U.S. Customs and Border Protection

Slip Op. 10–28

UNITED STATES STEEL CORPORATION, Plaintiff, v. UNITED STATES, and Defendant, POHANG IRON & STEEL COMPANY, LTD. AND POHANG COATED STEEL COMPANY, LTD., Defendant-Intervenors.

Court No. 07–00133
PUBLIC

[Denying Plaintiff's Motion for Judgment on the Agency Record, and sustaining U.S. Department of Commerce's final determination in administrative review of antidumping duty order.]

Dated: March 19, 2010

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer, John J. Mangan, Jeffrey D. Gerrish*, and *Jared R. Wessel*), for Plaintiff United States Steel Corporation.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Alessandris*); *Jonathan M. Zielinski*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Akin Gump Strauss Hauer & Feld LLP (*Spencer S. Griffith, J. David Park, Jarrod M. Goldfeder*, and *Lisa W. Ross*), for Defendant-Intervenors Pohang Iron & Steel Company, Ltd. and Pohang Coated Steel Company, Ltd.

OPINION

RIDGWAY, Judge:

I. *Introduction*

In this action, Plaintiff United States Steel Corporation ("U.S. Steel") — a domestic steel producer — contests the Final Results of the U.S. Department of Commerce's twelfth administrative review of the antidumping duty order covering corrosion-resistant carbon steel from the Republic of Korea ("Korea"). *See* Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 Fed. Reg. 13,086 (March 20, 2007) ("Final

Results")[1]; Issues and Decisions for the Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea (2004–2005) (March 12, 2007) (Pub. Doc. No. 232) ("Decision Memorandum").[2]

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which U.S. Steel challenges the methodology for calculating the U.S. indirect selling expenses ("indirect selling expenses" or "ISEs") that Commerce used in the Final Results for Pohang Iron & Steel Company, Ltd. and Pohang Coated Steel Company, Ltd. (collectively, "POSCO"), foreign manufacturers/exporters of the subject merchandise. *See generally* Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record under Rule 56.2 ("Pl.'s Brief"); Reply Brief in Support of Motion for Judgment on the Agency Record Filed by Plaintiff United States Steel Corporation ("Pl.'s Reply Brief"). Specifically, U.S. Steel contends that Commerce erred by calculating indirect selling expenses using the "payroll methodology" (an alternative methodology proposed by POSCO), rather than using Commerce's default methodology, known as the "relative sales value methodology." *See* Pl.'s Brief at 1, 7–8, 19; Pl.'s Reply Brief at 1–3, 15.[3]

U.S. Steel's motion is opposed by the Government, which maintains that Commerce's allocation of indirect selling expenses in the Final Results was both based on substantial evidence and otherwise in accordance with law. The Government therefore urges that U.S. Steel's motion be denied, and that Commerce's Final Results be sustained in all respects. *See generally* Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record and Appendix ("Def.'s Brief").

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[1] Commerce's Final Results were amended to correct a ministerial error in the calculation of the dumping margin for Union Steel Manufacturing Co., Ltd. *See* Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea; Notice of Amended Final Results of the Twelfth Administrative Review, 72 Fed. Reg. 20,815, 20,816 (April 26, 2007).

[2] Because the administrative record in this action includes confidential information, two versions of that record were filed with the Court. Documents in the public version of the administrative record are numbered sequentially, and are cited herein as "Pub. Doc. No. ____." Documents in the confidential version of the administrative record are also numbered sequentially, but differently from the public version, and are cited herein as "Conf. Doc. No. ____." The public version of the administrative record consists of copies of all documents in the record, with all confidential information redacted. The confidential version of the record consists of complete, un-redacted copies of only those documents that include confidential information.

[3] As originally filed, U.S. Steel's Complaint was not limited to POSCO. U.S. Steel also challenged Commerce's calculation of the indirect selling expense ratio as to Union Steel Manufacturing Company, Ltd. *See* Complaint, Count II. However, U.S. Steel subsequently dismissed its Complaint as to Union Steel. *See* Order of Dismissal in Part (Jan. 22, 2008).

The Defendant-Intervenors — collectively, POSCO — also oppose U.S. Steel's motion. Like the Government, POSCO asserts that Commerce's treatment of its indirect selling expenses was based on substantial evidence and otherwise in accordance with law, and that the agency's Final Results should be sustained in all respects. *See generally* Memorandum of Defendant-Intervenors, POSCO and POCOS, in Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("POSCO Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[4] For the reasons detailed below, U.S. Steel's Motion for Judgment on the Agency Record must be denied.

II. *Background*

U.S. antidumping laws require that antidumping duties be imposed upon imported merchandise that "is being, or is likely to be, sold in the United States at less than fair value . . . ," and results in material injury or the threat of material injury to a domestic industry. *See* 19 U.S.C. § 1673. The antidumping duty is equal to the "amount by which the normal value exceeds the export price ["EP"] (or constructed export price ["CEP"]) for the merchandise." *Id.* Normal value is defined as "the price at which the foreign like product is first sold . . . in the exporting country . . . . " *See* 19 U.S.C. § 1677b(a)(1)(B)(i). When normal value exceeds the price at which the merchandise is first sold to an unaffiliated purchaser in the United States, a sale is considered "dumped."

This case involves Commerce's calculation of the constructed export price ("CEP"), which is the first sale by a seller affiliated with the producer to an unaffiliated purchaser in the United States. *See* 19 U.S.C. § 1677a(b). The statute requires Commerce to adjust the reported constructed export price, in order to properly assess the amount by which normal value exceeds that price. *See* 19 U.S.C. §§ 1673, 1677a(c), 1677a(d)(1). Adjustments are necessary because the reported prices "represent prices in different markets affected by a variety of differences in the chain of commerce . . . ," and must be adjusted to "reconstruct the price at a specific, 'common' point in the chain of commerce, so that value can be fairly compared on an equivalent basis." *See SKF USA Inc. v. INA Walzlager Schaeffler KG*, 180 F.3d 1370, 1373 (Fed. Cir. 1999) (*citing Smith-Corona Group v. United States*, 713 F.2d 1568, 1572–73 (Fed. Cir. 1983)). The adjustments thus permit an "apples-to-apples" comparison between the price of

[4] All citations to federal statutes are to the 2000 edition of the United States Code. Similarly, all citations to federal regulations are to the 2005 edition of the Code of Federal Regulations.

the subject merchandise sold in the United States and the price of the foreign like product sold in the home market.

A. *Overview of Indirect Selling Expenses*

Among the adjustments that Commerce must make to the constructed export price is the deduction of “U.S. indirect selling expenses” (“indirect selling expenses” or “ISEs”), which are the focus of U.S. Steel’s challenge to the Final Results at issue here. *See* 19 U.S.C. § 1677a(d)(1)(D).[5] Indirect selling expenses are those expenses incurred by a respondent (or, as in this case, a respondent’s U.S. affiliate) which are related to the sale of subject merchandise but which cannot be directly tied to any particular sale — in other words, expenses that “would be incurred by the seller regardless of whether the particular sales in question are made,” including common expenses such as rent payments, and telephone charges that a company incurs in selling subject merchandise but which cannot be directly connected to a specific sale. *See Koenig & Bauer-Albert AG v. United States*, 22 CIT 574, 580, 15 F. Supp. 2d 834, 843 (1998), *aff’d in part, rev’d on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001); Antidumping Manual, Glossary of Terms (Dept. of Commerce Oct. 13, 2009) (noting that “[c]ommon examples of indirect selling expenses include inventory carrying costs, salesmen’s salaries, and product liability insurance.”); *see generally* Pl.’s Brief at 2, 9; Def.’s Brief at 8.

For example, companies typically do not calculate an amount of office rent based on how much rent was incurred in making any

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[5] Specifically, read in context, 19 U.S.C. § 1677a(d)(1)(D) provides:

(d) Additional adjustments to constructed export price

For purposes of this section, the price used to establish constructed export price shall also be reduced by —

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added) —

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) *any selling expenses not deducted under subparagraph (A), (B), or (C).*

19 U.S.C. § 1677a(d) (emphases added).

See Statement of Administrative Action, H.R. Doc. No. 103–316, at 824 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4164 (“SAA”) (stating that 19 U.S.C. § 1677a(d)(1)(D) “provides for the deduction of indirect selling expenses”); *see also* 19 U.S.C. § 3512(d) (setting forth Congress’ intent that Statement of Administrative Action is to be “regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application.”).

particular sale. Instead, companies generally report to Commerce the total amount of rent paid during the relevant period. In order to account for rent incurred in selling subject merchandise (so that an appropriate sum can be included in the agency's antidumping calculations), Commerce must allocate to sales of subject merchandise a portion of the total rent paid by the company. In doing so, Commerce must allocate the total rent (as well as other total indirect selling expenses) between the company's sales of subject merchandise and the company's other activities, including sales of non-subject merchandise. Indirect selling expenses may also include, for instance, salaries paid to employees who sell subject merchandise, since salaries normally are paid without regard to whether the employees sell subject merchandise or non-subject merchandise, or — for that matter — whether the employees actually sell any merchandise at all, during the relevant period. *See generally* Pl.'s Brief at 2; Def.'s Brief at 8–9; Transcript of Oral Argument ("Tr.") at 16.

The antidumping statute directs that, in calculating net U.S. prices using the CEP price methodology, Commerce is to deduct "any . . . expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added) . . . . " *See* 19 U.S.C. § 1677a(d); *see also id.* at § 1677a(d)(1)(D). Thus, the statute includes a general provision for the deduction of selling expenses in the CEP price calculation, but is entirely silent as to how Commerce is to calculate those expenses (including indirect selling expenses).

Commerce's regulations similarly include general provisions concerning the calculation of expenses. *See* 19 C.F.R. § 351.401(g). Commerce's stated preference is for the calculation of expenses on a transaction-specific basis. *See* 19 C.F.R. § 351.401(g)(1). However, where expenses cannot be ascertained on a transaction-specific basis, the agency's regulations permit expenses (including indirect selling expenses) to be allocated, provided, first, that the allocation is on "as specific a basis" as possible, and, second, that the methodology "does not cause inaccuracies or distortions":

> (1) In general. The Secretary may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied *the allocation method used does not cause inaccuracies or distortions*.
>
> (2) Reporting allocated expenses and price adjustments. Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is *calculated on as specific a basis as is*

> *feasible*, and must explain why *the allocation methodology used does not cause inaccuracies or distortions*.

19 C.F.R. § 351.401(g) (emphases added)[6]; *see also* 19 U.S.C. § 1677a(d)(1)(D).[7] Like the statute, Commerce's regulations are entirely silent as to how Commerce is to calculate indirect selling expenses. *See NSK Ltd. v. United States*, 29 CIT 1, 17–18, 358 F. Supp. 2d 1276, 1290–91 (2005), *aff'd*, 162 Fed. Appx. 982 (Fed. Cir. 2006).

Under these circumstances, Chevron accords Commerce great discretion as to the methodology used in the calculation of indirect selling expenses. *See generally Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984); *see also* section II, *infra*. Indeed, this court has previously underscored — in the context of calculating indirect selling expenses — that "[b]oth 19 U.S.C. § 1677a(d), the relevant statute, and the regulation, 19 C.F.R. § 351.401(g), give little direction on allocation methodology, and thus *Commerce enjoys discretion in choosing its methodology*." *See NSK*, 29 CIT at 17–18, 358 F. Supp. 2d at 1291 (emphasis added) (*citing Timken Co. v. United States*, 26 CIT 590, 598–99, 209 F. Supp. 2d 1373, 1381 (2002); *NSK Ltd. v. United States*, 27 CIT 56, 109–110, 245 F. Supp. 2d 1335, 1378–79 (2003)). Moreover, in light of Commerce's broad discretion in calculating indirect selling expenses, this court has observed that it "must accept Commerce's methodology if that methodology is reasonable." *See Koenig & Bauer-Albert AG*, 22 CIT at 580, 15 F. Supp. 2d at 843.

In the exercise of its ample discretion, Commerce has developed a standard, baseline practice known as the "relative sales value methodology," which calculates indirect selling expenses by using the ratio of sales of subject merchandise to total sales. *See Micron Technology, Inc. v. United States*, 23 CIT 55, 61, 44 F. Supp. 2d 216, 222 (1999) (noting that Commerce "typically . . . requires indirect selling expenses to be allocated on a sales value basis"). Specifically, under this

[6] In promulgating its regulations, Commerce cited language in the Statement of Administrative Action ("SAA") that instructs the agency to permit companies to allocate direct selling expenses when transaction-specific reporting is not possible, provided that the allocation method used does not result in inaccuracies or distortions. *See* Antidumping Duties; Countervailing Duties: Final Rule, 62 Fed. Reg. 27,296, 27,346 (May 19, 1997) (Preamble) (*quoting* Statement of Administrative Action). Although the statement in the SAA focused on direct selling expenses, Commerce found no reason to distinguish between *direct* selling expenses and other types of selling expenses (*e.g.*, indirect selling expenses) for purposes of the stated principle. The agency therefore extended the principle to *indirect* selling expenses by regulation. *Id.*; 19 C.F.R. § 351.401(g).

[7] Commerce's regulations further provide that the agency will not reject a method for the allocation of indirect selling expenses merely because the method may include expenses incurred in connection with the sale of non-subject merchandise. *See* 19 C.F.R. § 351.401(g)(4).

default methodology, Commerce calculates the ratio of subject merchandise sales to total sales, and then applies that ratio to the total indirect selling expenses reported for the period at issue, to calculate the indirect sales expenses attributable to sales of subject merchandise. Thus, for example, if sales of subject merchandise constitute half of the value of a company's total sales for the period of review, then — under the relative sales value methodology — half of the company's indirect selling expenses are allocated to sales of subject merchandise. *See generally* Pl.'s Brief at 4–5 & n.2; Def.'s Brief at 9; Pl.'s Reply Brief at 1 n.1.

As even U.S. Steel concedes, however, "it is not [Commerce's] policy to require allocation of indirect selling expenses based upon relative sales value in every instance." *See* Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 20,216, 20,217 (May 6, 1996); *see also* Pl.'s Brief at 11; Pl.'s Reply Brief at 3–4. Commerce has broad discretion to use a different methodology where the agency determines that the alternative methodology is reasonable and non-distortive. *See NSK*, 27 CIT at 109–10, 245 F. Supp. 2d at 1378–79; *see also* 19 U.S.C. § 351.401(g). Exercising its discretion, Commerce permits respondents that are calculating indirect selling expenses to segregate expenses that can be demonstrated to be unrelated to the sales of subject merchandise. *See* Def.'s Brief at 4–5.

B. *The Facts of This Case*

In reporting its data for the period covered by the administrative review here at issue (in response to Commerce's original questionnaire, as well as two supplemental questionnaires), POSCO proposed that Commerce use an alternative methodology — the "payroll methodology" — to allocate the indirect selling expenses incurred by POSCO's U.S. sales affiliate, POSCO American Corporation ("POSAM"), in re-selling to unaffiliated U.S. customers subject merchandise that POSAM had purchased from POSCO. Specifically, POSCO used payroll data to divide POSAM's payroll expenses and other common expenses into the three distinct categories of POSAM's activity during the relevant period: (1) POSAM's sales of subject merchandise (purchased from POSCO); (2) POSAM's sales of non-subject merchandise; and (3) POSAM's non-sales-related activity (in particular, POSAM's management of two subsidiaries). *See generally* POSCO Brief at 2, 13, 15–16; *see also* Pl.'s Brief at 2–3; Def.'s Brief at 3, 11–13; Tr. at 19.

For purposes of calculating the indirect selling expenses ratio, POSCO first identified the actual payroll expenses of each of the POSAM employees engaged in each of the three categories of POSAM's activity.[8] POSCO then allocated POSAM's common expenses — rent, depreciation, travel, etc. — to each of the three categories in direct proportion to the percentage of the total actual payroll expenses expended on each category. Finally, POSCO identified the sales revenue for the period of review for each of the three categories of activity. *See generally* POSCO Brief at 3, 13, 15–16; *see also* Pl.'s Brief at 2–4; Def.'s Brief at 3, 9–10, 11–13; Pl.'s Reply Brief at 1 n.1.

