

Company	Ad valorem rate
Agritalia, S.r.l.	2.55
Arrighi S.p.A. Industrie Alimentari	2.44
Barilla G. e R. F.lli S.p.A.	0.65
De Matteis Agroalimentare S.p.A.	2.47
Delverde, S.r.l.	5.55
F.lli De Cecco di Filippo Fara S. Martino S.p.A.	3.37
Gruppo Agricoltura Sana S.r.L.	0.00
Industria Alimentare Colavita, S.p.A.	2.18
Isola del Grano S.r.L.	11.23
Italpasta S.p.A.	11.23
Italpasta S.r.L.	2.44
La Molisana Alimentari S.p.A.,	4.17
Labor S.r.L.	11.23
Molino e Pastificio De Cecco S.p.A. Pescara	3.37
Pastificio Guido Ferrara	1.21
Pastificio Campano, S.p.A.	2.59
Pastificio Riscossa F.lli Mastromauro S.r.L.	6.91
Tamma Industrie Alimentari di Capitanata	5.55
All Others	3.78

We calculated the *ad valorem* rate for Agritalia, an export trading company, by weight averaging, based on the value of exports to the United States represented by each of Agritalia's suppliers, the adjusted subsidy rate for each supplier and adding to this rate the subsidy rate calculated for Agritalia based on subsidies it received directly. In performing this calculation, we adjusted the suppliers' rates to account for any mark-up or mark-down by Agritalia, to adjust prices to reflect Agritalia's f.o.b. export prices, and to exclude any export restitution benefits received by Agritalia's suppliers on export sales to the United States which were earned on sales made by the producer independently of Agritalia. We note that at the time of our preliminary determination, we lacked information to adjust the producers' subsidy rates for any mark-up or mark-down taken by Agritalia on sales. The methodology we have used in our final determination effectively calculates the f.o.b. subsidy rate for merchandise sold by Agritalia during the POI.

Since the estimated net countervailable subsidy rate for Barilla and Gruppo is either zero or *de minimis*, these companies will be excluded from the suspension of liquidation.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business

proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Investigations, Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist, these proceedings will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order directing Customs officers to assess countervailing duties on pasta from Italy.

Return or Destruction of Proprietary Information

This notice serves as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 705(d) of the Act.

Dated: June 3, 1996.

Paul L. Joffe,

Acting Assistant Secretary for Import Administration.

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DEPARTMENT OF COMMERCE

INTERNATIONAL TRADE ADMINISTRATION

[A-489-805]

Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Turkey

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

EFFECTIVE DATE: June 14, 1996.

FOR FURTHER INFORMATION CONTACT: John Brinkmann, Michelle Frederick or Sunkyu Kim, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-5288, (202) 482-0186, or (202) 482-2613, respectively.

The Applicable Statute

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

Final Determination

We determine that certain pasta (pasta) from Turkey is being sold in the United States at less than fair value (LTFV), as provided in section 735 of the Act. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the preliminary determination of sales at less than fair value in this investigation on December 14, 1995, (60 FR 1351, January 19, 1996) (*Preliminary Determination*), the following events have occurred:

On January 22, 1996, the Department requested that Filiz Gida Sanayii ve Ticaret (Filiz) and Maktas Makarnacilik ve Ticaret T.A.S. (Maktas), the two respondents in this case, submit additional information relating to level of trade. Responses were received on January 31, 1996, as part of their supplemental Section D questionnaire responses.

On January 25, 1996, Hershey Foods Corp., Borden Inc., and Gooch Foods, Inc. (collectively the petitioners) alleged ministerial errors in the Department's preliminary determination calculations regarding the two respondents. The respondents alleged a ministerial error in the Department's preliminary determination on January 26, 1996.

With respect to the petitioners' allegation, we agreed that errors were made as alleged and the errors were found to constitute significant ministerial errors because the correction resulted in a difference of at least five absolute percentage points and was at least 25 percent greater than the preliminary margin, for both Filiz and Maktas. With respect to the respondents' allegation, we determined that the respondents' allegation did not constitute a ministerial error. See Memorandum to Barbara R. Stafford from the Team dated February 6, 1996. An amended preliminary determination was issued on February 12, 1996 (61 FR 6348, February 20, 1996).

We conducted verification of Filiz's and Maktas's sales and cost questionnaire responses in Turkey in February and March 1996.

On May 1, 1996, Maktas, at the request of the Department, submitted

revised computer tapes that corrected clerical errors discovered at verification.

Filiz, Maktas and the petitioners submitted case briefs on April 30, 1996, and rebuttal briefs on May 3, 1996. At the request of both the petitioners and the respondents, a public hearing was held on May 7, 1996.

On May 8, 1996, the the Embassy of Turkey requested that the Department accept into the record a copy of Maktas's major shareholder's 1994 financial statements. The Department informed the Embassy that it could not accept any new information into the record at that point. (See, Memorandum to File from Barbara R. Stafford, May 8, 1996.)

Scope of Investigation

The scope of this investigation consists of certain non-egg dry pasta in packages of five pounds (or 2.27 kilograms) or less, whether or not enriched or fortified or containing milk or other optional ingredients such as chopped vegetables, vegetable purees, milk, gluten, diastases, vitamins, coloring and flavorings, and up to two percent egg white. The pasta covered by this scope is typically sold in the retail market, in fiberboard or cardboard cartons or polyethylene or polypropylene bags, of varying dimensions.

Excluded from the scope of this investigation are refrigerated, frozen, or canned pastas, as well as all forms of egg pasta, with the exception of non-egg dry pasta containing up to two percent egg white. In the companion countervailing and antidumping duty investigations involving pasta from Italy, we have excluded imports of organic pasta that are accompanied by the appropriate certificate issued by the Associazione Marchigiana Agricoltura Biologica (AMAB). The Department has determined that AMAB is legally authorized to certify foodstuffs as organic for the Government of Italy (GOI). If certification procedures similar to those implemented by the GOI are established by the Government of Turkey for exports of organic pasta to the United States, we would consider an exclusion for organic pasta at that time.

The merchandise under investigation is currently classifiable under items 1902.19.20 of the *Harmonized Tariff Schedule of the United States (HTSUS)*. Although the *HTSUS* subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation

The period of investigation (POI) is May 1, 1994, through April 30, 1995.

Facts Available

Section 776(a)(2) of the Act provides that if an interested party or any other person—(A) Withholds information that has been requested by the administering authority, (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority * * * shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination under this title.

Section 782(c)(1) permits the Department to modify the requests for information in its questionnaires if that party, "promptly after receiving a request {from the Department} for information, notifies {the Department} that such party is unable to submit the requested information in the requested form and manner." The Statement of Administrative Action (SAA) to the Uruguay Round Agreements Act (URAA) makes clear that paragraph (c)(1) is intended to apply to the Department's requests for information in computerized form. SAA at 865. Subsection (e) provides that the Department shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the Department if—

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the Department with respect to the information, and
- (5) the information can be used without undue difficulties.

Accordingly, in using the facts available, the Department may disregard information submitted by a respondent if any of the five criteria has not been met.

A. Filiz

As discussed in the *Preliminary Determination*, the Department initiated a cost of production (COP) investigation of Filiz on June 8, 1995. In its

questionnaire, the Department requested that in providing cost data, Filiz's valuation of materials used be based upon current material prices in accordance with the Department's normal methodology in hyperinflationary cases. (See, *Fair Value Comparisons* section.) In its response, however, Filiz reported its raw materials costs using last-in, first-out (LIFO) accounting. Filiz maintained that its use of LIFO assumptions accurately reflected the replacement cost methodology requested in the questionnaire. However, Filiz's response raised questions regarding the accuracy of its reported material costs, insofar as LIFO does not require materials used in production to be valued at costs from the current period. Instead, LIFO allows materials consumed to be valued at costs from both current and prior periods. Although we informed Filiz that the valuation of materials and conversion costs should be based upon current costs, Filiz provided an inventory accounting methodology that valued some semolina at costs from previous months. This deficiency was brought to Filiz's attention in a supplemental questionnaire and again during verification, but the company failed to modify its methodology to comply with the Department's instructions. Furthermore, during verification, Filiz declined to provide information necessary to quantify the understatement of costs associated with this method.

The results of our investigation, and the evidence which appears on the record, indicate that the use of a LIFO inventory methodology by Filiz has had a significant distortive impact on its reported COP data. Accordingly, we find that Filiz has not provided adequate data to compute its material costs. (For a more detailed explanation, see Memorandum to the File from Michael Martin and William Jones, May 20, 1996).

In addition, Filiz stated in its response to our antidumping duty questionnaire that its annual financial statements are prepared on an actual (not constant) currency basis. During our cost verification, however, we became aware that Filiz had available audited 1994 constant currency financial statements which had not been disclosed to the Department. We were informed by company officials that auditors from an outside accounting firm had prepared these statements from Filiz's normal audited financial statements (which are prepared in accordance with Turkish tax law) and that Filiz personnel would not be able to answer any questions related to the

constant currency statements. We requested that a copy of these financial statements be introduced as a verification exhibit, but Filiz denied our request. Furthermore, although we were permitted to examine the statements for a limited time at verification, we were not permitted to make copies of them, nor take the statements off the premises.

Nevertheless, our limited review of these statements gave us reason to believe that significant distortions exist in the COP and constructed value (CV) data submitted by Filiz. Specifically, the notes to the constant currency financial statements revealed that adjustments had been recorded for certain severance costs, pension liabilities, deferred salaries, operational expenses and interest on loans. We were informed that these adjustments were not reflected in the financial statements Filiz used to derive its COP and CV figures. The nature of the adjustments suggested that Filiz had excluded certain expenses incurred during the POI from its reported COP and CV data, and also raised concerns about whether the submitted conversion costs, general and administrative expenses and financial expenses accurately reflected the company's production costs. During the public hearing, counsel for Filiz stated that the adjustments were recorded to restate Filiz's submitted cash-basis financial statements to the accrual basis required under international accounting standards. Filiz's failure to explain or provide these financial statements as a verification exhibit prevents us from quantifying the magnitude of the distortions which exist in the submitted COP and CV data.

The use of LIFO inventory methodology by Filiz and its failure to provide the constant currency financial statements render Filiz's submitted COP and CV data unusable for purposes of margin calculations. Accordingly, the Department must consider the use of the facts available in determining a margin for Filiz, pursuant to section 776(a) of the Act.

Insofar as Filiz has not raised the issue of difficulty in providing information in the informational format or medium requested by the Department, section 782(c)(1) does not apply in this case.

When examined in light of the requirements of section 782(e), the facts in this case indicate that Filiz's cost data is thoroughly and systematically flawed. The gaps and inaccuracies in Filiz's cost data render its use impossible. First, for the reasons detailed above, the accuracy of Filiz's submitted cost data could not be verified, as required by section (e)(2).

Second, because of the flaws in its cost data, Filiz's submitted cost data "cannot serve as a reliable basis for reaching the applicable determination" under section (e)(3), nor can it "be used without undue difficulties" under section (e)(5). Third, in its failure to provide information based on current material costs (rather than LIFO) and its refusal to allow the constant currency financial statements to be entered into the record (or even closely examined by the Department or explained by Filiz itself at verification), Filiz has not acted to the "best of its ability" in meeting the Department's requirements, pursuant to section 782(e)(4) of the Act.

The use of facts available is also subject to section 782(d) of the Act. Subsection 782(d) provides that if the Department "determines that a response to a request for information * * * does not comply with the request, {the Department} shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for completion of investigations or reviews under this title." Filiz had ample opportunity to correct the defects in its submitted cost data. As indicated above, the deficiency in Filiz's submissions regarding materials costs was brought to its attention in a supplemental questionnaire and again during verification. Filiz, however, failed to modify its methodology to comply with the Department's instructions. Thus, Filiz has not acted to the best of its ability during this investigation. Therefore, in applying the facts available under section 776, the Department is acting consistently with section 782(d).

