

DATE: August 5, 2008

MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review on Certain Orange Juice from Brazil –
August 24, 2005, through February 28, 2007

Summary

We have analyzed the comments of the interested parties in the 2005-2007 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
2. Granting an Offset for U.S. Duty Drawback
3. Ministerial Errors in the Preliminary Results
4. Universe of Reviewed U.S. Sales Transactions

Company-Specific Issues

5. Constructed Export Price (CEP) Offset for Sucocitrico Cutrale, S.A. (Cutrale)
6. Treating Sales to One of Cutrale’s Home Market Customers as Affiliated Party Transactions
7. Calculation of CEP Profit for Cutrale

8. The Calculation of the Denominator used in the General and Administrative (G&A) and Financial Expense Ratios for Cutrale
9. Valuation of Fruit Purchased from Affiliates for Cutrale
10. Inclusion of Export Financing Expenses in the Calculation of the Financial Expense Ratio for Cutrale
11. Unit of Measure for Comparison Purposes for Not-from-Concentrate Orange Juice (NFC) for Fischer S.A. Comercio, Industria, and Agricultura (Fischer)
12. Product Matching Methodology for Fischer
13. Granting a Quantity Adjustment for Fischer's NFC Sales
14. Fischer's Home Market NFC Sales Used for Comparison Purposes
15. The Application of Inventory Carrying Costs by Control Number (CONNUM) for Fischer
16. The Calculation of Harbor Maintenance Fees for One U.S. Sales Observation for Fischer
17. Request to Treat Two of Fischer's U.S. Sales as Export Price (EP) Transactions
18. Fischer's Raw Material Cost Allocation Methodology
19. Calculation of Fischer's G&A Expense Ratio

Background

On April 7, 2008, 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 and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 18773 (Apr. 7, 2008) (Preliminary Results). The period of review (POR) is August 24, 2005, through February 28, 2007.

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 corrected a ministerial error in Cutrale's margin program regarding the treatment of billing adjustments and other discounts for U.S. sales, and we revised the conversion of Fischer's home market net prices and price adjustments from per-kilogram amounts to per-pounds-solids amounts using the brix level reported for each home market product. See Comment 3;
- We removed certain of Fischer's U.S. sales with entry dates preceding the POR from our analysis for the final results because these U.S. sales are not subject to the antidumping duty order on OJ from Brazil. We have also removed U.S. sales made by both respondents with entry dates during the period beginning February 21, 2006, and ending March 2, 2006 (i.e., the period after the expiration of provisional measures and before the date the International Trade Commission (ITC) published its final determination), because

these U.S. sales are also not subject to the antidumping duty order on OJ from Brazil. See Comment 4;

- We offset Cutrale’s U.S. repacking costs by drum and pallet revenue. See Comment 7;
- We recalculated Fischer’s home market and U.S. inventory carrying costs to base them on Fischer’s revised cost of manufacture (COM) for NFC and frozen concentrated orange juice for manufacture (FCOJM). See Comment 15;
- We recalculated the harbor maintenance fee for one of Fischer’s U.S. sales. See Comment 16;
- We calculated the cost of Fischer’s self-produced oranges used in the production of in-scope merchandise using the Department’s normal methodology. See Comment 18; see also the August 5, 2008, memorandum from Sheikh Hannan to Neal Halper entitled, “Cost of Production and Constructed Value Adjustments for the Final Results – Fischer S/A – Agroindustria” (Fischer Final Cost Calculation Memorandum); and
- We included lemon and grapefruit juice costs in the cost of goods sold (COGS) denominator of Fischer’s G&A expense ratio calculation. See Comment 19; see also the Fischer Final Cost Calculation Memorandum.

Discussion of the Issues

General Issues

Comment 1: Offsetting of Negative Margins

In the preliminary results, we followed our standard methodology of not using non-dumped comparisons to offset or reduce the dumping found on other comparisons (commonly known as “zeroing”). Cutrale and Fischer 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. Cutrale and Fischer 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. Cutrale and Fischer 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) (U.S.-Stainless Steel (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. Cutrale points out that the date of the initiation of this administrative review is after the date of WTO's ruling in U.S.-Zeroing (Japan).

The petitioners¹ respond to Fischer's and Cutrale's "zeroing" claims 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 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 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); NSK, Ltd. V. United States, 510 F.3d 1375 (CAFC 2007) (NSK). Furthermore, the petitioners state 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 U.S.C. 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 on practice in response to a WTO report. See 19 U.S.C. 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

¹ The petitioners are Florida Citrus Mutual, A. Duda & Sons, Citrus World Inc., and Southern Gardens Citrus Processing Corporation.

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 state that the Department has responded to the WTO’s decision without a change to the practice of “zeroing.” See CTL from Korea at Comment 2. Additionally, the petitioners maintain that the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews in response to U.S.-Zeroing (Japan). See Corus II, 502 F.3d at 1374-75; and NSK, 510 F.3d at 1377-80. 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 in these final results.

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 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 1342; and Corus I, 395 F.3d at 1347-49.

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 CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA. See Corus I, 395 F.3d at 1347-49; accord Corus II, 502 F.3d at 1375; and NSK, 510 F.3d at 1375.

With respect to U.S.-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 77722. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See Zeroing Notice, 71 FR at 77724. As discussed above, the CAFC found that WTO reports are without effect under U.S. law until they are implemented pursuant to the statutory scheme provided in the URAA. Id. The WTO report in U.S.-Stainless Steel (Mexico) has not been implemented pursuant to the statutory scheme and the parties to that dispute settlement are currently negotiating a reasonable period of time for implementation.

With respect to U.S.-Zeroing (Japan), and as discussed above, Congress has adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports. See, e.g., 19

U.S.C. 3538. 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 U.S.C. 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 U.S.C. 3533(g); see also Zeroing Notice, 71 FR at 77724. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure. With regard to U.S.-Zeroing (Japan), it is the position of the United States that appropriate steps have been taken in response to that report and those steps do not involve a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review. Furthermore, in response to U.S.-Zeroing (Japan), the CAFC has repeatedly affirmed the permissibility of denying offsets in administrative reviews. See Corus II, 502 F.3d at 1374-75; and NSK, 510 F.3d at 1375.

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 consistent 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 export transactions that exceed NV in this review.

Comment 2: Granting an Offset for U.S. Duty Drawback

In the final determination of the less-than-fair-value (LTFV) investigation, we offset the U.S. customs duties reported by both Cutrale and Fischer by the U.S. duty drawback amounts reported by each company. See Certain Orange Juice from Brazil: Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances, 71 FR 2183 (Jan. 13, 2006) (Orange Juice from Brazil Investigation), and accompanying Issues and Decision Memorandum at Comment 5. In the LTFV investigation, we stated that we intended to require respondents in subsequent segments of this proceeding to report U.S. duty drawback based on the amount of drawback received during the POR. Id. Consistent with this statement, in the preliminary results, we accepted the U.S. duty drawback amounts based on the refunds each company received during the POR, and we treated these amounts as an offset to each company's reported U.S. duty expenses. See Preliminary Results, 73 FR at 18775.

The petitioners disagree with the Department's treatment of U.S. duty drawback, arguing that it is contrary to the terms of both the Act and the Department's regulations. While the petitioners acknowledge that the Department's approach is consistent with that taken during the LTFV investigation, they note that the issue is currently on appeal before the CAFC. See Florida Citrus Mutual, et. al. v. United States, Appeal No. 2008-1102.

Specifically, the petitioners contend that, under section 772 of the Act, the price used to establish EP or CEP must be reduced by U.S. import duties which are related to bringing the subject merchandise from the export country to the place of delivery in the United States. The petitioners interpret this provision as requiring the Department to deduct from U.S. price the amount of import duties that affected the price charged for the imported subject merchandise during the POR. In this administrative review, the petitioners claim that the only U.S. import duties which were

included in the price paid by the first unaffiliated customer and were incidental to bringing the subject merchandise into the United States were the U.S. duties imposed at the time of importation. The petitioners assert that the records of both this administrative review and the LTFV investigation show that the respondents' cost of importing the subject merchandise into the United States was the full U.S. import duty and that this full cost was included in their prices to the U.S. customers, regardless of any U.S. duty drawback later received after exporting substitute merchandise. Furthermore, the petitioners contend that it is unreasonable for the Department to offset U.S. duties paid on imports during the POR by U.S. duty drawback received on imports which occurred prior to the POR and have no relationship to the sales under review. According to the petitioners, the Act is only concerned with the price of sales of the subject merchandise during the POR and any adjustments related to that price.

The petitioners further note that, in an antidumping duty investigation, the Department's regulations direct the Department to examine merchandise sold during the four most recently completed fiscal quarters as of the month preceding the month in which the petition was filed. See 19 CFR 351.204(b)(1). Thus, the petitioners claim that it makes no sense for the Department to adjust sales prices during the POR by funds which bear no relationship to POR sales. Consequently, according to the petitioners, the Department should end its practice of offsetting U.S. customs duties by U.S. duty drawback because it allows the respondents to manipulate the dumping margin through unrelated exports involving non-subject merchandise.

Cutrale and Fischer disagree with the petitioners, noting that the Department's decision in both the LTFV investigation and this administrative review was based on detailed information submitted in response to the Department's questionnaires. Moreover, the respondents point out that the Court of International Trade (CIT) affirmed the Department's decision to grant an adjustment for U.S. duty drawback in the LTFV investigation. See Florida Citrus Mutual, et. al. v. United States, 515 F. Supp. 2d 1324 (CIT 2007) (Florida Citrus Mutual). Cutrale maintains that, while it is true that this issue is on appeal before the CAFC, any reversal by the Department in the final results would defy not only its own practice but also the CIT. Cutrale asserts that such a reversal by the Department would not be sanctioned by the courts.

Cutrale notes that the CIT held that the term "U.S. import duties" is undefined in the Act and therefore subject to interpretation by the Department. Id. Additionally, Cutrale points out that the CIT found the Department's decision to grant an offset for U.S. duty drawback was within its discretion. Furthermore, Cutrale maintains that the CIT stated that the U.S. duty drawback refunds were clearly included in the U.S. price and therefore correctly adjusted by the Department. Id. Therefore, Cutrale and Fischer assert that the Department should continue to grant an offset to U.S. duty expenses for U.S. duty drawback in the final results.

Department's Position:

We have continued to accept the U.S. duty drawback amounts reported by both Cutrale and Fischer, and we have treated these amounts as offsets to each respondent's U.S. duty expenses, in our calculations for the final results. In Orange Juice from Brazil Investigation, we determined

that it was appropriate to offset U.S. duty expenses by the U.S. duty drawback received by Cutrale and Fischer, stating, in relevant part:

As a threshold matter, we disagree with the petitioners that the Act limits adjustments for duty drawback to amounts contemplated under section 772(c)(1)(B) of the Act. While it is true that this section frames drawback in the context of home market export programs, this section of the Act does not apply here. Rather, the relevant section is section 772(c)(2)(A) of the Act, which states that the price used to establish CEP shall be

(2) reduced by –

(A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States....

The Department has traditionally interpreted this provision as signifying that it must deduct from the U.S. starting price all movement expenses incurred by the respondent which are incident to importing subject merchandise into the United States. Although the issue of whether to offset U.S. customs duties by the amount of duties refunded under U.S. duty drawback law has not been raised in previous cases, we find no bar to granting such an offset in this case.

In its simplest terms, the question before the Department is how to determine the amount of “United States import duties” to be deducted. After carefully analyzing this issue, we have concluded that the statute’s reference to U.S. import duties does not preclude consideration of refunds of U.S. import duties paid on subject merchandise and to encompass the net duty experience of the respondents, rather than the gross amount of duties paid to CBP. Thus, a deduction for net import duties in this case is consistent with the statute’s requirement to reduce U.S. price by the movement expenses included in such price. We find that this interpretation results in a fair comparison to NV (despite the petitioners’ assertion to the contrary) because it results in the calculation of the ex-factory price for CEP based on the respondents’ actual U.S. customs duty cost experience for importations of subject merchandise.

We disagree with the petitioners that the duty refunds in question must be linked to specific U.S. sales transactions in order to be considered as legitimate offsets to POI customs duty expenses. It is the nature of duty drawback programs in general that drawback granted under these programs could be associated with any like amount of duties paid upon importation. While it is true that there is no necessary correspondence between drawback granted on exports and those paid on imports, it

would be unreasonable to conclude from this fact that substitution drawback programs do not impact a company's net duty costs. Given that companies have up to three years from the date of the importation of subject merchandise to claim such refunds, it would similarly be unreasonable to require these companies not only to match exports to specific import transactions during the POI but also to receive payment from CBP by this time. Because of this long lag time between the importation of subject merchandise and the corresponding U.S. duty drawback claim, we find that offsetting the respondents' reported duties by U.S. duty refunds received during the POI more accurately reflects a company's actual net duty expenses.

See Orange Juice from Brazil Investigation at Comment 5.

Further, in the LTFV investigation, we clearly articulated how we would require respondents in any future administrative reviews to report U.S. duty drawback, stating, "We note that, in the event that the Department issues an antidumping duty order in this proceeding, we intend to require respondents in subsequent segments to report U.S. duty refunds based on the amount of those refunds received during the review period." *Id.* Thus, in their U.S. sales listings, Cutrale and Fischer reported per-unit U.S. duty drawback on the basis of the refunds received during the POR. See Cutrale's June 12, 2007, response at pages C-26 and C-27. See also Fischer's May 31, 2007, response at page C-20.

