

producers must demonstrate both (a) the performance of different selling activities, and (b) a pattern of consistent price differences in sales of the same goods to different levels of trade in the foreign market.²⁵

In identifying dumping from a non-market economy country, Commerce will normally calculate normal value by valuing the non-market economy producers' factors of production in a market economy country most like the non-market economy country.

6.2 Sales Below the Cost of Production / Ordinary Course of Trade

Commerce will exclude sales made at prices below the per unit cost of production from the calculation of normal value when they have been made in substantial quantities and do not permit recovery of all costs within a reasonable period of time. Such sales are excluded because they are considered not to be in the "ordinary course of trade." The interpretation of "substantial quantities" is governed by an 80% rule. If sales below cost of production represent less than 20% of total sales (i.e. above-cost sales represent more than 80% of total sales), all home-market sales, including those made at below-cost levels, will be included in the calculation of normal value. Where more than 20% of total sales (the pre-Uruguay Round threshold was 10%) are made at below-cost prices (i.e. above-cost sales represent less than 80% of total sales), below-cost sales are excluded and the remaining above-cost sales are used to determine normal value. The relative value of the remaining above-cost sales may be quite low, meaning that normal value could conceivably be solely based on a few unusually high-priced sales. Where there are no sales above the cost of production, normal value will be based on the constructed value of the goods in question.²⁶

While previous U.S. law required that the below-cost sales be made "over" an extended period of time (interpreted by Commerce to mean a minimum of two months) in order to be excluded, the Uruguay Round Agreement stipulates that such sales must occur "within" a 12-month period. Thus below-cost sales may now be excluded even if they occur entirely within a one-month period.²⁷

Commerce will investigate to determine whether home-market sales are below the cost of production if it has reasonable grounds to suspect or believe that such sales have occurred, based on allegations made by the petitioner. The cost of production calculations are based on the exporter's or producer's own records, if kept according to generally accepted accounting principles (GAAP) of the country

25 19 U.S.C. § 1677b (a) (7) (A) (i), (ii) (1994).

26 19 U.S.C. § 1677b (a) (1) (1994).

27 19 U.S.C. § 1677b (b).