in prior determinations,<sup>52</sup> the differences in Cutrale's order input processing services between the home and U.S. markets were limited. These findings are also consistent with the Department's previous determinations. See 2008-2009 OJ from Brazil at Comment 7; and 2007-2008 OJ from Brazil at Comment 2.

Regarding the remaining three claimed home market functions (i.e., advertising, technical assistance, and after-sales services), we find that, while Cutrale did perform these during the POR, the amount and/or degree to which these functions were performed was not significant. Specifically, regarding Cutrale's advertising expenses, Cutrale reported that it: 1) sponsored a local basketball team which consisted of advertising Cutrale's name and logo on the team's website, uniforms, and a banner in the team's stadium; 2) advertised in Brazilian newspapers; 3) sponsored school lunch programs, 4) provided materials to trade fairs, and 5) participated in a

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<sup>50</sup> See Cutrale's September 15, 2011, supplemental section A response at 4.

<sup>51</sup> See Cutrale's September 15, 2011, supplemental section A response at 7; Cutrale's June 20, 2011, section B questionnaire response at 30 and Exhibit B-8; and Cutrale's May 26, 2011, section A questionnaire response at 13 and 17.

<sup>52</sup> See Preliminary Results, 77 FR at 21729, where we stated, "Cutrale entered orders into the company's computer system for home market sales based on orders placed by customers, while it generated sales documents for sales to its U.S. affiliate based on a general shipping schedule;" and 2008-2009 OJ from Brazil at Comment 7, citing to Cutrale Verification Report at 7 – 9, where we stated, "Cutrale employed one individual whose primary responsibilities were to input orders, contact customers, and organize shipments in the home market, while Cutrale's export sales department consisted of multiple employees whose responsibilities were to schedule delivery of merchandise and arrange for the shipment and international freight of merchandise to Cutrale's customers around the world (including CPI)." See also Cutrale's September 15, 2011, supplemental section A response at 4, and 11-12.

proprietary program.<sup>53</sup> However, the record indicates that Cutrale's advertising consists of general image advertising, and that expenses related to these activities were reported as part of Cutrale's indirect selling expenses.<sup>54</sup> Furthermore, we note that Cutrale sells products which are not the merchandise under consideration in both the home and U.S. markets, and it is not possible to determine to which of its products Cutrale's general image advertising applies. We have previously determined that provision of this type of indirect general advertising (that is not specific to the merchandise under consideration) in itself is not a substantial selling function. See 2008-2009 OJ from Brazil at Comment 7; and 2007-2008 OJ from Brazil at Comment 2. Therefore, although Cutrale engaged in home market advertising that was not performed in the U.S. market, we do not consider this a significant home market selling activity.

Additionally, regarding technical assistance and after-sales services in the home market, Cutrale's September 15, 2011, response shows that Cutrale provided these services on an occasional basis, limited to only a few occurrences during the POR.<sup>55</sup> Furthermore, this record evidence is consistent with Cutrale's activities in prior periods, where we previously found that, "by Cutrale's own admission, the services in this category were occasional consultative services rather than general selling functions regularly performed for home market customers."<sup>56</sup> Therefore, although Cutrale provided occasional technical assistance and occasional after-sales services which were not performed in the U.S. market, we do not consider these to be significant home market selling activities.

Finally, we find that, Cutrale also excluded from its selling functions chart that it performs arranging freight and delivery in both the home and U.S. markets.<sup>57</sup> Consistent with previous determinations, we find that Cutrale's provision of freight and delivery services does not differ substantially between its home and U.S. markets.<sup>58</sup>

In conclusion, we find that Cutrale performs ten selling functions in the home market and that it performed these functions to a limited degree. Similarly, with respect to the U.S. market, our findings demonstrate that Cutrale performed the three selling functions claimed in its chart to a limited degree, while it also performed an additional four U.S. selling activities not disclosed in its selling functions chart (*i.e.*, sales forecasting, direct sales personnel, inventory maintenance, and arranging freight and delivery). When these selling activities are compared across markets, we find that the seven common functions were performed at a similar level of intensity in both markets. Additionally, as noted above, the three selling functions (*i.e.*, advertising, technical

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<sup>53</sup> This proprietary program was not directly related to advertising frozen concentrated orange juice (FCOJ) or not-from-concentrate orange juice (NFC). See Cutrale's September 15, 2011, supplemental section A response at 3; and Cutrale's May 26, 2011, section A questionnaire response at 16.

<sup>54</sup> See Cutrale's September 15, 2011, supplemental section A response at 11 and Exhibit SA-2.

<sup>55</sup> Id. at 5.

<sup>56</sup> See 2005-2007 OJ from Brazil at Comment 5.

<sup>57</sup> See Cutrale's September 15, 2011, supplemental section A response at 4 and 7; see also Cutrale's June 20, 2011, section C questionnaire response at 19.

<sup>58</sup> See 2008-2009 OJ from Brazil at Comment 7, citing to Cutrale Verification Report at 7 – 10.

assistance, and after-sales service) that were unique to Cutrale's home market were not performed at a significant level. Therefore, we disagree with Cutrale that the differences in its selling functions are so significant that they rise to the level of a different marketing stage. As shown above, these functions collectively do not require a substantial expenditure of resources in either market. Similarly, the difference in the intensity level at which these activities are performed in the two markets is not significant. Therefore, given the similarity of selling activities undertaken in both markets, we find that sales in the home and U.S. markets were made at the same LOT.

In summary, we find that although Cutrale claims that it performed virtually no selling functions in making CEP sales, we find that Cutrale did in fact perform many of the same selling functions related to its U.S. sales that it performed in its home market. Furthermore, concerning those selling functions that Cutrale performed in the home market but not in the U.S. market, while we find that these were performed more frequently in the home market than in the U.S. market, we also find that these were not performed as significant selling functions. Therefore, on balance, we find that, during the POR, the selling activities performed by Cutrale related to its home and U.S. markets were more similar than different. Accordingly, we have continued to deny Cutrale's claim for a CEP offset for purposes of the final results.

The findings above are consistent with our findings in each of the prior segments of this proceeding. Based on the information on the record of this administrative review, we find no meaningful change in the selling functions provided by Cutrale in either the home market or the U.S. market here and those performed in previous years. In each of those prior segments, the Department found that Cutrale's selling functions in the U.S. and home markets were not sufficiently different to warrant a LOT adjustment. See 2009-2010 OJ from Brazil Preliminary Results, 76 FR at 19319, unchanged in 2009-2010 OJ from Brazil; 2008-2009 OJ from Brazil at Comment 7; 2007-2008 OJ from Brazil at Comment 2; 2005-2007 OJ from Brazil at Comment 5; and OJ from Brazil Investigation at Comment 10. Therefore, we continue to find that, while there may be some differences in the selling functions Cutrale performs with respect to the two markets, the differences are not substantial enough to find that Cutrale's U.S. and home market sales were at different stages of marketing (or their equivalent), and thus different LOTs, much less to find that Cutrale's home market was at a more advanced level which would warrant a CEP offset. See 19 CFR 351.412(c)(2). See also Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731, 61746 (Nov. 19, 1997) (where the Department found that minimal differences in selling functions do not warrant a CEP offset).

Finally, we note that Cutrale's arguments are largely verbatim from those rejected by the Department in a prior review,<sup>59</sup> and the Department's position in that segment of the proceeding was recently upheld by the CIT.<sup>60</sup> Specifically, the CIT stated that:

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<sup>59</sup> See 2008-2009 OJ from Brazil at Comment 7.

<sup>60</sup> See Cutrale, at 8-11.

Commerce's regulations, when read in conjunction with the statute Plaintiffs cite, clarifies that a CEP offset is available only when there are "substantial differences in selling activities" between the levels of trade in the two markets. See 19 USC § 1677b(a)(7)(B); 19 C.F.R. § 351.412(f)(iii). Therefore, Commerce's interpretation is in accordance with law.<sup>61</sup>

The CIT further stated that:

Although Cutrale may perform more selling functions or may perform selling functions more intensely in its home market, these differences do not warrant a CEP offset. The CEP offset provision applies in situations in which there is a substantial difference in the level of trade.

Id. Finally, the CIT concluded that:

Although Commerce noted minor differences between the two markets, these differences do not rise to the level required by the statute... Thus, Commerce's factual determination that there is not a substantial difference in the levels of trade in the two markets is reasonable and supported by substantial evidence.<sup>62</sup>

Accordingly, consistent with these previous rulings, and for the reasons outlined above, we continue to disagree that Cutrale is entitled to a CEP offset.

Comment 4: *Use of Actual Brix to Calculate the Home Market Prices and Quantities for Cutrale's Home Market Sales*

In the home market, Cutrale sells FCOJ on a metric ton basis and on a per-pounds solid basis in the U.S. market. Cutrale converted all prices and quantities reported in its home market sales listing to per-pounds-solid amounts using the brix levels at which the merchandise was sold, stated to the nearest whole number. In previous segments of this proceeding, we have found that these whole number brix figures were "standard" amounts, rather than the actual brix of each shipment.<sup>63</sup> Therefore, we instructed Cutrale to report the actual brix levels measured for each batch of FCOJ sold in the home market during the POR and to use these actual brix levels as the basis for converting its prices and quantities to a per pounds-solid basis. Additionally, we used this actual brix level data in the Preliminary Results to adjust Cutrale's home market costs, to ensure that these are also stated on a per pounds-solid basis using actual brix.

Cutrale argues that the Department's adjustment is inappropriate because Cutrale sells FCOJ in the home market on the basis of the standard brix (with its sales contracts containing a brix tolerance for the delivered product of plus or minus one-half degree brix). Cutrale contends that

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<sup>61</sup> See Cutrale, at 10.

<sup>62</sup> See Cutrale, at 11.

<sup>63</sup> See, e.g., 2008-2009 OJ from Brazil at Comment 5.

its home market prices and quantities of FCOJ do not change with variations of less than a whole-degree brix. Moreover, Cutrale argues that the actual brix data are derived from samples taken from various lots (and thus they may not be representative of the shipment as a whole) and can vary slightly within a single production run. Consequently, Cutrale argues that the brix sample is not the “actual” brix of a shipment. Rather, Cutrale maintains that brix samples are only used to ensure that the merchandise satisfies the customer’s product specifications, not to determine the actual brix of a product within a hundredth of a degree.

Additionally, Cutrale states that it keeps its accounting records in the home market based on whole brix and all of its home market sales invoices show brix to the whole degree. According to Cutrale, by using brix levels that were obtained through sampling to make adjustments to the company’s reported data, the Department is not using the actual brix of the merchandise in its entirety as delivered to the customer. Consequently, Cutrale argues that the Department’s adjustments result in the calculation of home market prices and quantities to the customer that are different from those actually transacted, an outcome which is clearly distortive. Cutrale argues that this difference not only distorts the margin calculations, but it also results in the Department’s departing from Cutrale’s own books and records when calculating both sets of data in violation of Department’s long-standing practice.

The petitioners argue that the Department properly used the actual brix to adjust Cutrale’s home market prices and quantities. The petitioners note that Cutrale has not based its home market prices and quantities on the actual brix of its FCOJ; consequently, the petitioners assert that Cutrale’s home market prices and quantities would be distorted if the Department relied on the company’s reported brix. Additionally, the petitioners maintain that the Department’s use of the actual brix is the most accurate method of comparing home market and U.S. sales, and that Cutrale has failed to provide substantial evidence demonstrating that the use of the standard brix would result in more accurate comparisons. The petitioners argue that, in the Preliminary Results, the Department followed the same methodology used in previous segments of this proceeding.<sup>64</sup> Moreover, the petitioners contend that the Department’s practice in this proceeding is consistent with its long-standing practice of making similar conversions for sales reported on a theoretical weight basis to an actual weight basis. In support of this statement, the petitioners cite to Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 64 FR 38756, 38781 (July 19, 1999) (Hot-Rolled Steel from Brazil).

