FMVs, and if half or more of the sales were found to be sold below cost, then home market sales would be rejected in their entirety and FMV would be based on CV.

Petitioner maintains that respondents have misrepresented the Department's past practice and ignored judicial precedent. Petitioner maintains that the current 50–90–10 test by which the Department removes from consideration ''significant'' quantities of sales made below COP but uses those sales made above cost, is correct. Petitioner maintains that the courts supported the Department's use of remaining above-cost sales as sufficient for FMV in *Timken Co.* v. *United States,* 673 F. Supp. 495, 516–517 (CIT 1987), and that the basic principle applies to all products.

DOC Position

We disagree with respondents. The Department has an established practice which takes into account the realities of selling perishable agricultural products. In *Final Determination of Sales at Less Than Fair Value: Certain Fresh Winter Vegetables from Mexico,* 45 FR 20512, 20515 (March 24, 1980), after examining the nature of sales of vegetables, the Department determined that it was a regular business practice to make a relatively high number of sales of the subject merchandise below cost because of the perishability of the product, which rapidly ages into non-salable merchandise. As a result, the Department determined that were it to apply the normal below cost test used for nonperishable products, *i.e.*, the 10–90–10 test, this would not fairly reflect the economic realities of the fresh vegetable industry. As a result, the Department concluded that it would permit all sales at below cost to remain in the FMV comparison unless more than 50 percent were found to be below cost.

This modified test was clarified in a review of *Final Results of Antidumping Duty Administrative Review; Certain Fresh Cut Flowers from Mexico,* 58 FR 1794, 1795 (January 17, 1991), wherein the Department explicitly stated that the test to be applied for determining sales below cost for perishable agricultural products was a 50–90–10 test, *i.e.,* if between 50 and 90 percent of home market sales consisted of prices below cost, then only the below cost sales were disregarded, while if over 90 percent of sales were below cost then all sales in the home market were disregarded. *See Final Results of Antidumping Duty Review: Certain Fresh Cut Flowers from Mexico,* 56 FR 1795, 1795 (January 17, 1991).

This modified test still remains our current practice and respondent's rationale for the adoption of a straight 50–50 test is an unmerited modification. Were we to adopt respondents' either/or position, *i.e.*, if less than 50 percent are below cost we will use all sales, and if more than 50 percent we will disregard all sales, then we would, in effect, be concluding that 11 percent of widget sales above cost are sufficient to be the basis for FMV but that 49 percent of rose sales above cost are insufficient. This is a an illogical result, which we are not prepared to accept.

Comment 16: Duty Deposit Rate—Roses Shipped But Not Sold

Respondents urge the Department to adjust the deposit rate to reflect the fact that many roses imported into the U.S. perish or are destroyed prior to sale. To avoid over collecting duty deposits on roses that never reach the U.S. market, and since there is no way of distinguishing between roses that will be sold and roses that will be destroyed at the time of entry, respondents argue that the duty deposit rate should be adjusted downward to reflect the quantity of roses shipped to the United States, but not sold. This practice is being used in *Flowers.* Respondents suggest the Department multiply any *ad valorem* rates it calculates by the ratio of total quantity sold divided by total quantity shipped, as reported by each respondent.

Petitioner states that all imports at the time of importation are potentially for sale and, therefore, must bear the appropriate cash deposit rate. Because the percentage of roses that will go unsold varies due to season, weather, problems in transportation, etc., petitioner argues that there is no accurate way to adjust for this potential impact.

Additionally, petitioner states that if the Department does adjust the duty deposit rate to account for roses shipped but not sold, than it is appropriate to adjust the deposit rate to reflect the fact that values entered by Customs are arbitrarily established on consignment entries. Petitioner argues that the use of the calculated USP to derive a cash deposit rate may bear no relation to the value used by Customs for collecting duties. Therefore, petitioner believes that the duty deposit rate should be adjusted upwards so that the duty amount collected reflects the potentially uncollectible duty deposits calculated in the final determination.

DOC Position

We disagree with respondent that the duty deposit rate should be adjusted for roses shipped but not sold. We do, however, agree with respondent, in part, that such adjustment is appropriate for assessment purposes, which are distinct from duty deposit purposes. In the case cited by respondents, *Fresh Cut Flowers from Colombia* 55 FR 20491 (May 17, 1990), the Department indicated that it would make such an adjustment in preparing assessment instructions to the Customs Service. The Department did not make such an adjustment to the duty deposit rates in that case and has not done so in subsequent reviews.

We agree with petitioners that all imports at the time of importation are potentially for sale, and that the percentage of roses which go unsold varies with the seasons. Moreover, this percentage will likely vary with each producer and reseller. Thus, any adjustment contemplated would be speculative. It is preferable to wait until the Department prepares assessment instructions on entries covered by these deposit rates and then make such an adjustment based on the actual experience of the affected companies.

Comment 17: Cash Deposits—The Department's Sampling Technique

Respondents claim that the all others cash deposit rate calculated by the Department is not based on a representative sample of the Colombian rose exporting population—it merely reflects the experience of 16 of the largest exporters. Furthermore, according to respondents, the all others rate disregards the representativeness of such experience. Respondents maintain that this is inconsistent with the Department's statutory requirement that any averages and samples used must be representative of the whole. *See* 19 U.S.C. 1677f–1(b).

DOC Position

We disagree with respondents. The Department's normal practice, in accordance its regulations, is to select that number of the largest exporters of the subject merchandise needed to represent 60 percent of the imports into the United States from the country under investigation. Due to the large number of companies needed to reach 60 percent of imports in this investigation and the administrative burden it would put on the Department's resources to investigate these companies, the Department selected the 16 largest exporters representing over 40 percent of the imports into the United States. *See* the May 2, 1994, Decision Memorandum from the Team to Barbara Stafford.

The methodology used by the Department maximized its coverage of