

Department to calculate an antidumping duty margin for Florinsa.

In assigning BIA, the Department applies a two-tier methodology based on the degree of respondent's cooperation. In the first tier, the Department normally assigns higher margins (*i.e.*, margins based on more adverse assumptions) for those respondents which did not cooperate in an investigation or which otherwise impede the proceeding. If a respondent is deemed as non-cooperative, the Department bases the final margin for the relevant class or kind of merchandise on the higher of: (1) The highest margin in the petition or (2) the highest calculated margin of any respondent within the country that supplied adequate responses for the relevant class or kind of merchandise.

In the second tier, the Department assigns lower margins to those respondents who substantially cooperate in an investigation. These margins are based on the higher of: (1) The highest calculated margin for any respondent within that country that supplied adequate information for the relevant class or kind of merchandise or (2) the average of the margins in the petition. *See, e.g., Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 FR 18992 (May 3, 1989).

The Department's two-tiered methodology for assigning BIA has been upheld by the U.S. Court of Appeals for the Federal Circuit. *See Allied-Signal Aerospace Co. v. United States*, 996 F.2d 1185 (Fed. Cir. 1993); *see also Krupp Stahl AG v. United States*, 822 F. Supp. 789 (CIT 1993).

Florinsa responded to our requests for information and we find that it has been substantially cooperative for purposes of this final determination. Accordingly, we used as second-tier BIA for this respondent, the average of the margins contained in the petition, which is 84.72 percent. This margin is higher than the highest margin calculated for any respondent in this investigation.

Exclusion of BIA Rate From Calculation of the "All Others" Rate

The Department has determined to exclude from the calculation of the "All Others" rate the BIA rate assessed to Florinsa. The Department's general practice is to include in its calculation of an "all others" rate all investigated firms that receive affirmative margins, including any firm whose margin is based upon BIA. However, where appropriate, the Department has departed from its general practice in

prior cases and excluded BIA-based margins from the calculation of the "all others" rate. *See, e.g., Silicomanganese from Brazil*, 59 FR 55432 (November 7, 1994); *Sweaters from Hong Kong (Sweaters)*, 55 FR 30733 (July 27, 1990) (affirmed by the CIT in *National Knitwear*).

For example, in *Sweaters*, an association of Hong Kong knitting manufacturers and an association of U.S. textile and apparel importers argued that firms not representative of the industry should not be included in the calculation of the "all others" rate, particularly where a firm had received a BIA-based margin. The Department agreed that departure from its general practice was warranted because it would have been "inappropriate" to include the BIA-based rate in the calculation of the "all others" rate given "(1) The enormous disparity between the three verified rates and the highest rate in the petition, *i.e.*, approximately 20 times greater; (2) [the Department's] examination of only the top 30 percent of total quota holdings, and (3) the small number of firms investigated, *i.e.*, four from a potential pool of over 300." 55 FR 30737-38 (comment 3).

Like *Sweaters*, the unusual circumstances present in the instant proceedings, particularly the Department's need to limit the number of firms investigated, call into question the representativeness of investigated firms with respect to noninvestigated firms. Specifically,

(1) The Department only examined companies which produced the top 40 percent of the total export volume, as opposed to the normal 60 percent minimum proscribed by the Department's regulations (19 C.F.R. 353.42(b));

(2) the Department examined only a relatively small number of firms, *i.e.*, four out of a potential pool of 20 firms in Ecuador;

(3) the Department was unable, due to administrative burdens, to accept voluntary respondents and exclusion requests.

Based on these circumstances and in light of the *Sweaters* precedent, it is reasonable to exclude Florinsa's BIA-based margin from the calculation of the "all others" rate. *See* comment 21, *infra* for petitioner and respondent arguments. *See also* the January 13, 1995, Memorandum from the Office of Chief Counsel to Susan G. Esserman.

Such or Similar Comparisons

We have determined that all roses covered by this investigation comprise two categories of "such or similar" merchandise: culls and export-quality roses. None of the respondents reported sales of culls in the United States. Therefore, no comparisons in this such

or similar category were made. Regarding export quality roses, we compared United States Price (USP) to constructed value (CV).

Fair Value Comparisons

To determine whether sales of roses from Ecuador to the United States were made at less than fair value, we compared the USP to the CV for all non-BIA respondents, as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

For all U.S. prices, we calculated USP using weighted-average monthly prices by rose type, where the appropriate data were available. *See* Comments 4 and 5 below.

During the POI, respondents paid commissions to related parties in the United States. However, we made no adjustment for these payments. Instead, we subtracted the actual indirect selling expenses incurred by the related party in the United States because we determined that to account for both commissions and actual expenses would be distortive. *See* Comment 7 below.

For sales by Arbusta and Guaisa, we based USP on purchase price, in accordance with 19 U.S.C. 1677a(b), when the subject merchandise was sold to unrelated purchasers in the United States prior to importation and when exporter's sales price (ESP) methodology was not otherwise indicated.

In addition, for Arbusta, Guaisa, and Floricola, where sales to the first unrelated purchaser took place after importation into the United States, we also based USP on ESP, in accordance with 19 U.S.C. 1677a(c).

Each of the respondents classified credits related to quality problems with the merchandise as warranty expenses. However, because these quality-related credits functioned as price reductions, we reclassified them as such.

We made company-specific adjustments, as follows:

1. Arbusta

For Arbusta, we calculated purchase price based on packed F.O.B. Quito prices to unrelated customers. In accordance with 19 U.S.C. 1677a(d)(2)(A), we made deductions, where appropriate, for foreign inland freight and for quality-related credits and for export taxes imposed by the Government of Ecuador, in accordance with 19 U.S.C. 1677a(d)(2)(B). We also deducted DHL expenses for one customer.