Finally, the petitioners contend that the Department has considered all of the issues raised by Cutrale in previous reviews and has consistently rejected these arguments. Further, the petitioners point out that the Department recently explained its brix practice in detail in Cutrale. Thus, the petitioners argue that the Department should reject Cutrale’s arguments here and continue to adjust Cutrale’s home market prices, expenses, and quantities to state them on an actual brix basis for purposes of the final results.

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<sup>64</sup> See 2008-2009 OJ from Brazil at Comment 5; and 2007-2008 OJ from Brazil at Comment 9.

Department's Position:

Consistent with our practice, we continue to find that using the actual brix of the merchandise is the most accurate method to convert Cutrale's home market sales of FCOJ from kilograms to a pounds-solid basis. See 2009-2010 OJ from Brazil at Comment 4; 2008-2009 OJ from Brazil at Comment 5; and 2007-2008 OJ from Brazil at Comment 9. Accordingly, we have continued to base Cutrale's home market prices, quantities, and costs on the actual brix, when converting to a per-pounds solid basis.

In order to perform our analysis and make product comparisons between Cutrale's home market and U.S. sales, we must ensure that Cutrale's reported home market and U.S. sales data are stated in a consistent unit of measure. Cutrale sells OJ in the United States primarily on a pounds-solid basis using the actual brix to determine the price and quantity. However, in the home market, Cutrale sells FCOJ in metric tons and it has converted its sales data to a pounds-solid basis using the standard brix. Thus, we find Cutrale's current methodology for reporting its sales data on a pounds-solid basis in its U.S. and home market databases to be inconsistent, in that it results in home market and U.S. sales stated on different bases.<sup>65</sup> Therefore, we find that it is appropriate to make adjustments to Cutrale's reported sales data to ensure an accurate comparison between its home market and U.S. sales.

We have consistently found in previous segments of this proceeding that, in order to achieve the most accurate results, respondents must use actual brix to convert their sales data to a pounds-solid basis. See 2009-2010 OJ from Brazil at Comment 4; 2008-2009 OJ from Brazil at Comment 5; 2007-2008 OJ from Brazil at Comment 9; 2005-2007 OJ from Brazil at Comment 11; and OJ from Brazil Investigation at Comment 19. Because brix measures the concentration of the OJ in question, and because the degree of concentration of the product affects the product's cost<sup>66</sup> (and thus by extension its value), we continue to find that it is more accurate to use the actual brix level in our analysis.

This decision was challenged by Cutrale in court and affirmed by the CIT in June 2012 as reasonable. Specifically, the Cutrale Court found that

although this is only a sample measurement, the measurement calculated to a hundredth of a degree is more accurate than a measurement calculated to the whole degree... It is reasonable to use the more accurate measurement (calculated to a hundredth of a degree) when Cutrale has already recorded that measurement.

See Cutrale at 12.

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<sup>65</sup> While Cutrale's home market sales contracts are stated in terms of the standard brix, we previously found that that Cutrale tracks the actual brix of its merchandise in its books and records in the ordinary course of business. See 2008-2009 OJ from Brazil at Comment 5.

<sup>66</sup> A more highly concentrated product contains more solid material.

Therefore, consistent with our practice, we find that it is appropriate to adjust Cutrale's home market sales data to state them on a pounds-solid basis using the actual brix of the merchandise. See the Cutrale Sales Calculation Memo at page 2, for the details of this adjustment.

Finally, prior to comparing Cutrale's home market prices and costs, we adjusted Cutrale's COP to ensure that it is stated on a pounds-solid basis using actual brix. Id. This decision is consistent with the Department's practice in steel cases of converting a respondent's U.S. sales which were made on a theoretical-weight basis to an actual-weight basis for comparison purposes, despite the fact that U.S. sales were priced by theoretical weight. See, e.g., Hot-Rolled Steel from Brazil, 64 FR at 38781. We disagree with Cutrale that this method of determining per-unit amounts requires a departure from the company's books and records. Cutrale does not record its cost or price data on a per-unit basis in the ordinary course of business, but rather it records the total costs and total sales revenue amounts. At issue here is not whether to accept these total costs and revenues but rather how to allocate them to the individual units used in our dumping calculations. As noted above, the CIT found that this methodology was reasonable in its recent opinion. See Cutrale at 12.

Comment 5: Inventory Carrying Costs for Cutrale's U.S. Sales

During the POR, Cutrale held its merchandise in inventory in the United States prior to shipment to U.S. customers. We computed the opportunity cost associated with holding this inventory in the preliminary results using the following components: the COM of the OJ (in Brazilian reais), the short-term interest rate paid by Cutrale (in Brazilian reais), and the duration of time that the OJ remained in inventory. This formula has been used to compute U.S. inventory carrying costs in all segments of this proceeding.

Cutrale disagrees that this formula is appropriate, arguing that, because CPI is the company that holds the subject merchandise in the United States and invoices the ultimate customer, it is CPI that bears the inventory carrying costs for Cutrale's U.S. sales. Therefore, Cutrale argues that the Department should calculate CPI's inventory carrying costs using the interest rate incurred by CPI on its borrowings in the United States, not Cutrale's interest rate for short-term borrowing in Brazil. According to Cutrale, it is the Department's practice to use the U.S. interest rate for the U.S. portion of inventory carrying costs.<sup>67</sup>

Specifically, Cutrale argues that, because CPI's invoice price is the starting point for determining U.S. price, the costs that are deducted from this price must be those that CPI itself incurs. Cutrale argues that to deduct something other than CPI's actual costs would result in a mismatch

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<sup>67</sup> As support for this assertion, Cutrale cites Notice of Final Results of Antidumping Duty Administrative Review: Certain Softwood Lumber Products from Canada, 69 FR 75921 (Dec. 13, 2004) (Softwood Lumber from Canada), and accompanying Issues and Decision Memorandum at pages 141-42; 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) (Steel Pipe from Taiwan), and accompanying Issues and Decision Memorandum at Comment 2; and Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold Rolled Carbon Steel Flat Products from Germany, 67 FR 62116, 62119 (Oct. 13, 2002) (Cold Rolled Steel from Germany).

between the price of the product and the costs that are used to adjust the price. Cutrale claims that this would create a skewed and unfair calculation of CPI's net costs.

Additionally, Cutrale argues even if the Department uses Cutrale's COM when calculating the value of its inventory, that this does not provide a justification for using the Brazilian cost of capital in determining CPI's inventory carrying costs. Cutrale contends that the COM is determined by the Department, involving many adjustments to Cutrale's actual cost of production, and does not constitute the cost of holding inventory in the U.S. If the Department finds it necessary to determine the cost of holding inventory in the same currency as the currency in which the inventory cost is incurred, then Cutrale urges the Department to translate its COM value in reais into U.S. dollars using an average exchange rate and then apply the interest rate incurred by CPI on its U.S. borrowings to determine CPI's inventory carrying costs. Cutrale maintains that this is the most accurate and fair method and is consistent with the Department's practice.

Finally, Cutrale argues that the Department's use of home-market interest rates to calculate inventory carrying costs in prior segments of this review does not make the practice correct. To the contrary, Cutrale has challenged this methodology in an appeal to the CIT and, while noting that the Court had not yet ruled on its claim, believes that the Court will overturn the methodology. Accordingly, Cutrale contends that the Department should not perpetuate its earlier error by adopting this improper methodology in the current review and should instead change its methodology to calculate inventory carrying costs using CPI's interest rates.

The petitioners disagree with Cutrale's assertion that the Department departed from its practice in the Preliminary Results when it used Cutrale's home market short-term interest rate to calculate U.S. inventory carrying costs. To the contrary, the petitioners point out that the Department employed the same methodology in previous reviews of this order.<sup>68</sup> Furthermore, the petitioners contend that Cutrale is incorrect in alleging that the Department's long-standing practice is to use the U.S. short-term interest rate in its calculation of inventory carrying costs incurred by a parent company's U.S. affiliate. The petitioners cite to SSSSC from Mexico<sup>69</sup> and Ball Bearings from France<sup>70</sup> as cases wherein the Department used the parent company's short-

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<sup>68</sup> The petitioners cite the March 31, 2011, Memorandum to the File from Blaine Wiltse, Trade Analyst, entitled, "2009-2010 Administrative Review of Certain Orange Juice from Brazil, Calculation Adjustments for Sucocitrico Cutrale Ltda. for the Preliminary Results," at page 2; and the April 7, 2010, Memorandum to the File from Blaine Wiltse, Trade Analyst, entitled, "2008-2009 Administrative Review of Certain Orange Juice from Brazil, Calculation Adjustments for Sucocitrico Cutrale Ltda. for the Preliminary Results," at page 2.

<sup>69</sup> See Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (Feb. 10, 2004) (SSSSC from Mexico), and accompanying Issues and Decision Memorandum at Comment 8.

<sup>70</sup> See Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Final Results of Changed-Circumstances Review, and Revocation of an Order in Part, 75 FR 53661 (Sept. 1, 2010) (Ball Bearings from France), and accompanying Issues and Decision Memorandum at Comment 3, where the Department stated, "While we recognize that there may be exceptions, it has generally been our longstanding practice that, if the payment terms that the parent company extends to its U.S. subsidiary indicate, in combination with the time the merchandise remains in the U.S.

term interest rate incurred on transactions in the comparison market in its calculation of inventory carrying costs incurred on U.S. sales. Accordingly, the petitioners urge the Department to uphold the methodology used in the Preliminary Results when calculating CPI's inventory carrying costs for the final results.

Department's Position:

We have reviewed the cases cited by Cutrale and recognize that the Department's practice regarding the interest rate used to calculate U.S. inventory carrying costs has varied. In some cases, the Department has used the U.S. interest rate to calculate U.S. inventory carrying costs,<sup>71</sup> while in others, including this proceeding, the Department has used the home market interest rate.<sup>72</sup> After considering the arguments on this issue, we find it appropriate to reconsider our practice. We now agree with Cutrale that it is more appropriate to use the U.S. interest rate to compute U.S. inventory carrying costs, under the theory that it is the opportunity cost of the U.S. reseller that is measured. Moreover, this decision is consistent with the instructions outlined in the questionnaire issued in this case, which direct respondents to calculate their U.S. inventory carrying costs using "the actual cost of U.S. dollar denominated short-term debt incurred by your company."<sup>73</sup> Accordingly, we have recalculated Cutrale's U.S. inventory carrying costs using both CPI's U.S. interest rate<sup>74</sup> and its cost of sales for the merchandise under consideration.<sup>75</sup> See the Memorandum to the File, from Blaine Wiltse, Senior Analyst, entitled, "Calculation Adjustments for Sucocitrnico Cutrale Ltda. (Cutrale) for the Final Results," dated October 9, 2012, at 1-2.

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subsidiary's inventory, that the parent company bears the cost of carrying the merchandise for a portion of time the merchandise is in inventory in the United States, we use the parent company's short-term interest rate to calculate that portion of the ICC {inventory carrying costs}."

<sup>71</sup> See Softwood Lumber from Canada at pages 141-42; Steel Pipe from Taiwan at Comment 2; and Cold Rolled Steel from Germany, 67 FR at 62119.