In calculating the indirect selling expenses ratio, POSCO included only those expenses and sales revenues associated with the first category of activity (i.e., POSAM's sales of subject merchandise). POSCO reasoned that the calculation of indirect selling expenses is — by definition — intended to capture expenses related to *sales of subject merchandise*. POSCO therefore excluded expenses related to the second category of POSAM's activity (*i.e.*, sales of non-subject merchandise), because those expenses did not concern sales of *subject merchandise*. And POSCO excluded expenses related to the third category of POSAM's activity (*i.e.*, POSAM's management of its investments), because those expenses concerned a non-selling activity, and thus did not concern *sales* of any merchandise (subject or not). Using this methodology, POSCO derived an indirect selling ratio, which it then applied to the reported gross unit prices to calculate the per-unit indirect selling expenses which POSCO reported to Commerce. *See generally* POSCO Brief at 3, 10–11; *see also* Pl.'s Brief at 4–5; Def.'s Brief at 3, 9–11; Pl.'s Reply Brief at 1 n.1.

In the Preliminary Results, Commerce did not use the payroll methodology that POSCO advocated, because — at that early stage of the proceedings — the agency was unsure of the accuracy of POSCO's proposed methodology. *See* Def.'s Brief at 3–4, 11. Instead, Commerce used the agency's default "relative sales value methodology," dividing POSAM's company-wide payroll and other common expenses by POSAM's *total sales revenue* for the period of review, and thus deriving a higher indirect selling expenses ratio than that which POSCO

[8] POSAM has a "very, very small" workforce — a total of only [ ] employees. *See* Tr. at 24–25. [ ] of the [ ] individuals sold exclusively subject merchandise, [ ] sold both subject and non-subject merchandise, [ ] individuals were dedicated to sales of non-subject merchandise, one individual (referred to as the "investment manager") was responsible for managing two POSAM subsidiaries, [ ] executives were responsible for oversight and management of the operations of the company as a whole, and [ ] general administrative personnel provided support services for the company. *See* Tr. at 16, 20, 50, 55–57, 82; Pl.'s Brief at 3 n.1.

had calculated using its proposed payroll methodology.[9] Commerce calculated an overall dumping margin of 0.48% for POSCO in the Preliminary Results. *See* Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Notice of Preliminary Results of Antidumping Duty Administrative Review, 71 Fed. Reg. 53,370, 53,376 (Sept. 11, 2006) ("Preliminary Results").

In the briefing that followed Commerce's issuance of the Preliminary Results, POSCO further explained, in detail, the basis for its proposed payroll methodology. With the benefit of that further explanation, as well as additional time to analyze POSCO's proposed methodology, Commerce determined that the evidence supported POSCO's claims, and therefore concluded that POSCO's proposed methodology was reasonable, accurate and not distortive, given the specific facts of this case. *See* Def.'s Brief at 3–4, 11–13. Accordingly, Commerce calculated its Final Results using the indirect selling expenses ratio derived from POSCO's payroll methodology. Commerce explained:

> In the Preliminary Results, we recalculated the POSCO Group's [indirect selling expenses] because the POSCO Group had not adequately explained the basis for its exclusion of certain expenses in its reported [indirect selling expenses] calculation. Specifically, we recalculated the POSCO Group's [indirect selling expenses] by including all indirect selling expenses incurred in the United States, including expenses related to POSAM's sales of non-subject merchandise and its non-selling activities during the [Period of Review]. However, *the POSCO Group provided evidence showing that the POSCO Group correctly calculated its [indirect selling expenses] by excluding expenses related to [1] POSAM's sales of non-subject merchandise and [2] its non-selling activities*. . . . Thus, the Department will change the [dumping] margin program in the final results to reflect the POSCO Group's original [indirect selling expenses] ratio.

Decision Memorandum at 45 (emphasis added) (footnotes omitted). In the Final Results, Commerce recalculated POSCO's dumping margin at 0.35%. *See* Final Results, 72 Fed. Reg. at 13,087; *see also* Decision Memorandum at 44–45.

In the instant action, U.S. Steel challenges Commerce's Final Results solely as to the agency's use of POSCO's payroll methodology to calculate POSAM's indirect selling expenses.

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9 While POSCO's proposed payroll methodology yielded an indirect selling expenses ratio of [ ]%, Commerce's application of the relative sales value methodology in the Preliminary Results produced a ratio of [ ]%. *See* POSCO Brief at 3; Pl.'s Reply Brief at 5.

III. *Standard of Review*

A final determination by Commerce in an antidumping case must be sustained, except to the extent that it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also NMB Singapore Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Substantial evidence is "more than a mere scintilla"; rather, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)); *see also Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1380 (Fed. Cir. 2008) (same).

Moreover, any evaluation of the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight," including "contradictory evidence or evidence from which conflicting inferences could be drawn." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting Universal Camera, 340 U.S. at 487–88); *see also Mittal Steel*, 548 F.3d at 1380–81 (same). On the other hand, the mere fact that it may be possible to draw two inconsistent conclusions from evidence in the record does not prevent Commerce's determination from being supported by substantial evidence. *See Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *see also Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966).

Further, while Commerce must explain the bases for its decisions, "its explanations do not have to be perfect." *NMB Singapore*, 557 F.3d at 1319. It is enough that "the path of Commerce's decision" is "reasonably discernable." *Id.*

To determine whether Commerce's interpretation of the antidumping statute is in accordance with law, the two-part test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) is applied. *See, e.g., Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007). The first step of a Chevron analysis requires a determination as to "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43; *see also Corus Staal BV v. Dept. of Commerce*, 395 F.3d 1343, 1346 (Fed. Cir. 2005). However, "if the statute is silent or ambiguous with respect to the specific issue" in question, the analysis proceeds to Chevron step two, where "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *see Wheatland Tube*, 495 F.3d at 1359 ("This court reaches step two of Chevron only 'if the statute is silent or ambiguous with respect to the specific issue.'" (*quoting Chevron*, 467 U.S. at 843)).

Under the second step of a *Chevron* analysis, "[a]ny reasonable construction of the statute is a permissible construction." *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (quotation omitted). "To survive judicial scrutiny, [Commerce's] construction need not be the only reasonable interpretation or even the most reasonable interpretation . . . . Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Timken*, 354 F.3d at 1342 (*quoting Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (*citing Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978))) (internal quotation marks omitted).

Finally, the Court of Appeals has underscored that, "[i]n recognition of Commerce's expertise in the field of antidumping investigations," *Corus Staal*, 395 F.3d at 1346, "[d]eference to [the] agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws." *Koyo Seiko*, 36 F.3d at 1570; *see also Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002) (emphasizing that Commerce's "special expertise in administering the anti-dumping law entitles its decisions to deference from the courts").

IV. *Analysis*

In its Motion for Judgment on the Agency Record, U.S. Steel contests Commerce's calculation and allocation of POSAM's indirect selling expenses in the Final Results of the twelfth administrative review of the antidumping duty order covering corrosion-resistant carbon steel flat products from the Republic of Korea. *See* Pl.'s Brief at 1, 8–19; Pl.'s Reply Brief at 1–15.

Although U.S. Steel frames its case in a number of different ways, U.S. Steel contends — in essence — (1) that Commerce erred in excluding POSAM's "investment management" expenses from the pool of indirect selling expenses to be allocated, and (2) that Commerce erred in using POSAM's payroll data — rather than POSAM's sales data — in allocating the company's common expenses. *See, e.g.*, Pl.'s Reply Brief at 11; Tr. at 30, 32–34; *see also* POSCO Brief at 6. In addition, U.S. Steel asserts that Commerce impermissibly switched methodologies between prior administrative reviews and the review at issue here, as well as between the Preliminary Results and the

Final Results in the instant review. *See* Pl.'s Brief at 5–6, 11–13. Each of U.S. Steel's arguments is analyzed in turn below, and for the reasons detailed there, must be rejected.

Given the particular facts of this case, Commerce's use of the payroll methodology in the Final Results allocated POSAM's indirect selling expenses to sales of subject merchandise on a more specific basis than would have the relative sale value methodology that U.S. Steel advocates. Commerce's use of the payroll methodology therefore was more consistent with the agency's regulations, which require the allocation of expenses "on as specific a basis as is feasible." 19 C.F.R. § 351.401(g)(2); *see* Def.'s Brief at 18–19; POSCO Brief at 1–2, 13, 18–19; Tr. at 25, 27, 54, 60; *see also* POSCO Brief at 19 (emphasizing that use of relative sales value methodology in this case would have been distortive and inaccurate, because it would have included "expenses associated with sales of *non-subject* merchandise and *non-selling activities*"); *id.* at 13, 17 (same); Def.'s Brief at 19 (same); Tr. at 25–28, 60, 64 (same).

Moreover, the exercise of Commerce's ample discretion may permit it to select from among several reasonable methodologies in a given case. Here, even assuming, *arguendo*, that the relative sales methodology would have been a reasonable choice, Commerce's use of the payroll methodology cannot be said to have been unreasonable, and so must be sustained.

A. *U.S. Steel's Claims Contrasting POSAM Data and Commerce's ISE Allocations*

U.S. Steel first argues that, "by adopting the payroll methodology in the Final Results, [Commerce] grossly distorted, and thereby *incorrectly* allocated, POSAM's [indirect selling expenses]" ("ISEs"). *See* Pl.'s Brief at 14; *see generally id.* at 13–17; Pl.'s Reply Brief at 2—5. Significantly, U.S. Steel does not contend that any of the data that POSCO submitted are inaccurate. *See* Def.'s Brief at 14. In attempting to prove its case, U.S. Steel does little more than state the results of Commerce's use of POSCO's payroll methodology, compare those results to POSAM's sales or other data, and assert that — *ipso facto* — a distortion exists. *See* Def.'s Brief at 14–15, 16; *see generally* POSCO Brief at 17–19.

U.S. Steel emphasizes, for example, that POSAM's sales of subject merchandise constituted a certain percentage of its total sales, contrasting that figure with the percentage of total indirect selling expenses allocated to sales of subject merchandise, and asserting — with little or no explanation or analysis — that the difference between those two figures illustrates a "gross distortion[]." *See* Pl.'s

Brief at 14–15 & Figure 1; *see also id.* at 4; Pl.'s Reply Brief at 2 (asserting that contrast between the two figures alone "shows that the payroll methodology is patently and unlawfully distortive"), 3; Def.'s Brief at 14–15; POSCO Brief at 17.[10] Focusing on the flip side of the same coin, U.S. Steel highlights the fact that POSAM's sales of non-subject merchandise constituted only a certain percentage of its sales — a figure which U.S. Steel contrasts sharply with the percentage of total indirect selling expenses that were allocated to those sales in the Final Results. *See* Pl.'s Brief at 14 & Figure 1; Pl.'s Reply Brief at 3; *see generally* Def.'s Brief at 15; POSCO Brief at 17.[11]

U.S. Steel's attempts to prove distortion simply by pointing to contrasting figures — with no supporting rationale or analysis whatsoever — is not valid legal argument. *See, e.g., U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1353 (Fed. Cir. 2005) (dismissing party's argument where party failed to "support its assertion . . . with any reasoning, evidence, or precedent"); *Consol. Int'l Automotive v. United States*, 16 CIT 1062, 1066, 809 F. Supp. 125, 130 (1992) (rejecting party's argument where party failed to "support its objection to [the agency's] choice other than by conjecture . . .").

Moreover, as to the substantive merits of the matter, U.S. Steel fundamentally fails to appreciate the significance of the percentage of POSAM's total payroll which was paid to the individual who managed POSAM's subsidiaries, together with the fact that those "investment management" activities generated no sales revenue for POSAM, and the fact of the "very, very small" size of POSAM's workforce — factors which, taken together, largely explain the figures that U.S. Steel seeks to contrast and cast as evidence of unlawful "distortion." *See generally* POSCO Brief at 17; *see also id.* at 13–14 (noting that extent to which POSAM's total expenses are attributable to salaries "underscor[es] the significance of personnel activities (as reflected in payroll information) to the [indirect selling expenses] ratio calculation"); *id.* at 15–16 (same); Tr. at 24; *id.* at 24–25 (POSCO explains that "the investment manager[,] while one individual[,] actually represents a fairly significant portion of the total workforce, so when you're hearing about the distortions . . . [and that] there was so much assigned to the investment category, . . . well it's correct because [the] invest-

[10] Specifically, the payroll methodology allocated [ ]% of POSAM's total indirect selling expenses to sales of subject merchandise, which accounted for [ ]% of POSAM's total sales. *See* Pl.'s Brief at 4, 14–15 & Figure 1; Pl.'s Reply Brief at 2–3; Def.'s Brief at 15; POSCO Brief at 17.

[11] Specifically, the payroll methodology allocated [ ]% of POSAM's total indirect selling expenses to sales of non-subject merchandise, which accounted for [ ]% of POSAM's total sales. *See* Pl.'s Brief at 14 & Figure 1; Pl.'s Reply Brief at 3; POSCO Brief at 17.

ment manager alone was a significant portion of the work force," and that "[w]hen you understand these contextual aspects, the fact that [POSAM] is not just a sales entity and the fact that it's a fairly small organization, . . . all of [U.S. Steel's] allegations . . . about the so-called distortions . . . just fall away then.").[12] *But see* Pl.'s Reply Brief at 6–9 (responding to POSCO's argument that difference in results between indirect selling expense allocation methodologies is attributable to exclusion of investment management expenses from pool of expenses used to calculate indirect selling expenses).

U.S. Steel insists that POSAM's investment management expenses should have been included in calculating indirect selling expenses. U.S. Steel argues that, like accounting and human resources, "activities [such as investment management] benefit the corporate entity — *i.e.*, POSAM — and properly belong in the pool of [indirect selling expenses] to be allocated." *See* Pl.'s Brief at 12; *see also* Pl.'s Reply Brief at 9; Tr. at 12. U.S. Steel concludes that Commerce "should *not* have excluded POSAM's investment management expenses in the calculation of the company's [indirect selling expenses]," citing *Aramide* for the proposition that it is Commerce's practice "to include [in the calculation of indirect selling expenses] the general and administrative ("G&A") expenses, such as expenses associated with investment management, that are incurred in support of the respondent's U.S. sales affiliate." *See* Pl.'s Reply Brief at 6–7 (*citing Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1101, 901 F. Supp. 353, 360 (1995)); *see generally id.* at 6–9, 10–11; Pl.'s Brief at 12–13 (*citing Aramide*, and asserting, *inter alia*, that "virtually every company has employees dedicated to 'managing investments'").

U.S. Steel is wrong on both the law and the facts. In *Aramide*, a parent company provided "various corporate-level administrative support services that at a minimum . . . were indirectly related to . . . [the] selling functions" of the U.S. selling affiliate of a foreign producer. *See Aramide*, 19 CIT at 1101–02, 901 F. Supp. at 360. Noting that Commerce generally includes G&A expenses incurred by a U.S. selling affiliate in the agency's calculation of indirect selling expenses, the *Aramide* court sustained Commerce's decision to "include[] a proportionate share of [the administrative, accounting and finance service] expenses in the calculation of [the foreign producer's] indirect selling expenses." *See id.*, 19 CIT at 1101, 901 F. Supp. at 360.

[12] As discussed in note 8 above, POSAM's workforce was "very, very small" — a total of only [ ] employees. *See* Tr. at 24–25, 55–57, 78. Moreover, POSAM's total payroll constituted [ ]% of POSAM's total expenses. *See* POSCO Brief at 13–14, 15. And the salary of POSAM's "investment manager" constituted [ ]% of POSAM's total payroll. *See* POSCO Brief at 17; Tr. at 58–59, 81.

U.S. Steel misstates the rule of *Aramide*, and — in addition — misapplies the decision given the facts of this case. According to U.S. Steel, *Aramide* requires that "[all] G&A expenses of a respondent's U.S. sales affiliate" be included "in the pool of [indirect selling expenses] to be allocated because they are indirectly related to selling *regardless of their classification by the respondent*." *See* Pl.'s Reply Brief at 8 (emphasis added) (footnote omitted). U.S. Steel therefore concludes that "POSAM's investment management expenses should have been allocated to, rather than excluded from, the pool of [indirect selling expenses] because [*the investment management expenses*] *were indirectly related to selling*." *Id.* (emphasis added).

As a threshold matter, Commerce's exclusion of POSAM's investment management expenses from the agency's calculation of indirect selling expenses was based on the specific, somewhat unusual facts of this case (discussed below) — *not* on the classification of those expenses by the respondent, POSCO. *See* Pl.'s Reply Brief at 8; Tr. at 29 (U.S. Steel argues that treatment of POSAM's "investment management" expenses should not be based on their characterization by POSCO).

