

DATE: August 4, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting 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, 2007, through February 29, 2008

Summary

We have analyzed the comments of the interested parties in the 2007-2008 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 as discussed in the “Margin Calculations” section of this memorandum. 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

Company-Specific Issues

2. Constructed Export Price (CEP) Offset for Sucocitrico Cutrale, S.A. (Cutrale)
3. Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses
4. Calculation of the Indirect Selling Expense Ratios for Cutrale’s U.S. Affiliates, Citrus Products Inc. (CPI) and Cutrale Citrus Juices (CCJ)
5. Ministerial Errors for Cutrale
6. Calculation of the Denominator used in the General and Administrative (G&A) and Financial Expense Ratios for Cutrale
7. Classification of Amortized Goodwill for Cutrale
8. Including *Adiantamentos Sobre Contraltos de Câmbio* (ACC) Financing Costs in Cutrale’s Financial Expense Ratio

9. Conversion of U.S. Sales of Not-from-Concentrate Orange Juice (NFC) for Fischer S.A. Comercio, Industria, and Agricultura (Fischer) from Gallons to Pounds Solids
10. Calculation of International Freight Expenses for Fischer
11. Window Period Sales for Fischer
12. Calculation of Fischer's U.S. Dollar Borrowing Rate
13. Raw Material Cost-Allocation Methodology for Fischer
14. Capitalized Costs Related to the Videira Plant for Fischer
15. Omission of Certain Costs in Calculating Fischer's Cost of Manufacture
16. Calculation of the G&A Expense Ratio for Fischer
17. Calculation of the Financial Expense Ratio for Fischer

Background

On April 6, 2009, the Department of Commerce (the Department) published the preliminary results of the administrative review of the antidumping duty order on OJ from Brazil. See Certain Orange Juice From Brazil: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 15438 (Apr. 6, 2009) (Preliminary Results). The period of review (POR) is March 1, 2007, through February 29, 2008.

We invited parties to comment on our preliminary results of review. 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 U.S. indirect selling expenses for Cutrale to offset U.S. financing expenses by U.S. imputed expenses. See Comment 4;
- We corrected our computer program to rely on the total cost of production variable (i.e., "TOTCOP") when performing the cost test for Cutrale for the final results. See Comment 5;
- We recalculated home market credit expenses for both Cutrale and Fischer using a published interest rate inclusive of a financial operations tax charged by the Brazilian government. See Comment 5;
- We recalculated Fischer's U.S. credit expenses using only the short-term U.S. dollar borrowing rate calculated for Fischer's affiliate, Citrosuco North America (CNA). See Comment 12; and
- We relied on Fischer's revised cost database, FISCHCOP3, submitted on April 27, 2009, which includes depreciation on the Videira plant and incorporates the Department's preliminary results cost adjustments. See Comment 14.

Discussion of the Issues

General Issues

Comment 1: *Offsetting of Negative Margins*

The respondents¹ maintain that the Department's practice of "zeroing," which has been found to be inconsistent with the Antidumping Agreement and the intent of the members of the World Trade Organization (WTO), should be abandoned because it artificially inflates the dumping margin. The respondents argue that for the Department to meet its obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the Antidumping Agreement, it should allow offsets for non-dumped sales in its calculations for the final results. The respondents also note that, on April 30, 2008, the WTO Appellate Body reversed a previous panel decision and affirmed its earlier decisions that "zeroing" in administrative reviews violates the Antidumping Agreement. See United States – Final Anti-Dumping Measures On Stainless Steel From Mexico, WT/DS344/AB/R (Apr. 30, 2008) (US-Zeroing (Mexico)).

Cutrale notes that, according to the WTO Appellate Body's ruling in United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS294/AB/R (Apr. 18, 2006) (U.S.-Zeroing (EC)), the Department's "zeroing" practice as applied in several administrative reviews violated U.S. obligations under the Antidumping Agreement and GATT 1994. While Cutrale concedes that the Appellate Body's decision in U.S.-Zeroing (EC) only applied to certain specific administrative reviews, Cutrale contends that the rationale of the panel's decision applies to any administrative review in which the Department employs "zeroing." Further, Cutrale asserts that the WTO Appellate Body considered a broader challenge to the Department's practice of "zeroing" in administrative reviews in United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (07-0081) (Jan. 9, 2007) (U.S.-Zeroing (Japan)), finding that "zeroing" was inconsistent with U.S. obligations under Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT.

The respondents also note the WTO Appellate Body's ruling on February 9, 2009, which affirmed the WTO panel's finding that the Department's practice of "zeroing" as applied in numerous administrative reviews was inconsistent with the Antidumping Agreement and GATT 1994. See United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (Feb. 9, 2009) (US-Zeroing (EC II)). Further, Cutrale states that no U.S. court has ever held that the Department is required to engage in "zeroing." Therefore, Cutrale argues that since "zeroing" is neither required nor prohibited by U.S. law, the Department should abandon the practice to comply with international agreements, especially, the WTO.

The petitioners² respond by pointing out that the Department has already rejected such arguments in recent administrative reviews, such as Certain Cut-to-Length Carbon-Quality Steel Plate

¹ The respondents in this administrative review are Cutrale and Fischer.

² The petitioners are Florida Citrus Mutual, A. Duda & Sons, Citrus World Inc., and Southern Gardens Citrus Processing Corporation.

Products From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Rescission of Administrative Review in Part, 73 FR 15132 (Mar. 21, 2008) (CTL Plate from Korea), and accompanying Issues and Decision Memorandum at Comment 2. The petitioners maintain that the Department has noted on several occasions that section 771(35)(A) of the Tariff Act of 1930, as amended (the Act), defines the dumping margin as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” The petitioners assert that the Department interprets this definition to mean that a dumping margin only exists when the NV is greater than the EP or CEP, and, thus, no dumping margin exists when NV is equal to or less than EP or CEP. The petitioners note that the U.S. Court of Appeals for the Federal Circuit (CAFC) has consistently upheld this interpretation. See Timken Co. v. United States, 354 F.3d 1334, 1342 (CAFC 2004) (Timken); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (CAFC 2005), cert. denied, and 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) (Corus I); 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).

Furthermore, the petitioners assert that the CAFC has held that WTO reports are not effective under U.S. law until they have been adopted through the statutory scheme specified in the Uruguay Round Agreements Act (URAA). The petitioners maintain that, according to the URAA, the decision to implement WTO reports is discretionary, providing for consultations with the Office of the U.S. Trade Representative, the administering authority, and the relevant congressional committees. See 19 USC 3538(b)(4). According to the petitioners, it is clear that Congress did not intend for WTO reports to supercede the Department’s discretion to interpret the Act. Additionally, the petitioners point out that Congress has provided a procedure as part of the URAA process through which the Department may change a regulation or practice in response to a WTO report. See 19 USC 3533(g). The petitioners state that the Department has not implemented this statutory procedure regarding its practice of “zeroing” in administrative reviews. Regarding U.S.-Zeroing (EC), the petitioners note that the Department modified its calculations of the dumping margin in investigations (see Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722 (Dec. 27, 2006) (Zeroing Notice)); however, the Department declined to modify its “zeroing” methodology for administrative reviews. See Zeroing Notice, 71 FR at 77724.

Finally, regarding U.S.-Zeroing (Japan), the petitioners contend that the Department has responded to the WTO’s decision without a change to the practice of “zeroing.” See CTL Plate from Korea at Comment 2. Thus, the petitioners assert that the Department should continue to employ its “zeroing” methodology in the calculations for the final results.

Department’s Position:

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

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.” Outside

the context of antidumping investigations involving average-to-average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price (EP) or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. *See, e.g., Timken*, 354 F.3d at 1334, 1342 (Fed. Cir. 2004); and *Corus I*, 395 F.3d at 1343, 1347-49 (Fed. Cir. 2005).

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 Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular “dumping margin” in section 771(35)(A) as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

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.” *See Timken*, 354 F.3d at 1343. 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 interpreted by the Department. No U.S. court 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. *See, e.g., Timken*, 354 F.3d at 1343; *Corus I*, 395 F.3d 1343; *Corus II*, 502 F.3d at 1370, 1375 (Fed. Cir. 2007); and *NSK*, 510 F.3d at 1375 (Fed. Cir. 2007).

The respondents have cited WTO dispute-settlement reports (WTO reports) finding the denial of offsets by the United States to be inconsistent with the Antidumping Agreement. As an initial matter, the U.S. Court of Appeals for the Federal Circuit 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 automatically trump the exercise of the Department's discretion in applying the statute. *See* 19 USC 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 USC 3533(g); and Zeroing Notice, 71 FR at 77722. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

With respect to US-Zeroing (EC), the Department has modified its calculation of weighted-average dumping margins when using average-to-average comparisons in antidumping investigations. See Zeroing Notice, 71 FR at 77724. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. Id.

With respect to US-Zeroing (Japan), US-Zeroing (Mexico), US-Zeroing (EC II), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is inconsistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, the Department has continued to deny offsets to dumping based on CEP transactions that exceed NV in this review.

Comment 2: 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. affiliates, CPI and CCJ. 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, 74 FR at 15441.

Cutrale objects to the Department's denial of its CEP offset claim. Cutrale claims the record evidence shows that it is entitled to a CEP offset because its sales in the home market are at a more advanced LOT than its sales to its U.S. affiliates. Cutrale notes that for its U.S. sales to CPI, CPI stores the merchandise in large tanks in storage facilities and thus, CPI acts as a national distributor for Cutrale's sales of orange juice in the United States. In contrast, Cutrale contends that it sells juice in the home market to individual soft-drink bottlers which purchase by the truck load and use what is sold to them directly in the manufacture of soft drinks. Cutrale claims that, because its home market sales are directly from the manufacturer to the end-use customer, its home market sales are clearly at a more advanced stage of distribution than sales to a national distributor like CPI. Cutrale claims that the Department must calculate the CEP price by determining what price Cutrale would have sold to CPI if CPI were not Cutrale's affiliate.

