

**THE NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW**

In The Matter Of:

**Light-Walled Rectangular Pipe and Tube from
Mexico; Final Determination of Sales at Less Than
Fair Value**

Secretariat File No.

USA-MEX-2008-1904-03

Panel: Lawrence J. Bogard, Panel Chair
Mélida Narcisa Hodgson
Gerardo Lozano Alarcón
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Ricardo Ramírez Hernández

MEMORANDUM OPINION AND ORDER

July 20, 2010

Michael Brown and Roger B. Schagrin, of Schagrin Associates, Washington, D.C., argued for Allied Tube and Conduit, Bull Moose Tube, California Steel and Tube, Hannibal Industries, Leavitt Tube Co., Maruichi American Corp., Searing Industries, Southland Tube, Vest, Inc., Welded Tube, and Western Tube and Conduit. With them on the brief were John W. Bohn and Jeffrey E. Farrah.

Yohai Baisburd, of White & Case LLP, Washington, D.C., argued for Productos Laminados de Monterrey S.A. de C.V. and Prolamsa, Inc. With him on the brief were David E. Bond and Jay C. Campbell.

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OPINION AND ORDER OF THE PANEL

Introduction

This Bi-National Panel was appointed pursuant to Article 1904(2) of the North American Free Trade Agreement (“NAFTA”) and Section 516(A) of the Tariff Act of 1930, as amended, 19 U.S.C. §1516(a)(g), to review the Final Determination of Sales at Less Than Fair Value issued by the International Trade Administration of the U.S. Department of Commerce (“Commerce” or the “Department”) in the antidumping duty investigation of Light-Walled Rectangular Pipe and Tube (“LWR Pipe and Tube”) from Mexico (the “*Final Determination*”).¹ Petitioners in the underlying investigation, comprising a coalition of domestic manufacturers² (the “domestic industry” or “Petitioners”), and respondents Productos Laminados de Monterrey S.A. de C.V. and Prolamsa, Inc. (collectively “Prolamsa” or “Respondents”) and Maquilacero, S.A. de C.V. (“Maquilacero” or “Respondent”)³ each challenge various aspects of the *Final Determination*.⁴

¹ *Notice of Final Determination of Sales at Less than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 Fed. Reg. 35,649, 35,649-650 (Dep’t Commerce June 24, 2008).

² Petitioners in the underlying investigation were Allied Tube and Conduit, Bull Moose Tube, California Steel and Tube, Hannibal Industries, Leavitt Tube Co., Maruichi American Corp., Searing Industries, Southland Tube, Vest, Inc., Welded Tube, and Western Tube and Conduit.

³ Petitioners, Respondents, and Commerce are referred to collectively as the “Participants.”

⁴ On January 7, 2009, the Participants filed a Joint Rule 20 Motion to Extend the Schedule for Filing Rule 57(2) and Rule 57(3) Briefs. On February 24, 2009, the Participants filed a Joint Rule 20 Motion for Leave to File Out of Time and Motion to Extend the Schedule for Filing Rule 57(3) Briefs and Rule 60 Joint Appendix. Both motions were granted once this Panel had been appointed. All motions and supporting briefs in this matter were therefore timely filed.

Petitioners challenge as contrary to the requirements of the antidumping duty statute certain adjustments to home market selling prices claimed by Prolamsa and Maquilacero and granted by Commerce in calculating the final dumping margins. Petitioners also find error in Commerce's decision to offset so-called "positive" dumping margins with "negative" margins in its calculation of the final dumping margins for both respondents.

Prolamsa and Maquilacero assert that Commerce incorrectly increased the value of certain fixed assets to account for the effects of inflation by misapplying Mexican Generally Accepted Accounting Practices ("GAAP") and thereby overstated the companies' depreciation costs and associated costs of production. Prolamsa also contends that Commerce erred by not reducing Prolamsa's costs of production for subject merchandise to account for discrepancies between Prolamsa's reported costs of manufacture and the company's actual costs of manufacture as established at the Department's verification.

For the reasons discussed below, this Panel concludes that Commerce's *Final Determination* concerning Light-Walled Rectangular Pipe and Tube from Mexico is supported by substantial evidence and is otherwise lawful.⁵

⁵ On December 11, 2009, Commerce filed a Motion to Strike as Non-Record Evidence an Appendix to Prolamsa's Rule 57(3) Brief comprising the text of Bulletin B-10 of the Mexican Institute of Public Accountants. Prolamsa responded to Commerce's Motion on January 19, 2010. The Panel heard oral argument on the Department's motion to strike on January 21, 2010. It was not necessary for the Panel to consider the text of Bulletin B-10 in reaching its determination. The Motion to Strike is therefore denied as moot.

Background

A. Summary of Administrative Proceedings

On July 24, 2007, Commerce initiated antidumping duty investigations of LWR Pipe and Tube from the Republic of Korea, Mexico, Turkey, and the People's Republic of China.⁶ Prolamsa and Maquilacero were named as mandatory respondents in the Mexico investigation.⁷

In the course of its investigation, the Department requested that Prolamsa and Maquilacero answer sections A through C of the Department's antidumping duty questionnaire pertaining to corporate organization, sales processes, accounting practices, characteristics of the subject merchandise, home market sales, and U.S. market sales. *See Preliminary Determination* at 5,516. Also, in response to Petitioner's allegation of sales below cost, the Department requested that Prolamsa and Maquilacero respond to section D of the questionnaire regarding cost of production and constructed value. *Id.* On the basis of the submitted questionnaire responses, the Department preliminarily found *ad valorem* dumping margins of 0.00 percent for Prolamsa and 4.96 percent for Maquilacero. *Id.* at 5,515.

In February and March 2008, the Department conducted onsite verifications of the sales and cost information reported by Respondents. *See Final Determination* at 35,649-650. Prior to verification, Prolamsa identified and submitted for correction five minor errors in its questionnaire responses. *Id.* As a result of the verifications and the submitted corrections, the

⁶ *Notice of Initiation of Antidumping Duty Investigation of Light-Walled Rectangular Pipe and Tube from the Republic of Korea, Mexico, Turkey, and the People's Republic of China*, 72 Fed. Reg. 40,274 (Dep't Commerce July 24, 2007).

⁷ *Notice of Preliminary Determination of Sales at Less than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 Fed. Reg. 5,515 (Dep't Commerce Jan. 30, 2008) ("*Preliminary Determination*").

Department issued revised weighted-average *ad valorem* dumping margins in its *Final Determination*. The new margin for Prolamsa increased to 5.73 percent, while the new margin for Maquilacero decreased to 2.92 percent. *Final Determination* at 35,651.

In response to assertions of ministerial error, the Department amended the *Final Determination* on August 5, 2008, reducing Prolamsa's dumping margin to 5.12 percent and Maquilacero's to 2.40 percent.⁸

The Department published the *Antidumping Duty Order* against LWR pipe and tube from Mexico on August 5, 2008.⁹

B. Issues Raised by the Complainants

Petitioners

Petitioners allege two errors in the *Final Determination*. Petitioners first contend that the Department erred by reducing the Normal Value of Respondents' subject merchandise based on certain direct price adjustments claimed by the Respondents and verified by the Department. Petitioners also contend that the Department erred by offsetting "positive" dumping margins with "negative" margins in calculating the final dumping margins applied to each Respondent.

Respondents

Prolamsa and Maquilacero each challenge the Department's decision to increase the value of their fixed assets to account for inflation pursuant to Mexican public accounting

⁸ *Notice of Amended Final Determination of Sales at Less than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 Fed. Reg. 45,403 (Dep't Commerce Aug. 5, 2008).

⁹ *Light-Walled Rectangular Pipe and Tube from Mexico, the People's Republic of China, and the Republic of Korea: Antidumping Duty Orders*, 73 Fed. Reg. 45,403 (Dep't Commerce Aug. 5, 2008) ("Antidumping Duty Order").

principles. Additionally, Prolamsa challenges the Department's refusal to reduce Prolamsa's reported costs of manufacture to reflect an overstatement of such costs discovered at verification.

Standard of Review

This Panel's authority derives from NAFTA Chapter 19, Article 1904(1), which provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." In accordance with NAFTA Annex 1911, the Department's *Final Determination* concerning LWR Pipe and Tube from Mexico is a "final determination" reviewable by a Binational Panel pursuant to Article 1904.

As provided under NAFTA Article 1904(2), this Panel must determine if the *Final Determination*:

[W]as in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

Further, pursuant to NAFTA Article 1904(3), this Panel is required to apply the standard of review and general legal principles that a United States Court would apply in review of the *Final Determination*. Article 1911 states that such general legal principles include "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies."

The applicable standard of review is set out in Section 516A(b)(1)(B) of the Tariff Act, 19 U.S.C. § 1516a(b)(1)(B)(i), which requires the United States Court of International Trade ("CIT"), and therefore this Panel, to "hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance

with law.” Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

NAFTA Article 1904(2) requires the Panel to conduct its review “based on the administrative record.” The Panel’s review of Commerce’s *Final Determination* is not *de novo* and must be made on the basis of the administrative record developed during the investigation. *See Cabot Corp. v. United States*, 694 F.Supp. 949, 952-53, (Ct. Int’l Trade 1988); *Ceramica Regiomontana, S.A. v. United States*, 636 F.Supp. 961, 966 (Ct. Int’l Trade 1986), *aff’d*, 810 F.2d 1137 (Fed. Cir. 1987). The Panel must, therefore, take into account any evidence on the administrative record that supports the Department’s conclusions as well as any evidence that fairly detracts from the weight of the evidence relied on by the agency in reaching its conclusions. *Huvis Corp. v. United States*, 570 F. 3d 1347, 1351 (Fed. Cir. 2009); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). It is well settled, however, that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Consolo v. Maritime Comm’n*, 383 U.S. 607, 619-620 (1966). The Panel therefore may not “displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488. Accordingly, the Panel must affirm Commerce’s *Final Determination* unless it concludes that the determination is not supported by substantial evidence on the administrative record of the underlying antidumping investigation. *Id.*

Finally, in determining whether Commerce's interpretation of the governing statute is "in accordance with law," this Panel follows the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* mandates that where the statute is clear and unambiguous on its face and Commerce interprets it accordingly, this Panel must defer to Commerce's interpretation. However, where the statute is silent or ambiguous with respect to the specific issue before it, this Panel must then determine whether the agency reasonably construed the statute. *Chevron*, 467 U.S. at 842-843. Moreover, this Panel must defer to Commerce's reasonable interpretation of the statute even if the Panel would have preferred another, as the "agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." *Chevron*, at 842-843. See also *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir.1992); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 813 (Ct. Int'l Trade 1998).