Further, *Aramide* cannot possibly be read as broadly as U.S. Steel suggests, to require that *all* G&A expenses must necessarily be included in the calculation of indirect selling expenses, *in every case*. Such a reading would inherently conflict with the very concept of "indirect selling expenses," which implicitly contemplates the exclusion of all expenses that relate to sales of non-subject merchandise, as well as the exclusion of all non-selling expenses (*i.e.*, all expenses that are entirely unrelated to sales). *See generally* Def.'s Brief at 9–11, 18–19; POSCO Brief at 19 (distinguishing between indirect selling expenses associated with sales of subject merchandise (which should be included in calculating indirect selling expenses) *versus* indirect selling expenses associated with sales of non-subject merchandise, and indirect selling expenses associated with non-selling activities (which should be excluded from the calculation of indirect selling expenses)). As the Government points out, when "an expense is demonstrated to be unrelated to the sale of subject merchandise . . . , that expense may be removed from the indirect selling expense calculation." *See* Def.'s Brief at 12.[13]

[13] *See, e.g., NSK Ltd. v. United States*, 29 CIT at 17–18, 358 F. Supp. 2d at 1291 (upholding Commerce's decision to exclude selling expenses related to non-subject merchandise from pool of indirect selling expenses); *NSK Ltd. v. United States*, 27 CIT at 108–10, 245 F. Supp. 2d at 1378–79 (sustaining Commerce's determination to deduct "certain expenses attributable to non-scope merchandise" from indirect selling expenses); *Timken Co. v. United States*, 26 CIT at 596–99, 209 F. Supp. 2d at 1379–81 (upholding Commerce's decision to "exclude certain expenses attributable to non-scope merchandise" from indirect selling

The Government also distinguishes *Aramide* from this case on its facts. Commerce concluded that the investment management function in this case was totally unrelated to sales of subject merchandise, "in contrast to the situation in *Aramide* . . . , relied upon by U.S. Steel, where the respondent attempted to remove financial services expenses from the calculation of indirect selling expenses solely because they were 'of a corporate-wide administrative nature.'" *See* Def.'s Brief at 12–13 (*quoting Aramide*, 19 CIT at 1101, 901 F. Supp. at 360).

U.S. Steel disputes Commerce's determination that the investment management function here lacks even an *indirect* relationship to POSAM's sales, and does not belong in the pool of expenses used to calculate the indirect selling expenses ratio. *See generally* Pl.'s Brief at 12–13; Pl.'s Reply Brief at 7, 9, 10–11; Tr. at 11–12, 28–29, 34, 39–40, 66–68, 89–92. However, U.S. Steel has pointed to nothing to cast doubt on the agency's finding that POSAM's investment management function is wholly distinct from POSAM's sales function and does not support or confer a benefit on sales, and thus should be excluded from the calculation of indirect selling expenses (unlike G&A expenses — such as human resources and accounting — which, in fact, do support or benefit sales).

As POSCO explained, and as Commerce concluded, the critical, distinguishing fact here is that POSAM is not only a sales organization. Unlike the typical U.S. selling affiliates in other, similar cases, POSAM comprises two entirely separate and distinct business units, which perform two entirely separate and distinct business functions. *See* POSCO Brief at 2, 11; Tr. at 19, 22, 24, 42–43, 76, 79. POSAM's first business function is its sales function, which involves the sales of subject and non-subject steel products. *See* POSCO Brief at 2, 15; Def.'s Brief at 9, 11; Tr. at 19, 22, 79. POSAM's second, entirely distinct and discrete business function — the so-called "investment management" function — is devoted exclusively to the management of two POSAM subsidiaries. *See* POSCO Brief at 2, 11; Def.'s Brief at

expenses); Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and the United Kingdom for the Period of Review May 1, 2004, through April 30, 2005, 2006 WL 1984601 (July 14, 2006), at comment 29 (finding that respondent properly excluded certain indirect selling expenses attributable to non-subject merchandise); Issues and Decision Memorandum for the Antidumping Duty Administrative Reviews of Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom for the Period of Review May 1, 2002, through April 30, 2003, 2004 WL 3524431 (Sept. 15, 2004), at comment 12 (finding nothing improper about respondent's exclusion of "the indirect selling expenses . . . that are attributable to non-subject merchandise"); *see also* POSCO Brief at 8–11 (and authorities cited there).

12–13; Pl.'s Brief at 3, 12; Tr. at 19–21, 41, 44, 46–47, 56, 69, 79, 91–92.[14]

POSAM's investment management function provided no conventional "investment management" services, generated no sales revenue whatsoever, did not — either directly or indirectly — support POSAM's sales function, and, indeed, had no relationship whatsoever with POSAM's sales function (direct or indirect), except that the two otherwise separate and distinct business units shared certain common expenses, including expenses for, *inter alia*, supervisory and administrative support personnel, rent, travel, communications, and depreciation. *See* POSCO Brief at 11–12, 17, 18; Def.'s Brief at 12; Tr. at 19–20, 22–23, 23–24, 26, 41–42, 44, 46, 60, 78, 80, 91–92.

As the Government notes, U.S. Steel is correct that "the managing of a company's investments is an activity that can be included as an indirect selling expense." *See* Def.'s Brief at 12 (*citing* Pl.'s Brief at 12). But the "investment management" function here is a very different animal. And investment management expenses should be excluded from the pool of indirect selling expenses where — as here — the investment management function is "unrelated to *the sale of subject merchandise*." *See* Def.'s Brief at 12 (emphasis added) (*citing NSK*, 29 CIT at 17–18, 358 F. Supp. 2d at 1291) (additional citation omitted).

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[14] *See also* Tr. at 17 (where Government notes that "the characterization as an investment manager is what's causing the confusion here"); *id.* at 19–21 & 46 (where POSCO and Government explain that POSAM's "investment manager" performs a function that is not performed at typical U.S. sales affiliates); *id.* at 20–21 (where POSCO explains that POSAM's "investment management" function is analogous to "a private equity firm which buys companies and has someone who manages [them]"; POSAM's "investment manager" is "not like a day trader sitting at a computer, . . . [and] moving the company's money around to . . . buy stocks and bonds"); *id.* at 41–42 (where Government explains that "[i]f [POSAM's investment manager] were . . . a day trader, . . . if he [was] . . . managing foreign currency trades for the entire corporation or something like that, there's no question that [the "investment management" function here] would be a G&A expense that should be allocated across the company because it would benefit the entire company" — but "what [POSAM's investment manager's] doing is managing solely [the two POSAM subsidiaries]"); *id.* at 46 (where Government explains that POSAM's "investment manager" is "doing . . . the actual management function of these subsidiaries within the U.S.," but that — in a typical case — "investment management" refers to "an overall G&A function that's benefitting the entire corporation because someone being referred to as an investment manager might be managing bank accounts or stock portfolios for the corporation or for a multi-national corporation handling . . . foreign currency exchanges, moving . . . company bonds or company assets between banks in different countries. Something like that would benefit the sales of subject merchandise and non-subject merchandise and would properly be considered G&A"); *id.* at 56–57 (where POSCO explains that POSAM's investment manager "is not an investment manager who's managing stocks, doing hedge funds, *et cetera* ").

U.S. Steel claims at one point in its briefs that POSAM's investment management expenses should be included in the pool of indirect selling expenses to be allocated simply because the function "benefit[s] *the corporate entity — i.e.*, POSAM." *See* Pl.'s Brief at 12 (emphasis added). Contrary to U.S. Steel's assertion, however, not every expenditure that may ultimately indirectly benefit or enhance a company's overall "bottom line" is to be included in the calculation of indirect selling expenses. Instead, indirect selling expenses are intended to capture only those expenditures that indirectly support or benefit the function of sales of subject merchandise. The function of POSAM's investment manager — who was devoted solely to the management of two POSAM subsidiaries — did not support or benefit POSAM's *sales of subject merchandise* (or, in fact, any sales at all). POSAM's so-called "investment management" expenses were therefore properly excluded from Commerce's calculation of indirect selling expenses in this case.

In its final challenge to Commerce's exclusion of POSAM's "investment management" expenses in the agency's calculation of indirect selling expenses, U.S. Steel — in the course of oral argument — challenged the sufficiency of the evidence. U.S. Steel contends, in essence, that the record is devoid of evidence to support Commerce's conclusions about the actual function of the investment manager and the absence of any benefit to POSAM's sales function. According to U.S. Steel, there is no evidence here that POSAM's investment management function differs in any way from the investment management functions at typical U.S. selling affiliates in other, similar cases (where investment management expenses are generally treated as part of G&A expenses, and included in the pool of indirect selling expenses for allocation to sales of subject merchandise). *See* Tr. at 11–12, 39–40, 66–68, 89–91; *cf.* Pl.'s Brief at 12–13 (arguing that "virtually every company has employees dedicated to 'managing investments'").

U.S. Steel is simply wrong. The evidence on POSAM's "investment management" function may be somewhat thin, and a bit cryptic. But that evidence is also undisputed, and — under the circumstances — more than sufficient to constitute "substantial evidence" to support Commerce's decision to exclude "investment management" expenses from the pool used to calculate POSAM's indirect selling expenses. *See* POSCO Letter to Commerce (Aug. 4, 2006) (Conf. Doc. No. 74) at 2–5; POSCO First Supplemental Questionnaire Response (May 23, 2006) (Conf. Doc. No. 46) at Exh. 27; POSCO Second Supplemental Questionnaire Response (July 26, 2006) (Conf. Doc. No. 66) at 4–5, Exh. 9 (including POSAM's Organization Chart, Job Descriptions and Legal Structure); POSCO Section C Response (Dec. 2, 2005) (Conf. Doc. No. 11) at Exh. C–18; *see also* Tr. at 41–44, 55–57, 91–92; POSCO Brief at 11–12, 17; Def.'s Brief at 12.

The substantial evidence test "requires only that there be evidence that a reasonable mind might accept as adequate to support a conclusion." *See Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (*citing Universal Camera*, 340 U.S. at 477). On this record, U.S. Steel cannot show that POSAM's investment manager supported or conferred a benefit on the company's sales of subject merchandise. Commerce's exclusion of POSAM's "investment management" expenses from the calculation of indirect selling expenses therefore was not unreasonable. *See generally* Decision Memorandum at 44–45.

In addition to its criticism of Commerce's exclusion of investment management expenses from the calculation of indirect selling expenses, U.S. Steel also attributes some of the alleged "distortion" to the use of payroll "to allocate [common] expenses that bore no relationship whatsoever to payroll." *See* Tr. at 14; *see also, e.g.*, Tr. at 30–31, 33–34. Thus, for example, U.S. Steel contends that — because "activities other than sales of subject merchandise" constituted only a certain percentage of total sales — Commerce erred by allocating to those activities a disproportionate share of the payroll expenses for executive and administrative staff. *See* Pl.'s Brief at 14–15.[15]

But U.S. Steel's analysis is inherently flawed. As discussed above, U.S. Steel ignores the fact that, as Commerce found, POSAM's investment management function generated no sales revenue, and did not even indirectly support or benefit POSAM's sales of merchandise (whether subject or not). *See generally* POSCO Brief at 11–12, 17–18; Def.'s Brief at 12; Tr. at 19–20, 22, 26, 44, 46, 91–92. Further, because POSAM's executives and administrative staff support and have responsibility for *all* personnel, Commerce reasonably concluded that it was appropriate to allocate the payroll expenses for executive and administrative personnel in direct proportion to the salaries of the employees that they supervised and/or supported — including those employees who were responsible solely for the sales of non-subject merchandise, as well as the individual devoted exclusively to non-selling ("investment management") activities, who had nothing to do with sales of any merchandise, subject or not. *See* POSCO Brief at 17–18.

[15] Specifically, Commerce allocated [ ]% of the payroll expenses for POSAM's executives and administrative staff to activities other than sales of subject merchandise (*i.e.*, to sales of non-subject merchandise and to management of POSAM's subsidiaries), which accounted for [ ]% of POSAM's total sales revenue. *See* Pl.'s Brief at 14–15 & Figure 2. *But see* POSCO Brief at 17–18.

U.S. Steel launches similar attacks on Commerce's allocation of assorted other "common expenses." *See generally* Pl.'s Brief at 15–17.[16] But, again, the payroll methodology began with the specific

[16] U.S. Steel targets communication expenses as a particularly "vivid" illustration of the alleged distortion, asserting that it is "inconceivable" that sales of subject merchandise consumed only the allocated percentage of communication expenses, given the magnitude of the contribution of sales of subject merchandise to total sales. *See* Pl.'s Brief at 15 & Figure 2. Specifically, U.S. Steel emphasizes that Commerce allocated "[ ] of total communication expenses" to sales of subject merchandise, which accounted for [ ]% of POSAM's total sales. *See* Pl.'s Brief at 15 & Figure 2. *But see* POSCO Brief at 18.

U.S. Steel further alleges the existence of "significant distortions" in Commerce's allocation of common expenses to sales of non-subject merchandise. *See* Pl.'s Brief at 16–17 & Figures 1–2. Specifically, U.S. Steel points to the fact that Commerce allocated to sales of subject merchandise and to sales of non-subject merchandise common expenses (and communication expenses in particular) which were generally comparable, even though sales of subject merchandise and sales of non-subject merchandise make very different contributions to POSAM's total sales (*i.e.*, [ ]% and [ ]%, respectively). *See* Pl.'s Brief at 16–17 & Figures 1–2; Tr. at 37–38. *But see* POSCO Brief at 18.

Criticizing Commerce's use of the payroll methodology to allocate communication expenses, U.S. Steel emphasizes that, as a matter of pure logic, communications expenses do not necessarily vary in proportion to salaries. *See* Tr. at 65. But it is equally true that, as a matter of pure logic, communications expenses do not necessarily vary in proportion to relative sales value either. *See* Tr. at 61. Certainly U.S. Steel has not identified even a scintilla of evidence to prove that, in this case, communications expenses increased with the relative value of sales. Thus, as to this point, there would be no advantage to use of the relative sales value methodology that U.S. Steel advocates.

Nor is there any record evidence here to support U.S. Steel's assertion that selling subject merchandise incurs disproportionately higher communications expenses than does selling non-subject merchandise (or, for that matter, managing POSAM's two subsidiaries). *See* Tr. at 54–55, 86–87. U.S. Steel seeks to make much of evidence of frequent communication between POSAM, its U.S. customers, and its corporate parent in Korea concerning sales of subject merchandise. *See* Pl.'s Brief at 15; Tr. at 37–38, 65. But, as the Government points out, nothing about that evidence speaks to the relative volume or expense of communications (*i.e.*, communications with POSCO about sales of subject merchandise *versus* other communications concerning sales of non-subject merchandise). *See* Tr. at 68–69. There is simply no record evidence — one way or the other — as to the comparative expense of communications concerning sales of the two types of merchandise. *See id.; see also id*. at 86–87.

Moreover, contrary to U.S. Steel's claims, the mere fact of higher sales value alone does not compel the conclusion that the individuals selling subject merchandise made more or longer telephone calls than the individuals selling non-subject merchandise. *See* Tr. at 63–64. Given that there were equal numbers of POSAM employees selling subject merchandise and non-subject merchandise, U.S. Steel's implication seems to be that one sales group was feverishly working the phones, while — as POSCO puts it — the other sales group played solitaire on their computers every day. *See* Tr. at 63–64, 82–83. Among its several grave flaws, U.S. Steel's theory fails to acknowledge that it is possible to make a very high value sale with a single phone call. *See* Tr. at 52–53, 88–89 (highlighting role of price of merchandise being sold).

U.S. Steel also disputes the reasonableness of the travel and entertainment expenses that Commerce allocated to POSAM's investment manager, as compared to the travel and entertainment expenses allocated to "*the entire sales force* for POSAM's subject assignment of payroll expenses based on the individual responsibilities of POSAM's personnel. Under these circumstances, it was not unreasonable for Commerce to allocate POSAM's common expenses (which are not otherwise segregated in the company's normal accounting records) in direct proportion to the actual activities of each of POSAM's employees. *See* POSCO Brief at 18. U.S. Steel's arguments to the contrary are lacking in merit.