Furthermore, during verification, Filiz declined to provide information that might have remedied the deficiencies: when the Department became aware at verification of systematic flaws in Filiz's cost data, Filiz refused to enter the statements into the administrative record or allow the Department's verification team to examine it closely, thereby "significantly impeding" the Department's ability to conduct its investigation (and verify Filiz's submitted data) under section 776(a)(2)(C) of the Act.

For the foregoing reasons, the Department has determined that, insofar as Filiz has failed to provide cost data in the form and manner requested by the Department, and has "significantly impeded" this investigation, it is required by section 776(a) of the Act to use the facts available with respect to

Filiz's cost data. However, the Department must also determine whether (1) the use of facts available for Filiz's cost data renders the rest of Filiz's submitted information (*i.e.*, the sales data) unusable, and (2) whether the use of adverse information as facts available is warranted.

First, we have determined that the resort to facts available for Filiz's cost data renders its sales data unusable. Because of the flawed nature of the cost data, home market sales cannot be tested to determine whether they were made at prices above production cost. Insofar as the Department can only make price-to-price comparisons (normal value to export price) on those home market sales that are made above cost, the systematically flawed nature of the cost data makes these comparisons impossible. A second problem with using the home market sales data is the absence of reliable difference in merchandise figures (DIFMERS). When comparing normal value to export price, the Department is required to account for the effect of physical differences between the merchandise sold in each market. *See*, section 773(a)(6)(C) of the Act. Insofar as DIFMER data is based on cost information, the effect of these physical differences cannot be determined by the Department.

In addition, the Department cannot derive a normal value that can be compared with U.S. price data. When home market sales prices cannot be used, the Department resorts to the use of constructed value as normal value. *See*, sections 773(a)(4), 773(e). However, the constructed value information reported by Filiz is part of the cost data that, because it is systematically flawed, has been rejected by the Department. Therefore, the use of facts available for Filiz's cost data precludes the use of the submitted constructed value information. The Department's prior practice has been to reject a respondent's submitted information *in toto* when flawed and unreliable cost data renders any price-to-price comparison impossible. The rationale for this policy is contained in *Notice of Final Determination of Sales at Less than Fair Value: Grain-Oriented Electrical Steel From Italy*, 59 Fed. Reg. 33952, 33953-54 (July 1, 1994), (*Grain-Oriented Electrical Steel From Italy*), where the respondent failed the cost verification. The Department explained that the rejection of a respondent's questionnaire response *in toto* is appropriate and consistent with past practice in instances where a respondent failed to provide verifiable COP information:

If the Department were to accept verified sales information when a respondent's cost information (a substantial part of the response) does not verify, respondents would be in a position to manipulate margin calculations by permitting the Department to verify only that information which the respondent wishes the Department to use in its margin calculation.

That is the situation with Filiz, which has provided accurate and verified sales information, but has not provided accurate and usable cost data and has hindered verification of its cost data (see Cost Verification Report). Although *Grain-Oriented Electrical Steel from Italy* was a case involving the Best Information Available (BIA) under the "old" statute, it demonstrates the Department practice of regarding verified sales information as unusable when the corresponding cost data is so flawed that price-to-price comparisons are rendered impossible. Cf. *Certain Corrosion-Resistant Carbon Steel Flat Products from Korea: Final Results of Antidumping Duty Administrative Review*, 61 FR 18547, 18559 (April 26, 1996) (the use of total BIA warranted where reliable price-to-price comparisons are not possible).

Accordingly, we find that there is no reasonable basis for determining normal value for Filiz in this case. As a result, there is nothing to compare to U.S. sales to derive a margin calculation. The Department has resorted, therefore, to total facts available for Filiz.

The next step is to determine whether an adverse inference is warranted. Section 776(b) of the Act provides that, where the Department "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from {the Department} * * * {the Department} may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available."

As discussed above, Filiz failed to provide cost data in the form and manner requested by the Department, notwithstanding the Department's repeated requests. Second, Filiz refused to allow the constant currency financial statements to be entered into the administrative record of this case. We have thus determined that Filiz has not cooperated by virtue of not acting to the best of its ability in this investigation. Accordingly, consistent with section 776(b)(1) of the Act, we have applied, as total facts available to Filiz, the higher of the margin from the petition or the highest rate calculated for a respondent in this proceeding, which is 63.29 percent.

Section 776(c) of the Act provides that where the Department relies on "secondary information," the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The SAA, accompanying the URAA, clarifies that the petition is "secondary information." See, SAA at 870. The SAA also clarifies that "corroborate" means to determine that the information used has probative value. *Id.* However, where corroboration is not practicable, the Department may use uncorroborated information.

In the present case, based on our comparison of the sizes of the calculated margin for the other respondent in this proceeding to the estimated margin in the petition, we have concluded that the petition is the most appropriate information on the record to form the basis for a dumping calculation. Accordingly, the Department has based the margin on information in the petition. In accordance with section 776(c) of the Act, we attempted to corroborate the data contained in the petition. The petitioners based export prices on U.S. import statistics. We find that this information has probative value because it was obtained from an independent, public source. See, *Notice of Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipe from South Africa* 61 FR 94, 24271 (May 14, 1996). The normal value was based on prices between a Turkish producer of pasta and its wholesaler which were obtained from a market research report.

When analyzing the petition, the Department contacted the consultant who prepared the market research report and confirmed the accuracy of the data as provided in the petition. Accordingly, we have corroborated, to the extent practicable, the data contained in the petition.

B. Maktas

In our January 16, 1996, supplemental questionnaire of the Department requested Maktas to provide a copy of the 1994 financial statements of its major shareholder, Piyale-Besin Sanayi ve Ticaret A.S. (Piyale-Besin). In its response, Maktas did not provide a copy of Piyale-Besin's financial statements, stating that since "Piyale-Besin is merely a shareholder of Maktas, the financial statements of Piyale-Besin are irrelevant to this investigation." At the cost verification, the Department again requested Piyale-Besin's 1994 financial statements. The Department explained to Maktas that the Department's normal practice is to request financial information from shareholders that own

a significant percentage of a respondent's stock. Maktas, however, declined to provide to the Department the financial statements of Piyale-Besin.

The failure of Maktas to provide Piyale-Besin's financial statements raises significant questions as to the accuracy of certain expenses reported to the Department, namely, interest, general and administrative (G&A), and selling expenses. It is the Department's practice to require the use of consolidated group information for the calculation of interest expenses based on the fact that the consolidated group's controlling entity has the power to determine the capital structure of each member of the group. See, e.g., *Final Determination of Sales at Less Than Fair Value: Certain Small Business Telephone Systems and Subassemblies Thereof From Korea*, 54 FR 53141, 53149 (December 27, 1989). Piyale-Besin has such power since it owns a substantial majority of Maktas and its affiliates. It is the Department's position that majority equity ownership is *prima facie* evidence of corporate control. See, e.g., *Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe From Italy*, 60 FR 31981, 31991 (June 19, 1995). However, because Maktas did not provide Piyale-Besin's financial statements, we have no information about Piyale-Besin's interest expenses. Therefore, in accordance with section 776(a) of the Act, we have applied facts available for Maktas's interest expenses. In addition to our lack of information regarding interest expenses, we are not able to confirm that Piyale-Besin did not provide G&A services to Maktas or incur selling expenses on behalf of Maktas. Accordingly, we have also applied facts available for G&A and selling expenses.

Further, Maktas's refusal to provide Piyale-Besin's financial statements demonstrates that it failed to cooperate by not acting to the best of its ability to comply with requests for information, insofar as Piyale-Besin's financial statements do exist and are available. Indeed, on May 8, 1996, several weeks after the Department conducted verification, the Embassy of Turkey requested that the Department accept into the record 1994 financial statements of Piyale-Besin, which the Embassy of Turkey would provide. The Department rejected the Embassy's request and informed the Embassy that it was too late to accept new factual information for the record. Therefore, in accordance with section 776(b) of the Act, we have determined that an adverse inference is warranted in the selection of the facts otherwise available

for interest, G&A, and selling expenses. As adverse facts available, we calculated an estimate of Piyale-Besin's interest expenses by applying the effective interest rate incurred by Maktas during 1994 to the average amount of Maktas equity owned by Piyale-Besin during the year. We then added the calculated interest expense to the combined interest expense of Maktas and three affiliated parties. As in the preliminary determination, we excluded foreign exchange gains and adjusted the monthly interest expense amounts for inflation using the wholesale price index. For G&A expenses, we have no evidence regarding the level of G&A expense for a company doing business in Turkey, other than the information reported by Maktas. Therefore, we assumed that Piyale-Besin's G&A would be at the same level as Maktas. Lastly, for selling expenses, we treated the indirect selling expenses Maktas incurred on its sales to the United States as a direct selling expense and made a circumstance of sale adjustment (COS) for these expenses. (See Comment 2 below.)

Product Comparisons

For purposes of determining appropriate product comparisons to U.S. sales, we compared identical merchandise, or where there were no sales of identical merchandise in the home market to compare to U.S. sales, we made comparisons based on the characteristics listed in the Department's antidumping questionnaire, as had been applied in the preliminary determination, and in accordance with section 771(16) of the Act.

Level of Trade

As set forth in section 773(a)(1)(B)(i) of the Act and in the SAA accompanying the Uruguay Round Agreements Act, at 829-831, to the extent practicable, the Department will calculate normal values based on sales at the same level of trade as the U.S. sales. When the Department is unable to find sales in the comparison market at the same level of trade as the U.S. sale(s), the Department may compare sales in the U.S. and foreign markets at different levels of trade.

In accordance with section 773(a)(7)(A) of the Act, if sales at different levels of trade are compared, the Department will adjust the normal value to account for the difference in level of trade if two conditions are met. First, there must be differences between the actual selling functions performed by the seller at the level of trade of the U.S. sale and the level of trade of the

normal value sale. Second, the differences must affect price comparability as evidenced by a pattern of consistent price differences between sales at the different levels of trade in the market in which normal value is determined.

In implementing these principles in this case, the Department's first task was to obtain information about the selling activities of the producers/exporters. Information relevant to level of trade comparisons and adjustments was requested in our July 12, 1995 questionnaire, and in supplemental questionnaires sent on October 23, 1995, and January 22, 1996. We asked each respondent to establish any claimed levels of trade based on the selling functions provided to each proposed customer group, and to document and explain any claims for a level of trade adjustment.

Our review of these submissions shows that Maktas has identified levels of trade based on channels of distribution. In order to determine whether separate levels of trade actually existed within or between the U.S. and home markets, we reviewed the selling functions attributable to the customer groups claimed by Maktas. Pursuant to section 773(a)(1)(B)(i) of the Act, and the SAA at 827, in identifying levels of trade for directly observed (*i.e.*, not constructed) export price and normal value sales, we considered the selling functions reflected in the starting price, before any adjustments. Whenever sales within a customer group were made by or through an affiliated company or agent, we "collapsed" the affiliated parties before considering the selling functions performed. The selling functions and activities examined for each reported customer group were:

(1) The process used to establish the terms and conditions of sale ("sales process"); (2) whether the sale was produced to order or filled from normal inventory ("inventory maintenance"); (3) whether the customer was serviced from a forward warehouse ("forward warehousing"); (4) freight and delivery provided or arranged by the manufacturer/exporter ("freight"); (5) manufacturer provided or shared direct advertising or in-store promotion expenses ("advertising"); and (6) warranty service program or after-sales service provided by producer ("warranties").

In reviewing the selling functions reported by Maktas for each customer group, we considered all types of selling functions, both claimed and unclaimed, that had been performed. Where possible, we further examined whether the selling function was performed on a

substantial portion of sales within the relevant customer group. In analyzing whether separate levels of trade exist in this investigation, we found that no single selling function in the pasta industry was sufficient to warrant a separate level of trade (*see, Notice of Proposed Rulemaking and Request for Public Comments*, 61 FR 7307, 7348 (February 27, 1996)) (Proposed Regulations).

