

Public Version

Fischer S.A. Comercio, Industria and Agricultura, and Citrosuco North America, Inc.
v. United States

Consol. Court No. 08-00277 Slip Op. 10-35 (CIT April 6, 2010)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (the Department) has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade (the Court or CIT) in Fischer S.A. Comercio, Industria and Agricultura, and Citrosuco North America, Inc. v. United States, Consol. Court No. 08-00277, Slip Op. 10-35 (CIT 2010) (Fischer). In its remand order, the Court disagreed with the Department's rejection of certain untimely-filed new factual information submitted in Fischer S.A. Comercio, Industria, and Agricultura's (Fischer's) case brief. As a result, the Court directed the Department to: 1) examine the new factual information submitted with Fischer's case brief (i.e., selected pages from a purchase agreement with one of Fischer's customers for U.S. sales of not-from-concentrate orange juice (NFC)); 2) determine whether this information set the price for Fischer's U.S. sales of NFC in a brix-neutral manner; and 3) recalculate Fischer's dumping margin based upon consideration of the additional agreement pages.

The Department issued draft remand results to all interested parties on April 27, 2010. See Draft Results of Redetermination Pursuant to Court Remand, April 27, 2010 (Draft Remand Redetermination). In these draft results, we respectfully disagreed with the Court's conclusion that the Department is required to accept Fischer's untimely submitted new factual information; however, we complied with the Court's instructions and examined the pages from Fischer's NFC purchase agreement. Because this information did not demonstrate that the price of Fischer's

NFC sales during the period of review (POR) was set in a brix-neutral manner, we found that it was not appropriate to recalculate Fischer's margin.

On April 30, 2010, we received comments on the draft results from Fischer, as well as from Florida Citrus Mutual, Duda Products, Inc., Citrus World, and Southern Garden Citrus Processing Corporation (collectively, "the petitioners"). These comments are addressed below. After analyzing these comments, we continue to find that: 1) the pages of Fischer's purchase agreement do not demonstrate that the prices of Fischer's NFC sales were set in a brix-neutral manner; and 2) it is not appropriate to recalculate Fischer's margin.

B. BACKGROUND

On April 6, 2010, the Court remanded to the Department its final results of the 2005-2007 antidumping duty administrative review of certain orange juice from Brazil. See Fischer, Slip Op. 10-35; and Certain Orange Juice from Brazil: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 46584 (Aug. 11, 2008) (OJ Final Results). The POR covers the period August 24, 2005, to February 28, 2007.

In the 2005-2007 antidumping duty administrative review, Fischer reported its U.S. sales of NFC on a gallon basis in the United States. In order to convert its NFC sales from gallons to pounds solid (which is the common unit of measure used in all of the Department's orange juice margin calculations), Fischer used the actual brix level¹ of each sale. This methodology is consistent with the conversion methodology employed in the original less-than-fair-value (LTFV) investigation in this proceeding. See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange

¹ Brix is the unit of measurement used in the orange juice industry to measure the amount of soluble solids in a concentrate. For example, NFC with a brix level of 11.8 contains 11.8 pounds of fruit sugar solids in every 100 pounds of solution. See Fischer, Slip Op. 10-35, at 12; see also Fischer's May 22, 2007, section A questionnaire response, at Exhibit 19.

Juice from Brazil, 71 FR 2183 (Jan. 13, 2006) (OJ Final Determination) and accompanying Issues and Decision Memorandum at Comment 19.

In its administrative case brief, Fischer argued that the calculation methodology it reported was distortive and that instead the Department should reconvert gallons into pounds solid using a “standard” brix of 11.8. See Fischer’s May 8, 2008, administrative case brief. To bolster this claim, Fischer submitted new information in its administrative case brief related to a purchase agreement with one of its customers for U.S. sales of NFC, which the Department rejected as untimely filed. In the final results, we continued to rely on Fischer’s reported data for NFC, converted on the basis of actual brix. See OJ Final Results at Comment 11.

