in a timely manner according to our regulations, we accorded petitioner sufficient time to comment and petitioner, therefore, was not prejudiced. *See* the January 17, 1995, Memorandum to File.

Company Specific Comments

Arbusta

Comment 22

Petitioner argues that respondent's sales to its related U.S. importer (related importer) were reported using an unreliable methodology, and, therefore, U.S. price for these sales should be based upon BIA. Specifically, petitioner takes issue with respondent's methodology for identifying the country of origin of U.S. sales by comparing production records with sales records.

Respondent argues that the Department should accept its method of reporting U.S. sales whose origin cannot be identified from sales records kept in the normal course of business. Respondent further argues that the Department cannot punish it for maintaining commercial records in the ordinary course of its business that do not identify data in accordance with the Department requirements.

DOC Position

We agree with respondent. At verification we noted that, in order to compile its sales listing for the Department, the related importer excluded the following from its total POI sales: (1) sales of non-Ecuadorian origin having a specific origin code; (2) non-subject merchandise; and (3) samples. The result represented sales of respondent-produced merchandise (representing approximately 86 percent of its related importer's total sales of subject merchandise) and sales of ''unknown'' origin. Based on records kept in the normal course of business, respondent's related importer was unable to determine the origin of the remaining sales. However, our review of the related importer's method of using the average price on its grower's report to determine which sales to report suggests that the sales of ''unknown'' origin were priced in accordance with sales of known origin. Therefore, we find the method used to report sales of unknown origin to be reasonable and non-distortive. Moreover, the related importer reported actual prices in its sales listing. Therefore, we have accepted respondent's reporting methodology as reflective of actual experience and have used it for purposes of the final determination.

Comment 23

Petitioner claims we should base the LTFV margin for respondent's consignment sales to two related consignees on BIA as we were unable verify these consignees. Petitioner argues that, with respect to the ESP sales listing for these consignees, as the data on the record was not verifiable and acceptance of the growers report data would constitute the submission of a substantially new response, the U.S. sales listing of ESP sales to these two related parties is unreliable and cannot be used for purposes of the final determination.

Respondent claims that, in preparing for verification, it discovered that sales through its two consignees in Miami had been systematically reported incorrectly in its sales listing, in part because of a computer error. Respondent claims that it immediately sought to rectify these errors by submitting a new sales listing for these consignees on September 28, 1994, as part of its timely response to the supplemental questionnaire issued by the Department on September 15, 1994. Respondent states that the Department erroneously rejected the new sales listing on the untenable grounds that 19 C.F.R. 353.31(a)(1)(i) requires that factual information be submitted ''seven days before the scheduled date on which the verification is to commence.'' Respondent alleges that the Department's interpretation of the regulation was grossly unfair and inconsistent with past precedent as verification of the information was not scheduled until October 19 and 20, far longer than seven days after the submission date of September 28, 1994. Thus, respondent contends that the new September 28, 1994, sales listing was filed well within the seven day deadline set forth in 19 C.F.R. 353.31(a)(1)(i).

DOC Position

We agree with petitioner. Respondent attempted to submit an entirely new, unsolicited sales tape beyond the deadlines established by 19 C.F.R. 353.31(a). Contrary to respondent's assertion, the September 28, 1994, sales listing was submitted less than two business days prior to the October 3, 1994, start of verification. We rejected the sales tape as untimely. Furthermore, when respondent provided excerpts from the untimely revised sales list at verification in Ecuador, we examined them and determined that they showed that the original sales list was substantially inaccurate and would not verify. *See* verification report. Accordingly, we have assigned BIA to these unverified sales. As BIA, we have used the highest of the highest non-aberrational margin calculated for any U.S. sale or the average petition margin.

Comment 24

With regard to the rejected sales tapes of respondent's two related consignees, petitioner argues that there is no basis in the record to apply a ''neutral'' margin where respondent conceded that its original sales listing was erroneous and where the revised data were neither timely submitted nor verified. Petitioner states that partial BIA for purposes of calculating the LTFV margins for the missing sales data should consist of the higher of the highest non-aberrant transaction margin or the average petition margin.

DOC Position

We agree with petitioner. *See* Comment 23 above.

Comment 25

Petitioner contends that, while the verification report erroneously suggests that alleged ''free samples'' or sales with a ''zero'' price should be removed from the sales listing, this conclusion is incorrect under the statute and Department precedent. First, petitioner claims that, as a matter of law, there is no basis to exclude any U.S. sale from the fair value comparison and that the statute applies to all sales, without the limitation ''ordinary course'' or otherwise. *Ipsco, Inc.* v. *United States,* 687 F. Supp. 633, 640–41 (CIT. 1988). Hence, petitioner argues that given an express limitation on the determination of FMV and no corresponding exclusion from USP, statutory construction requires that there be no exception in the latter case. *See Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement* v. *United States,* 13 F.3d 398, 401 (Fed. Cir. 1994). Second, petitioner claims that, to the extent that a box charge is recovered from sales at a ''zero'' price, such sales are indistinguishable from distress sales. Moreover, petitioner states that because USPs were averaged in order to take account of distress sales, such sales must be included in the sales listing in order to produce a ''representative'' average price. (19 U.S.C. § 1677f–1(b).) An average without including the alleged ''distress'' sales is clearly *not* ''representative'' of all U.S. sales. *Floral Trade Council* v. *United States,* 775 F. Supp. 1492, 1503 (CIT 1991), *appeal pending,* No. 94–1019, –1020. In *Floral Trade Council,* the court affirmed ITA's determination that so-called ''distress'' sales must be included in the U.S. sales listing because ''[a]veraging already