

DATE: August 11, 2010

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

FROM: Edward C. Yang
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Antidumping Duty
Administrative Review on Certain Orange Juice from Brazil –
March 1, 2008, through February 28, 2009

Summary

We have analyzed the comments of the interested parties in the 2008-2009 administrative review of the antidumping duty order covering certain orange juice (OJ) from Brazil. As a result of our analysis of those comments, we have made changes in the margin calculations from the preliminary results. We recommend that you approve the positions described in the “Discussion of the Issues” section of this memorandum. Below is the complete list of the issues in this administrative review for which we received comments from parties:

General Issues

1. Offsetting of Negative Margins

Company-Specific Issues

2. Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses
3. Ministerial Error in Cutrale’s Dumping Margin
4. Use of Actual Brix to Calculate the Prices and Quantities for Cutrale’s U.S. Sales
5. Use of Actual Brix to Calculate the Prices and Quantities for Cutrale’s Home Market Sales
6. Request for Revocation by Cutrale
7. Constructed Export Price (CEP) Offset for Cutrale
8. Cutrale’s Cost of Oranges from Affiliated Parties
9. Cutrale’s By-Product Revenue Offset to Cost of Goods Sold (COGS)
10. Cutrale’s Other Adjustments to COGS to Reflect Adjustments to the Cost of Manufacture (COM)
11. Fischer’s International Freight Expenses
12. Net Exchange Variation for Fischer

13. Fischer's Intercompany Interest Expenses
14. Offset to Intercompany Interest Expenses for Fischer's Financial Expenses
15. Market Prices for the Sale of Certain By-Products for Fischer
16. Fischer's Unrealized and Eradication Expenses

Background

On April 13, 2010, the Department of Commerce (Department) published the preliminary results of the administrative review of the antidumping duty order on OJ from Brazil. See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Antidumping Duty Order in Part, 75 FR 18794 (Apr. 13, 2010) (Preliminary Results). The period of review (POR) is March 1, 2008, through February 28, 2009.

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 calculation related to U.S. brokerage and handling revenue. See Comment 3;
- We removed an adjustment to Cutrale's U.S. sales prices and quantities to account for the brix level differences observed at verification because we determined that this adjustment did not result in a more accurate margin calculation. See Comment 4; and
- We used Cutrale's home market actual brix level data to adjust Cutrale's home market sales prices, quantities, and costs to state them on an actual brix basis. See Comment 5.

Discussion of the Issues

General Issues

Comment 1: *Offsetting of Negative Margins*

The respondents maintain that the Department's practice of "zeroing," which has been found to be inconsistent with the Antidumping Agreement and the intent of the members of the World Trade Organization (WTO), should be abandoned because it artificially inflates the dumping margin. The respondents argue that for the Department to meet its obligations under the General Agreement on Tariffs and Trade (GATT) 1994 and the Antidumping Agreement, it should allow offsets for non-dumped sales in its calculations for the final results.

Cutrale notes that, according to the WTO Appellate Body's findings 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 findings in U.S.-Zeroing (EC) only applied to certain specific administrative reviews, Cutrale contends that the rationale of the Appellate Body's decision applies to any administrative review in which the Department employs "zeroing." Further, Cutrale asserts that the WTO Appellate Body considered a broader challenge to the Department's practice of "zeroing" in administrative reviews in United States – Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (07-0081) (Jan. 9, 2007) (U.S.-Zeroing (Japan)), finding that "zeroing" was inconsistent with U.S. obligations under Article 9.3 of the Antidumping Agreement and Article VI:2 of the GATT.

The respondents also cite to the WTO Appellate Body's findings on February 9, 2009, which affirmed the WTO panel's finding that the Department's practice of "zeroing" as applied in numerous administrative reviews was inconsistent with the Antidumping Agreement and GATT 1994 (see United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (Feb. 9, 2009) (US-Zeroing (EC II)), as well as findings regarding the use of zeroing in antidumping investigations (see United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand, WT/DS383/R (Jan. 22, 2010) (US-Zeroing (Thailand)). Finally, Cutrale states that no U.S. court has ever held that the Department is required to engage in "zeroing." Therefore, Cutrale argues that since "zeroing" is neither required nor prohibited by U.S. law, the Department should abandon the practice to comply with international agreements, consistent with our WTO obligations.

Fischer also cites to WTO findings that the application of zeroing in periodic reviews is inconsistent with the Antidumping Agreement and GATT 1994 (see, e.g., U.S. – Zeroing (Japan); United States – Final Anti-Dumping Measures On Stainless Steel from Mexico, WT/DS344/AB/R (Apr. 30, 2008) (U.S.-Zeroing (Mexico)); United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (Feb. 4, 2009); and United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan, WT/DS322/RW (Apr. 24, 2009)).

The petitioners respond that the Department has already rejected such arguments, most recently in Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Final Results of the Fifteenth Administrative Review, 75 FR 13490 (Mar. 22, 2010). Moreover, 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 export price (EP) or CEP, and, thus, no dumping margin exists when NV is equal to or less than EP or CEP. The petitioners note that the U.S. Court of Appeals for the Federal Circuit (CAFC) has consistently upheld this interpretation. See Timken Co. v. United States, 354 F.3d 1334, 1342 (CAFC 2004) (Timken); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (CAFC 2005), cert. denied, and 126 S. Ct. 1023, 163 L. Ed. 2d 853 (Jan. 9, 2006) (Corus I); Corus Staal BV v.

United States, 502 F.3d 1370, 1375 (CAFC 2007) (Corus II); and NSK, Ltd. V. United States, 510 F.3d 1375 (CAFC 2007) (NSK).

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

Finally, the petitioners note that since Brazil has brought this issue before the Dispute Settlement Body of the WTO and a panel was formed on May 12, 2010, it would be premature for the Department to change its methodology in this administrative review. Thus, the petitioners contend that the Department should continue to deny offsets to dumping based on export transactions that exceed NV in this review.

Department's Position:

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

Section 771(35)(A) of the Act defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than EP or CEP. As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The CAFC has held that this is a reasonable interpretation of the statute. See, e.g., Timken, 354 F.3d at 1334, 1342 (Fed. Cir. 2004); and Corus I, 395 F.3d at 1343, 1347-49 (Fed. Cir. 2005).

Section 771(35)(B) of the Act defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping

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

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

The CAFC explained in Timken that denial of offsets is a "reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value." See Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate "masked dumping" before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. See, e.g., Timken, 354 F.3d at 1343; Corus I, 395 F.3d at 1343; Corus II, 502 F.3d at 1370, 1375; and NSK, 510 F.3d at 1375.

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 1375. As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary). Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports. See 19 USC 3533(g); and Zeroing Notice, 71 FR at 77722. With regard to the denial of offsets in administrative reviews, the United States has not employed this statutory procedure.

With respect to 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 77724. In doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. Id.

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

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

Comment 2: *Capping of Certain Revenues Received by Cutrale by the Amount of Reported Expenses*

In the Preliminary Results, the Department capped certain revenues reported by Cutrale by the amount of the corresponding expenses reported for such sales. Specifically, the Department capped the revenues from U.S. duty drawback and duty reimbursements by the amount of U.S. customs duties and fees, pallet revenue by the amount of repacking expenses actually paid in the United States, and the brokerage and handling revenue (received in the form of reimbursements) by the amount of brokerage and handling expenses in the United States.¹ The Department also capped the amount of warehousing revenue received on home market sales by the actual expense incurred for warehousing in the home market.

Cutrale argues that the Department’s cap on the revenue that its importer, Citrus Products Inc. (CPI), collects from its customers in the form of reimbursed port expenses is unreasonable and should be removed for the final results. Cutrale claims that the Department’s capping methodology fails to recognize monies actually received by CPI in connection with specific sales and are considered by Cutrale as part of the sales revenue. Cutrale alleges that use of this methodology has the effect of either understating the price actually paid by the customer on particular sales or of overstating the selling expenses incurred by Cutrale for them. Cutrale further contends that use of this methodology is legally impermissible in light of the Court’s ruling that the Department must not make adverse or punitive adjustments against a fully cooperative respondent. See Timken U.S. Corporation and Timken Nadellager GmbH v. United States, Slip Op. 04-21 (Mar. 5, 2004), citing Smith-Corona Group v. United States, 713 F.2d 1568, 1576 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022, 104 S.Ct. 1274, 79 L.Ed.2d 679 (1984) (Timken v. United States). Therefore, Cutrale argues that the Department should not cap the port-related revenues in question.

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

The petitioners agree with the Department’s preliminary decision to cap U.S. revenues by the amount of the associated expenses incurred. The petitioners note that the Department has followed the same capping methodology employed in previous administrative reviews of this proceeding and that it is the Department’s policy to use revenue to offset expenses when the revenue is directly related to the expense incurred. Furthermore, the petitioners contend that it

¹ Although we stated in the Preliminary Results that we intended to cap brokerage and handling revenue by the reported amount of the corresponding expenses, we failed to do so. We have corrected this error in the final results. See Comment 3, below.

would be inappropriate to treat the expenses and revenues at issue as price adjustments under 19 CFR 351.401(c) because they are not discounts, rebates, or post-sale price adjustments, they do not constitute changes in the price for subject merchandise. Additionally, the petitioners assert that it is the Department's practice not to treat freight-related revenues as additions to U.S. price under section 772(c) of the Act or as price adjustments under 19 CFR 351.102(b) but rather to incorporate freight-related revenues as offsets to movement expenses.² Therefore, the petitioners argue that the Department should continue to cap U.S. revenues for purposes of the final results.

Department's Position:

We disagree that the port-related revenue in question should be treated as a price adjustment and added to U.S. price in full for purposes of the calculation of net U.S. price. As a result, we have continued to set net revenue to zero where Cutrale's reimbursed port expenses exceed the amount that Cutrale actually paid.

The Department makes adjustments for U.S. movement expenses under section 772(c)(1) of the Act. Further, the Department's regulations at 19 CFR 351.401(c) direct the Department to use, in calculating U.S. price, a price which is net of any price adjustment that is reasonably attributable to the subject merchandise. The term "price adjustment" is defined under 19 CFR 351.102(b)(38) as "any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay."

We find that it would be inappropriate to treat the expenses and revenues associated with Cutrale's U.S. port expenses (i.e., U.S. brokerage and handling expenses and U.S. customs duties) as price adjustments under 19 CFR 351.401(c), because these fees do not represent "changes in the price for subject merchandise," such as discounts, rebates, and post-sale price adjustments. In past cases, the Department has declined to treat freight-related revenues as additions to U.S. price under section 772(c) of the Act or as price adjustments under 19 CFR 351.102(b). Rather, we have incorporated freight-related revenues as offsets to movement expenses because they relate to the movement and transportation of subject merchandise.³ Moreover, we find that it would be inappropriate to increase the gross unit price for subject merchandise as a result of profits earned on the provision or sale of services (such as brokerage services); such profits should be attributable to the sale of the service, not to the subject

² As support for this assertion, the petitioners cite Stainless Steel Wire Rod from Sweden: Preliminary Results of Antidumping Duty Administrative Review, 72 FR at 51411 (Sept. 7, 2007) (SSWR from Sweden), unchanged in Stainless Steel Wire Rod from Sweden: Final Results of Antidumping Duty Administrative Review, 73 FR at 12952 (Mar. 11, 2008); and Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 74 FR 40167, 40168 (Aug. 11, 2009) (2007-2008 OJ from Brazil), and accompanying Issues and Decision Memorandum at Comment 3.