<sup>72</sup> See SSSSC from Mexico at Comment 8; Ball Bearings from France at Comment 3; 2009-2010 OJ from Brazil at Comment 5; Certain Orange Juice From Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke Antidumping Duty Order in Part, 75 FR 18794, 18796 (Apr. 13, 2010) (2008-2009 OJ from Brazil Preliminary Results) unchanged in 2008-2009 OJ from Brazil: Certain Orange Juice From Brazil: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 15438, 15440 (Apr. 6, 2009), unchanged in 2007-2008 OJ from Brazil: Certain Orange Juice from Brazil: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 18773, 18775 (Apr. 7, 2008) unchanged in 2005-2007 OJ from Brazil: Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Critical Circumstances Determination: Certain Orange Juice from Brazil, 70 FR 49557, 49562 (Aug. 24, 2005) unchanged in OJ from Brazil Investigation.

<sup>73</sup> See the Department's antidumping duty questionnaire, issued on May 2, 2011, at page C-59.

<sup>74</sup> We recognize that in the cases cited by the petitioners the Department used the home market interest rate to impute inventory carrying costs for the portion of time that the parent company absorbed the cost of holding the merchandise in inventory. However, in the instant review, the date of payment between Cutrale and CPI is not on the record; therefore, we are unable to apply this practice here.

<sup>75</sup> Because cost of sales is a more appropriate reflection of the value of merchandise held in inventory than gross unit price, we have revised Cutrale's calculation of its U.S. inventory carrying costs to base it on CPI's cost of sales for the merchandise under consideration. See Cutrale's June 20, 2011, section C questionnaire response at 35.

Additionally, because Fischer used a home market interest rate in its calculation,<sup>76</sup> we also recalculated Fischer's U.S. inventory carrying costs to use its U.S.-dollar-denominated short-term interest rate. We have continued to use the cost of manufacturing incurred by Fischer in Brazil, converted to U.S. dollars and inclusive of movement expenses into U.S. inventory, to value the inventory in the United States. For details of this calculation, see the Memorandum to the File, from Elizabeth Eastwood, Senior Analyst, entitled, "Calculation Adjustments for Fischer S.A. Comercio, Industria and Agricultura (Fischer) for the Final Results," dated October 9, 2012, at 1.

Comment 6:        *Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses*

In the Preliminary Results, the Department capped certain revenues reported by Cutrale by the amount of the corresponding expenses reported for such sales. Specifically, the Department capped the revenues from U.S. duty drawback and duty reimbursements by the amount of U.S. customs duties and fees, pallet and drumming revenue by the amount of repacking expenses actually paid in the United States, and the brokerage and handling revenue (received in the form of reimbursements) by the amount of brokerage and handling expenses in the United States.

Cutralo argues that the Department's cap on the revenue that CPI collects from its customers in the form of reimbursed port expenses and pallet fees is unreasonable and should be removed for the final results. Cutrale claims that the Department's capping methodology fails to recognize monies actually received by CPI in connection with specific sales, which may bear no relationship to the actual costs incurred, are never questioned by the customer, and are considered by Cutrale as part of the sales revenue. Cutrale alleges that use of this methodology has the effect of either understating the price actually paid by the customer on particular sales or of overstating the selling expenses incurred by Cutrale for them. Cutrale further contends that use of this methodology is legally impermissible in light of the Court's ruling that the Department must not make adverse or punitive adjustments against a fully cooperative respondent. See Timken U.S. Corporation and Timken Nadellager GmbH v. United States, Slip Op. 04-21 (Mar. 5, 2004), citing Smith-Corona Group v. United States, 713 F.2d 1568, 1576 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed.2d 679 (1984) (Timken v. United States). Therefore, Cutrale argues that the Department should not cap the revenues in question.

Cutralo asserts that, as an alternative, if the Department does not agree to treat the entire amount of these funds as sales revenue, then the Department must include the balance of the capped revenue as an offset to indirect selling expenses.

The petitioners agree with the Department's preliminary decision to cap U.S. revenues by the amount of the associated expenses incurred. The petitioners note that the Department has followed the same capping methodology employed in previous administrative reviews of this

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<sup>76</sup> See Fischer's June 22, 2011, section C questionnaire response at Exhibit 22.

proceeding and that it is the Department's policy to use revenue to offset expenses when the revenue is directly related to the expense incurred. The petitioners state that the Department's practice is appropriate because it is recognition of the fact that the revenues at issue were received for the provision of a service, rather than for the sale of subject merchandise (and thus the revenues should be attributed to the sale of that service, rather than to the sale of OJ). Furthermore, the petitioners contend that it would be inappropriate to treat the expenses and revenues at issue as price adjustments under 19 CFR 351.401(c) because they are not discounts, rebates, or post-sale price adjustments, and thus they do not constitute changes in the price for subject merchandise. Additionally, the petitioners assert that it is the Department's practice not to treat freight-related revenues as additions to U.S. price under section 772(c) of the Act or as price adjustments under 19 CFR 351.102(b) but rather to incorporate freight-related revenues as offsets to movement expenses.<sup>77</sup>

The petitioners assert that the Department's practice has been consistent and fair, applying to both the calculation of U.S. price and NV, regardless of whether the methodology results in an increase or decrease in the dumping margin. Therefore, the petitioners argue that the Department should continue to cap U.S. revenues for purposes of the final results.

Regarding Cutrale's argument that the Department should apply any excess revenue received above the cap as an offset to indirect selling expenses, the petitioners maintain that there is no justification such a calculation. The petitioners note that the Department treats the revenue as directly related to the expense incurred, and the expenses in question are linked to movement and repacking, not indirect selling.

#### Department's Position:

We disagree with Cutrale that the revenue in question (*i.e.*, U.S. duty drawback, duty reimbursements, pallet and drumming fees, and brokerage and handling revenue) should be treated as a price adjustment and added to U.S. price in full for purposes of the calculation of net U.S. price. As a result, we have continued to set the net expense to zero in each instance where the revenue exceed the amount that Cutrale actually paid for the associated expense (*i.e.*, U.S. customs duties, repacking expenses, and U.S. brokerage and handling expenses). This treatment is consistent with the Act and our previous determinations regarding this issue.<sup>78</sup>

The Department makes adjustments for U.S. movement expenses under section 772(c)(1) of the Act. Further, the Department's regulations at 19 CFR 351.401(c) direct the Department to use, in calculating U.S. price, a price which is net of any price adjustment that is reasonably attributable to the subject merchandise. The term "price adjustment" is defined under 19 CFR

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<sup>77</sup> As support for this assertion, the petitioners cite Stainless Steel Wire Rod from Sweden: Preliminary Results of Antidumping Duty Administrative Review, 72 FR at 51411 (Sept. 7, 2007) (SSWR from Sweden), unchanged in Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review, 73 FR at 12952 (Mar. 11, 2008); and 2007-2008 OJ from Brazil at Comment 3.

<sup>78</sup> See, *e.g.*, 2008-2009 OJ from Brazil at Comment 2; 2007-2008 OJ from Brazil at Comment 3; 2005-2007 OJ from Brazil at Comment 7; and OJ from Brazil Investigation at Comment 5.

351.102(b)(38) as “any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser’s net outlay.”

We find that it would be inappropriate to treat the revenues associated with Cutrale’s U.S. port and repacking expenses as price adjustments under 19 CFR 351.401(c), because these fees do not represent “changes in the price for subject merchandise,” such as discounts, rebates, and post-sale price adjustments. In past cases, the Department has declined to treat freight-related revenues as additions to U.S. price under section 772(c) of the Act or as price adjustments under 19 CFR 351.102(b). Rather, we have incorporated freight-related revenues as offsets to movement expenses because they relate to the movement and transportation of subject merchandise.<sup>79</sup> Moreover, we find that it would be inappropriate to increase the gross unit price for subject merchandise as a result of profits earned on the provision or sale of services (such as brokerage services); such profits should be attributable to the sale of the service, not to the subject merchandise. Therefore, we have continued to treat these revenues as an offset to the underlying expenses. In so doing, we set Cutrale’s net port/repacking expenses to zero where the corresponding revenue exceeded the expenses, in accordance with our past practice.<sup>80</sup>

With regard to the arguments raised by Cutrale that the Department should administer the dumping law in a non-punitive manner towards a cooperative respondent, we agree that the antidumping law is not punitive and the Department does not administer it in a punitive manner. It is the Department’s practice, consistent with the Court’s requirements in Timken v. United States, to make any necessary adjustments to the calculation of U.S. price or NV based on the principles of a fair and equitable valuation, regardless of how those adjustments may affect the dumping margin. See 2007-2008 OJ from Brazil at Comment 3, where the Department capped U.S. duty drawback and duty reimbursements, pallet revenue, and brokerage and handling revenue, as well as warehousing revenue in the home market. This is evidenced by the fact that the Department has consistently applied the same capping methodology to both U.S. and home market revenues, regardless of whether it limits the increase to U.S. price or NV. Id.

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<sup>79</sup> See, e.g., 2008-2009 OJ from Brazil at Comment 2; 2007-2008 OJ from Brazil at Comment 3; SSWR from Sweden; Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results of Antidumping Duty Administrative Review, 67 FR 21634, 21637 (May 1, 2002) (2000-2001 Rebar from Turkey), unchanged in Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 66110 (Oct. 30, 2002); and OJ from Brazil Investigation at Comment 5.

<sup>80</sup> See, e.g., 2009-2010 OJ from Brazil Preliminary Results, 76 FR at 19317-18 (where the Department capped U.S. duty drawback and duty reimbursements, pallet revenue, drum revenue, and brokerage and handling revenue), unchanged in 2009-2010 OJ from Brazil; 2008-2009 OJ from Brazil at Comment 2 (where the Department capped U.S. duty drawback and duty reimbursements, pallet revenue, and brokerage and handling revenue); 2007-2008 OJ from Brazil at Comment 3 (where the Department capped U.S. duty drawback and duty reimbursements, pallet revenue, and brokerage and handling revenue, as well as warehousing revenue in the home market); 2005-2007 OJ from Brazil at Comment 7 (where the Department treated freight revenue, duty revenue, and U.S. duty drawback as offsets to movement expenses, capped U.S. duty where U.S. drawback exceeded U.S. duty expenses, treated drum and pallet revenue as offsets to U.S. repacking expenses, and capped U.S. repacking expenses where drum and pallet revenue exceeded the corresponding expense); OJ from Brazil Investigation at Comment 9 (where the Department capped the total amount of the offset to indirect selling expenses for gains and losses on rolled over futures contracts by the total amount of indirect selling expenses for the U.S. affiliate); and 2000-2001 Rebar from Turkey, 67 FR at 21637 (where the Department offset freight expenses by freight revenue).

Regarding Cutrale's argument that the Department should offset indirect selling expenses by the amount of excess expense-related revenue, we disagree. As noted above, the Department's policy is to use revenue to offset expenses where the revenue is directly related to the expense incurred. See 2008-2009 OJ from Brazil at Comment 2; 2007-2008 OJ from Brazil at Comment 3; and 2005-2007 OJ from Brazil at Comment 7. Cutrale has reported that the revenue at issue is directly related to various movement expenses (e.g., U.S. brokerage and handling, repacking, etc.), rather than to any of the expenses included in the indirect selling expense ratio. Cutrale improperly conflates indirect selling expenses with movement expenses. The profits from movement activities cannot be used to offset non-movement expenses, including indirect selling expenses. This situation is different from the Department's decision to offset U.S. indirect selling expenses by sales revenue related to futures contracts in the less-than-fair-value (LTFV) investigation, as the revenue there was indirectly related to selling activity associated with subject merchandise, rather than to particular expenses incurred on specific sales of subject merchandise. See OJ from Brazil Investigation at Comment 9. Therefore, we have not adopted Cutrale's suggestion to include the excess revenue as an offset to indirect selling expenses.