In a typical case, the U.S. sales affiliate is dedicated solely to sales of merchandise (whether both subject and non-subject merchandise, or subject merchandise alone). *See, e.g.*, Tr. at 75. In such a case, it is generally reasonable to use the relative sales value methodology to allocate indirect selling expenses to, *inter alia*, sales of subject merchandise. *Id.* at 75–76. But — as discussed herein — this is not a typical case; so application of the relative sales value methodology here made little sense.

In this case, the U.S. sales affiliate, POSAM, is also engaged in non-selling activity — specifically, the management of two POSAM subsidiaries, a function that did not support and conferred no benefit on POSAM's sales activities. As such, as discussed above, it was necessary to exclude from the calculation of indirect selling expenses the expenses associated with POSAM's management of its subsidiaries — a non-selling activity. Those expenses included not only the salary of POSAM's "investment manager," but also the investment manager's share of the common expenses for administrative support and other services that he shared with the POSAM sales staff (who sold subject, as well as non-subject, merchandise).

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merchandise." *See* Pl.'s Brief at 16 (emphasis added); *id.* at Figure 2. Specifically, U.S. Steel notes that Commerce allocated to the investment manager travel and entertainment expenses totaling [ ] the travel and entertainment expenses for that sales force. *See* Pl.'s Brief at 16 & Figure 2. *But see* POSCO Brief at 18.

What U.S. Steel conspicuously fails to note, however, is that "the entire sales force for POSAM's subject merchandise" is [ ] people. *See* Tr. at 61. Thus, distilled to its essence, U.S. Steel's complaint is simply that the payroll methodology allocated to POSAM's investment manager a [ ] share of travel and entertainment expenses than was allocated to [ ] who sold subject merchandise. Reframed in that fashion, U.S. Steel's claim hardly screams "distortion." Further, U.S. Steel cannot dispute that the investment manager incurred travel and entertainment expenses in connection with his management of POSAM's two subsidiaries. *See* Tr. at 76. Moreover, it is uncontroverted that the investment manager's salary constituted [ ]% of POSAM's total payroll. *See* POSCO Brief at 17; Tr. at 58–59, 81. It would seem to be a not unreasonable assumption that a higher-compensated employee would spend a greater sum on travel and entertainment. But, in any event, there is no record evidence to indicate that sales of merchandise (whether subject or not) incurred travel expenses that were disproportionate (either higher or lower) relative to those incurred in the management of POSAM's subsidiaries. Tr. at 86. In short, this claim of distortion by U.S. Steel — like its other, similar claims — is neither supported by evidence nor compelled by logic.

Commerce had no choice but to use some other methodology to properly account for the expenses associated with POSAM's non-selling function, because the relative sales methodology was not designed to do so. Under the circumstances, it was neither illogical nor unreasonable to begin with another fact that makes this case somewhat unusual — the fact that POSAM's relatively small staff and the discrete nature of each staffer's responsibilities made it possible not to *allocate* (as in the typical case) but, in fact, to *specifically assign* personnel salaries to three categories, depending on individuals' responsibilities: (1) sales of subject merchandise; (2) sales of non-subject merchandise; and (3) non-selling activities (*i.e.*, management of POSAM's two subsidiaries). Commerce then excluded the salaries of those engaged in the sales of non-subject merchandise, as well as the salary of the "investment manager" who managed POSAM's subsidiaries, because the activities of those individuals either did not relate to sales of *subject* merchandise or did not relate to *sales* of merchandise (whether subject or not), and thus were not properly included in the calculation of the indirect selling expenses ratio for subject merchandise.

The specific assignment of salaries (discussed above) disposed of a significant percentage of POSAM's total expenses, another somewhat distinctive fact. What remained to be accounted for were the "common expenses." Commerce could not properly treat those common expenses as though they related exclusively to sales of subject and non-subject merchandise, because they were shared (*i.e.*, consumed in part) by POSAM's investment manager. To determine the amount of common expenses attributable to the sales of subject merchandise, Commerce had no choice but to determine some means of accounting for the common expenses consumed by the investment manager (as well as the common expenses consumed by those individuals who sold non-subject merchandise). Particularly given the fact of the specificity with which personnel salaries were assigned in this case, it was neither illogical nor unreasonable for Commerce to decide to allocate POSAM's common expenses in accordance with the first step of the process — that is, in proportion to the very specific *assignment* of the salaries of individual POSAM personnel to the company's three activities.

While U.S. Steel criticizes Commerce's use of payroll to allocate common expenses in this case, a certain measure of imprecision is inherent in the allocation process; common expenses are allocated for the very reason that they — by definition — cannot be precisely assigned. Further, it is a fact that a number of major common expenses, such as rent, are fixed. Moreover, as discussed herein, in a number of instances where U.S. Steel argues that some particular common expense does not necessarily vary in proportion to salary, it is equally true that the expense does not necessarily vary relative to sales. The relative sales value methodology that U.S. Steel advocates thus would be no more specific than the payroll methodology that Commerce used. The bottom line is that there is no record evidence here — *none* — to indicate that POSAM's common expenses were incurred in proportion to sales value. *See, e.g.*, Tr. at 85. And, even assuming that there were some common expenses that would, logically, necessarily vary in proportion to sales (but not in proportion to payroll) — a matter which is not documented on the evidentiary record — it would nevertheless have been well within Commerce's discretion to use the payroll methodology, given the specific circumstances of this case. U.S. Steel's objections to Commerce's use of the payroll methodology therefore cannot be sustained.

B. *U.S. Steel's Factors Assertedly Used to Evaluate Alternative Methodologies*

U.S. Steel maintains that its claims of distortion are supported not only by the specific examples addressed above, but also by three factors which U.S. Steel contends are "normally considered and applied by [Commerce] itself in determining the appropriateness of an alternative allocation methodology." *See* Pl.'s Brief at 17; *see also id.* at 17–18; Pl.'s Reply Brief at 2, 5–14.[17] As set forth below, however, U.S. Steel again fails to show that Commerce's determination was not supported by substantial evidence or was otherwise not in accordance with law.

1. *Results of Relative Sales Value Methodology versus Alternative Methodology*

U.S. Steel points to the "difference in results between the relative sales value methodology and the alternative methodology in question" as one factor that Commerce has considered in the past in determining whether an alternative methodology is distortive. *See* Pl.'s Brief at 17 (*citing* Issues and Decision Memorandum for the Administrative Review of Gray Portland Cement and Clinker From Mexico — August 31, 2001 through July 31, 2002, 2003 WL 24153862 (Sept. 16, 2003)) ("Clinker from Mexico"), at comment 15; *see also* Pl.'s Reply Brief at 2–3, 5–6. U.S. Steel characterizes the difference in the

[17] U.S. Steel makes no claim that its asserted factors have been compiled — much less collectively memorialized or codified — anywhere. Instead, U.S. Steel apparently has distilled the three factors itself, from various sources.

results of the two methodologies in this case as "significant." *See* Pl.'s Brief at 17.[18] But U.S. Steel's argument is not well-taken.

As the Government points out, U.S. Steel does not identify any flaw or error in POSCO's reported data. *See* Def.'s Brief at 15–16. Nor does U.S. Steel do anything to explain *why* a difference in results between the two methodologies demonstrates distortion — much less why it means that *the payroll methodology* was distortive. *See* Def.'s Brief at 15–16. Instead, U.S. Steel simply states the ratio that results from each of the two methodologies, and summarily concludes that "the payroll methodology is distortive." *See* Pl.'s Brief at 17.

The Government notes that it should come as no surprise that different methodologies produce different results, and states that different results do not necessarily mean that one methodology is distortive. *See* Def.'s Brief at 16. The Government pointedly observes that there would be little point in seeking to use a *new* methodology if that methodology could be used only if its results mirrored those of Commerce's default methodology. *See* Def.'s Brief at 16. In sum and substance, U.S. Steel is arguing that the results produced by the payroll methodology are different from those produced by the relative sales value methodology. But that the results are different does not necessarily mean that they are wrong. As the Government puts it, "U.S. Steel's reliance upon expected differences rather than pointing out flaws in POSCO's methodology is not a valid argument." *See* Def.'s Brief at 16.

U.S. Steel's invocation of Clinker from Mexico is also unavailing. In Clinker from Mexico, Commerce concluded that a particular alternative methodology was not distortive, because it produced results similar to those produced by the agency's default "relative sales value" methodology. *See* Clinker from Mexico, 2003 WL 24153862, at comment 15. But, contrary to U.S. Steel's claims, it does not logically follow that a difference in results between methodologies automatically renders an alternative methodology distortive. *See* Def.'s Brief at 16. Otherwise, "there would be no purpose in allowing alternative methodologies." *Id.*

Obviously, Commerce was aware of the difference in results between the payroll methodology that it used in the Final Results and the relative sales value methodology, which was used in the Preliminary Results. As outlined above, Commerce's decision to use the payroll methodology cannot be said to have been unreasonable. By using the payroll methodology here, Commerce properly sought to

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[18] Specifically, the payroll methodology yielded an indirect selling expenses ratio of [ ]%, while the relative sales value methodology results in a ratio of [ ]%. *See* Pl.'s Brief at 17; Pl.'s Reply Brief at 5.

exclude from the calculation of indirect selling expenses those payroll and common expenses that were attributable to POSAM's sales of non-subject merchandise, as well as its management of investments (its non-selling activities). In contrast, if Commerce had used the relative sales value methodology here, the calculation of indirect selling expenses would have included both expenses related to sales of non-subject merchandise and expenses related to POSAM's non-selling activities. *See generally* POSCO Brief at 18–19

To be sure, POSCO's indirect selling expenses ratio would have been higher had it been calculated using the relative sales value methodology, as U.S. Steel advocates. But U.S. Steel has advanced no argument or evidence to indicate that the mere difference in results between the methodologies renders the payroll methodology distortive in this case.

2. *Disproportionate Allocation of ISEs to Non-Subject Merchandise*

According to U.S. Steel, "[t]he fact that the payroll methodology allocates [indirect selling expenses] disproportionately to [non-subject merchandise] is another factor that illustrates its distortive nature." *See* Pl.'s Brief at 17–18 (final alteration in the original) (*citing* Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Stainless Steel Wire Rod from Spain — March 5, 1998 through August 31, 1999, 2001 WL 171180 (Feb. 21, 2001) ("Wire Rod from Spain"), at comment 2 (stating that "satisfactory explanations to questions regarding possible distortions are particularly important given that [the alternative methodology] allocates indirect selling expenses disproportionately between [subject] and non-subject merchandise")).[19]

Specifically, U.S. Steel contends that — because sales of non-subject merchandise constituted only a certain percentage of POSAM's total sales — the extent of the indirect selling expenses allocated to those sales by Commerce was disproportionate, indicating that the payroll

[19] *See also* Antidumping Duties; Countervailing Duties: Final Rule, 62 Fed. Reg. 27,296, 27,348 (May 19, 1997) (Preamble) (stating that an allocation method that includes non-subject merchandise is distortive when expenses are "incurred . . . disproportionately on the out-of-scope or the in-scope merchandise" — but also emphasizing that "there is no basis for irrebuttably presuming such disproportionality without regard to the facts of a specific case") (*cited in* Pl.'s Brief at 17–18).

methodology is distortive. *See* Pl.'s Brief at 17–18; Pl.'s Reply Brief at 2–3, 5, 10–11.[20] However, U.S. Steel again fails to demonstrate that the different results from the payroll methodology are impermissible or erroneous.

As the Government points out, U.S. Steel's reliance on Wire Rod from Spain is simply misplaced. *See* Def.'s Brief at 17; Pl.'s Brief at 17 (*quoting* Wire Rod from Spain, 2001 WL 171180, at comment 2). The facts of that case are very different from the facts here.

In Wire Rod from Spain, a respondent based its proposed allocation methodology upon the hours that its employees worked. *See* Wire Rod from Spain, 2001 WL 171180, at comment 2. However, the respondent could not verify that the hours that it had reported to Commerce were correct. *See id.* Because Commerce concluded that those data were "at the heart of [the respondent's] allocation methodology," and because Commerce found them to be inaccurate, Commerce rejected the respondent's proffered methodology. *See id.*

In contrast, as the Government observes, here there is no claim — by U.S. Steel, or anyone else — that POSAM's payroll data are in any way inaccurate. *See* Def.'s Brief at 17. Nor has U.S. Steel identified any particular flaw in the payroll methodology as it was used in this case, except to assert generally that the results of that methodology appear to be disproportionate. *See* Def.'s Brief at 17. Unlike Wire Rod from Spain, Commerce in this case was satisfied that POSCO's alternative allocation methodology — using POSAM's uncontested payroll data — was not distortive. *See* Def.'s Brief at 17; *see also* sections III.A & III.B.2, *supra* (analyzing and rejecting, on the merits, U.S. Steel's claim of distortion based on the mere fact that POSAM's sales of non-subject merchandise constituted only a certain percentage of its sales, a figure that U.S. Steel seeks to contrast sharply with the percentage of indirect selling expenses allocated to those sales). U.S. Steel's criticisms thus cast no doubt on either Commerce's methodology or the Final Results in this case.

3. *Relationship Between Nature of Expenses and Their Allocation*

The third and final factor which U.S. Steel contends is "normally considered and applied by [Commerce] itself in determining the ap-

[20] In particular, U.S. Steel notes that the payroll methodology allocated [ ]% of POSAM's indirect selling expenses to sales of non-subject merchandise, even though such sales constituted only [ ]% of the company's total sales. *See* Pl.'s Brief at 18; Pl.'s Reply Brief at 10–11. U.S. Steel contrasts that observation with the fact that the payroll methodology allocated only [ ]% of the indirect selling expenses to sales of subject merchandise, which make up [ ]% of total sales. *See* Pl.'s Reply Brief at 11.

propriateness of an alternative allocation methodology" is whether common expenses are allocated in "direct relation to the manner in which [they were] incurred." *See* Pl.'s Brief at 18 (*quoting Micron Technology*, 23 CIT at 62, 44 F. Supp. 2d at 223 (approving alternative allocation methodologies where each bore "a direct relation to the manner in which the common expense [was] incurred")); *see also* Pl.'s Reply Brief at 2–3, 5, 12–14.

U.S. Steel argues that, in using the payroll methodology here, Commerce's allocation of POSAM's common expenses "bears no relation to the manner in which such expenses were incurred." *See* Pl.'s Brief at 18; *see also* Pl.'s Reply Brief at 2–3, 12, 14. In an attempt to illustrate its point, U.S. Steel singles out one particular type of expense included among POSAM's common expenses, and argues that "nothing in the administrative record even remotely suggests" that this particular type of expense "increased as POSAM's payroll increased." *See* Pl.'s Reply Brief at 12; *see also* Pl.'s Brief at 18.[21] But, significantly, U.S. Steel does not contend that Commerce's default methodology — the relative sales value methodology — would allocate that particular type of expense in "relation to the manner in which such expenses were incurred." *See* Pl.'s Brief at 18. Nor could U.S. Steel honestly make such a claim.

Although it is true that — as U.S. Steel asserts — the particular type of expenses that U.S. Steel cites as an example does not necessarily directly "increase[ ] as . . . payroll increase[s]," the same thing can be said of relative sales value: The particular type of expenses that U.S. Steel cites as an example also does not necessarily increase as sales increase. In short, the asserted infirmity that U.S. Steel highlights in the payroll methodology plagues the relative sales value methodology as well (and, indeed, is an issue that is largely inherent in the nature of common expenses and in the process of allocation). U.S. Steel thus has failed to identify a flaw specific to the payroll methodology, or its use in this case, which would be cured by the use of the methodology that U.S. Steel advocates.

Even more fundamentally, there is no truth to the basic premise of U.S. Steel's argument — that is, U.S. Steel's claim that an alternative allocation methodology is legally permissible only if all indirect selling expenses are allocated in a way that bears "a direct relation" to the nature of those expenses. In support of that proposition, U.S. Steel points to *Micron Technology*, 23 CIT at 62, 44 F. Supp. 2d at 223. *See* Pl.'s Brief at 18; Pl.'s Reply Brief at 12. But U.S. Steel misinterprets the case.

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[21] U.S. Steel focuses specifically on repair and maintenance expenses. *See* Pl.'s Brief at 18; Pl.'s Reply Brief at 12.