Finally, the CIT has upheld the Department's treatment of U.S. duty drawback in the LTFV investigation. See Florida Citrus Mutual, 515 F. Supp. 2d at 1324. While this issue is on appeal before the CAFC, the Department's determination is presumed correct unless and until a federal court "renders a decision that is contrary to that determination..." See Timken Co. v. United States, 893 F.2d 337, 342 (CAFC 1990). Accordingly, we find it would be inappropriate to change our methodology related to U.S. duty drawback absent a final ruling from the CAFC on this issue. For a complete discussion of the Department's findings regarding U.S. duty drawback, see Orange Juice from Brazil Investigation at Comment 5, which we incorporate herein by reference.

Comment 3: Ministerial Errors in the Preliminary Results

The petitioners assert that the Department made two ministerial errors in its preliminary results calculations for each respondent, and they request that the Department correct these errors in the final results. Regarding Cutrale, the petitioners maintain that the Department deducted post-sale discounts from U.S. price, despite Cutrale's statement that they should be added, while it added billing adjustments to U.S. price, despite Cutrale's statement that they should be deducted. Regarding Fischer, the petitioners argue that the Department incorrectly used the brix level of Fischer's U.S. sales to convert the net home market prices and adjustments from kilograms to pounds solid, rather than the brix level of the foreign like product reported in the home market sales listing. Moreover, the petitioners maintain that the Department failed to convert Fischer's reported indirect selling expenses incurred in the country of manufacture (*i.e.*, DINDIRSU) from Brazilian reais to U.S. dollars in its calculations for the preliminary results.

Cutrale did not comment on this issue. Fischer agrees that both of the items alleged by the petitioners constitute ministerial errors, and with one exception, it agrees with the petitioners' proposed corrections. Specifically, Fischer disagrees that the Department should convert its home market net prices and adjustments for NFC from kilograms to pounds solid using the actual brix level reported in the home market sales listing. As noted below (see Comment 11), Fischer argues that the Department should use the standard brix of NFC to convert its NFC sales from kilograms to pounds solid in the home market sales listing.

Department's Position:

We have reviewed our calculations and agree that both items for Cutrale and the first item for Fischer constitute ministerial errors. Thus, we have corrected our calculations to add other discounts and subtract billing adjustments from Cutrale's U.S. price and to convert Fischer's home market sales from kilograms to pounds solid using the brix level of each home market sale. We disagree with Fischer that it is appropriate to perform any conversions for NFC using the standard brix level because Fischer has not demonstrated that the Department's established methodology is distortive. For further discussion, see Comment 11, below.

Regarding the second item alleged by the petitioners for Fischer, however, we disagree that this item constitutes a ministerial error. Although Fischer, in its December 17, 2007, response at Exhibit 4, indicated that it reported DINDIRSU on a reais-per-pounds solid basis, the calculation of this per-unit expense demonstrates that this statement is incorrect. Specifically, applying the ratio for indirect selling expenses incurred in the country of manufacture to Fischer's gross unit prices (reported as U.S. dollar-per-pounds solid amounts) results in DINDIRSU amounts reported on a U.S. dollar-per-pounds solid basis. Therefore, it is not necessary to convert Fischer's reported DINDIRSU amounts and we have continued to rely on them as reported for the final results.

Comment 4: *Universe of Reviewed U.S. Sales Transactions*

Fischer states that the Department included in its margin calculations for the preliminary results U.S. sales which were imported into the United States before the POR. According to Fischer, all of these sales were imported prior to the date of suspension of liquidation in this administrative review and have already cleared customs. Thus, Fischer asserts that the Department should revise its calculations for the final results to remove these sales from its analysis.

The petitioners did not comment on this issue.

Department's Position:

The Department's normal practice for CEP sales is to review each transaction which has a date of sale during the POR. See Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27314-15 (May 19, 1997) (Preamble). However, in the Preamble, 62 FR at 27314 (discussing section 351.212(b)(1) of the Department's regulations), the Department recognized that "{s}ales

of merchandise that can be demonstrably linked with entries prior to the suspension of liquidation are not subject merchandise and therefore not subject to review by the Department. Merchandise that entered the United States prior to the suspension of liquidation (and in the absence of an affirmative critical circumstances finding) is not subject merchandise within the meaning of section 771(25) of the Act.” See also Certain Stainless Wire Rods from France: Final Results of Antidumping Duty Administrative Review, 61 FR 47874, 47875-47876 (Sept. 11, 1996); and Certain Frozen Warmwater Shrimp From the People's Republic of China: Notice of Final Results and Rescission, in Part, of 2004/2006 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 52049 (Sept. 12, 2007), and accompanying Issues and Decision Memorandum at Comment 10. In this case, Fischer demonstrated that certain sales of subject merchandise were linked with entries prior to the suspension of liquidation. See Fischer’s U.S. sales listing submitted with its March 13, 2008, response. Therefore, in accordance with the Department’s practice, we have excluded from our analysis Fischer’s U.S. sales which entered prior to the suspension of liquidation because they are not subject merchandise within the meaning of section 771(25) of the Act.

Additionally, in the LTFV investigation, we instructed U.S. Customs and Border Protection (CBP) to discontinue the suspension of liquidation for entries of certain orange juice made between February 20, 2006, and March 3, 2006 (i.e., the “gap period”).² The Department’s practice is to exclude those entries from its analysis which were made when suspension of liquidation was not in effect. See Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands; Final Results of Antidumping Duty Administrative Review, 69 FR 33630 (June 16, 2004), and accompanying Issues and Decision Memorandum at Comment 5, where we stated:

In the instant review, the gap period entries occurred during a period when suspension of liquidation was lifted. Because suspension of liquidation was lifted on these entries, we have not imposed antidumping duties on these entries. Since no duties have been assessed on these entries, it follows that it is improper to include sales of merchandise which entered during the gap period in the calculation of the dumping margin.

See also Notice of Preliminary Results of Antidumping Duty Administrative Review: Low Enriched Uranium from France, 69 FR 3883, 3884 (Jan. 27, 2004), unchanged in Notice of Final Results of Antidumping Duty Administrative Review: Low Enriched Uranium From France, 69 FR 46501 (Aug. 3, 2004). Therefore, for purposes of the final results, we excluded any sales made by the respondents which entered the United States during the gap period.

² We note that the gap period instructions sent to CBP in the LTFV investigation directed CBP to discontinue suspension of liquidation between February 20, 2006, and March 2, 2006; however, the ITC published its final determination on March 3, 2006. Therefore, the gap period ended on March 2, 2006, and suspension should have been reinstituted on March 3, 2006.

Company-Specific Issues

Comment 5: CEP Offset for Cutrale

In the preliminary results, we analyzed the selling functions Cutrale performed to make sales in the home market and to its U.S. affiliate, Citrus Products International (CPI). Based on this analysis we determined that Cutrale's sales to the U.S. and home markets were made at the same level of trade (LOT) during the POR. Therefore, we did not grant Cutrale either an LOT adjustment or a CEP offset in our calculations for the preliminary results. See Preliminary Results, 73 FR at 18776.

Cutrale objects to the Department's denial of its CEP offset claim. First, Cutrale claims the record evidence shows that it is entitled to a CEP offset. Cutrale contends that the selling functions chart provided by Cutrale in Exhibit 14 of its May 21 response shows that its sales in the home market are at a more advanced LOT than its sales to its U.S. affiliate. Cutrale notes that this chart shows that for its U.S. sales, Cutrale provides freight and delivery services, and performs only a limited amount of packing and order input/processing. Cutrale also argues that it does not negotiate price with CPI, but merely ships the product when CPI orders it. In contrast, Cutrale contends that its selling functions chart shows that it engages in significant selling activities in its home market, including employing separate sales personnel for home market sales and negotiations, monitoring product performance and quality, providing separate storage services for some home market sales, and engaging in significant product packing. Cutrale claims that the price to unrelated customers in the home market accounts for greater selling activities than its price to CPI.

Second, Cutrale claims that the Department incorrectly included the selling functions of its U.S. affiliate in its analysis. Cutrale notes that the Department included customer contact and price negotiation, order processing, freight and customs services, and inventory maintenance in its analysis. According to Cutrale, all of these selling functions were performed by CPI, not Cutrale itself. Cutrale argues that, for the Department to correctly analyze its LOT, it should compare the selling functions Cutrale performed to sell to its domestic customers in Brazil to the selling functions it performed to sell to its U.S. affiliate. As support for its assertion, Cutrale cites The Torrington Company v. United States, 68 F. 3d 1347 (CAFC 1995). Cutrale argues that it is entitled to a CEP offset under this analysis because it performed minimal selling functions to sell to its U.S. affiliate, while performing more considerable selling functions to sell to its home market customers.

Third, Cutrale argues that the four "core selling functions" analysis the Department used to analyze Cutrale's LOT is inconsistent with the Department's practice and not in accordance with the law. Cutrale asserts that this analysis oversimplifies a number of selling functions and groups them into four basic categories prior to comparison. Cutrale argues that its three U.S. selling functions could not possibly be categorized into four separate selling functions, and therefore, Cutrale must have fewer "core selling functions" in the U.S. market than in its home market. Thus, Cutrale contends that, intuitively, the selling functions it performed in selling to its affiliate must be grouped into fewer "core selling functions" than the 12 selling functions it performed in

the home market. Cutrale further claims that only one office in Import Administration uses this “core selling functions” analysis and characterizes this LOT analytical framework as unique, unusual, and aberrational. Cutrale cites 12 cases, all from the same office within Import Administration, claiming that these are the only cases in which the “core selling functions” methodology has been used.³ According to Cutrale, this “core selling functions” methodology is only used to deny CEP offset claims.

Finally, Cutrale contends that there is objective evidence on the record to substantiate its CEP offset claim. Cutrale alleges that, in the LTFV investigation, the Department denied its request for a CEP offset because Cutrale was unable to establish the measurable difference in the selling functions performed in selling to its home market and the United States with objective evidence. Cutrale concedes that in this review it stated that there were no significant changes in the selling functions it performed between the LTFV investigation and this review; however, it argues what has changed is its ability to objectively establish the difference in selling functions between the two markets. Cutrale points out that, unlike in the LTFV investigation, in this review it has put forth evidence regarding home market sales staff salaries and the costs of other selling functions. Cutrale further points to the increase in its home market indirect selling expense ratio between the LTFV investigation and this review, and to the fact that in this review, its home market indirect selling expense ratio is much greater than the U.S. indirect selling expense ratio in Brazil.

The petitioners maintain that a CEP offset is not warranted for Cutrale for the final results. The petitioners assert that the Department followed the law and excluded sales activity performed by CPI from its analysis. As support for this assertion, the petitioners point to the preliminary results where the Department stated, for CEP sales, “we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act.” See Preliminary Results, 73 FR at 18775. In addition, the petitioners note that Cutrale’s selling functions chart

³ See Certain Frozen Warmwater Shrimp from Brazil: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12081, 12085 (Mar. 6, 2008); Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12088, 12096-98 (Mar. 6, 2008); Certain Frozen Warmwater Shrimp from India: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12103, 12110-11 (Mar. 6, 2008); Certain Frozen Warmwater Shrimp From Ecuador: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 FR 12115, 12119 (Mar. 6, 2008); Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 72 FR 43236, 43243 (Aug. 3, 2007); Coated Free Sheet Paper from Indonesia: Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination, 72 FR 30753, 30756 (Jun. 4, 2007); Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10658, 10664-65 (Mar. 9, 2007); Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10669, 10676-77 (Mar. 9, 2007); Certain Frozen Warmwater Shrimp from Brazil: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10680, 10685 (Mar. 9, 2007); Certain Frozen Warmwater Shrimp from Ecuador: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10698, 10703 (Mar. 9, 2007); Stainless Steel Sheet and Strip in Coils From the Republic of Korea: Final Results and Rescission of Antidumping Duty Administrative Review in Part, 72 FR 4486 (Jan. 31, 2007) (SSSSC from Korea), and accompanying Issues and Decision Memorandum at Comment 1; and Stainless Steel Sheet and Strip in Coils from the Republic of Korea: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 18074, 18079 (Apr. 10, 2006).

indicates that it, not CPI, performed “order input/processing” and “freight and delivery” services for sales to the United States.

The petitioners further contend that the record supports the Department’s finding that Cutrale performed packing; customer contact and price negotiations; and inventory maintenance for its sales to CPI. The petitioners point out that Cutrale listed packing services in its selling functions chart, arguing that, although Cutrale stated it performed this function on a limited basis, Cutrale still performed the service. Further, the petitioners contend that there is nothing on the record to show the level of intensity at which Cutrale performed packing in each market. Additionally, the petitioners claim that the Department does not automatically accept a respondent’s intensity characterizations of its selling functions. As support for this assertion, the petitioners cite Certain Frozen Warmwater Shrimp from Thailand: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52065 (Sept. 12, 2007) (Shrimp from Thailand). The petitioners argue that “customer contact and price negotiations” services can be inferred from the fact that Cutrale employs sales personnel in Brazil to deal with its sales to the United States. The petitioners assert that Cutrale performs “inventory maintenance” on its sales to the United States, despite Cutrale’s claim to the contrary. The petitioners argue that, by Cutrale’s own admission, it holds merchandise in inventory at the port prior to export for all export sales, including sales to the United States.

The petitioners also note that in this review Cutrale admitted that there were no significant differences in its sales process between the LTFV investigation and this review. See Cutrale’s November 15, 2007, response at page 3. In addition, the petitioners point out that Cutrale’s reliance on the difference in home market indirect selling ratios between the LTFV investigation and this review is misleading. The petitioners note that, in the LTFV investigation, Cutrale reported its home market indirect selling ratio based on total global sales and expenses. The petitioners contrast this with Cutrale’s home market indirect selling expense calculation in this review, in which Cutrale only included expenses incurred in Brazil. Thus, the petitioners maintain that comparing the two figures is inappropriate since they were not calculated using the same methodology. Similarly, the petitioners argue that comparing the home market indirect selling expense ratio and the indirect selling expense ratio incurred in the country of manufacture in this review is inaccurate, since the latter is based upon total export sales and expenses, rather than strictly U.S. sales and expenses. Therefore, the petitioners claim Cutrale’s argument that it can demonstrate a higher level of expenses in the home market when compared to the United States is flawed because there is no ratio on the record that can be reasonably compared to the home market indirect selling expense ratio, only a general global export expense ratio.