³ See, e.g., 2007-2008 OJ from Brazil at Comment 3; SSWR from Sweden: Certain Steel Concrete Reinforcing Bars From Turkey: Preliminary Results of Antidumping Duty Administrative Review, 67 FR 21634, 21637 (May 1, 2002) (2000-2001 Rebar from Turkey), unchanged in Certain Steel Concrete Reinforcing Bars From Turkey: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 66110 (Oct. 30, 2002); and Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil, 71 FR 2183 (Jan. 13, 2006), and accompanying Issues and Decision Memorandum at Comment 5 (OJ from Brazil Investigation).

merchandise. Therefore, we have continued to treat these revenues as an offset to the underlying expenses. In so doing, we set Cutrale's net port expenses to zero where the corresponding revenue exceeded the expenses, in accordance with our past practice.⁴

With regard to the concerns raised by Cutrale that the Department administer the dumping law in a non-punitive manner towards a cooperative respondent, we agree. It is the Department's practice, consistent with the Court's requirements in Timken v. United States, to make any necessary adjustments to the calculation of U.S. price or NV based on the principles of a fair and equitable valuation, regardless of how those adjustments may affect the dumping margin. See 2007-2008 OJ from Brazil at Comment 3. This is evidenced by the fact that the Department has consistently applied the same capping methodology to both U.S. and home market revenues, regardless of whether it limits the increase to U.S. price or normal value. *Id.* In the current segment, the Department applied its capping methodology to both Cutrale's port revenue charged on sales to the United States as well as to warehousing revenue earned on Cutrale's sales in the home market. Therefore, we find that, in the current review, the Department has applied its capping methodology in a manner that assures a fair and equitable valuation of Cutrale's U.S. price and NV, consistent with our past practice.

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

Comment 3: *Ministerial Error in Cutrale's Preliminary Dumping Margin*

In the Preliminary Results, the Department stated that it capped the revenue received by Cutrale from brokerage and handling (received in the form of reimbursements) by the amount of

⁴ See, e.g., 2007-2008 OJ from Brazil at Comment 3 (where the Department capped U.S. duty drawback and duty reimbursements, pallet revenue, and brokerage and handling revenue, as well as warehousing revenue in the home market); Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584 (Aug. 11, 2008), and accompanying Issues and Decisions Memorandum at Comment 7 (2005-2007 OJ from Brazil) (where the Department treated freight revenue, duty revenue, and U.S. duty drawback as offsets to movement expenses, capped U.S. duty where U.S. drawback exceeded U.S. duty expenses, treated drum and pallet revenue as offsets to U.S. repacking expenses, and capped U.S. repacking expenses where drum and pallet revenue exceeded the corresponding expense); OJ from Brazil Investigation at Comment 9 (where the Department capped the total amount of the offset to indirect selling expenses for gains and losses on rolled over futures contracts by the total amount of indirect selling expenses for the U.S. affiliate); and 2000-2001 Rebar from Turkey, 67 FR at 21637 (where the Department offset freight expenses by freight revenue).

brokerage and handling actually paid in the United States. See Preliminary Results, 75 FR at 18796. The petitioners argue that this method is appropriate but claim the Department failed to execute it in the computer program used to calculate Cutrale's preliminary dumping margin. Therefore, the petitioners request that the Department correct this ministerial error in its final results.

Cutrale did not comment on this issue.

Department's Position:

We have examined the calculations performed for the preliminary results and agree that we did not properly cap Cutrale's U.S. brokerage and handling revenue in the computer program. Therefore, pursuant to section 751(h) of the Act, we have made the necessary changes to Cutrale's margin calculation program to correct this for the final results. For further discussion of this issue, see the August 11, 2010, Memorandum from Blaine Wiltse, Analyst, to the File, entitled "Calculation Adjustments for Sucocitrico Cutrale Ltda. for the Final Results" (Cutrale Sales Calculation Memo).

Comment 4: *Use of Actual Brix to Calculate the Prices and Quantities for Cutrale's U.S. Sales*

Cutrale sells both frozen concentrated orange juice for manufacture (FCOJM) and not-from-concentrate orange juice (NFC) on a pounds-solid basis in the United States, and it prices these products per-pound solid using their actual brix levels.⁵ In prior segments of this proceeding, we accepted Cutrale's sales data as reported because the brix level stated in its U.S. sales database was characterized as being the actual brix. In the current review, however, we adjusted the data based on our finding at verification that Cutrale did not report the actual brix of its Brazilian OJ, but rather it used the brix indicated on its sales invoices (which sometimes was for Brazilian and U.S. blended OJ). See Memorandum to the File, through James Maeder, Director, Office 2, from Miriam Eqab, Analyst, entitled, "Verification of the Sales Responses of Citrus Products Inc. In the 2008-2009 Antidumping Duty Administrative Review on Certain Orange Juice from Brazil," dated December 16, 2009, (Cutrale's CEP Verification Report), at 10. In making the adjustment, we multiplied Cutrale's reported U.S. prices and corresponding sales adjustments by the ratio of the actual brix obtained at verification to the brix reported in the field BRIXU of Cutrale's U.S. sales database, and we divided Cutrale's reported quantities by the same ratio.

Cutrale disagrees that this adjustment is appropriate, arguing that the Department misunderstood the data reported in the BRIXU field in the U.S. sales database. Cutrale maintains that the values in this field were: 1) the actual brix of the Brazilian juice sold during the POR, rounded to the nearest whole number; and 2) included merely for informational purposes (*i.e.*, they were not used to derive the reported prices or quantities). According to Cutrale, the Department verified this latter point, given that it confirmed at verification that the company had taken its reported prices and quantities directly from the sales invoices issued to the customer. Because the

⁵ Brix is the unit of measurement used in the orange juice industry to measure the amount of soluble solids in a concentrate. For example, FCOJM with a brix level of 66 contains 66 pounds of fruit sugar solids in every 100 pounds of solution.

Department based its adjustment, in part, on figures that were not used to derive the reported data, Cutrale contends that this adjustment is mathematically inaccurate (and thus it constitutes a ministerial error).

On a more general level, Cutrale disagrees that the brix data obtained at verification are in fact more accurate measurements of the actual brix of the merchandise sold than the brix stated on the invoice. While Cutrale concedes that the two sets of figures differ, it maintains that the difference is not because the former set contains “actual” brix levels and the second “average” brix levels, but rather because the former is a measurement of the actual brix of a larger batch and the latter the actual brix of only the shipped product. Cutrale claims that there is nothing on the record that calls into question either set of figures, nor is there any reason to attempt to adjust the price to account for the slight variation between the two sets of brix levels. Accordingly, Cutrale contends that the Department’s adjustments to its U.S. prices and quantities in the Preliminary Results were inappropriate and should be discontinued in the final results.

The petitioners support the Department’s use of the actual brix of subject merchandise to adjust Cutrale’s U.S. prices and quantities. The petitioners disagree with Cutrale that its reported brix levels represent the actual brix of its U.S. sales, noting that Cutrale has characterized these figures as an “average.” Consequently, the petitioners argue that Cutrale’s U.S. prices and quantities would be distorted if the Department relied on Cutrale’s reported brix. Moreover, the petitioners assert that the brix reported on the invoice often differed significantly from the actual brix provided at Cutrale’s CEP verification and Cutrale has not provided an explanation for these discrepancies.

Further, the petitioners argue that Cutrale’s claim that the Department made a ministerial error in the Preliminary Results is incorrect. Rather, the petitioners note that the Department intentionally merged Cutrale’s actual brix data into its U.S. sales database for the purposes of adjusting the U.S. sales prices and quantities. The petitioners contend that removal of the associated programming language would make Cutrale’s program unworkable and run contrary to the Department’s practice of using the actual brix to convert the price and quantity data in the U.S. sales database. Therefore, the petitioners urge the Department to reject Cutrale’s arguments and continue to adjust Cutrale’s U.S. prices, expenses, and quantities to state them on an actual brix basis for purposes of the final results.

Department’s Position:

We have reviewed the information on the record and our calculations for the Preliminary Results. Because the figures in the BRIXU field were not used to calculate the reported price or quantity data, we agree with Cutrale that using the BRIXU values to adjust Cutrale’s reported prices and quantities does not yield a mathematically meaningful result. Moreover, because there is no way to accurately use the brix data obtained at verification in our calculations, we have accepted Cutrale’s U.S. price, expense, and quantity data as reported for purposes of the final results.

We agree with Cutrale that its reported U.S. price, expense, and quantity data may accurately reflect the actual brix of the subject merchandise, and thus our acceptance of these data is

consistent with our longstanding practice of relying on actual brix for purposes of computing per unit prices and quantities. See 2007-2008 OJ from Brazil at Comment 9; 2005-2007 OJ from Brazil at Comment 11; and OJ from Brazil Investigation at Comment 19. We disagree, however, that Cutrale's reported data are always more accurate than the data obtained at verification and thus that they should be accepted without question. Specifically, we note that Cutrale occasionally blends FCOJM from Brazil and Florida, which it ships to U.S. customers. See Cutrale's CEP Verification Report at 10. Under such circumstances, the brix shown on the U.S. sales invoice would be for the shipped product, and not the Brazilian portion. Thus, while that brix may be "actual," it would not be the actual brix of the subject merchandise (as it would be an average of the Brazilian and U.S. content). We plan to consider this issue further in subsequent reviews and request that Cutrale provide the necessary information to determine the actual brix level of the Brazilian portion of its sales of blended FCOJM.

Finally, it remains necessary to adjust Cutrale's reported cost data to ensure that they reflect conversions to a pounds-solid basis using the actual brix. Cutrale stated that the BRIXU field contains rounded whole-numbers not used to calculate its reported U.S. price or quantity data. Conversely, the brix data obtained at verification list the actual batch-specific brix for each of Cutrale's U.S. sales invoices and is not rounded to the nearest whole number. Thus, we find that the brix data obtained at verification represents the most accurate and, therefore, best available information for adjusting Cutrale's cost data. Accordingly, we have adjusted Cutrale's costs using the brix data obtained at verification to ensure that these reflect conversions to a pounds-solid basis using the actual brix. For further discussion of this issue, see Cutrale Sales Calculation Memo.

Comment 5: *Use of Actual Brix to Calculate the Home Market Prices and Quantities for Cutrale's Home Market Sales*

In the home market, Cutrale sells FCOJM on a metric ton basis. For purposes of its home market sales listing, Cutrale converted all prices and quantities to per-pounds solid amounts using the brix levels at which the merchandise was sold, stated to the nearest whole number. At verification, we found that these brix figures were "standard" amounts, rather than the actual brix of each shipment. Therefore, we obtained a list of the actual brix levels measured for each batch of FCOJM sold in the home market during the POR. See Memorandum to the File, through James Maeder, Director, from Elizabeth Eastwood, Senior Analyst, entitled, "Verification of the Sales Response of Sucocitrico Cutrale Ltda. (Cutrale) in the 2008-2009 Antidumping Duty Administrative Review of Certain Orange Juice from Brazil," dated February 25, 2010 (Cutrale's Sales Verification Report), at 11. Although we also requested that Cutrale submit these brix figures in electronic form prior to the preliminary results, we were unable to use the database provided in response to this request because it contained numerous clerical errors. As a consequence, we adjusted Cutrale's reported data in the Preliminary Results using the highest actual brix level observed at verification, as facts available, and we afforded Cutrale an additional opportunity to submit corrected data.

Cutralé disagrees with the Department's decision on two bases. First, Cutrale argues that it was unnecessary for the Department to use facts available in the Preliminary Results because it provided the actual brix of all its home market sales at the sales verification in Brazil. Cutrale

contends that if the Department determines that it is appropriate to use brix data to the hundredth decimal place (i.e., actual brix) to make adjustments to its reported home market prices and quantities, then it has the information necessary to do so. Therefore, Cutrale asserts that there is no basis for the Department to continue to apply facts available in the margin calculations for the final results.