The Micron Technology court concluded that the three allocation methodologies proposed by the respondent during the administrative review there at issue were "more appropriate" than Commerce's default methodology, because each of the alternative methodologies bore "a direct relation to the manner in which the . . . expense [at issue was] incurred." *See Micron Technology*, 23 CIT at 62, 44 F. Supp. 2d at 223. As the Government here explains, however, "[t]his does not mean that a methodology that does not bear a direct relationship with the way an expense is incurred is distortive. Indeed, under U.S. Steel's interpretation, any alternative methodology, other than a methodology that allocates *each type of expense in a separate manner according to the way in which that expense was incurred*, would be distortive." *See* Def.'s Brief at 17–18 (emphasis added).

U.S. Steel thus engages in the same sort of faulty logic that characterized its analysis of Clinker from Mexico, discussed in section III.B.1, above. That the alternative methodologies at issue in Micron Technology bore "a direct relation to the manner in which . . . [the expenses at issue were] incurred" may have been *sufficient* to warrant the approval of those methodologies in *the specific case* there before the court. But that is not to say that such a "direct relation" is *necessary* in *this case*, much less *all cases*, as U.S. Steel maintains. *See* Pl.'s Brief at 18 (*quoting Micron Technology*, 23 CIT at 62, 44 F. Supp. 2d at 223).[22]

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[22] Finally, as the Government emphasizes, "Commerce has accepted indirect selling expense allocation methodologies similar to POSCO's in previous reviews." *See* Def.'s Brief at 18 (*citing* Issues Memorandum for the Antidumping Duty Investigations of Steel Concrete Reinforcing Bars from the Republic of Korea, 2001 WL 708441 (June 22, 2001), at comment 2 (finding the salary methodology "based on the ratio of total salaries to the salaries of personnel responsible for domestic sales, export sales, and G&A activities. . . . reasonable."); Issues and Decision Memorandum for the Final Determination of the Investigation of Prestressed Concrete Steel Wire Strand from Mexico, 2003 WL 24153876 (Dec. 8, 2003), at comment 2 (where indirect selling expense methodology was "based on the number of employees involved in the sales process of the product"); Issues and Decision Memorandum for the Administrative Review of Stainless Steel Sheet and Strip in Coils From the Republic of Korea for the Period of Review ("POR") January 4, 1999 through June 30, 2000, 2001 WL 1692844 (Dec. 17, 2001) ("Stainless Steel from Korea"), at comment 15 (applying a methodology "based on either the number of employees performing a given function, or the level of salaries and bonuses (for salary type expenses)"); *see also* POSCO Brief at 14.

U.S. Steel seizes on Stainless Steel from Korea (one of the cases that the Government cites), and argues that payroll information was used there only to allocate "*salary type expenses*." *See* Pl.'s Reply Brief at 13–14 (*quoting* Stainless Steel from Korea, 2001 WL 1692844, at comment 15 (emphasis added by Plaintiff)). What U.S. Steel neglects to note is that the remaining indirect selling expenses in that case were allocated in accordance with "the number of employees performing a given function" — *not* the relative sales value methodology that U.S. Steel advocates here. *See* Stainless Steel from Korea, 2001 WL 1692844, at comment 15. Moreover, U.S. Steel fails to explain how allocating indirect selling expenses

In sum, like the other two factors which U.S. Steel contends are "normally considered and applied by [Commerce] itself in determining the appropriateness of an alternative allocation methodology," this third and final factor — the relationship between the nature of expenses and their allocation — also does not advance U.S. Steel's case.[23]

C. *Commerce's Change of Methodology*

Lastly, U.S. Steel faults Commerce for changing the methodology used by the agency to allocate POSAM's indirect selling expenses. *See generally* Pl.'s Brief at 11–12, 13. U.S. Steel emphasizes that Commerce used the relative sales value methodology in prior administrative reviews involving POSCO, and, indeed, that POSCO itself advocated the use of that methodology in the tenth administrative review. *See* Pl.'s Brief at 11–12. In addition, U.S. Steel seeks to make much of the fact that Commerce used the relative sales value methodology in the Preliminary Results in the administrative review at issue here. *See* Pl.'s Brief at 13. U.S. Steel argues that Commerce "changed allocation methodologies between the preliminary and final results not based on any new evidence, but based on documents that were provided to the [agency] well before the preliminary results," and that the documents therefore cannot justify Commerce's decision to change methodologies for the Final Results. *See* Pl.'s Brief at 13; *see also id.* at 6.

Contrary to U.S. Steel's implication, the mere fact of Commerce's use of the relative sales value methodology in prior administrative reviews did not obligate the agency to continue to use that methodology for all future reviews. *See generally* POSCO Brief at 19–20. It is well-established that Commerce is required to calculate antidumping duty margins as accurately as possible in each segment of a proceeding. *See, e.g., Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Moreover, there is no requirement that Commerce use the same methodologies in every segment. *See, e.g., Huvis Corp. v. United States*, 570 F.3d 1347, 1353 (Fed. Cir. 2009) (rejecting argument that "law of the proceeding" obligated Commerce to apply methodology as it had been applied in three previous administrative

in accordance with "the number of employees performing a given function" bears a more "direct relation to the manner in which the allocated expenses were incurred" (relative to the payroll methodology), as U.S. Steel claims it does. *See* Pl.'s Reply Brief at 14.

[23] U.S. Steel appears to argue in the alternative that — even assuming that none of the three alleged factors that it identifies is sufficient to carry the day — "the three factors *considered as a whole* conclusively demonstrate that the payroll methodology is distorted." *See* Pl.'s Reply Brief at 5 (emphasis added); *see also id.* at 6. As set forth here in section III.B, none of the three asserted factors supports U.S. Steel's case. And this is one instance where the whole is no greater than the sum of its parts.

reviews; "Commerce need only show that its methodology is permissible under the statute and that it had good reasons for the new methodology"). Commerce's regulations expressly mandate that the agency calculate allocated expenses on as specific a basis as possible, which was the goal of POSCO and Commerce in using the payroll methodology to calculate POSAM's indirect selling expenses for purposes of the Final Results in the twelfth administrative review, at issue here. *See* 19 C.F.R. § 351.401(g)(2).

Further, there was a key change in POSCO's operations between the periods covered by prior administrative reviews and the period covered by this review. *See* POSCO Brief at 20.[24] Particularly given the different facts in the twelfth administrative review, it was not unreasonable for Commerce to use a different allocation methodology, to seek to achieve a more specific and more accurate indirect selling expenses ratio.

U.S. Steel's complaint that Commerce switched methodologies between the Preliminary Results and the Final Results in this administrative review is no more well-founded. *See generally* POSCO Brief at 20–21. It has long been recognized that Commerce is not bound by the positions taken or the methodologies employed in its preliminary determinations. *See, e.g., Peer Bearing Co. v. United States*, 22 CIT 472, 481–82, 12 F. Supp. 2d 445, 456 (1998) (explaining that "Commerce is allowed flexibility to change its position from the preliminary determination to the Final Results, as long as Commerce explains the basis for the change and the explanation is supported by substantial evidence. . . . Preliminary results, by their very nature, are preliminary and subject to change."). As POSCO notes, "the whole purpose of the [post-Preliminary Results] briefing process is to permit parties an opportunity to address aspects of Commerce's preliminary calculation methodology and attempt to convince Commerce to make appropriate revisions in the final decision." *See* POSCO Brief at 21.

In this case, as U.S. Steel emphasizes, Commerce had the requisite documentation in hand before the Preliminary Results issued. *See* Pl.'s Brief at 6, 13. Nevertheless, because Commerce had not yet had an opportunity to digest that information or to carefully analyze

[24] Specifically, during the period covered by the tenth administrative review, a substantial portion of POSAM's expenses related to sales to POSAM's subsidiaries. *See* Issues and Decisions for the Final Results of the Antidumping Duty New Shipper Review and the Antidumping Duty Administrative Review of Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea: Tenth Administrative Review (2002–2003), 2005 WL 2290629 (March 14, 2005), at comment 11; Tr. at 27–28. In contrast, there were no such sales during the period covered by the administrative review at issue here. *See* POSCO Brief at 20; Tr. at 27–28. POSAM's activity vis-a-vis the subsidiaries was limited to investment management. *See* Tr. at 27–28.

POSCO's proposed payroll methodology, the agency relied on its default methodology — the relative sales value methodology — for purposes of the Preliminary Results. *See* Def.'s Brief at 3–4, 11; *see also* Decision Memorandum at 45. After the Preliminary Results were released, Commerce reviewed POSCO's proposal more carefully, and considered it in light of the parties' briefing. As the Government explains, "after analyzing POSCO's explanation of the methodology in its case brief and after reviewing the evidence from the original and supplemental questionnaires, Commerce was satisfied that POSCO's methodology was accurate for the Final Results." *See* Def.'s Brief at 11; *see also id.* at 4; Decision Memorandum at 45. U.S. Steel's objections to Commerce's change of methodology must therefore be rejected.

V. *Conclusion*

For all the reasons set forth above, Commerce's well-reasoned decision — based on the specific facts of this case — to exclude POSAM's "investment management" expenses from the pool of indirect selling expenses and to allocate those expenses based on payroll data (rather than relative sales value) was supported by substantial evidence and otherwise in accordance with law.

U.S. Steel's Motion for Judgment on the Agency Record therefore must be denied, and the U.S. Department of Commerce's Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 Fed. Reg. 13,086 (March 20, 2007), as amended at 72 Fed. Reg. 20,815, 20,816 (April 26, 2007), must be sustained.

Judgment will enter accordingly.

Dated: March 19, 2010
New York, New York

/s/ Delissa A. Ridgway
Delissa A. Ridgway Judge

Slip Op. 10–34

FUJIAN LIANFU FORESTRY CO., LTD., A.K.A. FUJIAN WONDER PACIFIC INC., FUZHOU HUAN MEI FURNITURE CO., LTD., AND JIANGSU DARE FURNITURE CO., LTD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 07–00306

[Final remand results sustained.]

Dated: April 5, 2010

Arent Fox LLP (*Nancy A. Noonan, Matthew L. Kanna*) for Plaintiffs Fujian Lianfu Forestry Co., Ltd., a.k.a. Fujian Wonder Pacific Inc., Fuzhou Huan Mei Furniture Co., Ltd., and Jiangsu Dare Furniture Co., Ltd.

Steptoe & Johnson LLP (*Thomas J. Trendl, Jamie B. Beaber*) for Plaintiffs Starcorp Furniture Co., Ltd., Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co. Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Brian A. Mizoguchi*, Senior Trial Attorney); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Rachel E. Wenthold*), of counsel, for Defendant United States.

King & Spalding LLP (*J. Michael Taylor, Jeffrey M. Telep, Joseph W. Dorn, Stephen A. Jones*) for Defendant-Intervenor American Furniture Manufacturers Committee for Legal Trade and Vaughn-Bassett Furniture Co. Inc.

OPINION

Gordon, Judge:

I. Introduction

Before the court are the Final Results of Redetermination Pursuant to Court Remand (Dec. 14, 2009) ("*Remand Results* ") filed by the U.S. Department of Commerce ("Commerce") pursuant to *Fujian Lianfu Forestry Co. v. United States*, 33 CIT __, 638 F. Supp. 2d 1325 (2009). Plaintiffs Starcorp Furniture Company Ltd., Starcorp Furniture (Shanghai) Co., Ltd., Orin Furniture (Shanghai) Co., Ltd., Shanghai Star Furniture Co., Ltd., and Shanghai Xing Ding Furniture Industrial Co., Ltd. (collectively "Starcorp") challenge the *Remand Results*. Familiarity with the court's decision in Fujian is presumed.

II. Background

This case involves challenges to the first administrative review (2004–2005) of the antidumping duty order covering wooden bedroom furniture from China. During the administrative proceeding Commerce assigned Starcorp a total adverse facts available ("AFA") rate of 216.01 percent, which Starcorp challenged. The court sustained

Commerce's use of total AFA, but remanded the case to Commerce because Commerce had failed to corroborate the rate by tying it to Starcorp (or explaining why it was not practicable to do so). *Fujian*, 33 CIT at ___, 638 F. Supp. 2d at 1337.

On remand Commerce tied the rate to Starcorp by comparing it to model-specific margins calculated for Starcorp during the investigation, the prior segment of the proceeding. Commerce examined the program output used to calculate Starcorp's weighted average dumping margin in the investigation, and found that the AFA rate fell within the range of Starcorp's model-specific margins. *Remand Results* at 7; *see also Remand Results*, Confid. Attach. 2, at 10.

III. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains determinations, findings, or conclusions of the U.S. Department of Commerce unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B)(i) (2006).[1]

IV. Discussion

Starcorp argues that the Starcorp model-specific margins on which Commerce relied are "aberrant" outliers because they are much higher than the overall average margin Starcorp received when it was treated as a cooperative respondent (15.78 percent). *See* Comments of Starcorp on Final Remand Redetermination (Jan. 27, 2010) ("Starcorp Cmts.") at 7–12. Starcorp also argues, for basically the same reason, that the rate is "punitive." *Id.* at 12. The United States Court of Appeals for the Federal Circuit has on two occasions, however, sustained Commerce's corroboration of a total AFA rate based on a small number of individual transactions, regardless of whether such transactions represent a small percentage of respondent's sales. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339–40 (Fed. Cir. 2002) (sustaining corroboration of AFA rate based on the margin of a *single* sale calculated for the uncooperative respondent that represented just .04 percent of total sales); *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1340 (Fed. Cir. 2009) (sustaining corroboration of AFA rate based on transactions representing .05 percent of sales). Commerce's corroboration of Starcorp's rate is con-

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

sistent with the approach sustained in *Ta Chen* and *PAM*. The 216.01 percent total AFA rate falls within the range of, and ties to, Starcorp's actual margins, and therefore must be sustained.

Starcorp also contends that Commerce's reliance on data from the investigation is unlawful because the data was not included in the first review administrative record. *See* Starcorp Cmts. at 3–6. Commerce, however, properly relied upon Starcorp's record data from the prior proceeding, enabling Commerce to comply with the court's remand instructions to tie the selected rate to Starcorp. The antidumping statute requires Commerce to corroborate, if practicable, a total AFA rate, from "independent sources that are reasonably at [Commerce's] disposal.]" 19 U.S.C. § 1677e(c). As this was the first administrative review under the antidumping duty order, the recently completed less than fair value investigation provided an obvious source of independent corroborating information for Commerce to tie its chosen proxy to Starcorp.

There is no bar, statutory or otherwise, to Commerce accessing and using that information on remand even though it was not originally part of the administrative record for the final results. In *PAM*, for example, the Federal Circuit reviewed and approved Commerce's corroboration efforts that involved reliance upon data from earlier proceedings that Commerce first accessed and used on remand from the Court of International Trade. *PAM*, 582 F.3d 1336, 1338, 1340 & n.2 ("On remand, Commerce used PAM's databases from the fourth administrative review — in which PAM was also a respondent — and found the 45.49% AFA margin it had assessed in the sixth administrative review was corroborated by United States sales in the fourth review with margins in excess of 45.49%.").

During the remand proceedings here, Starcorp was provided the opportunity to review and comment on the Starcorp margin data upon which Commerce relied. Specifically, Commerce released the margin output in both hard copy (paper) and electronic form to the parties. Non Pub. Remand Record, Docs. 1–3. Prior to submitting comments on the draft remand results, Starcorp alerted Commerce to certain discrepancies in the electronic data release. Pub. Remand Record, Doc. 5. Prior to the submission of its final remand results, Commerce responded to Starcorp's concerns about the data relied upon, re-released the electronic output, and provided Starcorp additional comment time. Pub. Remand Record, Docs. 6 and 7; *see also Remand Results* at n.1. Starcorp does not contest the accuracy of the Starcorp model-specific margin calculations upon which Commerce's remand results rely. Nor does Starcorp deny that the program output relied upon was based upon its own sales data from the investigation.

Thus, the court is not persuaded that the remand process and Commerce's augmentation of the administrative record with corroborating information was in any way unreasonable.

V. Conclusion

Commerce's Remand Results comply with the court's remand order, are supported by substantial evidence, and otherwise in accordance with law. Accordingly, the court sustains Commerce's Remand Results and will enter judgment for the United States.