Finally, we note that Cutrale's arguments are largely verbatim from those rejected by the Department in a prior review,<sup>81</sup> and the Department's position in that segment of the proceeding was recently upheld at the CIT.<sup>82</sup> Specifically, the CIT stated that:

. . . the fees that Cutrale contests constitute a service charge rather than a charge for subject merchandise. Commerce properly determined that it was inappropriate to treat the fees as adjustments to U.S. price under section 1677a(c) or Commerce's regulations because these fees 'related to the movement of subject merchandise and were attributable to the sale of movement services, not to the subject merchandise.' . . . Thus, Commerce reasonably determined to include only an offset equal to the full amount of moving expenses that Cutrale actually incurred. Because this decision is supported by substantial evidence and is in accordance with law, this Court upholds Commerce's decision.

Therefore, for the reasons outlined above, we have continued to set the net expense to zero where the associated revenues (i.e., U.S. duty drawback, duty reimbursements, pallet and drumming fees, and brokerage and handling revenue) exceed the amount that Cutrale actually paid.

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<sup>81</sup> See 2008-2009 OJ from Brazil at Comment 2.

<sup>82</sup> See Cutrale, at 8.

Comment 7: Cutrale's Biological Assets

In the Preliminary Results, we recalculated Cutrale's G&A rate to exclude a valuation gain on "biological assets" (i.e., orange trees) which had been included in the reported figure. This gain was described in the notes to Cutrale's financial statements as an adjustment to the fair value of these assets. See Preliminary Results, 77 FR at 21731.

Cutrale argues that the Department's adjustment improperly inflated Cutrale's production costs because, instead of excluding the valuation gain in question, the Department actually increased G&A to include it. Cutrale contends that there is no basis to include this gain in G&A, given that it neither involves any cash loss to the company nor impacts the amount of depreciation recognized on the company's orange trees.

The petitioners agree with Cutrale that it would be inappropriate to include the valuation gain at issue in G&A because this gain is not an actual amount. However, the petitioners contend that, because Cutrale treated this gain as an offset to G&A expenses, the Department should continue to remove this adjustment for the final results.

Department's Position:

We agree with all parties that it would be inappropriate to include the gain in question in G&A. After reviewing our calculations, however, we disagree with Cutrale that we did, in fact, include it. Rather, as the petitioner correctly notes, Cutrale deducted the gain from the G&A expenses shown on its audited income statement and we simply removed this offset in order to arrive at an unadjusted starting G&A figure.<sup>83</sup>

Specifically, we calculated the numerator of Cutrale's G&A ratio by summing the "Other general and administrative expenses" line item shown on Cutrale's 2010 income statement<sup>84</sup> with cost of "Freight charges for finished products." This differs from Cutrale's calculation of the numerator, which included both of these items as well as a deduction for the "Increase in fair value of biological assets."<sup>85</sup> We then subtracted the same freight and selling expense items used in Cutrale's G&A calculation and divided the resulting figure by the same COGS figure used by Cutrale. Therefore, contrary to Cutrale's argument, we did not increase the company's G&A figure by the change in value of its orange trees, but rather removed the offset to arrive at the unadjusted starting G&A figure.

Because the details of these calculations are business proprietary in nature, we are unable to discuss them further here. For the specifics of our calculations, see the Cutrale Calculation Memo at Attachment I.

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<sup>83</sup> See the Cutrale Calculation Memo at 4 and Attachment 1, citing to Cutrale's January 18, 2012, supplemental D response at 6 and Exhibit SD-9.

<sup>84</sup> See Cutrale's September 14, 2011, submission at Exhibit SA-8.

<sup>85</sup> See Cutrale's January 18, 2012, submission at Exhibit SD-9.

Comment 8: Calculation of Fischer's International Freight Expenses to Include Bunker Fuel

Fischer reported that most of its U.S. sales in this administrative review were transported to the United States on vessels operated by an affiliated company. In the preliminary results, we determined that the international freight expenses provided by Fischer's affiliate were not at arm's length. See the Fischer Preliminary Calculation Memo at page 1. Therefore, for all sales shipped by Fischer's affiliate, we based Fischer's international freight expenses on the rate charged by the affiliate to an unaffiliated party in order to state these expenses on an arm's-length basis.

Fischer contends that, in making this adjustment, the Department overstated the amount of the unaffiliated freight expense. Specifically, Fischer notes that the invoice used as the arm's-length freight rate includes two separate charges: 1) the freight rate set out in a contract between the affiliate and its unaffiliated customer; and 2) a separate additional bunker fuel surcharge. While Fischer does not dispute the freight rate, it disagrees that the bunker fuel surcharge is a legitimate component of the expense. Specifically, Fischer claims that its customers are contractually obligated to reimburse the company for any fuel surcharges, and thus Fischer never incurs this component of cost. Fischer asserts that it demonstrated this fact in its original and supplemental U.S. sales responses,<sup>86</sup> and the Department has recognized it in past segments of this proceeding (i.e., in the LTFV investigation, where the Department stated that "it is appropriate to treat Fischer's reported bunker fuel adjustments as offsets to U.S. freight expenses").<sup>87</sup> Fischer further maintains that the affiliate's customer is required to reimburse it for bunker fuel adjustments as well, as set forth in the freight contract contained in Fischer's section C supplemental response.

Consequently, Fischer argues that the Department should either: 1) not include the bunker fuel surcharge in the arms-length freight rate used to determine Fischer's ocean freight expenses; or 2) offset the arm's-length freight rate (inclusive of the bunker fuel surcharge) by the amount of Fischer's reported bunker fuel adjustments. Fischer asserts that these two methods yield identical expenses, as the adjustment reimbursed by Fischer's customer is the same amount charged by the affiliated shipper to unaffiliated parties. Fischer claims that use of either calculation would also be consistent with the statutory mandate to "calculate the most accurate U.S. price for comparison with foreign value," recognized by the Federal Circuit in Florida Citrus Mutual, et. al. v. United States, 550 F.3d 1105, 1110 (Fed. Cir. 2008).

The petitioners agree with the Department's methodology for assigning an arm's-length international freight rate to sales shipped by Fischer's affiliate, noting that it is consistent with the methodology in previous administrative reviews.<sup>88</sup> Moreover, the petitioners note that the

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<sup>86</sup> See Fischer's Section C response at pages C-9 and C-10 and its first supplemental questionnaire response at page 3 and Exhibit 5.

<sup>87</sup> See OJ from Brazil Investigation at Comment 15.

<sup>88</sup> See 2009-2010 OJ from Brazil at Comment 8; 2008-2009 OJ from Brazil at Comment 11; and 2007-2008 OJ from Brazil at Comment 10.

Department already made the adjustment requested by Fischer when it offset the assigned international freight expenses with Fischer's own bunker fuel adjustments in the Preliminary Results. Therefore, the petitioners assert that no changes are necessary for the final results.

Department's Position:

In determining whether to use transactions between affiliated parties, our practice is to compare the transfer price to either prices charged to other unaffiliated parties who contract for the same service or prices for the same service paid by the respondent to unaffiliated parties. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not to Revoke in Part, 69 FR 644731 (Nov. 8, 2004), and accompanying Issues and Decision Memorandum at Comment 11; see also 2009-2010 OJ from Brazil at Comment 8; 2008-2009 OJ from Brazil at Comment 11; and 2007-2008 OJ from Brazil at Comment 10. For the final results, we have continued to assign the international freight rate charged to an unaffiliated party as the international freight expense for products shipped by Fischer's affiliate.

Fischer does not dispute that it is appropriate to base its international freight expenses on a rate charged by its affiliated shipper to an unaffiliated party. Rather, Fischer's argument is that, because it received a reimbursement for one component of this rate (i.e., the bunker fuel surcharge), the Department should not include this component in the expenses deducted from U.S. price. In our margin calculations for the Preliminary Results, we allowed Fischer's reported reimbursement for bunker fuel adjustments. The Department already offset the arms-length freight rate (inclusive of the bunker fuel surcharge) by the amount of Fischer's reported bunker fuel adjustments.<sup>89</sup> Therefore, because we already included this offset in our calculations, no further adjustment is necessary in these final results.

Comment 9: Ministerial Errors in Fischer's Cost Calculations

In the Preliminary Results, we found that Fischer had no home market sales in the ordinary course of trade during the POR. Therefore, we based Fischer's NV on CV.

Fischer argues that the Department made the following ministerial errors when computing Fischer's COP and then calculating CV: 1) it failed to use Fischer's most up-to-date cost database in its calculations; 2) in adjusting by-product revenue received from affiliated parties to market value, it applied the adjustment ratio to COM instead of to the by-product offset itself; 3) in computing G&A expenses, it used a different G&A ratio than the one set forth in the cost calculation memo prepared for the preliminary results<sup>90</sup>; and 4) it failed to convert Fischer's CVs, which were reported per kilogram, into the same unit as U.S. price (i.e., pounds solid).

Fischer contends that the Department should correct each of these errors in the final results.

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<sup>89</sup> See the Fischer Preliminary Calculation Memo at 1.

<sup>90</sup> See the Fischer Preliminary Calculation Memo at page 2.

Finally, Fischer requests that, in converting the basis for CV to pounds solid, the Department use the average brix level of Fischer's period-wide production; however, Fischer provides no arguments as to why average brix level is appropriate.

The petitioners did not address items 1, 3, and 4. However, with respect to by-products, the petitioner contends that Fischer's claim is without basis because it runs contrary to the methodology used for the same calculation in previous administrative reviews. As support for their claim, the petitioners cite 2008-2009 OJ from Brazil at Comment 15. Therefore, the petitioners urge the Department to make no changes to the by-product calculations performed for the preliminary results.

Department's Position:

After examining the calculations performed for the preliminary results, we agree with Fischer in part. Specifically, we agree that we failed to convert Fischer's CV from kilogram to pounds-solid equivalents in our preliminary margin calculations. Therefore, we have corrected this conversion in our calculations for the final results.

However, we disagree with Fischer that it is appropriate to use the average brix level of each OJ product in performing this recalculation. It is the Department's longstanding practice that, in order to achieve the most accurate results, we use actual brix to convert respondents' sales and cost data to a pounds-solid basis. See Comment 4 above; see also 2008-2009 OJ from Brazil at Comment 5; 2007-2008 OJ from Brazil at Comment 9; 2005-2007 OJ from Brazil at Comment 11; and OJ from Brazil Investigation at Comment 19. This practice has been upheld both by the CIT and CAFC. See, e.g., Cutrale at 12 (where the CIT held that using actual brix to make conversions results in a more accurate measurement than conversions made using average brix); Fischer S.A. Comerico, Industria, and Agricultura v. United States, 746 F. Supp. 2d 1353, 1356 (Ct. Int'l Trade 2010) ("Commerce reasonably continued to employ the same methodology for determining United States price that it used in the initial investigation, the preliminary results of the first administrative review, and its prior determination: Commerce converted Fischer's United States sales from gallons to pounds solids using the actual brix levels of those sales, and determined the unit price of the pounds solids. This methodology is completely reasonable...."). Therefore, consistent with our practice, we have continued to use the actual brix of the merchandise under consideration when converting Fischer's CV from kilograms to pounds solid.

We also disagree with Fischer that our decision to disregard its cost database submitted closest in time to the preliminary results constitutes a ministerial error. The Department made this decision affirmatively because Fischer made certain unexplained adjustments to its costs reported in December 2011. We informed parties of this decision in the Fischer Preliminary Calculation Memo at page 1 where we stated:

For Fischer's cost data, we have relied on Fischer's cost of production (COP) and constructed value (CV) information from the company's submission dated June 29, 2011. We intend to seek clarification/reconciliation with respect to the revised database submitted on December 30, 2011.