The petitioners assert that the “core selling functions” methodology used in the preliminary results is reasonable. As support for this assertion, the petitioners cite Shrimp from Thailand, noting that the Department has previously found this methodology to be reasonable. See Shrimp from Thailand at Comment 13. The petitioners argue that the 12 cases cited by Cutrale show that the Department has used this methodology in a significant number of cases. Thus, the petitioners point out that this methodology is not unique.

Further, the petitioners note that this case shows why this methodology is not only reasonable, but a necessary tool in the Department's analysis. The petitioners contend that the Department gives broad discretion to respondents in self-reporting their selling functions. Thus, according to the petitioners, the Department needs some type of methodology to analyze the reported data, rather than merely taking respondents' reported selling activities at face value. The petitioners contend that, absent such a methodology, respondents would exaggerate their reported home market selling functions and minimize their U.S. selling functions, which is exactly what Cutrale has done. For example, regarding Cutrale's home market selling functions, the petitioners note that Cutrale lists "sales forecasting" and "strategic economic planning" as separate selling functions, but in its November 15 response Cutrale explains that "sales forecasting is a part of strategic economic planning." Thus, the petitioners point out that this is really one selling function, not two as reported. Similarly, the petitioners argue that while Cutrale reports "provide guarantees" and "provide after sales services," as two separate home market selling functions, these appear to be overlapping and minimal functions. The petitioners also contend that the engineering services reported by Cutrale are not substantial.

Finally, the petitioners argue that Cutrale has not met its burden in demonstrating the selling functions performed for sales to the two markets are distinct enough to warrant a CEP offset. The petitioners state that, according to the Department's practice, Cutrale must first show there are substantial differences in the selling functions performed to sell to the two markets, and even substantial differences in the selling functions are not sufficient if they do not reach the level of a difference in marketing stages. As support for this assertion, the petitioners cite Roller Chain, Other than Bicycle, From Japan: Final Results of Antidumping Duty Administrative Review, and Determination Not To Revoke in Part, 61 FR 64322 (Dec. 4, 1996); SSSSC from Korea at Comment 1; and Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp From Thailand, 69 FR 76918 (Dec. 23, 2004).

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 planning, order processing, limited advertising, engineering services/technical assistance, inventory maintenance and post-sale warehousing, guarantees, and packing. Accordingly, based on the core selling functions, 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: customer contact and price negotiation; order processing; arranging for freight and the provision of customs clearance/brokerage services; and inventory maintenance.... Accordingly, based on the core selling functions, we find that Cutrale performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales.

In conducting this analysis, we evaluated the selling functions performed by Cutrale for its home market sales and its sales to CPI using information reported by Cutrale in its selling functions chart in Exhibit 14 of its May 21 response as well the supplementary explanation Cutrale provided in its November 15 response. Regarding CEP sales, we disagree with Cutrale that our analysis occurred at the downstream level, in direct contravention to the requirements of the Act and the Department's practice. Rather, as stated in the preliminary results, "{f}or CEP sales, we consider only the selling activities reflected in the price after the deduction of expenses and profit under section 772(d) of the Act. See Micron Technology, Inc. v. United States, 243 F.3d 1301, 1314 (Fed. Cir. 2001)." See Preliminary Results, 73 FR at 18775. This methodology is also consistent with our analysis in the LTFV investigation where "we compared the selling functions performed for home market sales with those performed with respect to the CEP transaction, which excludes economic activities occurring in the United States." See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Critical Circumstances Determination: Certain Orange Juice from Brazil, 70 FR 49557, 49563 (Aug. 24, 2005) (Orange Juice from Brazil LTFV), unchanged in Orange Juice from Brazil Investigation.

As to the specifics of our analysis, in its May 21 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 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 November 15 response.

Cutrale's November 15 response shows that a number of the reported home market selling functions in Cutrale's May 21 response were duplicative, and performed at varying degrees of intensity. Regarding the "sales forecasting" and "strategic/economic planning" performed for home market sales, Cutrale stated that "sales forecasting is a part of strategic economic planning," and that this function is performed in the context of meetings with customers that "occur at least annually but can occur more often." See Cutrale's November 15 response at page 3. Similarly, in its November 15 response, Cutrale stated that its home market "engineering services" consist of irregularly occurring meetings with customers to discuss transportation and storage problems, while its "advertising" consisted of one negligible expenditure made on one occasion for one customer during the POR. See Cutrale's November 15 response at page 4. Cutrale also reported performing "guarantees" and "after-sales services" for its home market sales. See Exhibit 14 of Cutrale's May 21 response. As explained in its November 15 response, Cutrale "guarantees that its products will meet the customer's specifications." See Cutrale's November 15 response at page 5. In addition 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 November 15 response at page 6. Finally, while Cutrale reported that it paid cash discounts on its home market sales, there is no evidence that this constitutes a significant selling activity which would have an impact on the Department's LOT analysis. See Exhibit 14 of Cutrale's May 21 response. Thus, upon a closer look, none of the 12 reported home market selling functions is significant, despite Cutrale's claims to the contrary.

In contrast, Cutrale's November 15 response shows that Cutrale's May 21 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-18 of Cutrale's June 12, 2007, response and page 5 of its November 15 response, Cutrale did in fact hold merchandise in inventory at the port prior to export, and, thus, we find that Cutrale does maintain inventory on its sales to its U.S. affiliate. Likewise, in its May 21 response, Cutrale reported "order input/processing," yet reported no sales personnel for sales to its U.S. affiliate. See Exhibit 14 of Cutrale's May 21 response. In its November 15 response, Cutrale admitted that it does have sales personnel dedicated to export sales, but it did not consider them when completing the selling functions chart for sales to CPI because they handle all export sales, not just export sales to CPI. See Cutrale's November 15 response at page 6. Thus, we find that Cutrale does employ sales personnel involved in sales to CPI. In summary, although Cutrale claims that the Department erred by including certain selling functions in its analysis (*i.e.*, customer contact, order processing, freight services, and inventory maintenance) because they were performed by CPI instead of Cutrale, we found that Cutrale itself did in fact perform those functions.

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 (*e.g.*, 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. Indeed, the

only meaningful difference in the selling functions performed to sell to the two markets appears to relate to: 1) the provision of technical services in Brazil; however, by Cutrale's own admission, the services in this category were occasional consultative services rather than general selling functions regularly performed for home market customers; and 2) the provision of freight and delivery services on all U.S. sales to CPI. Therefore, although there are some differences in the selling functions Cutrale performs to sell 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).

Our analysis in this administrative review is consistent with the analysis performed in the LTFV investigation, and we disagree with Cutrale that the evidence on the record here is any more probative than it was in the past. In the LTFV investigation, "{w}e found that both respondents performed essentially the same selling functions in their sales offices in Brazil for both home market and U.S. sales." See Orange Juice from Brazil LTFV, 70 FR at 49563, unchanged in Orange Juice from Brazil Investigation. Thus, our determination in the LTFV segment was not based on Cutrale's lack of objective evidence, but rather on the affirmative evidence on the record of the investigation demonstrating that Cutrale's sales in the home market and to the United States were made at the same LOT. Moreover, we find unpersuasive Cutrale's argument that the difference between the home market indirect selling expense ratio and the U.S. indirect selling expense ratio in Brazil objectively shows that sales to the two are at different LOTs. Although such differences can be used as a reasonableness test on CEP offset claims, such differences are not dispositive. See Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan: Final Results of Antidumping Duty Administrative Review, 67 FR 2408 (Jan. 17, 2002), and accompanying Issues and Decision Memorandum at Comment 1. In any event, although Cutrale's home market indirect selling expense ratio may be larger than the corresponding U.S. indirect selling expense ratio in Brazil, neither ratio is particularly large, as both reflect relatively minor expenses, with the home market ratio largely comprised of expenses related to salaries of two sales personnel. Therefore, we find that the difference in the two ratios is attributable to having two sales employees dedicated to home market sales, and as such this difference does not represent distinct levels of marketing between the two markets.

Finally, we disagree with Cutrale's contention that the "core" selling functions analysis employed in this case is counter to the Department's normal practice, peculiar to one office, and is used only to deny CEP offsets. The practice of analyzing the reported selling functions by organizing them into major categories for comparison is neither new, nor aberrational, nor isolated to a particular office. First, the Department has employed a similar analysis since 1996. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta From Italy 61 FR 1344, 1347 (Jan. 19, 1996), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy, 61 FR 30326 (June 14, 1996); and Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Pasta From Turkey, 61 FR 1351, 1353 (Jan. 19,

1996), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey, 61 FR 30309 (June 14, 1996). Further the Department has used such an analysis in numerous cases across Import Administration, and it has been used to grant CEP offsets and LOT adjustments.⁴ Additionally, this methodology has been upheld by the CIT. See Alloy Piping Products Inc. v. United States, No. 2008-30, slip op. at 19-20 (CIT 2008) (where the CIT upheld the use of this methodology in granting a CEP offset). Therefore, for the foregoing reasons, we have continued to deny Cutrale a CEP offset for the final results.

Comment 6: Treating Sales to One of Cutrale's Home Market Customers as Affiliated Party Transactions

Cutrale reported that it was not affiliated with any of its home market customers. However, the petitioners claim that sales to one of these customers should be reclassified as affiliated party transactions, and thus the Department should conduct the arm's-length test for sales to this

⁴ See, e.g., Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Partial Rescission of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Certain Individually Quick Frozen Red Raspberries from Chile, 72 FR 44112, 44120 (Aug. 7, 2007), unchanged in International Trade Administration Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order In Part: Individually Quick Frozen Red Raspberries from Chile, 72 FR 70295 (Dec. 11, 2007); Furfuryl Alcohol from Thailand: Preliminary Results of the 2005-2006 Antidumping Duty Administrative Review, 72 FR 42390, 42392 (Aug. 2, 2007), unchanged in Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from Thailand, 72 FR 58056 (Oct. 12, 2007); Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Preliminary Negative Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, 67 FR 31181, 31184 (May 9, 2002), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From Argentina, 67 FR 62138 (Oct. 3, 2002); Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From South Africa, 67 FR 31243, 31246 (May 9, 2002), unchanged in Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products From South Africa, 67 FR 62136 (Oct. 3, 2002); Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Preliminary Results of Antidumping Duty Administrative Review, 72 FR 51793, 51793 (Sept. 11, 2007) (using this methodology to grant a CEP offset) (unchanged in Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative Review, 73 FR 14439 (Mar. 18, 2008)); Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Preliminary Results of Antidumping Duty Administrative Review 71 FR 53363, 53366 (Sept. 11, 2006) (using this methodology to grant an LOT adjustment), unchanged in Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review, 72 FR 12758 (Mar. 19, 2007); Certain Cut-to-Length Carbon Steel Plate from Romania: Preliminary Results of the Antidumping Duty Administrative Review and Partial Rescission, 71 FR 53377, 53381 (Sept. 11, 2006) (using this methodology to grant a CEP offset), unchanged in Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania, 72 FR 6522 (Feb. 12, 2007); Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part, 71 FR 39663, 39666 (July 13, 2006) (using this methodology to grant a CEP offset) (unchanged in Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 71 FR 67098 (Nov. 20, 2006)); and Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar from France, 67 FR 3143 (Jan. 23, 2002), and accompanying Issues and Decision Memorandum at Comment 6 (using this methodology to grant a CEP offset).

customer. The petitioners argue that Cutrale's small ownership interest in the customer is not dispositive evidence that the two are not affiliated, and they argue that Cutrale has not provided further information regarding the full nature of the relationship between it and its customer. According to the petitioners, when the Department finds that a respondent made sales to an affiliate, it is the Department's practice to conduct the arm's-length test and exclude from its analysis all sales to those affiliated parties which do not pass the arm's-length test. See Circular Welded Carbon Steel Pipes and Tubes from Thailand: Preliminary Results of Antidumping Duty Administrative Review, 73 FR 18749, 18751 (Apr. 7, 2008).

Cutrale asserts that it is not affiliated with the customer in question, and it points to its ownership stake in the customer, which is well below the five percent threshold the Department normally uses in making affiliation determinations. Cutrale further argues that there are no indicators it is affiliated with its customer, other than this cross-ownership of shares. Cutrale points out that it appoints no members of the customer's board of directors, and that no Cutrale employee, owner, or family member has any role in the customer's internal management. Thus, Cutrale notes that it is in no position to influence its customer's business. Cutrale also argues that it does not negotiate prices directly with this customer, and therefore any relationship between the two companies has no bearing on the prices charged to this customer.⁵ Finally, Cutrale notes that the Department examined the potential for affiliation with this customer in the LTFV investigation and did not find the two parties to be affiliated.

Department's Position:

We disagree with the petitioners' contention that Cutrale is affiliated with the customer in question. Thus, we have continued to treat these entities as unaffiliated parties for purposes of the final results.

Section 771(33) of the Act defines affiliated parties as any of the following:

- (A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.
- (B) Any officer or director of an organization and such organization.
- (C) Partners.
- (D) Employer and employee.
- (E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

⁵ The details of Cutrale's method of negotiating prices with this customer are proprietary; thus, we cannot discuss them here.

- (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
- (G) Any person who controls any other person and such other person.