Dated: April 5, 2010
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 10–35

FISCHER S.A. COMERCIO, INDUSTRIA AND AGRICULTURA, AND CITROSUCO NORTH AMERICA, INC, Plaintiffs, v. UNITED STATES, Defendant, -AND- FLORIDA CITRUS MUTUAL, A. DUDA & SONS, CITRUS WORLD, INC., AND SOUTHERN GARDENS CITRUS PROCESSING CORPORATION, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Court No. 08–00277

[Plaintiffs" Motion for Judgment on the Agency Record is GRANTED IN PART. The Final Results of the first administrative review of the antidumping duty order on Certain Orange Juice from Brazil are REMANDED IN PART, with instructions that Commerce consider the additional sales agreement pages submitted by Plaintiffs, reconvert Plaintiffs' United States sales from gallons to pounds-solids, and recalculate the Constructed Export Price of Plaintiffs' United States sales in light of the new information. The Final Results are AFFIRMED as to the conversion of Plaintiffs' home market sales from kilograms to pounds-solids, the calculation of Plaintiffs' inventory carrying cost setoff, and Commerce's application of the "90/60 day contemporaneity rule" to examine a home market sale occurring before the period of review. Plaintiffs' Amended Motion for Oral Argument is DENIED.]

Dated: April 6, 2010

Kalik Lewin (*Robert G. Kalik* and *Brenna Steinert Lenchak*); *Galvin & Mlawski* (*John Joseph Galvin*), of counsel, for Plaintiffs Fischer S.A. Comercio, Industria and Agricultura and Citrosuco North America, Inc.

Tony West Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael J. Dierberg*); *Mykhaylo A. Gryzlov*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for Defendant.

Barnes, Richardson & Colburn (*Matthew Thomas McGrath* and *Stephen William Brophy*) for Defendant-Intervenors Florida Citrus Mutual, A. Duda & Sons, Citrus World, Inc. and Southern Gardens Citrus Processing Corporation.

OPINION & ORDER

Carman, Judge:

Introduction

Plaintiff Fischer S.A. Comercio, Industria and Agricultura is a foreign producer-exporter of orange juice subject to the final results of the first administrative review of an antidumping duty order on certain Brazilian orange juice. Certain Orange Juice from Brazil: Finals Results and Partial Rescission of Antidumping Duty Administrative Review, 73 Fed. Reg. 46,584 (Aug. 11, 2008) ("Final Results"). Plaintiff Citrosuco North America, Inc. is the affiliated importer of Fischer S.A. Comercio, Industria and Agricultura. (Compl. ¶ 3.) For simplicity, Plaintiffs are referred to together as "Fischer."

Fischer brings this challenge to a portion of the Final Results pursuant to section 516A of the Tariff Act of 1930, as amended, 19 U.S.C. 1516a (2006). The matter is now before the Court on Fischer's Motion for Judgment on the Agency Record, filed pursuant to USCIT Rule 56.2.[1] The United States ("Defendant" or "government") as well as domestic producers and interested parties Florida Citrus Mutual, A. Duda & Sons, Citrus World, Inc. and Southern Gardens Citrus Processing Corporation ("Defendant-Intervenors") opposed the motion,[2] and Plaintiff filed a reply.[3]

Fischer advances five claims challenging various aspects of the Final Results. (Compl. ¶¶ 26–39.) Fischer's first claim stems from the manner in which its United States sales of not-from-concentrate orange juice ("NFC") were converted from gallons, the unit in which NFC was sold in the United States, into pounds-solids so that they could be compared with home market sales made in kilograms. (Compl. ¶¶ 28–30.)[4] A pound-solid is "a basic and standardized measurement of the amount of dissolved citrus sugar found in juice." U.S. Int'l Trade Comm'n, Certain Orange Juice From Brazil, Investigation 731–TA–1089 (Final), Pub. 3838 (Mar. 2006) at 17 n.132. Converting

[1] Doc. No. 32: Public Motion for Judgment on the Agency Record ("Public Motion"); Doc. No. 39: Confidential (Final) Motion for Judgment on the Agency Record ("Confidential Motion"),

[2] Doc. No. 48: Def.'s Response to Motion for Judgment upon the Agency Record (Def.'s Public Opp."); Doc. No. 51: Confidential Response in Opposition to Motion for Judgment upon the Agency Record ("Def.'s Confidential Opp."); Doc. No. 49: Defendant-Intervenors' Public Response to Motion for Judgment on the Agency Record ("Def.'s-Int.'s Public Opp."); Doc. No. 53: Defendant-Intervenors' Final Confidential Response in Opposition to Motion for Judgment upon the Agency Record ("Def-Int.'s Confidential Opp.").

[3] Doc. No. 62: Reply to Defendant and Defendant-Intervenors' Responses in Opposition to Plaintiffs' Motion for Judgment upon the Agency Record ("Public Reply"); Doc. No. 64: Confidential Reply to Defendant and Defendant-Intervenors' Responses in Opposition to Plaintiffs' Motion for Judgment upon the Agency Record ("Confidential Reply").

[4] This claim is contained in Count Two of Fischer's complaint.

gallons of NFC to pounds-solids involves determining the weight in pounds of the fruit sugar solids dissolved in each gallon of NFC. Thus, the sweetness of the NFC is an essential factor in converting gallons of NFC into pounds-solid of NFC; the sweeter a batch of NFC is, the heavier will be the fruit sugar solids it contains. Fischer contends that Commerce distorted the price paid for its United States NFC sales by converting to pounds-solids using the actual sweetness of each individual shipment of NFC, rather than converting based upon an assumed amount of sweetness that actually determined the price of Fischer's NFC sales. According to Fischer, this conversion error had the effect of lowering the gross unit price[5] of Fischer's United States sales below the price actually paid by the United States buyer, resulting in an increased dumping margin contrary to substantial evidence in the record. (Public Motion at 18–23.) Second, Fischer argues that a similar error in Commerce's conversion of home market NFC sales from kilograms to pounds-solids caused an improper increase in the gross unit price in the home market, which was unsupported by substantial evidence. (*Id.* at 28.) Third, Fischer claims that Commerce abused its discretion by rejecting documents that Fischer submitted in response to the preliminary results of the administrative review, despite the fact that the submission was made almost nine months after the regulatory deadline had expired for the filing of factual information. Fischer asserts that Commerce was required to accept these documents, despite their lateness, because they simply clarified errors in information already timely submitted. (*Id.* at 24–27.) Fourth, Fischer claims that, in calculating the statutory Normal Value ("NV") of Fischer's home market sales, Commerce used an inventory carrying cost offset based on industry-wide average costs, rather than using data submitted by Fischer which showed the actual inventory carrying costs for the specific home market NFC sales under consideration. According to Fischer, this error distorted NV and was unsupported by substantial evidence. (*Id.* at 29–30.) Fifth, Fischer challenges Commerce's application of 19 C.F.R. 351.414(e)(2) (the "90/60 day contemporaneity rule"), pursuant to which Commerce considered a home market sale occurring outside the Period of Review ("POR") when calculating the antidumping margin. Fischer claims that, in doing so, Commerce acted contrary to statute and its own regulations. (*Id.* at 30–33.) Fischer also moves for oral argument.[6]

[5] Gross unit price is calculated by dividing the price paid for the shipment of NFC by the number of units (i.e. gallons or pounds-solids) contained in the shipment. *See Black's Law Dictionary* 1309 (9th ed. 2009) (defining unit price as "price of a food product expressed in a well-known measure such as ounces or pounds").

[6] Doc. No. 63: Amended Motion for Oral Argument.

As discussed in full below, the Court concludes that: (1) Commerce relied on Fischer's mistaken reporting of an incorrect conversion factor and, as a result, calculated an inaccurate gross unit price for Fischer's United States NFC sales, and (2) Commerce abused its discretion when it rejected materials Fischer submitted after the preliminary results of the investigation, which reliably established the mistake and demonstrated the correct conversion factor. On the other hand, both (3) Commerce's calculation of the gross unit price of home market NFC sales and (4) Commerce's calculation of inventory carrying cost offsets were supported by substantial evidence, and (5) Commerce acted in accordance with statute and regulation in applying its 90/60 day contemporaneity rule. The Court therefore grants in part Fischer's Motion for Judgment on the Agency Record, affirms Commerce's determination of NV for Fischer's home market sales and its use of the 90/60 day contemporaneity rule, and remands to Commerce for recalculation, as detailed below, of the gross unit price of Fischer's United States NFC sales using the appropriate conversion factor. Fischer's Amended Motion for Oral Argument is denied.

Factual Background

The antidumping duty order underlying this case went into effect on March 9, 2006. Antidumping Duty Order: Certain Orange Juice from Brazil, 71 Fed. Reg. 12,183 (Mar. 9, 2006) ("AD Order"). On March 2, 2007, Commerce published a notice of opportunity to request administrative review of the order, with the POR extending from August 24, 2005 to February 28, 2007. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review, 72 Fed. Reg. 9,505 (Mar. 2, 2007). Upon request, Commerce began a first administrative review. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 72 Fed. Reg. 20,986 (Apr. 27, 2007) ("Notice of Initiation"). In the course of the review, Fischer provided relevant information in several responses and supplemental responses to questionnaires from Commerce. These responses are contained in the administrative record as follows: (1) the "Section A Response" (*Letter w/Attachment(s) from law firm of Kalik Lewin to Sec of Commerce Fischer Sec A Qnaire* (May 5, 2007), PR 22, CR 2[7]; (2) the "Section B Response" (*Letter w/Attachment(s) from law firm of Kalik Lewin to Sec of Commerce Fischer Qnaire B Response* (June 1, 2007), PR 24, CR 3); (3) the "Section C Response" (*Letter w/Attachment(s) from law firm of Kalik Lewin to Sec of Commerce Fischer Qnaire C Response*

[7] "PR" refers to the public version of the official administrative record, and "CR" refers to the confidential version.

(June 1, 2007), PR 25, CR 4); (4) the "First Supplemental AB" (*Letter w/Attachment(s) from law firm of Kalik Lewin to Sec of Commerce Fischer Supp Qnaire Secs A&B* (Oct. 10, 2007), PR 47, CR 15); (5) the "Supplemental C" (*Letter w/Attachment(s) from law firm of Kalik Lewin to Sec of Commerce Fischer Supp Sec C QR* (Nov. 5, 2007), PR 58, CR 21); (6) the "Second Supplemental AB" (*Letter w/Attachment(s) from law firm of Kalik Lewin to Sec of Commerce Fischer Supp QR Secs A&B* (Nov. 15, 2007), PR 63, CR 24); (7) the "First Supplemental BC" (*Letter w/Attachment(s) from law firm of Kalik Lewin to Sec of Commerce Fischer Supp QR Secs B&C* (Dec. 17, 2007), PR 69, CR 28); and (8) the "Second Supplemental BC" (*Letter w/Attachment(s) from. law firm of Kalik Lewin to Sec of Commerce Fischer Supp Sec B&C QR* (Mar. 13, 2008), PR 80, CR 35).

The preliminary results of the first administrative review were published on April 7, 2008. Certain Orange Juice from Brazil: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 Fed. Reg. 18,773 (Apr. 7, 2008) ("Preliminary Results"). In the Preliminary Results, Commerce determined the weighted-average dumping margin for Fischer to be 2.46 percent for the period August 24, 2005 through February 28, 2007. *Id.* at 18,778.

Following publication of the Preliminary Results, Fischer timely submitted a case brief on May 8, 2008. (*Brief from Law Firm of Kalik Lewin to Sec of Commerce Fischer Case Brief*, PR 103, CR 48 ("Case Brief").) Commerce sent a letter to Fischer the same day stating that it had "determined that certain information contained in [the] case brief represents new and untimely filed factual information." (*Letter from Program Mgr/IA to law firm of Kalik Lewin rejecting your submission / Fischer*, PR 105 ("Rejection Letter").) Fischer deleted the rejected portions of the case brief and resubmitted it in accordance with the instructions of Commerce on May 12, 2008. (*Letter w/Attachment(s) from Law Firm of Kalik Lewin to Sec of Commerce Fischer Case Brief*, PR 106, CR 50 ("Resubmitted Case Brief").) Commerce then published the final results of the first administrative review on August 11, 2008, finding a dumping margin of 4.81 percent for Fischer. Final Results at 46,585.

Fischer brought this suit pursuant to § 516A(a)(2)(A)(i)(I) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i)(I), permitting challenges to the final results of an antidumping administrative review upon the filing of a summons and complaint "contesting any factual findings or legal conclusions upon which the determination is based." 19 U.S.C. § 1516a(a)(2)(A). (*See* Compl.¶ 1.)

Jurisdiction & Standard of Review

The Court of International Trade has exclusive jurisdiction over this action pursuant to 28 U.S.C. § 1581(c).

In reviewing a challenge to the final results of an antidumping administrative review, the Court shall hold the final results unlawful if they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197,229 (1938)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citations and quotation marks omitted). The Court "must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal citations and quotation marks omitted). Agency factual findings are supported by substantial evidence where the agency explains the standards applied and "demonstrates a rational connection between the facts on the record and the conclusions drawn." *Alloy Piping Prods., Inc. v. United States*, Consol. Court No. 08–00027, Slip. Op. 10–15 at 4 (C.I.T. 2010) (*citing Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984); *see also NMB Sing. Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009) ("[T]he path of [the agency]'s decision must be reasonably discernible to a reviewing court.").

Discussion

I. *Alleged Errors in Calculating Dumping Margin*

In its Section A Response, Fischer reported that it sold NFC in the United States "either on a pounds/solids or a per gallon basis," and in the home market "on a per kilogram basis." (Section A Response at A–17.) Commerce instructed Fischer to "describe any conversion factors necessary to put the sales on the same basis," and Fischer filed a document in response which illustrated the proper way to convert both United States and home market sales to common measurements expressed in pounds-solids. (*Id.* The conversion formula document reads as follows:

Standard conversions:

> The standard brix value[8] for NFC is 11.8
>
> Kilograms *divided by* .45359237= Pounds
> Pounds *multiplied by* Brix divided by 100 = Pounds of Solids
>
> . . .
>
> Using the above conversions along with the USDA Conversion Table[9] the conversion of 1 gallon of NFC into pounds of solids as follows:
>
> Per USDA Conversion Table: 1 Gallon @ 11.8 Brix = 8.717 Pounds
> 8.717 Pounds *multiplied by* 11.8 *divided by* 100 = 1.029 Pounds of Solids

(Section A Response, Ex. 19.)

The first part of the formula demonstrates how kilograms of NFC are converted into pounds-solids of NFC. First, the number of kilograms is divided by the factor .45359237, a constant which converts kilograms into pounds. To convert the resulting number of pounds of NFC into pounds-solids, the pounds are multiplied by an appropriate Brix measurement, and the result is divided by 100, yielding a number of pounds-solids as the final conversion result. The formula set out above illustrates the conversion by placing the standard Brix measurement of 11.8 degrees into the formula for the Brix factor. (Brix of 11.8 degrees is considered "standard" because that level is the average Brix value of unconcentrated natural orange juice in United States commerce. *See* 19 C.F.R. § 151.91.[10])

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[8] Brix is a unit of measurement for sugar solutions, expressed in degrees, "so graduated that its readings at a specified temperature represent percentages by weight of sugar in the solution." *Webster's New Collegiate Dictionary* 138 (1981). Orange juice with a higher Brix value is sweeter, and orange juice typically achieves Brix degree levels in the 60s when concentrated. *See generally Tropicana Prods., Inc. v. United States*, 16 C.I.T. 155,789 F.Supp. 1154 (1992); *see also National Juice Products Ass'n v. United States.*, 10 C.I.T. 48, 57 n.13, 628 F.Supp. 978, 987 n.13 (1986) ("Degree brix is a measurement of the percentage of the soluble solids (sugar) in a concentrate, as measured in air at 20° centigrade and adjusted for the acid correction of the solids. Thus, manufacturing concentrate with a brix value of 65° contains 65 pounds of fruit sugar solids in every 100 pounds of solution."). The Court notes that the term Brix derives from the last name of the inventor of the scale. *Webster's New Collegiate Dictionary* 138 (1981). Although the term should therefore be capitalized, it often is not; the capitalization used in source documents will be retained when those documents are quoted in this opinion.

[9] UNITED STATES DEPT. OF AGRICULTURE, FILE CODE 135–A–50, TECHNICAL INSPECTION PROCEDURES: SUCROSE CONVERSION TABLE (1970).

[10] Section 151.91 is not binding outside the context of determining tariff rates; it merely serves here to illustrate the basis for referring to 11.8 degree Brix as "standard" for NFC.