On April 4, 2012, we issued an additional supplemental questionnaire to Fischer in which we requested that Fischer provide: 1) a revised cost build-up worksheet and a narrative explanation of its changes to COM; and 2) a reconciliation of certain of its G&A expenses to its financial statements. Because Fischer's April 13, 2012, response satisfactorily addressed our concerns, we have used the database accompanying Fischer's April 2012 response in our calculations for these final results.

Moreover, we disagree with Fischer that we incorrectly applied the by-product adjustment calculated in the preliminary results to COM, instead of to the by-product offset itself. In the preliminary results, we calculated this adjustment as the total extended variance of the by-products sold to affiliated and unaffiliated customers, and we expressed it as a percentage of COM. See the Fischer Preliminary Calculation Memo at Attachment II. Therefore, it is reasonable to apply this percentage to the reported COM. In addition, we correctly described this by-product adjustment as an adjustment to COM in the preliminary results. See Preliminary Results, 77 FR at 21731. Finally, this methodology is consistent with our practice in the previous segments of this proceeding, in which the Department has computed by-product adjustments using an identical methodology. See, e.g., 2008-2009 OJ from Brazil Preliminary Results, 75 FR 18798, unchanged in 2008-2009 OJ from Brazil. Thus, we disagree that any change to Fischer's by-product adjustment is warranted in the final results.

We finally disagree with Fischer's claim that we used an incorrect G&A ratio to compute the company's COP and CV. While it is true that the figure used was different from the figure contained in the narrative portion of the Fischer Preliminary Calculation Memo, the error was in the narrative of the memorandum and not in the calculations themselves, which contained a correct number. Moreover, the figure used in our calculations was supported by a spreadsheet contained in Attachment IV of the Fischer Preliminary Calculation Memo. Therefore, we disagree that we made a ministerial error in Fischer's margin calculations with respect to G&A and we have continued to use the appropriate G&A ratio in the final results.

Comment 10: Loss on Hedge Operations included in the Calculation of Fischer's Financial Expense Ratio

In the Preliminary Results, we revised the calculation of Fischer's financial expenses to include the loss on hedging operations, which was recognized on Fischer's income statement. Fischer argues that a portion of this loss is unrealized, and thus it is the Department's practice when calculating financing expenses to exclude it. As support for this argument, Fischer notes that the Department has allowed it to exclude these expenses in the two previous reviews. According to Fischer, this practice is consistent with section 773(e)(2)(A) of the Act, which directs the Department to apply only "the actual amounts incurred and realized" by the specific exporter or producer . . . for selling, general, and administrative expenses..."

According to Fischer, the inclusion of this amount is incorrect because the notes to its financial statement show that the account includes both “realized” and “unrealized” hedging expenses.<sup>91</sup> Fischer argues that “although the entire amount of the hedge transactions may appear in Fischer’s income statement, the independent auditors confirm that a portion of those transactions are attributable to ‘unrealized losses.’” Therefore, Fischer argues that the Department should recalculate Fischer’s financial expenses to remove unrealized hedging expenses.

The petitioners disagree, arguing that Fischer misconstrued the facts in both the third and fourth reviews with respect to hedging expenses. Specifically, the petitioner asserts that the Department did, in fact, include unrealized hedging expenses in its calculation of financing expenses in the third review and, while it did not do so in the fourth review, this was solely attributable to the fact that the net financial expenses in the fourth review were zero (and thus the issue was moot).

#### Department’s Position:

We disagree with Fischer that the hedging losses in question should be excluded from its financial expense ratio. Accordingly, we have not revised the calculation of Fischer’s financial expenses as used in the Preliminary Results for purposes of these final results.

While we agree that in certain prior segments of this proceeding Fischer’s financial expense ratio calculation excluded certain hedging losses, this does not necessarily mean that such treatment was appropriate. In the segments to which Fischer refers, Fischer itself reported its financial expense rate calculation exclusive of the hedging losses. See, e.g., Fischer’s February 8, 2012, supplemental questionnaire response at Exhibit 1. The exclusion of such losses was neither identified nor debated by any party in those prior segments. As such, the Department never expressed its position on the issue. Had this issue been identified and briefed, it is likely we would have reached the conclusion we do now. Additionally, we note that each segment of a proceeding is independent of others and must be decided based on the record developed in that segment. The Department may reconsider certain aspects of its practice, as it gains a better understanding of certain issues that cut across segments of a particular proceeding or as new facts are submitted. See Final Results of the Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 78472 (Dec. 15, 2000), and accompanying Issues and Decision Memorandum at Comment 1.

In calculating the financial expense ratio, the Department’s practice is to include all foreign exchange and hedging gains and losses incurred during the period, regardless of the source of such foreign exchange or hedging activity (i.e., whether they are the result of natural hedging (the offsetting of foreign-denominated asset and liability accounts) or the purchase of complex foreign currency and/or financial instruments). See, e.g., Certain Preserved Mushrooms From India: Preliminary Results of Antidumping Duty Administrative Review, 68 FR 11045, 11048-11049 (Mar. 7, 2003), unchanged in Certain Preserved Mushrooms From India: Final Results of

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<sup>91</sup> See Fischer’s June 6, 2011, questionnaire response at Exhibit 13, containing the company’s 2010 financial statements on page 41 at footnote 23.

Antidumping Duty Administrative Review, 68 FR 41303 (July 11, 2003). This approach recognizes that the critical factor in analyzing the appropriate amount to include in the COP/CV is not the source of the foreign exchange and hedging gain/loss, but rather how the entity as a whole manages its overall foreign currency exposure and risk associated with interest rate variations. See Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan: Final Results of Antidumping Duty Administrative Review, 67 FR 2408 (Jan. 17, 2002), and accompanying Issues and Decision Memorandum at Comment 10 (Hot-Rolled Steel from Japan); and Certain Preserved Mushrooms From Indonesia: Preliminary Results of Antidumping Duty Administrative Review and Intent To Revoke Order in Part, 68 FR 11015, 11054 (Mar. 7, 2003) (unchanged in Certain Preserved Mushrooms from Indonesia: Final Results of Antidumping Duty Administrative Review and Final Determination to Revoke Order in Part, 68 FR 39521 (July 2, 2003)). In order to minimize the risk of holding foreign-denominated monetary assets and liabilities, companies often engage in a variety of activities from an enterprise-wide perspective to hedge exposure. Therefore, companies maintain a balanced holding of foreign-denominated assets and liabilities in any one currency so as to offset any foreign exchange losses with foreign exchange gains (i.e., hedging its foreign currency exposure on a company-wide basis, not for specific accounts). Including only certain components that result from the company's coordinated efforts to manage its foreign currency exposure does not reflect the financial results of the enterprise's foreign exchange management efforts adequately. Thus, including all of the foreign exchange gains and losses better reflects the results of the company's foreign exchange management. Likewise, derivative financial instruments are normally entered into by companies to manage risk associated with interest rate variations. The resulting hedge gain or loss are a part of the company's overall net financing activity and should accordingly be included in the interest rate computation, as was done in Hot-Rolled Steel from Japan.

Section 773(f)(1)(A) of the Act directs the Department to calculate the COP based on the records of the respondent, provided: 1) the underlying books and records are kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country; and 2) those records reasonably reflect the costs associated with the production and sale of the merchandise. Brazilian GAAP governs the accounting practice and treatment of all types of foreign exchange and hedging transactions giving rise to gains and losses, and their respective treatment in the income statement and equity section of the balance sheet. A review of Fischer's audited financial statements shows that the company is engaged in extensive foreign currency and hedging activities.<sup>92</sup> For example, footnote 2.5 discusses the company's investment in derivative financial instruments and the method of reporting the resulting gains and losses on such instruments. This footnote describes how in some instances the resulting gains and losses are recorded in the equity section of the balance sheet, and in other instances the resulting gains and losses are recorded in the income statement. Footnote 23 shows the details of the specific foreign currency and derivative financial instruments held by the company, the calculated gains and losses on each, the gain and loss amounts that are deferred (i.e., flow into the equity section of the balance sheet), and the gain and loss amounts that are recognized in the current period (recorded on the income statement). This schedule shows that Fischer recorded some of its

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<sup>92</sup> See Fischer's June 6 questionnaire response at Exhibit 13, containing the company's 2010 financial statements at footnotes 2.2(a), 2.5, 3(e), 4(a,b,d), 5, 15(a,b.), 22, and 23.

unrealized hedging gains and losses in the equity section of its balance sheet and some unrealized hedging gains and losses in its income statement. It is the unrealized hedging gains and losses reported in the income statement that are at issue here.

From a review of the above-noted footnotes and worksheet calculations reporting Fischer's foreign currency and derivative financial instrument hedging activity, it is clear from Fischer's financial statements, which are in accordance with Brazilian GAAP, that there are many detailed, specific and complex rules for such reporting, none of which appears to be unreasonable. Absent the identification of specific and clear distortions in how the company normally treats the resulting gains and losses on these transactions, in accordance with home country GAAP, we consider it appropriate to rely on the gains and losses recorded in the company's Brazilian GAAP audited income statement.

In addition, under Brazilian GAAP Fischer's books are maintained on an accrual basis, not a cash basis.<sup>93</sup> Transactions reported in Fischer's audited income statement, under the accrual method of accounting, represent true income and expenses, whether realized or unrealized. This includes gains and losses associated with foreign currency and derivative instrument positions that have not yet been sold (e.g., the security is valued at its fair market value at the balance sheet date). We disagree with Fischer's claim that since the mark-to-market<sup>94</sup> valuation of some of its hedging instruments is designated as unrealized losses, it is not real and should not be included in the financial expense ratio. While Fischer argues that section 773(e)(2)(A) of the Act directs the Department to apply only "the actual amounts incurred and realized" by the specific exporter or producer . . . for selling, general, and administrative expenses. . .," we disagree with Fischer's interpretation. Fischer would have the Department adopt a cash-basis accounting approach, where revenues and expenses are only recognized when cash is paid or received. However, most companies, including Fischer, follow an accrual basis of accounting, where expenses get matched to the period when revenues are earned. Under accrual accounting, an unrealized loss is still an actual loss or expense. A hedging instrument that has lost value, or any asset or liability that has lost value, but which has yet to be sold, or is held until maturity, is impaired and no longer represents its original value. The loss may be unrealized, but the economic impact to the company is real and was incurred and realized through the lost purchasing power.<sup>95</sup> In Micron Technology, Inc., v. United States, 893 F. Supp. 21 (CIT 1995) (Micron), the CIT held that,

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<sup>93</sup> See Fischer's 2010 financial statements at footnotes 2.1, 2.17, 2.21, 3 and 3.1, which explain how provisions, estimates, timing of reporting transactions, and accruals are used as the basis of preparing Fischer's financial statements.

<sup>94</sup> "Mark-to-market" refers to accounting for the fair value of an asset or liability based on its current market value.

<sup>95</sup> It is important to note that an "unrealized" loss is not the same as an "unrecognized" loss. Because Fischer has recognized this loss as an expense during its fiscal year and reflected it as such on its income statement, Fischer is treating this loss as an actual loss in its own books and records. When Fischer sells the financial instruments at issue, it will only recognize any additional loss (or gain) incurred between the time that the mark-to-market adjustment is made and the time of the sale of the instruments. Thus, the "unrealized" losses will never be accounted for as financing costs if the Department fails to include them here now.

A simple example illustrates this point. If Fischer acquired an asset for Rs. 100, it would record the value of this

although translation losses are unrealized, as there is no actual outflow of funds from the company, the resulting exposure to increased liability for borrowed funds caused by fluctuations in the exchange rate is by no means hypothetical. Admittedly, fluctuations in the exchange rate that occur subsequent to the POI may affect the magnitude of the translation losses measured during the POI; indeed, subsequent fluctuations may eliminate translation losses entirely, such that the company may eventually recognize a transaction gain at the time the underlying liability is extinguished. Notwithstanding the contingent nature of translation losses, however, such losses are akin to an increased cost of borrowing funds that should be included in any reasonable measure of the cost climate faced by the company during the POI.