Section 771(33) of the Act further states that “for purposes of this paragraph, a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over that person.” The Department’s regulations at 19 CFR 351.102(b) provide that “{t}he Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product.”

As shown on page A-9 of Cutrale’s May 21 response, there is no information on the record to demonstrate that Cutrale and this customer enjoy any of the types of relationships enumerated in section 771(33) of the Act. Furthermore, Cutrale has provided a full description of its relationship with this customer, and there is nothing to indicate that the two companies are otherwise in a position to exercise control or restraint over one another nor that their relationship has the potential to impact the decisions concerning pricing of subject merchandise or foreign like product. *Id.* In addition, Cutrale’s ownership stake in this company is below the five percent threshold set forth in section 771(33)(E) of the Act. We note that we examined this issue in the course of the LTFV investigation, addressed it at verification, and the facts regarding this issue have not changed since that segment of the proceeding. Accordingly, consistent with the LTFV investigation and the Preliminary Results, and in the absence of any new evidence to the contrary, we have continued to treat the two entities as unaffiliated.

Comment 7: *Calculation of CEP Profit for Cutrale*

Cutrale contends that the Department erred in the calculation of CEP profit for the preliminary results when it failed to increase CEP by the amount of certain invoice price additions and U.S. duty drawback. Specifically, Cutrale notes that the Department treated revenue that Cutrale received for repacking subject merchandise into drums and pallets (*i.e.*, DRUMREUV and PALLREUV) as offsets to “discounts, rebates, and post-sales agreements,” while it treated revenue received under a U.S. substitution duty drawback program (*i.e.*, DUTYDRAWU) and U.S. customs duty and freight reimbursements (*i.e.*, DUTYREUV and FRTREUV) as offsets to movement expenses. According to Cutrale, inclusion of duty and freight revenues as offsets to freight expenses improperly reduced the denominator of the CEP profit ratio, thereby overstating it and unfairly increasing Cutrale’s margin.

Cutrale alleges that the Department’s treatment of the revenues in question is inconsistent with the instructions provided in the Department’s standard margin program, which indicates that “negotiated invoice price adjustments” and “duty drawbacks” should be added to the gross unit price. According to Cutrale, the Department accepted without question Cutrale’s reporting of the above fields as revenue items in its section C response, rather than as “offsets” to expenses. See Cutrale’s June 11, 2007, response at Exhibits C-7 and C-15. Thus, Cutrale claims that the Department should amend its final results margin calculations for Cutrale to include the fields

DRUMREVVU, PALLREVVU, DUTYREVVU, FRTREVVU, and DUTYDRAWU, as additions to U.S. price, rather than as offsets to expenses.

Finally, Cutrale contends that, if the Department continues to treat U.S. duty drawback and duty revenue as an offset to U.S. duty expenses, it should remove the language from its program setting net U.S. duty to zero where U.S. drawback exceeds U.S. duty because none of the resulting net U.S. duty expenses are negative.

The petitioners did not comment on this issue.

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 for purposes of either the calculation of net U.S. price or of CEP profit. Section 772(c)(1) of the Act provides that the Department may increase the price used to establish EP or CEP in only the following three instances:

- (A) when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States,
- (B) the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States, and
- (C) the amount of any countervailing duty imposed on the subject merchandise under subtitle A to offset an export subsidy.

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 adjustments" is defined under 19 CFR 351.102(b) as a "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."

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

Orange Juice From Brazil Investigation at Comment 5. Further, while Cutrale argues that the Department's margin program mentions "duty drawbacks" as an addition to gross unit price, we note that the duty drawback mentioned in the margin program relates to duty drawback granted by the exporting country, not the U.S. duty drawback at issue in this case. See section 772(c)(1)(B) of the Act. Therefore, we have continued to treat freight revenue, duty revenue, and U.S. duty drawback as offsets to movement expenses in our calculations for the final results. Moreover, we have continued to set net U.S. duty to zero where U.S. drawback exceeds U.S. duty expense. We find no need to change this language because this language is not incorrect.

Regarding drum and pallet revenue, Cutrale described these items in its questionnaire response as fees charged to some of its customers for repacking the products in drums and pallets. We find that it would be inappropriate to increase U.S. price for drum and pallet revenue under section 772(c)(1)(A) of Act. This section of the Act only permits us to increase U.S. price for packing costs not included in the price, not for repacking revenue. Similarly, we find that it would be inappropriate to treat repacking fees 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. Therefore, consistent with our treatment of freight revenues as offsets to transportation expenses, we have now treated drum and pallet revenue as offsets to U.S. repacking expenses because we find that these items relate to the repacking of subject merchandise. We set net U.S. repacking expenses to zero where drum and pallet revenue exceeded U.S. repacking expenses, in accordance with our practice. See Orange Juice from Brazil Investigation at Comment 9.

Comment 8: *The 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 revenues received on the sales of by-products from the COGS denominator used in the calculation of the G&A and financial expense ratios. Cutrale argues that this adjustment results in an unbalanced formula and violates both the Department's long-standing practice and generally accepted accounting principles (GAAP) in that it reduces costs by a sales revenue item. Cutrale alleges that, according to GAAP, an item cannot be both a cost item and a revenue item, and a sales revenue item cannot be used to reduce costs.

Cutrale contends that the Department's policy when calculating the cost of production (COP) is to add amounts for G&A and financial expenses to the COM. Cutrale notes that G&A and financial expenses are calculated by multiplying the G&A and financial expense ratios by the COM. According to Cutrale, the Department's policy has been that the G&A and financial expense ratios are determined by dividing G&A and financial expenses by the COGS of the corporate entity. Cutrale indicates that the adjustment that the Department made in the preliminary results resulted in the denominator of the G&A and financial expense ratios being something other than the COGS of the corporation and states that the Department does not have a good reason to depart from its normal methodology in this case.

Cutrale asserts that reducing COM by the revenue received from the sales of by-products is appropriate in the calculation of the COM of orange juice but not in the COGS used as the denominator in the calculation of the G&A and financial expense ratios. Cutrale agrees that the COM of orange juice should both include the costs that were assigned to by-products in Cutrale's normal books and records and also be reduced by the revenue received from the sales of by-products.

However, Cutrale points out that in calculating the G&A and financial expense ratios, the Department is not calculating the COP of orange juice. Rather, Cutrale notes that the Department is expressing G&A and financial expenses as a percentage of the COGS of the corporate entity that produces orange juice. Cutrale asserts that this is an important distinction. Cutrale argues that G&A and financial expenses are borne by sales of all products produced by the corporation, and points out that the COGS includes the cost of sales of all citric acid products, including the costs of producing orange juice, lemon juice, and grapefruit juice, as well as the costs of producing the by-products. Cutrale contends that because G&A and financial expenses are borne by sales of all products produced by the corporation, it makes sense to calculate the ratios by dividing these amounts by the COGS for all products produced by the corporate entity. Cutrale asserts that the Department has long held that G&A and financial expenses are borne by sales, and therefore the most appropriate denominator to use in the ratio calculations is COGS. As support for this assertion, Cutrale cites Shrimp from Thailand at Comment 16.

Cutrale argues that the adjustment of subtracting by-product revenue is specific to the calculation of the COM of orange juice and if it is applied to the COGS of the corporation in calculating the G&A and financial expense ratios, then the denominators in the expense ratio calculations would be less than all of the corporate COGS. Cutrale asserts that by making this adjustment to COGS, the Department is creating an imbalanced formula whereby the numerator contains all of the G&A and financial expenses generated by sales of all products, but the denominator does not include the COGS of all products. Cutrale asserts that this calculation methodology, using a denominator which is neither COGS nor COP, produces skewed and unfair results.

In conclusion, Cutrale argues that the Department should not depart from its normal methodology. Thus, Cutrale contends that the Department should use its actual COGS as shown in the company's books and records as the denominator in the calculation of its G&A and financial expense ratios.

The petitioners agree with the adjustment the Department made at the preliminary results to reduce the COGS denominator in the calculation of Cutrale's G&A and financial expense ratios by the revenue from the sales of by-products. The petitioners assert that, in its case brief, Cutrale provided no evidence for its claim that the adjustment the Department made to reduce COGS by revenue from the sales of by-products is contrary to GAAP. According to the petitioners, Cutrale's claim contradicts Cutrale's own methodology for reporting the COP of orange juice because in its COP calculation, Cutrale deducted the revenue received from the sales of by-products from the COP of FCOJM and NFC. See Cutrale's June 11, 2007, section D response at pages 16, 19, 23, 31, 37, and Exhibits D-12e and D-13. The petitioners point out that Cutrale's position is inconsistent in that Cutrale agrees with offsetting the reported COM by the by-product

revenues in the COP database, but it objects to the by-product revenue offset to the COGS denominator for the calculation of the G&A and financial expense ratios.

The petitioners contend that it has been the Department's practice to reduce the COGS denominator used in the calculations of the G&A and financial expense ratios by revenue from the sales of by-products. The petitioners assert that, when calculating these ratios, the Department must ensure that the COGS denominator is on an equivalent basis to the COM to which the ratios are applied. As support for their assertions, the petitioners cite: Lemon Juice from Argentina: Preliminary Determination of Sales at Less Than Fair Value and Affirmative Preliminary Determination of Critical Circumstances, 72 FR 20820, 20824 (Apr. 26, 2007) (Lemon Juice from Argentina);⁶ Notice of Final Determination of Sales at Less Than Fair Value: Live Cattle from Canada, 64 FR 56738, 56756 (Oct. 21, 1999) (Live Cattle from Canada); and Certain Steel Concrete Reinforcing Bars from Turkey: Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082 (Nov. 7, 2006) (2004-2005 Rebar from Turkey), and accompanying Issues and Decision Memorandum at Comment 10.

Department's Position:

We disagree with the respondent that it is not appropriate to deduct the revenue from the sales of by-products from the COGS denominator used in the calculation of the G&A and financial expense ratios. Consistent with our past practice, we have determined that it is appropriate for these final results to include this adjustment in the expense ratio calculations because, in order to produce an accurate result, the bases upon which the ratios are calculated must be the same as the basis of the COM of the orange juice to which they are applied. See, e.g., Live Cattle from Canada, 64 FR at 56756; 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, e.g., section 773(b)(3)(B) of the Act. These amounts are determined by calculating G&A and financial expense ratios and multiplying these ratios by the COM of the investigated product. The ratios are calculated by dividing total G&A and financial expenses by the company's COGS. In the preliminary results, we subtracted by-product revenues from the COGS denominator of the G&A and financial expense ratios in order to keep the denominator of the calculations on the same basis as the COM to which they were applied (i.e., the revenues from the sales of by-products were also subtracted from the total COM of orange juice). Calculating ratios which do not include by-product revenues as an offset in the denominator and applying them to a base COM that includes the deduction for by-product revenues is incorrect arithmetically because the denominator does not reflect by-product revenue but the COM to which the ratios are applied does reflect amounts for by-product revenue. In order to correctly allocate the G&A and interest expenses incurred by a company to products, the

⁶ We note that this investigation was suspended before the Department issued its final determination. See Suspension of Antidumping Duty Investigation: Lemon Juice From Argentina, 72 FR 53991 (Sept. 21, 2007).

ratios must be calculated using a COGS figure that includes the by-product revenues offset, which is consistent with the COM to which it is applied.

Cutrale's contention that by making this adjustment the Department is departing from its normal practice is incorrect. It is the Department's practice to ensure that the COM to which the expense ratios are applied is on the same basis in which the ratios were calculated. See Live Cattle from Canada, 64 FR at 56756; and Shrimp from Ecuador at Comment 29. In the past, the Department has specifically reduced the company-wide cost of sales used as the denominator of the G&A expense ratio by by-product and scrap revenues. See Lemon Juice from Argentina, 72 FR at 20824; and 2004-2005 Rebar from Turkey at Comment 10. Cutrale makes inconsistent statements when it asserts that the Department's adjustment to reduce COGS by revenues from the sales of by-products violates GAAP and is not appropriate, but then argues that the adjustment is appropriate for the calculation of the COM of orange juice and is also in accordance with GAAP. Cutrale provides no evidence for its contention that the adjustment violates GAAP because an item is either a cost item or a sales revenue item but cannot be both. According to Accounting by Charles T. Horngren and Walter T. Harrison, Jr., second edition (1992) at page 1067, "Accounting for the cost of by-products is straightforward. By-products are assigned an accounting value called net-realizable value, which is their sales value, less the cost of selling them." Thus, the fact that the by-product sales revenue is used to reduce the COGS to eliminate the effect of by-products on the COP of orange juice does not render it contrary to GAAP. In addition, we disagree with Cutrale's contention that by-product revenue offsets are appropriate for COM but the COGS denominator used in the G&A and financial expense ratios must reflect exactly the figure recorded in the books and records of the respondent. This is not a valid argument because, if by-product revenues are used to offset the COM for reporting purposes, then to be arithmetically accurate the COGS denominator used in the G&A and financial expense ratios must also include a similar adjustment.

We agree with Cutrale that G&A and financial expenses are borne by the sales of all products of the corporation and apply to the costs of sales of all products sold including orange juice, lemon juice, and grapefruit juice. If the entire value (i.e., the surrogate cost) of by-products, which is represented by the revenues from the sales of by-products, is removed from the total COM of the company in the calculation of the COM of orange juice, then what is left in total COM is the COM of orange juice and non-subject products. In order for the entire amount of G&A and financial expenses to be allocated to the COM of these remaining products, the G&A and financial expense ratios must be calculated with an adjustment to remove the surrogate cost of the by-products from the denominator of the ratio calculations. Therefore, contrary to Cutrale's assertions, the ratio calculations would be skewed and unbalanced if the revenues from the sales of by-products were not removed from the COGS denominator of the ratios.

