CIF price quotations based on the percentage difference between the Customs value and CIF value reported for U.S. imports of collated nails from Taiwan to Los Angeles using June 1996 IM–145 Import Statistics for collated nails entered under HTSUS subheading 7317.00.55.05.

With respect to normal value, petitioner provided information showing that the Taiwanese market was not viable. Additionally, although petitioner obtained a third country price for CR nails, petitioner provided evidence that no third country market is viable. Therefore, petitioner based normal value on CV.

Petitioner's calculation of CV included the cost of manufacturing (''COM''), selling, general and administrative (''SG&A'') expenses, and U.S. packing expenses. The manufacturing costs contained in the petition were based on petitioner's own experience and publicly available industry data, adjusted for known differences between production costs incurred in the United States and production costs incurred in Taiwan. For SG&A expenses, petitioner used its own 1995 audited financial statements because it could not obtain financial statements for a Taiwan CR nail producer. Petitioner did not include an amount for CV profit.

Based on the Department's modifications to petitioner's methodology, the estimated dumping margins for Taiwan range from 30.52 to 40.28 percent ad valorem.

*Fair Value Comparisons*

Based on the data provided by petitioner, there is reason to believe that imports of CR nails from the PRC, Korea, and Taiwan are being, or are likely to be, sold at less than fair value.

*Initiation of Investigations*

We have examined the petition on CR nails and have found that it meets the requirements of section 732 of the Act, including the requirements concerning allegations of the material injury or threat of material injury to the domestic producers of a domestic like product by reason of the complained-of imports, allegedly sold at less than fair value. Therefore, we are initiating antidumping duty investigations to determine whether imports of CR nails from the PRC, Korea, and Taiwan are being, or are likely to be, sold in the United States at less than fair value. Unless extended, we will make our preliminary determinations by May 5, 1997.

*Distribution of Copies of the Petitions*

In accordance with section 732(b)(3)(A) of the Act, a copy of the public version of each petition has been provided to the representatives of the governments of Korea and PRC, as well as to the authorities of Taiwan. We will attempt to provide a copy of the public version of each petition to each exporter named in the petition (as appropriate).

*ITC Notification*

We have notified the ITC of our initiations, as required by section 732(d) of the Act.

*Preliminary Determination by the ITC*

The ITC will determine by January 6, 1997, whether there is a reasonable indication that imports of CR nails from the PRC, Korea, and Taiwan are causing material injury, or threatening to cause material injury, to a U.S. industry. A negative ITC determination in any of the investigations will result in that investigation being terminated; otherwise, the investigations will proceed according to statutory and regulatory time limits.

Dated: December 16, 1996.

Robert S. LaRussa,

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 96–32406 Filed 12–19–96; 8:45 am]

**BILLING CODE 3510–DS–P**

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**[A–588–815]**

## Gray Portland Cement and Clinker From Japan; Final Results of Antidumping Duty Administrative Review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of final results of antidumping duty administrative review.

**SUMMARY:** On October 6, 1995, the Department of Commerce (the Department) published the preliminary results of review of the antidumping duty order on gray portland cement and clinker from Japan. The review covers one manufacturer/exporter, Onoda Cement Co., Ltd., and the period May 1, 1993, through April 30, 1994.

We gave interested parties an opportunity to comment on the preliminary results. Based on our analysis of the comments received, we have changed the final results from those presented in the preliminary results of review

**EFFECTIVE DATE:** December 20, 1996.

**FOR FURTHER INFORMATION CONTACT:** David Genovese, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, D.C. 20230; telephone (202) 482–4697.

**SUPPLEMENTARY INFORMATION:**

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions as they existed prior to January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930, as amended (the Act) by the Uruguay Round Agreements Act (URAA).

Background

On May 12, 1994, and May 31, 1994, Onoda Cement Co., Ltd. (Onoda), and the Ad Hoc Committee of Southern California Producers of Gray Portland Cement (the Petitioner), respectively, requested that the Department conduct an administrative review of the antidumping duty order on gray portland cement and clinker from Japan (56 FR 21658, May 10, 1991) for Onoda. We initiated the review, covering the period May 1, 1993, through April 30, 1994, on June 15, 1994 (59 FR 30770). On October 6, 1995, we published the preliminary results of the administrative review (60 FR 52368). The Department has now completed the administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Act).

Scope of the Review

The products covered by this review are gray portland cement and clinker from Japan. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material produced when manufacturing cement, has no use other than grinding into finished cement. Microfine cement was specifically excluded from the antidumping duty order.

Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (HTS) item number 2523.29, and clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under item number 2523.90 as ''other hydraulic cements.''

The HTS item numbers are provided for convenience and Customs purposes. The written product description remains dispositive as to the scope of the product coverage.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received

comments from the petitioner and from the respondent. At the request of the petitioner and respondent, we held a public hearing on November 20, 1995.

*Comment 1*

Onoda argues that in calculating foreign market value (FMV), the Department should deduct home market pre-sale movement expenses either in their entirety as direct selling expenses or as indirect selling expenses up to the amount of U.S. pre-sale movement expenses. Onoda states that it has been the Department's practice since *The Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement v. United States,* 13 F.3d 398 (Fed. Cir. 1994), *cert. denied* 115 S. Ct. 67 (1994) (hereinafter *Ad Hoc Committee I*), to deduct pre-sale movement expenses as direct expenses when the freight expenses are ''incurred in positioning the merchandise at [a] warehouse,'' and the warehousing expenses are classified as direct expenses. Onoda argues that in this review, pre-sale movement expenses should be deducted from FMV as direct expenses since the cost of warehousing the cement is a direct expense. Onoda argues that warehousing is a direct expense because sales of the subject merchandise constitute virtually all of its cement sales; therefore, virtually all of Onoda's warehousing expenses are associated with the subject merchandise.

Onoda argues that, alternatively, if the Department decides to treat home market pre-sale movement expenses as indirect expenses, in purchase price situations, the Department should deduct from FMV home market pre-sale movement expenses up to the amount of U.S. pre-sale movement expenses. Onoda argues that the Department has the power to make such an adjustment pursuant to its authority to make circumstances-of-sale (COS) adjustments and under its inherent authority to achieve a fair comparison. Onoda further argues that 19 CFR § 353.56 permits the Department to adjust FMV to account for indirect expenses as a COS adjustment and that the Department has the power to adjust FMV for indirect expenses under its inherent authority to fill in gaps in an area where the statute is silent or ambiguous. Onoda cites *Timken Company v. United States,* 865 F. Supp. 881 (CIT 1994) (hereinafter *Timken*) and *Smith-Corona Group v. United States,* 713 F.2d 1568 (Fed. Cir. 1983) (hereinafter *Smith-Corona*) in support of its position.

Moreover, Onoda cites 19 C.F.R. § 353.56(b)(1) and the *Final Determination of Sales at Less than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea,* 56 FR 16305 (April 22, 1991) (hereinafter *PET Film from Korea*) as precedent for offsetting direct selling expenses in the U.S. market with indirect selling expenses in the home market in purchase price situations.

Petitioner contends that Onoda's argument that pre-sale movement expenses should be deducted from FMV as a direct expense has been rejected by the Department in a number of Japanese cases, including, *Polyethylene Terephthalate Film, Sheet and Strip, from Japan,* 60 FR 32,133 (June 20, 1995), *Stainless Steel Angle from Japan,* 60 FR 16,608 (March 31, 1995), *Granular Polytetraflourethylene Resin from Japan,* 60 FR 5,622 (January 30, 1995), and *Tapered Roller Bearings, Four Inches or Less in Diameter, and Components Thereof, from Japan,* 59 FR 56,035 (November 10, 1994) (hereinafter *TRBs from Japan*).