See Micron, 893 F. Supp. at 840.

Hedging instruments can be extremely complicated in how they are structured and in how any related gains and losses must be reported. Contributing to the complexity of hedging instruments is that they are not only financial instruments that create their own gains and losses, but they are also related to underlying monetary assets and liabilities that generate offsetting gains and losses. The Department's preference to include all foreign exchange and hedging gains and losses, as reported on a respondent's audited income statement, and to rely on how such transactions are recorded and reported in a respondent's normal books and records falls within the discretion given to the Department when dealing with complicated financial and accounting issues. The CAFC has held that "Commerce is entitled to substantial deference"<sup>96</sup> in matters involving "complex economic and accounting decisions of a technical nature."<sup>97</sup>

While the hedging strategies which include derivative instruments are numerous and complex, Fischer attempts to cherry pick one side of the hedged transaction (i.e., the unrealized loss) for exclusion from the financial expense ratio calculation without justifying its exclusion. Fischer has not demonstrated how or why its normal books and records are unreasonable or distortive, and therefore it is not appropriate for the Department to exclude the unrealized hedge results recorded in the income statement account from Fischer's financial expense ratio calculation. Accordingly, for the final results, we have continued to include the hedging losses reported in Fischer's audited income statement in the financial expense rate calculation.

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asset as Rs. 100 in its books and records. However, if the market value on the mark-to-market date declined to Rs. 90, Fischer would reduce its book value of the asset to Rs. 90 and recognize the Rs. 10 loss as an unrealized loss on its income statement. If Fischer then sold the asset during the next fiscal year (FY) for Rs. 70, it would recognize an additional Rs. 20 as a realized loss on its income statement. Because the total loss was Rs. 30, the Department includes the first Rs. 10 as a loss in FY1 and the second Rs. 20 as a loss in FY2 (for a total loss of Rs. 30). Under Fischer's proposal, the Department would only include the second loss, clearly understating its costs.

<sup>96</sup> See PSC VSMPO-AVISMA v. United States, 688 F.3d 751, 764 (Fed. Cir. 2012) (quoting Fujitsu Gen. Ltd. v. United States, 88 F.3d 1034, 1039 (Fed. Cir. 1996)).

<sup>97</sup> Id.

Comment 11: Exclusion of Long-Term Interest Income from the Calculation of Fischer's Financial Expense Ratio

In the Preliminary Results, we revised the calculation of Fischer's financial expenses to include only the short-term portion of Fischer's interest income, while excluding long-term interest revenue. Fischer argues that the Department must either include both long-term interest revenue and expenses in the financial expense ratio calculation, or exclude both, in order to accurately reflect Fischer's interest income and expenses during the POR. Therefore, Fischer contends that the Department should recalculate Fischer's financial expense ratio to either include or exclude both categories equally.

The petitioners cite several cases which state that the Department's practice is to treat all interest expenses (regardless of term) as financial expenses and only offset these expenses with interest income on short-term assets.<sup>98</sup> Therefore, the petitioners argue that the Department should make no changes to Fischer's financial expense ratio for purposes of the final results.

Department's Position:

We disagree with Fischer that it would be appropriate to include Fischer's long-term interest income earned from long-term interest bearing assets as an offset to its financial expenses. In accordance with section 773(b)(3)(B) of the Act, the Department includes net financial expenses in its calculation of a respondent's cost of production. In calculating these net financial expenses, it is the Department's practice to allow a respondent to offset financial expenses with short-term interest income generated from working capital. See, e.g., Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review, Partial Rescission, and Final No Shipment Determination, 76 FR 41203 (July 13, 2011), and accompanying Issues and Decision Memorandum at Comment 4; Polyethylene Retail Carrier Bags from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 2511 (Jan. 15, 2009), and accompanying Issues and Decision Memorandum at Comment 5; Certain Frozen Warmwater Shrimp from Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47551 (Sept. 16, 2009), and accompanying Issues and Decision Memorandum at Comment 7; and Chlorinated Isocyanurates from Spain: Notice of Final Determination of Sales at Less Than Fair Value, 70 FR 24506 (May 10, 2005), and accompanying Issues and Decision Memorandum at Comment 10 (Isos from Spain). The Department recognizes that a certain amount of working capital is required to conduct normal production activities. As such, a company must maintain working capital to meet daily requirements (e.g., material purchases, payroll, supplies, etc.) and a company normally maintains this working capital in interest-bearing accounts. See Notice of Final Determination of Sales at Less Than Fair Value: Live Swine from Canada, 70 FR 12181 (Mar. 11, 2005), and accompanying Issues and Decision Memorandum at Comment 2; and Silicon

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<sup>98</sup> See Color Television Receivers from Korea: Final Results of Antidumping Duty Administrative Review, 53 FR 24975 (July 1, 1988); Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta from Italy, 61 FR 30326 (June 14, 1996); and Television Receivers, Monochrome and Color, From Japan: Final Results of Antidumping Duty Administrative Review, 56 FR 56189 (Nov. 1, 1991).

Metal from Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part, 66 FR 11256 (Feb. 23, 2001), and accompanying Issues and Decision Memorandum at Comment 8 (Silicon Metal from Brazil). Accordingly, we allow the interest income earned on working capital to offset the financial expenses that we include in the cost of production, and we usually assume the working capital interest income to be interest income from short-term interest bearing assets. Because interest-bearing short-term assets are presumed to be ready for use in a company's current operations, and are thus readily available and for day-to-day cash requirements, the Department permits a respondent to use the interest income earned on them to offset financial expenses.

When the record evidence does not demonstrate that the interest income received is related to a company's working capital, the Department excludes the interest income earned from that item from the financial expense calculation. See, e.g., Isos from Spain at Comment 10. The Department does not permit offsets to financial expenses for interest earned on long-term assets because those accounts cannot relate to a company's working capital, given that the funds in those accounts are not readily available and cannot be used for a company's day-to-day cash requirements. See, e.g., Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea: Final Results of Antidumping Duty Administrative Review, 65 FR 68976 (Nov. 15, 2000), and accompanying Issues and Decision Memorandum at Comment 7; and Silicon Metal from Brazil at Comment 8. Instead, the underlying asset account that generated the long-term interest income is an investment activity. The CAFC affirmed the Department's practice regarding this issue in Pakfood Pub. Co. v. United States, 2011 U.S. App. LEXIS 25106 (Fed. Cir. 2011). Fischer admits that the interest income for which it seeks an offset to financial expenses is long-term. Therefore, we have not granted the offset it seeks.

In the current administrative review, Fischer does not claim that the interest income excluded by the Department is short-term in nature; rather, Fischer argues that if long-term interest expenses are included in the calculation, then long-term interest income must be allowed as an offset as well. We disagree. Assets that generate long-term financial income lock up the related cash funds for over a year, whereas liabilities that generate long-term interest expenses provide the company with cash that can be used in current operations. See Certain Frozen Warmwater Shrimp From India: Final Results of Antidumping Duty Administrative Review and Final No Shipment Determination, 77 FR 40848 (July 11, 2012), and accompanying Issues and Decision Memorandum at Comment 6. Therefore, because Fischer's long-term interest income is not related to its working capital and is not short-term in nature, we have continued to exclude it from the calculation of financial expenses in accordance with our practice.

Comment 12: Date of Sale for Louis Dreyfus

In its U.S. sales listing, Louis Dreyfus reported the date of an e-mail order confirmation with its customer as the date of sale. In the Preliminary Results, we found that the essential terms of sale were not set as of the date of this e-mail because the quantity and entry date changed after that date. Therefore, we used as the date of sale the date that Louis Dreyfus shipped its merchandise from Brazil because this date is earlier than the date LDCI issued the commercial invoice and

better reflects the date on which the material terms of sale were established, in accordance with our practice<sup>99</sup> and 19 CFR 351.401(i).

Louis Dreyfus disagrees with the Department's determination to use shipment date as the U.S. date of sale. According to Louis Dreyfus, the record evidence demonstrates that it set the significant terms of sale (*i.e.*, price, product, and quantity) via e-mail with its customer. While Louis Dreyfus acknowledges that there is a difference between the quantity shipped to its customer and the quantity set forth in the email agreement, it claims that this difference only exists because of a slight variation in the actual brix of the NFC delivered to the customer. Louis Dreyfus argues that the overall amount delivered did not differ materially from the amount contracted, and thus it is clear that the quantity of the sale was determined in the agreement. Regarding the difference in entry dates, Louis Dreyfus also acknowledges that there were differences between the actual dates of delivery and those set forth in the agreement. However, Louis Dreyfus argues that the shipping schedule set forth in the e-mails was simply an estimate, and, moreover, the delivery dates in the agreement were not "essential" terms of sale. Finally, Louis Dreyfus maintains that the price of the NFC did not change from the price set forth in the agreement. Therefore, Louis Dreyfus contends that the Department should use the date of the e-mail agreement as the U.S. date of sale for purposes of the final results.

The petitioners argue that Louis Dreyfus' sales terms for its U.S. sales, including brix level, quantity, and price differed between the e-mail order confirmation and the invoice. The petitioners assert that, while Louis Dreyfus attempts to downplay the extent of these differences, the fact remains that they represent changes to the material terms of the sale.<sup>100</sup>

According to the petitioners, 19 CFR 351.401(i) directs the Department normally to use the date of invoice as the date of sale unless it is satisfied that a different date better reflects the date on which the material terms of sale are set. The petitioners also cite Allied Tube and Conduit Corp. v. United States, 132 F.Supp 2d 1087, 1090-1092 (CIT 2001), which upheld the Department's rebuttable presumption that invoice date is the appropriate date of sale. Because information on the record shows that the appropriate date of sale for Louis Dreyfus' U.S. sales is the date of invoice, the petitioners argue that the Department should use invoice date as the date of sale for the final results.

#### Department's Position:

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<sup>99</sup> See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from Romania: Final Results of Antidumping Duty Administrative Review, 72 FR 71357 (Dec. 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1 (Hot-Rolled Steel from Romania); Certain Steel Concrete Reinforcing Bars from Turkey: Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Notice of Intent to Revoke in Part, 72 FR 25253, 25256 (May 4, 2007), unchanged in Certain Steel Concrete Reinforcing Bars From Turkey: Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination To Revoke in Part, 72 FR 62630 (Nov. 6, 2007); and 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 (Dec. 23, 2004), and accompanying Issues and Decision Memorandum at Comment 10.

<sup>100</sup> The petitioners maintain that the brix level should be considered a material term of sale because it reflects the actual amount of orange solids the customer received.

We have continued to use as the date of sale for Louis Dreyfus' U.S. sales the date that Louis Dreyfus shipped its merchandise from Brazil. Section 351.401(i) of the Department's regulations directs the Department to determine the date that subject merchandise is sold as follows:

In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of the invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

Pursuant to this regulation, in order for the Department to select a date of sale other than invoice date, there must be evidence on the record demonstrating that the respondent set the material terms of sale on another date.