The second part of the formula demonstrates how gallons of NFC are converted into pounds-solids of NFC. The first step is determining, based on the USDA Conversion Table, how many pounds each gallon of NFC weighs. Doing so requires choosing the appropriate Brix measurement for the gallons of NFC, since gallons of NFC with a higher Brix degree contain more dissolved sugars and consequently weigh more. Once the appropriate Brix variable is chosen, the USDA Conversion Chart provides the corresponding weigh in pounds per gallon of NFC. This number of pounds is then multiplied by the same Brix variable chosen in determining the pounds per gallon of NFC, and the result is divided by 100. The end result of this calculation provides the number of pounds-solids per gallon of NFC.

A. United States Sales

The USDA measured the average Brix of each shipment of Fischer's orange juice upon entry into the United States, establishing a "USDA Brix" or "actual Brix" value which varied with the minor fluctuations of sweetness naturally occurring from shipment to shipment of NFC. (Public Motion at 9.) On June 1, 2007, Fischer replied to Commerce's request for "the brix level at which the product is sold" by reporting in its Section C Response (at C–3) the actual Brix levels as measured by the USDA for each United States sale under review. (*See* Public Motion at 15.)[11] Fischer then calculated the gross unit price per pound-solid of its United States sales (also reported to Commerce on June 1, 2007) by converting the sales into pounds-solids using the conversion formula given above and filling in the Brix variable with the actual Brix figures for each shipment as measured by the USDA. (*See* Public Motion at 3, 15.) Fischer claims that these calculations were made in error because Fischer's sales in the United States were priced assuming a standard Brix level of 11.8, but Fischer accidentally reported actual Brix—and then based the calculated gross unit price on mistakenly-reported actual Brix. (Public Motion at 3, 15.)

Without yet discussing the appropriateness of choosing any particular Brix number as the factor for converting United States sales from a gallons to a pounds-solids basis, the Court notes that the conversion formula has the mathematical property of yielding lower United States unit prices as the Brix conversion factor increases. The following table illustrates this effect by contrasting the gross unit prices yielded by a hypothetical USDA Brix measurement of 12.5

[11] In its Public Motion, Fischer erroneously refers to this information having been reported in its Section 13 Response at B–2. (Public Motion at 15.) The Section B Response, however, contains information regarding "Sales in the Home Market" (Section B Response at B–1), while the Section C Response contains information regarding "Sales to the United States" (Section C Response at C–1).

degrees against those that result using the standard Brix of 11.8 degrees, when applied to conversion of a hypothetical sale of 100,000 gallons of NFC for a price of $100,000:[12]

Conversion formula: (1) USDA Sucrose Conversion Chart value of pounds per gallon at Brix x Brix + 100 =pounds-solids per gallon (2) Pounds-solids per gallon x total sale gallons = total pounds-solids sold (3) Total sale price + total sale pounds-solids = price per pound-solid		
	Hypothetical USDA Brix of 12.5°:	**Standard Brix of 11.8°:**
(1)	8.742 pounds per gallon at 12.5° x 12.5 ÷ 100 = **1.09275 pounds-solids per gallon**	8.717 pounds per gallon at 11.8° x 11.8 ÷ 100 = **1.028606 pounds-solids per gallon**
(2)	1.09275 pounds-solids per gallon x 100,000 total sale gallons = **109,275 total pounds-solids sold**	1.028606 pounds-solids per gallon x 100,000 total sale gallons = **102,860.6 total pounds-solids sold**
(3)	$100,000 ÷ 109,275 = **$0.91512240 per pound-solid**	$100,000 + 102,860.6 = **$0.97218955 per pound-solid**

As the table shows, converting a sale from gallons to pounds-solids using a Brix value higher than standard Brix yields a lower gross unit price than converting the same sale to pounds-solids using standard Brix.

Fischer illustrated this effect as applied to the actual United States sales observations considered by Commerce in the administrative review with a chart that Commerce accepted into the official administrative record. (Resubmitted Case Brief at Ex. 2, PR 103 (“Comparison Chart”).) The Comparison Chart accurately notes, for example, that Fischer’s United States sale #317 has a gross unit price when converted from gallons to pounds-solids using actual degrees Brix that is more than 12¢ lower per pound-solid than the price that would result if the conversion used the standard Brix of 11.8 degrees. (*Id.*)

B. Home Market Sales

Fischer claims that it made a similar reporting mistake as to its home market sales, providing the minimum permissible Brix level of 10.5 degrees instead of the Brix level at which home market sales were actually priced. (Public Motion at 28.) Fischer appears to argue that home market sales were priced at the standard Brix level of 11.8

[12] Numbers here are rounded off at eight decimal places. The conversion employs the formula used in the administrative review, given in Fischer’s Section A Response, Ex. 19.

degrees. (*See* Public Motion at 28 (referring to the sample conversion chart and stating that "Plaintiffs informed Commerce in the Section A Response that the Brix levels [sic] of NFC sold in the home market is also 11.8.").) But Fischer's Public Reply can also be read as suggesting that actual Brix should have been used. (*See* Public Reply at 5 (challenging Commerce's reliance upon minimum Brix levels "and not the actual or standard brix levels of the sale," but not specifying which Brix level Commerce should have relied upon), 9 (stating Commerce relied on minimum Brix levels rather than actual levels); *see also* Resubmitted Case Brief at 2 (stating that "Fischer sells to its Brazilian customer on a kilogram basis. The drums are filled either to 180 or 185 kilograms. The customer pays based on kilograms and not based on brix levels.").) Fischer submitted a product specification sheet from the home market showing a minimum Brix of 10.5 degrees, with no maximum or target Brix provided. (Supplemental AB at Ex. 15.) However, Defendant points out, correctly, that Fischer reported varying Brix levels for home market NFC sales, which is inconsistent with Fischer's claim that it reported uniform minimum Brix levels in the home market sales listing. (Def.'s Public Opp, at 24; *see* Section B Response, CR 3, Ex. 2.)

Again examining the mathematical properties of the conversion formula, the Court notes that using a lower Brix number when converting home market sales from kilograms to pounds-solids results in a higher unit price—the converse of the effect illustrated in Fischer's Comparison Chart for United States prices. The following table illustrates this, contrasting the home market minimum Brix of 10.5 degrees with standard Brix of 11.8 degrees, as applied to a hypothetical sale of 100,00 kilograms of NFC for $100,000:[13]

Conversion formula: (1) Kilograms ÷ .45369237 = pounds (2) Pounds x Brix ÷ 100 = pounds-solids (3) Total shipment price ÷ pounds-solids = price per pound-solid		
	Minimum Brix of 10.5°:	**Standard Brix of 11.8°:**
(1)	100,000 kilograms ÷ .45359237 = **220462.26218488 pounds**	100,000 kilograms ÷ .45359237 = **220462.26218488 pounds**
(2)	220462.26218488 pounds x 10.5° Brix ÷ 100 = **23148.53752941 pounds-solids**	220462.26218488 pounds x 11.8 Brix ÷ 100 = **26014.54693782 pounds-solids**

[13] Numbers here are rounded off at eight decimal places. The conversion follows the formula used in the administrative review, given in Fischer's Section A Response, Ex. 19.

(3)	$100,000 ÷ 23148.53752941 = **$4.31992733 per pound-solid**	$100,000 ÷ 26014.54693782 = **$3.84400314 per pound-solid**

Because kilogram to pounds-solids conversions made using a lower Brix factor result in higher home market unit prices, the result would be an increased difference between home market and United States prices and, consequently, a greater dumping margin.

C. Inventory Carrying Costs

On June 1, 2007, Fischer provided Commerce with a chart each for frozen concentrated orange juice ("FCOJ") and NFC, calculating average inventory carrying cost. (Section B Response, Ex. 12.) Fischer asserted in its Public Motion that Commerce ignored these charts when it "calculated inventory carrying cost based upon an average inventory cost for all products" instead of using the "actual carrying charge associated with NFC sales and a separate charge associated with FCOJ sales." (Public Motion at 29.) Fischer later recharacterized the alleged error, contending that Commerce rejected submissions that showed "the actual number of days that each home market NFC sale was held in inventory, and recalculated inventory carrying costs on an invoice specific basis." (Public Reply at 5.)

II. *Analysis*

A. Rejection of the Extra Pages as Untimely Factual Information

The first question to be addressed is whether Commerce's decision to enforce its deadline for the submission of factual information and reject the additional agreement pages that accompanied Fischer's Case Brief was an abuse of discretion.

1. *Fischer's Position:*

Fischer claims that Commerce should have accepted the additional pages of the agreement because they merely clarified information already in the record. According to Fischer, the additional excerpts of the agreement were submitted "[s]o that Commerce could read and understand" the previously submitted agreement extract, revealing the previously submitted extract to be a "key provision" indicating that "brix levels higher than 11.8 were not subject to a price adjustment." (Public Motion at 25.) Fischer thus characterizes the additional agreement pages as "not new information, but rather clarification material," since they were "already cited within the text of the

Agreement attached at the Supplemental C response." (*Id.*) Commerce abused its discretion in rejecting the additional pages, Fischer claims, because Commerce must allow correction of any error, so long as the error is identified before the final results, involves "a straightforward mathematical adjustment," and would not delay the Final Results. (*Id.* at 25–26 (citing *Timken U.S. Corp. v. United States*, 434 F.3d 1345, 1353 (Fed. Cir. 2006), *cert. denied*, 549 U.S. 1030 (2006) ("*Timken*") and *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208–09 (Fed. Cir. 1995) ("*NTN Bearing*").) Fischer also contends that, in classifying the additional agreement pages as new factual information, Commerce violated its own policy of accepting correction of unintended errors pursuant to the criteria set forth in Certain Fresh Cut Flowers from Colombia, 61 Fed. Reg. 42,833, 42,834 (Aug. 19, 1996) (the "Colombia Flowers criteria"). (*Id.* at 26–27.) In Fischer's view, the Case Brief satisfied the Colombia Flowers criteria because it (1) identified deficiencies in Fischer's previous submissions, (2) gave reliable evidence of those errors in the extra agreement pages, (3) corrected the errors at the earliest opportunity, since Fischer first noticed the errors when it received the Preliminary Results, and (4) required only a small change to the numbers used in the conversion formula. (*Id.* at 27.)

2. *The Government's Position*

The government claims that Commerce appropriately rejected the additional agreement pages as untimely submitted new factual information. Defendant points out that the additional agreement pages were submitted on May 7, 2008,[14] almost nine months after the August 20, 2007 deadline for the submission of factual material set by 19 C.F.R. 13 351.301(b)(2), and that pursuant to 19 C.F.R. § 351.302(d)(1) Commerce cannot consider material rejected as untimely. (Def.'s Public Opp. at 5, 17–19.) According to Defendant, while Commerce may extend deadlines for good cause pursuant to 19 C.F.R. § 351.302(b), Fischer neither requested nor demonstrated grounds for an extension. (*Id.* at 19.) The government cites several court decisions upholding Commerce's authority to establish and enforce its own rules of procedure and deadlines: *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519 (1978); *Uniroyal Marine Exports Ltd. v. United States*, 33 CIT ___, 626 F. Supp. 2d 1312 (2009) ("*Uniroyal*"); *Yantai Timken Co., Ltd. v. United States*, 521 F. Supp. 2d 1356,1371 (C.I.T. 2007) ("*Yantai*"), aff'd 300 Fed.

[14] Although the Case Brief bears the date "May 8, 2008" on its cover sheet, Commerce stamped it as received on May 7, 2008. (*See* PR 103, CR 48.)

App'x 934 (Fed. Cir. 2008); *Tianjin Machinery Import & Export Corp. v. United States*, 28 CIT 1635, 353 F. Supp. 2d 1294, 1303–04 (2004).

While maintaining that Fischer's additional pages were properly rejected as untimely, Defendant also appears to argue that Fischer's additional pages were *not* rejected for being untimely, Specifically, the government argues that *NTN Bearing* is inapposite here since *NTN Bearing* stands for the proposition that "it was an abuse of discretion for Commerce to refuse to correct factual errors in information submitted by the producer based upon timeliness when the errors were identified prior to the final determination," but Commerce rejected Fischer's argument on its merits, not for untimeliness. (*See* Def's Public Opp. at 20–21 (stating "[h]ere, in contrast [to *Timken* and *NTN Bearing*], Fischer asked Commerce to apply a different methodology" and "Commerce rejected Fischer's request because Commerce found that the methodology used in conversion was appropriate," so there was "no error to correct.").) Defendant also argues that *Timken* held only that Commerce cannot "refuse to correct factual errors in information submitted by the producer, identified prior to the final results, solely because the errors were not 'clerical' in nature," and, accordingly, that *Timken* does not apply here because Commerce did not reject Fischer's additional pages on the grounds that they were not "clerical" in nature. (*Id.*)

Finally, Defendant states that Commerce "did not use, and had no reason for using, the *Colombia Flowers* factors," which is "a test that Commerce used to use when evaluating whether to correct errors in information submitted by a party," but was invalidated by *Timken* at least to the extent that it limited the correction of errors to those that were clerical in nature. (*Id.* at 21–22.)

3. *Defendant-Intervenors' Position*

Defendant-Intervenors contend that Commerce properly rejected the additional agreement pages submitted by Fischer because "this information cannot be fairly characterized as merely clarification material," but rather represents "an abrupt tactical shift, once [Fischer] found that it had miscalculated its dumping margin." (Def.-Int.'s Public Opp. at 15–16.) Defendant-Intervenors, like Defendant, argue that *Timken*, *Yantai*, and *NTN Bearing* are inapplicable because they only allow for the late correction of errors' but conversion of Fischer's sales into pounds-solid using actual Brix measurements did not lead to an erroneous result. (*Id.* at 16–17.) According to Defendant-Intervenors, Fischer did not satisfy the Colombia Flowers test because the errors it alleges (1) were not clerical, (2) were unsupported by reliable evidence, (3) were not corrected at the earliest opportunity, and (4) required substantial changes to the Preliminary Results. (*Id.* at 17–18.)

B. Rejecting the Additional Agreement Pages Was an Abuse of Discretion

Timken and *NTN Bearing* both stress that, at the preliminary results stage, Commerce abuses its discretion where it refuses to let a respondent establish an accurate dumping margin by correcting mistakes in its response. Finality concerns only begin to counterbalance accuracy concerns when the administrative review reaches the final results stage. Here, Commerce refused to consider pages from Fischer's sales agreement establishing that the dumping margin in the preliminary results was inaccurate. The Court finds that, in doing so, Commerce abused its discretion.

In *Timken*, upon reviewing the preliminary results of the administrative review of an antidumping duty order, the respondent (like Fischer) allegedly realized that it had "inadvertently and inaccurately" misreported sales data important in calculating an accurate dumping margin. 434 F.3d at 1347–48. Like Fischer, Timken submitted documentary exhibits with its case brief and requested that Commerce correct the alleged error on the basis of those documents. *Id.* at 1348. Commerce refused in *Timken* to consider the new information on the basis, *inter alia*, that the errors were not "clerical" and therefore did not satisfy the *Colombia Flowers* criteria, and published the Final Results without corrections. *Id.* On appeal, the Court of International Trade (CIT) rejected Commerce's application of the *Colombia Flowers* test based on its concern that rejecting Timken's new information "would render a grossly erroneous dumping margin," and remanded for Commerce to recalculate the dumping margin upon consideration of Timken's new information. *Id.* (*citing Timken U.S. Corp. v. United States*, 28 C.I.T. 329, 318 F. Supp. 2d 1271, 1277–79 (2004)). Commerce considered Timken's new evidence on remand and found it insufficiently reliable to use; the CIT subsequently affirmed that determination. *Id.* at 1349. When Timken appealed to the CAFC, Commerce argued, as an alternative ground for affirmance, that the CIT erred in initially remanding for consideration of Timken's new evidence since the new evidence was not limited to correcting clerical errors. *Id.* at 1351. The CAFC disagreed with this argument "[o]n the merits." *Id.* The CAFC noted that the government did not "identify any statute or regulation" supporting its contention that only clerical errors could be corrected once the preliminary results issued. *Id.* at 1351–52. The CAFC noted that it had held, in *NTN Bearings*, that a refusal to consider corrective information offered in response to the preliminary results on the basis of untimeliness constituted an abuse of discretion where correction of the errors involved only a "straightforward mathematical adjustment" that "would neither have required beginning anew nor have delayed making the final determination." *Id.* at 1353 (*quoting* 74 F.3d at 1208). In affirming the CIT's remand order that Commerce consider the new information submitted with Timken's case brief, the CAFC explained:

> [T]he government seemingly aims to save itself from having to evaluate corrective information . . . whether correction is sought at the preliminary results stage or the final results stage. This court, however, has never discouraged the correction of errors at the preliminary result [sic] stage; we have only balanced the desire for accuracy in antidumping duty determinations with the need for finality at the final results stage. . . . [B]ecause Timken sought correction of its errors after Commerce issued the preliminary results, but before it issued the final results, we conclude that the Court of International Trade . . . did not err in remanding the case to Commerce for an analysis of Timken's new evidence.