In determining whether separate levels of trade existed in or between the U.S. and home markets, the Department considered the level of trade claims of Maktas, but the ultimate decision was based on the Department's analysis of the selling functions associated with the customer groups reported by Maktas.

To the extent practicable, we compared normal value at the same level of trade as the U.S. sale. For Maktas, we compared the level of trade in the U.S. market to the sole home market level of trade and found them to be dissimilar in aggregate selling functions. Therefore, we established normal value at a level of trade different than the U.S. sales.

We then examined whether a level of trade adjustment was appropriate for Maktas when comparing its U.S. level of trade to its home market level of trade. However, because there was only a single home market level of trade, there was no basis for making a level of trade adjustment based on a demonstration of a consistent pattern of price differences between the home market levels of trade. The SAA states that "if information on the same product and company is not available, the adjustment may also be based on sales of other products by the same company. In the absence of any sales, including those in recent time periods, to different levels of trade by the exporter or producer under investigation, Commerce may further consider the selling experience of other producers in the foreign market for the same product or other products." SAA at 830. The alternative methods for calculating a level of trade adjustment for Maktas were examined. However, we do not have information which would allow us to examine pricing patterns based on Maktas's sales of other products at the same level of trade as the home market sales and there are no other respondents with the same levels of trade as those found for the home market sales of Maktas. Therefore, we were unable to calculate a level of trade adjustment for Maktas based on these alternative methods. Accordingly, Maktas's U.S. sales were compared to home market sales based solely on the product characteristics of the merchandise.

As noted below in the "Comparison Methodology" section of this notice, where there were distinct price differences within different levels of trade in the case of Maktas, we considered the customer category in creating the averaging groups for our comparisons.

Fair Value Comparisons

To determine whether sales of pasta by Maktas to the United States were made at less than fair value, we compared the Export Price (EP) to the Normal Value (NV), as described in the "Export Price" and "Normal Value" sections of this notice. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs for comparisons to weighted-average NVs.

As discussed in the *Preliminary Determination*, we determined that Turkey's economy experienced hyperinflation during the POI. Accordingly, to avoid the distortions caused by the effects of hyperinflation on prices, we calculated EPs and NVs on a monthly average basis, rather than on a POI average basis.

Export Price

We calculated EP in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchase in the United States prior to importation and Constructed Export Price (CEP) methodology was not otherwise warranted based on the facts of this investigation. We calculated EP based on the same methodology used in the preliminary determination. We made the following additional adjustment, based on information obtained at verification; we included export customs commission expenses as part of brokerage and handling expenses and made deductions for these expenses from the starting price (gross unit price).

Normal Value

In accordance with section 773(a)(1)(B) of the Act, we based NV on home market sales, or, where appropriate, on CV. We compared all home market sales to the COP, as described below. Where home market prices were above the COP, we calculated NV based on the same methodology used in the preliminary determination, with the following exceptions:

1. As discussed above, we applied facts available for selling expenses. As facts available, we treated the indirect selling expenses Maktas incurred on its sales to the United States as a direct selling expense and made a COS adjustment for these expenses. Indirect

selling expenses as reported were revised based on information obtained at verification.

2. We made an additional COS adjustment for bank charges incurred on U.S. sales, based on information obtained at verification.

3. We used revised home market short-term interest rates obtained at verification for computing imputed credit expenses for home market sales. For the month of August 1994, in which Maktas did not report a short-term borrowing rate, we used the average of the short-term borrowing rates for July and September 1994.

4. For sales made through Andas Gida Dagitim ve Ticaret A.S. (Andas), one of Maktas's two affiliated distributors in the home market, we made no deductions for inland insurance because it was found at verification that Andas did not actually incur any expense for inland insurance during the POI.

Cost of Production Analysis

As discussed in the preliminary determination notice, the Department conducted an investigation to determine whether Maktas made home market sales during the POI at prices below COP within the meaning of section 773(b) of the Act. Before making any fair value comparisons, we conducted the COP analysis described below.

A. Calculation of COP

We calculated the COP based on the sum of Maktas's cost of materials and fabrication for the foreign like product, plus amounts for home market selling, general and administrative expenses (SG&A) and packing costs in accordance with section 773(b)(3) of the Act. As noted in the *Preliminary Determination*, we used the respondent's reported monthly COP figures which were based on the current production costs incurred during each month of the POI. This was done in order to avoid the distortive effect of inflation on our comparison of costs and prices. We relied on the reported COP amounts with the following exceptions:

1. As discussed above in the *Facts Available* section, we applied facts available for interest and G&A expenses.

2. Based on information obtained at verification, we recalculated fixed overhead costs by including certain depreciation expenses. See, Comment 7 below.

3. We recalculated packing costs for certain products. See, Comment 6 below.

B. Test of Home Market Prices

As stated in the *Preliminary Determination*, we used the

respondent's adjusted monthly COP amounts and the wholesale price index published by the Government of Turkey's State Institute of Statistics to compute an annual weighted-average COP for the POI. We compared the adjusted weighted-average COP figures to home market sales of the foreign like product as required under section 773(b) of the Act, in order to determine whether these sales had been made at below-cost prices within an extended period of time in substantial quantities, and at prices that did not permit recovery of all costs within a reasonable period of time. On a product specific basis, we compared the COP to the home market prices, less any applicable movement charges, discounts, rebates, packing, and direct and indirect selling expenses.

C. Results of COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of sales during the POI of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because the below-cost sales were not made in substantial quantities within an extended period of time. Where 20 percent or more of sales of a given product were at prices less than the COP, we disregarded only the below-cost sales because such sales were found to be made within an extended period of time, in accordance with section 773(b)(2)(B) of the Act, and at prices which would not permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Where all sales of a specific product were at prices below the COP, we disregarded all sales of that product, and calculated NV based on CV, in accordance with section 773(a)(4) of the Act.

We found that, for certain pasta products, more than 20 percent of Maktas's home market sales were sold at below COP prices within the POI. Further, these sales did not provide for the recovery of costs within a reasonable period of time. We determined, therefore, that these below cost sales were made in substantial quantities within an extended period of time and we excluded these sales and considered the remaining above-cost sales in determining NV, if such sales existed, in accordance with section 773(b). For those pasta products for which there were no above-cost sales in the ordinary course of trade, we compared export prices to CV.

D. Calculation of CV

In accordance with section 773(e)(1) of the Act, we calculated CV based on

the sum of Maktas's cost of materials, fabrication, SG&A and U.S. packing costs as reported in the U.S. sales database. In accordance with sections 773(e)(2)(A), we based SG&A and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in the foreign country. Where appropriate, we calculated CV based on the methodology described above in the calculation of COP and added an amount for profit. For selling expenses, we used the weighted-average home market selling expenses.

Comparison Methodology

In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs for comparison to weighted-average NVs. The weighted averages were calculated and compared by product characteristics and, where appropriate, level of trade and/or price averaging groups. The SAA states that in determining the comparability of sales for inclusion within a particular average, "Commerce will consider factors it deems appropriate, such as * * * the class of customer involved," SAA at 842. The Department, not the respondents, determines which customers may be grouped together for product comparison purposes. *Cf.*, *N.A.R., S.p.A. v. U.S.*, 741 F. Supp. 936 (CIT, 1990). Based on the chain of distribution for the pasta industry, we have identified the following five distinct customer categories that represent different points in the chain of distribution: (1) Other pasta manufacturers (Pastificios) who purchase and resell pasta; (2) distributors; (3) wholesalers; (4) retailers; and (5) consumers. Each of these customer categories was defined by functions commonly associated with each category of customer in the areas of: (1) category of the supplier; (2) contractual relationship with the supplier; (3) exclusivity of sales territory; (4) exclusivity of product range; (5) sales practices; and (6) downstream customer category.

For Maktas, based on our analysis, we found that there were consistent price differentials among the customer categories in the home market. Therefore, the weighted-average prices were calculated and compared by product characteristics and by customer category.

Currency Conversion

The Department's preferred source for daily exchange rates is the Federal Reserve Bank. However, the Federal

Reserve Bank does not track exchange rates for the Turkish lira. Therefore, we made currency conversions based on the daily exchange rate from the Dow Jones Service, as published in the *Wall Street Journal*. As discussed below under Comment 12, we used the actual daily exchange rates for the final determination.

Verification

As provided in section 782(i) of the Act, we verified information provided by Maktas using standard verification procedures, including the examination of relevant sales and financial records, and selection of original source documentation containing relevant information.

Interested Party Comments

Comment 1 Use of Facts Available for Filiz: The petitioners argue that Filiz failed verification and, therefore, the Department should base its final determination on total adverse facts available. Specifically, the petitioners claim that Filiz significantly impeded the investigation and acted in an uncooperative fashion by: withholding its constant currency financial statements; failing to report materials costs in accordance with the Department's instructions; and refusing to provide consolidated financial information.

With respect to the constant currency financial statements, the petitioners argue that Filiz's submitted cost data is flawed due to the absence of adjustments which were observed by the verifiers in notes to these financial statements. Furthermore, the petitioners argue that Filiz was uncooperative by not allowing the constant currency financial statements as an exhibit and by failing to provide adequate explanations for concerns which were raised by the Department regarding the adjustments found in the statements.

Moreover, the petitioners claim that Filiz was instructed by the Department to report its material costs based upon current material prices, rather than a LIFO (last-in, first-out) methodology, but failed to do so. Finally, the petitioners assert that, insofar as Filiz failed to provide the Department with its consolidated 1994 financial information, the Department must use adverse facts available.

According to the petitioners, if the Department determines not to use total facts available, it must adjust Filiz's costs for errors and correct its final margin calculations to account for inaccuracies and omissions in the reported costs and expenses that the

Department discovered during verification.

Filiz urges the Department to reject the petitioners' assertion that facts available should be used for the final determination. Contrary to the petitioners' contention, Filiz asserts that it was entirely cooperative throughout the investigation and that its costs were fully verified. Specifically, Filiz claims that the constant currency financial statements are irrelevant to this investigation, that it reported material costs as reflected in its accounting system, and that it was an impossible task to provide the Department with consolidated financial information. Filiz suggests that the Department should use its submitted costs, adjusted for a few clerical errors, for the final determination.

Filiz argues that the Department did not need to utilize the constant currency statements because they are irrelevant to this investigation, insofar as they are adjusted for inflation, were prepared in accordance with international accounting standards, and reflect the consolidation of Filiz and Filiz Pazarlama (its affiliate).

In furtherance of its contention that the Department did not need to make use of the constant currency financial statements, Filiz argues that its independent accountants did not, in fact, perform an audit on Filiz's 1994 financial statement, but rather prepared a consolidated, inflation-adjusted report from the financial statements of the two corporations (Filiz and Filiz Pazarlama). Moreover, according to Filiz the adjustments which were noted in the constant currency statements were not required under Turkish tax law and all pertinent costs of production are captured in the financial statements which were submitted to the Department. Filiz suggests that the constant currency statements may not be used in this investigation since consolidated financial statements prepared in Turkey do not eliminate intragroup transactions, and argues that this renders such consolidated financial statements valueless for antidumping purposes since the Department holds that intragroup sales must be eliminated from a consolidated statement.

In addition, Filiz argues that it properly reported material costs in accordance with the Department's instructions and that the apparent underreporting described by the petitioners is merely a phenomenon caused by the high level of sophistication in Filiz's cost accounting system. According to Filiz, it properly replaced semolina costs with the average purchase price for the month

and used a LIFO inventory assumption thereafter. Filiz claims that it could not have taken any action to avoid the consequence discussed in the Department's verification report without severing the linkage between the company's normal accounting procedures and its reported costs. Therefore, Filiz argues that the Department should accept its reported costs as they reconcile to its cost accounting system and have been fully verified.

Finally, Filiz notes that it submitted the stand-alone financial statements of its parent company and argues that it is prohibited by Turkish tax law from consolidating the financial statements of the 40 or so affiliated parties in its group. Filiz maintains that it provided a group-wide interest expense ratio in a supplemental response and that this figure should be used by the Department for the imputation of any expenses. In the absence of any evidence of financial transactions between Filiz and its affiliated parties, Filiz asserts that there is no justification for amending its reported interest expenses.

DOC Position: Our decision to use facts available for the final determination is discussed in detail in the *Facts Available* section. In this section we respond to additional comments by Filiz which were not addressed therein.

Based upon our limited review of Filiz's constant currency financial statements, we agree with Filiz that they were adjusted for inflation, prepared in accordance with international accounting standards, and reflect the consolidation of Filiz and an affiliated distributor of pasta. However, none of these characteristics mitigate questions raised by the "major adjustments" we observed in a note to the financial statements. These adjustments, which were not recorded by Filiz in its submitted financial statements, cause us to question whether Filiz's reported conversion costs, G&A expenses, and financial expenses accurately reflect the company's production costs.

The fact that these consolidated financial statements were inflation-adjusted and prepared in accordance with international accounting standards does not reduce our concerns. Although Filiz claims that these adjustments arise from differences between Turkish tax law and international accounting standards, it does not explain why these differences were not taken into account during its preparation of the COP and CV data. As noted in the cost verification report, Price Waterhouse has stated that the differences between these two sets of accounting rules

(Turkish and international) are significant and, in fact, the constant currency financial statements would present a more accurate picture of Filiz's costs: "In general, lack of clearly defined commercial accounting principles and the predominance of tax law mean that reports prepared in accordance with Turkish law should be treated with extreme caution and the framework of fair presentation under IASC 'Standards Recommended by the International Accounting Standards Committee' is preferred." (*Doing Business in Turkey* by Price Waterhouse (1993), page 101.)

Additionally, Filiz's counsel stated during the public hearing that the financial statements used by Filiz to calculate its reported costs were prepared on a *cash* basis. The potential effect of calculating production costs on a cash basis, rather than an accrual basis, is especially significant due to the hyperinflation which existed in Turkey during 1994 (inflation totaled 121.24 percent, according to the IMF's *International Financial Statistics*).

The suggestion at verification by counsel for Filiz that the company's management and staff were unable to answer any questions about the constant currency statements because they were prepared by the company's auditors, is not supported by international accounting standards. As noted in the cost verification report, and as confirmed by Filiz, the constant currency statements were prepared in accordance with standards issued by the International Accounting Standards Committee (IAS). According to the IAS, "The management of an enterprise has the primary responsibility for the preparation of the financial statements of the enterprise." (*Framework for the Preparation and Presentation of Financial Statements*, International Accounting Standards Committee (July 1989) at paragraph 11.) Accordingly, it is reasonable to expect that Filiz personnel should have been able to answer the Department's questions about these statements. Moreover, Filiz management had ample opportunity to consult with its auditors, if they believed it was necessary to do so, for a proper understanding of the statements. Instead, Filiz chose to withhold the statements and explanations.

Additionally, Filiz appears to contradict itself when it argues that the constant currency financial statements do not eliminate intragroup transactions. Filiz claims that certain companies in Turkey produce consolidated financial statements in which "no elimination of intragroup

transactions or unrealized intercompany profits is possible." (*Doing Business in Turkey*, page 106.) We note, however, that if these statements were prepared in accordance with IAS standards, as claimed, then, such transactions would not have been included: "intragroup balances and intragroup transactions and resulting unrealized profits should be eliminated in full." (*Consolidated Financial Statements and Accounting for Investments in Subsidiaries*, International Accounting Standards Committee (April 1989) at paragraph 30.)

Regarding the LIFO methodology, the Department provided clear instructions to Filiz that the "valuation of materials used should be based upon current material prices." (See, July 12, 1995 questionnaire at D-13 and October 13, 1995 supplemental questionnaire at 3.) Furthermore, the respondent was instructed to contact the Department if there were any questions regarding its computation of costs.

With regard to Filiz's comments regarding its consolidated financial information, these issues became moot when the Department decided to base its final determination on total adverse facts available.

Comment 2 Use of Facts Available for Maktas: The petitioners argue that the Department should use total facts available for Maktas in the final determination because: (1) Maktas failed to provide the Department with critical information; (2) the Department made repeated requests for such information; (3) Maktas ignored these requests and provided no explanation why it would not provide the requested information; and (4) without this information, the Department cannot rely on or properly verify other information provided by Maktas. Specifically, petitioners note that Maktas refused to provide the Department with the 1994 financial statements of its major shareholder, Piyale-Besin, and the monthly financial statements of Mafer Ambalaj Sanayi ve Ticaret Ltd. Sti (Mafer), one of Maktas's affiliated companies. Without the financial statements of these two companies, the petitioners contend that the Department could not confirm the accuracy of the information provided in both the COP/CV and sales verifications, and, thus, the Department cannot calculate an appropriate normal value or perform accurate sales comparisons.

According to the petitioners, Maktas's failure to provide financial statements for Piyale-Besin results in a failure by the Department to verify whether Piyale-Besin has provided Maktas with any assistance or absorbed any costs related to administration, finance,

accounting, selling, marketing, or advertising of pasta. Additionally, the petitioners contend that without Piyale-Besin's financial information, the Department could not properly verify sales information for Maktas and its affiliates. In particular, the petitioners raise questions about Maktas's claim that, with the exception of Maktas's two affiliated distributors in the home market (*i.e.*, Tumgida Dagitim ve Ticaret Ltd. Sti. and Andas), none of the affiliated companies of Maktas, including Piyale-Besin, is engaged in the production or sale of pasta.

Moreover, the petitioners note that Maktas failed to provide the Department with monthly financial information for Mafer, which was requested in a supplemental questionnaire. Accordingly to the petitioners, without the monthly financial statements of Mafer, the Department could not verify Maktas's claim that Mafer is an inactive company. The petitioners in particular question whether Mafer, who is related to Maktas, has provided Maktas with any packaging materials for pasta which, if true, could result in discrepancies in the reported packaging costs.

In support of its position for application of total facts available, the petitioners cite *Grain-Oriented Electrical Steel From Italy*, where the Department concluded that "without verified COP/CV data" the Department has no basis to calculate an appropriate normal value and cannot perform sales comparisons. Therefore, the Department used total facts available in that case. Similarly, the petitioners urge the Department to use total facts available for Maktas in the final determination.

Furthermore, the petitioners argue that the Department should apply adverse facts available because the respondent failed to cooperate by not acting to the best of its ability to comply with a request for information. The petitioners claim that Maktas's refusal to provide the financial information of Piyale-Besin and Mafer demonstrates that Maktas has been uncooperative and has significantly impeded this investigation. Accordingly, the petitioners contend that the Department should select as facts available the highest margin contained in the petition for use in the final determination.

Maktas argues that the application of facts available is unwarranted. In the absence of significant intercompany transactions between Piyale-Besin and itself, Maktas claims that it would be improper to presume that expenses of Piyale-Besin and itself should be consolidated for purposes of margin calculation. In support of its argument,

Maktas cites *Final Determination of Sales at Less Than Fair Value: Ferrosilicon from Brazil*, 59 FR 732, 737 (January 6, 1994) (*Ferrosilicon from Brazil*).

According to Maktas, even though the Department was not able to examine the financial statements of Piyale-Besin, it had full access to all of Maktas's financial records from which to verify that there were no significant transactions between Piyale-Besin and Maktas. Maktas submits that, in fact, there was one small sales transaction between Piyale-Besin and Tumgida during the POI, which was reported in its response and subsequently excluded from the preliminary margin calculation. Maktas maintains that the Department, through its examination of Maktas, Andas, and Tumgida's sales records, verified that no other transactions between Piyale-Besin and the respondent occurred during the POI. Accordingly, Maktas argues that it should not be subjected to facts available by reason of not providing the financial statements of Piyale-Besin.

With respect to Mafer, Maktas maintains that Mafer was inactive during the POI. Mafer's 1994 year-end financial statement, which was provided to the Department in its November 13, 1995, submission, reports a small amount of gross sales and cost of services. Maktas asserts that such small financial figures are indicative of an inactive company. Therefore, Maktas contends that it should not be subjected to any facts available by reason of not providing the monthly financial statements of Mafer.

DOC Position: We disagree with the petitioners' claim that we should use total adverse facts available for Maktas in the final determination. With respect to Piyale-Besin, we do not believe that Maktas's refusal to provide Piyale-Besin's financial statements warrants the application of total adverse facts available. However, as discussed above in the *Facts Available* section of the notice, we conclude that the application of facts available for certain elements of cost and sales data (*i.e.*, interest, G&A and selling expenses) is appropriate for our final determination.

Regarding the petitioners' reliance on *Grain-Oriented Electrical Steel From Italy* in support of its request for total facts available, we note that circumstances as presented in that case are distinct from those in this investigation. Unlike in *Grain-Oriented Electrical Steel From Italy*, there were no significant problems found in Maktas's reported materials, labor, and overhead costs. While it is true that Maktas's failure to provide the financial

statements of Piyale-Besin raises questions as to the accuracy of certain reported expenses, Maktas was able to substantiate much of the remaining information contained in its COP/CV database. Therefore, the application of total adverse facts available would be inappropriate.

Furthermore, with respect to the petitioners' assertion that without access to Piyale-Besin's financial statements we could not verify Maktas's claim that Piyale-Besin is not engaged in the sale of pasta, we refer to the Dun and Bradstreet "Business Information Report" (BIR) on Piyale-Besin which we independently obtained for the record on January 24, 1996. The BIR states that Piyale-Besin is an "investment company" with five employees, which supports Maktas's contention that Piyale-Besin is only a holding company. Further, the BIR lists "affiliates" of Piyale-Besin. Based on information on the record, we are satisfied that none of the active affiliates listed in the BIR, other than Maktas, Tumgida and Andas, are engaged in the production or sale of pasta. Thus, we believe that it is reasonable to conclude that Maktas has completely reported its sales of pasta.

Turning to Maktas's argument, we note that Maktas's reliance on *Ferrosilicon from Brazil* in support of its position that consolidation of interest expense (or any other expenses) is required "only after it has been established that the holding company and the respondent have significant financial transactions with each other" is misplaced. In that case, the Department clearly stated its position that "the cost of capital is fungible, therefore, calculating interest expenses based on consolidated statements is the most appropriate methodology." *Id.* at 732. With respect to Mafer, we agree with Maktas that the evidence on the record supports its claim that Mafer is inactive.

Comment 3 Level of Trade: Comment 3A Whether the Department Should Consider the Class of Customer and/or Channel of Distribution in Determining Whether Separate LOTs Exist: The petitioners and Maktas argue that the level of trade (LOT) methodology adopted by the Department in its preliminary determination is flawed and should be substantially revised in the final determination. Specifically, the petitioners and Maktas assert that the Department improperly focused solely on selling functions and ignored the customer groups and/or channels of distribution identified by each respondent as potentially different points in the chain of distribution.

The petitioners assert that it has been long recognized by the Department and the Court of International Trade (CIT) that LOTs reflect "an attempt to reconstruct prices at a specific, 'common' point in the chain of commerce * * *"), *Smith Corona v. United States*, 713 F.2d 1568, 1571-72 (Fed. Cir. 1983). Claiming that the new statute, the SAA, and the Department's Proposed Regulations do not define LOT or establish criteria for determining separate LOTs, the petitioners argue that the fundamental concept of LOT has not changed under the new statute. Therefore, they each contend that the definition of LOT still reflects the Court of Appeals' and the Department's longstanding interpretation of that term (i.e., that LOT refers to different points in the chain of distribution). (See, e.g., Import Administration Policy Number 92/1 at 2 (July 29, 1992), ("In asking for LOT information, the Department is trying to determine where in the distribution chain the respondents' customer falls (end user, distributor, retailer).") *Certain Carbon and Alloy Steel Wire Rod from Canada*, 59 FR 18,791, 18,794 (April 20, 1994), ("Comparisons are made at distinct, discernable levels of trade based on the function each level of trade performs, such as end-user, distributor, and retailer.")).

Although the petitioners recognize that the new statute contains certain refinements to the LOT concept, the petitioners argue that the amendments to the law made by the URAA did not alter the fundamental definition of LOT as noted above. Consequently, they argue that the starting point for determining whether different LOTs exist is whether the sales take place at different points in the chain of distribution. The petitioners cite *Certain Stainless Steel Wire Rods from France: Preliminary Results of Antidumping Duty Administrative Review*, 61 FR 8915, 8916 (March 6, 1996) (*French Rod*) as a recent case where, in analyzing potential LOTs, the Department relied upon the distinctions the respondents identified between channels of distribution. ("Respondents reported two channels of distribution in the home market * * *. We examined and verified the selling functions performed in each channel * * *. Overall we determine that the selling functions between the two sales channels are sufficiently similar to consider them one level of trade in the home market.")), *French Rod*, 61 FR 8916. Therefore, the petitioners assert that the Department should consider the potential LOTs identified by the

respondents, in terms of channels of distribution or customer groups, in determining whether separate LOTs exist.

DOC Position: While neither the Act nor the SAA provides an explicit definition of LOT or establishes criteria for determining whether separate LOTs exist, the SAA does specify that the Department requires evidence that "different selling activities are actually performed at the allegedly different levels of trade" before recognizing distinct LOTs. SAA at 829. This is confirmed again by the SAA in the discussion of the required pattern of price differences for the LOT adjustment, where it states that "where it is established that there are different levels of trade based on the performance of different selling activities * * *," Commerce will make a LOT adjustment. SAA at 830. Thus, the Act and the SAA have identified selling activities as a key factor in determining LOTs; however, the statute does not require that this analysis begin and end with the selling activities of the producer/exporter.

In the preliminary determination, the Department stated that it would continue to examine its policy for making LOT comparisons and adjustments. After reviewing the comments we received on this issue as well as the Department's recent practice for determining the existence of LOTs, we have determined that certain modifications to the LOT methodology used in the preliminary determination are warranted. As described in the "Level of Trade" section of this notice, above, in order to determine whether distinct LOTs exist, we have examined the full array of selling functions provided to each of the customer groups alleged by Maktas. As noted in Comment 3C below, we believe that this approach will allow us to consider all types of selling functions, both claimed and unclaimed, that had been actually performed in determining the LOT and avoid instances where a single selling function difference on individual sales transactions warrants the finding of a distinct LOT. Finally, by reviewing the selling functions within each of the alleged customer groups, we expect that the analysis will capture any possible differences in the mix of selling activities provided for each customer group.

Comment 3B Whether the Selling Functions of a Respondent Should be Considered in Determining Whether Separate LOTs Exist: Maktas argues that the functions or services performed by the respondents are not determinative of whether different LOTs exist and should not be taken into consideration in the

Department's LOT analysis. Maktas asserts that Section 773(a)(7)(A) of the new statute provides for a *LOT adjustment* "if the difference in LOT * * * involves the performance of different selling activities." Accordingly, Maktas asserts that the selling activities of the respondent cannot be part of the definition of LOT and only become relevant *after* it is determined that separate LOTs, in fact, exist. Therefore, Maktas argues that the question of whether the seller performs different selling functions is only relevant in determining whether a LOT adjustment is warranted.

The petitioners argue that the SAA is clear in stating that selling functions are intended to be an integral part of establishing whether different LOTs exist. ("Commerce will grant {LOT} adjustments only where: (1) There is a difference in the LOT (i.e., there is a difference between the actual functions performed by the sellers at the different levels of trade in the two markets). SAA at 829. The petitioners contend that the SAA's reference to a "difference between the *actual functions performed*" clearly implies that a distinction in LOT should not be made without a finding of functional differences. In addition, the petitioners claim that the SAA implies that something more than a mere reference to the class of customer would be needed to identify separate LOTs { "[n]ominal reference to a company as a 'wholesaler,' for example, will not be sufficient" in determining LOT}. SAA at 829. Therefore, the petitioners argue that a selling function analysis is relevant in determining whether separate LOTs exist and that the Department should continue to examine the selling functions of the respondents in its final determination. The petitioners cited *French Rod* as a recent case where the Department examined the selling activities of the respondent in determining whether there were separate LOTs ("In order to identify LOTs, the Department must review information concerning the selling functions of the exporter," *French Rod*, 61 FR 8916 (March 6, 1996).

DOC Position: We agree with the petitioners. The SAA states that, "Commerce will require evidence from the foreign producers that the functions performed by the sellers at the same level of trade in the U.S. and foreign markets are similar, and that different selling activities are actually performed at the allegedly different levels of trade * * *. On the other hand, Commerce need not find that the two levels involve no common selling activities to

determine that there are two levels of trade." SAA at 159, and *Cf.*, *Proposed Regulations* at 7348. Thus, as noted in Comment 3A above, information about the selling activities of the producer/exporter is essential to the identification of LOTs.

Comment 3C Whether the Department Should Reject The Four Selling Function Coding System Used in the Preliminary Determination: In the event the Department determines it is appropriate to define LOTs based on selling function distinctions, the petitioners argue that the LOT coding methodology used in the preliminary determination should be rejected because it is inconsistent with law and commercial reality. First, the petitioners assert that the Department's LOT coding system resulted in a finding that a difference in any one selling function is sufficient to define a separate LOT. The petitioners argue that this methodology is at odds with the Department's Proposed Regulations which specifically reject the notion that a difference in one selling function alone would be sufficient to define an entirely separate LOT in most instances. *Cf.*, *e.g.*, *Notice of Proposed Rulemaking and Request for Public Comments*, 61 FR 7308, 7348 (February 27, 1996) (*Proposed Regulations*) at 7348.

Second, the petitioners argue that the selling function categories used in the preliminary determination are unreasonable and overly narrow. Given the different combinations of the four selling function categories used in the preliminary determination, there were 16 possible LOT combinations in each market. The petitioners assert that because LOT is used as a matching criterion, the overly-narrow LOT segments resulted in large amounts of home market sales not being used to determine whether dumping was occurring.

Finally, the petitioners argue that the extent or cost of the function provided should not be used to distinguish selling activities. The petitioners assert that while expenses for services to some customers may be more than to others, the expense difference may not reflect a true difference in selling activities or services, but instead represent the costs associated with sales shipped in larger or smaller quantities or to different geographic locations. In addition, the petitioners note that because the Department did not request data concerning the degree to which any selling activity is performed, there is no basis for the Department to perform such an analysis in this case.

DOC Position: In the preliminary determination, the Department stated

that it would continue to examine its policy for making LOT comparisons and adjustments. After reviewing the comments we received on this issue as well as the Department's recent practice for determining the existence of separate LOTs, we agree with the petitioners that certain modifications to the LOT methodology utilized in the preliminary determination are warranted.

Specifically, we find that: (1) The preliminary coding methodology measured LOTs based on the existence of individual selling functions, rather than basing LOTs on the collective array of selling activities performed by the seller; and (2) the coding system led to the result that a difference in just one selling function on any given sale necessarily justified a difference in LOT. Although neither the Act nor the SAA provide explicit guidelines for identifying LOTs, the preamble to the Proposed Regulations reflects our practice and states that "small differences in the functions of the seller will not alter the level of trade."

Proposed Regulations at 7348. Although the Proposed Regulations provide that a single function may be so significant as to constitute the existence of a separate LOT, we have determined that no single selling function in the pasta industry warrants the finding of a separate LOT. Therefore, as noted in the "Level of Trade" section of this notice, above, we have revised the LOT methodology used for the final determination. In order to determine whether separate LOTs existed within or between the U.S. and home markets, we have reviewed the full array of selling functions, in the aggregate, provided to each of the customer groups alleged by Maktas. In addition, because we have determined that no single selling function in the pasta industry is so significant as to alter the LOT, we have no longer considered a single difference in selling function to justify the finding of a separate LOT.

Comment 3D Which Selling Functions Should be Considered in Determining Whether Separate LOTs Exist: In lieu of the LOT methodology adopted in the preliminary determination, the petitioners argue that the Department should examine the full array of selling functions, in the aggregate, provided to each potential LOT to determine whether separate LOTs exist. The petitioners assert that this methodology was adopted by the Department in the *French Rod* case where the Department examined the collective array of selling activities performed for each channel of distribution and found that minor differences between the home market

sales examined did not justify segmenting the sales into different LOTs ("we found that the two sales channels provided many of the same or similar selling functions including: strategic planning, order evaluation, warranty claims, technical services, inventory maintenance, packing and freight and delivery. We found some differences between the two channels of trade in advertising, customer contacts, computer systems (order input/invoice system), and administrative functions. Overall, we determine that the selling functions between the two sales channels are sufficiently similar to consider them as one level of trade in the home market"). 61 FR at 8916.

Specifically, the petitioners assert that the following selling functions are relevant to the Department's LOT analysis for the U.S. and Italian pasta markets: (1) Freight and delivery; (2) customer sales contacts; (3) advertising; (4) technical services; (5) warranties; (6) inventory maintenance (pre-sale); (7) post-sale warehousing; and (8) administrative functions. In addition, the petitioners contend that in performing the selling function analysis, the Department should ensure that the selling activity is consistently applied to all, or at least the vast majority, of customers at each potential LOT identified. The petitioners claim it would be inappropriate to consider a selling function applicable to a particular LOT where the function was not provided to all customers, or on some but not all sales.

Finally, the petitioners argue that the Department should not attempt to define LOTs based on the following factors because they do not relate to differences in selling activities:

(1) *Quantities/Volumes Sold:* The petitioners assert that the SAA states that differences based on quantities sold are not a legitimate basis for defining LOTs or LOT adjustments. SAA at 830.

(2) *Geographical Location of the Customer:* The petitioners claim that the fact that two customers may be located in physically distinct geographical areas does not, in and of itself, demonstrate that different LOTs exist.

(3) *Which Selling Entity Performs the Functions:* The petitioners assert that whether a selling function is performed by an unaffiliated sales agent, an affiliated sales agent or the manufacturer, the same function is provided and the costs to the seller are the same. Therefore, the petitioners argue that the Department should not differentiate LOT based on which entity performs the selling function.

(4) *Commissions:* The petitioners argue that commissions are merely

payments to an agent to perform the same function that would otherwise be incurred by the manufacturer directly. Accordingly, the petitioners argue that commissions are an invalid basis to distinguish LOT.

(5) *Discounts and Rebates:* The petitioners argue that discounts and rebates are pricing mechanisms, not selling functions or activities, and that the presence of a discount or rebate has no bearing on the point in the chain of distribution at which the transaction occurs. In addition the petitioners contend that the dumping calculations recognize that discounts and rebates are a function of price by deducting them as "price adjustments" rather than "COS adjustments." *Proposed Regulations* at 7381. For all of these reasons, the petitioners argue that discounts and rebates should not be included as a selling function distinction for LOT purposes.

(6) *Distinctions Between Customers Based on Price:* The petitioners assert that the statute does not suggest that LOT distinctions can be based on price differentials. (For a further discussion of this issue, see Comment 4D below.)

DOC Position: We agree with the petitioners that the Department's LOT analysis should consider the full array of selling functions in the aggregate, and ensure that the selling function was consistently applied to at least the vast majority of customers and sales in each LOT. As stated in the "Level of Trade" section of this notice, above, no single selling function in this industry warranted a separate LOT and, wherever possible, we examined whether the selling function was performed on a substantial portion of sales within the customer groups reported by Maktas. A company specific description of the selling functions assigned to the level(s) of trade for Maktas is provided in Comment 3E, below. In determining whether a selling function was applicable to a substantial portion of customers in the reported customer group, we relied on Maktas's narrative responses and sales transaction data, as well as information obtained during verification.

Section 773(a)(1)(B)(i) of the statute states that normal value will be based on "the price at which the foreign like product is first sold * * * and to the extent practicable, at the same LOT as the export price or constructed export price." The SAA specifies that normal value will be calculated "at the same LOT as the constructed export price or the starting price for export sales." SAA at 827. Therefore, in identifying LOTs for export price and normal value sales, we considered the selling functions

reflected in the starting price, before any adjustment, for the customer group reported by Maktas.

We agree, in part, with the petitioners regarding the types of selling functions that should or should not be considered in defining LOTs. The selling functions to be considered in establishing whether separate LOTs exist were based on the nature of the pasta industry. The five selling functions used by the Department to establish the LOTs in this investigation are reflective of the functions and activities incurred in the sale of pasta to the U.S. and in the home market. These functions have been identified in the "Level of Trade" section of this notice, above. However, we disagree with the petitioners that technical services or post-sale warehousing should be included in the selling function analysis; these activities did not occur in the pasta industry. Regarding the other selling functions, we were generally in agreement with the petitioners' recommendations regarding which selling functions to include in determining LOTs.

Comment 3E Company-Specific Analysis of Selling Functions: The petitioners argue that a review of the selling functions undertaken by Maktas to the U.S. and home market customers, based on the collective approach to analyzing selling functions utilized in *French Rod*, shows that there are few, if any, functional differences between the U.S. and home market sales of pasta. Therefore, petitioners claim that the Department should determine that different LOTs do not exist for Maktas within the U.S. or Turkish markets or between the U.S. and Turkish markets.

Insofar as the Department has conducted its own selling function analysis to determine whether separate LOTs exist, many of the arguments presented by the petitioners are now moot and, therefore, have not been specifically addressed. Therefore, the Departmental Position for each respondent reflects the results of the Department's selling function analysis. The selling function analysis utilized by the Department is described in the "Level of Trade" section of this notice, above.

The petitioners argue that Maktas's request for differentiating LOTs on must be rejected for two reasons: (1) Maktas has not demonstrated which sales are in which channel of distribution identified, or even that all sales within a channel are shipped as described, and (2) the selling functions examined by the Department provide no basis for distinguishing home market LOTs. Further, the petitioners argue that an examination of the selling functions

used by the Department at the preliminary determination provides no basis to find different LOTs in the U.S. or home market. Therefore, the petitioners argue that the Department should continue to compare U.S. sales to all home market sales for the final determination.

DOC Position: We agree with the petitioners, in part. Based on our own analysis of the selling functions performed by Maktas, as described in the "Level of Trade" section of this notice, above, we found that all U.S. and home market sales were made at a single LOT. However, we determined that the U.S. LOT was different from the home market LOT.

Maktas reported one customer group in the U.S. market. For the home market, Maktas reported seven customer groups. We found these customer groups to be similar in that Maktas performed the following selling functions for certain customer groups: sales process, inventory maintenance, forward warehousing, freight, advertising and warranties. We found these customer groups to be different in how Maktas performed forward warehousing for certain customer groups. Overall, we determined the selling functions between these seven customer groups to be sufficiently similar to consider them one LOT.

We then compared the LOT in the U.S. market to the home market LOT and found the selling functions performed for certain customer groups in the areas of freight, forward warehousing, and warranties to be similar. We found the selling functions performed for certain customer groups in the areas of sales process, inventory maintenance, forward warehousing, and advertising to be dissimilar. Overall, these factors warrant finding the U.S. and home market sales to be made at different LOTs.

Comment 3F LOT Adjustments: To the extent the Department finds LOT distinctions between U.S. and home market sales, the petitioners argue that there is no justification for a LOT adjustment for any of the respondents in this investigation. Specifically, the petitioners assert that Section 773(a)(7)(A) of the Act states that LOT adjustments are permissible only to the extent that it has been *demonstrated* that the difference between EP and normal value reflects differences in LOTs involving the performance of different selling functions and "a pattern of consistent price differences between sales" at the different LOTs in the home market. In addition, the petitioners assert that the SAA states that "if a respondent claims an

adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment." SAA at 829. Therefore, the petitioners argue that by law, the respondents bear the burden of demonstrating entitlement to a LOT adjustment and that Maktas has not met this burden.

DOC Position: We agree with the petitioners, in part. As described in the "Level of Trade" section of this notice, above, we found no basis for making a LOT adjustment for Maktas. In light of the fact that we did not make a LOT adjustment, we regard the petitioners' argument concerning the burden on respondent to demonstrate entitlement to a LOT adjustment to be moot.

Comment 4A Whether to Take Customer Category into Account in Creating the Weighted-Average Groups used for Product Comparisons: The petitioners argue that neither the law nor the facts of this investigation support making product comparisons based on customer classes unless it is demonstrated that the difference between customer classes reflect a difference in the LOT. Citing Section 773(a)(1)(B) of the Act, the petitioners contend that normal value is defined based on price comparisons reflecting the same physical characteristics and, where possible, the same LOT, as the export or constructed export price. Therefore, the petitioners assert that absent a finding of different LOTs among the various customer categories, the Department cannot make product comparisons based on customer categories or channels of distribution.

Although the petitioners recognize that the SAA refers to "the class of customer involved" as a factor that the Department may consider in creating averaging groups, the petitioners contend that the Department's Proposed Regulations emphasize that the use of averaging groups was intended to apply only to U.S. prices, and was not meant to affect the calculation of normal value. ("In applying the average-to-average method, the Secretary will identify those sales* * * to the United States that are comparable, and will include such sales in an "averaging group." "An averaging group will consist of subject merchandise* * * that is sold to the United States at the same LOT. In identifying sales to be included in an averaging group, the Secretary also will take into account, where appropriate, the region of the United States in which the merchandise is sold* * *"). *Proposed Regulations* at 7386 (section 351.414(d)). (Emphasis added).

The petitioners contend that normal value is still defined in the law based on price comparisons reflecting the same product characteristics and, where possible, the same LOT. Therefore, the petitioners argue that the Department does not have the authority under the new statute to subdivide home market sales into separate groups based on customer classes unless it is first demonstrated that the difference between customer classes reflects a difference in LOT. The petitioners claim that to do otherwise would effectively be using the product averaging concept to re-define normal value.

Finally, the petitioners argue that the Department's recent practice of considering either the class of customer or the channel of distribution as a factor in the averaging group without first finding distinct LOTs is unlawful and inconsistent. Specifically, the petitioners assert that in *Polyvinyl Alcohol* the Department created product averaging groups based on customer categories stating that it found "significantly different prices, depending on the customer category." 61 FR at 14070. The petitioners contend that in *French Rod* and *Kiwifruit* the Department relied on channels of distribution, rather than customer categories, in determining the averaging groups and further identified no pricing distinctions between the channels examined. In all three cases the petitioners assert that the Department made no statutory citations and provided little or no explanation for its actions.

DOC Position: We disagree with the petitioners. Section 777A(d)(1)(A)(i) of the Act states that the Department will determine whether the merchandise is being sold in the United States at less than fair value "by comparing the weighted average of the normal values to the weighted average of the export prices (and/or constructed export prices) for comparable merchandise." In addition, the SAA specifies that in order to ensure that the weighted-averages are meaningful, "Commerce will calculate averages for comparable sales of subject merchandise" sold in both the U.S. and foreign markets. "In determining the comparability of sales for inclusion within a particular average, Commerce will consider factors it deems appropriate, such as * * * the class of customer involved." SAA at 842. See also, *Proposed Regulations* at 7349.

Although we agree with the petitioners that the Proposed Regulations refer to the term "averaging groups" only in the context of U.S. sales, we do not agree with the petitioners' assertion that the use of

averaging groups was intended to apply only to U.S. prices, and was not meant to affect the calculation of normal value. As noted above, the statute directs the Department to compare weighted average normal values to weighted-average export prices/constructed export prices. In addition, the SAA states that for inclusion within a particular average, the Department will consider factors it deems appropriate. Therefore, in order to ensure a fair comparison, customer category is a factor that may be used in both the calculation of export price and/or constructed export price and normal value.

As noted in the "Comparison Methodology" section of this notice, above, and Comment 4B, below, it is the responsibility of the Department, not respondents, to determine which customers may be grouped together for product comparison purposes. Accordingly, consistent with the SAA and our practice in *Polyvinyl Alcohol*, we have relied on the revised customer categories in calculating the weighted-average values used for sales comparisons in instances where: (a) We found that distinct customer categories existed, and (b) we determined that there was a consistent and uniform pattern of pricing differences among the customer categories. (For a further discussion on price averaging and the calculation of the weighted average prices for each respondent, see the "Comparison Methodology" section of this notice, above.)

Comment 4B Whether to Accept the Customer Classifications or Channels of Distribution Alleged by the Respondents: The petitioners argue that in the event the Department determines it is appropriate to create averaging groups based on customer categories or channels of distribution, it is up to the Department, not the respondents, to determine which customers may be grouped together. *Timken Co. v. United States*, 630 F. Supp. 1327 (Ct. Int'l Trade 1986) (the Court held that the Department is obligated to choose the home market models for comparison and may not delegate this role to respondents). In addition, the petitioners cite to the SAA in support of their contention that the Department should not accept a respondent's "nominal reference to customer classes" without requiring evidence of actual class differences based on the selling functions of the respondent. SAA at 829. To the extent the Department rejects reliance on selling functions as a means of distinguishing customer categories, the petitioners argue that the Department should, at a minimum,

determine whether different customers exist at different points in the chain of commerce. Citing *PETs from Singapore*, the petitioners assert that it is not the Department's practice to accept, without question, the respondents' characterizations of its customer classes as the basis for determining its product comparison groups. (See, e.g., *Final Determination of Sales at Less Than Fair Value: Certain Portable Electric Typewriters from Singapore*, 58 FR 43334, 43338-43339 (August 16, 1993) (*PETs from Singapore*) (stating that all retailers had the same function and, thus, no distinction between the claimed customer categories was justified.)

DOC Position: We agree with the petitioners that it is the responsibility of the Department, not respondents, to identify which customers may be grouped together for product comparison purposes. This has been our consistent practice and policy. Cf., *N.A.R., S.p.A. v. United States*, 741 F. Supp. 936 (Ct. Int'l Trade 1990). (Insofar as a foreign manufacturer, given the opportunity of selecting which product comparisons should be used, would most likely make a choice that is most advantageous to itself, the identification of product comparisons are made by the Department.) See also, *United Engineering & Forging v. United States*, 779 F. Supp. 1375, 1381 (Ct. Int'l Trade 1991); See *Final Determination of Sales at Less than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products and Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands*, 58 Fed. Reg. 37199, 37202 (July 9, 1993).

Therefore, as noted in the "Comparison Methodology" section of this notice, above, it is the responsibility of the Department, not respondents, to determine which customers may be grouped together for product comparison purposes. Based on the chain of distribution for the pasta industry, we reclassified the customer groups identified by Maktas into two distinct customer categories representing distinct points in the chain of distribution. For a further discussion, see the "Comparison Methodology" section of this notice, above.

Comment 4C Whether to Use Customer Category or Channel of Distribution in Defining the Averaging Groups used for Product Comparisons: The petitioners argue that to the extent a respondent has claimed distinctions in home market sales based on channels of distribution, the Department should reject these distinctions and instead rely on customer categories in creating the product comparison groups. The petitioners assert that nothing in the

new statute, the SAA, or the Proposed Regulations permits the Department to consider channels of distribution in making product comparisons. As case precedent for their position, the petitioners cite *PETs from Singapore* where the Department explicitly rejected the respondent's request that it rely on channels of distribution as a comparison criteria, finding no support in the law for such an approach. ("Furthermore, channel of distribution is not a proper merchandise comparison criterion * * * there is no regulatory basis for comparing identical channels of distribution.") *Id.* at 43338.

DOC Position: We agree with the petitioners that channels of distribution are not an appropriate basis for creating product averaging groups. As noted in Comment 4A above, the SAA states that in determining which sales to include within a particular average, "Commerce will consider factors it deems appropriate, such as the physical characteristics of the merchandise, the region of the country in which the merchandise is sold, the time period, and the class of customer involved." SAA at 842. See also, *Proposed Regulations at 7349*. The SAA does not contemplate the use of channels of distribution as a basis for creating an averaging group.

In addition, it has been the Department's past policy and practice, as outlined in Import Administration Policy Bulletin Number 92/2 ("Matching at Levels of Trade"), to consider the customer category, not channel of distribution, to determine whether the respondent's customers exist at distinct points in the chain of distribution (e.g., end-user, distributor, retailer). Therefore, we have not relied on Maktas's reported channels of distribution in creating the weighted-average prices used for product comparisons in this final determination.

Comment 4D Whether the Department Can Rely on Price Differences as a Method for Distinguishing Customer Categories: If the Department determines it is not necessary to establish that there are different selling functions as a means of distinguishing customer categories, the petitioners argue that the Department should not define customer categories based on price distinctions as it did in *Polyvinyl Alcohol*. The petitioners assert that if price distinctions were all that was needed to define customer category, respondents would have a "field day" manipulating the dumping law by grouping its low-priced home market sales together and requesting that the Department compare its U.S. sales to this group of low-priced sales. Although

the petitioners recognize that price distinctions may be relevant to a determination of whether product comparisons should be segmented by customer category, the petitioners argue that prices themselves cannot be the sole criterion. In order to establish that there are separate customer categories, the petitioners argue that the Department must first determine that different customers exist at different points in the chain of commerce.

DOC Position: We agree with the petitioners that price distinctions can not be a basis for determining the existence of customer categories. As noted in the "Comparison Methodology" section of this notice and Comment 4A, above, in order to determine whether the customer groups proposed by Maktas actually represented different customer categories, we considered whether the alleged customer groups represented distinct points in the chain of distribution. Therefore, price distinctions were not considered a relevant factor in defining the existence of customer categories. The existence of consistent price differences, however, was considered in determining whether customer categories should be taken into consideration in creating the product averaging groups.

Comment 5 Cost Test: Maktas states that the Department should conduct its 80/20 cost test on a monthly basis rather than over the POI. Maktas argues that the use of the POI to determine the extent of below cost sales for each control number sometimes results in normal values that are based on only a few above-cost sales. According to Maktas, the comparisons involving these above-cost sales "drive" the dumping margins for certain control numbers in certain months. Maktas refers to these above-cost sales as outliers and argues that the Department should delete the outliers from the sales database in performing its margin calculations. Furthermore, Maktas claims that, in a hyperinflationary economy, the Department has the discretion to determine that a single month is an extended period of time and, therefore, the 80/20 cost test should be conducted on a monthly basis for this investigation.

The petitioners argue that the methodology used by the Department to determine whether sales should be disregarded is in accordance with the law. They state that the statute and the SAA direct the Department to use a below-cost test that includes the full POI and argue that the Act does not provide for an exception from this rule for hyperinflationary economies.

Accordingly, the petitioners argue that the Department properly used the POI to determine whether it should disregard respondents' below-cost sales. The petitioners also claim that the Department's use of the few remaining above-cost sales as a basis for normal value in certain months is in accordance with the law. According to the petitioners, the SAA directs the Department to resort to constructed value only if there are no above-cost sales in the ordinary course of trade in the foreign market under consideration.

DOC Position: We disagree with Maktas. The Department's practice is to apply the 80/20 test on a POI basis since the SAA directs us to "examine below-cost sales occurring during the entire period of investigation or review, as opposed to a shorter time period." Although Maktas argues that the Department has the discretion to determine that, in a hyperinflationary economy, we should conduct the 80/20 test on a single month, it has not provided any basis as to why we should depart from our general practice of applying the cost test over the entire POI. The only reason offered by Maktas is a belief that such a deviation might reduce the effect of so-called "outlier sales." Moreover, section 773(b)(2)(B) of the Act defines the extended period of time in which we are to conduct the cost test as "normally one year, but not less than six months."

Finally, despite the concerns raised by Maktas with regard to basing normal value on "outliers," the petitioners are correct in stating that the law requires us to use any sales found to be above cost in the ordinary course of business before resorting to CV as the basis for normal value.

Comment 6 Indexing of Costs: Maktas objects to the Department's use of an index to restate submitted monthly production costs. While the use of such an index to adjust costs may smooth out the effects of inflation, Maktas argues that the law's focus on exporter behavior precludes the Department from performing such an adjustment. Additionally, Maktas contends that the Department has not determined whether prices of below-cost sales allow for the recovery of costs in a reasonable period of time.

The petitioners did not comment on this issue.

DOC Position: We disagree with Maktas and have calculated the company's COM following the same methodology as used in our preliminary determination. (See, memorandum from William H. Jones and Michael P. Martin to Christian B. Marsh, dated December 13, 1995.) The Department's normal

practice in non-hyperinflationary cases has been to calculate a single weighted-average COM, mitigating the effects of monthly cost fluctuations. Such fluctuations may result from the timing of expenses and production runs. We have determined that, where the data permits, it is also appropriate to calculate an annual weighted-average cost in hyperinflationary cases. However, since the value of the local currency (Turkish lira) changed significantly during the POI, the nominal value of costs incurred at different times are not comparable. As a result, it is necessary to restate the average cost into equivalent terms.

To calculate a meaningful, period-average COM, it was first necessary to restate each month's cost of manufacturing in equivalent terms. After each month's cost of manufacturing was restated in equivalent terms, they were added together and divided by the quantity produced during the POI to obtain an annual weighted-average COM expressed in period-end currency. Because this figure is stated in the currency value at the end of the POI, it is necessary to apply the index again to restate it in each month's respective currency value. The resulting monthly COM amounts are used as the basis for monthly COP and CV figures.

Finally, we disagree with Maktas's assertion that we failed to perform the recovery of cost test, as required under section 773(b)(2)(D) of the Act. We compared each home market price to the weighted-average per-unit production costs stated in the value of the month of sale. This approach properly tests whether the prices of below-cost sales allow for the recovery of costs in a reasonable period of time.

Comment 7 Packing Costs: Maktas argues that its reported packing costs should be adjusted for inflation to avoid understating packing costs for certain home market sales, inflating normal values and increasing dumping margins. Maktas suggests that this problem can be solved by removing certain small-volume products from the sales database. Alternatively, Maktas argues that the Department should use production information on the administrative record to identify products which were not produced in every month and that the Department should index the reported packing costs from previous months by means of the wholesale price index.

The petitioners argue that the Department should not attempt to adjust Maktas's reported packing costs as there is no consistent pattern for the discrepancies noted in Maktas's

reported packing costs during the cost verification. Additionally, the petitioners argue that the Department cannot make a proper inflation adjustment to Maktas's reported packing costs without information regarding purchases of packing materials during the POI.

DOC Position: The timing of packing materials purchases in a hyperinflationary economy may result in an over-or under statement of net home market prices. We have determined, therefore, that it is appropriate to adjust packing costs as suggested by Maktas and have indexed its reported packing costs for certain products which were not produced in each month of the POI. Although a more accurate solution to the timing problems would be achieved by indexing all packing costs, in a manner similar to that by which we adjusted COM for our preliminary determination, the petitioners are correct in their assertion that the information necessary for such an adjustment is not on the record.

Comment 8 Depreciation Expenses: Maktas argues that its audited depreciation figures should not be revised by the Department. According to Maktas, its depreciation expenses were recorded in accordance with Turkish tax law and that there is no evidence that its treatment of depreciation distorts "real" costs.

The petitioners claim that Maktas failed to include certain POI depreciation costs associated with its annual fixed asset revaluation, current year additions, and holiday shut-down periods during the POI. They note that these amounts were identified by the Department in Maktas's financial statements, but were not included by Maktas in its reported costs. Further, since Maktas failed to provide financial statements for its parent company, the petitioners argue that there may be unreported depreciation expenses in addition to those identified during verification. Therefore, the petitioners claim that the Department cannot rely on Maktas's reported depreciation expenses and also cannot obtain an appropriate depreciation figure by adjusting for the unreported amounts which were identified by the Department.

DOC Position: We agree with the petitioners that Maktas understated its reported costs by improperly excluding certain depreciation expenses and we have adjusted COP and CV by adding these amounts to Maktas's reported fixed overhead costs. Maktas has not offered any explanation as to why these depreciation expenses should not be included in its COP or CV.

The depreciation costs associated with the annual fixed asset revaluation were classified by Maktas as "other operating expenses" in the company's financial statements. Depreciation costs related to current year fixed asset additions were classified as "extraordinary expenses," along with depreciation costs incurred during normal, recurring holiday shut-down periods. All of these costs are necessary to obtain a fair measurement of costs incurred by Maktas during the POI for its production assets and, thus, these amounts should be included in its COP and CV.

We are satisfied that the adjustments described above will result in an appropriate depreciation expense figure for Maktas's production assets. As to the petitioners' concern regarding possible unreported expenses incurred by Maktas's parent, Piyale-Besin, we have determined that facts available should be applied for the calculation of G&A expenses for Maktas. See, *Facts Available* discussion above.

Comment 9 Tax Assessments: Maktas argues that the taxes identified by the Department's cost verification team are not part of the company's cost of production and were appropriately excluded from its reported costs.

The petitioners claim that the Department normally includes extraordinary expenses in its cost of production calculations. The petitioners argue that, if the Department decides to recalculate Maktas's reported costs, it should include the tax assessments which were excluded by the respondent.

DOC Position: We agree with the petitioners that these taxes should be included in COP and CV. Maktas has classified as extraordinary expenses certain taxes which were calculated on the value of company assets. Maktas also excluded other asset-based taxes which it believes will be recovered from the Turkish government pursuant to ongoing litigation. The Department's practice has been to allow a respondent to exclude certain costs if they demonstrate that such costs are both unusual in nature and infrequent in occurrence. See, e.g., *Final Determination of 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 Plate from Belgium*, 58 FR 37083, 37088 (July 9, 1993). Maktas has not demonstrated that the taxes assessed on asset values are unusual in nature nor has it demonstrated that they are infrequent in occurrence. Certain business and property taxes are a normal expense of

operating a business and, as such, are appropriately included in COP and CV.

Furthermore, the Department does not normally consider income taxes, based on the profit/loss of a corporation, to be a cost of producing the product. (See, e.g., *Final Determination; Rescission of Investigation and Partial Dismissal of Petition: High Information Content Flat Panel Displays and Display Glass Therefor from Japan*, 56 FR 32376, 32392 (July 16, 1991).) However, taxes based on asset values have been included by the Department in COP. See, e.g., *Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Argentina*, 60 FR 33539, 33550 (June 28, 1995). Therefore, we have included the taxes in Maktas's production costs.

Comment 10 Foreign Exchange Gains: Maktas argues that all of its foreign exchange gains which resulted directly from export sales should be applied as an offset against interest expense, since it incurs interest expense to produce and sell merchandise. In support of its position, Maktas cites *Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Canada*, 59 FR 18791 (April 20, 1994) (*Wire Rod from Canada*), in which the Department allowed a respondent to offset interest expense with dividend income received. Maktas also cites to *Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Ecuador*, 60 FR 7019 (February 6, 1995) (*Roses from Ecuador*).

The petitioners argue that interest expenses are a normal part of the Department's cost of production calculation. The petitioners contend that foreign exchange gains resulting from export sales of finished pasta are unrelated to the cost of producing pasta in Turkey. Therefore, the petitioners claim that the Department should continue to exclude foreign exchange gains from its cost of production calculation for the final determination.

DOC Position: We agree with the petitioners. Maktas's foreign exchange gains relate to export sales transactions and, thus, are calculated on the accounts receivable balances associated with such sales. It is the Department's normal practice to exclude exchange gains and losses on accounts receivable because the exchange rate used to convert home market sales to U.S. dollars is that in effect on the date of the U.S. sale. See, e.g., *Final Determination of Sales at Less Than Fair Value: Small Diameter Circular Seamless Carbon and Alloy Steel, Standard, Line and Pressure Pipe from Italy*, 60 FR 31991 (June 19, 1995).

With regard to Maktas's reliance on *Wire Rod from Canada*, the respondent provided no explanation as to why it believes foreign exchange gains are the equivalent of dividend income. Moreover, the facts in *Wire Rod from Canada* are quite different from the facts in the instant investigation. In *Wire Rod from Canada*, the respondent demonstrated that its dividend income was directly linked to the interest expense to which it was applied. Maktas has not demonstrated any direct link between its foreign exchange gains and its production costs and, in fact, has argued that they are unrelated. Therefore, we excluded Maktas's exchange gains from the interest expense rate calculation. Furthermore, the Department's position in *Roses from Ecuador* is contrary to Maktas's argument and represents an example of our normal practice, i.e., to disallow the application of foreign exchange gains on sales transactions as offsets to financial expenses.

Comment 11 Short-Term Interest Rate: The petitioners argue that the Department should use the same short-term interest rate to calculate imputed credit expenses for Maktas's U.S. and home market sales. The petitioners argue that since the short-term borrowings that Maktas actually used to finance the credit period for its sales in Turkey were also the short-term borrowings that Maktas used to finance the credit period for its U.S. sales, the interest rates used to calculate imputed credit expenses should be the same for U.S. and home market sales.

Maktas objects to the petitioners' request and asserts that the Department should not use the same interest rates in computing imputed credit expenses for U.S. and home market sales.

DOC Position: We disagree with the petitioners. The Department's policy is to calculate imputed credit costs using a weighted average short-term borrowing rate which reflects the currency in which the sale was invoiced. See, *Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit from Thailand*, 60 FR 107 (June 5, 1995); *Final Determination of Sales at Less than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from Thailand*, 60 FR 10552 (February 27, 1995). Consistent with the Department's practice, we have continued to apply Maktas's actual Turkish lira denominated short-term borrowing rates for all home market sales. For sales to the United States, all of which were denominated in U.S. dollars, we applied a U.S. dollar short-term interest rate obtained from public information because Maktas did not

have any U.S. dollar denominated borrowings during the POI.

Comment 12 Exchange Rate

Conversion: Maktas asserts that the currency conversion methodology used at the preliminary determination should be discarded for the final determination. Specifically, Maktas disagrees with the Department's policy of using a 40-day period to establish a benchmark rate for purposes of defining fluctuations and sustained movement in the exchange rate. Maktas argues that a 30-day period would be more appropriate than a 40-day period.

More importantly, the respondent submits that given the extreme depreciation of the Turkish lira against the U.S. dollar in 1994, the Department should use actual daily rates in making currency conversions.

The petitioners argue that the Department should continue to use the currency conversion methodology used in the preliminary determination for the final margin calculation.

DOC Position: We believe that it is more appropriate in this case to use actual daily exchange rates for currency conversion purposes. As noted in *Policy Bulletin 96-1: Currency Conversions*, 61 FR 9434 (March 8, 1996), the Department is continuing to examine the appropriateness of the currency conversion policy in situations where the foreign currency depreciates substantially against the dollar over the POI. In those situations, it may be appropriate to rely on daily exchange rates. When the rate of domestic price inflation is significant, as it is in this case, it is important that we use as a basis for NV home market prices that are as contemporaneous as possible with the date of the U.S. sale. This is to minimize the extent to which calculated dumping margins are overstated or understated due solely to price inflation that occurred in the intervening time period between the U.S. and home market sales. For this reason, as noted above in the *Fair Value Comparisons* section, we calculated EPs and NVs on a monthly average basis. This need for a high degree of contemporaneity applies not only to home market sales, but to the exchange rate as well, since the dollar value of pasta that Maktas sells in its home market—upon which the calculated margin ultimately rests—depends on (1) the lira price of that pasta, and (2) the dollar price of the lira. Since the dollar value of the lira tends to fall over time—when the rate of domestic price inflation is significant—it is just as important to use contemporaneous exchange rates as it is to use contemporaneous (lira-denominated) home market prices. For

this reason, we have used the daily exchange rates for currency conversion purposes.

Comment 13 Inventory Carrying Cost and Indirect Selling Expenses: Maktas argues that the Department should make an adjustment to NV for inventory carrying costs and indirect selling expenses. With respect to inventory carrying costs, the respondent claims that inventory carrying costs should be treated in the same manner as imputed credit expenses, and that no distinction can be drawn between EP and CEP sales for purposes of application of inventory carrying cost. Specifically, Maktas submits that adjustments for both imputed credit expenses and imputed inventory carrying costs are based on "opportunity cost" rationale. As with imputed credit expenses, Maktas argues that the opportunity cost of holding inventory is a real expense that should be adjusted for regardless of whether the sales transaction is EP or CEP.

Further, Maktas notes that "the new legal requirement of section 773 of the Act that a 'fair comparison shall be made between the export price or constructed export price and normal value' requires that like economic elements be treated in a like manner." Given the analogy between imputed credit expenses and inventory carrying costs, Maktas urges the Department to adjust normal value for inventory carrying costs in the same manner as imputed credit expenses.

Additionally, Maktas asserts that, in order to make such a "fair comparison", the Department should adjust normal value for the difference in indirect selling expenses attributable to the U.S. and home market sales.

The petitioners submit that the statute does not allow the Department to make the type of adjustments requested by the respondent. With respect to inventory carrying costs, the petitioners note that the respondent fails to recognize an important difference between imputed credit expense and inventory carrying cost which is that while imputed credit expense is a COS adjustment that typically can be calculated on a sale-by-sale basis, inventory carrying cost represents indirect selling expenses that are not tied to any particular sales. Regarding indirect selling expenses, the petitioners note that because Maktas's U.S. sales are based on export price, no adjustment to normal value for indirect selling expenses is permitted.

DOC Position: We agree with the petitioners that the statute does not allow the Department to make the type of adjustments for inventory carrying costs and indirect selling expenses requested by Maktas. In export price

sales, it is the Department's practice to make an adjustment for inventory carrying costs or indirect selling expenses if the respondent claims a commission adjustment to export price. Because Maktas's U.S. sales are based on export price and no commissions were reported for either the home or U.S. market, there is no basis for making an adjustment for inventory carrying costs or indirect selling expenses. Moreover, the deduction of inventory carrying costs or indirect selling expenses is not one of the enumerated requirements under Section 773 of the Act, which provides for adjustments to normal value to achieve a fair comparison between the export price and normal value.

Regarding Maktas's assertion the inventory carrying costs should be treated in the same manner as imputed credit expenses, we disagree with Maktas that the two items are analogous. Imputed credit expenses represent a direct selling expense which can be tied to particular sales. Inventory carrying costs, on the other hand, represent indirect selling expenses that would be incurred regardless of whether particular sales were made.

Comment 14 Goodwill: Maktas submits that the Department should make an adjustment for the "goodwill" which Maktas's products enjoy in the domestic market. Specifically, Maktas notes that its products, which are sold under the "Piyale" brand name, are well known throughout Turkey and have higher value than they enjoy elsewhere. In the United States, Maktas sells to importers who, in turn, sell under their own brand name. Accordingly, Maktas asserts that an adjustment should be made in the margin calculation for the brand recognition it commands in the domestic market.

The petitioners oppose Maktas's request for an adjustment for "goodwill".

DOC Position: We disagree with Maktas. When making price comparisons, the Department makes adjustments to account for any differences in the prices resulting from verified differences in circumstances of sales. The "goodwill" Maktas described is not an expense item and, therefore does not qualify as a COS adjustment. Moreover, such "goodwill" is not susceptible to verifiable quantification. Therefore the Department has no basis to make an adjustment for it.

Comment 15 Corrections Found at Verification: Maktas requests that a number of corrections presented at, and found during, the sales verification should be incorporated into the

Department's calculations of the final margins.

DOC Position: All corrections as confirmed on-site at the sales verification were incorporated in the Department's calculation of the final margin.

Continuation of Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of pasta from Turkey, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse for consumption, on or after January 19, 1996, the date of publication of our preliminary determination in the Federal Register. Article VI.5 of the General Agreement on Tariffs and Trade (GATT) provides that "[n]o product * * * shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." The Department has determined, in its *Final Affirmative Countervailing Duty Determination: Certain Pasta from Turkey*, that the product under investigation benefitted from export subsidies. Normally, where the product under investigation is also subject to a concurrent CVD investigation, we would instruct the U.S. Customs Service to require a cash deposit or posting of a bond equal to the weighted-average amount by which the normal value exceeds the export price (as shown below), minus the amount determined to constitute an export subsidy. (See, *Antidumping Order and Amendment of Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Malaysia*, 57 FR 46150 (October 7, 1992)). However, in this investigation, Filiz has not cooperated with the Department and has not acted to the best of its ability in providing the Department with necessary information. This has prevented the Department from making its normal determination of whether the subsidies in question may have affected the calculation of the dumping margin. Thus, as indicated above, Filiz's margin is based on total adverse facts available, taken from the petition. Insofar as the dumping margin for Filiz is not a calculated margin, there is no way to determine the portion of the antidumping duty which is attributable to the export subsidy. For that reason, and to prevent Filiz from benefitting from its non-cooperation in this investigation, we have not subtracted the amount of any export subsidy from that margin. For Maktas, we are subtracting for deposit purposes

the cash deposit rate attributable to the export subsidies found in the countervailing duty investigation (12.61 percent) from the antidumping bonding rate for Maktas. We are also subtracting from the "All Others" rate the cash deposit rate attributable to the export subsidies included in the countervailing duty investigation for All Others.

This suspension of liquidation will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Exporter/manu- facturer	Weighted- average margin per- centages	Deposit per- centages
Filiz	63.29	63.29
Maktas	56.87	44.26
All Others	56.87	47.49

Pursuant to section 735(c)(5)(A) of the Act, the Department has excluded Filiz's margin from the calculation of the All Others rate because it was determined entirely under section 776 of the Act.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. As our final determination is affirmative, the ITC will determine whether these imports are causing material injury, or threat of material injury, to the industry within 45 days. If the ITC determines that material injury, or threat of material injury, does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is published pursuant to section 735(d) of the Act.

Dated: June 3, 1996.
Paul L. Joffe,
Acting Assistant Secretary for Import Administration.
[FR Doc. 96-14735 Filed 6-13-96; 8:45 am]
BILLING CODE 3510-DS-P

International Trade Administration

[A-475-818]

Notice of Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy

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

EFFECTIVE DATE: June 14, 1996.

FOR FURTHER INFORMATION CONTACT: John Brinkmann or Michelle Frederick, Office of Antidumping Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-5288 or (202) 482-0186, respectively.

THE APPLICABLE STATUTE: Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act (URAA).

Final Determination

We determine that certain pasta ("pasta") from Italy is being sold in the United States at less than fair value (LTFV), as provided in section 735 of the Act. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the publication of the preliminary determination of sales at less than fair value in this investigation on December 14, 1995, (60 FR 1344, January 19, 1996) (*Preliminary Determination*) the following events have occurred:

In January 1996, the Department received letters from the AFI Pasta Group, Pastificio Guido Ferrara (interested parties), and Hershey Foods Corp., Borden Inc., and Gooch Foods, Inc. (collectively "the petitioners") regarding the provisional antidumping measures in this investigation and whether the suspension of liquidation affected entries of the subject merchandise 120 days after the Department's preliminary determination. The Department determined that the requests for an extension of the final determination contained an implied request to extend the provisional measures period, during which liquidation is suspended, to six months (see *Extension of Provisional Measures* memorandum dated February 7, 1996).