While Louis Dreyfus contends that the material terms of sale for its U.S. sales were established in the e-mail order confirmation, we disagree that this is so because the quantity shown in the e-mail does not match the quantity actually shipped to the customer. Louis Dreyfus claims that the difference is attributable to a slight variation in the actual brix of its U.S. sales; however, this claim is refuted by record evidence, given that there is a difference in the quantities even when they are expressed in gallons, where the brix level is not a factor.<sup>101</sup> Moreover, while Louis Dreyfus contends that the overall quantity of its sales does not differ materially from total quantity set forth in the e-mail, the facts on the record contradict this claim. See the memorandum from Elizabeth Eastwood, Senior Analyst, to the file entitled, "Order Confirmation and U.S. Invoice Comparison for Louis Dreyfus Commodities Agroindustrial S.A. (Louis Dreyfus)," dated October 9, 2012, for a comparison of the quantities in the e-mail order confirmation to the amounts shown on the commercial invoices.<sup>102</sup> In addition, this comparison demonstrates that the price shown on the e-mail is not the same price shown on LDCI's commercial invoices. Id. Thus, we find that material terms of sale for Louis Dreyfus' U.S. sales were not set as of the date of the e-mail order confirmation.

Additionally, we disagree with the petitioners that we should use invoice date as the date of sale for Louis Dreyfus' U.S. sales. In cases where the date of shipment precedes the date of invoice, it is the Department's practice to consider the shipment date to be the date of sale because the quantity of the sale is set when it is shipped to the customer. See e.g., Hot-Rolled Steel from Romania at Comment 1; and Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 76 FR 67675, 67680 (Nov. 2, 2011), unchanged in Notice of Final Determination of Sales at

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<sup>101</sup> When expressing quantity in terms of pounds solids, the actual brix level of the sale affects the total quantity in that a higher brix level results in more pounds solids of OJ.

<sup>102</sup> Because this information is business proprietary in nature, it cannot be disclosed here.

Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea, 77 FR 17413 (Mar. 26, 2012). Therefore, in accordance with 19 CFR 351.401(i), we find that the date Louis Dreyfus shipped its U.S. sales from Brazil “better reflects the date on which the exporter or producer establishes the material terms of sale.” Consequently, we have continued to use shipment date from Brazil as the date of sale for Louis Dreyfus’ U.S. sales for purposes of the final results.

Comment 13: Classification of Louis Dreyfus’ U.S. Sales as CEP Sales

Louis Dreyfus reported its U.S. sales as EP transactions. According to Louis Dreyfus, this classification is appropriate because its own sales personnel in Brazil negotiated the sales with the U.S. customer. However, in the Preliminary Results, we treated all of Louis Dreyfus’s U.S. sales as CEP transactions because: 1) we found that the document relied upon by Louis Dreyfus to support its EP claim did not establish the material terms of sale; and 2) Louis Dreyfus’ U.S. affiliate, LDCI, was identified as the seller on the commercial invoice to the U.S. customer.

Louis Dreyfus disagrees with the Department’s decision to treat its U.S. sales as CEP transactions. According to Louis Dreyfus, the Department neither fully explained this decision in the preliminary results nor supported its determination with record evidence. Louis Dreyfus reiterated its claim that the record evidence shows that it negotiated its U.S. sales entirely in Brazil and it fixed the terms of sale (including price and quantity) with the U.S. customer before shipping the merchandise to the United States.

According to Louis Dreyfus, LDCI performed no selling functions on behalf of the U.S. sales. Moreover, Louis Dreyfus asserts that LDCI neither registered these sales as purchases/resales in its books and records, nor did it enter the subject merchandise into its inventory (either physically or for accounting purposes). In fact, Louis Dreyfus claims that LDCI’s only function related to the U.S. sales was to serve as the importer of record and pay U.S. duties and port charges (for which it was later reimbursed by the U.S. customer, aside from antidumping duty deposits). Thus, Louis Dreyfus claims that LDCI acted solely as an agent for Louis Dreyfus and Louis Dreyfus Citrus Trading Ltda., performing no selling role in these transactions.

Louis Dreyfus argues that the language of section 772(a) of the Act makes clear that its U.S. sales transactions must be treated as EP sales because the sales were made “before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States.” According to Louis Dreyfus, its U.S. sales could only be treated as CEP transactions under section 772(b) of the Act if LDCI made the sales in the United States. However, Louis Dreyfus contends that the record evidence clearly demonstrates that Louis Dreyfus itself made these sales in Brazil prior to their importation. Because these sales were neither made by LDCI, nor sold in the United States, Louis Dreyfus claims that there is no basis for the Department to treat them as CEP transactions. Consequently, Louis Dreyfus argues that the Department must treat these sales as EP transactions for purposes of the final results.

The petitioners disagree with Louis Dreyfus, asserting that the Department’s reclassification of these sales as CEP transactions is in accordance with both its practice and section 772(b) of the

Act. According to the petitioners, the Department has repeatedly held that a sale should be classified as a CEP transaction if the first sale to an unaffiliated party is made in the United States by a U.S. affiliate, unless that U.S. affiliate performs only clerical functions in connection with the sale. The petitioners point out that the documentation on the record of this administrative review shows that LDCI: 1) was identified as the seller of the merchandise on the commercial invoice issued to the U.S. customer; 2) acted as the importer of record; and 3) paid U.S. duties and port charges.<sup>103</sup>

Further, the petitioners note that the commercial invoices are dated after the date of importation of the merchandise into the United States. As noted above, the petitioners argue that the proper date of sale for Louis Dreyfus' U.S. transactions is the date of invoice, and thus these sales cannot be classified as EP transactions in accordance with section 772(a) of the Act. However, the petitioners contend that, even if the Department disagrees on this point, it should nonetheless continue to classify these sales as CEP transactions for the reasons stated above.

#### Department's Position:

Based on the facts on the record, we continue to find that it is appropriate to treat Louis Dreyfus' U.S. sales as CEP, rather than EP, transactions. Section 772(b) of the Act defines CEP as follows:

The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter . . . (emphasis added)

While we find that the date of sale for Louis Dreyfus' U.S. sales is before importation, as discussed in Comment 12, above, this fact alone does not determine whether the sale is EP or CEP. Section 772(b) of the Act expressly states that CEP may be applied to sales made before importation.

In AK Steel Corp. v. United States, 226 F.3d 1361 (Fed. Cir. 2000) (AK Steel), the CAFC explained that CEP sales can be made by either the foreign producer/exporter or the foreign producer/exporter's U.S. affiliate, while EP sales "can only be made by the producer or exporter of the merchandise" (*i.e.*, sales "made by a U.S. affiliate can only be CEP").<sup>104</sup> Moreover, the CAFC stated in AK Steel that:

Commerce does not require a cumbersome test, examining the activities of the affiliate, to determine whether or not the U.S. affiliate is a seller, when the answer to that question is plain from the face of the contracts governing the sales in

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<sup>103</sup> In their case brief, the petitioners discuss other record evidence supporting the classification of these sales as CEP transactions which cannot be discussed here because it is proprietary in nature.

<sup>104</sup> See AK Steel at 1370-1371.

question. If Congress had intended the EP versus CEP distinction to be made based on which party set the terms of the deal or on the relative importance of each party's role, it would not have written the statute to distinguish between the two categories based on the location where the sale was made and the affiliation of the party that made the sale.<sup>105</sup>

Thus, the analysis the Department undertakes to determine whether a sale is properly classified as EP or CEP involves: 1) the identity of the seller to the first unaffiliated U.S. customer; and 2) the location of the sale to the first unaffiliated U.S. customer.<sup>106</sup> Subsequent to AK Steel, the CAFC further clarified that "AK Steel does not stand for the proposition that all sales by foreign sellers to unaffiliated U.S. customers should be considered EP transactions. . . . The statute, moreover, is clear on that point: EP treatment is limited to transactions that occur between a seller outside the United States and a buyer inside the United States, before the date of importation." See Corus II, 502 F.3d at 1377.

Louis Dreyfus argues that the existence of its e-mail order confirmation demonstrates that it, not LDCI, made the sale to its U.S. customer; however, given that the material terms of sale changed after the date of this e-mail, it is clear that the e-mail did not establish the material terms of sale. (See Comment 12, above.) Further, the record demonstrates that LDCI, Louis Dreyfus' affiliate, was the seller of the subject merchandise to the first unaffiliated U.S. customer because: 1) it was identified as such on the commercial invoice issued to the U.S. customer and it acted as importer of record; and 2) Louis Dreyfus submitted an "umbrella agreement" in Exhibit SA-4 of its September 22, 2011, response which contradicts Louis Dreyfus' position.<sup>107</sup>

If a sale is executed in the United States and title passes in the United States, then according to AK Steel, the sale must be classified as a CEP transaction. See AK Steel, 226 F.3d at 1375. In this case, LDCI issued the commercial invoice to the first unaffiliated U.S. customer, in which it was identified as the seller (and thus the sale was executed in the United States). Additionally, LDCI acted as importer of record (and typically the importer takes title to the merchandise even if it does not take physical possession of it).<sup>108</sup> Accordingly, we are treating these sales as CEP transactions in accordance with AK Steel and our practice. See, e.g., Id., and Frozen Concentrated Orange Juice From Brazil; Final Results of Antidumping Duty Administrative Review, 65 FR 60406 (Oct.11, 2000), and accompanying Issues and Decision Memorandum at Comment 5.

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<sup>105</sup> See AK Steel at 1372.

<sup>106</sup> See AK Steel at 1370: "the critical difference between EP and CEP sales is whether the sale or transaction takes place inside or outside the United States and whether it is made by an affiliate." See also Id. at 1371: "The location of the sale and the identity of the seller are critical to distinguishing between {EP and CEP}."

<sup>107</sup> Because the details of this document are proprietary in nature, we cannot discuss them here.

<sup>108</sup> See, e.g., Peer Bearing Co.-Changshan v. United States, Court No. 09-00052, Slip Op. No. 2012-102 (CIT 2012) (Peer Bearing); Union Steel; and Pohang Iron & Steel Co. v. United States, Consol. Court No. 98-04-00906, Slip Op. 99-112 (CIT 1999) (POSCO).

Moreover, we disagree that LDCI performed no selling functions on behalf of these U.S. sales. LDCI invoiced the U.S. customer and collected payment from it, and it also acted as the importer of record and paid U.S. duty expenses and port charges for these sales. While it did not take physical possession of the merchandise, we do not find this fact significant.<sup>109</sup> As noted above, section 772(b) of the Act states that CEP may be applied to sales made before importation, as is the case here. Moreover, we also find unpersuasive Louis Dreyfus' claim that these sales are not recorded as revenue in LDCI's books and records and thus they must be EP transactions. As noted above, LDCI is expressly identified as a seller on the invoice issued to the first unaffiliated U.S. customer and takes title as the importer of record. Accordingly, these sales must be treated as CEP sales. Therefore, we have continued to treat LDCI's U.S. sales as CEP sales pursuant to section 772(b) of the Act for purposes of the final results.

Comment 14: Calculation of Louis Dreyfus' U.S. Brokerage and Handling Expenses

In the Preliminary Results, we included in our margin calculations certain POR U.S. brokerage and handling expenses which the Louis Dreyfus omitted from its U.S. sales listing. While Louis Dreyfus acknowledges that it incurred these expenses on certain sales, it contends that the Department significantly overstated them in the Preliminary Results. Specifically, Louis Dreyfus notes that information contained in Exhibit SSBC-11 of its March 1, 2012, response shows the amount of these unreported expenses denominated in cents per pounds-solid. However, according to Louis Dreyfus, the Department in its margin calculations for the preliminary results incorrectly treated these expenses as dollars per pounds-solid amounts. Because the amount of these expenses is less than one tenth of one cent per pounds-solid, Louis Dreyfus argues that the Department should ignore this adjustment entirely. Nonetheless, Louis Dreyfus asserts that if the Department insists on making this adjustment, it must correct this error in its calculations for the final results.

The petitioners did not comment on this issue.

Department's Position:

We agree with Louis Dreyfus that we inadvertently overstated these expenses in the preliminary results. Accordingly, we have corrected the U.S. brokerage and handling expense amounts used in our calculations for purposes of the final results.