Second, Cutrale argues that the adjustment itself is inappropriate because: 1) Cutrale sells FCOJM in the home market on the basis of the standard brix (with its sales contracts containing a brix tolerance for the delivered product of plus or minus one-half degree brix); and 2) the actual brix data obtained at verification are derived from samples taken from various batches (and thus they may not be representative of the shipment as a whole). Regarding this latter point, Cutrale states that the brix of its products is measured by sampling taken during a production run and can vary slightly within a single production run. Consequently, Cutrale argues that the brix sample is not the “actual” brix of a shipment. Rather, Cutrale contends that taking a brix sample is the equivalent of taking a snapshot of a wave; as a snapshot of a wave is not indicative of the actual wave which changes over time, neither is a brix sample indicative of the actual brix of the OJ in a given batch. Thus, Cutrale maintains that brix samples are only used to ensure that the merchandise satisfies the customer’s product specifications, not to determine the actual brix of a product within a hundredth of a degree.

Moreover, Cutrale contends that its home market prices and quantities of FCOJM do not change with variations of less than a whole-degree brix. According to Cutrale, by using brix levels that were obtained through sampling to make adjustments to the company’s reported data, the Department is not using the actual brix of the merchandise in its entirety as delivered to the customer. Consequently, Cutrale argues that the Department’s adjustments result in the calculation of home market prices and quantities to the customer that are different from those actually transacted, an outcome which is clearly distortive.

Finally, Cutrale notes that it reported its cost of production on the basis of standard brix. Therefore, Cutrale contends that the Department’s adjustments of home market prices and quantities using the actual brix results in prices/quantities and costs stated on different bases. Cutrale argues that this difference not only distorts the margin calculations, but it also results in the Department’s departing from Cutrale’s own books and records when calculating both sets of data (in violation of Department’s long-standing practice).

The petitioners support the Department’s use of the actual brix to adjust Cutrale’s home market prices and quantities. The petitioners note that Cutrale has not based its home market prices and quantities on the actual brix of its FCOJM; consequently, the petitioners assert that Cutrale’s home market prices and quantities would be distorted if the Department relied on the company’s reported brix. Furthermore, the petitioners contend that Cutrale’s suggestion that the Department rely on the average brix, as reported on the invoice, for its U.S. sales (see Comment 4, above) and the standard brix, as reported in Cutrale’s home market sales database, for its home market sales would result in comparisons not made on an “apples-to-apples” basis.

Additionally, the petitioners maintain that the Department’s use of the actual brix is the most accurate method of comparing home market and U.S. sales, and that Cutrale has failed to provide

substantial evidence demonstrating that the use of the standard brix would result in more accurate comparisons. The petitioners argue that, in the Preliminary Results, the Department followed the same methodology used in previous segments of this proceeding. See 2007-2008 OJ from Brazil at Comment 9. Moreover, the petitioners contend that the Department's practice in this proceeding is consistent with its long-standing practice of making similar conversions for sales reported on a theoretical weight basis to an actual weight basis. In support of this statement, the petitioners cite to Notice of Final Determination of Sales at Less Than Fair Value: Certain Hot Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil, 64 FR 38756, 38781 (July 19, 1999) (Hot-Rolled Steel from Brazil). Thus, the petitioners argue that the Department should reject Cutrale's arguments and continue to adjust Cutrale's home market prices, expenses, and quantities to state them on an actual brix basis for purposes of the final results.

Department's Position:

With regard to the issue of converting Cutrale's home market sales of FCOJM to a pounds-solid basis using either the actual or standard brix, consistent with our practice, we continue to find that using the actual brix of the merchandise is the most accurate method to convert these sales to a pounds-solid basis. See 2007-2008 OJ from Brazil at Comment 9. As noted above, we found during verification that Cutrale had not used the actual brix of the merchandise to convert its home market data to a pounds-solid basis. See Cutrale's Sales Verification Report at 11 and verification exhibit 2. We also found that Cutrale tracks the actual brix of its merchandise in its books and records in the ordinary course of business. Accordingly, we required Cutrale to revise its home market sales database to report its home market prices and quantities based on the actual brix.

In order to perform our analysis and make product comparisons between Cutrale's home market and U.S. sales, we must ensure that Cutrale's reported home market and U.S. sales data are stated in a consistent unit of measure. Cutrale sells OJ in the United States primarily on a pounds-solid basis (although Cutrale occasionally sells OJ in gallons and metric tons) using the actual brix to determine the price and quantity (see Comment 4, above). However, in the home market, Cutrale sells FCOJM in metric tons and it has converted its sales data to a pounds-solid basis using the standard brix. Thus, we find Cutrale's current methodology for reporting its sales data on a pounds-solid basis in its U.S. and home market databases to be inconsistent, in that it results in home market and U.S. sales stated on different bases. Therefore, we find that it is appropriate to make adjustments to Cutrale's reported sales data to ensure an accurate comparison between its home market and U.S. sales.

We have consistently found in previous segments of this proceeding that, in order to achieve the most accurate results, respondents must use actual brix to convert their sales data to a pounds-solid basis. See 2007-2008 OJ from Brazil at Comment 9; 2005-2007 OJ from Brazil at Comment 11; and OJ from Brazil Investigation at Comment 19. Because brix measures the concentration of the OJ in question, and because the degree of concentration of the product affects the product's cost⁶ (and thus by extension its value), we continue to find that it is more accurate to use the actual brix level in our analysis. Therefore, consistent with our practice, we

⁶ A more highly concentrated product contains more solid material.

find that it is appropriate to adjust Cutrale's home market sales data to state them on a pounds-solid basis using the actual brix of the merchandise. See the Cutrale Sales Calculation Memo for the details of this adjustment.

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

Finally, we agree with Cutrale that the use of facts available is no longer appropriate because Cutrale submitted revised home market actual brix data in electronic format on April 15, 2010 (i.e., after the date of the Preliminary Results). We find that the brix data contained in Cutrale's April 15, 2010, submission correct the errors and omissions contained in Cutrale's previous submission of these data.⁷ Therefore, we have used this actual brix data to make adjustments to Cutrale's home market prices, quantities, and costs in our margin calculations for the final results.⁸ For further discussion of this issue, see the Cutrale Sales Calculation Memo.

Comment 6: Request for Revocation by Cutrale

Cutral was a respondent in each of the prior segments of this proceeding and its antidumping duty margins were 0.45 and 2.17 percent in the first and second administrative reviews, respectively. See 2005-2007 OJ from Brazil, 73 FR at 46585; see also 2007-2008 OJ from Brazil, 74 FR at 40168.

Cutral argues that it is entitled to revocation in this segment of the proceeding because, had the Department granted offsets with non-dumped transactions, it would have received dumping margins of de minimis or zero for three consecutive years. Therefore, Cutrale argues that the Department should revoke the antidumping duty order with respect to its exports of subject merchandise.

⁷ See the April 7, 2010, Memorandum from Blaine Wiltse, Analyst, to the File, entitled, "Request for Corrected Actual Brix Database for Home Market Sales made by Sucocitrico Cutrale Ltda. (Cutrale) in the 2008-2009 Antidumping Duty Administrative Review of 8 Orange Juice from Brazil."

⁸ We note that Cutrale did not include the actual brix for a small number of home market sales invoices in its April 15, 2010, submission. Therefore, we have assigned, as facts available under section 776(a) of the Act, the weighted-average brix of Cutrale's home market sales to these invoices for the final results because: 1) the missing data were not contained elsewhere on the record; and 2) we find that Cutrale has cooperated to the best of its ability in this review. For further discussion, see Cutrale's Sales Calculation Memo.

The petitioners disagree that Cutrale is entitled to revocation in this segment of the proceeding. Specifically, the petitioners assert that, even were the Department to stop zeroing here, this decision would not have to be, nor should it be, applied retroactively. Specifically, the petitioners note that, when the Department ended its practice of zeroing in antidumping investigations, it implemented the decision with respect to current and future investigations, not retroactively, as Cutrale has requested. As support for this assertion, the petitioners cite Zeroing Notice, 71 FR at 77722.

Department's Position:

We continue to find that Cutrale is not eligible for revocation in this segment of the proceeding.

The Department may revoke, in whole or in part, an antidumping duty order upon completion of a review under section 751 of the Act. While Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is described in 19 CFR 351.222. This regulation requires, *inter alia*, that a company requesting revocation must submit the following: 1) A certification that the company has sold the subject merchandise at not less than NV in the current review period and that the company will not sell subject merchandise at less than NV in the future; 2) a certification that the company sold commercial quantities of the subject merchandise to the United States in each of the three years forming the basis of the request; and 3) an agreement to immediate reinstatement of the order if the Department concludes that the company, subsequent to the revocation, sold subject merchandise at less than NV. See 19 CFR 351.222(e)(1). Upon receipt of such a request, the Department will consider: 1) whether the company in question has sold subject merchandise at not less than NV for a period of at least three consecutive years; 2) whether the company has agreed in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Department concludes that the company, subsequent to the revocation, sold the subject merchandise at less than NV; and 3) whether the continued application of the antidumping duty order is otherwise necessary to offset dumping. See 19 CFR 351.222(b)(2)(i). See also Sebacic Acid From the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Determination To Revoke Order in Part, 67 FR 69719, 69720 (Nov. 19, 2002).

We have determined that Cutrale is not eligible for revocation because it does not meet all of the criteria under 19 CFR 351.222. With regard to the criteria of subsection 19 CFR 351.222(b)(2), our final margin calculations show that Cutrale sold OJ in the United States at less than NV during the current review period. In addition, Cutrale sold OJ at less than NV in the previous administrative review (*i.e.*, Cutrale's dumping margin was not zero or *de minimis*). See 2007-2008 OJ from Brazil. Therefore, we find that Cutrale does not qualify for revocation of the antidumping duty order on certain orange juice from Brazil under 19 CFR 351.222(b)(2). Accordingly, we are not revoking the order with respect to subject merchandise produced and exported by Cutrale.

With respect to Cutrale's argument that it would be eligible for revocation were the Department to change its margin calculation methodology, we find that this argument is based entirely on speculation. Moreover, this argument is also irrelevant because the Department correctly

calculated Cutrale's margins in the final results of prior reviews, which Cutrale did not challenge.

Finally, we disagree with Cutrale that it would be appropriate to reconsider our analysis in the second administrative review of this order or to recalculate Cutrale's margin using an alternative methodology. The Department does not revisit the results of previously-finalized reviews unless directed to do so by the Court. See Norsk Hydro Canada Inc. v. United States, 672 F.3d 1367 (Fed. Cir. 2006) ("Revisiting issues that were resolved in prior review proceedings would impair the finality of any one annual review, potentially prolonging a . . . dispute far beyond the year to which it relates."). There is no final and conclusive court determination directing the Department to recalculate the margin of the 2007-2008 administrative review. Therefore, given that Cutrale did not receive a zero or de minimis margin in the final results of the 2007-2008 review of this order, nor has it received one here, we disagree that either review "counts" towards Cutrale's eligibility for revocation.

Therefore, as a result of the analysis set forth above, and consistent with the Department's practice and regulations, we find that Cutrale is not currently eligible for revocation. See 2007-2008 OJ from Brazil; see also 19 CFR 351.222(b).

Comment 7: 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, 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, 75 FR at 18797-98.

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

Cutrale claims that the Department must calculate the CEP price by determining what price Cutrale would have sold to CPI if CPI were not Cutrale's affiliate. Cutrale argues that, in so doing, the Department must take into consideration that Cutrale does not perform any selling functions to make its sales to the United States via CPI. According to Cutrale, it does not contact U.S. customers, negotiate prices, store products, arrange for delivery, pay claims for defective

products, follow-up or provide quality assurance, or blend the product to suit the customer's needs. Cutrale states that all of these functions are performed entirely by CPI in the United States. Further, Cutrale states that CPI merely directs it to supply subject merchandise based on what the overall demands of the U.S. market are likely to be on a quarterly and monthly basis, and Cutrale arranges for shipments to be delivered to CPI to fulfill its needs. Therefore, Cutrale asserts that it is merely processing orders to supply merchandise to CPI which is then sold by CPI in the United States.

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

The petitioners maintain that a CEP offset is not warranted for Cutrale for the final results because Cutrale has failed to demonstrate significant changes in its U.S. and home market selling functions from the prior administrative review period. The petitioners contend that, as in the prior segment, Cutrale's argument is contrary to the Department's regulations at 19 CFR 351.412(c)(2), which state that, in order for the Department to find that sales are made at different levels of trade, "substantial differences in selling activity are necessary, but not sufficient, condition for determining that there is a difference..." Further, the petitioners note that Cutrale's claim that it performs no selling activities in the United States is contrary to the Department's findings in the previous segments of this case and contrary to the Department's verification findings which show that, in the U.S. market, Cutrale performed at least the following selling functions: sales and marketing, freight and delivery services, inventory maintenance, and warehousing.

Regarding Cutrale's home market, the petitioners maintain that the Department determined at verification that Cutrale performed the following selling functions: sales and marketing, inventory maintenance, and warehousing. According to the petitioners, the Department thus reasonably concluded that the selling functions performed by Cutrale for U.S. and home market customers do not differ significantly. Regarding Cutrale's claim that contacting its home market customers should be considered a significant selling function, the petitioners argue that this only seems significant when compared to U.S. customer contact (*i.e.*, Cutrale has a U.S. affiliate whose business it obviously cannot lose). Moreover, the petitioners contend that, if the Department were to accept Cutrale's argument, then a CEP offset would be warranted in every case where a foreign producer sells through a U.S. affiliate, which would be contrary to the Department's regulations under 19 CFR 351.412(c)(2). Consequently, the petitioners assert that the Department should continue to deny a CEP offset for Cutrale in the final results.

Department's Position:

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. For Cutrale's U.S. sales we found that:

... Cutrale performed the following selling functions: Maintaining weekly contact with the customer; preparing quarterly and annual sales forecasts and corresponding shipping schedules; packing; arranging delivery to the port of exportation and the provision of customs clearance/brokerage services; and maintaining inventory at the port of exportation.... Based on these selling function categories, we find that Cutrale performed sales and marketing, freight and delivery services, and inventory maintenance and warehousing for U.S. sales.

In addition, in the home market we found that:

... Cutrale performed the following selling functions: Maintaining weekly contact with customers; visiting the customer and permitting the customer to visit the factory; preparing sales estimates five times a year; order processing; advertising via sponsorship of a soccer team and signs placed on tankers; packing; inventory maintenance at the factory; and arranging delivery to home market customers.... Accordingly, based on the four selling function categories listed above, we find that Cutrale performed sales and marketing, and inventory maintenance and warehousing for home market sales.

See Preliminary Results, 75 FR at 18797-98.

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

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

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

See Statement of Administrative Action, accompanying the URAA, H.R. Rep. No. 103-316, 870 (1994), at section B.2.c.(4) of the Agreement On Implementation Of Article VI (emphasis added).

Therefore, we continue to find that a detailed analysis of Cutrale's claimed selling activities related to its home market and U.S. sales is necessary in order to determine whether a CEP offset is warranted. Upon concluding this analysis, which is summarized above and set forth in more detail below, we find that Cutrale's claims do not meet the Department's regulatory guidelines or statutory requirements for a CEP offset. Accordingly, we have continued to deny Cutrale's claim for a CEP offset for purposes of the final results.

As to the specifics of our analysis, in Exhibit A-5 of its June 1, 2009, 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 U.S. 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."

In a supplemental questionnaire dated August 11, 2009, we requested that Cutrale clarify the information in its selling functions chart. Cutrale provided this information in its August 26, 2009, response.⁹ In November 2009, we verified Cutrale's sales response. During verification,

⁹ In this submission, Cutrale acknowledged that there "are no significant differences in the sales process between the two {2007-2008 and 2008-2009} PORs....," although Cutrale continued to argue that it was entitled to a CEP offset. See Cutrale's August 26, 2009, response at 3. We note that the Department found that a CEP offset was not warranted for Cutrale in the final results of the 2007-2008 administrative review. See 2007-2008 OJ from Brazil at Comment 2. Despite that the facts are largely the same between the 2007-2008 and 2008-2009

we examined in detail the selling functions that Cutrale performed during the POR for its U.S. and home market sales and discussed with company officials Cutrale's performance of each of the selling functions listed in the chart provided in Exhibit A-5. See Cutrale's Sales Verification Report at 7.

After examining Cutrale's descriptions of its home market and U.S. market selling functions in its questionnaire responses and discussing these functions with company officials during the Department's verification, we find that Cutrale's actual selling experience in both markets differed significantly from the experience reported in its questionnaire responses. Specifically, as explained in our verification report, we found that Cutrale did not, in fact, perform five of the claimed 12 home market selling functions during the POR (i.e., guarantees, after-sales services, cash discounts, engineering services, and technical assistance),¹⁰ it did perform one function not claimed (i.e., arranging freight/delivery to home market customers), and it performed this function plus the remaining seven functions to a limited degree. Similarly, with respect to the U.S. market, our findings during verification demonstrate that Cutrale performed the three claimed functions also to a limited degree, while it also performed an additional four U.S. selling activities not disclosed in its response (i.e., sales forecasting, strategic/economic planning, direct sales personnel, and inventory maintenance).¹¹ When these selling activities are compared across markets, we find that the seven common functions were performed at a similar level of intensity in both markets, while the eighth home market function (i.e., advertising) was not significant. Therefore, given the similarity of selling activities undertaken in both markets, we find that sales in the home and U.S. markets were made at the same LOT.

Further, we disagree with Cutrale that it performed selling functions at a significantly higher degree of intensity in the home market. Regarding the seven common selling functions noted above, we based our conclusion that Cutrale performed these functions at a similar level of intensity in the home and U.S. markets on the following facts:

- Cutrale made sales projections and performed strategic/economic planning five times a year in its home market, and, in the U.S. market, generated a sales projection once a year which was adjusted on a quarterly basis (for a total of four or five times per year);¹²

administrative reviews, we have analyzed and verified the facts contained within the current administrative review to determine whether a CEP offset is warranted.

¹⁰ See Cutrale's Sales Verification Report at 8 – 10.

¹¹ See Cutrale's Sales Verification Report at 7 – 10.

¹² In Cutrale's Sales Verification Report we stated: "Regarding sales forecasting and strategic and economic planning in the home market, company officials stated that Cutrale's home market sales manager estimates what sales will be made from year to year, based on historical sales data. According to company officials, five times a year Cutrale's home market sales manager makes sales projections based on conversations with Cutrale's customers, either over the phone or based on in-person meetings. Company officials stated that these projections take limited time to perform because of the sales manager's knowledge of the home market. Regarding sales forecasting and strategic and economic planning for sales to the United States, company officials stated that Cutrale and CPI generate a sales projection together once a year based on CPI's sales history from the previous year. Based on this projection, company officials explained that they prepare a shipping schedule, which is adjusted on a quarterly basis, to ensure that a sufficient volume of juice is delivered to the United States to meet CPI's needs." See Cutrale's Sales Verification Report at 7-8 (emphasis added).

- Cutrale shipped OJ to its home market customers and to its U.S. customer, CPI, packed in both drums and in bulk. See Cutrale’s Sales Verification Report at 8;
- Cutrale employed one individual whose primary responsibilities were to input orders, contact customers, and organize shipments in the home market, while Cutrale’s export sales department consisted of multiple employees whose responsibilities were to schedule delivery of merchandise and arrange for the shipment and international freight of merchandise to Cutrale’s customers around the world (including CPI). Therefore, we find that at a minimum Cutrale maintained a similar level of sales personnel directly responsible for servicing its customers and conducting its business in its home and U.S. markets. See Cutrale’s Sales Verification Report at 9;
- Cutrale arranged for the freight/delivery of its OJ sales to its customers in both the home and U.S. markets (although this was a more involved process for U.S. sales, in that Cutrale arranged for freight to the port, warehoused the merchandise there, procured brokerage services necessary to the exportation, shipped the merchandise to CPI and paid for all freight-related activities);¹³
- Cutrale provided similar inventory maintenance for its U.S. and home market customers by maintaining separate storage tanks at the port for its FCOJM and NFC shipments to the United States, and maintaining an inventory of OJ products for its home market customers;¹⁴ and

¹³ In Cutrale’s Sales Verification Report we stated: “Regarding the arranging of transport for sales to home market customers, company officials stated that Cutrale arranges for freight for many of its sales to home market customers. According to company officials, although Cutrale makes the transportation arrangements, ultimately Cutrale’s home market customers pay the freight expenses. Regarding the arranging of freight for sales to CPI, company officials explained that the export sales department arranges for both the shipment of merchandise from the plant to storage at the port, as well as international freight.” See Cutrale’s Sales Verification Report at 10 (emphasis added).

¹⁴ This finding is consistent with our decision in 2007-2008 OJ from Brazil where we stated that the difference between the inventory maintenance Cutrale provides in the home and U.S. markets does not rise to the level of a “substantial difference in selling activities” and stated that, “when reduced to its essence, this claim is merely that Cutrale sells a slightly different product to one home market customer that it keeps it in a separate part of the warehouse....” See 2007-2008 OJ from Brazil at Comment 2. Additionally, in Cutrale’s Sales Verification Report we stated: “Regarding inventory maintenance in the home market, company officials explained that inventory is normally held at Cutrale’s plants for the company’s home market customers, although certain customers hold inventory at their own facilities. According to company officials, while the merchandise has not been invoiced to the customer when it is held in inventory, it is “committed” to a particular home market customer because it has been produced to each customer’s particular orange juice specifications. Company officials further explained that Cutrale’s customers contact the home market sales manager to schedule their withdrawals from inventory. Regarding inventory maintenance for U.S. sales, company officials explained that Cutrale maintains inventory at the port for all export sales. According to company officials, this inventory is not held for specific customers, but rather it is placed in inventory based on Cutrale’s production schedule and not to meet the demands of any particular export customer (including CPI). Because the juice sold for export is produced simply to meet general specifications, and not to the specifications of particular customers, company officials stated that they do not believe that they provide inventory maintenance for U.S. sales to the same extent as for home market sales.” See Cutrale’s Sales Verification Report at 8-9 (emphasis added).

- Cutrale input home market customer orders into its computer system to initiate the production of merchandise, whereas in the U.S. market, Cutrale input into its computer system a previously set shipping schedule. See Cutrale's Sales Verification Report at 9.

Accordingly, the record supports our findings that these selling functions (*i.e.*, sales forecasting, strategic/economic planning, packing, direct sales personnel, arranging freight/delivery, inventory maintenance, and order input/processing), albeit different in some ways, were performed at a similar level of intensity in the home and U.S. markets during the POR. When these activities are viewed as a whole, we find that the differences do not rise to the level of a "substantial difference in selling activities" as is necessary to be indicative of different LOTs.