Discussion

Respondents' Price Adjustments Reducing Normal Value

To calculate a dumping margin the Department must determine "the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise." 19 U.S.C. § 1673. In so doing, the Department adjusts the normal value and export prices of the subject merchandise "in an attempt 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." *Smith-Corona Group v. United States*, 713 F.2d 1568, 1572-73 (Fed. Cir. 1983).

In the challenged determination, the Department reduced the normal value of Respondents' LWR pipe and tube based on certain price adjustments made by Respondents to

the selling price of their merchandise, specifically discounts, rebates, billing adjustments, early payment discounts, and commissions. In reviewing Respondents' reported sales data, the Department found that, for a limited number of transactions, Prolamsa and Maquilacero had not recorded price adjustments in the normal course of business on a transaction- or product-specific basis because the relevant price adjustments were issued as credits to a customer's account against invoices covering multiple transactions or products. Consequently, for a minority of their reported home market sales, Respondents allocated the value of the claimed price adjustments to each line item of the invoice based on each line item's share of total invoice value, and then claimed as a price adjustment only that portion of the total adjustment allocated to in-scope merchandise. The Department accepted these allocated price adjustments, thereby reducing normal value accordingly.

Petitioners argue that the Department's reduction of Respondents' normal values using allocated price adjustments was not supported by substantial evidence. Petitioners contend that "direct price adjustments may only be allowed as a reduction to normal value if . . . '(a) they were reported on a transaction-specific basis and were not based on allocation, or (b) they were granted as a fixed and constant percentage of sales on all transactions for which they are reported.'" Pet. Br. at 10 (quoting *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts thereof from France, et. al.: Final Results of Antidumping Administrative Review*, 60 Fed. Reg. 10,900 (Dep't Commerce Feb. 28, 1995)). They further contend that the Department erred by considering credits and billing adjustments to invoices or customer accounts that were allocated to in-scope and out-of-scope merchandise, regardless of whether Respondents only reported the portion of the price adjustment that was allocated to subject merchandise because "there is no evidence that [such] adjustments were granted for subject merchandise because

respondents' records do not provide any evidence as to the particular product for which the adjustments at issue were granted." Pet. Br. at 7. Consequently, Petitioners argue, the *Final Determination* contravenes the decision of the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *SKF USA, Inc. v. INA Walzlager Scharffler KG*, 180 F. 3d 1370 (Fed. Cir 1999), which, Petitioners contend, interpreted the antidumping statute as precluding Commerce's consideration in calculating dumping margins of price adjustments granted on sales of goods outside the scope of the investigation. Petitioners request that the Panel remand the *Final Determination* and instruct Commerce to deny any price adjustments that reduce normal value and are not shown to be limited to subject merchandise. Pet. Br. at 64. In addressing Petitioners' arguments we examine first whether the Department properly applied the correct statutory and regulatory standards in accepting Respondents' price adjustments. We then address Petitioners' argument that *SKF USA* prohibits the challenged price adjustments.

1. The Department's Requirements for Submission of Information: Regulation and Practice.

19 U.S.C. § 1673 provides that, following affirmative determinations of sales at less-than-fair value of subject merchandise and material injury to a domestic producer of subject merchandise,

[T]here shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

In determining normal value the Department considers a variety of price adjustments in order to calculate the most accurate dumping margin possible. *Smith-Corona Group*, 713 F.2d at 1572-73. Neither 19 U.S.C. § 1673, nor any other statutory provision, instructs the Department as to when and how it should grant or deny price adjustments to normal value. *See Timken Co. v.*

United States, 16 F. Supp. 2d 1102, 1108 (Ct. Int'l Trade 1998); *Torrington Co. v. United States*, 82 F.3d 1039, 1048 (Fed. Cir. 1996).

In implementing the United States' obligations under the Uruguay Round Trade Agreements, Congress added a new provision to the U.S. antidumping statute, 19 U.S.C. § 1677m(e), which requires the Department to accept and consider imperfect information when certain criteria are met. Section 1677m(e) mandates that, in reaching a determination, the Department:

[S]hall not decline to consider information that is submitted by an interested party and is necessary to the determination **but does not meet all the applicable requirements established by the administering authority** or the Commission, if—

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

Id. (emphasis added).

The highlighted language of section 1677m(e) confirms that the relaxed information reporting requirements of that provision need not be invoked if the Department's established requirements allow for the submission of the information at issue. Stated another way, the Department *must* accept the information submitted by a respondent if such information (a) meets

the Department's established reporting requirements, *or* (b) is necessary to the determination and complies with the enumerated criteria of section 1677m(e).

Our analysis, therefore, begins with determining whether the price adjustments to which Petitioners object meet the applicable requirements established by the Department. If that analysis establishes that the manner in which Respondents reported their price adjustments meets Commerce's requirements, then we must affirm Commerce's acceptance of them. If the price adjustments do not meet those requirements, however, we must then determine whether Commerce properly concluded that the information was necessary to its determination and in compliance with the enumerated criteria of section 1677m(e).

The Department's requirements governing the submission of price adjustment data are set forth in 19 C.F.R. § 351.401(g).¹⁰ Section 351.401(g) provides that the Department will accept

¹⁰ Section 351.401(g) provides:

Allocation of expenses and price adjustments.

(1) In general. The Secretary may consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that 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.

(3) Feasibility. In determining the feasibility of transaction-specific reporting or whether an allocation is calculated on as specific a basis as is feasible, the Secretary will take into account the records maintained by the party in question in the ordinary course of its business, as well as such factors as the normal accounting practices in the country and industry in question and the number of sales made by the party during the period of investigation or review.

(4) Expenses and price adjustments relating to merchandise not subject to the proceeding. The Secretary will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that

[Footnote continued.]

allocations of price adjustments that are not capable of being reported on a transaction-specific basis if the reporting party is able to demonstrate that the allocation methodology is necessary, is as transaction-specific as is feasible, and is not distortive of the final margin calculation. 19 C.F.R. § 351.401(g)(1-3). 19 C.F.R. § 351.401(g)(4) expressly provides that the Department “will not reject an allocation method solely because the method includes expenses incurred, or price adjustments made, with respect to sales of merchandise that does not constitute subject merchandise.”

Consistent with this regulation and 19 U.S.C. § 1677m(e), the Department has established an administrative practice of preferring transaction-specific allocation methodologies, but accepting other reasonable allocation methodologies when respondents are able to demonstrate that transaction-specific reporting is not feasible. *See Final Determination, Issues and Decision Memorandum (“I&D Memo”)* at cmt. 1 (citing *Certain Pasta From Italy*, 65 Fed. Reg. 7,349 (Dep’t Commerce Feb. 14, 2000); *Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Brazil*, 65 Fed. Reg. 5,554 (Dep’t Commerce Feb. 4, 2000)). The test by which Commerce will accept non-transaction-specific price adjustments may be summarized as follows: where a respondent allocates price adjustments over merchandise subject to investigation and merchandise beyond the scope of the investigation, the price adjustments will be accepted if (1) the respondent’s “records did not allow it to report [] on a more specific basis, and (2) the allocation methodology for [the] adjustment did not have a distortive effect.” *NTN Bearing Corp. v. United States*, 104 F. Supp. 2d 110, 155 (Ct. Int’l Trade 2000), *aff’d*, 295 F.3d

does not constitute subject merchandise or a foreign like product (whichever is applicable).

1263 (Fed. Cir. 2002) (“*NTN CAFC*”); *Timken Co. v. United States*, 16 F. Supp. 2d 1102, 1107 (Ct. Int'l Trade 1998). The Department’s findings at verification demonstrate that the price adjustments claimed by Respondents in the LWR pipe and tube determination meet this test.

In response to the Department’s antidumping questionnaire, Respondents reported that a minor portion of their claimed credits were issued against entire invoices or customer accounts, and that they did not, in the normal course of business, record such credits on a transaction-specific basis. *I&D Memo* at cmt. 1.¹¹ Thus, the Department properly concluded that, in the words of the CIT in *NTN Bearing Corp.*, Respondents’ “records did not allow [them] to report [their claimed price adjustments] on a more specific basis.” 104 F. Supp. 2d at 155.

In addition to finding that Respondents reported their price adjustments as specifically as possible, the Department concluded that where Respondents’ records forced them to allocate price adjustments to more than one transaction, some of which included non-subject merchandise, such allocations were limited and not distortive of the Department’s final determination. Specifically, the Department concluded that:

We find that the methodology used by both companies to report their price adjustments . . . is reasonable. Moreover, there is no evidence to suggest that respondents’ reporting methodologies cause inaccuracies or create distortions in the Department’s analysis and calculations.

I&D Memo at cmt. 1.