Petitioner states that contrary to Onoda's assertion, the Department requires that pre-sale movement expenses be directly related to specific sales in order to be classified as direct expenses. Petitioner contends that in situations like this, where the merchandise is not dedicated to specific customers but, instead, is kept in inventory at the warehouse and is generally available for sale to any customer, the pre-sale expenses are indirect because there is no specific sale to which the expenses can be directly related. Petitioner argues that the Department addressed the issue of whether or not Onoda's pre-sale home market transportation expenses are direct expenses, in the second review of this case. See *Gray Portland Cement and Clinker from Japan,* 60 FR 43,761 (August 23, 1995) (hereinafter *Gray Portland Cement and Clinker—Second Review*). Petitioner states that in the second review of this case, the Department determined that Onoda's pre-sale home market movement expenses were indirect expenses.

Petitioner argues that Onoda's home market distribution system has not changed from the second review and that, therefore, the Department should continue to consider Onoda's pre-sale home market movement expenses as indirect expenses as it did in the preliminary results of this review. Petitioner states that the methodology applied in the preliminary results of this review and the second review of this case (*i.e.,* the methodology outlined in *Ad Hoc Committee I*) has been applied by the Department in a number of Japanese cases where the Japanese producers, like Onoda, have a home market distribution system whereby products are transported from manufacturing plants to warehouses prior to sale.

Petitioner further contends that the Department's methodology for determining whether pre-sale home market movement expenses are indirect expenses has been approved by the Court of International Trade (CIT) and the Court of Appeals for the Federal Circuit (CAFC) in a number of decisions including, *Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement v. United States,* No. 95–1129 (Fed. Cir., October 10, 1995), *Ad Hoc Committee of AZ–NM–TX–FL Producers of Gray Portland Cement v. United States,* 865 F. Supp. 857 (CIT 1994) (hereinafter, *Ad Hoc Committee II*), *Federal Mogul Corp. v. United States,* 871 F. Supp. 443 (CIT 1994), *Torrington Co. v. United States,* 866 F. Supp. 1434 (CIT 1994), and *Timken Co. v. United States,* 855 F. Supp. 399 (CIT 1994).

With regard to Onoda's argument that in purchase price situations the Department should deduct home market pre-sale freight expenses up to the amount of the U.S. pre-sale movement expenses, Petitioner states that such a methodology would require the Department to overrule the CAFC's decision in *Ad Hoc Committee I* and all of the judicial and administrative rulings based on this decision. Petitioner contends that in *Ad Hoc Committee I,* the CAFC plainly stated that because Congress drafted the FMV section of the antidumping statute without any authority for the deduction of home market pre-sale movement expenses, Congress did not intend those expenses to be deducted from FMV under any ''inherent'' authority. Petitioner states that this principle is supported by the decision of the current Congress, in enacting the implementing legislation for the Uruguay Round amendments to the antidumping law, to provide expressly for the deduction of pre-sale home market movement expenses from FMV.

With regard to Onoda's argument that the Department has the power to adjust FMV for indirect expenses under its inherent authority to fill in gaps in an area where the statute is silent or ambiguous, Petitioner argues that the Department has recognized that *Ad Hoc Committee I* plainly held that in purchase price comparisons there was no ''gap'' with respect to whether pre-sale movement charges could be deducted from FMV. Petitioner cites to *TRBs from Japan,* in which the Department stated: ''The *Ad Hoc Committee* decision states that the statute does not give the Department the

authority to deduct home market movement expenses from FMV by invoking its inherent power to fill 'gaps' in the antidumping statute.'' *TRBs from Japan,* at 56042.

In a related issue, Petitioner argues that because home market pre-sale transportation costs should be considered indirect selling expenses and because Onoda reported home market pre-sale transportation expenses with other direct selling expenses in the field DIRSELH, the Department should treat all expenses reported in the DIRSELH field as indirect, rather than direct, selling expenses.

In response, Onoda states that DIRSELH consists of freight expenses associated with swap transactions and periodic adjustments made to the freight expenses recorded in Onoda's books. Onoda contends that freight expenses associated with swap transactions are post-sale rather than pre-sale freight expenses since such freight occurs after the sale has been made by the other manufacturer. Moreover, states Onoda, while the freight costs associated with the tanker freight adjustment include pre-sale freight expenses, the Department should still deduct these expenses from FMV pursuant to Onoda's aforementioned argument on the deduction of pre-sale freight expenses as a direct expense or as an indirect expense capped by U.S. pre-sale freight expense.

*Department's Position*

We disagree with Onoda. Onoda is correct that since *Ad Hoc Committee I* the Department has deducted pre-sale movement expenses as direct expenses when freight expenses are incurred in positioning the merchandise at the warehouse, and the warehousing expenses are classified as direct expenses. However, as with the first and second reviews of this case, the Department has determined that Onoda's warehousing expense is an indirect selling expense. The Department's determination in the first review that Onoda's warehousing expense is an indirect selling expense has been upheld by the CIT in *The Ad Hoc Committee of Southern California Producers of Gray Portland Cement* v. *United States,* 914 F. Supp. 535 (CIT 1995) (hereinafter *Southern California Producers.*). In its decision the CIT stated that:

> Home market expenses for which Commerce makes an allowance, must, as a general matter, be directly tied to specific sales or specific customers. *Hussey Copper,* 17 CIT at 1001, 834 F. Supp. at 421. If the expenses are not directly tied to specific sales, but are incurred to advance sales in general, then Commerce may treat them as indirect selling expenses * * *
>
> Upon review, the Court finds that Commerce's decision to classify Onoda's home market service station expenses as warehousing expenses, and to treat them as indirect selling expenses, is supported by substantial evidence and otherwise in accordance with law for several reasons. First, Onoda has not earmarked the cement held in the service stations for particular sales or particular customers; indeed, Onoda admits that the service stations temporarily store cement that is awaiting sale. *Final Results,* 58 Fed. Reg. 48,828. Second, Onoda failed to submit evidence showing that service stations differ from warehouses in their physical structure. *See Id.* Third, some repacking, a job that is traditionally done at warehouses, is done at the service stations. *Id.;* Pub. Doc. 107, Conf. Doc. 46. Fourth, Commerce found evidence to indicate that the service stations are not entirely necessary to transport cement to customers.

*Id.* at 540–541. The facts of this review are no different from the facts in the first review upheld by the CIT. Accordingly, the Department continues to view Onoda's warehousing as an indirect expense and therefore, we continue to view Onoda's home market pre-sale movement charges as an indirect expense.

The Department also disagrees with Onoda's argument that in purchase price situations the Department should deduct from FMV as indirect expenses home market pre-sale movement expenses up to the amount of U.S. pre-sale movement expenses through the Department's inherent authority to fill in gaps in an area where the statute is silent or ambiguous. We have determined, in light of *Ad Hoc Committee I* and its progeny, that the Department no longer can deduct home market movement charges from FMV pursuant to its inherent power to fill in gaps in the antidumping statute. We instead adjust for those expenses under the COS provision of 19 CFR § 353.56 and the ESP offset provision of 19 CFR § 353.56(b) (1) and (2), as appropriate, in the manner described below.

When USP is based on either ESP or purchase price, we adjust FMV for home market movement charges through the COS provision of 19 CFR § 353.56(a). Under this adjustment, we capture only direct selling expenses, which include post-sale movement expenses and, in some circumstances, pre-sale movement expenses. Specifically, we treat pre-sale movement expenses as direct expenses if those expenses are directly related to the home market sales of the merchandise under consideration. In order to determine whether pre-sale movement expenses are direct, the Department examines the respondent's pre-sale warehousing expenses, since the pre-sale movement charges incurred in positioning the merchandise at the warehouse are, for analytical purposes, linked to pre-sale warehousing expenses. *See* Final Results of Redetermination Pursuant to Court Remand, dated January 5, 1995 (pertaining to Slip. Op. 94–151). If the pre-sale warehousing constitutes an indirect expense, the expense involved in getting the merchandise to the warehouse, in the absence of contrary evidence, also must be indirect; conversely, a direct pre-sale warehousing expense necessarily implies a direct pre-sale movement expense. *See Gray Portland Cement and Clinker—Second Review,* at 43765; *Ad Hoc Committee II,* 865 F. Supp. 861–862.