Regarding the selling functions it performs to sell to the United States, Cutrale explains that it does nothing to make sales to CPI. According to Cutrale, it does not contact U.S. customers, negotiate prices, store juice, arrange for delivery, or provide quality assurance. Cutrale states that all of these activities are performed by CPI. Further, Cutrale states that CPI merely directs it to supply subject merchandise based on current U.S. demands. Cutrale contrasts this with the situation in the home market, where Cutrale must meet with customers and negotiate prices.

Additionally, Cutrale notes that it has two employees who maintain regular contact with home market customers. Cutrale points out that the salaries of these employees are a clear example of indirect selling expenses that it does not incur on its CEP sales.

Cutrale also notes that it maintains special inventory services for one customer in the home market, which require Cutrale to create a special blend as required by the customer and ensure its availability to the customer for pick up on a day-to-day basis. See Cutrale's June 18, 2008, response at page B-19. Cutrale asserts that it does not perform this activity for its sales to CPI. In fact, Cutrale states that it keeps orange juice for its U.S. sales in the same storage tanks as those for all export sales. Further, Cutrale asserts that services similar to the inventory services offered in the home market are only offered to customers through CPI. Cutrale notes that, since CEP is calculated by deducting CPI's and CCJ's warehousing expenses, the CEP price does not have any warehousing services comparable to those that Cutrale performs in the home market.

Finally, Cutrale contends that its sponsorship of a Brazilian soccer team, including providing jerseys with Cutrale's logo and advertising at a soccer stadium, is a marketing expense incurred only in the home market. Cutrale notes that it incurred no similar marketing costs for its sales to CPI.

The petitioners maintain that a CEP offset is not warranted for Cutrale for the final results because Cutrale has failed to demonstrate significant changes in its U.S. and home market selling functions from the prior administrative review period. The petitioners contend that, as in the prior segment, 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 first administrative review of this case and contrary to Cutrale's own statements that it performs substantially the same process as the previous administrative review.

Finally, the petitioners maintain that Cutrale's reliance on the sponsorship of a Brazilian soccer team as support for its claim of an additional selling function in the home market is misplaced. The petitioners assert that Cutrale has tried to downplay its U.S. selling functions and exaggerate its home market selling functions where there is no basis for the Department to grant a CEP offset.

Department's Position:

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.

In the preliminary results we analyzed Cutrale's U.S. and home market selling functions, and organized them 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. In the home market we found that:

...Cutrale performed the following selling functions: Sales forecasting, strategic/economic planning, engineering services, advertising, packing, inventory maintenance, order input/processing, employment of direct sales personnel, technical assistance, provision of guarantees, and provision of after-sales services. Accordingly, based on the four selling function categories listed above, we find that Cutrale performed sales and marketing, inventory maintenance and warehousing, and warranty and technical support for home market sales.

In addition, for Cutrale's U.S. sales we found that:

...Cutrale performed the following selling functions: Order Processing {sic}; arranging for freight and the provision of customs clearance/brokerage services; packing; and maintaining inventory at the port of exportation... Accordingly, based on these selling function categories, we find that Cutrale performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales.

See Preliminary Results, 74 FR at 15441.

As to the specifics of our analysis, in its May 30, 2008, response, Cutrale provided a chart showing the following 12 selling functions for its sales in the home market: sales forecasting, strategic/economic planning, engineering services, advertising, packing, inventory maintenance, order input/processing, direct sales personnel, technical assistance, cash discounts, guarantees, and after-sales services. Cutrale reported all of these selling functions with equal intensity designations, labeling each function "Yes." For its sales to CPI, Cutrale reported three selling functions: packing, order input/processing, and freight and delivery, and designated packing and order input/processing as "Limited," while labeling freight and delivery "Yes."

Cutrale's arguments suggest that the Department should view this selling functions chart in isolation, ignore the record evidence beyond the initial chart that Cutrale prepared, and find that Cutrale's sales in the home market were made at a more advanced LOT than its sales to CPI. However, the Department asked supplemental questions regarding Cutrale's 12 home market and three U.S. selling functions, and Cutrale provided further information regarding its selling functions in its July 17, 2008, response.

Cutrale's July 17 response shows that a number of the reported home market selling functions in Cutrale's May 30 response, including providing guarantees, advertising, and engineering services, were performed at varying degrees of intensity. After examining Cutrale's descriptions of these functions, we find that most of the selling functions are insignificant. Cutrale did not perform many of them frequently or at a high level of intensity. For example, in its July 17

response, Cutrale stated that its home market “engineering services” consist of irregularly occurring meetings with customers to discuss transportation and storage problems. See Cutrale’s July 17, 2008, response at page 5. Cutrale also reported performing “guarantees” and “after-sales services” for its home market sales. See Exhibit 14 of Cutrale’s May 30, 2008, response. However, as explained in Cutrale’s July 17 response, these “functions” consist solely of “insuring the quality of the merchandise in the home market so that customers know they can notify Cutrale of a complaint and that Cutrale will rectify the complaint.” See Cutrale’s July 17, 2008, response at page 9. Similarly, Cutrale explained that its “after-sales services” involved providing assistance to customers when problems arise with the merchandise, and noted this occurred only once in the POR. See Cutrale’s July 17, 2008, response at page 10. Finally, while Cutrale reported that it sponsored a Brazilian soccer team using jerseys with Cutrale’s name and logo and a stadium displaying Cutrale’s name, this in itself is not a substantial selling function as it did not directly relate to either FCOJM or NFC (or to any of the other products produced by Cutrale, such as animal feed, orange oils, and pulp wash), but rather primarily consisted of displaying Cutrale’s name and the company’s logo, which merely provided indirect advertising to the company. See Cutrale’s July 17, 2008, response at page 6 and Cutrale’s May 30, 2008, response at page A-6 and A-7.

As to the remainder of the selling functions which Cutrale claimed were performed on home market, but not U.S. sales, we disagree with Cutrale that these functions were significant. Cutrale maintains that it engages in sales forecasting in the home market by ensuring that it has adequate supply to meet the sales requirements of its home market customers. With regards to strategic/economic planning, Cutrale notes that it evaluates long term business opportunities and relationships with its home market customers by examining seasonal production yields, customers’ needs, and expected profitability in the home market. See Cutrale’s July 17, 2008, response at pages 4 and 5.³ In addition, Cutrale states that it performs technical assistance by assisting customers who have requested information on how to improve the final product, as well as by providing samples, having Cutrale representatives make visits to customers’ factories, and allowing visits of Cutrale’s factories by customers (several visits occurred in 2007). See Cutrale’s July 17, 2008, response at page 8.

Regarding cash discounts, in its July 17 response at page 9, Cutrale does not explain why the provision of discounts reaches the level of a separate selling function (other than a passing reference to the Department’s selling functions chart). Absent a showing that Cutrale performed actual selling activities associated with the provision of these discounts (e.g., extensive negotiations with its customers as to the discount amounts, the establishment of formal discount programs which require separate personnel to administer, etc.), we find the provision of home market discounts to be irrelevant to our LOT analysis.

Finally, Cutrale claims that its “inventory maintenance” in the home market is more extensive than that performed in the United States because it maintained a separate inventory of a specific blend of OJ for one of its home market customers, whereas it stored product shipped to the

³ We find it unlikely that Cutrale would not similarly determine the expected profitability for its sales to the United States or take CPI’s needs into account when examining seasonal production yields and planning production (especially given that Cutrale does not produce to order for sales to CPI).

United States in export sales storage tanks. See Cutrale's July 17, 2008, response at page 7. However, we disagree with Cutrale that this difference rises to the level of a "substantial difference in selling activities." When reduced to its essence, this claim is merely that Cutrale sells a slightly different product to one home market customer that it keeps it in a separate part of the warehouse (analogous to its separating FCOJM and NFC into different storage tanks, which is how Cutrale stores the products shipped both to the United States and to other home market customers).

In summary, upon a closer review, none of the 12 reported home market selling functions is significant, despite Cutrale's claims to the contrary.

In contrast, Cutrale's June 13 response shows that Cutrale's May 30 response understated its U.S. selling functions, and it completely omitted certain selling activities. For example, although Cutrale's chart did not reflect any inventory maintenance for its U.S. sales, according to page C-20 of Cutrale's June 13, 2008, Cutrale did in fact hold merchandise in inventory at the port prior to export for its sales to CPI, and, thus, we find that Cutrale does maintain inventory for its sales to its U.S. affiliate. See also Cutrale's May 30, 2008, response at page A-14. Moreover, although Cutrale claims that the CEP price involves virtually no selling functions, we find that Cutrale did in fact perform selling functions, given that Cutrale communicated with CPI regarding orders, processed orders placed by CPI, arranged for shipment of the merchandise from the factory to CPI, and held inventory at the port prior to its shipment to the United States. See Cutrale's July 17, 2008, response at pages 8 and 10-12.

On balance, we find that in the home market Cutrale engaged in some sales and marketing activities, the most significant of which relates to order processing, although it performed no activities at a high level of intensity and most of the selling functions (*i.e.*, sales forecasting, advertising, after-sale "services, and engineering "services") were performed occasionally at best. To sell to its U.S. affiliate, Cutrale performed similar sales and marketing activities. There is no meaningful change in the selling functions provided by Cutrale in both the home market and the U.S. market between the last review and the current review, despite the current sponsorship of a Brazilian soccer team. In the last review, 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 Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584 (Aug. 11, 2008), and accompanying Issues and Decision Memorandum at Comment 5 (OJ from Brazil Final Results). Therefore, although there are 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). Therefore, we have continued to deny Cutrale's claim for a CEP offset for purposes of the final results.

Comment 3: *Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses*

In the preliminary results, the Department capped certain reported revenue received 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, the pallet 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 actually paid in the United States. The Department also capped the amount of warehousing revenue received on home market sales by the actual expense incurred for warehousing in the home market.

Cutrale claims that the Department's capping methodology is inappropriate and that all caps on revenue should be removed for the final results. Cutrale relies on 19 CFR 351.102(b) as support for its contention that the pallet, customs, and brokerage and handling revenues are appropriate adjustments to price for determining antidumping duty liability because these price adjustments are reflected on the U.S. invoice. Cutrale argues that, because this revenue is tied to specific entries, the revenue should be included in the net U.S. price computed for the final results. Additionally, Cutrale alleges that the cap on duty reimbursements understates the price actually paid by the customer on particular sales and therefore overstates Cutrale's dumping margin.

Cutrale also contends that the Department's treatment of the caps as offsets was inappropriate. Cutrale claims that this practice is inconsistent with the statutory preference for calculating dumping margins accurately. Cutrale points out that Cutrale's U.S. affiliates build these expenses into their prices, and that these expenses are no different than an excess freight charge. Cutrale maintains that the Department would treat this revenue differently if it were received from home market sales. Cutrale illustrates its argument by pointing to warehousing revenue received in the home market and claiming that this was not capped in the calculation of NV.⁴ Cutrale argues that, as an alternative, if the Department does not remove the cap, then the Department must offset the indirect selling expenses by the revenue amounts.

The petitioners agree with Cutrale that capping of certain revenues is improper, but they disagree over which revenues should be capped. Specifically, the petitioners contend that the Department improperly capped Cutrale's home market warehousing revenue because doing so violates the Department's practice both in this proceeding and in other antidumping cases. The petitioners argue that capping home market revenues would create a precedent that would allow respondents to manipulate the dumping margins by lowering prices and disguising revenues in other charges.

In contrast, the petitioners disagree with Cutrale's argument that the Department should not cap U.S. revenues. The petitioners respond to Cutrale's argument by pointing out that section 771(c)(1) of the Act permits the Department to increase the price used to establish either EP or CEP in only three instances: 1) where packing is not included in the price; 2) where the exporting country provides for duty drawback upon exportation of the subject merchandise; and

⁴ Contrary to Cutrale's assertions, the Department did cap home market warehousing revenue received by the actual expense incurred on home market warehousing. See Preliminary Results, 74 FR at 15442.

3) where the Department imposes certain countervailing duties on imports of the subject merchandise. Because the revenues in question do not fall into one of these three categories, the petitioners argue the Department must cap revenue received by the actual expense incurred in order to prevent an unauthorized increase in the U.S. price.

Finally, the petitioners contend that the statute does not permit “negative” expenses. The petitioners maintain that the Department only allows for the price to be reduced by the amount of expenses incurred, not increased by negative expenses. As support for their position that the Department should not increase the U.S. price for negative expenses, the petitioners cite Thyssen Stahl AG et. al. v. AK Steel Corporation, 1998 U.S. App. LEXIS 17064 (July 27, 1998) (where the CAFC held that “the statute clearly contemplates only reductions in U.S. price to account for expenses, and not increases to account for gains, associated with selling the merchandise”). Therefore, the petitioners argue that the Department should continue to cap U.S. revenues for purposes of the final results.

Department’s Position:

We disagree that any of the revenue items in question should be treated as price adjustments and added to U.S. price or home market price in full for purposes of either the calculation of net U.S. price, net home market price, or CEP profit. As a result, we have continued to set net revenue to zero where U.S. duty drawback and duty reimbursements exceed the amount of U.S. customs duties and fees paid, the pallet revenue exceeds the amount of repacking expenses actually paid in the United States, and the brokerage and handling revenue exceeds the amount of brokerage and handling actually paid in the United States. We have also continued to set the net warehousing revenue to zero where the amount of warehousing revenue received on home market sales exceeds the actual expense incurred for warehousing in the home market.

The Department makes adjustments as appropriate for U.S. and home market movement and packing expenses, under section 772(c)(1) and 773(b)(6) of the Act, respectively. 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 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 expenses and revenues associated with U.S. customs duties, brokerage and handling, repacking, or warehousing 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 all relate to the movement and transportation of subject merchandise. See Stainless Steel Wire Rod from Sweden: Preliminary Results of Antidumping Duty Administrative Review, 72 FR at 51411 (Sept. 7, 2007), unchanged in Stainless Steel Wire Rod from Sweden: Final Results of

Antidumping Duty Administrative Review, 73 FR at 12952 (Mar. 11, 2008); Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results of Antidumping Duty Administrative Review, 67 FR at 21637 (May 1, 2002), unchanged in Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR at 66112 (Oct. 30, 2002) (2000-2001 Rebar from Turkey); and OJ From Brazil Investigation at Comment 5. 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 freight or warehousing); such profits should be attributable to the sale of the service, but not to the subject merchandise. Therefore, we have continued to treat the revenues as an offset to expenses. We set the net expenses to zero where revenue exceeded the expenses, in accordance with our past practice. See OJ from Brazil Investigation at Comment 9; OJ from Brazil Final Results at Comment 7. See also Certain Steel Concrete Reinforcing Bars From Turkey; Preliminary Results of Antidumping Duty Administrative Review, 67 FR at 21637 (May 1, 2002), unchanged in Certain Steel Concrete Reinforcing Bars From Turkey; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR at 66112 (Oct. 30, 2002) (where the Department offset freight expenses by freight revenue) and Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil, 71 FR 2183 (Jan. 13, 2006), and accompanying Issues and Decision Memorandum at Comment 9 (OJ from Brazil Investigation) (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).

Regarding Cutrale's argument that the Department should offset indirect selling expenses by the amount of excess expense 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 OJ from Brazil Final Results at Comment 7. Cutrale has reported that the revenue at issue is directly related to various movement and repacking expenses, rather than to any of the expenses included in the indirect selling expense ratio. This rationale is distinguishable from the Department's decision to offset U.S. indirect selling expenses by sales revenue related to futures contracts in the 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 expense revenue as an offset to indirect selling expenses.

In the interest of consistency, the Department applies the same cap to both U.S. and home market prices. In other words, we will apply the cap regardless of whether it limits the increase to U.S. price or normal value. With regard to the petitioners' argument that capping home market revenues could lead to manipulation of the home market prices, the petitioners fail to identify record evidence to support this contention.

Comment 4: Calculation of the Indirect Selling Expense Ratios for Cutrale's U.S. Affiliates, CPI and CCJ

During the POR, both CPI and CCJ incurred financing expenses in the United States. However, Cutrale did not include these expenses as part of the indirect selling expenses reported for either of its U.S. subsidiaries. Therefore, for purposes of the preliminary results, we recalculated CPI's and CCJ's indirect selling expenses to include financing expenses, offset by interest income. We accepted the other components of each company's indirect selling expenses as reported.

Regarding CPI, Cutrale asserts that the Department's decision to add interest expenses to CPI's indirect selling expenses resulted in double-counting these expenses in the U.S. price for CPI because these interest expenses relate to accounts receivable. As support for its argument, Cutrale cites the remand results of Alloy Piping Inc. et al v. United States, 28 CIT 1805 (Oct. 28, 2004) (Alloy Piping), where the Department stated "in order to avoid double-counting of expenses, we did not add the financial interest expense to the indirect selling expense because the imputed inventory carrying and credit expenses {for the CEP importer} already captured an amount for interest expense." See Final Results of Determination Pursuant to Court Remand: Alloy Piping Products, Inc., Flowline Division, Markovitz Enterprises, Inc., Gerlin, Inc., and Taylor Forge Stainless Inc., v. United States of America and the U.S. Department of Commerce (Feb. 14, 2005). Cutrale notes that in Alloy Piping the Department acknowledged that the double-counting would not lead to a more accurate dumping margin. For this reason, Cutrale contends that the Department should remove these expenses from CPI's indirect selling expenses. Nonetheless, Cutrale argues that, in the event that the Department continues to include these expenses, it should offset them by the amount of imputed credit attributable to CPI's U.S. sales in accordance with past practice. See Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 67 FR 78417 (Dec. 24, 2002), and accompanying Issues and Decision Memorandum at Comment 8 (Butt-Weld Pipe Fittings from Taiwan) (where the Department recalculated the indirect selling expense ratio to offset interest expenses included by the amount of imputed expenses related to subject merchandise).

The petitioners agree with the Department's inclusion of financing expenses in the calculation of the indirect selling expense ratio for both U.S. affiliates. The petitioners assert that it is the Department's practice under section 772(d)(1)(D) of the Act to include interest expenses attributable to U.S. sales of subject merchandise incurred by the U.S. affiliate in the pool of U.S. indirect selling expenses. As support for this assertion, the petitioners cite Butt-Weld Pipe Fittings from Taiwan at Comment 8. Moreover, the petitioners disagree with Cutrale's claim that interest expenses should be excluded from CCJ's indirect selling expenses because they relate to the financing of production equipment for non-subject merchandise. According to the petitioners, this claim is incorrect because CCJ made POR sales of subject merchandise and it would be impossible to separate the interest expenses for non-subject merchandise from those for subject merchandise.

However, the petitioners argue that the calculation of CCJ's indirect selling expenses is incorrect on other grounds. Specifically, the petitioners argue that the Department should consider all of CCJ's indirect selling expenses and G&A expenses as U.S. indirect selling expenses, rather than

accepting Cutrale's methodology of corporate allocation, which resulted in the exclusion of certain expenses.⁵ Moreover, the petitioners object to the allocation of these incomplete expenses over CCJ's total sales of all products (including both subject and non-subject merchandise). The petitioners maintain that the methodology Cutrale suggested would contain a numerator with expenses related to only subject merchandise and a denominator with revenues related to both subject and non-subject merchandise, which the petitioners claim is clearly inaccurate.

Department's Position:

Section 772(d)(1)(D) of the Act directs the Department to reduce CEP by the amount of "any selling expenses not deducted under subparagraph (A), (B), or (C)." Consistent with this section of the Act, it is our general practice to include a portion of U.S. interest expenses in the calculation of indirect selling expenses because these expenses have not been deducted from CEP elsewhere in our calculations. See Stainless Steel Sheet and Strip From the Republic of Korea; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 66 FR 64950 (Dec. 17, 2001), and accompanying Issues and Decision Memorandum at Comment 1; and Stainless Steel Plate in Coils From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 66 FR 64107 (Dec. 11, 2001), and accompanying Issues and Decision Memorandum at Comment 14. However, in this specific instance, we are not including any interest expenses in either CPI's or CCJ's indirect selling expenses because the aggregate U.S. imputed expenses on U.S. sales of subject merchandise for CPI and CCJ exceeded their actual U.S. interest expenses.

We agree with Cutrale that the Department should avoid double counting whenever possible, and we recognize that the methodology used in the preliminary results may have resulted in the double counting of certain financing costs. Therefore, in order to eliminate any potential for double counting, we adjusted our methodology for calculating the indirect selling expenses to follow the methodology set forth in Notice of Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea, 67 FR 11976, 11979 (Mar. 18, 2002), and accompanying Issues and Decision Memorandum at Comment 1 (Cold-Rolled Flat Products from Korea). In that case, the Department included U.S. financing expenses as part of indirect selling expenses and recalculated the indirect selling expense ratio (also referred to as the "ISE" ratio) as follows:

Beginning with the respondent-provided indirect selling expense amount, we calculated a preliminary ISE ratio by dividing the ISE amount by the total sales amount. Additionally, we calculated an interest expense ratio. To do this, we calculated the ratio of U.S. sales of subject merchandise to total sales and applied it to the total interest expense, as reported by respondents. This yields a subject merchandise-specific interest expense amount. This allocation is appropriate to ensure that the deduction for double counting is taken from a pool of expenses at the same level as the offset, e.g., subject merchandise. This more accurately ensures that no non-subject merchandise interest or imputed expenses are applied to subject merchandise. From this amount, we then deducted the

⁵ The name of the category of expenses excluded is proprietary information.

sum of imputed expenses, creating a new net interest expense amount. Following this, we divided the net interest expense amount by the total sales of subject merchandise to create the interest expense ratio introduced above. Because both the preliminary ISE ratio and the interest expense ratio are ultimately applied to gross unit price (i.e., the same variable), we added the two ratios together to create a new and final ISE ratio, inclusive of all relevant indirect selling expenses and interest expenses. We applied this final ISE ratio to the gross unit price.

See Colled Rolled Flat Products from Korea, 67 FR at 11979.

Consistent with our decision in Colled Rolled Flat Products from Korea, we have employed the above methodology in the calculation of CCJ's and CPI's indirect selling expense ratios. This methodology is also similar to the methodology followed in Butt Weld Pipe Fittings from Taiwan. However, because it matches interest expenses with the corresponding offset for imputed expenses at the same level, we find that it is more accurate. After applying this methodology in the instant review, as noted above, we found that the aggregate U.S. imputed expenses on CPI's and CCJ's U.S. sales of subject merchandise exceeded their actual U.S. interest expenses; therefore, we removed the financing expenses from the calculation of CPI's and CCJ's indirect selling expense ratios.

Regarding Cutrale's argument that CCJ's financing expenses are related to non-subject merchandise, and thus it would not be proper to include them in its U.S. indirect selling expenses, we disagree. Due to the fungibility of money, the Department normally includes all interest expense amounts incurred in the interest expense rate computation regardless of the activity generating such costs. See Notice of Final Determinations of Sales at Less Than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 FR 52741 (Sept. 5, 2003) (Wheat from Canada), and accompanying Issues and Decision Memorandum at Comment 53. Accordingly, we find that the methodology set forth above is equally appropriate for CCJ as for CPI.

Finally, we disagree with the petitioners regarding the allocation of CCJ's indirect selling expenses. The Department's regulations at 19 CFR 351.401(g)(1)-(3) state:

- (1) *In general.* The Secretary may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions.
- (2) *Reporting allocated expenses and price adjustments.* Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.
- (3) *Feasibility.* In determining the feasibility of transaction-specific reporting or whether an allocation is calculated on as specific a basis as is feasible, the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and

industry in question and the number of sales made by the party during the period of investigation or review.

After examining the information on the record with respect to the expenses at issue, we have concluded that they were appropriately excluded from the calculation of CCJ's indirect selling expenses because they are G&A expenses associated with CCJ's manufacturing operations, rather than expenses incurred to sell subject merchandise. See Cutrale's March 20, 2009, response at page 10. As to whether the amount of the excluded expenses was appropriately calculated, we find no reason to question Cutrale's allocation methodology because it employed the same methodology to allocate these expenses to CCJ's manufacturing operations as CCJ itself uses in the ordinary course of business. Further, given that this ratio is used in CCJ's normal books and records and the underlying expenses are general in nature, we find that the allocation was calculated on as specific a basis as is feasible. As a result, we are satisfied that the allocation method does not cause inaccuracies or distortions and we have continued to accept CCJ's calculation for purposes of the final results.

Comment 5: *Ministerial Errors for Cutrale*

During the POR, neither Cutrale nor Fischer had any short-term borrowings in the home market. Therefore, the Department calculated home market imputed credit expenses for both of these companies using the SELIC rate (i.e., the interest rate published by the International Monetary Fund (IMF) as the money market rate for Brazil). Cutrale maintains that the Department made a ministerial error in its preliminary margin calculations when it recalculated the SELIC interest rate without a financial operations tax of 1.56 percent. According to Cutrale, the financial operations tax is a tax charged by the Brazilian government on all financial transactions, including loans, and therefore must be included in the calculation of the cost of Cutrale's borrowings.

The petitioners maintain that the Department was correct in not including the 1.56 percent financial operations tax in the calculation of home market credit expenses. As support for this, the petitioners note that the Department used the same interest rate for both Fischer and Cutrale. Furthermore, the petitioners state that the SELIC rate published by the IMF does not include the 1.56 percent financial operations tax and should thus be excluded from the Department's calculations.

However, the petitioners allege that the Department made a different ministerial error in its preliminary margin calculations for Cutrale by: 1) computing the company's average cost of materials, instead of the average cost of production, under the variable "AVGCOP"; and 2) using this variable in the sales-below-cost test, instead of the variable "TOTCOP." The petitioners request that the Department correct its calculations to account for this error. Cutrale did not comment on the petitioners' ministerial error allegation.

Department's Position:

With respect to the first of these issues, we disagree with Cutrale that the Department's decision to rely on the SELIC rate, without accounting for the financial operations tax, in computing

home market credit constitutes a ministerial error. A “ministerial error” is defined under 19 CFR 351.224(f) as:

an error in addition, subtraction, or other arithmetical function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial.

Because the Department intentionally excluded this tax from the calculation of the SELIC rate, Cutrale’s argument is methodological in nature. Nonetheless, we have reexamined the information on the record of this review and find that there is insufficient information to determine: 1) what the financial operations tax is; and 2) whether it should be added to the SELIC rate for purposes of calculating credit. Because we failed to request sufficient information from Cutrale to make an accurate determination on this issue, we have accepted Cutrale’s assertions as facts available for purposes of the final results. See Cutrale’s June 18, 2008, response at page B-24. Therefore, we have added the financial operations tax to the SELIC rate and recalculated home market credit expenses for Cutrale and Fisher using this revised rate. However, in any future segment of this proceeding where respondents do not have short-term borrowings in the home market, we plan to solicit further information regarding this tax and we will consider the proper calculation of the SELIC rate at that time.

Regarding the second issue, we have reviewed our calculations and agree that the point raised by the petitioners constitutes a ministerial error. Thus, we have corrected our program to rely on the variable “TOTCOP” when performing the cost test for Cutrale for the final results.

Comment 6: *Calculation of the Denominator used in the G&A and Financial Expense Ratios for Cutrale*

Cutrale asserts that the Department erred in the preliminary results when it subtracted the revenue received on the sales of by-products from the cost of goods sold (COGS) denominators it used in the G&A and financial expense ratios. Cutrale states that, in order for the G&A and financial expense ratios to be arithmetically consistent, the numerator must be consistent with the denominator of the ratio calculation. Cutrale contends that, because its G&A and financial expenses relate to all products, the expense ratios must be computed over the COGS of all products including by-products. Cutrale argues that, because of this alleged error, the Department has divided G&A and financial expenses, which were incurred on sales of all products, by something less than the cost of producing all products. Therefore, Cutrale asserts that the Department has computed arithmetically incorrect G&A and financial expense ratios.

Cutrale states that the Department justified this calculation in the preliminary results by stating that the deduction of by-product revenue was necessary to keep the calculation of the G&A and financial expense ratios on the same basis as the cost of manufacturing (COM) to which it is applied. However, Cutrale contends that when the Department computes the G&A and financial expense ratios, the G&A and financial expenses are divided by COGS and then applied to COM. Cutrale explains that COGS differs from COM in that it includes opening and ending inventories. In addition, Cutrale notes that COM includes only the COM of merchandise under review and does not include merchandise not under review. Cutrale infers that the point of the

Department's methodology is to use COGS as a surrogate for COM, on the theory that the G&A and financial expense ratios, computed based on COGS, will approximate what they would be for merchandise under consideration as a percentage of COM. Therefore, Cutrale concludes that COGS is not determined on the same basis as COM. As a result of all of these points, Cutrale returns to its original argument that the ratios should be internally consistent, and therefore the numerator and denominator of the ratios must be determined on the same basis.