The Panel concludes that the Department’s findings were supported by substantial evidence. The Department’s *I&D Memo* indicates that both Respondents reported the

¹¹ Petitioners do not cite to any legal authority that requires Respondents to record their price adjustments more specifically than they did, nor can they as none exists. See discussion, *infra*, in the context of the standards imposed on respondents in the context of 19 U.S.C. 1677m(e).

overwhelming majority of their price adjustments at a transaction-specific level. *Id.* The Department found that, where necessary, Maquilacero and Prolamsa utilized allocation methodologies that were as specific as possible and linked the claimed adjustments to subject merchandise to an extent sufficient to render them non-distortive of the Department's final results. *Id.*

With respect to Prolamsa, the record confirms that the Department verified that the majority of the price adjustments claimed by Prolamsa were directly linked to invoice line-items consisting of subject merchandise. *Id.* The minority of Prolamsa's claimed price adjustments were in the form of billing adjustments to entire invoices. For those few transactions where a price adjustment was made against an entire invoice, the Department verified that Prolamsa allocated the value of the price adjustment to each invoice line item based on each line item's share of the total invoice value for in-scope merchandise to the extent of their allocated share of the total price adjustment made to the entire invoice. *Id.*

Maquilacero originally reported its claimed price adjustments on a customer-specific basis. *Id.* The record documents that, in response to requests from the Department, Maquilacero subsequently manually reviewed each claimed credit note and was ultimately able to report 100 percent of the credits issued during the POI on a transaction-specific basis, without resorting to allocation. *Id.* Such credits accounted for the bulk of Maquilacero's claimed price adjustments. P.R. Doc. 245. The remaining small percentage of Maquilacero's claimed price adjustments were billing adjustments made to entire invoices and allocated at a fixed percentage rate to every

item on the invoice. *Id.* Significantly, the Department verified that Maquilacero only claimed price adjustments on invoice line-items relating to subject merchandise. *I&D Memo* at cmt. 1.¹²

The Department and Respondents point to several past cases where Commerce has accepted price adjustments that were reported on similarly specific, and in some cases, less specific bases as those utilized by Respondents in this case. *See Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 72 Fed. Reg. 75671 (Dep't Commerce Jan. 31, 2007) (accepting customer-specific allocation of price adjustments as reasonable and non-distortive), *Certain Pasta from Italy*, 73 Fed. Reg. 75671 (Dep't of Commerce Dec. 12, 2008), and *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 64 Fed. Reg. 2176 (Dep't Commerce Jan. 13, 1999). Additionally, as we discuss more fully below, the Federal Circuit and CIT have sustained Commerce's acceptance of less exact allocation methodologies than those at issue in this case. *See NTN Bearing Corp.*, 104 F. Supp. 2d at 149-155 (holding that post-sale price adjustments granted to customer accounts and allocated proportionately to sales of in-scope and out-of-scope merchandise were properly accepted by the Department in light of the requirements of 19 U.S.C. § 1677m(e)), *aff'd*, *NTN CAFC*, 295 F.3d at 1267-68 (Fed. Cir. 2002); *Torrington Co. v. United States*, 146 F. Supp. 2d 845, 894 (Ct. Int'l Trade 2001) (holding that customer-specific price adjustments that included out-of-scope merchandise were properly accepted in accordance with the Department's regulations).

¹² Indeed Petitioners appear to concede that Maquilacero's reported price adjustments were transaction-specific and were non-distortive of the final results, stating that "[t]he transaction-specific data Maquilacero reported in its January 28, 2008 response for its home market sales of the subject merchandise may meet" the standard advocated by Petitioners. Pet. Br. at 34.

We note that Petitioners do not challenge the validity of 19 C.F.R. § 351.401(g). Nor do they take direct issue with the Department's application of the regulatory criteria to Respondents' reported price adjustments.¹³ Their only challenge to the Department's acceptance of the reported price adjustments pursuant to 19 C.F.R. § 351.401(g) is that the decision of the Court of Appeals in *SKF USA* prohibits such acceptance. As discussed below, however, we reject Petitioners' arguments with respect to the applicability of *SKF USA*.

2. 19 U.S.C. § 1677m(e) Mandates Acceptance of Respondents' Reported Price Adjustments.

In addition to meeting the requirements of 19 C.F.R. § 351.401(g) and the Department's recent administrative practice, the Respondents' reporting of allocated price adjustments complies with each of the five elements of 19 U.S.C. § 1677m(e), further obligating the Department to accept and consider such information. Petitioners do not disagree that at least several of the elements of 19 U.S.C. § 1677m(e) are met in this case. There is no dispute that the Respondents timely reported the challenged price adjustments. Nor do Petitioners voice any objection to the Department's conclusion that the information could be used without difficulties. Respondents were able to provide an allocation or identify a direct adjustment for every claimed price adjustment and link each claimed adjustment to sales involving subject merchandise, facts which support the Department's conclusion that the information was not so incomplete that it could not serve as a reliable basis for reaching a determination.

¹³ Petitioners rely on *NSK Ltd. v. United States*, 510 F. 3d 1375, 1382 (Fed. Cir. 2007) to support their position that the Department should have rejected Respondents' allocation methodologies. *NSK*, however, is inapposite. There, the CIT upheld the Department's rejection of respondent's allocation methodology where the Department found that methodology to be distortive of the Department's final duty calculations. Here, the Department concluded that the challenged allocation methodologies are not distortive.

Petitioners do argue that two of the five section 1677m(e) elements were not met by Respondents. First, they contend that the “price adjustments at issue ‘cannot be verified’ as having been granted for subject merchandise, because respondents did not retain information in their accounting records that identified the particular sales or products for which the adjustments at issue were granted.” Pet. Br. at 25. This argument merely restates Petitioners’ position that the Department may only accept price adjustments that were originally recorded on a product- or transaction-specific basis, framed in the context of verification. Such an interpretation renders 19 U.S.C. § 1677m(e) a nullity. If Respondents had recorded their price adjustments in their books and records in the manner that Petitioners contend is required for the price adjustments to be capable of verification, then it would not be necessary to invoke sub-section 1677m(e). Conversely, Petitioners posit, the circumstances that trigger resort to section 1677m(e) – allocation of price adjustments – render the price adjustments incapable of verification and preclude their consideration under section 1677m(e). Such a reading of the statute contravenes a basic rule of statutory construction. *Kawaauku v. Geiger*, 523 U.S. 57, 62 (1998); *Mellon Bank, N.A. v. United States*, 265 F.3d 1275, 1280 (Fed. Cir. 2001).

Moreover, Petitioners misconstrue the nature of the Department’s verification function by seeking to impose a legal test on a fact-finding exercise. Whether information is capable of verification is unrelated to whether the information is supportive of Petitioners’ or Respondents’ legal conclusions. The purpose of the Department’s verification is to determine whether the information submitted by Respondents is complete and accurate. *See Bomont Indus. v. United States*, 733 F. Supp. 1507, 1508 (Ct. Int’l Trade 1990) (“[V]erification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness.”). That Petitioners object to Respondents’ allocation methodologies does not mean that the

methodologies are incapable of verification. The extent to which Respondents' claimed price adjustments are related to subject merchandise is irrelevant to whether the price adjustments, as reported by Respondents, were complete and accurate.

Ultimately, Petitioners' argument fails because in fact both Respondents passed verification.¹⁴ *Prolamsa Verification Report*, P.R. Doc. 228; *Maquilacero Verification Report*, P.R. Doc. 224. The Panel must, therefore, conclude that the information submitted by Respondents was "capable of verification" within the meaning of 19 U.S.C. § 1677m(e)(2).¹⁵

Petitioners also contend that neither Respondent has "demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority" with respect to the challenged price adjustments, thereby failing to meet the fourth element of 19 U.S.C. § 1677m(e). They assert that Respondents did not "act to the best of their ability" because they "failed to identify the credits at issue on a sale- or product-specific basis when they recorded the amounts for the credits into the customer's receivable account" in the normal course of business. Pet. Br. at 25. In effect, Petitioners contend that in designing their record-keeping and accounting systems and in crediting the accounts of their customers, Respondents should have anticipated the possibility of an antidumping investigation

¹⁴ Petitioners do not allege that the Department abused its discretion in verifying the reported data. See *Micron Tech. Inc. v. United States*, 117 F.2d 1386, 1396 (Fed. Cir. 1997) (the Panel "review[s] verification procedures employed by Commerce in an investigation for abuse of discretion").

¹⁵ Petitioners' contention that Respondents' price adjustments were not limited to subject merchandise is contradicted by the Department's conclusions following verification of Respondents' reported data. After reviewing Respondents' records, the Department concluded that each claimed price adjustment was either limited to sales of subject merchandise or allocated in such a way as to exclude all transactions involving non-subject merchandise. See *I&D Memo* at cmt. 1.

against LWR pipe and tube from Mexico, and Respondents' failure to do so constitutes a failure to act to the best of their ability. This contention is wholly without merit.

The U.S. antidumping statute does not require foreign manufacturers to design their record keeping systems in anticipation of the technical elements of U.S. antidumping law. Indeed, it is well-settled that the Department "cannot retroactively apply a more stringent requirement for record-keeping than that which was in effect when the records were created." *NSK Ltd. v. United States*, 510 F.3d 1375, 1383, n.1 (Fed. Cir. 2007); *Princess Cruises, Inc. v. United States*, 397 F.3d 1358, 1368 (Fed. Cir. 2005). Moreover, it is the Department's consistent practice "to obtain and analyze a respondent's data as it is kept and recorded in their normal course of business." *I&D Memo* at cmt. 1 (citing 19 U.S.C. § 1677b(f)(1)(A); *Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 71 Fed. Reg. 75,504 (Dep't Commerce Dec. 15, 2006)).

Following its verification of Respondents' reported data, the Department reasonably concluded that Respondents did act within the best of their abilities to accurately report their home-market price adjustments and link such price adjustments to sales of subject merchandise, given the records kept by Respondents in the normal course of their businesses. *I&D Memo* at cmt. 1. Respondents are required to do nothing more. *See* 19 C.F.R. § 351.401(g)(3); Statement of Administrative Action, H.R. Doc. 103-316, Vol. 1 (1994) at 865 ("[The Department] may take into account the circumstances of the party including (but not limited to) . . . its accounting systems, and computer capabilities.").

Finally, Petitioners contend that Respondents' price adjustment data was not "necessary to the determination" as is required by section 1677m(e). Relying on *SKF USA*, Petitioners contend that only price adjustments that are directly related to sales of subject merchandise are

“necessary to the determination.” This argument falls short for two reasons. First, the Department did conclude that each of Respondents’ claimed price adjustments was linked to sales of subject merchandise by virtue of Respondents’ allocation methodologies. Second, as discussed below, to the extent that the court’s decision in *SKF USA* might have required more specific reporting than Respondents were able to provide, that decision was superseded by Congress’s subsequent enactment of 19 U.S.C. § 1677m(e).

3. The *SKF USA* Decision Is Inapplicable in Light of the Subsequent Enactment of 19 U.S.C. § 1677m(e)

Petitioners argue that the court in *SKF USA* interpreted 19 U.S.C. § 1673 (1994) to preclude the Department from considering any price adjustments that Respondents have not proven to relate solely to merchandise that is subject to the relevant antidumping duty investigation. 19 U.S.C. § 1673 (1994) provides, in pertinent part:

If . . . a class or kind of foreign merchandise is being . . . sold in the United States at less than its fair value, [and a domestic industry is injured by the dumping] then there shall be imposed upon such merchandise an antidumping duty . . . in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

The court in *SKF USA* stated the following concerning section 1673:

The statutory language thus requires that the antidumping duty be calculated on the basis of the difference between the [fair market value] and [United States price] for the “merchandise;” *i.e.* “the foreign merchandise [which] is being . . . sold in the United States at less than its fair value.” Price adjustments granted on goods outside the scope of the antidumping duty order are irrelevant to calculating the [fair market value] of goods within the scope of the antidumping duty order; they simply play no part in determining the [fair market value] of the in-scope goods themselves. The statutory language therefore precludes the use of price adjustments granted on sales of goods outside the scope of the antidumping duty order.

SKF USA, 180 F.3d at 1376.

Petitioners contend that *SKF USA*'s holding that "price adjustments granted on goods outside the scope . . . are irrelevant," *id.*, prohibits the Department from accepting the price adjustments that were not granted specifically on sales of subject merchandise and recorded in Respondents' records as such.

Petitioners also argue that while 19 U.S.C. § 1677m(e) may allow the Department to relax its information-reporting requirements under certain circumstances, it does not allow the Department to ignore the statute's other requirements. Thus, they argue, *SKF USA*'s conclusion that section 1673 prohibits consideration of price adjustments that are not limited to in-scope merchandise is unaffected by enactment of section 1677m(e).

Petitioners' reliance on *SKF USA* is unfounded for two reasons. First, *SKF USA* interprets the antidumping statute as it read prior to enactment of 19 U.S.C. § 1677m(e), and several courts have noted the strictures of *SKF USA* no longer apply in light of 19 U.S.C. § 1677m(e)'s mandate that the Department relax its reporting requirements. Second, even if *SKF USA* did still govern the Department's acceptance of Respondents' claimed price adjustments, it is likely that Respondents' methods for reporting such price adjustments would comply with the court's holding in *SKF USA*.

The *SKF USA* decision affirmed the Department's practice as it existed prior to enactment of the Uruguay Round Agreements Act ("URAA"), *i.e.*, that the Department would only accept price adjustments in the form of direct selling expenses if such adjustments were reported on a transaction-specific basis, thereby assuring that the claimed adjustments were limited to merchandise within the scope of the relevant antidumping duty investigation. *SKF USA*, 180 F.3d at 1375; *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts*

Thereof from France, et al.: Final Results of Antidumping Administrative Review, 60 Fed. Reg. 10,900, 10,929 (Dep't Commerce Feb. 28, 1995).

The relevant facts in *SKF USA* and the Department practice that it affirmed predate the enactment of 19 U.S.C. § 1677m(e) in 1994 as part of the URAA. *SKF USA*, 180 F.3d at 1372 n.1 (acknowledging enactment of the URAA, but determining that pre-URAA law was applicable because the administrative review at issue was initiated prior to the date of enactment of the URAA.) Following enactment of section 1677m(e), the Department revised its data reporting requirements and promulgated 19 C.F.R. § 351.401(g) which, as discussed, *supra*, authorizes the reporting methodologies used by Respondents in this case. *See Torrington Co. v. United States*, 146 F. Supp. 2d 845, 894 (Ct. Int'l Trade 2001).¹⁶

The U.S. Court of Appeals for the Federal Circuit has addressed and rejected arguments substantially similar to those put forward by Petitioners. In *NTN CAFC*, the Federal Circuit upheld the CIT's determination that the Department properly accepted various price adjustment allocations, including post-sale billing adjustments in which a lump-sum adjustment was made against a customer's account for in-scope and out-of-scope merchandise and reported to the

¹⁶ Prior to enactment of the URAA, Commerce separated price adjustments into direct and indirect selling expenses. *SKF USA*, 180 F.3d at 1375. Direct selling expenses were those price adjustments that varied based on the quantity of merchandise sold and were directly related to particular sales. Indirect selling expenses were the opposite. *Id.* at 1375 n.6. Following enactment of the URAA, the Department abandoned its treatment of price adjustments as selling expenses, either direct or indirect. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan Singapore, and the United Kingdom*, 62 Fed. Reg. 2,081 (Dep't Commerce Jan. 15 1997), as amended, 62 Fed. Reg. 2,130 (Dep't Commerce Jan. 15, 1997). The Department's post-URAA practice is to evaluate all price adjustments on the basis of its post-URAA regulations and the requirements of section 1677m(e). The Department's change in practice further undermines the continued validity of *SKF USA* because the analytical framework that the court affirmed no longer exists.

Department as a proportionate allocation to in-scope and out-of-scope merchandise. *NTN CAFC*, 295 F.3d at 1267-68.

On appeal from the CIT's decision upholding Commerce's acceptance of this approach, the Federal Circuit expressly approved the Department's acceptance of "price adjustments [that] were calculated with, and likely included, sales not within the scope of the antidumping duty order," *id.*, because the reporting methodologies used by the respondent complied with 19 U.S.C. § 1677m(e). The appellate court did so despite Petitioners' argument that Respondents' allocated approach was barred by *SKF USA*. *Id.*

As recognized by the CIT, "[i]n light of Commerce's clear authority to reevaluate its treatment of [price adjustments], the pre-URAA judicial precedents are no longer relevant." *Torrington*, 146 F. Supp. 2d at 894 (finding that the Department's acceptance of price adjustments on a customer-specific basis was supported by the Department's post-URAA administrative practice and expressly upholding the Department's acceptance of customer-specific billing adjustments that were allocated over both subject and non-subject merchandise because the respondents were able to comply with the post-URAA regulatory test for the acceptance of such information).

We agree with the CIT's reasoning in *Torrington*. To the extent *SKF USA* holds that Commerce may not accept price adjustment allocation methodologies that include out of scope merchandise, that holding is rendered irrelevant by the passage of section 1677m(e) and its express mandate that Commerce accept imperfect information. Moreover, we are bound by the Federal Circuit's affirmation in *NTN CAFC* of the Department's practice of accepting allocation

methodologies that meet the requirements of section 1677m(e). Accordingly, the Panel finds Petitioners' reliance on *SKF USA* unpersuasive.¹⁷

Finally, Petitioners reading of *SKF USA* is overbroad. In *SKF USA*, the Federal Circuit upheld the Department's denial of certain home-market price adjustments because "SKF provided no means of identifying and segregating billing adjustments paid on non-scope merchandise," and SKF could not provide any evidence to support the conclusion that the billing adjustments were limited to in-scope merchandise. *SKF USA*, 180 F.3d at 1376; *NTN CAFC*, 295 F.3d at 1267. However, the *SKF USA* court also noted that allocation methodologies are, in principle, perfectly acceptable so long as the reporting entity endeavors to remove adjustments granted on the basis of non-subject merchandise. *SKF USA*, 180 F.3d at 1376. After acknowledging that the Federal Circuit "accepted allocations of rebates on in-scope and out-of-scope merchandise" in its previous decision in *Smith-Corona*, 713 F.2d at 1579-1580), the *SKF USA* court stated that:

We perceive no conflict between *Smith-Corona* and our holding today. In *Smith-Corona*, this court approved of a method of calculating an adjustment to foreign market value in which the

¹⁷ In neither *NTN Bearing Corp.* (as affirmed by *NTN CAFC*) nor *Torrington* does it appear that Respondents went to the same lengths to remove the effects of non-subject merchandise as Prolamsa and, in particular, Maquilacero did in the investigation at issue here. Nevertheless, the price adjustments claimed in both cases were accepted by the courts. Notably, the post-sale billing adjustment at issue in *NTN Bearing* involved a less precise allocation methodology than those at issue in this case. Respondents in *NTN Bearing* simply averaged the price adjustment over all of the relevant transactions on a customer's account and claimed the proportion of the adjustment that related to the subject merchandise, rather than specifically linking the claimed price adjustment to invoice line items. *NTN Bearing Corp.*, 104 F. Supp. 2d at 149-155. Thus, it appears that Commerce's acceptance of Prolamsa's and Maquilacero's price adjustments manifests a more rigorous application of the Department's practice than has already passed muster with the reviewing courts. *See id.*, *aff'd NTN CAFC* 295 F.3d at 1267-68(Fed. Cir. 2002); *Torrington*, 146 F. Supp. 2d at 893-94.

total rebates paid by the manufacturer (on both in-scope and out-of-scope goods) was divided by the percentage of the rebated sales which represented sales of in-scope goods. This calculation “yielded the rebate amount per unit allowed as an adjustment to foreign market value.” The *Smith-Corona* court noted that “despite the necessity of apportionment calculations to unravel the rebate transactions, the cost of the rebates can be directly correlated with specific merchandise using verified cost and sales information.” Since the claimed adjustments could be directly correlated with specific merchandise, there was no question in *Smith-Corona* of adjustments on merchandise outside the scope of an antidumping duty order being used in the calculation of antidumping duties. The holding of *Smith-Corona* is in no way inconsistent with the in-scope/out-of-scope rule that we adopt today.

SKF USA, 180 F.3d at 1376 (internal citations omitted).

Thus, the *SKF USA* court did not preclude allocated price adjustments in all circumstances, merely in those instances in which, as was the case in *SKF USA*, respondents “provide[] no means of identifying and segregating [] adjustments paid on non-scope merchandise.” *Id.* at 1377; *see also NTN CAFC*, 295 F.3d at 1267-68 (stating that “In *SKF USA*, we upheld Commerce’s refusal to accept SKF USA’s billing adjustments because Commerce found that ‘SKF provided no means of identifying and segregating billing adjustments paid on non-scope merchandise’” and noting that “In *Smith-Corona*, we affirmed Commerce’s acceptance of out-of-scope sales figures because proper apportionment reasonably correlated the adjustments to sales of in-scope merchandise.”). As we have discussed, Prolamsa and Maquilacero went to significant lengths to limit their claimed price adjustments to sales of subject merchandise. Thus, Petitioners’ suggestion that *SKF USA* requires all price adjustments to be recorded on a product-specific basis cannot be squared with the language with the decision itself. Accordingly, we deny Petitioners’ request for remand on this issue.

Offsetting Positive Dumping Margins with Negative Dumping Margins

In calculating a respondent's final dumping margin, "Commerce may compare a weighted-average of normal values to a weighted-average of the export or constructed export prices of comparable merchandise, or it may compare the normal values of individual transactions to the export prices or constructed export prices of individual transactions for comparable merchandise." 19 U.S.C. § 1677f-1(d)(1)(A)(i)-(ii). When Commerce applies the first methodology (commonly called the "average-to-average" methodology) during an investigation, it usually divides the export transactions into groups based on models of merchandise levels of trade at which it is sold. 19 C.F.R. § 351.414(d)(2). Commerce then compares an average of the export prices or constructed export prices of the transactions within one averaging group to the weighted-average of normal values of such sales. 19 C.F.R. § 351.414(d)(1). *See Searing Indus. v. United States*, 662 F. Supp. 2d 1327, 1330 (Ct. Int'l Trade 2009).

In its investigation of LWR pipe and tube from Mexico, the Department elected to calculate the weighted-average dumping margin of the subject merchandise. *I&D Memo at* cmt. 3. To determine the weighted-average dumping margin of LWR pipe and tube from Mexico the Department subtracted the so-called "negative margins,"¹⁸ on transactions where there were negative margins, from the positive margins on the remaining transactions. *Id.*

The Department's methodology in the LWR pipe and tube from Mexico *Final Determination* reflects a recent change in the Department's administrative practice. Prior to the

¹⁸ "Negative dumping margins" represent the extent to which the normal value of subject merchandise was lower than its export price to the U.S. market for sales in which that was the case.

publication of *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep’t Commerce Dec. 27, 2006) (“*Final Modification*”), it had been the Department’s practice to “perform average-to-average comparisons in investigations without treating the results of a comparison where average export price or constructed export price exceeds average normal value (*i.e.*, negative dumping margins) as an offset to positive margins.” Gov. Br. at 66. Rather, it was the Department’s practice to set the value of negative margins at zero for the purposes of calculating the weighted-average dumping margin. This practice was appropriately referred to as “zeroing.” The result of zeroing is that only sales-at-less than fair value are considered in the calculation of final dumping margins and all non-dumped sales are excluded from consideration.¹⁹ Prior to the Department’s discontinuance of zeroing, the Federal Circuit had sustained zeroing as a lawful exercise of the Department’s discretion. *See Corus Staal BV v. United States*, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (“*Corus Staal I*”); *Corus Staal BV v. United States*, 502 F. 3d 1370, 1372-74 (Fed. Cir. 2007) (“*Corus Staal II*”); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004).

Petitioners contend that 19 U.S.C. § 1677(35)(A) precludes “Commerce from considering a negative margin as a dumping margin, and requires thus that Commerce exclude negative margins from the calculation of the [] weighted-average dumping margin ratio.” Pet. Br. at 44. Section 1677(35)(A) defines the term “dumping margin” as “the amount by which the normal

¹⁹ The Department discontinued its zeroing practice in the *Final Modification* in response to an October 2005 World Trade Organization (“WTO”) dispute settlement panel determination that the zeroing practice is inconsistent with Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (“Antidumping Agreement”) (*reprinted in* 1H.R. Doc. No. 316, 103d Cong., 2d Sess. 1453).

value exceeds the export price or constructed export price of the subject merchandise.”

Petitioners further contend that *Timken* and *Corus Staal I* and *II* do not control the Department’s current practice because there is a substantive difference between “zeroing,” where negative margins are replaced with zeros in the calculation of dumping margins (affirmed in *Corus Staal I* and *II* and *Timken* as a lawful exercise of the Department’s discretion), and “offsetting,” where negative margins are subtracted from positive margins (which Petitioners contend is barred by the unambiguous terms of section 1677(35)(A)). Rather, Petitioners contend, the statute requires Commerce to “disregard” negative dumping margins.

Additionally, Petitioners contend that the Department’s consideration of negative margins is inconsistent because Commerce has limited its offsetting methodology to antidumping investigations, while continuing to apply zeroing in the context of antidumping administrative reviews. They argue that in *Corus Staal I* the Federal Circuit held that section 1677(35)(A) applies to both antidumping investigations and administrative reviews. They therefore conclude that the Department’s determination to continue zeroing in the context of administrative reviews binds Commerce to the same methodology in the context of an investigation.

The statute defines the individual “dumping margin” at 19 U.S.C § 1677(35)(A) and the aggregated “weighted-average dumping margin” at 19 U.S.C. § 1677(35)(B), as follows:

Dumping margin

The term “dumping margin” means the amount by which the normal value exceeds the export price or constructed price of the subject merchandise.

Weighted average dumping margin

The term “weighted average dumping margin” is the percentage determined by dividing the aggregate dumping margins for a specific exporter or producer by the aggregate export prices and constructed export of such exporter or producer.

The Court of Appeals for the Federal Circuit concluded in *Corus Staal* and *Timken* that this statutory language is ambiguous, and that Commerce’s former “zeroing” practice was a reasonable interpretation of the statute and therefore a lawful exercise of the Department’s discretion, stating:

We conclude Commerce based its zeroing practice on a reasonable interpretation of the statute. First, while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce’s construction. Basically, one number “exceeds” another if it is “greater than” the other, meaning it falls to the right of it on the number line. Here, because Commerce’s zeroing practice is a reasonable interpretation of the statutory language, we do not question it in light of other reasonable possibilities.

Timken, 354 F. 3d at 1342; *accord*, *Corus Staal I*, 395 F. 3d at 1347; *Corus Staal II*, 502 F. 3d at 1372.

Inherent in the Department’s discretionary authority to “zero” dumping margins is discretionary authority not to “zero” dumping margins. The Department exercised this discretion in its 2005 *Final Modification*, after following appropriate procedures. Petitioners appear to accept that Commerce may lawfully decline to “zero” dumping margins. Pet. 57(1) Br. at 49. They contend instead that the statute bars Commerce from “offsetting” dumping margins.

The Panel is not persuaded that the same statutory provision that the Federal Circuit found to be ambiguous with respect to “zeroing” is explicit with respect to offsetting. The crux of Petitioners argument is that the court in *Timken* found only the single word “exceeds” in section 1675(35)(A) to be ambiguous, but did not find any other language in the same provision, particularly the phrase, “normal value exceeds,” to be ambiguous. It is the phrase, “normal value exceeds,” that Petitioners contend bars Commerce’s consideration of “negative” margins. We find Petitioners’ reading of *Timken* to be too narrow by far. Plainly, the court’s analysis

implicates the provision as a whole, as the language quoted above demonstrates. The court's holding in *Timken*, as affirmed by *Corus Staal I* and *II*, is not based on a single word plucked from its context in the statute.

Moreover, Petitioner's argument rests on semantics more than substance. Petitioners' Rule 57(1) brief demonstrates the effect of "disregarding" of negative margins is undistinguishable from Commerce's former "zeroing" practice. Pet. 57(1) Br. at 49-51. A discretionary practice does not become mandatory merely by changing its label.

Although the Panel is not bound by decisions of the U.S. Court of International Trade, we may take note of their instructive value. In that context, we note that in two cases the CIT has addressed – and rejected – arguments similar or identical to those made by Petitioners here. In *U.S. Steel Corp. v. United States*, 637 F. Supp. 2d 1199 (Ct. Int'l Trade 2009), plaintiff domestic industry members challenged Commerce's application of the new "offset" methodology described in its *Final Modification* in a particular Section 129 proceeding,²⁰ arguing that the use of "offsetting" and the failure to use "zeroing" was not in accordance with U.S. antidumping law. *U.S. Steel*, 637 F. Supp. 2d at 1203-04. Plaintiffs also alleged that Commerce's application of the methodology outlined in the *Final Modification* to reach the final results of the Section 129 Proceeding was not in accordance with U.S. law. *Id.* at 1204. The CIT rejected these arguments. Using the two-step analysis outlined in *Chevron*, the court held that Commerce's interpretation

²⁰ See *Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261 (Dep't Commerce May 4, 2007) ("Section 129 Proceeding").

and application of the antidumping statute does comport with U.S. law. *Id.* at 1212. The reasoning of the CIT in *U.S. Steel* is instructive:

Just as the Federal Circuit has repeatedly found that the pertinent antidumping statutes do not unambiguously reveal Congress's position on the issue of zeroing, this court similarly finds that a clear Congressional intent or purpose on the question of offsetting is absent from the statutes at issue. According to § 1677(34), subject merchandise is dumped into the U.S. if it is sold, or likely to be sold, at less than fair value. § 1677(34). **That definition, on its face, merely provides the core explanation for that term, which appears frequently throughout several antidumping statutes. The term does not, however, speak to any one method for determining whether sales made fairly or unfairly, nor does it state the types of sales that Commerce must consider when making an antidumping determination. In other words, the definition housed in § 1677(34) is limited, explicitly defining a term that describes the behavior which the antidumping system aims to eradicate.**

Id. at 1210 (emphasis added). The court went on to state: “In other words, the central point of *Timken* is that Congress, in crafting the statutory definitions of ‘dumping margin’ and ‘weighted-average dumping margin,’ did not address whether Commerce must (1) employ a certain methodology to calculate the dumping margins for the subject merchandise, and (2) consider only certain values – positive, negative, or both – as a ‘dumping margin’ when calculating the weighted-average dumping margin.” *Id.* at 1211.

The *Searing* decision is even more instructive in that it involved the same plaintiffs as Petitioners here, presenting essentially the same arguments that Petitioners present here. In *Searing*, Plaintiffs similarly challenged Commerce’s “offset” methodology, and specifically Commerce’s inclusion of negative margins in the calculation of the weighted-average dumping margin. *Searing*, 662 F. Supp. 2d at 1332. Plaintiffs in *Searing* also argued, as do Petitioners here, that 19 U.S.C § 1677(35) has a plain meaning that bars the offset methodology. *Id.* The

Searing court held that these issue had been settled by the Federal Circuit in *Timken* and *Corus Staal I*, stating:

Although plaintiffs attempt to distinguish the two cases, *Timken* and *Corus Staal I* direct the outcome here. Each case relied on the rules of statutory construction set out in [*Chevron*], to find that Commerce’s former zeroing methodology was a permissible construction of 19 U.S.C. § 1677(35)(A). Using *Chevron*’s first step, each case examined 19 U.S.C. § 1677(35)(A) and found, in the context of unfair trade laws, the word “exceeds” to be ambiguous and the statute overall to “not directly speak to the issue” of whether only positive dumping margins might be included in weighted-average dumping margins calculations. *Timken*, 354 F. 3d at 1342. Thus, using *Chevron*’s second step, the Federal Circuit considered whether Commerce made a reasonable choice within a gap left open by Congress. *Chevron*, 467 U.S. at 866.

Searing, 662 F. Supp. 2d at 1332.

The *Searing* court also reviewed in detail the *U.S. Steel* decision before concluding that “taken together, these cases all lead to the conclusion that Commerce reasonably interpreted an ambiguous statute. Based on the holdings in *Timken* and *Corus Staal I* and *II* and the analysis in *U.S. Steel*, the court finds that Commerce’s methodology of offsetting positive dumping margins with negative dumping margins in calculating the weighted-average dumping margins is a permissible interpretation of 19 U.S.C. § 1677(35)(A).” *Id.* at 1334.

This Panel similarly finds that Commerce’s “offset” methodology is a permissible interpretation of 19 U.S.C. 1677(35)(A). We agree with the *U.S. Steel* and *Searing* courts, and similarly find that these issues were settled in *Timken* and *Corus Staal I* and *II*. The relevant courts have concluded – and we concur – that the language of 19 U.S.C. § 1677(35) mandates no particular methodology (or administrative practice) to determine whether “normal value exceeds export price”. If the statute is sufficiently ambiguous to sustain “zeroing” as a matter of agency discretion and interpretation, it is sufficiently ambiguous to sustain “offset” on the same basis; a discretionary practice (“zeroing”) does not become mandatory (“disregarding”) by applying a

different label. Furthermore, neither can a particular meaning for methodological purposes be ascribed to the broader phrase “normal value exceeds” from the statutory language. As the *U.S. Steel* court reasoned, neither the word “exceeds” nor the term “normal value exceeds” suggest, “that Congress intended for certain values to fit within the definition of a ‘dumping margin’ when Commerce determines the weighted-average dumping margin.” *U.S. Steel*, 637 F. Supp. 2d at 1216. In this respect, the language is ambiguous at best, and we are bound to follow the Federal Circuit’s decisions in *Timken* and *Corus Staal I* and *II*.

We also agree with the CIT’s reasoning in *U.S. Steel* that the statute does not mandate a specific practice for determining the weighted-average dumping margin. *U.S. Steel*, 637 F. Supp. 2d at 1210, n.10 (citing *Corus Staal I*, 395 F.3d at 1347). The statutory text does not compel this Panel to find that Commerce’s use of offsetting to determine the dumping margin is prohibited. *Timken*, 354 F. 3d at 1341-42.

Further, we find Commerce’s reading of the statute to be reasonable. We note that in *Timken* and *Corus Staal I* and *II*, the Federal Circuit found Commerce’s interpretation to be reasonable, as did the CIT in *Searing*. We agree, particularly in light of the deference that is granted to Commerce’s expertise in the arena of antidumping law. *U.S. Steel*, 637 F. Supp. 2d at 1212; *Chevron*, 467 U.S. at 842-843. Most important, Commerce does not offend the central aim of the antidumping law in interpreting section 1677(35) (A)-(B) to permit offsetting. This issue has been examined by the relevant U.S. courts from every angle, and no court has found Commerce’s practice to be unreasonable or not in accordance with U.S. law.

In addition, it is of no moment that Commerce may continue to employ zeroing in reviews. Indeed, “the Federal Circuit has reviewed, and accepted, the use of different calculation

methodologies for reviews and investigations.” *Searing*, 662 F. Supp. 2d at 1333 (citing *Corus Staal II* at 1375).

In sum, we conclude that the antidumping statute is “unclear as to the use of positive and negative value dumping margins in weighted-average dumping margin calculations,” *U.S. Steel*, 637 F. Supp. 2d at 1212, and that Commerce’s use of the “offset” methodology manifests a reasonable interpretation of the statute. We therefore deny Petitioners’ request for a remand on this issue.

B-10 Adjustment for Inflation

In determining Respondents’ cost of production (“COP”) for subject merchandise, the Department adjusted the value of Respondents’ fixed assets to account for inflation before calculating Respondents’ investigation period costs for depreciation. The Department explained that it applied an adjustment to the value of Respondents’ fixed assets because Respondents’ independently audited books and records included such an adjustment in accordance with Mexican GAAP as published in Bulletin B-10 of the Mexican Institute of Public Accountants (“Bulletin B-10”). The Department, however, declined to similarly adjust any of Respondents’ other manufacturing costs or revenues.

Respondents argue that the Department erred in its determination to revalue their fixed assets in accordance with Bulletin B-10. Bulletin B-10 requires Mexican companies to index all items on their audited financial statements to account for inflation (whether or not the Mexican economy is experiencing inflation) for the prior and current fiscal years, to enable the financial information for the years presented in the financial statement to be compared in constant currency terms.

Respondents argue that the Department misinterpreted Bulletin B-10 by applying the required adjustment only to their depreciation costs and treating the B-10 adjustment as if it were a depreciation provision. Respondents argue that this misapplication of the B-10 adjustment created a distortion in their costs of production. They contend that the Department should either have declined to adjust their depreciation costs for inflation or have made a corresponding adjustment to home-market sales, by comparing costs – calculated with a depreciation component indexed for inflation – with historical sales prices.

The issue before the Panel is whether the Department’s determination to include the inflation adjustment to depreciation on revalued fixed assets was in accordance with law and supported by record evidence.

The relevant statutory provision is 19 U.S.C § 1677b(f)(1)(A), which governs the calculation of costs of production in antidumping investigations:

Costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

In interpreting this statutory provision the Federal Circuit has stated that “an agency may either accept the financial records kept according to generally accepted accounting principles in the country of exportation or reject the records if accepting them would distort the company’s true costs.” *Hynix Semiconductor, Inc. v. United States*, 424 F. 3d 1363, 1369 (Fed. Cir. 2005).

In analyzing Respondents' contentions we first examine whether it is within the Department's discretion to adjust fixed asset depreciation costs where the relevant home market economy is not experiencing hyperinflation. Second we consider whether the adjustment for inflation applied by the Department in its *Final Determination* was made in accordance with Respondents' records. Finally, we consider whether the adjustment is distortive of Respondents' actual costs.

Before we address the merits of the Department's B-10 adjustment in this case, we consider first whether an adjustment of depreciation on revalued fixed assets is limited to cases where the exporting country is experiencing hyperinflation. Citing Commerce's determination in two previous investigations,²¹ Prolamsa contends that:

Inflation is present in virtually all countries that have been or will be subject to U.S. antidumping proceedings. Yet, unless the economy is experiencing hyperinflation, the Department does not account for the "inflationary impact" over the useful life of an asset. The Department has not articulated a single reason as to why Mexico, which was not experiencing hyperinflation during the period of investigation, should be treated any differently from any other country.

Prolamsa 57(3) Br. at 10-13.

It is undisputed that Mexico was not experiencing hyperinflation during the period of the Department's investigation of LWR pipe and tube from Mexico. However, neither *CWNSP from Mexico* nor *OCTG from Mexico*, involved adjustments to capital assets to account for inflation over time. Rather, in both cases Commerce considered a general adjustment for hyperinflation.

²¹ *Circular Welded Non-Alloy Steel Pipe from Mexico*, 66 Fed. Reg. 21,311 (Dep't Commerce Apr. 30, 2001) ("*CWNSP from Mexico*"); *Oil Country Tubular Goods from Mexico*, 65 Fed. Reg. 1,593, 1,595-95 (Dep't Commerce Jan. 11, 2000) ("*OCTG from Mexico*").

Moreover, neither determination addresses specifically an adjustment for depreciation on fixed assets revalued for inflation. Thus, neither case represents a precedent in conflict with Commerce's *Final Determination* in LWR Pipe and Tube.

The Panel finds that there is administrative precedent for Commerce's adjustment of fixed asset values in the absence of hyperinflation. In *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea* ("CWNSP from Korea"), 57 Fed Reg. 42,942 (Dep't Commerce Sept. 17, 1992), *Porcelain-on-Steel Cooking Ware from Mexico* ("PSCW from Mexico"), 60 Fed. Reg. 2,378 (Dep't Commerce Jan. 9, 1995), and *Fresh Cut Roses from Ecuador* ("FCR from Ecuador"), 60 Fed. Reg. 7,019, 7,029 (Dep't Commerce Feb. 6, 1995), the Department did make adjustments to fixed assets similar to the adjustment challenged in this review and did so despite the fact that the countries involved were not experiencing hyperinflation. Notably, the Department's determination in *PSCW from Mexico* applied the same adjustment being challenged here. A NAFTA panel reviewing a challenge to Commerce's *PSCW from Mexico* determination affirmed that determination, stating:

The Panel finds that Cinsa's hyperinflation argument is without merit because it misstates the Department's practice of choosing between historical and revalued costs for the calculation of the depreciation expense.

As explained by Commerce and upheld by the Court of International Trade, the choice of methodology for calculating depreciation expense is based upon home market GAAP and turns upon whether the methodology adequately represents costs of production. In a hyperinflationary economy, use of revalued method would be preferred means of calculating depreciation. The Panel finds no cases, however, that support Cinsa's position that Commerce only uses the revalued method in the context of a hyperinflationary economy.

In the Matter of Porcelain-on-Steel Cooking Ware from Mexico, USA-95-1904-01 at 31-32 (Apr. 30, 1996).

We agree with this reasoning. Prolamsa has not directed the Panel to any case from which we can conclude that Commerce may not adjust a respondent's fixed asset costs for the effects of inflation unless the exporting country is experiencing hyperinflation. Furthermore, the adjustment to the value of capital assets in other cases has been upheld by the CIT, *see Laclede Steel Co. v. United States*, 18 C.I.T. 965 (1994) in addition to the *Porcelain-On-Steel Cooking Ware* NAFTA panel.

It is clear that Bulletin B-10 manifests Mexican GAAP within the meaning of 19 U.S.C § 1677b(f)(1)(A). No party has argued that this adjustment was not made in accordance with Prolamsa's and Maquilacero's accounting books and records or that such records were not in conformity with Mexican GAAP.

In its *I&D Memo*, the Department explained why depreciation based on the values of fixed assets adjusted pursuant to Bulletin B-10 properly represented Prolamsa's and Maquilacero current costs:

Depreciation calculated based on the revalued asset values represents the current cost associated with holding these assets. Calculating depreciation on revalued assets is not unreasonable in light of the inflationary impact over multiple years of the useful lives of the assets. In other words, the adjusted depreciation expense associated with purchases in prior years reasonably reflects historical values updated to current currency levels.

I&D Memo at cmt. 13.

Once the Department decided to rely on the B-10 adjustments to fixed assets as presented in Prolamsa's and Maquilacero's financial statements, the burden fell to Respondents to prove that Commerce's use of depreciation on the B-10 revalued assets – as opposed to historic depreciation – distorted the calculation of Respondents' costs of production. *Laclede Steel*, 18 C.I.T. at 975. We conclude that Respondents did not meet this burden.

Prolamsa and Maquilacero contend that the Department's failure to make a Bulletin B-10 adjustment to home market selling prices distorted the Department's final antidumping margin calculation. They contend that Mexican companies are required to make the Bulletin B-10 adjustment to all items on their audited financial statements for the prior and current fiscal years. Consequently, Respondents argue, if the Department makes the B-10 adjustment to Respondents' fixed asset costs, it should be required to make the adjustment in the same way that Mexican companies are required to apply it, *i.e.*, to all items under consideration. They argue that the Department may not "selectively just look at depreciation and isolate only that element of B-10 to aggregate to Maquilacero's [and Prolamsa's] cost of production." *Hearing Transcript* at 38. At its heart, Prolamsa's and Maquilacero's argument is that Commerce should have made the Bulletin B-10 adjustment to all elements of the companies' responses – *i.e.*, to all costs and to revenues – or it should not have made any Bulletin B-10 adjustment at all.

We are not persuaded by this reasoning. The fact that Prolamsa and Maquilacero adjusted all elements of their financial statements in accordance with Bulletin B-10 does not, in and of itself, mean that the Department must also adjust for inflation all elements relevant to a dumping calculation. Fundamentally, the statutory provision pursuant to which Commerce made the Bulletin B-10 adjustment, 19 U.S.C. § 1677(b)(f)(2)(A), expressly concern only the calculation of costs of production and constructed values, not selling prices. Respondents have not cited any statutory authority requiring Commerce to make a Bulletin B-10 adjustment to selling prices; nor is the Panel aware of any.

Moreover, Commerce applies the Bulletin B-10 adjustment to cost elements such as fixed assets to measure "the inflationary impact over multiple years of the useful lives of the assets," *I&D Memo* at cmt. 13, in order to calculate the depreciation cost during the fixed and limited

period of an investigation or administrative review. Maquilacero and Prolamsa have not been able to articulate why the Bulletin B-10 adjustment would be applicable to production costs incurred on a current basis during the investigation or review period, e.g., wages, utilities, or materials, particularly in light of the fact that these costs are unaffected by inflation over a time period broader than that covered by an investigation or administrative review.

Although the Panel believes that the Department could have better articulated the rationale for its decision to apply the B-10 adjustment to Respondents' fixed asset costs, the path of the Department's decision is reasonably discernable. *NMB Sing., Ltd. v. United States*, 557 F.3d 1316, 1319 (Fed. Cir. 2009). Respondents have not met their burden of showing that the Department's Bulletin B-10 adjustment to the value of their fixed assets distorted the margin calculation. Accordingly, we see no reason to depart from previous CIT and NAFTA Panel determinations in which the application of a Bulletin B-10 adjustment only to fixed assets was upheld. *See Porcelain-On-Steel Cooking Ware*, USA-95-1904-01 (Apr. 30, 1996); *Laclede Steel Co. v. United States*, No. 94-160, Slip. Op. at 23-24 (Oct. 12 1994). The Panel concludes that the Department's determination to use the depreciation of fixed assets that were revalued pursuant to Bulletin B-10 in its calculations of Respondent's production costs is in accordance with law and supported by substantial evidence.

Reduction of the Cost of Manufacturing to Reflect Differences Between Reported Costs and Verified Costs.

In its response to section D of the Department's antidumping questionnaire Prolamsa reported its total cost of manufacture ("COM") for its merchandise, which the Department used as an element of its calculation of Prolamsa's cost of production and constructed value of its

merchandise. At verification of Prolamsa's reported data,²² the Department identified a discrepancy between the sum of the COM of subject and non-subject merchandise as reported in Prolamsa's Section D questionnaire ("reported COM") and the total COM for Prolamsa's merchandise as recorded in the company's cost accounting system and verified by Commerce ("verified COM"). Based on this verification finding, Prolamsa argued that it had over-reported its COM for subject merchandise and petitioned the Department to adjust its reported COM downward to match the COM reflected in the company's accounting system. In the *Final Determination*, the Department acknowledged the existence of discrepancies between Prolamsa's reported costs and verified costs, *I&D Memo*. at cmt. 8, but concluded that it could not determine the nature of the discrepancies or whether they related to subject merchandise. *Id.* Because the Department was not satisfied that the overstatement of reported COM was linked to subject merchandise it declined to make the adjustment requested by Prolamsa. *Id.*

The antidumping statute is silent as to how the Department should treat unexplained, unreconciled differences between a respondent's reported costs and the costs reflected in its accounting system. *Micron Tech v. United States*, 117 F.3d 1386, 1394-1396 (Fed. Cir. 1997). Where the statute is silent or ambiguous, the Department has considerable discretion in implementing its Congressional mandate. *Id.* See also *Chevron*, 467 U.S. at 842-843.

In the context of this discretion, Commerce has adopted a practice in which, if it identifies a discrepancy between reported data and verified data that works in favor of a respondent, it will adjust the data in the respondent's favor (e.g., reduce the cost of manufacture) only if the respondent is able to explain the discrepancy and demonstrate that it is related to

²² 19 U.S.C. 1677m(i).

subject merchandise. *See, e.g., Metal Calendar Slides from Japan*, 71 Fed. Reg. 36,063 (Dep't Commerce June 23, 2006); *Polyvinyl Alcohol from Taiwan*, 63 Fed. Reg. 32,810, 32,819 (Dep't Commerce June 16, 1998). Conversely, Commerce will not give a respondent the benefit of an adjustment where an apparent overstatement of costs is discovered at verification if the respondent cannot explain the discrepancy and tie it to subject merchandise. This practice, as well as Commerce's practice of adjusting costs upward where verification reveals that a respondent under-reported its actual costs, is consistent with the Department's regulation requiring a respondent to establish the amount and nature of an adjustment "to the satisfaction of the Secretary [of Commerce,]" 19 C.F.R. § 351.401(b)(1), stating that "[t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of particular adjustment." That the burden to establish entitlement to a favorable adjustment rests on the party seeking to benefit from the adjustment has been established by the Court of Appeals. *Fujitsu Gen. v. United States*, 88 F.3d 1034, 1040 (Fed. Cir. 1996).

Prolamsa contends that the Department's policy of requiring parties to demonstrate their entitlement to favorable adjustments is internally inconsistent and inequitable. In circumstances where the Department discovers an underreporting of costs, it is the Department's practice to automatically increase the reported costs to reflect the verified costs, unless the effected respondent is able to demonstrate why the reported costs are more accurate. *See, e.g., Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil*, 64 Fed. Reg. 38,756 (Dep't Commerce July 19, 1999); *Stainless Steel Plate and Coils from Taiwan*, 64 Fed. Reg. 15, 493, 15, 498 (Dep't Commerce March 31, 1999). Prolamsa contends that this practice, which increases dumping margins, while requiring a demonstration of entitlement to adjustments that

decrease dumping margins, is punitive and contrary to the requirement that the Department calculate accurate dumping margins. *See Rhone Poulenc v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (stating that “the basic purpose of the statute” is “determining current margins as accurately as possible”). The Panel disagrees and concludes that the Department’s practice is reasonable and supportive of its statutory directive.

The Department’s practice flows from the fact that the party claiming the adjustment is in control of its own data.²³ On one hand, Respondent’s have a clear incentive to underreport their costs and little incentive to explain why their costs were underreported. The Department’s practice of automatically increasing under-reported costs discovered at verification addresses this problem. Conversely, where a possible error exists and its adjustment would benefit a respondent, it is the respondent that is in a position to explain the error and document its nature and relationship to the subject merchandise. It is therefore reasonable for the Department to place the burden of demonstrating entitlement to the benefit of a corrected discrepancy on the party in control of the information. *See Sugiyama Chain Co. v. United States*, 797 F. Supp. 989, 994 (Ct. Int’l Trade 1992) (concluding that the practical implications of placing the burden of determining the accuracy of the voluminous reported data submitted during the course of an antidumping duty investigation on Commerce “would transform the administrative process into futility.”). Accordingly, we conclude that it is within the Department’s discretion to require

²³ The Panel need not look far for an example of the Department’s willingness to adjust reported data in favor of a respondent when the respondent properly supports its claim of entitlement to the adjustment. At verification in the instant investigation, the Department confirmed that Prolamsa over-reported an element of its Cost of Production and Constructed Value (“COP/CV”) as a result of an input error. *Memorandum re Cost of Production and Constructed Value Calculation Adjustments for the Final Determination – Prolamsa*, at 2 (C.R. 99). Because Prolamsa was not only able to demonstrate the existence of an error, but also the cause of that error and the fact that the correction of the error would result in a more accurate dumping margin, the Department adjusted Prolamsa’s reported costs to reflect the more accurate figure. *Id.*

Prolamsa to explain the discrepancy between reported and verified costs and to demonstrate that the over-reported costs relate to subject merchandise. Having so concluded, we must determine whether Commerce properly exercised its discretion.

Prolamsa's over-reported costs comprise two elements. The first relates to a discrepancy between the company's cost of goods sold ("COGS") for all merchandise as generated by Prolamsa's cost accounting system. The verification report shows that the verified COGS was slightly lower than the system COGS. *Prolamsa Cost Verification Report* (Prop. R. Doc. 79) at 11-12. Prolamsa contends that because the system COGS formed the basis of the value reported as the COM for subject merchandise, the COM for subject merchandise, along with all other reported values derived from the system COGS, should be reduced by the percentage by which the system COGS was found to exceed the verified COGS. Prolamsa contends that such a reduction would be consistent with the Department's past practice in similar circumstances.

Prolamsa points to *Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34,122 (Dep't Commerce June 18, 2004), in which Commerce made a global adjustment to a respondent's reported data on the basis of an over statement of quantity of subject merchandise sold to support its position with respect to its requested reduction in COGS. The discrepancy in Prolamsa's data is distinguishable from the discrepancy at issue in *Polyethylene Retail Carrier Bags from Thailand*, however, because the respondent in that investigation was able to demonstrate that the error for which it sought adjustment was the product of a specific, identifiable data entry error. *Id.* In *Polyethylene Retail Carrier Bags from Thailand* the respondent was able to identify and explain the reason for the discrepancy to the Department's

satisfaction. In contrast, at no point during the Department's investigation, or subsequently, has Prolamsa been able to explain why its reported COGS and verified COGS do not match.²⁴

As a consequence of Prolamsa's inability to explain the nature of the discrepancy there is nothing on the administrative record that would have enabled Commerce to identify what portion – if any – of the over-reported COGS is attributable to subject merchandise. Because both the verified COGS and the system COGS relate to all merchandise produced by Prolamsa, it is clear that the over-reported costs relate to both subject and nonsubject merchandise. Prolamsa appears to concede as much. Commerce's conclusion that Prolamsa had failed to meet its burden of persuasion that it was entitled to the requested adjustment was therefore reasonable and supported by substantial evidence.

The second element of Prolamsa's over-reported costs related to an unidentifiable difference between the COM it reported for its subject merchandise and the total COM for all merchandise as recorded in its cost accounting system.

As an element of verification, Commerce asked Prolamsa to reconcile the COM reported for subject merchandise ("merchandise under consideration") to the COM in its accounting system.²⁵ In response, Prolamsa provided reconciling data under the following categories:

²⁴ At the hearing, counsel for Prolamsa was unable to answer the Panel's questions regarding the causes of the errors at issue. *See* Record 45 at 21-27.

²⁵ Specifically Commerce requested that Prolamsa:

Review the reconciliation of the total POI/POR COM to the total of the per-unit manufacturing costs submitted to the Department (i.e., multiply the reported COMs of all merchandise under consideration for the POI/POR by their respective production quantities then sum the totals). Discuss each reconciling item and obtain supporting documentation for major reconciling items, including the following items:

[Footnote continued.]

- COM from Cost Accounting system (at standard);
- Less: COM non-subject merchandise
- Less: Difference
- COM for Subject Merchandise
- Less: packing
- Less: Scrap Offset
- Plus: B10 Adjustment
- Plus: Variance
- Total

Prolamsa Cost Verif. Rpt (Prop. R. Doc. 79) at 14.

At issue here is the amount that Prolamsa reported under the “Difference” category, which comprises the amount of the difference between the COM that Prolamsa reported and the COM in Prolamsa’s accounting system. The “Difference” field documents the amount by which the total COM generated by Prolamsa’s cost accounting system (“system COM”) was slightly

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1. differences between the reporting methodology and the normal record keeping;
 2. cost of the merchandise not under consideration (i.e., multiply the per-unit COM of all merchandise not under consideration produced by the company during the cost reporting period by their respective production quantities, then sum the totals; or if per-unit costs are not tracked, then, sum the total of the costs directly assigned to or allocated to the merchandise not under consideration);
 3. if not already provided, the total cost of merchandise under consideration not sold in the United States or comparison market (i.e., multiply the per-unit COM of all merchandise under consideration not sold in either the U.S. or the comparison market of the cost reporting period by their respective production quantities, then sum the totals);
 4. cost of merchandise under consideration sold in the U.S. or comparison market that the company has been excused from reporting (i.e., multiply the per-unit COM of all merchandise excused from reporting produced by the company during the cost reporting period by their respective production quantities, then sum the totals); and,
 5. all other reconciling items.

Prolamsa Cost Verification Report (Prop. R. Doc. 79) at 13.

lower than the amount of the total COM reported by Prolamsa in response to the Department's questionnaire ("reported COM").²⁶ *Id.* at 14. For reconciliation purposes, Prolamsa reconciled the subject merchandise system COM to its financial statements by starting with the system COM for all merchandise and first subtracting the non-subject merchandise system COM and then the "Difference" amount, before adjusting the result for packing, scrap offset, the B-10 adjustment, and variance. *Id.* Because the total system COM is slightly lower than the total reported COM by the amount of the reconciling "Difference," the subject merchandise system COM is lower than the reported subject merchandise COM.

Prolamsa argues that because its calculation reconciles the reported COM for subject merchandise to the system (or verified) COM for subject merchandise, the reconciled amount must necessarily be attributable to subject merchandise. Review of the reconciliation's structure, however, reveals that this is not the case. The discrepancy between the reported and verified COM numbers is generated at the starting point of the calculations, *i.e.*, at the level of total COM, and is carried through to the end. The source of the discrepancy – the amount that Prolamsa identified in the field labeled "Difference" in order to reconcile its total COM – could

²⁶ The Department's verification report states that:

We noted that the POI COM from this reconciliation agrees to the POI COM from the reconciliation at step III.B. above. Prolamsa subtracted from this amount the COM of the non-subject merchandise and the difference of . . . Thousand MXP to compute the COM for subject merchandise.

Id. at 14.

The fact that Prolamsa generated the subject merchandise COM by subtracting the non-subject merchandise COM and the "difference" from the POI COM indicates to the Panel that the "difference" was between the POI COM (or system COM) and the reported COM.

therefore be attributable to subject merchandise, non-subject merchandise, or some combination of the two. The record does not contain sufficient information for Commerce to make that determination, and Prolamsa failed to meet the burden imposed on it by 19 C.F.R. 351.401(b)(1) and the Department's administrative practice. Accordingly, the Department's decision not to grant the requested reduction in Prolamsa's COM was reasonable and supported by substantial evidence. We see no grounds to remand the *Final Determination*.

Conclusion

The Panel concludes that the Commerce Department's Final Determination concerning Light-Walled Rectangular Pipe and Tube from Mexico is supported by substantial evidence and lawful in its entirety.

We affirm.

It is so ORDERED.

Signed in the original by:

<u>Lawrence J. Bogard</u>	<u>7/19/2010</u>
Lawrence J. Bogard, Panel Chair	Date

<u>Mélida Narcisa Hodgson</u>	<u>7/19/2010</u>
Mélida Narcisa Hodgson, Panelist	Date

<u>Gerardo Lozano Alarcón</u>	<u>7/19/2010</u>
Gerardo Lozano Alarcón, Panelist	Date

<u>Luis Felipe Aguilar</u>	<u>7/20/2010</u>
Luis Felipe Aguilar, Panelist	Date

<u>Ricardo Ramírez Hernández</u>	<u>7/20/2010</u>
Ricardo Ramírez Hernández, Panelist	Date

CONCURRING OPINION

I consider that Commerce correctly changed its previous practice of “zeroing” dumping margins. However, I disagree with the majority with respect to their opinion that the decision to change its zeroing practice is justified by the Department’s discretion. I understand that such discretion can only exist when it does not conflict with an obligation. As previous NAFTA Panels have noted, Commerce has an international obligation with respect to commitments of the United States under the World Trade Organization (*Carbon and Certain Alloy Steel Wire Rod from Canada, 2007* and *Stainless Steel Strip and Coils From Mexico, 2010*), commitments that were merely formalized by the *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dep’t Commerce Dec. 27, 2006) (“*Final Modification*”) regarding Antidumping Investigations such as this case.

Signed in the original by:

Luis F. Aguilar