similar to the differences that existed in *Flowers*.

The second Flowers factor we considered was whether a comparison of third country sales to U.S. sales would require comparisons of low-price U.S. sales in off-peak months with highprice third country sales in peak months, or vice versa. In the preliminary determination, we found that this factor was not present in these investigations because: (1) There were sufficient third country sales in each month of the POI (when markets were combined); and, (2) using two six-month FMV periods reduced distortion caused by price comparisons involving peak and non-peak periods.

For purposes of this final determination, we have determined that use of third country prices could result in off-peak U.S. sales being compared with peak third country sales. While six- month averages ameliorate potential distortions, almost all of the respondents do not have third country sales in every month of the POI. It is only by combining markets that respondents have sales in each month of the POI. If we were to use third country prices as the basis for FMV, prices during peak periods in one third country could be combined with prices during peak periods in another third country. These peak prices would then be compared to both peak and non-peak periods in the United States. We find that this factor supports use of CV in these cases, albeit to a somewhat lesser degree than in Flowers.

The third Flowers factor we considered was the extreme perishability of roses—i.e., the inability to control short-term production—and the resultant "chance" element to sales. As noted in our preliminary determinations, there are substantial similarities between the subject merchandise in these investigations and Flowers: (1) Roses, like flowers, are extremely perishable; (2) rose growers have relatively minor control over shortterm production; (3) rose production is also affected by exogenous factors (e.g., weather, disease, etc.) like other flowers; and 4) roses cannot be stored and we note that there are only very minor alternative uses (e.g., drying).

In conclusion, we have determined that the factors that led the Department use CV instead of third country prices in Flowers are present in these investigations. Therefore, we have adopted CV as the basis for comparison with U.S. prices.

Comments Pertaining to Related Party Commissions

Comment 7: Related Party Commissions

Petitioner requests that commissions paid to consignment agents should be deducted from USP even where consignees are related parties. Specifically, petitioners argue that: (1) The statute directs us to deduct commissions from USP in ESP situations, without discretion to disregard U.S. commissions in related party transactions; (2) in Timken, the court recognized that the statute required a deduction when a U.S. importer was paid commissions, as opposed to earning "profits;" (3) the statute should be followed, regardless of the fact that commissions were not deducted in Flowers; and (4) we should deduct U.S. indirect selling expenses if such expenses exceed the related consignee's commissions, in accordance with 19 U.S.C. 1677a(e)(2).

Respondents claim that the Department's treatment in the preliminary determination of related party sales commissions is invalid. They argue that deducting the related importer's commission from U.S. price has the effect of deducting the importer's profit, which the Department does not have the authority to do. The Department should deduct the importer's actual selling expenses rather than intra company transfers. Respondent's argue that the Department's approach is inconsistent with past practice since related party commissions have never been treated as a direct selling expense, but rather have been collapsed in the past for the purposes of determining U.S. price and expenses. Moreover, respondents assert that the Department's statute and regulations do not authorize the Department to deduct the higher of related party commissions or related party actual expenses. Respondents claim that in selectively choosing deductions of commissions or actual expenses, the Department fails to account for the fact that the commission it treats as a cost is also sales related income to the related importer. Respondents maintain that the Department should ignore the sales commissions paid between related parties on ESP sales, regardless of whether such commissions are at arm's length, and treat as U.S. indirect selling expenses the importer's share of operating and selling expenses allocable to the exporter's subject sales.

DOC Position

The difference between a related consignee's commission and the related

consignee's U.S. indirect selling expenses is equal to the related consignee's profit. The Department does not deduct profit from USP in ESP transactions because the law does not allow it. 19 CFR 353.41(e)(1) and (2) do, however, instruct us to make adjustments in ESP situations for commissions and expenses generally incurred by or for the account of the exporter in selling the merchandise.

With respect to treatment of related party commissions paid in the U.S., we have in the past looked to the definition of "exporter" which provides that related party importers are to be collapsed with, and treated as part of, the exporter. 19 U.S.C. 1677(13). In this context, it is inappropriate to treat a commission the exporter has paid to itself as an expense. The expense is the actual costs incurred by or for the

account of the exporter.

In LMI-Le Metalli Industriale, S.p.A. v. United States, 912 F.2d 455, 459 (Fed. Cir. 1990) (*LMI*), the CAFC indicated that related party commissions can and should be adjusted for if the commissions are at arm's-length and are directly related to the sales under review.1 By implication, an arm's-length commission includes the actual indirect selling expenses incurred by the commissionnaire and the commissionnaire's profits. Thus, *LMI* allows us to deduct the profits that are implicit in the commission. The facts in LMI, however, are distinguishable from the facts in these investigations. In *LMI*, the Court directed the Department to adjust for sales commissions paid to a related subsidiary of the respondent in the home market. The sales on which the commissions were paid in the home market were purchase price-type transactions made with the assistance of the related party selling agent. The issue of how to treat any selling expenses incurred by the related party selling agent in addition to commissions earned by that related party selling agent did not arise in LMI.

In the instant investigations, the sales on which the commissions were paid are ESP transactions where, because the importer of the merchandise is related to the exporter, we collapse the two pursuant to 19 U.S.C. 1677(13) and base USP on the sale to the first unrelated party. In contrast to *LMI*, therefore, the

¹In Coated Groundwood Paper from Finland, 56 FR 56363 (November 4, 1991), which was subsequent to *LMI*, we developed guidelines to determine whether commissions paid to related parties, either in the United States or in the foreign market, are at arm's-length. If, based on the guidelines, we found commissions to be at arm's-length, we stated that we would make an adjustment for such commissions.