Comment 15: Calculation and Application of Louis Dreyfus' U.S. Indirect Selling Expense Ratio

Louis Dreyfus did not report the indirect selling expenses incurred by LDCI in its questionnaire responses. Therefore, in the Preliminary Results, we calculated U.S. indirect selling expenses for Louis Dreyfus using information contained in the 2010 financial statements of LDCI's parent company, Louis Dreyfus Commodities LLC (LDC) and deducted them from U.S. price. On

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<sup>109</sup> See, e.g., Peer Bearing, Union Steel, and POSCO.

April 17, 2012, in response to the Department's request, Louis Dreyfus provided a POR U.S. indirect selling expense ratio for LDCI.

Louis Dreyfus contends that the Department should not deduct LDCI's indirect selling expenses from U.S. price because its U.S. sales are EP transactions. See Comment 13, above. However, Louis Dreyfus also argues that the Department should not deduct these expenses even if it continues to classify Louis Dreyfus' sales as CEP because LDCI did not sell the merchandise in the United States (and thus LDCI's expenses do not relate to sales of subject merchandise).

Louis Dreyfus contends that an expense under consideration must be at least indirectly related to sales of subject merchandise, and therefore it is the Department's practice to allocate selling expenses between subject and non-subject merchandise. According to Louis Dreyfus, the courts have generally approved such allocations.<sup>110</sup> Louis Dreyfus argues that the amount of LDCI's U.S. indirect selling expenses which should be allocated to sales of subject merchandise is zero because these expenses are not indirectly related to sales of Brazilian OJ.

Nonetheless, Louis Dreyfus contends that if the Department continues to disagree, it should deduct LDCI's indirect selling expenses in a manner that reflects that company's actual costs.<sup>111</sup> Louis Dreyfus states that LDCI is mainly a manufacturing operation which produces and sells Florida OJ. Therefore, Louis Dreyfus asserts that a significant portion of LDCI's expenses relate to manufacturing costs. Louis Dreyfus claims that it is the Department's longstanding practice to allocate the G&A expenses of a U.S. subsidiary that engages in both manufacturing and selling activities between these activities and to treat only the portion related to selling activities as indirect selling expenses. According to Louis Dreyfus, using such a methodology (even with LDCI's depreciation expenses which relate to OJ produced in the United States) would result in a U.S. indirect selling expense ratio of less than half of that used in the Preliminary Results. Consequently, Louis Dreyfus maintains that, at a minimum, the Department should use the LDCI expense ratio provided in its April 17 response in the calculations for the final results.

The petitioners argue that Louis Dreyfus has understated LDCI's indirect selling expenses by omitting certain selling, general, and administrative (SG&A) expense categories as well as an additional expense category shown on LDCI's income statement,<sup>112</sup> and applying a distortive allocation methodology. The petitioners assert that it is the Department's practice to treat all of the U.S. affiliate's SG&A expenses as U.S. indirect selling expenses. According to the petitioners, Louis Dreyfus provided no support for its claim that its omitted SG&A expenses have nothing to do with LDCI's sales activities. Moreover, the petitioners contend that Louis

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<sup>110</sup> See, e.g., Timken Co. v. United States, 26 CIT 590 (CIT 2002); Micron Technology Inc. v. United States, 44 F.Supp. 2d 216, 222 (CIT 1999); and NSK Ltd. et. al. v. United States, 21 CIT 617, 969 F.Supp. 34 (CIT 1997).

<sup>111</sup> According to Louis Dreyfus, the Department's use of LDC's indirect selling expense ratio in its calculations for the preliminary results was not only excessive but also inappropriate, given that LDC does not sell OJ in the United States.

<sup>112</sup> Louis Dreyfus claimed business proprietary treatment for this expense category and thus the nature of this expense cannot be disclosed here.

Dreyfus used arbitrary percentages to allocate LDCI's administrative expenses between the company's selling and manufacturing functions. The petitioners assert that Louis Dreyfus also provided no support for its claim that LDCI used these allocation percentages in the ordinary course of business. Therefore, the petitioners maintain that the Department should include all of LDCI's SG&A expenses, without disregarding any categories or applying any allocation ratios, in its calculation of U.S. indirect selling expenses for the final results.

Department's Position:

As discussed in Comment 13, above, we have continued to treat Louis Dreyfus' U.S. sales as CEP transactions for purposes of the final results. Consequently, we have deducted an amount for LDCI's U.S. indirect selling expenses from U.S. price using the information provided in Louis Dreyfus' April 17, 2012, response. While Louis Dreyfus contends that all of LDCI's expenses relate to non-subject merchandise, we disagree that this is so. LDCI performed selling and administrative activities associated with these U.S. sales, including issuing invoices and collecting payment for them, recording the transactions in LDCI's accounting records, and serving as the importer of record and paying certain port-related expenses (see Comment 13). Thus, we find that a portion of LDCI's SG&A expenses are in fact related to sales of subject merchandise.

Regarding the valuation of these expenses, we disagree with the petitioners that the Department classifies all SG&A expenses as U.S. indirect selling expenses as a matter of practice. Where a U.S. affiliate performs both manufacturing and selling operations, the Department permits companies to allocate the G&A portion of the affiliate's expenses to each of these functions. See 2007-2008 OJ from Brazil at Comment 4. Thus, we find it appropriate to allocate a portion of LDCI's G&A expenses to its manufacturing operations, in accordance with this practice.

We also disagree with the petitioners that the percentage used to allocate G&A between manufacturing and selling operations is unusable. While it is true that this percentage was based on an estimate made by LDCI company personnel, this estimate is in line with the experience reported by another respondent (Cutrale) for its own U.S. affiliate/producer (Cutrale Citrus Juices).<sup>113</sup> Moreover, there are no better alternative allocation methodologies on the record of this review.<sup>114</sup> Thus, because we find LDCI's estimate to be reasonable and nondistortive, we have accepted it as facts available for purposes of the final results.

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<sup>113</sup> See Cutrale's March 13, 2012, response at page 5.

<sup>114</sup> Louis Dreyfus also provided an alternative allocation calculation in its April 17 submission based on the ratio of LDCI's short-term assets to total assets. However, while Louis Dreyfus claimed that the Department has in the past used such an allocation, it cited no cases in support of this contention. Moreover, although the Department has allocated an offset to financing expenses for short-term interest income in this manner where a respondent's financial statements do not identify the nature of its interest income (see, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the United Kingdom, 64 FR 30688, 30710 (June 8, 1999)), we disagree that this methodology is appropriate here because there is no rational relationship between relative asset ratios and the division of a company's expenses between its selling and manufacturing operations.

Regarding the petitioners' final argument -- that the expenses reported in the April 17 submission are incomplete, we agree. Louis Dreyfus excluded from LCDI's U.S. indirect selling expense ratio certain SG&A expenses (consisting of administrative expenses of other companies)<sup>115</sup> and an additional expense category shown on LDCI's income statement. Louis Dreyfus describes the expenses in the former category to be largely the information technology costs of corporate operations, while the record contains no information on the latter. The Department's practice is to include in a respondent's G&A expenses an amount for administrative services performed by the parent company or other affiliated party on the respondent company's behalf. See, e.g., Stainless Steel Bar From Germany: Preliminary Results of Antidumping Duty Administrative Review, 71 FR 5811, 5813 (Feb. 3, 2006), unchanged in Stainless Steel Bar from Germany: Final Results of Antidumping Duty Administrative Review, 71 FR 42802 (July 28, 2006). Therefore, because Louis Dreyfus has provided neither an adequate rationale for excluding these expenses nor any support for its statements that these expenses recorded in LDCI's income statement do not (indirectly) relate to LDCI's sales of subject merchandise, we have included them in the calculation of LDCI's indirect selling expenses. We divided these expenses between selling and manufacturing operations using the same percentage used to allocate LDCI's other administrative expenses.

For further discussion and the details of our calculations, see the Memorandum from Elizabeth Eastwood, Senior Analyst, to the file entitled, "Calculation Adjustments for Louis Dreyfus Commodities Agroindustrial S.A. for the Final Results" dated October 9, 2012.

Comment 16: Use of Partial AFA for Louis Dreyfus' U.S. Indirect Selling Expenses and Inventory Carrying Costs

As noted in Comment 13, above, we treated Louis Dreyfus' U.S. sales as CEP transactions for purposes of the Preliminary Results. As a result, we deducted from U.S. price an amount for U.S. indirect selling expenses using the financial statements of LDC, Louis Dreyfus' parent company, because Louis Dreyfus did not report indirect selling expenses for LDCI. Louis Dreyfus did not report either Brazilian or U.S. inventory carrying costs in its U.S. sales listing.

The petitioners argue that in its margin calculations for Louis Dreyfus the Department improperly did not: 1) deduct from U.S. price "other" indirect selling expenses<sup>116</sup> incurred either in Brazil or by another foreign affiliate; or 2) account for Louis Dreyfus' inventory carrying costs. According to the petitioners, while the Department requested such data, Louis Dreyfus refused to report it in its U.S. sales listing. Therefore, for the final results, the petitioners claim that the Department should apply partial AFA pursuant to section 776(a)(2) of the Act with regard to "other" indirect selling expenses and inventory carrying costs. As partial AFA for the other indirect selling expenses, the petitioners request that the Department use the indirect selling expense ratio for LDC which it calculated in the Preliminary Results. Finally, as partial AFA for

<sup>115</sup> The names of these companies are business proprietary information and thus cannot be disclosed here.

<sup>116</sup> The details of these other indirect selling expenses are proprietary information. See the petitioners' May 11, 2012, proprietary case brief for a full discussion of this issue.

the inventory carrying costs, the petitioners contend that the Department should use the publicly-available average inventory turnover of the other respondents in this administrative review.

Louis Dreyfus did not comment on this issue.

Department's Position:

We have not applied partial AFA to Louis Dreyfus either for "other" indirect selling expenses or inventory carrying costs, as suggested by the petitioners. Regarding the "other" indirect selling expenses incurred by Louis Dreyfus in Brazil, Louis Dreyfus did not report these expenses in its U.S. sales listing, despite our request that it do so. However, we disagree with the petitioner that it is appropriate to base the missing expenses on AFA. There is no provision in the Act for the deduction from U.S. price of foreign indirect selling expenses; rather, foreign indirect selling expenses are only used in the Department's margin analysis as part of commission or CEP offsets or as a component of the CEP profit calculation. Because Louis Dreyfus neither paid commissions in the U.S. and Brazilian markets nor qualified for a CEP offset, offset calculations are not applicable here. Moreover, including these expenses in the CEP profit calculation serves to reduce Louis Dreyfus' total profit; therefore, because it is conservative to exclude these expenses, we have done so for purposes of the final results.

Regarding inventory carrying costs, we disagree that we requested that Louis Dreyfus report these expenses. As with foreign indirect selling expenses, inventory carrying costs in Brazil are only used in the Department's margin analysis as commission and CEP offsets. Because we are performing no offset calculations in the final results, we did not require Louis Dreyfus to report unnecessary expenses. Regarding U.S. inventory carrying costs, Louis Dreyfus did not incur such expenses because it shipped subject merchandise directly from Brazil to its U.S. customer. Thus there is no basis to apply AFA to account for Louis Dreyfus' inventory carrying costs here.

Recommendation:

Based on our analysis of the comments received, we recommend adopting all of the above positions. If this recommendation is accepted, we will publish the final results of review and the final weighted-average dumping margins for the reviewed firms in the Federal Register.

Agree

Disagree

  
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 Paul Piquado  
 Assistant Secretary  
 for Import Administration

9 OCTOBER 2012  
 (Date)