

In response, petitioners argue that it is well established in the cold-rolled carbon steel flat products cases that all products which have the same CONNUM are considered by the Department to be "identical" for the purpose of applying Section 773(a)(4)(C). For example, Appendix V of the questionnaire from the underlying investigation states that "[f]or purposes of these investigations, products will be considered 'identical' in thickness if they fall within the same thickness range * * * regardless of the actual thickness of the products"; "products will be considered 'identical' in width if they fall within the same width range identified * * * regardless of the actual width of the merchandise"; "and "[n]o difference in merchandise adjustment (difmer) may be claimed for products that are within the same thickness or width range, but differ in actual measurement." Similarly, the Department stated that, in following such an approach for determining which sales are of "identical" merchandise, "if there are 'identical' matches according to our designated criteria, we will not make an adjustment for any additional differences in merchandise (difmer)."

Petitioners argue that, in the present review, CONNUMs have been defined such that each CONNUM has a unique set of identifiers for the matching criteria established by the Department. As a result, products sold in the United States and home markets which have the same CONNUM would share the same "identifier" for all of the Department's product-matching criteria and, accordingly, the Department was correct in not making difmer adjustments for U.S. and home market products with the same CONNUM.

Department's Position: We disagree with respondent. As explained below, the Department correctly declined to make difmer adjustments when U.S. sales were matched to what we determined to be home market sales of identical merchandise (*i.e.*, when the U.S. and home market sales in question possessed the same product characteristics as set forth by the Department in its model matching criteria).

Section 771(16) of the Act directs the Department to compare sales of home market merchandise which are "such or similar" to merchandise sold in the United States. In accordance with section 771(16)(A), the Department first identifies and compares that merchandise which is "identical" in physical characteristics, followed by sales of merchandise which is most "similar" in physical characteristics. To

make these determinations, the Department devises a hierarchy of commercially meaningful characteristics suitable to each class or kind of merchandise. The Department considers merchandise to be identical within the meaning of section 771(16)(A) when all the relevant characteristics match.

The courts have recognized that the Department has broad discretion "to choose the manner in which 'such or similar' merchandise shall be selected." *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995). This discretion extends to determining which products properly should be considered identical.

However, the Department is not authorized to grant difmer adjustments within identical product categories. Under section 773(a)(4)(C) of the Act, the Department may only adjust for cost differences between two products which are "similar" in physical characteristics, and in this way compensate for any difference in the price derived solely from the physical difference between the two products compared.

Basing its product matching criteria on commercially meaningful characteristics permits the Department to draw reasonable distinctions between products for matching purposes, without attempting to account for every possible difference inherent in certain classes or kinds of merchandise. Given the tremendous number of variations between products in the various flat-rolled carbon steel product categories, including cold-rolled steel, the Department has followed this approach in the present case, beginning with the original less-than-fair-value investigation. As such, the Department may define certain products as being "identical" within the meaning of section 771(16)(A), even though they contain minor differences. See *Final Determination of Sales at Less Than Fair Value; Gray Portland Cement and Clinker From Mexico*, 55 FR 29244, 29247-48 (July 18, 1990). Similarly, the Department need not account for every conceivable physical characteristic of a product in its hierarchy. Thus, a range of products may be considered "identical" within the meaning of the statute.

For instance, as Thyssen correctly notes in its case brief, many steel products would have been treated by the Department as identical (*i.e.*, in the same CONNUM) even when their widths differed from one another, because this product characteristic is identified in terms of ranges (*e.g.*, 40 to 60 inches as identifier "F" for the width product characteristic). In other words, two sales could be classified in the same

CONNUM even if one was of merchandise with a width of 41 inches and the other was of merchandise with a width of 59 inches because both would fall within the width category identified as "F".

At the outset of the present review, when it had an opportunity to comment on the hierarchy of product matching criteria, Thyssen failed to argue that it considered the Department's width and thickness product categories overly broad, nor did Thyssen argue that additional product characteristics should be included within the hierarchy. Because the products within each CONNUM are identical within the meaning of the statute, the VCOMH and VCOMU reported by Thyssen within individual CONNUMs do not provide a basis for making difmer adjustments.

Comment 11: Thyssen contends that the Department improperly compared U.S. sales of seconds to constructed value, rather than to home market sales of seconds. Thyssen acknowledges that home market seconds were sold at prices below cost. However, Thyssen cites the Senate Report accompanying the Trade Reform Act of 1974 to argue that neither the statute nor the Department's regulations mandate that all below cost home market sales be disregarded in calculating foreign market value. See S.Rep. No. 1298, 93d Cong., 2nd Sess. 173 (1974). Thyssen argues that in the steel industry it is normal business practice for all companies, including Thyssen, to sell secondary steel at less than the cost of producing prime steel of the same grade. At the same time, however, sales of seconds are relatively infrequent in comparison to sales of prime material and do not prevent a steel manufacturer from recovering production costs on all steel sales, primes and seconds, within a reasonable period in the normal course of trade. Thyssen contends that this result is directly contrary to the intent of Congress.

Thyssen argues that *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1060 (Fed. Cir. 1992), which the Department cites at page 3 in its April 19, 1995, memorandum on treatment of non-prime merchandise (from Roland MacDonald to Joseph Spetrini, General Issue Case No. A-100-003), merely *permits* the Department to compare the prices of seconds to constructed value in appropriate circumstances; *IPSCO* does not mandate that result. Thyssen contends that the particular issue which it has raised, the question of whether Thyssen's sales of seconds were in sufficiently large quantities over a significantly lengthy period, is fact-