Finally, regarding Cutrale's home market advertising expenses, Cutrale reported that it: 1) sponsored a local soccer team which consisted of advertising Cutrale's name and logo on the team's website, uniforms, and a banner in the team's stadium; and 2) conducted an advertising campaign related to the fortieth anniversary of the company, a portion of the expenses related to which were incurred during the POR, and that expenses related to these activities were reported as part of Cutrale's indirect selling expenses. However, consistent with our findings in 2007-2008 OJ from Brazil, we continue to find that this type of indirect advertising in itself is not a substantial selling function as it did not directly relate to either FCOJM or NFC (or to any of the other products produced by Cutrale, such as animal feed, orange oils, and pulp wash), but rather primarily consisted of displaying Cutrale's name and the company's logo, which merely provided indirect advertising to the company. See 2007-2008 OJ from Brazil at Comment 2. Therefore, although Cutrale engaged in home market advertising that was not performed in the U.S. market, we do not consider this a significant home market selling activity.

In summary, upon a close review, we find that many of the home market selling functions claimed by Cutrale were not actually performed during the POR, and of those remaining that Cutrale did perform, only one was performed at a higher level of intensity in the home market than in the U.S. market. With respect to the U.S. market, although Cutrale claims that the CEP price involves virtually no selling functions, we find that Cutrale did in fact perform many of the same selling functions related to its U.S. sales that it performed in its home market. Therefore, on balance we find that, during the POR, the selling activities performed by Cutrale related to its home and U.S. markets were more similar than different. Accordingly, we have continued to deny Cutrale's claim for a CEP offset for purposes of the final results.

The findings above are consistent with our findings in each of the prior segments of this proceeding. Based on the information on the record of this administrative review, we find no meaningful change in the selling functions provided by Cutrale in either the home market or the U.S. market here and those performed in previous years. In each of those prior segments, the Department found that Cutrale's selling functions in the U.S. and home markets were not sufficiently different to warrant a LOT adjustment. See 2007-2008 OJ from Brazil at Comment 2; 2005-2007 OJ from Brazil at Comment 5; and OJ from Brazil Investigation at Comment 10. Therefore, although there are some differences in the selling functions Cutrale performs with respect to the two markets, the differences are not substantial enough to find that Cutrale's U.S. and home market sales were at different stages of marketing (or their equivalent), and thus different LOTs, much less to find that Cutrale's home market was at a more advanced level

which would warrant a CEP offset. See 19 CFR 351.412(c)(2). See also Notice of Final Determination of Sales at Less than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa, 62 FR 61731, 61746 (Nov. 19, 1997) (where the Department found that minimal differences in selling functions do not warrant a CEP offset).

Comment 8: *Cutrale's Cost of Oranges from Affiliated Parties*

In the preliminary results, the Department increased Cutrale's COM to reflect the market value of the oranges purchased from an affiliated supplier.¹⁵ Cutrale argues that this adjustment is not necessary, but if made, it should be modified.

Cutrale claims that the price paid to unaffiliated suppliers includes transport and harvesting costs but the price paid to the affiliated supplier does not. Cutrale refers to an unaffiliated supplier's contract and an affiliated supplier's purchase record included in cost verification exhibit 6 to support its claim. In addition, Cutrale claims that at verification, the Department reviewed a contract from the affiliated supplier that supports this statement. Cutrale states that, to adjust accurately the cost of oranges provided by the affiliated supplier, the Department needs to compare affiliated and unaffiliated prices that are calculated on the same basis. To allow the Department to do so, Cutrale provided its cost for transport and harvesting per box during the POR. Cutrale concludes that, for the final results, the Department should adjust the price Cutrale paid to the affiliated supplier to include transport and harvesting costs.

The petitioners argue that Cutrale made no mention of the difference between the prices paid to affiliated and unaffiliated suppliers in its cost responses and at the cost verification. The petitioners add that Cutrale failed to provide transport and harvesting cost data during the verification, nor was this issue discussed there. The petitioners note that Cutrale did not mention the source of the transport and harvesting cost data it provided in its case brief.¹⁶ The petitioners believe that these data may constitute new factual information, and they conclude that, for the final results, the Department should disallow the use of Cutrale's transport and harvesting costs in the adjustment of the affiliated supplier's price because there is no evidence that the data are reliable and that it was timely submitted.

Department's Position:

We disagree with Cutrale that the adjustment to the cost of oranges purchased from an affiliated supplier is not necessary. According to section 773(f)(2) of the Act (i.e., the "transactions disregarded rule"), 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

¹⁵ See Memorandum to Neal Halper from Angie Sepúlveda entitled, "Antidumping Duty Administrative Review of Certain Orange Juice from Brazil, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results - Sucocitrico Cutrale Ltda." (Cutrale Preliminary Cost Calculation Memo), dated April 7, 2010, at pages 1-2 and Attachment 2.

¹⁶ See Cutrale's May 13, 2010, Case Brief at page 20.

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 had the transaction 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 oranges purchased from an affiliated supplier was below the average market price. Therefore, in accordance with section 773(f)(2) of the Act, as in previous reviews of this order and for the preliminary results we increased Cutrale's COM to reflect the market value of this input. See Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 15438 (Apr. 6, 2009) (OJ from Brazil 2007-2008 Prelim), unchanged in Certain Orange Juice from Brazil: Final Results of Antidumping Duty Administrative Review, 74 FR 40167 (Aug. 11, 2009); 2005-2007 OJ from Brazil at Comment 9; and Diamond Sawblades and Parts Thereof from the Republic of Korea: Notice of Final Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances, 71 FR 29310 (May 22, 2006) (Diamond Sawblades), and accompanying Issues and Decision Memorandum at Comment 10.

Additionally, we disagree with Cutrale that the Department's calculation should be modified because the affiliated and unaffiliated prices used to make the adjustment for the preliminary results are not on the same basis. Cutrale made no mention of the difference between the prices paid to affiliated and unaffiliated suppliers in its cost responses or at the cost verification. In fact, Cutrale's supplemental cost questionnaire response contradicts its statement that the prices paid to unaffiliated suppliers include transport and harvesting costs but the price paid to the affiliated supplier does not. In the first supplemental questionnaire regarding section D, the Department asked Cutrale to explain if the price paid to affiliated and unaffiliated suppliers for oranges included delivery, and if it did, to demonstrate how these transportation costs were included in the reported costs. In response, Cutrale stated that: 1) the price paid to affiliated and unaffiliated suppliers for oranges included delivery; 2) as previously explained, the invoice price of the fruit was a "delivered" price, including both harvesting costs and the cost of delivering the fruit to the factory; and 3) these costs were fully included in the cost of raw materials in the reported costs. See Cutrale's supplemental section D questionnaire response dated October 29, 2009, at page 20. Further, we disagree with Cutrale's claim that, at verification, the Department reviewed a contract from the affiliated supplier. The only items reviewed by the Department at verification related to this issue were the affiliated party invoices and major input purchases table included in cost verification exhibit 6.

Finally, we disagree with the petitioners that the transport and harvesting cost data, provided by Cutrale in its case brief, are new factual information and should be disallowed. These figures can be derived from cost verification exhibit 9, which is on the record, by calculating Cutrale's POR transport and harvesting costs, per box.

Therefore, for the final results, we have not adjusted the price Cutrale paid for the oranges purchased from the affiliated supplier to include transport and harvesting costs and, in accordance with section 773(f)(2) of the Act, we have continued to increase Cutrale's COM to reflect the market value of this input as calculated for the preliminary results.

Comment 9: Cutrale's By-Product Revenue Offset to COGS

Cutrale calculated its reported general and administrative (G&A) and financial expense ratios using COGS as the denominator. In the preliminary results, the Department recalculated both of these ratios by deducting from COGS net by-product revenue in order to keep the calculation on the same basis as the COM to which the ratios are applied.¹⁷ Cutrale argues that this deduction is improper.

According to Cutrale, the Department calculates G&A and financial expense costs by dividing the G&A and financial expenses by the COGS of the corporate entity, and applying the resulting ratios to COM. Cutrale asserts that, in order for the G&A and financial expense ratios to be arithmetically consistent, the numerator and the denominator of the ratios should contain the same elements. Cutrale contends that, because its G&A and financial expenses relate to all products, the expense ratios must be computed over the COGS of all products, including by-products. Therefore, according to Cutrale, the Department has computed arithmetically incorrect G&A and financial expense ratios.

Cutrale disagrees with the Department's stated rationale that the deduction of by-product revenue was necessary to keep the calculation of the G&A and the financial expense ratios on the same basis as the COM to which they are applied. Cutrale explains that COGS differs from COM in that it includes opening inventory and excludes ending inventory, and it adds that COM for the Department's purposes includes only the COM of merchandise under consideration. Cutrale contends that if the Department's methodology is to use COGS as a surrogate for COM, then by definition COGS will differ from COM. Cutrale claims that the point is not whether the G&A and financial expense ratios are determined on the same basis as COM, but whether the ratios are internally consistent (*i.e.*, the numerator and denominator contain consistent elements). Cutrale concludes that reducing COGS by the by-product revenue, but not increasing COGS to reflect increases in COM, creates a skewed ratio.

The petitioners agree with the Department's decision to reduce COGS by net-by-product revenue, noting that the Department followed the same methodology used in the previous administrative reviews of this order. As support for this statement, the petitioners cite 2007-2008 OJ from Brazil at Comment 6; and 2005-2007 OJ from Brazil at Comment 8. The petitioners add that this methodology has also been the Department's long-standing practice in other cases, including 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); and Live Cattle from Canada: Notice of Final Determination of Sales at Less Than Fair Value, 64 FR 56738, 56756 (Oct. 21, 1999) (Live Cattle from Canada). Thus, the petitioners conclude that the Department should continue to recalculate Cutrale's G&A and financial expense ratios for purposes of the final results.

¹⁷ See Cutrale Preliminary Cost Calculation Memo at page 2 and Attachments 3 and 4.

Department's Position:

We disagree with Cutrale that the Department improperly deducted the by-product sales revenue from the COGS denominator. Cutrale's suggested change to the calculation is arithmetically incorrect because it results in a denominator which does not include by-product revenue, while the COM to which the G&A and financial expenses ratios are applied does contain such revenue. Consistent with our past practice and our determination in the prior administrative reviews of this order, it is appropriate to include this adjustment in the G&A and financial expense ratio calculations because, in order to produce an accurate result, the ratios must be calculated on the same basis as the COM to which they are applied. See 2007-2008 OJ from Brazil at Comment 6; 2005-2006 OJ from Brazil at Comment 8; Live Cattle from Canada at Comment 2; and Certain Frozen and Canned Warmwater Shrimp from Ecuador: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 76913 (Dec. 23, 2004), and accompanying Issues and Decision Memorandum at Comment 29.

In calculating the COP of the merchandise under consideration, the Department adds to COM an amount for G&A and financial expenses. See section 773(b)(3)(B) of the Act. The Department has developed a consistent practice that these amounts are determined by calculating G&A and financial expense ratios and multiplying these ratios by the COM of the investigated product. See 2007-2008 OJ from Brazil at Comment 6; and 2005-2007 OJ from Brazil at Comment 8. The purpose of the ratios is to allocate all G&A and financial expenses (i.e., the numerator of the ratios) to the cost of all products. To make the ratio arithmetically correct, the denominator must be on the same basis as the cost to which the ratio is applied. Because the product-specific cost to which the ratio is applied has been reduced by by-product revenue, the denominator of the ratio (the total cost of all products) must likewise be reduced by the by-product revenue. See 2007-2008 OJ from Brazil at Comment 6. In the preliminary results, we subtracted the total by-product revenue from the COGS denominator of the G&A and financial expense ratios in order to keep the denominator of the ratios on the same basis as the COM to which the ratios were applied. That is, because we subtracted the by-product revenue from the total COM of orange juice in calculating the product-specific cost, we must reduce the denominator of the ratios by total by-product revenue. Calculating ratios which do not include by-product revenue as an offset in the denominator and applying them to the COM that has been reduced by by-product revenue is arithmetically incorrect because the denominator does not reflect by-product revenue while the COM to which the ratios are applied does. In order to correctly allocate the total G&A and financial expenses incurred by a company to all products, the ratios must be calculated using a COGS figure that has been reduced by total by-product revenue. See 2007-2008 OJ from Brazil at Comment 6; and 2005-2007 OJ from Brazil at Comment 8.

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 used in the calculation of the ratios. Furthermore, by adjusting the COGS denominator by the by-product revenue the Department is being consistent with the methodology it has employed in other cases with similar fact patterns. See Lemon Juice From Argentina, 72 FR at 20824; and Certain Steel Concrete Reinforcing Bars from Turkey: Final Results and Rescission of Antidumping Duty Administrative Review in Part, 71 FR 65082 (Nov. 7, 2006) (Rebar from Turkey), and accompanying Issues and Decision Memorandum at Comment 10. Therefore, for

these final results we have not departed from our normal methodology, used in the preliminary results of this segment of the proceeding as well as the final results of the previous reviews of this order, and have continued to reduce the G&A and financial expense ratios' COGS denominator by net by-product revenue in order to keep the calculation on the same basis as the COM to which it is applied.

Comment 10: Cutrale's Other Adjustments to COGS to Reflect Adjustments to COM

As mentioned above, in the preliminary results, the Department reduced the COGS denominator used in the calculation of the G&A and financial expense ratios by net by-product revenue to reflect the adjustment made to COM. Cutrale argues that if the Department wants to keep the calculation of the G&A and the financial expense ratios on the same basis as the COM to which they are applied, it should also increase COGS for other adjustments made to COM. Cutrale states that, in the preliminary results, the Department increased COM to account for the increase in the cost of oranges from affiliated parties, the reduction of revenue from the sale of by-products to affiliated parties, and the reduction of revenue for ICMS taxes included in the by-product revenue. Cutrale asserts that all these adjustments were made to COM (*i.e.*, the amount against which the G&A ratio is applied), but none were made to COGS, which was only reduced by the gross by-product revenue. According to Cutrale, failure to adjust COM and COGS equally implies that the Department makes adjustments to increase cost, but never to reduce it. Cutrale concludes that if the Department insists on increasing COM for these cost adjustments, for the final results, it should also increase COGS to account for such adjustments.

The petitioners did not comment on this issue.

Department's Position:

We disagree with Cutrale that the calculation of the G&A and financial expense ratios is not on the same basis as the COM to which they were applied. In the preliminary results the Department made certain adjustments to Cutrale's COM and, when applicable, applied the same adjustments to the COGS denominator in order to keep the calculation of the ratios on the same basis as the COM to which they were applied. This methodology is reasonable and consistent with our past practice. See Live Cattle from Canada at Comment 2, and Rebar from Turkey at Comment 10.

In the preliminary results, the Department first increased Cutrale's COM to reflect the market price of the by-products sold to affiliated suppliers, in accordance with the transactions disregarded rule of section 773(f)(2) of the Act. The resulting COM was then used in the calculation of Cutrale's COP and constructed value (CV). However, the G&A and financial expense ratios were applied to the COM exclusive of this transactions disregarded adjustment. This can be easily seen in the Cutrale Preliminary Cost Calculation Memo at page 1 (Adjustment 1.a), page 2 (Adjustments 2 and 3), page 3 (Computer Instructions), and Attachments 1 and 2. Therefore, Cutrale is mistaken in its statement that this adjustment was made to the COM to which the ratios were applied. However, Cutrale correctly states that this adjustment was not made to the COGS denominator. In order to keep the calculation of the ratios on the same basis as the COM to which they were applied (*i.e.*, a COM that was not increased to reflect the market

price of the by-products sold to affiliated suppliers), for the preliminary results, the Department did not increase the COGS denominator.

Next, the Department increased Cutrale's COM to reflect the market value of the oranges purchased from an affiliated supplier, also in accordance with the transactions disregarded rule of section 773(f)(2) of the Act. The resulting COM was then used in the calculation of Cutrale's COP and CV. However, the G&A and financial expense ratios were applied to the COM exclusive of this transactions disregarded adjustment. This can be seen in the Cutrale Preliminary Cost Calculation Memo at page 1 (Adjustment 1.b), page 2 (Adjustments 2 and 3), page 3 (Computer Instructions), and Attachment 2. Therefore, Cutrale is once again mistaken in its statement that this adjustment was made to the COM to which the ratios were applied. Again, we agree with Cutrale that this adjustment was not made to the COGS denominator. As stated before, in order to keep the calculation of the ratios on the same basis as the COM to which they were applied (*i.e.*, a COM that was not increased to reflect the market value of the oranges purchased from an affiliated supplier), for the preliminary results, the Department did not increase the COGS denominator.

Finally, the Department increased Cutrale's COM to reflect the reduction of revenue for ICMS taxes included in the by-product revenue for the merchandise under consideration. The resulting COM was then used in the calculation of Cutrale's COP, CV, and G&A and financial expense ratios. In calculating the amount of by-product revenue to be deducted from the COGS denominator, the Department reduced the gross fiscal year (FY) 2008 by-product revenue by the FY 2008 by-product cost, the FY 2008 net by-product revenue for merchandise not under consideration, and the FY 2008 ICMS taxes included in the by-product revenue for the merchandise under consideration. See the Cutrale Preliminary Cost Calculation Memo at page 2 (Adjustments 1.c, 2 and 3), page 3 (Computer Instructions), and Attachments 3 and 4. Therefore, Cutrale is once again mistaken in that this adjustment was not made to the COGS denominator and that the COGS denominator was only reduced by the gross by-product revenue. As stated before, in order to keep the calculation of the ratios on the same basis as the COM to which they were applied (*i.e.*, a COM that was offset by the POR net by-product revenue), for the preliminary results, the Department reduced the COGS denominator by the FY 2008 net by-product revenue.

In conclusion, as demonstrated in the Cutrale Preliminary Cost Calculation Memo, the Department's calculation of the G&A and financial expense ratios for the preliminary results was on the same basis as the COM to which they were applied. Therefore, for the final results, we have continued to use the COGS denominator as calculated for the preliminary results.

Comment 11: Fischer's International Freight Expenses

In this administrative review, Fischer reported that most of its U.S. sales were transported to the United States on vessels operated by an affiliated company. In the preliminary results, we determined that the international freight expenses provided by Fischer's affiliate were not at arm's length. Therefore, for all sales shipped by Fischer's affiliate, we assigned the international freight rate charged by Fischer's affiliate to an unaffiliated party to restate them on an arm's-length basis.

The petitioners agree that certain of the international freight expenses at issue are not at arm's length. Specifically, the petitioners agree that, where the affiliate charged Fischer less than the unaffiliated company, the Department should use the price charged to the unaffiliated company. However, where the affiliate charged Fischer more, the petitioners argue that the Department should accept the expenses as reported.

Fischer did not comment on this issue.

Department's Position:

In determining whether to use transactions between affiliated parties, our practice is to compare the transfer price either to prices charged to other unaffiliated parties who contract for the same service or prices for the same service paid by the respondent to unaffiliated parties. See Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not to Revoke in Part, 69 FR 644731 (Nov. 8, 2004), and accompanying Issues and Decision Memorandum at Comment 11. See also 2007-2008 OJ from Brazil at Comment 10.

For the final results, for all U.S. sales shipped by Fischer's affiliate, we have continued to assign the international freight rate charged by Fischer's affiliate to an unaffiliated party to restate it on an arm's-length basis, as we did in the preliminary results. While the petitioners contend that this is unnecessary for some of Fischer's U.S. sales, we disagree. The petitioners' sole rationale for their argument is that the prices charged to Fischer exceed those charged to unaffiliated parties. However, the mere fact that prices between affiliated parties are higher does not mean that they are at arm's length. In this case, the prices at issue differ significantly from the prices charged to an unaffiliated company, which leads us to conclude that they are affected by the relationship between Fischer and its affiliate.

Therefore, we have determined that the price used in our analysis represents the best evidence of the price that Fischer's affiliate charges when it sets prices on an arm's-length basis. Because this price differs markedly from the prices that the affiliate charged Fischer for the same service, we cannot rely on the affiliated party prices in this instance.

Comment 12: Net Exchange Variation for Fischer

Fischer argues that, in deriving its financial ratio for purposes of the preliminary results, the Department erroneously included the amount of a net exchange variation shown in its financial statements. Fischer argues that this exchange variation was not an actual expense incurred by Fischer. As support for this contention, Fischer cites section 773(e)(2) of the Act, as well as 19 CFR 353.51(c), which directs the Department to include "the *actual* amounts incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general, and administrative expenses" (emphasis added).

Fischer notes that in January 2008 it adopted the U.S. dollar as its functional currency. See the September 9, 2009, Section D supplemental questionnaire response at page 7; and the July 22,

2009, Section A supplemental questionnaire response at Exhibit 7, containing Fischer's audited 2008 financial statements at pages 8 through 11. Fischer asserts that, pursuant to Brazilian law, it was required to present its financial statements in reais and track monetary variations resulting from fluctuations in the exchange rate. According to Fischer, these exchange rate differences are not classified as financial expenses in the income statement, but rather as adjustments to shareholders' equity.

Fischer further states that the "exchange variation" was not recorded as a financial result but rather is a cumulative translation adjustment of shareholders' equity. Fischer claims that this particular exchange variation represents the change in the value of its assets and liabilities in comparison to the functional currency; it is the representation adjustment to fair value of these assets in the functional currency at a point in time (*i.e.*, December 31, 2008) and is recorded in the exchange variation account.

Fischer contends that, should the Department disagree with the argument set forth above, it must nonetheless adjust the exchange variation to reflect the extraordinary circumstances occurring during the POR. Fischer claims that the dramatic drop in the value of the Brazilian currency during the POR created an artificially high expense on December 31, 2008. Specifically, Fischer maintains that, during the POR, the exchange rate used to convert U.S. dollars to Brazilian reais "jumped quickly" and dramatically as a result of the global economic crisis. Fischer further argues that, because the global economic crisis both was unforeseen and is not reasonably expected to recur in the foreseeable future, its exchange variation expense is an extraordinary expense which must be removed or adjusted to reflect a true financial expense calculation for the POR. See Florida Trade Council of Davis, California v. United States, 16 CIT 1014 (1992) (Florida Trade Council) at 2.

Finally, Fischer notes that, in the context of high inflation, the Department modifies its COP methodology when nominal production costs increase over time even when such costs expressed in real terms remain constant.¹⁸ According to Fischer, in high inflation situations, the Department uses indexing to avoid the distortive effects of inflation on the comparison of costs and prices. See Pipe and Tube from Turkey, 61 FR at 69070. Fischer contends that the cost distortion caused by high inflation is analogous to Fischer's exchange variation because the exchange variation has artificially increased Fischer's COP although Fischer's actual costs have remained constant. Therefore, Fischer argues that the Department should eliminate this distortion by removing or adjusting the exchange variation in Fischer's financial expense calculation.