The petitioners argue that the Department should continue to deduct by-product revenue from the denominator in the calculation of Cutrale's G&A and financial expense ratios. The petitioners assert that the Department justified its calculation of the COGS denominator in order to keep the calculation of the G&A and financial expense ratios on the same basis as the COM to which they are applied. The petitioners explain that, in order to do this, the Department reduced the denominator of the G&A and financial expense ratios by the by-product revenue. Additionally, the petitioners explain that this is the same approach taken by the Department for packing expenses that are included in the sales database and also in COGS. Specifically, the petitioners note that, in order to keep the calculation of the G&A and financial expense ratios on the same basis as the COM to which they are applied, the Department has deducted packing expenses from the COGS denominator for calculating the respondent's G&A and financial expense ratios. As support for its position, 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 (Apr. 26, 2007) (Lemon Juice from Argentina), where the Department revised the G&A and net financial expense rates by deducting by-product revenue and packing expenses from the COGS denominator. The petitioners urge the Department to uphold the methodology used to recalculate the G&A and net financial expense ratios using the COGS denominator, net of by-product revenue, as set forth in the March 31, 2009, memorandum from Gina Lee, Senior Accountant, to Neal M. Halper, Director, Office of Accounting, entitled, "Cost of Production and Constructed Value Adjustments for the Preliminary Results--Sucocitrico Cutrale Ltda" and in accordance with the Department's longstanding practice in other cases and in the previous administrative review of this order.

Department's Position:

In the final results, we have continued to deduct the by-product revenue from the COGS denominator used in the calculation of the G&A and financial expense ratios. Cutrale's suggested change to the calculation is arithmetically incorrect. Consistent with our past practice and our determination in the prior administrative review, it is appropriate to include this adjustment in the expense ratio calculations because, in order to produce an accurate result, the ratios must be calculated on the same basis as the COM of the orange juice to which they are applied. See, e.g., OJ from Brazil Final Results at Comment 8; 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 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.

In calculating the COP of the merchandise under consideration, the Department adds to COM an amount for G&A and financial expenses. See section 773(b)(3)(B) of the Act. The Department

has developed a consistent practice that these amounts are determined by calculating G&A and financial expense ratios and multiplying these ratios by the COM of the investigated product. See OJ from Brazil Final Results at Comment 8. The purpose of the ratios is to allocate all G&A and financial expenses to the cost of all products. To make the ratio arithmetically correct, the denominator must be on the same basis as the cost to which the ratio is applied. Because the product-specific cost to which the ratio is applied has been reduced by by-product revenue, the denominator of the ratio (the total cost of all products) must likewise be reduced by the by-product revenue. 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 orange juice 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. 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., OJ from Brazil Final Results at Comment 8.

As for Cutrale's concern that the Department's G&A and financial expense ratio calculations use COGS to compute the ratios which are then applied to COM, we disagree that this is inappropriate. Using COGS as the denominator is consistent with the Department's well-established practice of calculating the G&A or interest expense ratios. See 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) (Shrimp from Thailand), and accompanying Issues and Decision Memorandum at Comment 12. Section 773(e)(2) of the Act provides the general description of calculating G&A expense for constructed value. However, the Act does not prescribe a specific method for calculating the G&A expense ratio. When a statute is silent or ambiguous, the determination of a reasonable and appropriate method is left to the discretion of the Agency. See Shrimp from Thailand at Comment 12. Because there is no bright line definition in the Act of what a G&A expense is or how the G&A expense ratio should be calculated, the Department has, over time, developed a consistent and predictable practice for calculating and allocating G&A expenses. See Shrimp from Thailand at Comment 12. This practice is to calculate the ratio based on the company-wide G&A costs incurred by the producing company allocated over the producing company's company-wide cost of sales. The Department's standard section D questionnaire instructs respondents that the G&A expense ratio should be calculated as the ratio of total company-wide G&A expenses divided by COGS.

As with many cost allocation issues that arise during the course of an antidumping proceeding, there may be more than one way to reasonably allocate the costs at issue. This is precisely why we have developed a consistent and predictable approach to calculating and allocating G&A costs. Specifically, in this case, the only difference between the COM and COGS is the change in finished goods inventory. The change in finished goods inventory could have either a favorable or unfavorable effect on the expense ratios depending on whether the inventory

balance increases or decreases at the year-end. The Department's normal practice of calculating G&A based on the COGS rather than COM affords consistency across cases and is not results driven. We recognize that a unique fact pattern may present itself where it may be appropriate to deviate from our normal practice. See Shrimp from Thailand at Comment 12. However, that fact pattern does not exist in this case. In this case, G&A and interest expenses were incurred for products sold during the POR that were manufactured both in the current and prior periods. Because the Department considers these expenses as period expenses and extracts them from the financial statements for the period most closely corresponding to the POR, the G&A and interest expense ratios should be calculated based on expenses (i.e., COGS) that are also reflected in the financial statements for the same period. Thus, the Department's normal methodology for calculating a respondent's G&A expense ratio, which we applied here, is reasonable, predictable, and not results-oriented.

Therefore, we disagree with Cutrale that the Department has made an error in calculating the G&A and financial expense ratios. As explained earlier, by adjusting the COGS denominator by the by-product revenue the Department is being consistent with the methodology it has employed in other cases with similar fact patterns. See, e.g., Lemon Juice from Argentina, 72 FR at 20824; 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), and accompanying Issues and Decision Memorandum at Comment 10. Therefore, for these final results we have not departed from our methodology, used both in the preliminary results of this proceeding and in the final results of the prior proceeding, of including an offset for by-product revenue to the COGS denominator of the G&A and financial expense ratios.

Comment 7: Classification of Amortized Goodwill for Cutrale

Cutrale argues that the Department erred when it included the amortization of goodwill incurred on the purchase of a corporation as a G&A expense rather than a financial expense. Cutrale claims that it does not oppose including the expense in its total costs; however, Cutrale disputes the manner that it was included in the preliminary results. Cutrale points out that the amortization of goodwill is reported on a separate line item in its income statement, and not as part of the company's G&A expenses. Cutrale objects to the Department's statement that the amortization of goodwill relates to the general operations of the company. Specifically, Cutrale explains that the goodwill is the result of a purchase of a corporation, in particular the difference between the purchase price and the book value of the corporation. Cutrale concludes that by definition goodwill is not the asset of the company, but rather only the portion of the purchase price that exceeds net asset value. Cutrale asserts that the amortization of goodwill is not an operating cost, but rather a financial cost. Cutrale claims that, because it had made a business decision to invest its money in a corporation for an amount greater than the value of the asset, the goodwill is therefore a financial expense relating to the investment decisions of the corporation.

The petitioners maintain that the Department was correct in including the amortization of goodwill in Cutrale's G&A expense ratio calculation. The petitioners note that the Department explained in the preliminary results that the goodwill is regularly amortized in Cutrale's general ledger and financial statements under Brazilian generally accepted accounting principles (GAAP) and that the amortization of goodwill relates to the general operations of the company.

The petitioners assert that including the amortization of goodwill in G&A expenses was appropriate in the preliminary results and is consistent with the Department's practice.

Department's Position:

Goodwill is recognized when a company purchases another company for an amount in excess of the acquired company's net book value. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (Apr. 2, 2002), and accompanying Issues and Decision memorandum at Comment 16. The amortization of goodwill recognized by Cutrale reflects the current year's portion of the decrease in value of the acquired asset. The Department's general practice is to consider goodwill as related to the general operations of the company as a whole. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Brazil, 67 FR 62134 (Oct. 3, 2002) (Steel from Brazil), and accompanying Issues and Decision Memorandum at Comment 23. Regarding Cutrale's argument that the amortization of goodwill should be included in financial expenses and not G&A expenses, we disagree. If this expense were part of the recognized investment in the subsidiary acquired, it would be included in the equity in subsidiaries account. Cutrale argues that the goodwill is not an asset of the company, and therefore it should not be treated as part of Cutrale's operations. However, goodwill is indeed recognized as an asset of the company, and is categorized as such in Cutrale's Balance Sheet. See Exhibit SD-1 of Cutrale's October 6, 2008, supplemental section D response. It is an intangible asset, not a physical asset. The Department accepts data recorded in the books and records of the respondent if they follow home country GAAP and the data reasonably reflect costs. See Steel from Brazil at Comment 23. In this case, we note that Cutrale did in fact recognize the amortization of goodwill in accordance with Brazilian GAAP, as shown in its fiscal year 2007 financial statements under "Operating Expenses." See Exhibit SD-1 of Cutrale's October 6, 2008, supplemental section D response. Therefore, because Cutrale recognized these costs as operating expenses in its normal books and records, and because we find that these costs are related to the general operations of the company as a whole, consistent with our practice, we have included these costs in the calculation of Cutrale's G&A expense ratio. See Solvay Solexis v. United States, Slip Op. 09-54, CIT LEXIS 58 (June 11, 2009) (where the Court upheld our decision that it was appropriate to use Solvay's statutory financial statements that included goodwill amortization to calculate the G&A expense ratio) and Chlorinated Isocyanurates from Spain: Final Results of Antidumping Duty Administrative Review, 73 FR 79789 (Dec. 30, 2008), and accompanying Issues and Decision Memorandum at Comment 4 (where we found that the negative goodwill amortization reported by Aragonesas should be included as an offset to G&A expenses).

Comment 8: *Including ACC Financing Costs in Cutrale's Financial Expense Ratio*

The petitioners assert that, in the preliminary results, the Department did not include the interest expenses related to ACC financing costs in the net financial expense ratio for Cutrale. The petitioners claim that this is not only contrary to the Department's methodology in previous segments of this case, but it also resulted in a miscalculated financial expense ratio. The petitioners note that it is the Department's longstanding policy to take into account all financial expenses (e.g., short and long-term financial expenses, foreign exchange gains and losses) in the

calculation of the financial expense ratio. The petitioners contend that neither the Department nor Cutrale has offered any rationale for this change to the Department's policy.

The petitioners urge the Department to recalculate Cutrale's net financial expense ratio by including the amount of interest on ACC, as reported in Cutrale's response. The petitioners point out that this would be consistent with the reporting requirements set forth in section D of the Department's questionnaire, the Department's longstanding policy and practice for the calculation of financial expense ratios in similar cases, and the methodology used by the Department in the first administrative review.

Cutralé did not comment on this issue.

Department's Position:

For the final results, we followed our methodology from the preliminary results and continued to include the ACC financing costs in the net financial expense rate for Cutrale as they are financing expenses incurred by Cutrale during the year. This is consistent with our finding in the previous administrative review of this case. See OJ from Brazil Final Results at Comment 10. In calculating the net financial expense ratio, we used the total net financial expenses from the audited financial statements. We did not include the goodwill expenses in the financial expense calculation, as addressed in Comment 7, above. In addition, as noted above, we disallowed Cutrale's exclusion of the ACC financing costs (which are included in the net financial expense line item in the financial statements). Using this total net financial expense figure in our recalculated financial expense ratio, the financial expense ratio resulted in a negative amount. Therefore, in our preliminary results, we set the financial expense ratio to zero. See Certain Pasta From Turkey: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order in Part, 67 FR 298 (Jan. 3, 2001), and accompanying Issues and Decision Memorandum at Comment 3 (where the Department set the negative financial expense rate to zero). We have continued to use this zero financial expense ratio in our calculations for the final results.

Comment 9: *Conversion of U.S. Sales of NFC for Fischer from Gallons to Pounds Solids*

In accordance with the Department's instructions in the questionnaire, Fischer reported its U.S. sales of both FCOJM and NFC in pounds solids, although it sells NFC on a gallon basis in the United States. In order to convert its NFC sales from gallons to pounds solids, Fischer used the standard brix level of each sale in its U.S. sales listing submitted with its March 20, 2008, response. However, the Department determined in the 2006-2007 administrative review that it is appropriate to make conversions for NFC using the actual brix level of each sale. See OJ from Brazil Final Results at Comment 11. According to its March 20 response, Fischer reported its NFC sales on an actual-brix basis in its original U.S. sales listing submitted on June 20, 2008. Therefore, for Fischer's U.S. sales of NFC, we used certain fields from the U.S. sales listing submitted on June 20 in our calculations for the preliminary results, and we adjusted other information reported by Fischer to express all NFC sales and expenses on an actual-brix basis.

Fischer claims that the pounds solids-gallon conversion methodology used by the Department is distortive and contrary to the antidumping statute. According to Fischer, the Department should accept the gross unit price, quantity, and expense data for NFC converted on a standard-brix basis as reported in its March 20, 2009, response. Fischer notes that it sells NFC in the United States pursuant to an agreement with its customer which clearly establishes that NFC is sold a per-gallon basis at a standard brix of 11.8. According to Fischer, it provided information in its section A response from the U.S. Department of Agriculture's (USDA's) U.S. Bureau of Standards which confirms that the proper conversion from gallons to pounds and then to pounds solids uses this standard brix level.

Fischer argues that the standard brix level conversion set forth in the section A response is consistent with the NFC agreement between Fischer and its customer. According to Fischer, the agreement does not require the brix level of the NFC it sells under the agreement to be measured. Nevertheless, Fischer notes that the USDA grades samples from every tanker truck loaded from the bulk NFC vessel and provides the brix level of each tanker to Fischer; further, Fischer admits that this USDA brix level is also included on the invoice to the customer. However, Fischer contends that because the USDA brix level is not used to set the price paid by the customer, it is irrelevant under the NFC agreement. According to Fischer, as a matter of law only the standard brix of 11.8 can be properly used by the Department to convert gallons to pounds solids.

Fischer alleges that the Department ignored the evidence on the record of this proceeding and continued to rely upon the reported USDA brix levels when converting NFC from gallons to pounds solids. According to Fischer, this conversion causes distortions in both the price and quantity of these NFC sales in the calculations performed for the preliminary results. Fischer notes that there is one constant price for NFC in the NFC agreement. According to Fischer, when this per-gallon price is converted at the standard brix level, the per-pounds solids price remains constant. However, Fischer alleges that the differing per-pounds solids prices that result from the conversion from gallons using the USDA brix level are a distortion that the Department introduced. Fischer contends that it alerted the Department to this problem in its supplemental questionnaire response and this is why it reported the price and quantity of its U.S. sales of NFC using the standard brix of NFC. Fischer claims that its methodology for reporting the gross unit price and quantity of its U.S. sales of NFC is consistent with the Department's questionnaire instructions, which require respondents to "{r}eport the unit price recorded on the invoice for sales shipped and invoiced in whole or in part." Further, Fischer contends that section 772(b) of the Act requires the Department to use the actual price at which the product is first sold to the unaffiliated customer in calculating CEP.⁶ Thus, Fischer argues that the Department's failure to properly convert its U.S. sales of NFC to reflect the price actually paid by the customer is contrary to the Act. Consequently, according to Fischer, the Department should rely on the

⁶ Fischer cites several pre-Uruguay Round Agreement Act decisions by the Courts to support its assertion that the Department is required to use the actual price to the unaffiliated customer. See Smith-Corona Group v. United States, 713 F.2d 1568, 1572 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984) (where the Court held that the antidumping law attempts to "construct value on the basis of arm's length transactions"). See also PQ Corp. v. United States, 11 CIT 53; 652 F. Supp. 724, 741; Ct. Intl. Trade LEXIS 11; Slip Op. 87-11, citing S. Rep. No. 16, 67th Cong., 1st Sess. 12 (1921) (where Congress explained that the predecessor to CEP, exporter's sales price, "is defined in such a manner as to make the price the net amount returned to the foreign exporter").

properly-converted sales of NFC contained in Fischer's reported U.S. sales listing in its calculations for the final results.

The petitioners assert that the Department should not change its methodology with regard to Fischer's NFC sales and should continue to use the actual brix levels to convert U.S. NFC sales into pounds solids for price comparison purposes, as was done in prior segments of this proceeding. The petitioners note that Fischer raised this same argument in the previous administrative review where it was properly rejected by the Department. See OJ from Brazil Final Results at Comment 11. Further, the petitioners point out that this issue is currently subject to litigation at the CIT. See Fischer S.A. Comercio, Industria and Agricultura v. United States, Court No. 08-00277.

The petitioners note that, not only did they provide comments on this issue from the very beginning of this segment of the proceeding, but also the Department required Fischer to report the actual brix level for each of its POR U.S. sales of FCOJM and NFC in its supplemental U.S. sales questionnaire. However, the petitioners note that, in response to the Department's supplemental questionnaire, Fischer instead provided the "contract brix level" for all of its U.S. sales of NFC, while reporting the actual brix level of these sales in a separate field (i.e., USDABRIXU) which Fischer stated was not needed for calculation purposes. According to the petitioners, information provided by Fischer in response to the Department's supplemental questionnaires shows that its conversions of U.S. sales of NFC using the "contract brix level" result in distortions to both the price and quantity of such sales. The petitioners assert that a comparison of Fischer's conversion methodology to that using the actual weight (in pounds) and the actual brix level (as provided on the invoice) for one of Fischer's POR U.S. sales of NFC demonstrates that Fischer's conversion methodology is distortive. Thus, the petitioners maintain that the record of this proceeding contradicts Fischer's contention that the Department's should use the standard brix level to convert its U.S. sales of NFC from gallons to pounds solids. Consequently, the petitioners assert that the Department should continue to use the actual brix levels of each sale to convert Fischer's U.S. NFC sales into pounds solids for the final results.

Department's Position:

For the final results we have continued to convert Fischer's U.S. and home market sales of NFC to a pounds-solids basis using the actual brix levels reported for these sales. In order to perform our analysis and make product comparisons between Fischer's home market and U.S. sales, we must ensure that Fischer's reported home market and U.S. sales data are stated in a consistent unit of measure. Therefore, because Fischer sells NFC in gallons and FCOJM in pounds solids in the United States, and NFC and FCOJM in kilograms in the home market, we have converted all quantities into pounds solids.

In prior segments of this proceeding, Fischer also reported all of its U.S. sales on a pounds-solids basis and all of its home market sales on a kilogram basis, and we made all product comparisons on a pounds-solids basis, converting home market sales of all products into pounds solids using the actual brix reported. In the most recently completed segment, Fischer raised similar objections to the Department's calculation methodology. However, after considering these arguments, we found that they were not persuasive. Specifically, we stated:

. . . in this administrative review, Fischer itself reported its U.S. sales of both FCOJM and NFC in pounds solid and converted its NFC sales from gallons to pounds solid using the actual brix level of each sale. Further, Fischer has provided no evidence demonstrating that the existing methodology is invalid. Rather, Fischer has merely shown that the conversion of its U.S. sales from gallons to pounds solid using the actual brix results in a price that is different from the price converted using the standard brix without providing evidence which shows that: 1) the conversion from kilograms to pounds solid is distortive on the home market side; or 2) the comparison of home market and U.S. sales of NFC, when both are converted to pounds solid using the actual brix, is distortive. The fact that the per-unit price of NFC differs when a different conversion basis is used does not automatically establish that the price is distortive. Rather, it only demonstrates that the per-unit prices are different.

The Department has converted a respondent's U.S. sales from the basis on which the sales were made in many cases. For example, in 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), the Department converted 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. Therefore, for the final results and consistent with the methodology used in the LTFV investigation, we have not modified the conversion methodology used for the purposes of product comparisons between Fischer's home market and U.S. sales of NFC.

See OJ from Brazil Final Results at Comment 11.

In this segment of the proceeding, Fischer has provided no new arguments as to why our conversion methodology is distortive, nor why the rationale set forth above is invalid. Because brix measures the concentration of the OJ in question, and because the degree of concentration of the product affects the product's cost⁷ (and thus by extension its value), we find that it is more accurate to use the actual brix level in our analysis. Therefore, consistent with our decision in OJ from Brazil Final Results, we have continued to convert U.S. sales of NFC from per-gallon to per-pounds solids amounts using the actual brix of the merchandise.

Comment 10: Calculation of International Freight Expenses for Fischer

In this administrative review, Fischer reported that most of its U.S. sales 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. Therefore, for all sales shipped by Fischer's affiliate, we assigned the international

⁷ A more highly concentrated product contains more solid material.

freight rate charged by Fischer's affiliate to an unaffiliated party to restate them on an arm's-length basis.

Fischer disagrees with this decision, contending that use of a single freight expense is inaccurate because the company's ocean freight expenses vary by vessel and by destination. Specifically, Fischer notes that the invoices it provided to the Department demonstrate that its international freight expenses are comprised of two components: 1) the per-ton rate charged for the transportation of orange juice; and 2) a bunker fuel surcharge that is increased or decreased depending on the route of the vessel. According to Fischer, it provided a worksheet to the Department listing its vessel-specific international freight expenses during the POR which demonstrates that the international freight expenses it paid are unique to each vessel. Therefore, Fischer contends that the Department erred when it assigned the same international freight expense amount to all U.S. sales shipped by Fischer's affiliate because the Department assumed that Fischer incurred the same international freight expense and bunker fuel surcharge for each sale. According to Fischer, the bunker fuel surcharge shown on the invoice to the unaffiliated customer was calculated in a specific manner by Fischer's affiliate for its unaffiliated customer. Therefore, Fischer argues that it is arbitrary and capricious for the Department to apply this customer-specific bunker fuel surcharge to all of the sales shipped by its affiliate, as well as to apply the international freight expense amount specific to one vessel to all vessels operated by Fischer's affiliate.

In addition, Fischer contends that the Department's inclusion of the bunker fuel surcharge as a part of international freight expenses results in double counting in instances where Fischer's customer reimburses it for the bunker fuel surcharge. As a result, Fischer claims that the Department should rely on the invoice- and vessel-specific international freight amounts reported in its U.S. sales listing in its calculations for the final results.

The petitioners disagree with Fischer, noting that the invoice the Department used to assign Fischer's international freight expenses was the only information on the record which established an arm's length international freight rate. According to the petitioners, section 773(f)(2) of the Act directs the Department to ensure that all expenses between affiliates represent arm's-length transactions and to adjust them if they do not. See, e.g., 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 64731 (Nov. 8, 2004) (Rebar from Turkey) and accompanying Issues and Decision Memorandum at Comment 11. The petitioners find it telling that Fischer did not claim in its case brief that the international freight rates charged by its affiliate were at arm's length. Further, the petitioners maintain that there is no evidence to support either of Fischer's claims that: 1) there is a variable element to the bunker fuel surcharge for each shipment; or 2) the international freight rate used by the Department was not generally reflective of the rates the affiliate charged to unaffiliated customers. Finally, the petitioners note that, in response to a request from the Department, Fischer provided another invoice from its affiliate for the same voyage covered by the invoice to the unaffiliated party. According to the petitioners, that invoice conclusively demonstrates that the rates reported by Fischer for sales shipped by its affiliate were not at arm's length, regardless of the bunker fuel surcharge. Therefore, the petitioners assert that the Department should continue to assign all U.S. sales

shipped by Fischer's affiliate the international freight rate charged by its affiliate to an unaffiliated party to state them on an arm's-length basis.

Department's Position:

Section 773(f)(2) of the Act directs the Department to disregard transactions between affiliated parties when the amount representing that element does not fairly reflect the amount usually reflected in sales of subject merchandise under consideration in the market under consideration. In determining whether to use transactions between affiliated parties, our practice is to compare the transfer price either to 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 Rebar from Turkey at Comment 11. The section further states that if a transaction is disregarded and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated. See section 773(f)(2) of the Act.

For the final results, for all U.S. sales shipped by Fischer's affiliate, we have continued to assign the international freight rate charged by Fischer's affiliate to an unaffiliated party and to restate them on an arm's-length basis, as we did in the preliminary results. While Fischer contends that this freight rate is inaccurate for the majority of its U.S. sales, Fischer has provided no information to demonstrate that the international freight rates it was charged by its affiliate were at arm's length, nor has it claimed that these prices were, in fact, arm's-length transactions. Moreover, we disagree with Fischer that the use of a price to an unaffiliated party is either arbitrary or capricious. This price represents the best evidence of the price that Fischer's affiliate charges when it sets prices on an arm's-length basis. Because this price differs markedly from the prices that the affiliate charged Fischer for the same service, we cannot rely on the affiliated party prices in this instance.

Finally, regarding the alleged double-counting of the bunker fuel surcharge, there is no double counting because we accepted Fischer's bunker fuel adjustments as reported (i.e., in the field BILLADJU1) and included them as an offset to international movement expenses in our calculations for the preliminary results. Accordingly, we find that using the international freight rate charged by Fischer's affiliate to an unaffiliated party, which includes a bunker fuel surcharge component, does not result in the double-counting of this surcharge.

Comment 11: Window Period Sales for Fischer

Fischer did not report its home market window period sales of foreign like product in the course of this administrative review. According to the petitioners, Fischer declined to report these sales because it claimed that the Department would not need to use such sales in its margin calculations. The petitioners contend that the calculations for the preliminary results make clear that, if Fischer had provided window-period information, the Department may have been able to make identical matches for certain U.S. sales of NFC, instead of relying on similar matches for these sales. The petitioners note that, in the preceding administrative review, Fischer attempted to convince the Department to disregard certain home market window-period sales of NFC. See OJ from Brazil Final Results at Comment 14. The petitioners point out that in OJ from Brazil

Final Results, the Department properly rejected Fischer’s argument and thus followed the window period methodology set forth in the regulations. According to the petitioners, the Department will only look for similar home market sales after it attempts to find home market sales of identical merchandise during either: 1) the same month as the U.S. sale; and 2) if no such sales exist, the “90/60” day window surrounding the month of the U.S. sale. See Policy Bulletin 92/4 (Dec. 15, 1992); and Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews, 61 FR 66472, 66490-66491 (Dec. 17, 1996).

The petitioners maintain that, in the instant proceeding, the Department did not have the opportunity to follow its normal methodology because Fischer did not report its window period sales to the Department. According to the petitioners, under section 776(a)(2) of the Act, if a party withholds information requested by the Department, the Department may make a determination based on the facts available. The petitioners argue that, because Fischer failed to provide its home market window period sales, the Department should assign Fischer a dumping margin of 16.51 percent, the all-others rate calculated in the LTFV investigation, for all of Fischer’s sales of NFC during the POR.

Fischer contends that the petitioners’ argument is baseless, given that it notified the Department that it made no home market sales of NFC during the window period of concern to the petitioners (i.e., the 60-day period after the POR) in its January 21, 2009, supplemental questionnaire response.

Department’s Position:

We disagree with the petitioners’ claim that Fischer prevented the Department from making identical matches for certain U.S. sales of NFC by not reporting its window-period home market sales of NFC. In its January 21, 2009, supplemental questionnaire response at page 2, Fischer stated the following regarding its window-period home market sales:

“It is not necessary for Fischer to report the window-period sales in the home market sales listing. For FCOJ, Fischer has sales of FCOJ in every month during the period of review. For NFC sales, the first sale took place outside of the gap period and Fischer has no sales of NFC during two months after the POR.”

Therefore, we find that Fischer properly did not report its home market window period sales of NFC because it had no such sales to report. As a result, we have continued to rely on Fischer’s reported home market and U.S. sales information in our calculations for the final results.

Comment 12: Calculation of Fischer’s U.S. Dollar Borrowing Rate

In the preliminary results, we based Fischer’s U.S. credit expenses on the U.S. dollar borrowing rate reported in Exhibit 20 of its February 2, 2009, supplemental questionnaire response. In this exhibit, Fischer calculated a weighted average short-term interest rate using POR U.S. dollar

borrowings incurred by both Fischer and its U.S. affiliate, CNA. The petitioners contend that the Department should use only CNA's short-term borrowing rate to calculate Fischer's U.S. credit expenses for the final results. According to the petitioners, because all of Fischer's U.S. sales during the POR were CEP transactions, CNA's U.S. dollar borrowings are the only ones relevant to calculating U.S. price for these sales.

Fischer maintains that it reported its own U.S. dollar borrowings consistent with the Department's instructions in the section C supplemental questionnaire. Fischer notes that the petitioners have cited no legal authority to suggest that either: 1) the Department's instructions to Fischer were incorrect; or 2) the foreign producer's short-term U.S. dollar borrowing rate is irrelevant to the calculation of U.S. credit expenses. Therefore, Fischer urges the Department to disregard the petitioners' suggested treatment and to continue to base the calculation of U.S. credit expenses on Fischer's reported weighted-average U.S. dollar borrowing rate for the final results.

Department's Position:

For the final results, we have reconsidered our methodology and have now recalculated Fischer's POR short-term U.S. dollar borrowing rate basing it only on the borrowings of CNA, rather than the weighted-average of the POR borrowings of both CNA and Fischer. Because Fischer does not prepare consolidated audited financial statements (see Fischer's December 18, 2008, response at page 2 and Exhibit 1) and because Fischer made only CEP sales during the POR, we find that CNA's borrowings more closely measure the opportunity cost associated with extending credit to CNA's U.S. customers. Therefore, we have recalculated U.S. credit expenses using this revised U.S. dollar borrowing rate for the final results. For the details of the revised short-term U.S. dollar borrowing rate used in our calculations, see the August 4, 2009, memorandum from Elizabeth Eastwood, Senior Analyst, to the file entitled, "Calculations Performed for Fischer S.A. Comercio, Industria, e Agricultura (Fischer) for the Final Results in the 07-08 Antidumping Duty Administrative Review of Certain Orange Juice from Brazil."

Comment 13: Raw Material Cost-Allocation Methodology for Fischer

The petitioners contend that the Department should not use Fischer's revised cost database, submitted as part of Fischer's April 27, 2009, supplemental section D questionnaire response, for purposes of the final results. According to the petitioners, this database reflects a change in the raw material cost-allocation methodology from that used in Fischer's original section D submission, submitted on June 13, 2008, and improperly shifts costs from NFC to FCOJ. The petitioners claim that Fischer has failed to provide an adequate explanation for its revised costs and the change in methodology is Fischer's attempt to manipulate costs in order to achieve a desired dumping margin. The petitioners urge the Department to reject Fischer's reported costs submitted in its supplemental section D questionnaire response and instead use the costs submitted in its original section D response for the final results.

According to Fischer, it revised its reported costs in order to reflect the Department's preferred methodology with respect to the allocation of OJ direct material costs. Fischer explains that the date of the final results for the prior review fell in the interim period between the date of its

original section D questionnaire response and the date of its supplemental section D questionnaire response in the current administrative review. Therefore, Fischer states that it merely incorporated the raw material cost-allocation methodology used by the Department in the prior administrative review. Accordingly, Fischer asserts that the Department should use its revised costs in the calculations for the final results.

Department's Position:

Fischer's costs as revised and submitted in its supplemental section D questionnaire response reflect the raw material cost-allocation methodology used in the Department's cost adjustments for the prior administrative review. We explained the raw material cost-allocation methodology used for Fischer in the final results of that review. See OJ from Brazil Final Results at Comment 18. We disagree with the petitioners that Fischer failed to explain the change in methodology it employed in reporting its revised costs. Fischer provided the reasoning behind this change in the narrative and an explanation in a worksheet in its supplemental section D questionnaire response. See Fischer's December 18, 2008, response at page 14 and page 4 of Exhibit 13. Therefore, we have continued to use Fischer's revised costs in our calculations for the final results.

Comment 14: Capitalized Costs Related to the Videira Plant for Fischer

The petitioners argue that Fischer failed to account for all costs related to the construction and acquisition of new fixed assets at the Videira plant in its reported costs. The petitioners acknowledge that Fischer has revised its reported costs after the preliminary results to include the depreciation on the new fixed assets related to the construction of the Videira plant. However, petitioners also state that Fischer has not provided any detail regarding the complete investment costs at Videira. Therefore, the petitioners urge the Department to include the entire capitalized costs related to the Videira plant in the reported costs.

Fischer claims that it has provided all necessary detail on the capitalized costs related to the new Videira plant and that it included depreciation on the plant in the revised costs submitted on April 27, 2009.

Department's Position:

We disagree that all of the capitalized costs relating to the construction of the new orange juice production line at the Videira plant belong in the reported costs. In Micron Technology, Inc., v. U.S., 893 F. Supp 21, 844 (CIT 1995) (Micron), the Court stated "To the extent test production and related construction (costs) provide a benefit to current and future production, such costs are properly capitalized and amortized over the periods in which these benefits accrue." Consistent with Micron, Fischer properly reported its costs inclusive of only the current year's depreciation expense associated with the construction of the Videira plant. Furthermore, we disagree with the petitioners that Fischer failed to provide detail regarding the costs related to constructing the new orange juice production line at the Videira plant. Fischer provided a list of costs related to the construction of the Videira plant and showed that those costs were capitalized in its normal books and records by reconciling them to its financial statements. See Fischer's March 5, 2009, response, at Exhibit 1. Therefore, we relied on Fischer's revised cost database submitted on

April 27, 2009, which includes depreciation on the Videira plant, in our calculations for the final results.

Comment 15: Omission of Certain Costs in Calculating Fischer's COM

The petitioners claim that Fischer omitted certain costs shown on the trial balance from its reported costs.⁸ The petitioners contend that Fischer has not provided an explanation as to why these costs should be excluded.

Fischer asserts that these costs do not represent a component of total costs, but rather are investments in fixed assets. Therefore, Fischer maintains that they were appropriately excluded from the reported costs.

Department's Position:

We agree that the costs in question are not a component of Fischer's COM. An examination of the fiscal year-end trial balance shows that the account balances are transferred to fixed assets (i.e., the costs are capitalized) and should not be included in Fischer's reported costs. See Micron. Therefore, we have accepted Fischer's costs as reported in its April 27, 2009, submission and used these costs in our final results margin calculations.

Comment 16: Calculation of the G&A Expense Ratio for Fischer

The petitioners state that the Department failed to include in the G&A expense ratio calculation certain expenses categorized as non-operating expenses on Fischer's 2007 income statement. The petitioners note that Fischer's explanations given in response to the Department's supplemental questionnaire on certain non-operating expenses show that they relate to the merchandise under consideration and should be included in the G&A expense ratio calculation. The petitioners add that, in the last administrative review, the Department included certain of these non-operating expenses and should do the same in this administrative review.

Fischer argues that the non-operating expenses in question: 1) do not relate to the production of the merchandise under consideration; 2) were extraordinary in nature; and 3) were properly excluded from the reported costs.

Department's Position:

The categories of expenses listed in Fischer's 2007 financial statements, "net non-operating income (expenses)" and "net other operating income (expenses)," encompass multiple incomes and expenses. See Fischer's June 10, 2009, response at Exhibit 16 (containing Fischer's financial statements) and Exhibit 13 at page 45 (containing Fischer's trial balance). We disagree that Fischer has not provided justification to support the exclusion of certain non-operating expenses and other operating expenses from the reported costs. Fischer provided responses to our questions regarding specific accounts under both expense categories. See Fischer's

⁸The account names are proprietary information and, thus, cannot be discussed here.

December 18, 2008, response at Exhibit 11. Furthermore, contrary to the petitioners' claim, Fischer's reported G&A expense ratio, as adjusted in the preliminary results, takes into account all of the items for which the Department recalculated the G&A expense ratio in the first administrative review. See the cost database submitted with Fischer's April 27, 2009, response. In the first administrative review, we adjusted the G&A expense ratio calculation, in part, for certain expenses categorized as net other operating income (expenses) and not non-operating income (expenses) on Fischer's 2006 financial statements. See OJ from Brazil Final Results at Comment 19. Specifically, in the first administrative review we added two items to the G&A expense ratio calculation from Fischer's 2006 trial balance: 1) losses with labor claims; and 2) provision for losses on fruit contracts. In the current administrative review, Fischer included the losses with labor claims from the 2007 trial balance in its reported G&A expense ratio. See Fischer's June 13, 2008, response at Exhibit 17. For the preliminary results of the current review, we adjusted Fischer's reported G&A expense ratio to include the provision for losses on fruit contracts from Fischer's 2007 trial balance. See the March 31, 2009, memorandum to Neal M. Halper from Frederick W. Mines entitled, "Antidumping Duty Administrative Review on Certain Orange Juice from Brazil, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results." Therefore, we find that no further adjustments to Fischer's G&A expense ratio are necessary. Consequently, we have continued to rely on Fischer's reported G&A expense ratio, as adjusted in the preliminary results, in our calculations for the final results.

Comment 17: Calculation of the Financial Expense Ratio for Fischer

The petitioners claim that the Department should disallow the interest income offset to financial expenses because Fischer did not break out the interest income between that which was generated from short-term sources and that which was generated from long-term sources. Also, petitioners point out that a portion of Fischer's net foreign exchange gain is generated from transactions with an affiliate. Therefore, the petitioners argue that the portion of the net exchange gain relating to the affiliate should be disallowed as an offset to the financial expenses.

Fischer states that its interest income is not overstated and is related to the production and sale of the merchandise under consideration and therefore is a valid offset to financial expenses. Fischer also points out that, assuming no interest income is claimed as an offset, the net financial expense rate would still be negative and therefore would be zeroed by the Department. Also, Fischer argues that the net foreign exchange gain is recorded in its financial statements in accordance with Brazilian GAAP and is used as an offset to the financial expenses consistent with the Department's methodology.

Department's Position:

We disagree with the petitioners that the portion of the net exchange rate gains in question should be disallowed on the basis that the gains are generated from transactions with an affiliate. The transactions between Fischer and Fischer's affiliate which give rise to the exchange gains and losses are denominated and settled in U.S. dollars. See Fischer's March 5, 2009, response at page 4. The affiliate's name and the specific kinds of transactions are business proprietary and cannot be discussed here; therefore, see the March 5, 2009, response at page 4 for a description

of these transactions. The exchange variation between U.S. dollars and Brazilian reais are calculated based on the amount of the transactions and the exchange rate. Id. Fischer has provided calculations of the exchange gains and has demonstrated that the net gains related to the transactions with its affiliate are calculated based on arms-length exchange rates as published by the Brazilian Central Bank. Id. at Exhibits 5 and 6. With regard to the second part of petitioners' argument regarding Fischer's failure to break out the interest income between that which was generated from short-term sources and that which was generated from long-term sources, because net foreign exchange gains exceed Fischer's financial expenses, this issue is moot.

Recommendation

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

Agree_____

Disagree_____

 Ronald K. Lorentzen
 Acting Assistant Secretary
 for Import Administration

 (Date)