We disagree with Cutrale that the Department has departed from its normal methodology for calculating the G&A and financial expense ratios. As explained earlier, in making this adjustment 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 2004-2005 Rebar from Turkey at Comment 10. Therefore, for these final results we have not

departed from our methodology in the preliminary results of including an offset for by-product revenue to the COGS denominator of the G&A and financial expense ratios.

Comment 9: Valuation of Fruit Purchased from Affiliates for Cutrale

Cutrale argues that, although the Department correctly determined in the preliminary results that certain purchases of oranges that Cutrale made from an affiliate did not constitute a major input, the Department nonetheless incorrectly proceeded to apply the “major input rule” (i.e., section 773(f)(3) of the Act) to value these inputs. Cutrale argues that the major input rule stipulates that the Department is permitted to use an alternative form of determining the value of an input received from related parties only when that input is a major input to the merchandise. Consequently, Cutrale contends that the major input rule must also be interpreted to mean that, when an input is not a major input, the Department is not permitted to disregard the transfer price between related parties and must value the input at the transfer price as shown in the company’s normal books and records. Therefore, Cutrale asserts, having determined in the preliminary results that the cost of oranges from affiliates is not a major input into the cost of producing orange juice, the Department must value this input at its transfer price.

The petitioners point out that in the preliminary results the Department did not revalue the inputs from affiliates based on the major input rule but rather revalued these inputs in accordance with the “transactions disregarded rule” (i.e., section 773(f)(2) of the Act). The petitioners refute Cutrale’s contention that, because the input is not a major input, the Department is not permitted to disregard the transfer price between the related parties. The petitioners assert that, based on the transactions disregarded rule, the Department correctly determined that, because the transfer price paid to the affiliated supplier was below the average market price paid to unaffiliated suppliers, the market price fairly reflects the value of the input in the market under consideration. The petitioners urge the Department to uphold the methodology it used in the preliminary results to revalue the inputs purchased by Cutrale from an affiliated supplier using the market price in accordance with section 773(f)(2) of the Act.

Department’s Position:

During the POR, Cutrale obtained a certain amount of its raw material inputs (i.e., oranges) from an affiliate. For the purposes of its questionnaire response, Cutrale valued this input at the transfer price. Based on the small amount of the purchases from the affiliate, in the preliminary results we did not consider these oranges to be a major input in accordance with section 773(f)(3) of the Act and, thus, we did not apply the major input rule. However, section 773(f)(2) of the Act (i.e., the “transactions disregarded rule”) states:

A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence 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.

During our analysis of Cutrale's reported costs, we found that the average transfer price reported by Cutrale for this input was below the average market price for oranges. Therefore, pursuant to section 773(f)(2) (and not 773(f)(3)) of the Act and in accordance with our practice, we increased Cutrale's COM to reflect the market value of this input. See Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea, 71 FR 29310 (May 22, 2006), and accompanying Issues and Decision Memorandum at Comment 10.

Comment 10: Inclusion of Export Financing Expenses in the Calculation of the Financial Expense Ratio for Cutrale

Cutrale argues that the Department erred in the preliminary results when it included financial expenses related to export sales in the calculation of the financial expense ratio when determining the COP of orange juice. Cutrale contends that the Department's COP determination should be related solely to the cost of producing the merchandise that is sold in the home market. Cutrale states that the COP is used for: 1) comparison to domestic sales prices to see if these sales are above or below cost; and 2) the calculation of constructed value (CV) to use as a surrogate for domestic sales prices. Cutrale argues that in both cases the calculation of COP has nothing to do with the cost of producing merchandise that is sold for export, and that to include these financing costs in the COP calculation would result in an unfair comparison, *i.e.*, a comparison between the price of products sold domestically and the cost of producing exported product.

Cutrale explains that the costs in question are *adiantamentos sobre contraltos de câmbio*, or "ACC," financing costs which are interest costs incurred on loans received from a Brazilian bank that are linked to export sales. During fiscal year 2006, Cutrale states that it paid financing costs that were associated with these ACC loans. According to Cutrale, under the terms of an ACC loan, an exporter receives an ACC loan from a Brazilian bank prior to shipping merchandise for export, provided that the bank can tie the loan to one or more specific accounts receivables generated from export sales. Cutrale notes that it obtained its ACC loans prior to shipping merchandise for export and, when the overseas customer paid for the exported merchandise, the bank charged interest for the period between the issuance of the loan and the receipt of the customer's payment.

Cutrale asserts that ACC loans cannot be obtained on sales in the home market, and therefore the loan proceeds are not fungible in this case because these financing costs can have nothing to do with the cost of producing or selling goods in the home market.

The petitioners assert that, in the preliminary results, the Department correctly included interest expenses related to ACC financing in the financial expense ratio calculation. The petitioners point to the March 31, 2008, memorandum from James Balog to Neal M. Halper entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Sucocitrico Cutrale Ltda.," in which the Department stated that its practice is "to calculate the net

interest expense based on the total financing expenses incurred on behalf of the highest consolidated group of companies to which the respondent belongs” and that “this practice recognizes that financial expenses are fungible and may be used in any capacity the company decides.”

The petitioners maintain that it is the longstanding policy of the Department to include all financial expenses in the calculation of the financial expense ratio. Therefore, the petitioners assert that Cutrale’s position, that interest costs related to ACC financing should be excluded from financial expenses, is without basis and contrary to the Department’s policy as set forth in section D of the Department’s questionnaire. Further, the petitioners state that the Department has held in past cases that interest expenses incurred on advance financing for export sales should be included in the financial expense ratio calculation, citing Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 65 FR 5554 (Feb. 4, 2000), and accompanying Issues and Decision Memorandum at Comment 21 (Cold-Rolled Steel from Brazil).

Department’s Position:

We disagree with Cutrale and have continued to include the interest expenses related to its ACC loans in the calculation of Cutrale’s financial expenses for the final results. The Act does not mandate any particular methodology for calculating financial expenses. Accordingly, the Department has discretion to select a reasonable methodology. The Department’s practice is to calculate financial expenses based on the total financing expenses incurred on behalf of the highest consolidated group of companies to which the respondent belongs. See, e.g., Certain Frozen Warmwater Shrimp from India: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 52055 (Sept. 12, 2007) (Shrimp from India Final Results), and accompanying Issues and Decision Memorandum at Comment 7; and Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 (Aug. 30, 2002), and accompanying Issues and Decision Memorandum at Comment 8. This practice recognizes that money received from loans that generate financial costs is fungible and may be used in any capacity the company decides. We disagree with Cutrale that, because the ACC loans cannot be obtained on sales in the home market, the interest paid on the loans has nothing to do with the COP of the merchandise in the home market. Had the company not obtained these ACC loans, then it may have needed to obtain other types of loans using other types of collateral (e.g., collateral such as buildings, vehicles, and machinery instead of the accounts receivable used as collateral for the ACC loans) in order to satisfy the cash needs of the business. We find that ACC loan proceeds are fungible and can be used by the company for any purpose the management of the business dictates. Cash obtained from the ACC loans could have been used for purchasing a number of items related to the production of the merchandise that was sold in the home market including items such as property, plant and equipment used to manufacture orange juice or the raw material inputs used to produce orange juice.

We have made similar determinations to include financing from export sales in financial expenses in cases such as Cold-Rolled Steel from Brazil. See Cold-Rolled Steel from Brazil at Comment 21. The issue in that case, analogous to the instant case, was whether to include interest expenses

incurred on advance financing for export sales in the calculation of COP. In Cold-Rolled Steel from Brazil, the respondent argued that such interest expenses should be excluded from the calculation of COP because the interest was incurred exclusively on export sales and COP must be based on merchandise sold in the home market. In Cold-Rolled Steel from Brazil, the Department consistently applied its practice of including total interest expenses in the calculation of COP by including the interest expenses on the export financing in the COP calculation. *Id.* Consequently, for the final results we have continued to include the interest expenses related to ACC loans in the calculation of Cutrale's financial expenses.

Comment 11: Unit of Measure for Comparison Purposes for NFC for Fischer

In accordance with the Department's instructions in the questionnaire, Fischer reported its U.S. sales of both FCOJM and NFC in pounds solid, although it sells NFC on a gallon basis in the United States. In order to convert its NFC sales from gallons to pounds solid, Fischer used the actual brix level of each sale.

Fischer claims that its pounds solid-gallon conversion methodology is distortive and should either be eliminated or changed. Specifically, Fischer argues that the brix level of NFC is not a factor in the price unless the brix level of the juice falls below the standard brix of NFC, which is 11.8 according to U.S. customs regulations. Fischer claims that the only price neutral way to convert NFC from gallons to pounds solid is to use the standard brix of NFC. According to Fischer, such a conversion would reflect the requirements of the contract with its U.S. customer for NFC. Fischer notes that, when converting the price in gallons to pounds solid using the actual brix, the gross unit price for each individual sale changes; however, basing the conversion to pounds solid on the standard brix results in a constant gross unit price.

Fischer contends that the same distortion exists in the conversion of its Brazilian NFC sales from kilograms to pounds solid. According to Fischer, its customer pays based on the kilogram weight of the sale, not the brix level of the juice. Fischer claims that converting its home market NFC sales from kilograms to pounds solid using the standard brix of NFC will result in a price neutral conversion.

Therefore, Fischer argues that the Department's price comparisons for the final results should be made on a gallon basis, to comport with the Department's preference for using a methodology consistent with a respondent's normal books and records. However, Fischer contends that, if the Department chooses to convert its home market sales of NFC in kilograms and its U.S. sales of NFC in gallons to pounds solid, it should do so using the standard brix of NFC to eliminate the price distortion caused by basing the conversion on the actual brix level of each NFC sale.

The petitioners assert that the Department should not change its methodology with regard to Fischer's NFC sales and should continue to convert all sales into pounds solid for price comparison purposes, as was done in the LTFV investigation. The petitioners note that when this same price comparison methodology was used in that segment of the proceeding, Fischer did not object to it, nor has Fischer objected to this approach during this administrative review at any point before the submission of its case brief.

In any event, the petitioners point out that Fischer's implication that the Department mistakenly converted Fischer's sales to pounds solid using the actual brix is misleading because Fischer itself converted its U.S. sales of NFC from gallons to pounds solid. In fact, the petitioners note that Fischer reported the gross unit price of all of its U.S. sales, as well as most of its U.S. expenses, on a pounds-solid basis. Further, according to the petitioners, Fischer stated in its response to section C of the questionnaire that all quantities were reported in pounds solid, the quantity used for its sales. Therefore, the petitioners maintain that the most Fischer can claim is that it made an error in converting its per-gallon U.S. sales of NFC to pounds solid by using the actual brix level, rather than the standard brix level, of each sale. The petitioners note that, if Fischer is claiming that this conversion is a clerical error, the Courts have held that a company is required to have availed itself of the earliest reasonable opportunity to correct the error. As support for this assertion, the petitioners cite Maui Pineapple Co. v. United States, 264 F. Supp. 2d 1244, 1261 (CIT 2003) (Maui Pineapple), where the CIT upheld the Department's discretion to accept the correction of clerical errors under certain conditions. Because Fischer submitted numerous supplemental section C questionnaire responses, the petitioners assert that Fischer had numerous opportunities to correct any alleged errors before the submission of its case brief.

Finally, the petitioners maintain that there is insufficient information on the record of this proceeding to conclude that Fischer's price reporting methodology for its U.S. sales of NFC was actually an error. The petitioners note that Fischer cites to a contract between it and its U.S. NFC customer to support its contention that a standard brix of 11.8 is required to make price comparisons in this case. However, the petitioners point out that the pages of the contract included in Fischer's response do not support this contention. In addition, the petitioners maintain that Fischer has not established that the conversion methodology it employed has distorted the comparison between U.S. and home market sales in any way because Fischer has not submitted any evidence to demonstrate how the conversion to pounds solid affects its home market sales. Thus, the petitioners assert that the Department should not modify its conversion methodology for Fischer's NFC sales for the final results.

Department's Position:

For the final results we have continued to rely on Fischer's U.S. and home market sales of NFC as reported on a pounds-solid basis. 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 solid in the United States, and NFC and FCOJM in kilograms in the home market, we have converted all quantities into pounds solid.

In the LTFV investigation, Fischer also reported all of its U.S. sales on a pounds-solid basis and all of its home market sales on a kilogram basis, and we made all product comparisons on a pounds-solid basis, converting home market sales of all products into pounds solid using the actual brix reported. In the LTFV investigation, no party objected to this methodology. Moreover, 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.

Comment 12: Product Matching Methodology for Fischer

The matching criteria in this case consists of two product characteristics: 1) type (*i.e.*, FCOJM and NFC); and 2) organic designation. In this administrative review, neither Cutrale nor Fischer sold organic orange juice; thus, the CONNUM is essentially composed of only one product characteristic, type.

Fischer contends that, if the Department adopts its proposal to convert NFC from gallons to pounds solid using the standard brix of NFC, it will be able to compare a per-pounds solid price for NFC sold in the United States to a per-pounds solid price for FCOJM sold in the home market in the same month, thus eliminating both: 1) the rationale behind having separate CONNUMs for FCOJM and NFC; and 2) the need to use its home market window-period sales of NFC for matching purposes. While Fischer claims that it is not advocating that the Department eliminate the CONNUMs it has assigned in this case, it alleges that once the Department makes its comparisons on the basis of weight (rather than volume), having separate CONNUMs is no longer valid because any price stated on a per-pounds-solid basis can be compared to another price stated on the same basis without regard to the type of orange juice. Fischer notes that this treatment would be consistent with the petitioners' argument before the ITC during the LTFV investigation, where the petitioners stated that "a pound solid is a pound solid whether it is NFC or FCOJ; it is all orange juice." See Certain Orange Juice from Brazil, 731-TA-1089 (Final), USITC Final Hearing Transcript at 106, 223, and 267 (Jan. 10, 2006).

The petitioners assert that the Department should continue to maintain separate CONNUMs for FCOJM and NFC when making its product comparisons. The petitioners dispute Fischer's contention that they ever advocated making product comparisons between FCOJM and NFC, and

they point out that the ITC did not make comparisons on such a basis in its final determination. See Certain Orange Juice from Brazil, 731-TA 1089 (Final), USITC Pub. No. 3838 (Mar. 2006). The petitioners maintain that, because Fischer has not presented any evidence in this or any other segment of this proceeding to demonstrate that the use of separate CONNUMs for FCOJM and NFC is unreasonable, its argument should be dismissed.

In fact, the petitioners point out that the CONNUMs used by the Department in this administrative review are the same CONNUMs which were used in the LTFV investigation. The petitioners contend that no party objected to the use of these CONNUMs in either the LTFV investigation or this segment of the proceeding until the submission of Fischer's case brief. The petitioners also cite Orange Juice from Brazil Investigation at Comment 23, noting that, while Fischer objected to the calculation of separate COPs for FCOJM and NFC, it did not advocate that the Department revise its product comparison methodology, and the Department decided to continue to use Fischer's CONNUM-specific COPs in its calculations. Thus, the petitioners note that the Department determined that it would continue to use Fischer's CONNUM-specific costs of production in its margin calculations and to make comparisons using the established CONNUMs. Id.

According to the petitioners, Fischer's proposed model matching methodology is flawed on several levels. First, the petitioners maintain that Fischer's methodology ignores the concept of model matching by CONNUM set forth by the Department not only in this proceeding, but in all other antidumping proceedings. Second, the petitioners assert that Fischer's proposal completely disregards the concept of matching U.S. sales to contemporaneous sales in the home market using the methodology set forth in the Department's regulations at 19 CFR 351.414 (e)(2). Therefore, the petitioners urge the Department to reject Fischer's arguments and to maintain separate CONNUMs for FCOJM and NFC in its calculations for the final results.

Department's Position:

While Fischer claims that it is not advocating that the Department eliminate the CONNUMs assigned to products in this case, we find that Fischer's proposal would effectively do so. After considering Fischer's arguments, we disagree that eliminating CONNUMs in this case is appropriate.

As an initial matter, we have not accepted Fischer's proposal of converting NFC sales using the standard brix of NFC (see Comment 11), nor has Fischer demonstrated adequately why this proposal is germane to the question of whether NFC and FCOJM should be treated as the same product. We find that the difference between FCOJM and NFC is meaningful on a commercial level and, for that reason, these two products are not completely interchangeable. Specifically, FCOJM and NFC are priced differently in the marketplace (as evidenced by the data reported in Fischer's U.S. sales listing) and they cost different amounts to produce (as evidenced by the data reported in Fischer's COP response). See Fischer's U.S. sales listing submitted with its March 13, 2008, response and Exhibit 1 of Fischer's January 18, 2008, response. Further, FCOJM and NFC have different concentration levels, as measured by their reported brix levels. See Fischer's

U.S. sales listing submitted with its March 13, 2008, response. Assigning these products the same CONNUM would in effect treat them as identical products, with identical costs, when they are not.

Moreover, we use the matching criteria assigned in a particular case in order to make the most similar product matches in our calculations, and we do not change these criteria in different segments of a proceeding unless a respondent can demonstrate that there are meaningful commercial differences not captured by the matching criteria. See Notice of Final Results of Antidumping Duty Administrative Reviews and Determination Not To Revoke in Part: Certain Corrosion-Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate From Canada, 66 FR 3543 (Jan. 16, 2001), and accompanying Issues and Decision Memorandum at Comment 1; and 2000-2001 Rebar from Turkey at Comment 1. We note that Fischer has not provided any analysis to demonstrate that the elimination of the CONNUMs used in this case would result in more accurate matches in our calculations. Therefore, for the final results we have continued to: 1) use separate CONNUMs for FCOJM and NFC; and 2) base our product comparisons for the final results on these CONNUMs.

Comment 13: Granting a Quantity Adjustment for Fischer's NFC Sales

Fischer argues that the Department should make a price adjustment to account for the significant sales volume differences between its small quantity spot NFC sales in the home market and its tanker vessel NFC sales in the United States. Specifically, Fischer notes that it sells NFC in the United States to one customer under a long-term supply agreement, and it ships this merchandise on large ships which can provide a significant volume of orange juice in a single voyage. In contrast, Fischer notes that it occasionally sells drums of NFC in the home market to customers who either blend the orange juice with FCOJM or sell it to ready-to-drink packagers. Fischer contends that the differences in its two markets for NFC are starkly apparent when comparing the volume of NFC sales in the two markets.

According to Fischer, it is the Department's practice to examine sales that are the most similar in quantity. For example, Fischer contends that the Department has found that quantity adjustments may be necessary where the sales quantity of an individual transaction has an effect on price. As support for its contention, Fischer cites section 773(a)(6)(C)(i) of the Act and Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada, 70 FR 22636, 22638 (May 2, 2005) (Section 129 Lumber from Canada). Therefore, Fischer requests that the Department make a price adjustment to account for the significant difference in sales volume between its two markets; Fischer does not, however, specify how this adjustment should be calculated.

The petitioners disagree that a price adjustment is warranted in this case, and they maintain that Fischer is unclear as to how the Department should take into account any differences in quantity between its home market and U.S. sales of NFC. While the petitioners acknowledge that section 773(a)(6)(C)(i) of the Act allows the Department to make a quantity adjustment, they point out that the regulations at 19 CFR 351.409 require the respondent to demonstrate that the amount of any price difference between sales in the home market and the United States is wholly or partly due to a difference in quantities sold. The petitioners note that this requirement has been upheld in

several cases, including Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Round Wire from Canada, 64 FR 17324, 17329 (Apr. 9, 1999) (Round Wire from Canada) (where the Department declined to make a quantity adjustment for the respondent because it failed to demonstrate that any difference in prices were specifically attributable to the production of the different quantities); and Notice of Final Determination of Sales at Less Than Fair Value: Open-End Spun Rayon Singles Yarn From Austria, 62 FR 43701, 43706-07 (Aug. 15, 1997) (where the Department also declined to make a quantity adjustment for the respondent because it did not find that the respondent demonstrated that it gave discounts on a uniform basis and that such discounts were available to substantially all home market customers).

According to the petitioners, Fischer has provided no analysis to support its claim, nor indeed has it provided any evidence that it granted quantity discounts at all on its sales in the home market. The petitioners assert that, to the contrary, Fischer explicitly stated in its section B and C questionnaire responses that it did not offer quantity discounts in the home market, and it did not report quantity discounts in the U.S. sales listing because all quantity discounts are netted out of the final invoice price.

Finally, the petitioners assert that Fischer's reliance on Section 129 Lumber from Canada is misplaced because the Department did not grant a quantity adjustment in that case. Rather, the petitioners note that, in Section 129 Lumber from Canada, the Department modified its product matching methodology to use a difference in quantity as a "tie breaker" when more than one home market sale could be used as an equally similar match to a U.S. sale. See Section 129 Lumber from Canada, 70 FR at 22638. According to the petitioners, such a methodology is not warranted here because Fischer has not provided any evidence to show that the quantity of merchandise sold affected the price of any individual transactions. The petitioners state that Fischer has merely made an unsupported allegation that the difference between the quantity of NFC sold in the home market and the quantity sold in the United States must have affected the price. Consequently, the petitioners maintain that the Department should reject Fischer's claim for a quantity adjustment for the final results.

Department's Position:

For the final results, we have not made a quantity adjustment for Fischer's sales of NFC. The Department's practice regarding quantity adjustments is set forth in Round Wire from Canada, 64 FR at 17329, where we stated:

With respect to making an adjustment if we make comparisons of products sold at different quantities, our regulation at 19 C.F.R. 351.409 states that "the Secretary will make a reasonable allowance for any difference in quantities to the extent the Secretary is satisfied that the amount of any price differential * * * is wholly or partly due to that difference in quantities." The regulation identifies the standards we use to determine whether any price differential is wholly or partly due to that difference in quantities: "[t]he Secretary normally will calculate normal value based on sales with quantity discounts only if * * * the exporter or producer granted quantity discounts of at least the same magnitude on 20 percent or more of sales of

the foreign like product” or “the exporter or producer demonstrates to the Secretary's satisfaction that the discounts reflect savings specifically attributable to the production of the different quantities.” Central Wire did not grant quantity discounts nor did it demonstrate that any difference in prices were specifically attributable to the production of the different quantities. In addition, Central Wire did not demonstrate how any evidence on the record, such as price lists, supported its claim that prices varied by quantity. Therefore, we have not made any quantity adjustments.

Similar to the respondent in Round Wire from Canada, Fischer did not report that it granted quantity discounts during the POR. In addition, an examination of the data reported in Fischer's home market and U.S. sales listings shows that the NV for NFC does not exceed U.S. price for this product in all instances. Further, in those instances where the NV for NFC does exceed U.S. price, Fischer has provided no evidence showing that this difference is attributable to any difference in quantities between home market and U.S. sales. Rather, Fischer has merely provided conclusory statements without any supporting analysis.

Finally, we find that Fischer's reliance on Section 129 Lumber from Canada is misplaced. The Department did not make a quantity adjustment in that case. Rather, the Department modified its product matching methodology to use a difference in quantity as a “tie breaker” when more than one home market sale could be used as an equally similar match to a U.S. sale. See Section 129 Lumber from Canada, 70 FR at 22638. However, Fischer has not requested that the Department modify the product matching methodology used in this case in the manner it was done in Section 129 Lumber from Canada. Consequently, we have not made a quantity adjustment for Fischer's sales of NFC in our calculations for the final results.

Comment 14: Fischer's Home Market NFC Sales Used for Comparison Purposes

In the preliminary results, we compared U.S. sales of subject merchandise to contemporaneous sales of FCOJM and NFC in Brazil. We determined which sales were contemporaneous following the guidance set forth in 19 CFR 351.414(e)(2), which instructs the Department to compare each U.S. sale to comparison market sales made within the six month “window” surrounding the sale (i.e., the “90/60” contemporaneity rule).

Fischer asserts that, in its margin calculations for the preliminary results, the Department used one home market sale of NFC which was made during the window period to compare to three large volume U.S. sales of NFC. According to Fischer, the Department should disregard this home market sale of NFC because it was both produced and priced prior to not only the beginning of the POR, but also to the date of suspension of liquidation in this proceeding. Fischer points out that the Department has a practice of not applying its “90/60” contemporaneity rule when case-specific factors exist that would not permit a normal price-to-price comparison using the window periods. See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan: Final Results Antidumping Duty Administrative Review, 66 FR 11555 (Feb. 26, 2001) (LNPP from Japan), and accompanying Issues and Decision Memorandum at Comment 1; and Certain Steel Concrete Reinforcing Bars From Turkey: Final Results of

Antidumping Duty Administrative Review and New Shipper Review and Determination To Revoke in Part, 72 FR 62630 (Nov. 6, 2007) (2005-2006 Rebar from Turkey), and accompanying Issues and Decision Memorandum at Comment 4. Further, Fischer asserts that, for different reasons, the Department decided to not apply the “90/60” contemporaneity rule in Notice of Final Results of Antidumping Duty Administrative Review: Frozen Concentrated Orange Juice From Brazil, 62 FR 5798, 5799 (Feb. 7, 1997) (FCOJ from Brazil).

According to Fischer, the Department has also disregarded sales during the window periods in LTFV investigations, citing Section 129 Lumber from Canada, 70 FR at 22644-22645. While Fischer notes that the decision in Section 129 Lumber from Canada related to an LTFV investigation, rather than an administrative review, Fischer argues that the “90/60” contemporaneity rule is the same. Finally, Fischer claims that 19 CFR 351.213(e)(1)(ii) applies here because it mandates that first administrative reviews will only cover entries, exports, or sales during the POR starting from the date of suspension of liquidation. Therefore, Fischer contends that the Department should follow its regulations and exercise its discretion to disregard the home market sale in question for its final results margin calculations.

The petitioners disagree with Fischer’s contention that it was improper for the Department to use the home market sale in question for matching purposes in the preliminary results margin calculations. According to the petitioners, the “90/60” contemporaneity rule is the Department’s longstanding practice and has ensured consistency and transparency in the Department’s methodology across cases. As support for this assertion, the petitioners cite 2005-2006 Rebar from Turkey at Comment 4. The petitioners maintain that none of the facts in the cases cited by Fischer to support its proposed deviation from the “90/60” contemporaneity rule is similar to those present here. In Section 129 Lumber from Canada, the petitioners note that the Department did not apply the “90/60” contemporaneity rule because of the high level of price volatility in the market. See Section 129 Lumber from Canada, 70 FR at 22644-22645. Similarly, in FCOJ from Brazil, the petitioners state that the Department did not apply the “90/60” contemporaneity rule because of the price volatility of minimum export prices, where NV was based on third country market sales. See FCOJ from Brazil, 62 FR at 5799; see also Notice of Preliminary Results of Antidumping Duty Administrative Review: Frozen Concentrated Orange Juice From Brazil, 60 FR 41874, 41875 (Aug. 14, 1995). Further, in LNPP from Japan, the petitioners contend that the Department actually expanded the window periods due to the unique nature of the product. See LNPP from Japan at Comment 1. Finally, in certain administrative reviews of rebar from Turkey, the petitioners note that the Department did not apply the “90/60” contemporaneity rule because of hyperinflation in the Turkish economy. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part, 69 FR 64731 (Nov. 8, 2004), and accompanying Issues and Decision Memorandum at Comment 2.

The petitioners point out that the Department has deviated from its “90/60” contemporaneity rule in very few instances and under very limited circumstances, none of which is present in this administrative review. As support for this assertion, the petitioners cite Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey, 61 FR 69067, 69068 (Dec. 31, 1996) (where the Department did not apply the “90/60”

contemporaneity rule because the Turkish economy experienced hyperinflation); and Final Results of Antidumping Duty Administrative Review; Certain Valves and Connections, of Brass, for Use in Fire Protection Systems From Italy, 56 FR 5388, 5389 (Feb. 11, 1991) (where the Department did not apply the “90/60” contemporaneity rule because goods in both markets were sold pursuant to price lists that were changed only once a year). Further, the petitioners note that the Department has never deviated from its “90/60” contemporaneity rule simply because certain home market sales were made prior to the suspension of liquidation in the antidumping investigation. According to the petitioners, such a practice would preclude the Department from considering home market sales made during the three months preceding the POR in all first administrative reviews.

Finally, the petitioners disagree that 19 CFR 351.213(e)(1)(ii) supports deviating from the “90/60” contemporaneity rule. The petitioners note that this section of the Department’s regulations is not only clearly concerned with U.S. sales, not home market sales, but also the date of suspension of liquidation is irrelevant in the context of home market sales. Thus, the petitioners maintain that this regulation does not prevent the Department from considering pre-POR home market sales in its analysis. As a consequence, the petitioners assert that Fischer’s argument is unsupported by the Act, the Department’s regulations, or the Department’s practice. Consequently, the petitioners maintain that the Department should reject Fischer’s arguments and continue to apply the “90/60” contemporaneity rule for purposes of the final results.

Department’s Position:

We disagree with Fischer that it is appropriate to deviate from our regulations and standard practice in conducting an administrative review in this case. The Department’s regulations at 19 CFR 351.414(e)(2) state:

Normally the Secretary will select as the contemporaneous month the first of the following which applies:

- (i) The month during which the particular U.S. sale under consideration was made;
- (ii) If there are no sales of the foreign like product during this month, the most recent of the three months prior to the month of the U.S. sale in which there was a sale of the foreign like product;
- (iii) If there are no sales of the foreign like product during any of these months, the earlier of the two months following the month of the U.S. sale in which there was a sale of the foreign like product.

In this administrative review, we followed the Department’s regulations and practice when determining NV for each U.S. transaction. The fact that the Department has followed this regulation in virtually all administrative reviews, with only a few exceptions that are not applicable here, has ensured consistency and transparency in the Department’s methodology across cases.

See, e.g., Stainless Steel Hollow Products From Sweden; Final Results of Antidumping Duty Administrative Review, 57 FR 21389, 21392 (May 20, 1992) (where the Department rejected the respondent's request to depart from the "90/60" contemporaneity rule to minimize distortions resulting from metal price fluctuation); Final Results of Antidumping Duty Administrative Review; Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand, 56 FR 58355, 58359 (Nov. 19, 1991) (where the Department declined to depart from its normal practice of applying the "90/60" contemporaneity rule); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany: Final Results of Antidumping Duty Administrative Review, 56 FR 31692, 31714 (July 11, 1991) (where the Department rejected a request to depart from its "90/60" contemporaneity rule to find matches for two unmatched sales outside the 90/60 day window); Color Television Receivers, Except for Video Monitors, from Taiwan; Final Results, 55 FR 47093, 47098 (Nov. 9, 1990) (where the Department reversed its preliminary determination to look outside the 90/60 day window period for model matches); and 2005-2006 Rebar from Turkey at Comment 4 (where the Department rejected the petitioners' request to depart from its normal practice of applying the "90/60" contemporaneity rule).

In this review, Fischer contends that it is inappropriate for the Department to use the home market NFC sale in question for matching purposes because this sale was made prior to the date of suspension of liquidation in this proceeding. However, the Department does not deviate from its "90/60" contemporaneity rule in cases where home market sales were made prior to the suspension of liquidation in a proceeding. See, e.g., Certain Frozen Warmwater Shrimp from India: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 72 FR 10658, 10663 (Mar. 9, 2007), unchanged in Shrimp from India Final Results. Neither the Act nor the Department's regulations provide such an exception to this rule. Moreover, we find that such a practice would preclude the Department from considering home market sales made during the three months preceding the POR in all first administrative reviews.

Finally, we disagree with Fischer that any of the circumstances present in the cases it cites where the Department did depart from the "90/60" contemporaneity rule are present in the instant proceeding. First, in LNPP from Japan, we based NV on CV, rather than sales to the home market, because we determined that the unique, custom-built nature of each large newspaper printing press sold does not permit proper price-to-price comparisons. See LNPP from Japan at Comment 1. The nature of the subject merchandise in LNPP from Japan contrasts with the nature of OJ, which is a commodity product. Further, in FCOJ from Brazil, the Department decided not to apply the "90/60" contemporaneity rule because of volatility in the price of FCOJ on the futures market which was used as the basis for the foreign market value (i.e., NV) of the merchandise. NV in this case is not based on a futures market price, but rather on the actual home market sales prices of the respondents.

Finally, we find that Fischer's reliance on 2005-2006 Rebar from Turkey is similarly misplaced because, as noted above, the Department declined to depart from its "90/60" contemporaneity rule in that proceeding. See 2005-2006 Rebar from Turkey at Comment 4. Therefore, in accordance with 19 CFR 351.414(e)(2), as well as the Department's long-standing practice, we are continuing to apply our "90/60" contemporaneity rule for the final results.

Comment 15: *The Application of Inventory Carrying Costs by CONNUM for Fischer*

For purposes of the preliminary results margin calculations, the Department used the product-specific home market inventory carrying costs for FCOJM and NFC reported in Fischer's June 1, 2007, response to section B of the questionnaire. Fischer claims, however, that the calculation of inventory carrying costs used by the Department in the preliminary results was based on the average of all drums in storage. Therefore, Fischer argues that because the Department has established separate CONNUMs for its products, the average inventory carrying cost should be product-specific (*i.e.*, by CONNUM) and, thus, the Department should adjust the calculation of inventory carrying costs for NFC to reflect the average time only NFC was held in inventory.

The petitioners point out that the Department did use product-specific home market inventory carrying costs for FCOJM and NFC in the calculations for the preliminary results. Thus, according to the petitioners, no further adjustment is necessary.

Department's Position:

We disagree that we failed to calculate home market inventory carrying costs on a product-specific basis in the preliminary results. We relied on the calculations Fischer provided in its June 1 submission; these calculations were specific to FCOJM and NFC because they were based on both the costs for these individual products as well as their specific inventory carrying periods.

Nonetheless, we have recalculated Fischer's inventory carrying costs for purposes of the final results to take into account our revisions to COM related to the cost of self-produced oranges. For further discussion, see Comment 19, below.

Comment 16: *The Calculation of Harbor Maintenance Fees for One U.S. Sales Observation for Fischer*

Fischer claims that it misreported the amount of U.S. harbor maintenance fees for one U.S. sale during the POR, and it requests that we correct this error in our final results. Specifically, Fischer notes that these fees are calculated as 0.125 percent of the entered value of the merchandise, whereas Fischer reported harbor maintenance fees for one observation in the U.S. sales listing equaling more than 75 times their true value. Therefore, Fischer asks that the Department correct this amount in its calculations for the final results.

The petitioners did not comment on this issue.

Department's Position:

We have examined the harbor maintenance fee for the U.S. sale in question and find that the per-unit expense amount reported in Fischer's U.S. sales listing is significantly higher than 0.125 percent of the entered value amount, which is the rate charged by CBP. Thus, because we find

that this is a clear error, we have recalculated the harbor maintenance fee for this U.S. sale to be 0.125 percent of the entered value for purposes of the final results.

Comment 17: Request to Treat Two of Fischer's U.S. Sales as EP Transactions

Fischer reported all of its transactions in the U.S. sales listing for the POR as CEP sales. According to Fischer, two of its U.S. sales during the POR were purchased and imported by an unaffiliated third party, rather than Citrosuco North America (CNA), Fischer's U.S. affiliate. Thus, Fischer contends that these sales should properly be classified as EP sales, not CEP sales, because the purchaser/importer is not affiliated with Fischer.

The petitioners disagree, noting that this is the first time that Fischer has claimed making EP sales in the United States. The petitioners point out that all of Fischer's U.S. transactions were coded as CEP sales in Fischer's original U.S. sales listing as well as all of Fischer's U.S. sales listings submitted in response to supplemental questionnaires. Therefore, according to the petitioners, Fischer cannot claim that coding these transactions as CEP sales was a clerical error made by the Department in its preliminary results. At best, the petitioners maintain that Fischer may claim that it made a clerical error itself by coding the transactions in question as CEP sales in its prior submissions.

The petitioners assert that the Court has upheld the Department's discretion to accept corrections of clerical errors only under certain conditions, citing Maui Pineapple, 264 F. Supp. 2d at 1261. According to the petitioners, these conditions include: "1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; 2) {Commerce} must be satisfied that the corrective documentation provided in support of the clerical error is reliable; 3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; 4) the clerical error allegation, and any corrective documentation, must be submitted to {Commerce} no later than the due date for the respondent's administrative case brief; 5) the clerical error must not entail a substantial revision of the responses; and 6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification." See Maui Pineapple, 264 F. Supp. 2d at 1261. The petitioners contend that the earliest reasonable date for Fischer to correct this alleged error would have been in its November 2, 2007, supplemental section C response, in which it first explained that CNA was not the importer of record for the sales in question. However, the petitioners note that Fischer did not at that time or in any subsequent supplemental questionnaire response indicate that these transactions should be treated as EP sales.

Further, the petitioners maintain that Fischer has not established that the classification of these transactions as CEP sales was a clerical error, or that the Department should have known that this classification was a clerical error. According to the petitioners, the only fact Fischer provides in support of classifying these transactions as EP sales is the fact that an unaffiliated third party was the purchaser and importer of record of the subject merchandise. However, the petitioners state that this is not sufficient evidence to establish that the transactions in question are EP sales. Rather, the petitioners claim that a comparison of the entry dates to the sale dates of these transactions appears to indicate that these transactions would qualify as CEP sales.

Consequently, the petitioners assert that the Department should reject Fischer's argument and continue to treat these transactions as CEP sales for the purposes of the final results.

Department's Position:

We have examined the data on the record with respect to the two transactions at issue and find that there is insufficient basis to conclude that they are more properly classified as EP sales. Specifically, no information exists on the record of this proceeding to indicate that these sales should be classified as EP transactions, apart from the fact that CNA did not act as the importer of record for them. However, the identity of the importer of record is not dispositive and Fischer provided an explanation for why its customer acted as the importer of record for these sales in its May 31 section C response at page C-32.⁷ Moreover, we note that Fischer itself reported these sales as CEP transactions in its original response to the Department's questionnaire and in all supplemental questionnaire responses. See Fischer's May 31, 2007, section C response. See also Fischer's November 5, 2007, supplemental questionnaire response; Fischer's December 17, 2007, supplemental questionnaire response; and Fischer's March 13, 2008, supplemental questionnaire response.

In addition, a comparison of the entry dates and the sale dates for these sales indicates that the sales were made after importation into the United States. See Fischer's U.S. sales listing submitted with its March 13, 2008, response. We find that this fact alone provides a sufficient basis to classify these sales as CEP because, pursuant to the Act, EP sales cannot be made after importation to the United States. See section 772(a) of the Act. See also Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review, 71 FR 45521, 45527 (Aug. 9, 2006), unchanged in Stainless Steel Sheet and Strip in Coils From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 71 FR 77504 (Dec. 15, 2006); Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products From Canada, 66 FR 56062, 56067-68 (Nov. 6, 2001), unchanged in Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, 67 FR 15539 (Apr. 2, 2002); and Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 62 FR 42496, 42500 (Aug. 7, 1997). Absent information demonstrating that either the sale or entry dates are incorrect (which Fischer did not provide), we conclude that these sales are CEP transactions. Therefore, we have continued to treat Fischer's two U.S. sales which were purchased and imported by an unaffiliated third party as CEP transactions for purposes of the final results.

Comment 18: Fischer's Raw Material Cost Allocation Methodology

In the preliminary results, Fischer valued its self-produced oranges used in the production of scope merchandise by dividing the total POR agricultural cost by the associated harvested quantity. As neutral facts available, we relied upon Fischer's reported cost for self-reported oranges for the preliminary results. However, we noted that the appropriate methodology for reporting the cost

⁷ Because Fischer's explanation contains proprietary information, we cannot discuss it here.

of self-produced oranges in this case and future reviews is to calculate the average per-unit cost to produce oranges during the 12-month growing season that most appropriately matches the POR. See Preliminary Results, 73 FR 18777. We also revised Fischer's reported product-specific manufacturing costs by reallocating the common material and conversion costs to FCOJM, NFC, and "Dairy Pak" orange juice (Dairy Pak) based on the relative quantity of finished production of each type of orange juice converted into an equivalent brix level. Id.

Regarding the first item noted above, Fischer states it reported the cost of self-produced oranges used in the production of certain orange juice using data for the POR because it was not clear to it that the Department required a different calculation. Fischer points out that the information to calculate the cost of self-produced oranges based on a 12-month harvesting period is on the record and the Department can calculate the cost of Fischer's self-produced oranges using its normal methodology, if the Department so chooses.

Regarding the second item, Fischer objects to the Department's revision of its reported allocation of common orange and processing costs in the preliminary results. Fischer contends that the Department's methodology is less precise than the company's own methodology. Fischer claims that its production system is able to track the effective quantities of raw material (i.e., oranges) used in the production of each juice product (i.e., FCOJM, NFC, and Dairy Pak), and accordingly, Fischer allocated the common costs (i.e., orange input and conversion costs) to these juice products based on their relative effective orange input quantities. Fischer asserts that the internal production orders it submitted in Exhibit 4 of its January 18, 2008, response shows the total allocation of fruit input to each orange juice product. Fischer claims that its reported allocation methodology of common orange and processing costs in this administrative review is that same methodology that Fischer used in the LTFV investigation and which the Department did not challenge.

The petitioners note that the Department accepted Fischer's reported costs of self-produced oranges in the preliminary results as neutral facts available even though the calculation was not in accordance with the Department's normal methodology because Fischer's reported methodology did not benefit it. The petitioners argue that the Department should not accept Fischer's claim of not understanding the Department's request because the valuation of self-produced oranges was an issue in the LTFV investigation in which Fischer participated. See Orange Juice from Brazil Investigation at Comment 20. Additionally, the petitioners cite the March 31, 2008, memorandum from Sheikh M. Hannan to Neal M. Halper entitled, "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Fischer S/A – Agroindustria," where the Department stated that Fischer was given an opportunity to remedy this deficiency in a supplemental questionnaire and Fischer failed to comply, referring the Department to its previously submitted data. Thus, the petitioners argue that Fischer should not be rewarded for its failure to comply with the Department's request.

The petitioners contend that Fischer's assertion that its cost allocation methodology for common fruit and processing costs is more precise than the allocation methodology used by the Department is misguided and without basis. The petitioners argue that Fischer has failed to demonstrate that its cost allocation methodology is used in its normal books and records to value inventory and

COGS. Therefore, the petitioners assert that the Department should continue to use the cost allocation methodology it used in both the preliminary results and in the LTFV investigation.

Department's Position:

For these final results, we have recalculated the cost of self-produced oranges based on the 12-month growing season that most appropriately matches the POR in accordance with our normal methodology for self-produced agricultural products. Fischer reported the cost of self-produced oranges for the 18-month POR, which includes the full 12-month growing season. We disagree with the petitioners that it is appropriate to ignore information submitted on the record of this administrative review and, as a consequence, achieve a less accurate result. Section 782(e) of the Act states:

- (e) **USE OF CERTAIN INFORMATION.** – In reaching a determination under section 703, 705, 733, 735, 751, or 753 the administering authority and the Commission shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if –
 - (1) the information is submitted by the deadline established for its submission,
 - (2) the information can be verified,
 - (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
 - (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
 - (5) the information can be used without undue difficulties.

Fischer's cost information for self-produced oranges used as the basis of our recalculation satisfies the requirements of section 782(e) of the Act because: 1) the information was submitted by the deadline established by the Department; 2) we chose not to conduct a verification in this segment of the proceeding, so this item is inapplicable; 3) the information is not so incomplete that it cannot form the basis of our recalculation; 4) Fischer has acted to the best of its ability in providing this information; and 5) this information can be used without undue difficulty. Thus, we have used the information provided by Fischer to recalculate the cost of its self-produced oranges, as outlined below.

The Department's normal methodology with regard to self-produced agricultural inputs is to calculate the average per-unit cost to produce the input during the 12-month growing season that most appropriately matches the period of investigation (POI) or POR. See Orange Juice from Brazil Investigation at Comment 20. The Department values the self-produced agricultural input used in the production of scope merchandise by multiplying the average per-unit cost to produce the input during the 12-month growing season by the quantity of the self-produced agricultural input used in the production of scope merchandise.

The Department has developed this practice because a full growing and harvesting cycle represents the full cost of the self-produced agricultural input used in the production of scope merchandise which in this case is the full cost of an orange used in the production of orange juice. In this case, the POR covers part of three different growing seasons. Using POR growing and harvesting costs results in a per-unit POR orange cost that includes elements of agricultural costs (i.e., growing, pre-harvesting, and harvesting costs) from different growing seasons which does not represent all the elements of a full growing season (e.g., growing costs from two seasons but pre-harvesting costs and harvesting costs from only one season). The growing season per-unit cost combines all the growing, pre-harvesting, and harvesting costs incurred in a particular growing season which jointly contribute to the yield and harvested quantity of that season. The growing season per-unit cost is meaningful because all the elements in the calculation of the per-unit cost are confined within a particular growing season and represent one full growing cycle cost. See Notice of Final Results of Antidumping Duty Administrative Review: Honey from Argentina, 69 FR 30283 (May 27, 2004), and accompanying Issues and Decision Memorandum at Comment 3; and Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Fresh Tomatoes from Mexico, 61 FR 56608, 56610 (Nov. 1, 1996).⁸

Therefore, for the final results, we calculated the cost of Fischer's self-produced oranges used in the production of scope merchandise by first calculating the cost of self-produced oranges per box for the February 2006 to January 2007 growing season (i.e., the 12-month growing season that most appropriately matches the current POR). We then multiplied the calculated growing season average per-box cost by the number of boxes of self-produced oranges consumed in the production of scope merchandise during the POR.

Further, we disagree with Fischer that its normal accounting treatment and reported method for allocating fresh orange input costs and processing to the various orange juice products it produced was reasonable. In accordance with section 773(f)(1)(A) of the Act, the Department normally calculates costs based on the records of the exporter or producer of the merchandise, if those records are kept in accordance with the GAAP of the exporting country and they reasonably reflect the costs associated with the production and sale of the merchandise under consideration. In instances where a company's normal accounting practices do not reasonably reflect its production costs, the Department adjusts the respondent's costs or uses an alternative calculation methodology that more reasonably reflects the costs incurred to produce the merchandise under consideration.

⁸ We note that this investigation was suspended before the Department issued its final determination. See Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, 61 FR 56618 (Nov. 1, 1996).

See Notice of Final Results of Antidumping Duty Administrative Review: Certain Steel Concrete Reinforcing Bars from Turkey, 70 FR 67665 (Nov. 5, 2005), and accompanying Issues and Decision Memorandum at Comment 3. In the normal course of business, Fischer estimates the orange juice yield it will achieve based on the quality of oranges input into production. See Fischer's June 25, 2007, response at pages D-14 and D-15. Depending on which product Fischer is producing (i.e., FCOJM, NFC or Dairy Pak) at different times of year, and the random quality difference of the input oranges throughout the year, the identical intermediate orange juice product used to produce each of the orange juice products gets assigned a different COM. As a result, the reported cost differences between products are not limited to the differences in the physical characteristics of the products produced.

Trucks carrying oranges arrive at Fischer's orange juice production plant and are unloaded, and then the oranges are disinfected and stored in bins. Oranges are sent to the laboratory to determine the characteristics of the load and a projected yield is calculated based on the fruit sample. The projected yield from the sample oranges is used to estimate the yield associated with the orange juice products produced from the related truckload of oranges. Oranges leaving the storage bins are washed and sized prior to being sent to the extractors. The extractors crush the fruit and extract the juice from the oranges. The extracted juice is sent to the turbo filter, the paddle finisher, and the centrifuges to reduce the pulp and oil presence in the juice. All orange juice products share the same common processes (i.e., from the storage bins to the centrifuges). The same orange juice from the centrifuges is used as an input in the production of all juice products. The decision to produce FCOJM, NFC, or Dairy Pak is made after the centrifuge process. If the orange juice is to become FCOJM or Dairy Pak, it is sent to the evaporator and through the cooling process. If the orange juice is to become NFC, it is pasteurized and sent through the cooling process. The yield of the orange juice from the centrifuges is exactly the same regardless of which end orange juice product it is used to produce. See Fischer's June 25, 2007, response at page D-2.

It is only due to the random quality differences in the fresh oranges consumed and the random timing of what finished products are produced at any particular point in time that reported cost differences for the identical intermediate orange juice product exists. Since there is no difference in the intermediate orange juice produced, and all of the orange juice produced goes through the same processes through the centrifuge stage of production, we have determined that all orange juice intermediate products should be assigned the same average fresh fruit and processing costs. Therefore, for the final results, we have continued to allocate common material and conversion costs to the orange juice products based on their relative quantities of finished production converted into an equivalent brix level (i.e., a measure of juice concentration).

Finally, we note that in the previous segment of this proceeding, Fischer deviated from its normal books and records and allocated the common fresh orange and conversion costs to orange juice products based on the Department's methodology, as noted above. That is, the same average fresh orange and processing costs were assigned to all intermediate orange juice production. Thus, the Department's methodology in this administrative review is the same as that used in the LTFV investigation.

Comment 19: Calculation of Fischer's G&A Expense Ratio

Fischer contends that for the preliminary results, the Department erroneously recalculated Fischer's G&A expense ratio to include certain amounts related to provisions for losses on fruit contracts and labor claims. Fischer argues that these expenses were incurred prior to the POR and should not be included in the G&A expense ratio calculation. Fischer also contends that the Department erred in revising the denominator of the ratio by excluding the by-product costs from the company-wide COGS. Fischer points out that the by-product costs include the cost of lemon and grapefruit juice, items not considered to be by-products of orange juice production.

The petitioners contend that the Department appropriately included the provisions for losses on fruit contracts and labor claims in the G&A expense ratio calculation because these items were recorded as expenses in Fischer's fiscal year income statement. The petitioners claim that Fischer has failed to provide any documentation to support its claim that these expenses were related to periods prior to the POR. In addition, the petitioners assert that the Department correctly offset the COGS denominator used in the G&A expense ratio for by-product revenue because the COGS denominator used in the G&A ratio should be calculated on an equivalent basis as the COM value to which the rate is applied. See Live Cattle from Canada, 64 FR at 56756.

Department's Position:

We disagree with Fischer that the provision for losses on fruit contracts and labor claims recognized as expenses in its 2006 fiscal year audited financial statements should be excluded from the calculation of the G&A expense ratio. These amounts became known and quantifiable during the 2006 fiscal year, and therefore, were recorded as expenses in the 2006 fiscal year audited financial statements.

It is the Department's well-established practice to include in the G&A expense ratio calculation those expenses that relate to the general operations of the company as a whole. See Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Carbon-Quality Steel Products from Japan, 64 FR 24329, 24350 (May 6, 1999). Consequently, in determining whether it is appropriate to include or exclude from the G&A expense ratio calculation particular income or expense items, the Department reviews the nature of the item and its relation to the general operations of the company. Losses on fruit contracts and labor claims both result from the general operations of a fruit processor. Accordingly, we have included both types of losses in the numerator of the G&A expense ratio calculation. In the corresponding LTFV investigation, the Department included similar losses in the numerator of the G&A ratio calculation. See Orange Juice from Brazil Investigation at Comment 24.

We disagree with Fischer's point that the events related to these losses on fruit contracts and labor claims occurred prior to the POR and therefore any associated expenses should not be recognized in this POR. Note 2 of Fischer's 2006 audited financial statements explicitly states that the preparation of financial statements requires the use of estimates and, accordingly, management provides estimates of the provisions for contingent liabilities. See Exhibit 12 of Fischer's May 22, 2007, response. Contingent liabilities (*i.e.*, provisions for losses on fruit contracts and labor

claims) are recorded for events that have occurred and the associated expenses are recorded in the year when the outcome of the loss is known or probable and the amount can be determined. While Fischer argues that the events associated with the contingent liabilities occurred prior to the POR, Fischer did not record these provisions until the 2006 fiscal year and did not recognize the losses on its income statement until fiscal year 2006. We disagree that the event occurrence date determines when the expense is recognized because that is not how Fischer itself recognized these expenses in its audited financial statements. Fischer recognized these losses when they become known, probable, and could be quantified, which was in fiscal year 2006. This treatment is consistent with the Department's practice in past cases. For example, in Notice of Final Results of Antidumping Duty Administrative Review: Certain Cut-to-Length Carbon Steel Plate from Romania, 72 FR 6522 (Feb. 12, 2007), and accompanying Issues and Decision Memorandum at Comment 3, the Department included provisions for losses recorded in the respondent's 2005 fiscal year income statement, in connection with lawsuits filed against the company in 2002 for events that occurred between 1998 to 2002, in the reported G&A expenses.

Regarding Fischer's argument related to the treatment of by-product costs, in its normal books and records, Fischer tracks the production quantity of the by-products of orange juice production but it does not track, assign, or allocate production costs to these by-products. See Fischer's June 27, 2007, response at page D-13. Rather, each month, Fischer values the generated by-products based on their average monthly net sales value. Fischer allocates all production costs, less the net sales value of the by-products, to the orange juice products. Id. When these by-products are sold, the net sales value of these by-products is included in Fischer's company-wide COGS amount. For reporting purposes, Fischer allocated all orange juice-related production costs, less the net sales value of the by-products generated during the POR, to scope merchandise. See Fischer's June 27, 2007, response at page D-16. In this case, the G&A and financial expense ratios are applied to the reported per-unit COM of the scope merchandise that were calculated by reducing the orange juice-related production costs by the net sales value of the by-products generated during the POR. In order to produce an accurate result, the bases upon which the ratios are calculated must be the same as the basis of the COM of the orange juice to which they are applied. As such, we deem it appropriate to reduce the company-wide cost of sales used as the denominator to compute the G&A expense ratio by the net sales value of the by-products sold. See Shrimp From Ecuador at Comment 29, where the Department reduced the company-wide cost of sales used as the denominator to compute the G&A expense ratio by the by-product revenues. See also Lemon Juice from Argentina, 72 FR at 20824. Therefore, for the final results, we have continued to reduce the company-wide cost of sales used as the denominator of the G&A expense ratio by the net sales value of the by-products sold. However, we have included in the company-wide cost of sales the value of lemon and grapefruit juice sold.

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_____

David M. Spooner
Assistant Secretary
for Import Administration

(Date)