The petitioners assert that Fischer's argument with respect to this variation is contrary to its position in the prior reviews of this order. The petitioners note that, in the prior segment of this

¹⁸ As support for this assertion, Fischer cites Notice of Final Determination of Sales at Less Than Fair Value: Certain Steel Concrete Reinforcing Bars From Turkey, 62 FR 9737 (Mar. 4, 1997); Notice of Final Results of Antidumping Duty Administrative Review: Certain Welded Carbon Steel Pipe and Tube From Turkey, 61 FR 69067 (Dec. 31, 1996) (Pipe and Tube from Turkey); Notice of Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Brazil, 60 FR 31960 (June 19, 1995); and Final Determination of Sales at Less Than Fair Value: Ferrosilicon From Brazil, 59 FR 732 (Jan. 6, 1994).

proceeding, the Department accepted Fischer's reported net exchange variation gain as an offset to financial expenses. The petitioners maintain that they did not challenge this treatment in those reviews because the Department has consistently included the net exchange variations in the financial expense calculations in Brazilian antidumping cases.

The petitioners argue that the amounts of the net exchange variations reported in prior segments refute Fischer's assertion that the variations at issue were unusual in nature and infrequent in occurrence. Rather, the petitioners maintain that the existence of prior variations demonstrates that they are frequent and the fact that the prior period amounts far exceed the amount reported in the third administrative review demonstrates that sizeable variations are not unusual. Moreover, according to the petitioners, in Silicomanganese From Brazil: Final Results of Antidumping Duty Administrative Review, 69 FR 13813 (Mar. 24, 2004), and accompanying Issues and Decision Memorandum at Comment 14, the Department rejected a respondent's argument that exchange losses occurring twice within the span of four years constituted an extraordinary event. Therefore, the petitioners assert that the Department should continue to include Fischer's exchange variation in the calculation of the financial expense ratio for purposes of the final results.

Department's Position:

We disagree with Fischer. Fischer argued for the inclusion of the exchange variance as an offset to financial expenses in the prior segment of this proceeding, and we agreed in that segment to include the amount as an offset to financial expense.¹⁹ There is no new information on the record of this review concerning this account to warrant a change in the approach taken in the prior segment of this proceeding, other than the fact that the gain is now a loss. Thus for the final results, we have included Fischer's exchange variation in the financial expense ratio calculation.

We agree with Fischer that the adjustment relating to currency translations recorded separately in shareholders equity should not be included in the financial expense ratio for this review. However, while Fischer cites to its 2008 financial statements where it stated, "All exchange differences are recognized as a separate component in shareholders' equity,"²⁰ we disagree that this statement is on point because it refers to a different adjustment. This section of Fischer's 2008 financial statement discusses the company's use of the U.S. dollar as its functional currency, and the exchange rate differences that occur when the functional currency is converted to financial statement presentation currency (reais). However, the net exchange variance included in the financial expense ratio calculated for the preliminary results is classified as a line item in the income statement, not the statement of equity, and is an actual expense incurred by the company during the POR. As noted above, the exchange variance account was an element of Fischer's income statement in the prior review, when Fischer was claiming its functional currency was the Brazilian reais.

¹⁹ See 2007-2008 OJ from Brazil at Comment 17.

²⁰ See Fischer's Section D supplemental questionnaire response at page 7; and Fischer's 2008 Financial Statements.

We also disagree with Fischer's argument that account #6103040001 in the trial balance was not recorded as an income statement item, but rather as a cumulative translation adjustment in shareholders' equity. This account (code category #6103-“Total Net Exchange Variation”), is traceable from the current year trial balance (denominated in reais) directly to the income statement. Only through the year-end closing entries does this account (through the net income or loss from the current year) close out to shareholder's equity. As evidenced by the 2008 and 2007 comparative trial balances,²¹ we traced at verification the summary account code #6103 for each fiscal year directly to its respective income statement.

We also disagree with Fischer that the exchange variation account reflects extraordinary circumstances. We note that for a particular event to be treated as extraordinary and thus excluded, the event must be unusual and infrequent.²² Fischer meets neither of these requirements for the extraordinary classification of its exchange variance account, as these transactions occur annually as evidenced by its financial statements for fiscal years 2007 and 2008. Furthermore, this exchange variation account was not classified as extraordinary in the audited financial statements for fiscal years 2007 and 2008. In addition, the absolute amount of exchange variation as a percentage of COGS is substantially smaller in this review than in the prior segment. In neither review do we consider the circumstances surrounding the reporting of the exchange variation account to be extraordinary. As for Fischer's claim that the dramatic drop in the value of the Brazilian currency created an artificially high expense, the increase in value of the Brazilian currency in the prior segment had a substantially greater favorable impact (as a percentage of COGS). Neither party in the prior review, when the exchange variation was more than double the amount in fiscal year 2008, or in this review until the briefs, argued that the exchange variation account was an extraordinary item. As noted above, we included this substantially higher gain as an offset to the financial ratio in the prior POR and have included the fiscal year 2008 expense in this review.

Further, we disagree with Fischer's assertion that high inflation is analogous to an exchange variation expense. There is no record evidence to indicate Brazil's economy experienced high inflation during the POR. High inflation occurs when the purchasing power of a currency changes significantly over a short period of time. Translation and exchange gains and losses occur when one country's currency changes value in relation to another country's currency. Many factors affect the relative values of currencies. While the difference between inflation rates of two countries may affect the relative exchange rate, the difference in each country's inflation rate is not the only factor affecting exchange rates. Fischer's contention that the exchange variation has artificially increased Fischer's COP even though Fischer's actual costs have remained constant is incorrect. Fischer's costs have not remained constant and the amount of the exchange variation reflected in Fischer's income statement represents a current year expense as recognized under Brazilian generally accepted accounting principles (GAAP).

²¹ See the December 29, 2009, memorandum to file through Neal M. Halper and Michael P. Martin from Christopher J. Zimpo entitled, “Verification of the Cost Responses of Fischer S.A. Comércio Indústria e Agricultura in the Antidumping Review of Certain Orange Juice from Brazil” at cost verification exhibit 4 (Fischer Cost Verification Report).

²² See Financial Reporting Group of Ernst & Young. IFRS/US GAAP Comparison, 3rd Edition page 21 (APB 30.20).

Finally, we disagree with Fischer that the adoption of the U.S. dollar as a functional currency should persuade us to exclude the variation gains or losses recorded in the reais-denominated financial statements. Fischer reported its costs to the Department based on reais, which is the currency used in Fischer's underlying normal books and records. All of the underlying records observed at verification were denominated in reais. While Fischer notes that orange prices are quoted in U.S. dollars, Fischer's payments for orange purchases are made in reais, and inventory purchased is recorded in reais. As stated by Fischer, under Brazilian GAAP, Fischer is required to prepare financial statements denominated in reais.²³ Fischer did not provide any U.S. dollar-denominated financial statements. Thus, absent a demonstration that Fischer's financial statements are distortive, we have continued to rely on the reais-denominated financial statements for these final results and have continued to include the financial income and expense accounts recorded in Fischer's income statement.

Comment 13: Fischer's Intercompany Interest Expenses

Fischer states that, in its original response to Section D of the questionnaire, it identified interest expenses related to borrowing from an affiliated trading company and it appropriately excluded this entire amount from the calculation of financial expenses. Fischer asserts that this exclusion was consistent with the Department's actions in the original investigation and subsequent reviews, where the Department excluded the intercompany interest expenses from Fischer's total financial expenses calculation. Fischer argues that the Department excludes intercompany borrowings because they do not reflect a true and accurate representation of a company's interest expenses. For this reason, according to Fischer, it is the Department's practice to use consolidated financial statements, which do not include intercompany interest expenses. See 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), and accompanying Issues and Decision Memorandum at Comment 7.

Fischer states that in Notice of Final Determination of Sales at Less Than Fair Value: Structural Steel Beams from South Africa, 67 FR 35485 (May 20, 2002), and accompanying Issues and Decision Memorandum at Comment 7, the Department recognized the distortive effect that intercompany lending has on a company's total interest expense when it determined that removing intercompany transactions from the financial expense calculation provided an untainted picture of the financial expense incurred to produce the products of the group. Fischer notes that it does not prepare consolidated financial statements and, thus, it is unable to report its financial expenses to the Department at a higher level of consolidation. Nonetheless, Fischer contends that the principle that intercompany transactions should be removed from the financial expense calculation still holds true. According to Fischer, by including intercompany interest expenses in the numerator of Fischer's financial expense ratio calculation, the Department has inaccurately represented Fischer's financial activities and thereby disregarded its duty to

²³ See Certain Preserved Mushrooms from India: Final Results of Antidumping Administrative Review, 68 FR 41303 (July 11, 2003), and accompanying Issues and Decision Memorandum at Comment 12 ("...the Department relies on audited financial statements as a reliable basis of information for purposes of calculating COP....").

calculate margins as accurately as possible. See Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (CAFC 1990).

The petitioners note that in the 2007-2008 OJ from Brazil at Comment 17 the Department allowed as an offset a portion of intercompany interest income generated from Fischer's affiliated company. Therefore, according to the petitioners, just as the Department allowed intercompany income from an affiliate, it is only fair and consistent to continue include intercompany interest expenses in its calculation of financial expenses.

Department's Position:

We disagree with Fischer's assertion that interest expenses associated with affiliated party loans should be excluded from the calculation of financial expenses. The monies received from the affiliated loan are a real asset and there is a real cost of borrowing associated with them.

It is the Department's normal practice to calculate financial expenses at the highest level of consolidation available. In Shrimp from India at Comment 7, we reiterated our preference for using consolidated financial statements; however, the Department's practice is to calculate the respondent's net interest expense based on the financing expenses incurred on behalf of the highest consolidated group of companies to which the respondent belongs. See 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; and Notice of Final Results of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 65 FR 78472 (Dec. 15, 2000), and accompanying Issues and Decision Memorandum at Comment 7.

In this case, Fischer's financial statements represent the highest level of consolidation. Fischer's argument hinges on the premise that intercompany transactions should always be eliminated; however, intercompany transactions are eliminated through the process of consolidation which is a procedure that combines the accounts and eliminates intercompany transactions in order to present a correct picture of the consolidated entity. Although it is true that affiliated party financial expenses between two consolidated entities would be eliminated upon consolidation, the interest expenses paid to unaffiliated parties by both companies are added into the consolidation. We note that we have not added in the financial expenses that Fischer's affiliated party incurred. Moreover, a consolidation does not eliminate transactions between affiliated parties that are not consolidated, such as owners, officials, and unconsolidated affiliates. Thus, Fischer is incorrect when it states that we automatically eliminate all financial expenses associated with affiliated parties. It would be inappropriate to automatically disregard intercompany transactions with entities that are not consolidated in Fischer's financial statements. Instead, we test whether the affiliated party transactions occurred at an arm's-length prices, rather than eliminating such transactions altogether.²⁴ As a result, we have continued to include the interest expense Fischer paid to its affiliate in the financial expense ratio calculation for purposes of the final results.

²⁴ See Comment 15, below, for a discussion of arm's length transactions with affiliated parties.

Comment 14: Offset to Intercompany Interest Expenses for Fischer's Financial Expenses

Fischer states that, if the Department includes intercompany interest expenses in the calculation of financial expenses, then it must also include a credit for Fischer's other operating income related to intercompany transactions. Fischer's cites its section D supplemental questionnaire response at exhibit 9 and refers to the income account entitled "reversal of interest expenses on intercompany transactions." Fischer argues that, consistent with the Department's practice of reducing the amount of interest expenses incurred by any interest income earned on short-term investments of its working capital, the Department should similarly reduce any intercompany interest expenses by any intercompany interest income. See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Bar From Italy, 67 FR 3155 (Jan. 23, 2002), and accompanying Issues and Decision Memorandum at Comment 22; and Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan, 61 FR 57629, 57645 (Nov. 7, 1996). According to Fischer, the Department reviews the nature of the activity and the relationship when determining whether to include an item, such as interest income, in the financial expense calculation. See Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Korea, 67 FR 62124 (Oct. 3, 2002).

The petitioners argue that at the cost verification the Department examined the various accounts that made up the other operating income and noted that it may be appropriate to consider including in Fischer's G&A expenses the operating accounts of: 1) provisions and reversals; and 2) fixed asset sales. According to the petitioners, it is clear that the Department examined and verified all of the accounts in the operating income category and concluded that only the ones outlined above should be considered as G&A expenses.

Department's Position:

We disagree with Fischer that the account referred to as "reversal of interest expenses on intercompany transactions" (see the trial balance at cost verification exhibit 4) should be used as an offset to financial expenses in calculating Fischer's financial expense ratio. In this review, Fischer excluded from its reported costs the gain recognized in this account, and it only now at the briefing stage that it claims that this account should be used to offset its interest expenses. Throughout this entire segment of the proceeding, Fischer did not report the amounts in this account as an offset to costs, either as an offset to G&A expenses or financial expenses. Further, we disagree that the cases cited by Fischer are on point. While they refer to our general practice of using consolidated financial expense, they do not address transactions between affiliated parties.

As stated above, it is the Department's practice to calculate a respondent's net interest expenses based on the financial expenses incurred at the highest level of consolidation, which in this case is Fischer's own financial statements. Therefore, we have included in Fischer's financial expense ratio the arm's-length interest expenses resulting from its borrowings with an affiliated company (see Comment 13, above). Fischer's borrowing of funds from its affiliated company and thus its recording of interest expenses represented the fair value of the transactions related to the borrowing. In other words, Fischer obtained a loan and recorded the cost of that borrowing

as interest expenses. While Fischer appropriately recognized the interest expense associated with its affiliated party loans in the prior years, in this segment Fischer's cost of borrowing in prior years was forgiven (*i.e.*, the payable was waived).²⁵ The reversal of these interest expenses in the current year, as a prior period adjustment, not only retroactively treats such loans as non-interest bearing (*i.e.*, not at arm's-length amounts), but also creates an artificial gain in the current year for Fischer.²⁶ The Department is required to analyze the arm's-length nature of affiliated transactions and the forgiveness of the cost associated with the use of the funds cannot be considered an arm's-length transaction. In accordance with section 773(f)(2) of the Act, if a transaction does not fairly reflect the amount usually reflected in the market under consideration, it may be disregarded. See Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 72 FR 51595 (Sept. 10, 2007) (SS Bar from India 05-06), and accompanying Issues and Decision Memorandum at Comment 6. As in the instant review, where there were loans from affiliated parties in SS Bar from India 05-06, we calculated an adjustment to create an arm's-length transaction. In this case, it is necessary to disregard the forgiveness of affiliated party interest expenses to create an arm's-length transaction representative of loan activity between Fischer and its affiliated party. The forgiveness of the costs associated with borrowing from a related party does not reasonably reflect the market value of the transactions between related parties. As a result, we have not offset Fischer's financial expenses by this account for the final results.

Comment 15: Market Prices for the Sale of Certain By-Products for Fischer

Fischer states that, while the Department in prior reviews made adjustments to the prices of its by-product purchases from affiliates so that these purchases reflect a market price, it is not appropriate to make a similar adjustment here for citrus pulp pellets. Fischer claims that the difference in the by-product price for citrus pulp pellets was not a result of the customer's status as an affiliate, but rather of level of trade. Fischer asserts that all of its citrus pulp pellet by-product sales to unaffiliated parties were delivered to customers in trucks at the same processing plant where they were produced (*i.e.*, either Matao, Limeira or Bebedouro). However, all citrus pulp pellet by-product sales to Fischer's affiliate were exported and sold free-on-board Santos. As a result, Fischer claims that it incurred additional costs on sales to the affiliate such as trucking to Santos, weighing, unloading in Santos, storage in Santos, and finally loading in vessels. Fischer also claims that citrus pulp pellets are a very low value product, and therefore shipping and logistics constitute a considerable percentage of the sales price. For this reason, Fischer contends that the price to its affiliate is higher than the price to third parties and thus the Department should accept Fischer's reported price for purposes of the final results.

The petitioners state that this is similar to the issue raised by Cutrale and addressed by the petitioners in Comment 8, above. The petitioners argue that not only did Fischer provide insufficient evidence to support its claim, but also if it were to provide such evidence, it would

²⁵ We believe it is fair to assume that absent the affiliation, Fischer's prior year interest expenses would not have been forgiven under normal market circumstances.

²⁶ We note that Fischer has not repaid the loans and still enjoys the use of the assets (*i.e.*, the money) and there is still a cost of borrowing associated with the asset.

constitute new information provided beyond the established deadlines for providing new information.

Department's Position:

We disagree with Fischer that the adjustment for citrus pulp pellets should be removed. While the freight difference may be a factor to consider, Fischer's claims are not supported by record evidence. In response to the Department's section D questionnaire (at exhibit D-15), and in its section D supplemental questionnaire response (at exhibit SD-3), where Fischer provides an analysis of by-product sales between its affiliated party and third parties, Fischer failed to mention a difference in freight costs, and it provided no net freight analysis or the necessary adjustment to support its claim that the additional freight was the cause of higher prices. During our analysis of Fischer's reported by-product sales, we found that the average transfer price to Fischer's affiliated party for citrus pulp pellets was higher than the average market price. Therefore, in accordance with section 773(f)(2) of the Act, as in previous reviews of this order and consistent with the Preliminary Results, we reduced the by-product offset to Fischer's COM to reflect the market value of by-product sales.²⁷ See OJ from Brazil 2007-2008 Prelim, 74 FR 15438; 2005-2007 OJ from Brazil at Comment 9; and Diamond Sawblades at Comment 10. See also Comment 8, above.

Comment 16: Fischer's Unrealized and Eradication Expenses

Fischer argues that in the Preliminary Results the Department inappropriately revised its G&A expense ratio calculation to include: 1) the "other" operating expense accounts of net provisions and reversals and disposal of fixed assets;²⁸ and 2) unrealized contingency expenses and expenses related to provisions for eradication of citrus trees and associated write-offs. Fischer maintains that under section 773(e)(2) of the Act, the Department may only include the actual amounts incurred and realized by the specific exporter or producer under review for selling, general, and administrative expenses. Furthermore, Fischer argues that it informed the Department that "these items must be excluded from the reported costs as, if the contingency is not realized, it is reverted. Often these extraordinary items are related to non-subject merchandise or are outside the POR." See Fischer's March 18, 2010, section D supplemental questionnaire response at page 8.

Moreover, Fischer states that it isolates a significant sub-account from the provisions and reversals subtotal (i.e., provision for eradication of citrus trees) and a significant sub-account from the disposal of fixed assets subtotal (i.e., the write-off for eradication (fixed assets) adjustments). Fischer maintains that the Department has an obligation to evaluate each item in the G&A expense calculation to determine "the nature of the G&A activity and the relationship

²⁷ We note that the by-product adjustment to reflect market value in the Preliminary Results included other by-product adjustments to reflect market value. However, the adjustment to citrus pulp pellets was the most significant. See Memorandum to Neal Halper from Christopher Zimpo entitled, "Antidumping Duty Administrative Review of Certain Orange Juice from Brazil, Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results – Fischer S.A. Comercio, Industria and Agricultura" (Fischer Preliminary Cost Calculation Memo), dated April 7, 2010.

²⁸ See Fischer Preliminary Cost Calculation Memo at page 1 and attachment 2.

between this activity and the general operations of the company." See Dynamic Memory Semiconductors of One Megabit and Above from Taiwan, 64 FR 56308, 56323 (Oct. 19, 1999). See also Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Review: Certain Pasta From Italy, 64 FR 6615, 6627 (Feb. 10, 1999). Finally, Fischer claims that these two accounts represent capital costs related to the demolition of diseased trees, which is the first step in the rejuvenation process and is thus included in the total capitalized cost of the new grove area.

The petitioners argue that in the original investigation and first administrative review, Fischer made a similar argument with regard to the exclusion of contingency losses and provisions for losses and labor claims. However, according to the petitioners, the Department determined that these provisions and losses were recognized in the 2006 fiscal year, stating that, "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."²⁹ The petitioners note that these operating expenses were recognized in Fischer's 2008 financial statements. Therefore, the petitioners maintain that the Department should continue to use the G&A expense ratio calculated for Fischer in the Preliminary Results, consistent with its findings from verification and the methodology used in previous administrative reviews.

Department's Position:

We disagree with Fischer and have continued to follow the practice that we employed in OJ from Brazil Investigation at Comment 24 and 2005-2007 OJ from Brazil at Comment 19. In OJ from Brazil Investigation, as in this proceeding, Fischer's audited financial statements were prepared in accordance Brazilian GAAP, which in the case of Fischer requires the use of an accrual-based accounting system. Furthermore, note 2.1 of Fischer's 2008 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. Fischer is incorrect in stating that an accrued or contingent liability is not an actual cost or expense, and that the Department must only include actual amounts. Certain expenses are accrued in order to match revenues and expenses. Because the expenses are shown on the audited income statement, Fischer's assertion that the expenses have not actually been incurred because the accrual has not been written off is inaccurate. Under accrual accounting,³⁰ an estimate of a loss should be accrued and therefore reported in the income statement, if the loss is probable and an estimate of the amount can be determined.³¹ The Department considers the recognition of the liability and the associated expenses to be a real cost. In this case, Fischer's auditor determined that the loss was probable and the amount of the loss could be estimated. Because these two criteria were met, Fischer's auditors were required to reflect the losses and related write-offs in the 2008 fiscal year income statement.

²⁹ See 2005-2007 OJ from Brazil at Comment 19; and OJ from Brazil Investigation at Comment 24.

³⁰ The concept of accrual accounting does not differ between countries and depend on the local GAAP; rather, it only differs between companies when a cash basis or accrual basis accounting is used.

³¹ See Financial Reporting Group of Ernst & Young, IFRS/US GAAP Comparison, 3rd Edition. Lexis Nexis, 2005: p. 519.

In addition, in 2005-2007 OJ from Brazil as in this proceeding, in determining whether it is appropriate to include or exclude from the G&A expense ratio calculation particular income or expense items, the Department reviewed the nature of the item and its relation to the general operations of the company. In this review, Fischer provided the Department with detailed trial balances showing all subaccounts for expenses related to provisions, reversals, and disposal of fixed assets, and thus the Department evaluated each of these subaccounts to determine if it related to the general operations of the company. See Fischer Cost Verification Report at 25-26 and cost verification exhibit 11; and Fischer's March 18, 2010, section D supplemental questionnaire response at 8 and exhibit 9. G&A expenses are expenses related to the general operations of the company as a whole, rather than directly related to the products produced during the period. 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). G&A expenses relate more to the period of time and are not generally inventoried with other product costs. Consequently, in determining whether it is appropriate to include or exclude particular income or expense items from the G&A expense ratio calculation, the Department considers the nature of the item and its relation to the general operations of the company. Both the provisions for eradication of citrus trees and the write-off of diseased trees result from the general operations of a fruit grower. While these expenses could arguably be treated as a component of COM, Fischer does not treat them as such in its books and records. Accordingly, we have included both types of losses in the numerator of the G&A expense ratio calculation.

Finally, we disagree with Fischer's claim that the provision for the eradication of citrus trees and the net losses related to fixed assets are related to the capitalization process. We find that the evidence on the record does not support this conclusion. The record in this case shows that the costs associated with the eradication of citrus trees and the net losses related to fixed assets that we have included were expensed in the period and not capitalized. Therefore, for the final results, we have continued to include the accounts related to the provisions for eradication and disposal of fixed assets in the numerator of the G&A expense ratio.

Recommendation

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

Agree_____

Disagree_____

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

(Date)