Onoda reported in its questionnaire response of August 22, 1994, that it incurred no after-sale warehousing expenses and respondent did not claim any warehousing expenses as direct COS expenses. The Department interprets this to mean that any warehousing expenses incurred are properly classified as pre-sale, indirect selling expenses and that the expense of transporting the cement to the warehouse should also be treated as an indirect expense. Accordingly, the Department has not deducted home market pre-sale movement expenses from FMV for comparison to PP sales. However, we deducted post-sale movement expenses from FMV as a direct expense.

Additionally, it is the Department's standard practice when a respondent commingles direct and indirect home market expenses in the same field to treat that field as an indirect expense. *See Gray Portland Cement and Clinker—Second Review,* at 43766; *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.* 58 FR 39729, 39742 (July 26, 1993). Accordingly, we agree with Petitioner that since Onoda reported home market pre-sale transportation expenses (which are indirect expenses) with direct selling expenses in the field DIRSELH, we should treat all expenses reported in the DIRSELH field as indirect, rather than direct, selling expenses.

*Comment 2*

Onoda argues that the Department should not include home market sales of bagged cement in the FMV calculation since it only sold bulk cement in the United States. Onoda argues that comparing bulk sales to bagged sales in this case contravenes the Department's past practice of comparing, whenever possible, sales of identically packed

merchandise. Onoda cites to the *Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker from Japan,* 56 FR 12,156 (March 22, 1991), *Final Determination of Sales at Less Than Fair Value: Fresh Kiwifruit from New Zealand,* 57 FR 13,695 (April 17, 1992) (hereinafter, *Kiwifruit from New Zealand*), *Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker from Mexico,* 55 FR 29,244 (July 18, 1990) (hereinafter *Cement from Mexico*), and the concurrence memorandum for *Gray Portland Cement and Clinker from Venezuela,* 56 FR 56,390 (November 4, 1991) (hereinafter *Cement from Venezuela*), in support of its position.

Petitioner argues that Onoda made this same argument in the second review and that the Department determined in the second review that it was appropriate to compare bulk sales in the United States to bulk and bagged sales in the home market after adjusting for differences in packing costs. *See Gray Portland Cement and Clinker—Second Review,* at 43763. Petitioner argues that home market sales of bagged cement should be included in the calculation of FMV since the technical specifications for cement sold in bags and in bulk are identical. Moreover, asserts Petitioner, Onoda has made no attempt to demonstrate that bagged cement is sold in different distribution channels or at different levels of trade than bulk cement, or that sales of bagged cement are not in the ordinary course of trade.

*Department's Position*

We agree with the petitioner. As we stated in the second review of this case, there is no physical difference between the bagged and bulk cement sold in Japan. The only difference is the manner in which the merchandise is packed. Since packing is not a criterion for comparability, and because there is no physical difference between bulk and bagged cement sold in the home market, we did not exclude home market sales of bagged cement from our calculations of FMV. *See Gray Portland Cement and Clinker—Second Review,* at 43763.

In the second review of this case, we determined that the cases cited by Onoda in support of its argument did not construct a standard whereby the Department will not make bulk-to-bag comparisons. Further, the LTFV investigation of this case is distinguishable from both the second and present case. In the LTFV investigation, bagged cement was sold in the United States, not in the home market, and the amount sold in the United States was ''insignificant.'' Accordingly, in the LTFV investigation, we did not require Onoda to report U.S. sales of bagged cement and we did not use bagged sales in our margin calculations. In the second review of this case, and in this review, bagged cement was sold in the home market and the amount was not insignificant. Accordingly, Onoda was required to report bagged sales and such sales were included in the Department's margin calculations.

We conclude here, as we did in the second review of this case, that the cases cited by Onoda do not stand for the proposition that the Department must always compare bulk-to-bulk and bag-to-bag sales, and that packing is not a criterion for matching types of cement. Therefore, we compared sales of bulk cement in the United States to sales of both bulk and bagged cement in the home market, and made the appropriate adjustments to reflect the packing costs associated with bagged cement.

*Comment 3*

Onoda argues that in the preliminary results of review, the Department improperly classified a commission paid to an unrelated trading company as a ''document handling fee'' (*i.e.,* as a movement expense that was directly deducted from U.S. price). Onoda states that its sales to the United States are made through an unrelated trading company which purchases the cement from Onoda at a discount and then resells the cement at the pre-discount price to Lone Star Northwest (LSNW), a party related to Onoda. Onoda claims that the payment the trading company receives (*i.e.,* the difference between what the trading company pays Onoda and what LSNW pays the trading company for the cement) is a commission compensating the trading company for arranging transportation and providing other services in support of cement sold to the United States.

Onoda asserts that under the antidumping law, payments for a wide range of services may qualify for treatment as commissions. Onoda, citing to Chapter 8, page 26 of the Department's antidumping manual, states that the services provided by a commissionaire may vary from the level of minimal services in facilitating communication to substantive services including maintaining inventory and providing support in all areas of the sales transactions. Similarly, Onoda cites to *Final Determination of Sales at Less Than Fair Value: Coated Groundwood Paper from France,* 56 FR 56,380 (November 4, 1991) to argue that the ''Department treats payments for 'ensuring that *production, shipping, and deliveries meet . . . scheduling requirements,* taking title to the merchandise, performing sales accounting and collection functions, arranging for the provision of technical services, and participating in trade shows and other events' as commission.'' *See* Onoda's case brief at page 10, fn 14.

Onoda, citing to *Final Determination of Sales at Less Than Fair Value and Final Determination of Sales at Not Less Than Fair Value: Certain Carbon Steel Products from Austria,* 50 FR 33,365 (August 19, 1985) (hereinafter *Carbon Steel Products from Austria*), states that the Department has, in the past, treated payments like that which Onoda pays to the trading company as commissions. Onoda states that in *Carbon Steel Products from Austria,* the Department stated the following:

> Home market purchasers contact [the respondent] to establish price and terms of sale. Once the parties have agreed on the terms of sale, the purchaser designates a trading company to handle the paperwork. [The respondent] then sells to the trading company at a reduced price and the trading company resells to the purchaser at the full price. Under these facts, *the payments are clearly commissions paid to the trading company for services rendered in connection with the sale.* (emphasis added by Onoda)

Onoda also argues that the payment to the trading company does not affect the final price to the U.S. customer, and, therefore, it should not be deducted from U.S. price as a discount. Onoda cites to *Carbon Steel Products from Austria* and the *Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Flat Products from Belgium,* 58 FR 37,083 (July 9, 1993), in support of its position.

Petitioner argues that the role of the trading company has not changed since the LTFV investigation in which ''Onoda minimized the role of the trading company in the sales process, stating that the trading company 'arranged the freight and takes care of the shipping,' but that otherwise it was a 'bystander'.'' *See* Petitioner's Case Brief, at 16. Petitioner states that since the trading company merely arranged for the shipment of merchandise that had already been sold, the Department should continue to treat payments to the trading company as a movement expense. Petitioner cites to *Certain Internal-Combustion, Industrial Forklift Trucks from Japan,* 57 FR 3,167 (January 28, 1992), *accord Certain Internal-Combustion, Industrial Forklift Trucks*

*from Japan,* 59 FR 1,374 (January 10, 1994), *Mechanical Transfer Presses from Japan,* 55 FR 335 (January 4, 1990), in support of its argument.

Petitioner argues that the Department classifies payments to trading companies as commissions only if the services provided by the trading company involve selling the merchandise (*i.e.*, finding and cultivating customers, marketing the product, negotiating transactions, retaining customers, etc.). Petitioner cites to *Oil Country Tubular Goods from Austria,* 60 FR 33,551 (June 28, 1995) (hereinafter *OCTG from Austria*), *Stainless Steel Angle from Japan,* 60 FR 16,608 (March 31, 1995) (hereinafter *SSA from Japan*), and *Sweaters Wholly or in Chief Weight of Man-Made Fiber from Taiwan,* 55 FR 34,585 (August 23, 1990) (hereinafter *Sweaters from Taiwan*), in support of its position.

Petitioner argues that alternatively, the Department could classify payments to the trading company as discounts on sales to the United States. Petitioner asserts the Onoda classified the payment as a discount in its August 22, 1994, questionnaire response. Petitioner cites to *Industrial Phosphoric Acid from Israel,* 52 FR 25,440 (July 7, 1987), *accord Mirrors in Stock Sheet and Lehr End Sizes from the United Kingdom,* 51 FR 43,411 (December 2, 1986), and *Portland Hydraulic Cement from Japan,* 48 FR 41,059 (September 13, 1983), to argue that Department precedent supports this approach.

*Department's Position*

We disagree with Onoda. If the trading company provides services related to the movement of the merchandise, the Department considers the payment the trading company receives for such services as a movement expense which is deducted directly from U.S. price. *See Forklift Trucks from Japan,* at 3178. The Department considers a payment to a trading company to be a commission if the trading company provides services related to the sale of the merchandise. *See* Chapter 8, page 26 of the Department's antidumping manual. In this case, the trading company is not involved in the sale of the merchandise to the customer. Rather, LSNW sells cement to the United States. The price of the cement is set by LSNW, in consultation with Onoda. After the terms of the sale are negotiated between LSNW, Onoda, and the U.S. buyer, Onoda hires the trading company to arrange shipment of the cement. Clearly, the work performed by the trading company (*i.e.*, arranging for transportation of the cement) is a movement expense rather than a commission. This is supported by Onoda's statement in its case brief of November 6, 1995 at page 11, where Onoda states that the trading company ''is primarily responsible for arranging transportation of cement.'' Additionally, in its supplemental questionnaire response of October 31, 1994 at page 30, Onoda clarifies the role of the trading company, stating, that the trading company does not take physical possession of the merchandise; it is not a freight-forwarder, although it does coordinate with the broker and with arranging the shipments; and, it is not the importer of record. Again, the service provided by the trading company is to arrange for shipment, after the sale between Onoda, LSNW and the U.S. customer has been completed.

Onoda's cite to *Carbon Steel Products from Austria* is accurate; however, the Department's practice has evolved since 1985. Specifically, the Department has recognized that commissions paid to trading companies have certain characteristics: (1) they are agreed upon in writing; (2) they are earned directly on sales made, based on flat rates or percentage rates applied to the value of individual orders; (3) they take into consideration the expenses which a trading company must incur to cultivate and maintain successful relationships with purchasers; and, (4) they take into consideration the sales and marketing services performed by a trading company in lieu of an exporter/manufacturer establishing its own larger sales force. *See OCTG from Austria*, at 33554. Again, the trading company in this case does not cultivate and maintain relationships with purchasers nor does it perform sales and marketing services. Rather, the trading company is paid to arrange for shipment of the cement after it has been sold and the terms set.

Moreover, Onoda's cite to *Groundwood Paper from France* is misleading in that the quote cited is not attributable to the Department, but rather to the respondent who argued that a markup to a related party should not be considered a commission because the related party ''performs a number of additional selling and administrative functions not undertaken by commission agents, including ensuring that production, shipping, and deliveries meet printers' scheduling requirements, taking title to the merchandise, performing sales accounting and collection functions, arranging for the provision of technical services, and participating in trade shows and other events.'' *See Groundwood Paper from France*, at 56381. In that case, although the Department granted the deduction as a commission, it focused its response on the related-party nature of the commission rather than the actual services performed for the commission payment. Moreover, in the instant case, the only function performed by the trading company is to arrange for shipment of the merchandise.

We do agree with Onoda that the payment to the trading company should not be considered a discount since the payment to the trading company does not reduce the final price to the U.S. customer. *See Carbon Steel Products from Austria*, at 33366.

Accordingly, for these final results of review, we have continued to treat the payment to the trading company as a movement expense and have deducted this expense directly from U.S. price.

*Comment 4*

Onoda argues that in performing the calculations for determining whether Onoda made home market sales below cost, the Department erroneously double-counted the expenses reported in the DIRSELH field on the sales tape (*i.e.*, the Department included the field DIRSELH in its calculation of COP, and the Department deducted the DIRSELH field from the home market price that was used in the cost test). Onoda asserts that the Department should revise its COP calculations for the final results to make only one of these adjustments. The Department should either (1) include the DIRSELH field in the COP and not deduct it from the home market price used in the cost test, or (2) the Department should not include the DIRSELH field in COP and deduct the DIRSELH field from the home market price used in the cost test.

Petitioner agrees with Onoda and has no objection to the Department's correcting the COP test in the manner suggested by Onoda so that the DIRSELH field is either included in COP or deducted from the net price compared to COP, but not both.

*Department's Position*

We agree with Onoda and Petitioner. For these final results, we included the DIRSELH field in the COP and did not deduct the field DIRSELH from the home market price used in the cost test.

*Comment 5*

Petitioner argues that the Department should use best information available (BIA) to account for unreported downstream sales by related distributors that failed the arm's-length test rather than drop such sales from the analysis.

Petitioner argues that the Department has repeatedly asked for this information, and Onoda has refused to provide it. Petitioner, citing to *Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Products from Argentina*, 58 FR 37,062 (July 9, 1993) (hereinafter *Steel from Argentina*), argues that the Department has stated in the past that when a related seller fails the arm's-length test, the need for downstream sales becomes evident.

Moreover, states Petitioner, citing to *Gray Portland Cement and Clinker from Mexico*, 60 FR 26,865 (May 19, 1995) (hereinafter *Cement from Mexico*) and *Certain Malleable Cast Iron Pipe Fittings from Brazil*, 60 FR 41,876 (August 14, 1995) (hereinafter *Pipes from Brazil*), it is the Department, not respondent which determines what information is to be provided for an administrative review, and, respondent should not be allowed to control the results of the review by providing only partial information.

Petitioner hypothesizes that given the Department's prior practice of applying BIA for unreported downstream sales only to establish FMVs for those U.S. sales left without adequate matches when non-arm's-length sales are excluded, Onoda could have reasonably concluded that refusing to report downstream sales in this review would carry no risks. Under such circumstances, asserts Petitioner, the Department should resort to BIA for unreported downstream sales lest Onoda be rewarded for ''stonewalling'' and refusing to respond. Petitioner, citing to *Silicon Metal from Argentina*, 58 FR 65,336 (December 14, 1993), states that Onoda should not be placed in a better position as a result of non-compliance than it would have occupied had it provided the Department with complete, accurate, and timely data. Petitioner concludes that based on the foregoing, the Department should report to BIA for unreported downstream sales, and as BIA, the Department should use the highest net home market price otherwise reported by Onoda and verified by the Department. Alternatively, the Department should apply as BIA the weighted-average price of all related-party home market sales that passed the arm's-length test, increased by the standard distributor mark-up.

Onoda argues that it cooperated with the Department in every aspect of this administrative review, but that it was unable to report downstream sales because none of the related distributors is consolidated with Onoda, and Onoda does not have the power to compel its minority-owned distributors to report information on their sales to unrelated customers. Onoda states that in the LTFV investigation and the first and the second review of this case, the Department has not required it to report downstream sales; rather, the Department has simply applied an arm's-length test to determine whether to include sales to the related distributors in the FMV calculations. Moreover, Onoda asserts that there are other cases in which the Department has not required the reporting of downstream sales if the respondent demonstrates that the sales to the related parties were made on an arm's-length basis. Onoda cites to *Certain Corrosion Resistant Carbon Steel Flat Products from Australia; Preliminary Results of Antidumping Duty Administrative Review*, 60 FR 42,507 (August 16, 1995), in support of its position. Further, asserts Onoda, it is not the Department's practice to resort to BIA when there are sufficient home market sales to unrelated customers to provide matches for all of a respondent's U.S. sales. Onoda cites to *Steel from Argentina* and *Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Product, and Certain Cut-to-Length Carbon Steel Plate from France*, 58 FR 37,125 (July 9, 1993) (hereinafter *Steel from France*), in support of its position.

Onoda concludes that because there were more than enough home market sales to unrelated parties to provide matches for all of Onoda's U.S. sales during the POR, any sales to the related distributors which are found not to be at arm's-length should simply be dropped from the FMV calculation.

*Department's Position*

We disagree with Petitioner. As Onoda points out, it is the Department's practice to drop from our FMV calculations sales to home market related parties which have failed the arm's-length test. If sales to a related party in the home market are determined not to be at arm's-length, and the Department does not have information pertaining to downstream sales (because respondent has refused or is unable to provide such information), it is the Department's practice to resort to BIA. However, the Department will only resort to BIA if it cannot find a home market match for a U.S. sale (*i.e.*, there are no home market sales to unrelated parties or to related parties that have passed the arm's-length test to match to a U.S. sale) and that sale would be matched to a non-arm's length sale.

In this case, the Department did not include those home market sales to related parties which were not made at arm's-length prices. In order to determine whether these sales were made at arm's-length prices, we calculated a weighted-average price of the home market sales for each related party. Where the weighted-average price charged to a related party was less than the weighted-average price charged to all of Onoda's unrelated customers, we determined that those related party sales were not made at arm's-length prices, and removed those sales from our FMV calculation.

We agree with Petitioner that the Department has stated in the past that when a ''related seller fails the arm's-length test, the need for downstream sales becomes evident.'' However, as fully explained in *Steel from Argentina:*

> As outlined in the preliminary determinations, when the respondents could not, or would not, report downstream sales, we applied margins based on BIA to any U.S. sale matched *only* to a sale to a related reseller in the home market that failed the arm's-length test, and we will continue to do so for these final determinations. In other words we did not simply disregard the fact that respondents failed to report downstream sales. Once a related reseller fails the arm's-length test, the need for downstream sales becomes evident, *but only as an alternative to the sale to that related reseller. The integrity of FMV is not seriously challenged because in all other cases U.S. sales are matched to unrelated party sales in the home market or to related party sales at arm's length.* (emphasis added)

*Id.* at 37083. In the instant case, all U.S. sales were matched to unrelated-party sales in the home market or to related-party sales that were conducted in an arm's-length manner.

We agree that the Department, not respondent, determines what information is to be provided and that respondent should not be allowed to control the results of review by providing partial information. However, in the instant case, these principles have not been breached. The Department requested information, and the respondent did not provide it. In this instance, BIA was not necessary since all U.S. sales were matched to unrelated-party sales in the home market or to related-party sales that were conduced in an arm's-length manner. Accordingly, the Department did determine what information was to be provided and respondent has not been allowed to control the results of the review.

We also agree that Onoda should not be placed in a better position due to non-compliance with a request for information. As stated above, it is the Department's practice to require downstream sales information when a related party fails the arm's-length test and the Department does not have home market matches for U.S. sales. If the Department does have home market matches for U.S. sales, the Department drops related party sales that failed the arm's length test, as was the case here. Under these circumstances, Onoda does not benefit from its noncompliance since U.S. sales were matched with home market sales to unrelated parties and to related parties at prices determined to be on an arm's-length basis.

Accordingly, for these final results, as with the preliminary results, we have not resorted to BIA to account for unreported downstream sales by related distributors that have failed the arm's-length test. Rather, we have dropped these sales from our analysis of FMV.

*Comment 6*

Petitioner argues that because Onoda failed to report distributor rebates and prompt payment discounts (PPDs) on a transaction-specific basis and these adjustments were not granted as a fixed and constant percentage of sales on all transactions for which they were reported, these adjustments should be classified as indirect selling expenses.

Petitioner argues that the Department requested that Onoda report rebates and discounts on a transaction specific basis but that Onoda responded that: (1) its central accounting system is ''unable to tie the rebates and discounts to specific sales'' and (2) rebates and discounts were allocated over all sales because Onoda's accounting system ''is unable to identify the specific distributors which earned the rebates and discounts.'' (*See* Onoda's October 31, 1994 Deficiency questionnaire Response at 16–17.) Petitioner also argue that Onoda's rebate calculations inappropriately allocated rebates granted on sales of non-comparison merchandise (*i.e.*, gray portland cement other than Type N cement) over all sales of gray portland cement, including sales of comparison merchandise.

Petitioner argues that at verification the Department found that no written rebate contracts exist between the distributor and Onoda. Instead, Onoda informs the distributor verbally about rebates. Also at verification, the Department noted that Onoda's records do not reflect which distributors actually received rebates. Accordingly, argues Petitioner, Onoda's rebates and discounts were not granted as a fixed and constant percentage of sales on all transactions for which they are reported. Petitioner states that contrary to being fixed and constant, Onoda did not grant rebates and/or discounts on every reported home market sale.

Citing to *Smith Corona, Torrington Co.* v. *United States,* 832 F. Supp 379 (CIT 1993) (hereinafter *Torrington),* *Koyo Seio Co.* v. *United States,* 796 F. Supp. 1526 (CIT 1992) (hereinafter *Koyo Seiko*), and *SKF USA Inc.* v. *United States,* 874 F. Supp 1395 (CIT 1995), Petitioner argues that because Onoda's rebates and discounts were not actually paid on all sales, and the expenses could not be directly correlated with the sales to which they actually related, the Department should deny Onoda's claim for a direct adjustment to price for rebates and discounts. Petitioner argues that to adjust home market prices downward without any evidence that any rebate or discount was even granted in the months in which U.S. sales were made, has the potential to result in a severe distortion when calculating FMV.

Petitioner argues that Onoda's only argument in support of its allocation methodology is that the Department accepted the same methodology in previous reviews. Petitioner asserts, however, that the Department's findings in previous reviews, based on different factual records, are irrelevant. Petitioner argues that antidumping administrative reviews are separate and distinct proceedings, and the results of this review must be in accordance with law and based on substantial evidence in the record of this review.

With specific regard to PPDs, Petitioner states that the Department should make no adjustment to FMV for such discounts because they were allocated over sales of non-subject merchandise (*i.e.*, white cement). Petitioner asserts that this methodology distorts the prices used to calculate Onoda's dumping margin. Petitioner argues that because the total amount of PPDs reported by Onoda includes PPDs granted on sales of non-subject merchandise, Onoda's claim for any PPD adjustment to FMV (either direct or indirect) must be rejected.

With specific regard to rebates, Petitioner argues that Onoda included in its rebate amounts rebates paid to distributors to sell cement manufactured by two cement manufacturers who rely on Onoda to sell their products under Onoda's label. Petitioner contends that these rebates should not be included in the rebate amount because Onoda charges (*i.e.*, is reimbursed by) the two manufacturers for these rebates.

Onoda argues that the Department's general policy always has been to favor the reporting of transaction-specific information but that the Department has accepted Onoda's allocation methodology in prior administrative reviews of this case and the CIT and CAFC have, on numerous occasions (*e.g., Torrington* and *Smith-Corona*), upheld the Department's authority to treat allocated rebates and discounts as direct expenses.

Onoda asserts that an allocation methodology is appropriate in this case because Onoda grants rebates based on a distributor's sales for an entire six-month period rather than on specific sales transactions. Moreover, asserts Onoda, its sales records simply do not permit it to report transaction-specific information and its central accounting system is unable to tie the rebates and discounts to specific sales. Onoda, citing to *Final Determinations of Sales at Less Than Fair Value: Professional Electric Cutting Tools and Professional Electric Sanding/Grinding Tools from Japan,* 58 FR 30,144 (May 26, 1993), states that the Department has held in prior cases that a respondent should not be required to submit information it does not maintain, nor should it be required to report information which would be unduly burdensome to provide. Accordingly, asserts Onoda, the Department should not penalize Onoda for not reporting information which it does not maintain in its central accounting system.

With regard to Petitioner's claim that Onoda inappropriately allocated rebates over non-comparison merchandise, Onoda asserts that the subject merchandise covered by the antidumping duty order includes all types of gray portland cement, not just Type N cement. Moreover, argues Onoda, it offers rebates on all of its home market sales of gray portland cement to distributors not just on home market sales of Type N cement. Consequently, in calculating the per unit distributor rebates, Onoda allocated the rebates only over sales to distributors of gray portland cement in the home market.

Onoda asserts that there is no requirement that Onoda allocate its rebates over the specific product (Type N cement) which serves as the model match for sales to the United States. Onoda, citing to *Torrington,* asserts that while the CIT has held that the Department may deny adjustments for rebates if they include rebates on non-subject merchandise, the CIT has permitted allocations over the subject merchandise.

With regard to Petitioner's argument that Onoda's rebates and discounts were not granted as a fixed and constant percentage of sales on all transactions for which they were reported, Onoda contends the Department made no such finding at verification and that the record evidence leads to a contrary conclusion. Onoda cites to its August 22, 1994 Questionnaire Response at B–4, to argue that the distributor rebates that it granted were given according to a fixed schedule on the basis of the total volume of cement purchased by each distributor. Similarly, argues Onoda, the PPD was applied as a fixed percentage, and all of Onoda's home market sales were eligible for the discount. Onoda asserts that the Department verified Onoda's cost and sales information and the total amount of the rebates and discounts and, therefore, it is appropriate to grant a full adjustment for these expenses.

With regard to Petitioner's argument that the Department should not adjust home market prices downward without any evidence that any rebate or discount was even granted in the months in which U.S. sales were made, Onoda claims that its methodology precludes the possibility that rebates and discounts have been applied to sales which did not receive them. First, argues Onoda, the rebates were given only on sales to distributors, and, therefore, were only allocated to sales to distributors. Accordingly, argues Onoda, if there were no sales to distributors in a given month, then no rebates would be applied to the sales in that month. Second, argues Onoda, rebates were given on all of its distributors sales, even if a distributor only purchased one ton of cement during the period. Therefore, asserts Onoda, there is no possibility that a rebate would have been reported for a particular sale when no rebate was actually given on that sale. Third, argues Onoda, the distributor rebates were not given based on the volume of individual transactions. Rather, states Onoda, the distributor rebates were calculated based on the aggregate volume of the sales made to the distributors over a six-month period. Therefore, a portion of the total rebates should be allocated to each sale made during that six-month period. Consequently, argues Onoda, there is no possibility that any distributor sales within a particular month did not receive a rebate.

Finally, argues Onoda, the Department must calculate FMV based on weighted-average monthly prices. Thus, the Department will calculate FMV by dividing the total value of sales for the month over the total volume of sales for the month. Regardless of whether the rebates and discounts granted on sales during the month are allocated or reported on a transaction-specific basis, the total value of the sales will not be affected. Therefore, argues Onoda, the fact that the rebates and discounts cannot be matched to specific transactions does not distort the FMV calculation.

Onoda argues that contrary to Petitioner's assertion, it did not include PPDs paid on non-subject merchandise in the reported PPD adjustment. Onoda argues that, as in the first and second reviews, it gave PPDs on sales of both gray and white cement during the POR but that Onoda's central accounting system does not permit it to trace these discounts to individual transactions. Consequently, in calculating the per unit discounts, Onoda allocated the total discounts over total sales of cement and not just sales of gray portland cement. Onoda asserts that this methodology was upheld by the CAFC in *Smith Corona* and CIT in *Torrington Co.* v. *United States*, 818 F. Supp. 1563, 1577 (CIT 1993) (hereinafter *Torrington II*).

Onoda argues that the total amount of rebates granted should not be reduced by the amounts reimbursed by other manufactures. Onoda argues that sales of cement manufactured by the two other producers were included in Onoda's reported volume and value if the cement was sold under the Onoda brand. Because cement produced by the other manufacturers are reported on the sales tape, the rebates reimbursed by the producers must be included in the total rebate amount in the allocation calculation. Onoda contends that Petitioner's methodology would artificially inflate the net price and would distort the total income Onoda and the other producer received because, while the amount of rebates would be reduced, the volume of cement sold would remain the same. This would reduce the rebate adjustment thereby inflating FMV in the Department's calculations.

*Department's Position*

We agree with Petitioner. It is our practice to make a direct adjustment to the home market price for rebates and discounts if (a) they were reported on a transaction-specific basis or (b) they were granted as a fixed and constant percentage of sales on all transactions for which they were reported. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 60 FR 10,900, 10929 (February 28, 1995) (hereinafter *AFBs from France*); *NSK Ltd. v. United States*, 896 F. Supp. 1263, 1271 (CIT 1995) (hereinafter *NSK*); and *Torrinngton* at 387. The rationale for this practice is that we only accept direct adjustments to price if actual amounts are reported for each transaction. Discounts and rebates based on allocations are not allowable as direct adjustments to price since allocated price adjustments have the effect of partially averaging prices by diluting discounts or rebates on some sales, inflating them on others, and attributing them to sales which received no such discounts. Just as we do not normally allow respondents to report average prices, we do not allow average direct additions or subtractions to price. Although we usually average FMVs on a monthly basis, we require individual prices to be reported for each sale.

In this case, Onoda took the total amount of rebates granted to distributors of gray portland cement and divided this amount by total sales of gray portland cement by all distributors for a six-month period. This amount was then applied to the home market unit price to calculate the amount of rebate to allocate to each sale of Type N cement. Onoda's rebate adjustment fails to provide actual amounts that were discounted or rebated on each individual sale. Under this methodology there is no way to determine which discount or rebate was applied to each particular sale. Onoda's allocation methodology presents the very type of flaws discussed above.

Although we verified that the rebates granted to distributors were given according to a fixed schedule, we found that Onoda's rebate were not granted as a fixed and *constant* percentage of sales but rather varied based on the volume of cement sold by a distributor. If one distributor sold more cement than another distributor it received a higher rebate per metric ton. Thus, consistent with our practice discussed above, because Onoda did not report discounts or rebates on either a transaction-specific basis or as a fixed and constant percentage of sales, we have disallowed its claim as a direct adjustment to FMV.

Onoda is correct in its statement that in *Torrington* and *Smith-Corona* the courts have upheld the Department's authority to treat allocated rebates and discounts as direct expenses. However, in order for allocated price adjustments to be regarded as a direct deduction from FMV, the allocation methodology employed by respondent must ''be directly correlated with specific merchandise'' (*i.e.*, results in the calculation of the actual amount incurred on each individual sale). See

*Torrington* at 390; *AFBs from France* at 10929.

Onoda calculated its PPD in a fashion similar to its rebate calculation. Accordingly, we have also disallowed a direct deduction from FMV for PPDs. Moreover, Onoda included non-subject merchandise in its calculation of PPDs. It is the Department's practice to disallow an adjustment which relies on a methodology that includes discounts, rebates, and other price adjustments paid on out-of-scope merchandise. See *AFBs from France* at 10935; *Torrington II* at 1578. Therefore, since Onoda's prompt payment discounts were given for and allocated over sales of non-subject merchandise, we have made no adjustment to FMV for Onoda's prompt payment discounts.

Finally, Onoda's argument that the Department should allow these deductions in this review since it permitted them in prior reviews is without merit. The Courts have recognized that antidumping administrative reviews are separate and distinct proceedings, and the results of this review must be in accordance with law and based on substantial evidence in the record of this review. See, *e.g.*, *Torrington Co.* v. *United States*, 786 F. Supp. 1027, 1028 (CIT 1992).

Accordingly, based on the foregoing, we have not adjusted FMV for Onoda's claimed rebates and PPDs.

*Comment 7*

Petitioner, citing to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan*, 58 FR 39,729 (July 26, 1993) (hereinafter *AFBs from Japan*) and *accord Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 58 FR 64,720 (December 9, 1993), argues that the Department should have included the depreciation of idle machinery in Onoda's cost of production. Petitioner, citing to *Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line, and Pressure Pipe from Italy*, 60 FR 31,981 (June 19, 1995), states that the Department's practice requires that this cost be included in Onoda's COP because the machinery was temporarily idle, not permanently idle and due to be sold or scraped.

Onoda states that it has no objection to Petitioner's suggestion that the Department add the depreciation of idle assets on Onoda's COP.

*Department's Position*

The Department agrees with Petitioner. In *AFBs from Japan*, we stated:

> We include in the fully absorbed factory overhead the depreciation of equipment not in use or temporarily idle. While Japan's accounting methodology does provide that depreciation for idle equipment may be stopped, we do not accept this accounting method because idle fixed assets are a cost to the company.

*Id.* at 39756.

Accordingly, for these final results, we have included the depreciation of idle machinery in Onoda's COP.

*Comment 8*

Petitioner argues that the Department should exclude from its calculation of FMV sales in which other cement manufacturers shipped cement from their inventory to Onoda's customers (with the sale recorded by Onoda) as well as sales of cement purchased by Onoda from other manufacturers.

Petitioner, citing to section 773(a)(1)(A) of the Act, states that the FMV of imported merchandise shall be the price ''at which such or similar merchandise is sold, or in the absence of sales, offered for sale in the . . . country from which exported.'' Petitioner, citing to section 771(16) (A), (B), and (C) of the Act, states that ''such or similar'' in turn, is defined as merchandise ''produced in the same country by the same person'' as the merchandise that is the subject of the investigation. Petitioner, citing to *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 57 FR 28,360 (June 24, 1992); *accord Canned Pineapple Fruit from Thailand*, 60 FR 2,734 (January 11, 1995); *Titanium Sponge from Japan*, 57 FR 557 (January 7, 1992) and *Brass Sheet and Strip from Japan*, 53 FR 23,296 (June 21, 1988), argues that based on the definition of ''such or similar'' merchandise, it has been the Department's policy to exclude sales of merchandise produced by a manufacturer other than the respondent from the calculation of FMV for the respondent.

Petitioner contends that the Department should be able to exclude such merchandise since Onoda identifies sales of merchandise produced by other manufacturers. Petitioner notes that Onoda has not separately identified sales of cement produced by two unrelated manufacturers (*i.e.*, the two manufacturers referred to in comment 6 above) based on the claim that they cannot separately identify these sales. Petitioner argues that this claim is inconsistent with Onoda's ability to identify the amount of rebates it paid with respect to sales of cement manufactured by the two manufacturers. Petitioner contends that if Onoda can identify the amount of rebates paid with respect to sales of merchandise produced by the two manufacturers, Onoda should be able to identify these sales. Accordingly, argues Petitioner, the Department should require Onoda to identify sales of cement manufactured by the two manufacturers so that such sales can be excluded from the calculation of FMV. Petitioner contends that this is necessary since using sales of merchandise produced by one manufacturer to calculate another manufacturer's FMV could distort FMV (*i.e.*, manufacturers generally have different costs of production resulting in a possible price differential).

Onoda states that it does not object if the Department wishes to drop the sales of cement which are indicated on the sales tape as having been produced by other manufacturers and shipped directly to Onoda's customer (*i.e.*, not commingled with Onoda cement). However, Onoda states that it cannot provide a revised sales tape indicating which of the remaining sales were resales of cement manufactured by two specific cement producers. Onoda states that it cannot provide a revised sales tape because it cannot identify which sales contained cement produced by the two manufacturers. Onoda states that cement it purchased from the two manufacturers was intermixed with Onoda cement and was sold under the Onoda brand name. Accordingly, states Onoda, while it knows the total amount of the two manufacturers' cement that it sold, it sales records cannot trace this cement to individual transactions. Onoda allocates a portion of its total rebates to the two manufacturers based on the total volume of the two manufacturers' cement that it sold. Accordingly, asserts Onoda, the fact that it can determine the amount of the total rebates allocated to the two manufacturers does not mean that Onoda can provide a revised sales tape which indicates which individual sales were of cement produced by the two manufacturers. Moreover, argues Onoda, due to the intermixing of the cement, it prices the cement produced by Onoda and the other manufacturers in exactly the same manner. Accordingly, argues Onoda, there is no merit to Petitioner's allegations that including such sales in the FMV calculation could result in distortion.

*Department's Position*

In *AFBs from France* the Department stated:

> In accordance with the definition of such or similar merchandise in section 771(16)(B)(i), we have not considered merchandise known to have been produced in the facilities of one manufacturer to be such or similar to the merchandise produced in the facilities of another manufacturer, even if the merchandise is physically identical or physically similar and is sold by the same person.

*Id.* at 28367. Accordingly, for these final results of review, we have excluded from our calculation of FMV those sales that Onoda could indicate were produced by other manufacturers.

Although Onoda's home market sales listing also includes sales that commingled Onoda-produced cement with cement produced by manufacturers other than Onoda, we continue to find it reasonable to use this sales listing because (1) we verified that Onoda was unable to indicate which sales were sales of commingled cement and (2) the commingled sales were sold under the Onoda name necessitating that Onoda price such sales as if they were Onoda-produced cement. In contrast, in the cases cited by Petitioner in support of excluding the commingled sales from the calculation of FMV, the respondent was able to identify the commingled sales. Onoda's inability to identify commingled sales is not inconsistent with Onoda's ability to identify the amount of rebates it paid with respect to cement manufactured by these two producers because its allocation methodology was based upon the total volume of cement sold rather than individual transactions.

In other cases where the respondent has been unable to identify commingled sales, the Department has utilized a weighting methodology in order to neutralize the effect of including commingled sales. *See, Certain Cut-to-Length Carbon Steel Plate From Sweden*, 60 FR 48502 (September 19, 1995). As in those cases, in this case, we applied to the reported home market quantities a ratio of the volume of Onoda-produced cement to the combined total volumes of Onoda-produced and purchased cement sold on a biannual basis for the fiscal year. These ratios were derived from verified rebate documents which indicated, on a six-month basis for Onoda's fiscal year (*i.e.,* April 1993–September 1994 and October 1993–March 1994), the total amount of cement sold, the amount of Onoda-produced cement sold and the amount that was manufactured by other producers. Additionally, since the POR is May 1, 1993–April 30, 1994, we applied the ratio for the October 1993–March 1994 period to Onoda's April 1994 sales.

*Comment 9*

Petitioner argues that Onoda is not entitled to a difference-in-merchandise (difmer) adjustment for the cost differences between U.S. model Type I and home market model Type N. Petitioner argues that Onoda has failed to meet the criterion for a difmer adjustment that was articulated in the Department's Policy Bulletin No. 92.2 and in other antidumping cases. According to petitioner, respondents are entitled to a difmer adjustment only if they show that the difference in cost between the two models is attributable to the difference in physical characteristics of the merchandise. Petitioner relies upon plant-by-plant variable cost of manufacture data for Type N cement to argue that the weighted-average difmer adjustment reported by Onoda is largely attributable to differences in efficiencies between Onoda's various production facilities and not to cost differences associated with the physical characteristics of the merchandise.

Petitioner argues that the Department's rationale for granting a difmer adjustment in the first and second reviews of this case does not support granting a difmer adjustment in this review. Petitioner asserts that there is ample evidence that the cost differences between Type I and Type N cement are attributable to differences in efficiencies between Onoda's plants. Accordingly, petitioner requests that the Department deny Onoda's difmer adjustment.

Onoda argues that it followed the exact same procedure in preparing its difmer adjustment in this segment of the proceeding as it did in the LTFV investigation and the first and second reviews. Onoda asserts that the Petitioner has presented no new arguments or evidence which would justify a change in the Department's prior decisions in this case. Onoda states that in its August 22, 1994, Questionnaire Response and October 31, 1994, Deficiency Response, it has fully documented its difmer claim, which is based on differences in both the physical and chemical characteristics of the comparable types of cement. Onoda states that these differences include differences in the amounts of clinker and gypsum, and differences in fineness and compressive strength between Type I and Type N. Onoda states that other differences between Type I and Type N include both material inputs (*e.g.,* limestone, clay, silica, fuel inputs, fuel oil, coal, and anthracite) and energy, due to the different fineness and compressive strengths of these comparable cement types.

Onoda asserts that in its August 22, 1994, Questionnaire Response it provided detailed charts setting out the variable costs of producing comparable types of cement and that the Department verified these charts and tied them directly to Onoda's cost accounting system in the LTFV investigation and in this review. Onoda notes that during the LTFV investigation and in this review, the Department verified the difmer data, and granted the difmer adjustment in calculating the dumping margin. Furthermore, Onoda observes that in the LTFV investigation and in this review, the Department was satisfied that Onoda had reasonably tied cost differences to physical differences. Additionally, Onoda notes that the Department determined in the final results of the first and second reviews that evidence on the record did not establish that any differences in plant efficiencies were the source of the cost differences.

Additionally, Onoda argues that the only way it can calculate the difmer adjustment is to weight-average the variable costs to produce Type N cement at all plants and compare that amount to the variable costs to produced Type I cement at the single plant where it produce Type I cement. Onoda argues that this methodology of weight-averaging costs across all plants is consistent with Departmental practice.

Furthermore, argues Onoda, the evidence on the record of this proceeding parallels exactly the type of evidence that was on the record of the prior proceedings. Onoda states that the factories producing Type I and Type N cement are the same factories that were producing these cement types since the original investigation. Moreover, states Onoda, the production processes used to produce these types of cement are virtually unchanged, as are the physical specifications and characteristics of the cement. Additionally, Onoda states that it has also calculated and reported the difmer adjustment in exactly the same manner as it has in all other prior proceedings of this case.

Thus, according to Onoda, there is no reason for the Department not to grant the difmer adjustment in this review.

*Department's Position*

Consistent with the Department's practice in the LTFV investigation and the first and second reviews of this case, we have allowed the difmer adjustment claimed by Onoda. As we stated in the

first and second reviews, although Onoda's plants may have different efficiencies, evidence on record does not establish that any differences in plant efficiencies are the source of the cost differences identified by Onoda. Rather, cost differences are due to differences in material inputs and the physical differences which result from different production processes.

First, as stated previously, the Department compared Type I cement in the United States with Type N cement in the home market. The specific differences in cost between Type I and Type N were due to the varying costs of the inputs, including material inputs (limestone, clay, silica, etc.), fuel inputs (fuel oil, coal, anthracite, etc.) and electricity (mixing, grinding, burning, etc.). For example, Type I cement contains clinker, gypsum and minor grinding agents. In contrast, Type N cement contains clinker, gypsum, minor grinding agents and additives. Furthermore, Type I cement contains a higher percentage of clinker and gypsum than Type N cement. Moreover, Type I, on average, has a slightly higher percentage of silicon dioxide.

Second, as noted in the LTFV investigation, ''we verified Onoda's claimed difference in merchandise adjustment and found it to be an accurate representation of the relevant variable costs of production as reflected in its actual cost accounting records. Given the fact that physical differences between types of cement arise from differences in the production process (*e.g.*, amount and duration of heat), and from differences in component materials, we are satisfied that Onoda has reasonably tied cost differences to physical differences'' (*see Gray Portland Cement and Clinker—LTFV Investigation* at 12161). We also verified the information supplied by Onoda with regard to its difmer adjustment in this review and did not note any discrepancies. Additionally, with regard to the weighted-average methodology employed by Onoda, the Department specifically requested that Onoda report is cost of manufacture information on a weighted-average basis (*see* the Department's questionnaire at page 60: ''If the subject merchandise is manufactured at more than one facility, the reported COM should be the weighted-average manufacturing cost from all facilities'').

The Department's determination that Onoda is entitled to a difmer adjustment for differences between Type I and Type N cement has been upheld by the CIT in the first review of this case (*See Supra Southern California Producers*). In affirming the Department's decision to grant the difmer adjustment, the Court stated:

> Upon review, the Court finds that Commerce's determination that price differences between U.S. and home market models were caused by differences in the physical characteristics of the merchandise compared, and Commerce's concomitant decision to grant a difference in merchandise adjustment to Onoda, are supported by substantial evidence and otherwise in accordance with law. First, evidence submitted by Onoda shows that U.S. models contain different materials than type N * * * In addition * * * U.S. models are produced in a different manner, i.e. with a different amount and duration of heat than type N, and that this causes differences in the chemical and physical composition of the cements * * * Further * * * Commerce verified that Onoda was entitled to a difference in merchandise adjustment.

*Id.* at 545 (cites omitted).

Accordingly, we have allowed Onoda's claimed difmer adjustment.

Final Results of Review

Based on our analysis of comments received, and the correction of clerical errors, we have determined that a final margin of 30.12 percent exists for Onoda for the period May 1, 1993, through April 30, 1994.

The Department will instruct the U.S. Customs Service to assess antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentage stated above. The Department will issue appraisement instructions directly to the U.S. Customs Service.

Furthermore, the following deposit requirements will be effective for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date of these final results of administrative review, as provided by section 751(a)(1) of the Act: (1) the cash deposit rate for Onoda will be 30.12 percent; (2) for merchandise produced by manufacturers or exporters not covered in this review but covered in a previous review or the original less-than-fair-value (LTFV) investigation, the cash deposit rate will continue to be the rate published in the most recent final results or determination for which the manufacturer or exporter received a company-specific rate; (3) if the exporter is not a firm covered in this review, earlier reviews, or the original investigation, but the manufacturer is, the cash deposit rate will be that established for the manufacturer of the merchandise in these final results of review, earlier reviews, or the original investigation, whichever is the most recent; and (4) the ''all others'' rate, as established in the original investigation, will be 70.23 percent.

These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 353.26 to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of double antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective orders (APOs) of their responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Timely written notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

This administrative review and notice are in accordance with section 751(a)(1) of the Act (19 U.S.C. 1675(a)(1) and 19 CFR 353.22.

Dated: December 13, 1996.

Jeffery P. Bialos,

*Acting Assistant Secretary for Import Administration.*

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**[A–588–046]**

## Polychloroprene Rubber From Japan; final results of antidumping duty administrative review

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of Final Results of Antidumping Duty Administrative Review.

**SUMMARY:** On September 11, 1996, the Department of Commerce (the Department) published the preliminary results and partial termination of antidumping duty administrative review of the antidumping duty order on polychloroprene rubber (rubber) from Japan. The review covers eight manufacturers/exporters of the subject merchandise to the United States for the period December 1, 1994 through November 30, 1995. These