Id. at 1353–54.

NTN Bearing also bears a strong resemblance to the current case. Like Fischer, *NTN Bearing* responded to the preliminary results of an antidumping duty administrative review with a case brief, accompanied by supporting documentary evidence showing that it had made reporting errors—NTN Bearing had (1) accidentally misidentified the goods in certain United States sales and (2) mistakenly listed a number of sales to Canadian customers as United States sales. *NTN Bearing*, 74 F.3d 1204, 1205 (Fed. Cir. 1995). Commerce rejected NTN Bearing's evidence as "untimely data" under the then-applicable regulation limiting the submission of factual information.[15] *Id.* at 1206–07. The CAFe stated that a regulation "not required by statute," such as the timeliness regulation, "must be waived where failure to do so would amount to an abuse of discretion," and held that Commerce abused its discretion when it "refused to consider correction of these errors because of the 'untimely' submission of the corrective information," emphasizing that "[i]t is the duty of [Commerce] to determine dumping margins as accurately as possible" and that "the antidumping laws are remedial, not punitive." *Id.* at 1207–08 (citations and

[15] 19 C.F.R. § 353.31(a) (1995) (imposing a deadline for factual information of "the earlier of the date of publication of notice of preliminary results of review or 180 days after the date of publication of notice of initiation of the review.")

quotations omitted); *see also World Finer Foods, Inc. v. United States*, 24 C.I.T. 541, 2000 WL 897752 (2000) (requiring Commerce to accept corrections to mistaken reporting that plaintiff only became aware of upon review of the preliminary results). The CAFC noted that failure to perform the "straightforward mathematical adjustment" called for by the new information "resulted in the imposition of many millions of dollars in duties not justified under the statute." *NTN Bearing*, 74 F.3d at 1208.

On the authority of *Timken* and *NTN Bearing*, the Court holds that Commerce abused its discretion in rejecting Fischer's additional agreement pages as untimely. Doing so was an abuse of discretion because (1) no finality concerns demanded exclusion of the additional data at the preliminary results stage; (2) failure to consider the additional pages to correct information already provided was a violation of Commerce's duty to determine Fischer's dumping margin as accurately as possible; (3) consideration of the additional data is necessary to ensure that the remedial, non-punitive nature of the antidumping laws is not violated by imposition of inaccurately high antidumping duties on Fischer despite the evidence that was rejected; and (4) the recalculation of Fischer's dumping margin could be accomplished by simply replacing the actual Brix levels reported by Fischer in its database with the standard Brix level of 11.8 degrees, should Commerce determine upon remand that the sales agreement pages in fact substantiate that Brix levels above 11.8 degrees did not increase the United States unit price of Fischer's NFC.

Furthermore, *Uniroyal*, *Yantai*, and *Tianjin* are all consistent with this result. In those three cases, the plaintiffs either failed to respond to a questionnaire from Commerce (*Uniroyal*) or failed verification (*Yantai* and *Tianjin*), then later asked the court to overturn Commerce's rejection of untimely fact submissions and Commerce's consequent application of adverse facts available. *Uniroyal*, 626 F. Supp. 2d at 1313–14, Y*antai*, 52J F. Supp. 2d at 1360–62, *Tianjin*, 353 F. Supp. 2d at 1303–04. In upholding Commerce's enforcement of its regulatory deadline for factual information, the courts noted that the information the plaintiffs offered did not correct a mistaken previous submission, but instead attempted to fill the gap caused by failure to provide a questionnaire response or evidence requested during verification. *Uniroyal*, 626 F. Supp. 2d at 1314, 1316 (highlighting respondent's inability to demonstrate that it had submitted the questionnaire response at issue to Commerce), *Yantai*, 521 F. Supp. 2d at 1370 (noting that *Timken* did not apply because it allows "submission of information after a preliminary determination to correct errors of information already on the record," not "new factual information after

Commerce issued the preliminary results"), *Tianjin*, 353 F. Supp. 2d at 1304 (stating that Commerce "is under no obligation to request or accept substantial new factual information from a respondent after discovering that a response cannot be corroborated during verification.").

Finally, the Court finds the Colombia Flowers test inapplicable to this case. *Timken* squarely rejected the limitations of the *Colombia Flowers* criteria to the extent that those criteria restrict correction of errors at the preliminary results stage, and the United States does not argue that *Colombia Flowers* should apply here.

The Court further notes that Defendant asserts that Commerce rejected Fischer's additional information not only on a timeliness basis but also (or perhaps only) on the merits. The argument is unpersuasive, however, because Commerce rejected the additional agreement pages that Fischer submitted, and did not consider that evidence in its subsequent determination that the conversion of United States sales to pounds-solids using actual Brix was proper. When it rejected the pages from the agreement that indicated the Brix level at which Fischer priced its NFC sales in the United States, Commerce lost the ability to evaluate whether Fischer's claim of error in the conversion methodology had merit. Simply put, Commerce has not yet considered whether Fischer's dumping margin is inaccurate due to having been calculated on the mistaken premise that Fischer priced its NFC based on its sweetness, rather than volume regardless of sweetness. The Court therefore remands to Commerce to (1) examine the additional agreement pages submitted by Fischer with its Case Brief dated May 8, 2008; (2) determine whether the agreement set the price for Fischer's NFC in the United States in a Brix-neutral manner; and (3) recalculate Fischer's dumping margin based upon consideration of the additional agreement pages.

C. Conversion of Fischer's Home Market Sales

In contrast to Fischer's additional agreement pages suggesting that United States gross unit prices might have been distorted by the use of actual Brix in the conversion to pounds-solids, Fischer's contentions regarding home market pricing find no support. In the first place, as noted above, Fischer's argument as to how Commerce should have converted home market sales from kilograms into pounds-solids is unclear and possibly inconsistent. Fischer does not point to reliable documentation such as sale agreement excerpts to establish the alleged home market conversion error. Instead, Fischer merely offers the bare assertion that it misreported minimum Brix levels for home market sales. That assertion might find support in the product specification sheets showing minimum Brix for home market sales was set at 10.5 degrees—if the home market sales listing did not belie Fischer's contention, showing that Fischer reported home market sales priced at varying Brix levels, rather than consistently priced at the minimum Brix level. (*See* CR 3, Ex. 2.)

Given that Fischer appears not to have reported the incorrect sales Brix level as it alleges, the Court finds no reason to question Commerce's reliance on the information Fischer supplied during the investigation. The Court therefore affirms Commerce's conversion of the home market sales from kilograms into pounds-solids using the Brix levels reported by Fischer, and holds that Commerce's determination in this respect was supported by substantial evidence and in accordance with law.

D. Inventory Carrying Costs

1. *Positions of the Parties*

Although Fischer contends that Commerce calculated home market inventory carrying costs incorrectly, Fischer's position regarding this alleged error has shifted over time. In its Resubmitted Case Brief, Fischer argued that, "as the Department has established three CONNUMs for the products,[16] the average inventory carrying cost should similarly be based on the average carrying charge for the specific product," and that "[t]he Department should adjust this calculation to reflect the *average* time only NFC was held in inventory." (Resubmitted Case Brief at 6.)

In its motion papers, Fischer stated that it determined after the preliminary results that "the calculation of inventory carrying costs . . . were not consistent with Commerce's requirement that cost be calculated by Connum" because "Commerce calculated inventory carrying cost based upon an average inventory cost for all products," instead of "the actual carrying charge associated with NFC sales and a separate charge associated with FCOJ sales." (Public Motion at 29.) In its motion, Fischer contended that it "presented customer invoices tied to home market sales already on the record to clarify the production dates and amount of time that the product was held in inventory." (*Id.*)

Finally, in its reply in support of its motion, Fischer argued that Commerce, in the second administrative review, abandoned the inventory carrying cost methodology used in the first administrative

[16] CONNUM refers to a unique number which is assigned for purposes of the administrative review to each distinct commercial product analyzed. In this administrative review, three CONNUMs were established to distinguish Fischer's three products: FCOJ, NFC, and a product known as "Dairy Pak."

review, contested in this lawsuit, and therefore the Court should not defer to Commerce. (Public Reply at 12.) Fischer stated that it was not alleging "that Commerce failed to calculate separate *average* inventory carrying costs for NFC and FCOJ." (*Id.*) Instead, Fischer claimed that it took the position that "Commerce's calculation of an average NFC inventory carrying period for the Connum resulted in an inaccurate calculation of home market NFC inventory carrying charges" since it calculated "a general average movement of all NFC produced that was held in inventory during the period of review." (*Id.* at 12–13.) According to Fischer's Public Reply, Commerce thus ignored "the true length of time that the product was held in inventory" as demonstrated by date-of-production data for the home market NFC sales under consideration, which allegedly showed "the specific dates of production and days held in inventory to enable Commerce to properly calculate NFC inventory carrying cost." (*Id.* at 12–13.)

The government asserts that Commerce did, in fact, calculate inventory carrying costs "by using the product-specific inventory carrying costs for FCOJ and NFC that Fischer reported" in the Section B response. (Def.'s Public Opp. at 24.) Defendant therefore states that, "contrary to Fischer's allegations, its reported inventory carrying costs are product specific," since Fischer reported separate inventory carrying costs for NFC and FCOJ. (*Id.* at 25.) Commerce also asserts that it acted in accordance with its timeliness regulations in rejecting new factual information regarding "home market inventory carrying costs" submitted by Fischer with the Case Brief. (*Id.*) Defendant-Intervenors take a position consistent with that of the government. (Def.-Int.'s Public Opp. at 21–22.)

2. *Analysis*

The Court finds that the record establishes that Commerce did, in fact, calculate inventory carrying costs on the basis requested by Fischer in its Case Brief and Public Motion. Fischer emphasized in those briefs that Commerce should ensure that the calculation of inventory carrying cost was (1) product-specific and (2) averaged. Commerce, in its calculations, relied on documents provided by Fischer that demonstrate inventory carrying costs (1) by specific product (NFC vs. FCOJ), and (2) average those costs within each specific product category. (*See* Section B Response at Ex. 12 (PR 24, CR 3) (containing two spreadsheet reports, averaging carrying costs separately for NFC and FCOJ); *see also FR Notice (unpublished) from Analyst/IA to file final results/ partial rescission / issues and decision memo* (Aug. 5, 2008) at 40 (PR 117) (Commerce "relied on the calculations Fischer provided in its June 1 [2007] submission [*i.e.*, Section B Response]; these calculations were specific to FCOJM[17] and NFC because they were based on both the costs for these individual products as well as their specific inventory carrying periods.").) Thus, Fischer's Public Motion contending that Commerce should have calculated inventory carrying costs in the manner that Commerce did, in fact, calculate inventory carrying costs is denied as moot.

The ground for error argued in Fischer's Public Reply is that Commerce should have calculated the inventory carrying cost of the specific NFC that was the subject of each home market NFC sale under consideration, based upon the actual dates that those drums of NFC were held in inventory between production and shipment. The Court finds that Fischer's submissions to Commerce did not, fairly read, articulate this position. Therefore, this argument was not preserved at the administrative level; to the extent that Fischer now raises the argument in its Public Reply to support its motion, it is denied as unpreserved. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (citations omitted), *see also Paul Müller Industrie Gmbh & Co. v. United States*, 31 C.I.T. 1084, 502 F. Supp. 2d 1271, 1275 (2007) ("The doctrine of exhaustion provides that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.") (citations and quotations omitted). Commerce's calculation of inventory carrying cost for NFC was supported by substantial evidence in the record and in accordance with law, and the Court therefore affirms that part of the Final Results.

E. Application of the 90/60 Day Contemporaneity Rule

1. *Positions of the Parties*

Fischer argues that Commerce applied its 90/60 day contemporaneity rule, 19 C.F.R. § 351.414(e)(2), to compare three United States sales with a home market sale that occurred prior to the preliminary determination in the original antidumping investigation and the beginning of the POR. Fischer claims that Commerce used the 90/60 day contemporaneity rule in a fundamentally unfair manner when it applied the rule to sales Fischer made prior to the POR because Fischer did not at that time have notice that its sales might be subject to such a comparison. In what Fisher asserts to be an issue of first impression, Fischer also argues that Commerce's use of the 90/60 day contemporaneity rule in this manner violated 19 C.F.R. § 351.213(e)(1)(ii), which Fischer reads as mandating that first administrative reviews only cover entries, exports, or sales occurring on or

[17] Frozen concentrated orange juice for manufacture, also known as FCOJ.

after the date of suspension of liquidation. According to Fischer, the conflict arises when the 90/60 day contemporaneity rule, as here, permits selection of a home market sale occurring outside the POR for comparison purposes. (Public Motion at 30–33.)

Defendant and Defendant-Intervenors counter that Fischer misreads 19 C.F.R. § 351.213(e)(1)(ii), which limits the period of *United States* sales to be considered, but is silent as to the dates of home market sales that Commerce may examine. Defendant also argues that Fischer's fair notice contention "appears to be arguing that Commerce has a duty to give foreign producers an adequate opportunity to game the system to avoid paying antidumping duties" and that, in any event, the promulgation of the 90/60 day contemporaneity rule itself gave Fischer notice that such sales might be considered by Commerce in a first administrative review. (Def.'s Public Opp. at 25–29; Def.-Int.'s Public Opp. at 25–34.)

2. *Analysis*

Defendant and Defendant-Intervenors are correct that the POR regulation only limits the period of United States sales that Commerce may consider in an administrative review. 19 C.F.R. § 351.213(e)(1) (referring to "entries, exports, or sales of the subject merchandise"); 19 U.S.C. § 1677(25) (indicating that "subject merchandise" refers to various types of merchandise sold within the United States). It is unsurprising that only sales made within the United States can be "subject" to antidumping duties imposed by the United States. Therefore, the Court holds that the 90/60 day contemporaneity rule, which applies only to home market sales by foreign producers, does not conflict with the POR regulation.

Furthermore, the Court is unpersuaded by Fischer's fundamental-fairness and lack-of-notice arguments. Commerce is correct that the mere fact of publication of the 90/60 day contemporaneity rule gives Fischer sufficient prior notice. As to fundamental fairness, this Court declines to find that Fischer is entitled to know in advance whether a particular sale it makes will be reviewed to determine whether Fischer is making sales at less than fair value. Commerce promulgated the 90/60 day contemporaneity rule under its broad authority to give effect to the antidumping statutes; the Court defers to that rule and will not upset it. The Court therefore finds that Commerce acted within its lawful authority and in accordance with law in its application of the 90/60 day contemporaneity rule, and affirms the Final Results to the extent that Commerce relied on application of the 90/60 day contemporaneity rule to a home market sale occurring prior to the POR.

F. Oral Argument

The Court having determined that oral argument is unnecessary here, Fischer's Motion for Oral Argument is denied.

Conclusion

For the reasons given above, this Court affirms in part and remands in part the Final Results. It is hereby

ORDERED that Fischer's Motion for Summary Judgment on the Agency Record is partially granted and partially denied; and it is further

ORDERED that the Final Results of the first administrative review of the antidumping duty order on Certain Orange Juice from Brazil are remanded to Commerce to (1) examine the additional agreement pages submitted by Fischer with its Case Brief dated May 8, 2008; (2) determine whether the agreement set the price for Fischer's NFC in the United States in a Brix-neutral manner; and (3) recalculate Fischer's dumping margin based upon consideration of the additional agreement pages; and it is further

ORDERED that the Final Results of the first administrative review are affirmed in all other respects; and it is further

ORDERED that Commerce shall file with this Court the remand results no later than May 10, 2010; that Plaintiffs may file comments with this Court indicating whether they are satisfied or dissatisfied with the remand results no later than May 31, 2010; and that Defendant and Defendants-Intervenor may file responses to Plaintiffs' comments no later than June 21, 2010.

SO ORDERED.

Dated: April 6, 2010
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN