

Import Administration Policy Bulletin

Number: 98.1
Date of Issue: February 23, 1998
Topic: Basis for Normal Value When Foreign Market Sales Are Below Cost
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Issue

The basis for normal value when there are no above-cost sales of the identical or most similar model in the foreign market.

Discussion

In order to determine normal value⁽¹⁾ under section 773(a) of the Tariff Act of 1930 (the Act), the Department selects the model (*i.e.*, the specific product) sold in the foreign market that is identical or most similar to the model sold in the United States. Section 771(16) of the Act provides a hierarchy of preferences for determining which model sold in the foreign market is most similar to the model sold in the United States and also expresses a preference for the use of identical over similar merchandise. In cases where all foreign market sales (otherwise suitable for comparison) of the model identical or most similar to the model sold in the United States are sold at prices below the cost of production, the Department has had a long-standing practice of basing normal value on constructed value.⁽²⁾

We have reconsidered our interpretation of the post-*URAA* version of the Act in light of

the recent ruling by the U.S. Court of Appeals for the Federal Circuit in *CEMEX v. United States*.⁽³⁾ In this case, based on the pre-*URAA* version of the Act, the Court ruled that it is inappropriate to resort directly to constructed value, in lieu of foreign market sales, as the basis for foreign market value when the Department finds foreign market sales of models identical to that sold in the United States to be outside the "ordinary course of trade." The Court ruled that, instead, the Department should use sales of similar models, if such sales exist.

The Court's decision is based on the pre-*URAA* version of the Act. Before the *URAA*, the term "ordinary course of trade" referred to "the conditions and practices which, for a reasonable time prior to the exportation of the [subject] merchandise... have been normal in the trade" with respect to the general class of merchandise.⁽⁴⁾ Under both the pre- and post-*URAA* versions of the Act, examples of sales outside the "ordinary course of trade" might include sales of merchandise produced according to unusual product specifications, merchandise sold under unusual terms, or merchandise sold at aberrational prices.⁽⁵⁾ However, the *URAA* has amended the definition of sales outside the "ordinary course of trade" to include also below-cost sales that are disregarded pursuant to section 773(b)(1) of the Act.

As noted by the Court, the pre-*URAA* Act directed us to match a particular U.S. sale to foreign market sales of the next most similar model when sales of the identical or most similar model were outside the ordinary course of trade. This directive has not changed in the post-*URAA* Act. Therefore, the designation of below-cost sales as sales outside the "ordinary course of trade" in the post-*URAA* Act affects our practice of resorting immediately to constructed value when foreign market sales that are matched to U.S. sales are disregarded as below-cost. Instead, we must match U.S. sales to *any* foreign market sales that are above-cost and otherwise suitable for comparison before resorting to constructed value.

Statement of Policy

When we disregard any below-cost foreign market sales, we will match U.S. sales to any remaining foreign market sales in the ordinary course of trade of identical or similar models. In cases where we conduct a cost investigation, we will use constructed value as the basis for normal value only when there are no above-cost sales that are otherwise suitable for comparison.⁽⁶⁾

Implementation

We will begin applying the new matching methodology immediately in all ongoing investigations and reviews being conducted pursuant to the post-*URAA* Act. This change does not affect any cases being conducted pursuant to the pre-*URAA* Act.

In most proceedings, all foreign market sales of the foreign like product are on the record and, therefore, implementing our new policy will not require the collection of additional sales information; it will require only modification of the computer programs used to calculate antidumping margins. In some cases, however, we have allowed respondents to limit their reporting of foreign market sales to only those that could serve as the basis for normal value under our old practice. In cases where we have allowed limited reporting of foreign market sales, we will request respondents to report additional sales only if there is enough time prior to the issuance of preliminary results or to the foreign market verification, whichever is earlier. In

cases that have progressed beyond this point, collecting new sales information would delay the final results and not allow us sufficient time to analyze and verify the new data. We will apply the new methodology to the extent possible using the existing foreign market sales databases, but we will not collect new sales information. To the extent that some of the uncollected sales could have served as a basis for normal value, we will not consider respondents who had our permission to limit reporting to have been uncooperative by not placing these sales on the record, because they had no way of anticipating this change. Therefore, in these cases, we will use constructed value as a neutral facts available basis for normal value.

footnotes:

1. Prior to the *Uruguay Round Agreements Act (URAA)*, "normal value" was termed "foreign market value."
2. See, e.g., *Import Administration Policy Bulletin 92.4*
3. *CEMEX, S.A., v. United States*, 1998 WL 3626 (Fed. Cir.).
4. See Section 771(15) of the Act (1988).
5. See *Statement of Administrative Action* accompanying the *URAA*, at 164.
6. Sales suitable for comparison are, generally, contemporaneous sales otherwise within the ordinary course of trade consisting of models whose variable manufacturing cost differences do not exceed 20% of the total cost of manufacture of the model exported to the United States. See *Import Administration Policy Bulletin 92.2*, "Differences in Merchandise; 20% Rule."