In its remand order, the Court found that the Department abused its discretion when it rejected the new information provided by Fischer in its administrative case brief because this information may have “established the mistake in Fischer’s preliminary results margin calculations and demonstrated the correct conversion factor.” See Fischer, Slip Op. 10-35, at 27. Therefore, the Court directed the Department to:

- examine the agreement pages submitted with Fischer’s case brief;
- determine whether the agreement set the price for Fischer’s U.S. sales of NFC in a brix-neutral manner; and
- recalculate Fischer’s dumping margin based upon consideration of the additional agreement pages.

See Fischer, Slip Op. 10-35, at 37-38.

We respectfully disagree with the Court’s conclusion that the Department abused its discretion when it rejected Fischer’s untimely new factual information. However, pursuant to the Court’s remand instructions, we have examined the pages from Fischer’s NFC purchase

agreement, an analysis of which is set forth below. Because we find that this information does not demonstrate that the price of Fischer's NFC sales was set in a brix-neutral manner, we have not recalculated Fischer's margin.

C. ANALYSIS

When performing any antidumping duty analysis, the Department first ensures that a respondent's reported home market and U.S. sales data are stated in an identical unit of measure in order to make an apples-to-apples comparison. In this case, Fischer sells NFC in gallons in the United States and in kilograms in the home market. In addition, Fischer sells a second product, frozen concentrated orange juice, in pounds solid in the United States and in kilograms (like NFC) in the home market. Therefore, our consistent practice in this proceeding has been to require respondents to convert all quantities and values into pounds solid amounts when reporting their sales data. At issue here is whether it is appropriate to perform one of these conversions—U.S. sales of NFC from gallons to pounds solid—using the actual or a “standard” (i.e., theoretical) brix measurement.

As the starting point in our analysis and as directed by the Court, we examined the pages from Fischer's purchase agreement with its U.S. customer for U.S. sales of NFC, which was submitted with Fischer's administrative case brief. As an initial matter, we note that: 1) Fischer submitted only nine out of 63 pages of this agreement on the record;² 2) this document is dated five years before the beginning of the POR; and 3) its effective period is unspecified. Moreover, the agreement sets a price per-gallon for NFC delivered to the United States of \$[], without reference to a particular brix level. Contrary to Fischer's assertions, this agreement does not reference a “standard” brix, nor does it define what the “standard” brix of NFC is; however, it

² Fischer provided two of these pages in its November 2, 2007, supplemental questionnaire response and eight pages, including one page already provided on November 2, in its May 8, 2008, administrative case brief.

does contain a clause providing the customer a credit for low brix if the average brix of NFC delivered during a specific crop year is less than a “target brix” of 11.8.³ See Fischer’s May 8, 2008, administrative case brief at Exhibit 1; and Fischer’s November 2, 2007, supplemental questionnaire response at Exhibit 5. Because: 1) the agreement does not explicitly reference a “standard” brix; 2) the “target” brix relates to a general crop year rather than to each individual sale; and 3) there is no stated maximum brix, it is unclear at best that the agreement does in fact set a “standard brix” for NFC.

Even assuming, arguendo, that the “target” brix is the same as the “standard” brix, we cannot determine whether Fischer’s POR sales met the target because the data on the record are reported on a POR, not crop-year, basis.⁴ Consequently, we find that the agreement pages Fischer provided do not definitively establish that this agreement set a “standard” brix level for Fischer’s actual U.S. sales of NFC during the POR.

Fischer has argued (see Section D below) that the Department does not need to establish the brix level for the crop years of its POR NFC sales because the record shows that Fischer made no billing adjustments for low brix levels on those sales. Thus, Fischer contends that it logically follows that Fischer must have met its “target” brix level. However, Fischer’s point is only valid if the agreement was in effect during the POR. As noted below, this assumption is not supported by record evidence because Fischer’s reported prices do not tie to the purchase

³ While the term “target brix” is not defined in the agreement pages Fischer provided, Exhibit VIII(A) of the agreement (entitled “Specifications for the USA Product”) does set forth a minimum brix of [] and no maximum brix. See Fischer’s May 8, 2008, administrative case brief at Exhibit 1. As shown in the table below, none of Fischer’s POR U.S. sales of NFC had an actual brix level below the minimum level of [].

⁴ Contrary to Fischer’s claim, the fact that Fischer certified its submissions as accurate is not sufficient to link the agreement to its POR sales of NFC. We note that Fischer’s submissions contain factual inconsistencies in some instances. (For example, Fischer’s statement in its case brief that all of its POR U.S. sales of NFC had actual brix levels above 11.8, whereas the data on the record shows that in fact [] of Fischer’s POR sales had actual brix levels below this figure. See table, below.) These inconsistencies call into question the reasonableness of accepting its assertions at face value.

agreement in all instances, and certain of the prices do not even appear to be set in gallons (see Section D below). As a result, we find that Fischer’s lack of a reported billing adjustment would only be meaningful if it were consistent with the entirety of the administrative record.

With regard to the pricing data on the record, as noted above, the agreement does not contain an effective period. Therefore, we attempted to establish whether it could have been in effect during the POR by tying it to the data reported in Fischer’s U.S. sales listing. However, we found that, in almost a third of the reported transactions, the price per gallon differed from the price in the agreement. Specifically, the table below shows the actual brix level Fischer reported for each of its U.S. POR sales of NFC, as well as the per-gallon price of each sale (converted using the actual brix levels reported for each sale).⁵

<u>Invoice Number</u>	<u>Actual Brix</u>	<u>Reported Gross Unit Price</u> <u>(in pounds solid)</u>	<u>Gross Unit Price</u> <u>(in gallons)</u>
[]
[]
[]
[]
[]
[]
[]
[]
[]
[]
[]
[]
[]
[]
[]
[]

⁵ Because Fischer reported its quantities and gross unit prices for NFC sales in the U.S. sales listing on a per-pounds solid basis (converted using the actual brix), we used the reported information to reconvert reported prices into per-gallon amounts using the following formulas: 1) quantity in gallons = quantity in pounds solid ÷ (actual brix÷100) ÷ pounds per gallon specific to each actual brix; and 2) gross unit price per gallon = total value (i.e., reported quantity multiplied by reported gross unit price) ÷ quantity in gallons. See the April 27, 2010, memorandum from Elizabeth Eastwood to the file entitled, “Calculation of Per-Gallon Gross Unit Prices for Fischer S.A. Comercio, Industria, and Agricultura (Fischer) in the 2005-2007 Antidumping Duty Administrative Review of Certain Orange Juice from Brazil.”

This data shows that the per-gallon gross unit prices of Fischer’s NFC sales ranged between \$[] and \$[] per gallon, with four of the 14 U.S. sales of NFC having a different gross unit price per gallon than the \$[] per-gallon price specified in Fischer’s purchase agreement.⁶ Given that: 1) the purchase agreement is dated []; 2) the effective period of Fischer’s purchase agreement is not specified; and 3) almost a third of the U.S. sales of NFC have per-gallon gross unit prices which differ from that set forth in the purchase agreement,⁷ it is unclear that this purchase agreement was actually in effect or set the price for any of Fischer’s POR U.S. sales of NFC, despite Fischer’s assertions to the contrary.⁸ As a result, this agreement provides an insufficient basis to: 1) establish that the prices for POR sales of NFC to Fischer’s U.S. customer were set in a “brix neutral” manner; or 2) change the conclusion in the OJ Final Results that gallons to pounds solid conversions made using actual brix are more accurate. See OJ Final Results at Comment 11.

In the OJ Final Results, we recognized that the conversion from gallons to pounds solid using the actual or standard brix yielded different results. However, we disagreed with Fischer that this difference signified that our comparisons were inaccurate in any way. Specifically, we stated:

⁶ In its comments on the draft remand results (see Section D below), Fischer argued that the formula used to compute the per-gallon prices was incorrect. However, because Fischer converted its reported gross unit prices from gallons to pounds solid using the actual brix level for each U.S. sale of NFC, we must perform this conversion in reverse (i.e., using the actual brix level) to obtain the original per-gallon price of each sale. Further, we note that if we were to perform this conversion using the “standard” brix level, as Fischer contends, none of the per-gallon prices would match the \$[] per gallon price set forth in the purchase agreement. For further discussion, see below.

⁷ Not only do these sales represent almost a third of Fischer’s U.S. sales of NFC during the POR, but also the quantity of these sales is significant, ranging from [] gallons to [] gallons.

⁸ In addition, at least one of these invoices does not appear to have prices set per gallon at all. See Fischer’s December 17, 2007, supplemental questionnaire response at Exhibit 7. Specifically, this invoice is priced based on pounds solid. This invoice also shows the equivalent number of gallons based on the actual brix (but not a per-gallon price). Id.

Fischer has merely shown that the conversion of its U.S. sales from gallons to pounds solid using the actual brix results in a price that is different from the price converted using the standard brix without providing evidence which shows that: 1) the conversion from kilograms to pounds solid is distortive on the home market side; or 2) the comparison of home market and U.S. sales of NFC, when both are converted to pounds solid using the actual brix, is distortive. The fact that the per-unit price of NFC differs when a different conversion basis is used does not automatically establish that the price is distortive. Rather, it only demonstrates that the per-unit prices are different.

See OJ Final Results at Comment 11. We are also mindful that using the actual brix for converting U.S. sales of NFC to pounds solids is consistent with the methodology that the Department used in the original LTFV investigation. See OJ Final Determination at Comment 19.

Finally, we note that the Court has upheld the Department's conversion of Fischer's home market sales of NFC from kilograms to pounds solid using the actual brix level of each sale. See Fischer, Slip Op. 10-35, at 30. We find that comparing home market prices per actual pounds solid to U.S. prices per theoretical pounds solid would be distortive because the prices would be stated on different bases.⁹ Making such an apples-to-oranges comparison would not only be contrary to the Department's long-standing practice, but it would also result in inaccurate margins. See, e.g., Rhone-Poulenc, Inc. v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (where the Court stated that the basic purpose of the statute is to determine current margins as accurately as possible); Notice of Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 FR 38756, 38781 (July 19, 1999) (where the Department converted a respondent's U.S. sales which were made on a theoretical-weight basis to an actual-weight basis for comparison purposes, despite the fact that U.S. sales were priced by theoretical weight); and Final Results of Antidumping Duty

⁹ We similarly find that converting a U.S. price per actual pounds solid (such as the one in Exhibit 7 of Fischer's December 17, 2007, response) to a theoretical figure would be equally distortive.

Administrative Review and Partial Termination of Administrative Review: Circular Welded Non-Alloy Steel Pipe From the Republic of Korea, 62 FR 55574, 55576 (Oct. 27, 1997) (where the Department converted costs reported on an actual weight basis to a theoretical weight basis in order to make equitable comparisons to sales stated on a theoretical-weight basis).

D. COMMENTS FROM INTERESTED PARTIES

On April 30, 2010, Fischer and the petitioners submitted comments on our Draft Remand Redetermination. These comments are summarized below.

Issue: *Use of Actual Vs. Standard Brix*

Fischer objects to the Department's analysis on three bases: 1) the absence of billing adjustments reported in Fischer's U.S. sales listing was deemed significant by the Court and should have been relied upon here; 2) the Department's price analysis is both unnecessary and flawed; and 3) the history of this case, as well as Fischer's and its counsel's certifications of accuracy, show that the purchase agreement was in effect during the POR.

Regarding the first point, Fischer argues that the Department oversimplified the Court's instructions when framing the issue in this case as one of merely assessing whether the information in Fischer's purchase agreement set the price for Fischer's U.S. sales of NFC in a brix-neutral manner. See Draft Remand Redetermination at 1. According to Fischer, the Court in its opinion also focused on the Department's price adjustment as the determinant of whether the price conversions from gallons to pounds solid were brix-neutral under the contract in question. See Fischer, Slip Op. 10-35, at 15, 27. For this reason, Fischer contends that the Department's analysis should revolve around the clause in the agreement setting forth the circumstances under which Fischer is required to make a price adjustment for low-brix

shipments. According to Fischer, the Court recognized the importance of this clause when it chastised the Department for rejecting Fischer's untimely-filed new information.¹⁰

Fischer argues that, under the purchase agreement, Fischer's U.S. sales of NFC were subject to a price adjustment for brix level deviations only if the actual brix level of the delivered NFC was less than the "target" brix level. Fischer points out that it did not report price adjustments for any of its POR U.S. sales of NFC, which it claims demonstrates that the agreement was in effect during the POR. Thus, Fischer contends that the Department's refusal to convert its U.S. sales of NFC from gallons to pounds solid using the "brix-neutral" target is inappropriate.¹¹

Similarly, Fischer argues that the Department's unsuccessful attempt to link the average brix level for the crop years during the POR to the "target" brix level of 11.8 is irrelevant because Fischer did not report a price adjustment for its U.S. sales of NFC (thus demonstrating that the target brix requirement was met).

Second, Fischer contends that the price component of the Department's analysis is flawed because the Department used incorrect conversion factors to restate the reported unit prices on a per-gallon basis (i.e., the Department used the U.S. Department of Agriculture (USDA) conversion factor for the actual brix level of each NFC sale, rather than the USDA conversion factor of 8.717 for the "standard" NFC brix of 11.8). Fischer points out that, despite this incorrect calculation, the Department found that the prices for ten of its 14 POR U.S. sales of NFC equaled the \$[] per gallon price set forth in the purchase agreement. Fischer argues that

¹⁰ Specifically, the Court noted that replacing the actual brix with 11.8 in the Department's calculations would be a simple fix, "should Commerce determine upon remand that the sales agreement pages in fact substantiate that Brix levels above 11.8 degrees did not increase the United States unit price of Fischer's NFC." Id. at 27.

¹¹ Fischer's argument appears to be specific to sales "with a brix above the 11.8 target." See Fischer's administrative case brief at 3. We note that the information presented in the table, above, demonstrates that [] of Fischer's POR U.S. sales of NFC had actual brix levels below the "target" brix of 11.8.

the prices for two of the remaining four sales were only two tenths of a cent higher than the price in the purchase agreement. Fischer implies that this difference is immaterial and thus it cannot serve as proof that the agreement was no longer valid.

Third, Fischer disagrees that it is necessary to question now whether the purchase agreement remained valid, as the Department previously recognized that it was in force during the POR. Fischer maintains that it provided information to the Department on numerous occasions establishing this fact, and to support this assertion Fischer cites excerpts from its responses to sections A (i.e., the section covering general information about the company) and C (i.e., the section covering U.S. sales) of the questionnaire.¹² Fischer implies that, because the Department did not challenge this information when it issued supplemental questionnaires, the Department must have deemed it relevant and accepted it on that basis.

According to Fischer, it is evident that the additional pages of the purchase agreement provided in its May 8, 2008, administrative case brief are from the same contract presented in Fischer's section C supplemental questionnaire response; for example, page 16 of the contract excerpt submitted in the section C supplemental questionnaire response is identical to page 16 of the contract contained in Fischer's administrative case brief.¹³ Moreover, Fischer claims that the Department verified this and all other U.S. sales contracts at the sales verification of CNA conducted during the LTFV investigation.

Finally, Fischer points out that it and its counsel certified that all of its submissions containing excerpts of the purchase agreement were true and accurate. Therefore, Fischer

¹² Specifically, Fischer notes that in its section A response, it stated that its U.S. affiliate, Citrosuco North America (CNA), had [] customer relationship. In its section C supplemental questionnaire response, Fischer points out that it referenced its customer [] by name and attached an excerpt from the purchase agreement related to billing adjustments.

¹³ Fischer asserts that there is no basis for the Department to reject this agreement because the record contains only selected pages from it. Fischer notes that it submitted full copies of the NFC purchase agreement at issue in this proceeding on the record of the 2007-2008 and 2008-2009 antidumping duty administrative reviews.

contends that there is no basis for the Department to challenge the legitimacy of its NFC purchase agreement during the POR.

In summary, Fischer argues that the Department failed to review Fischer's NFC purchase agreement properly and thus it inadequately responded to the Court's remand order. As a result, Fischer contends that the Department's refusal to recalculate its U.S. prices for NFC continues to violate the Department's duty to determine Fischer's dumping margin as accurately as possible. Consequently, Fischer contends that the Department should recalculate the prices of its U.S. sales of NFC by converting gallons to pounds solid using a brix level of 11.8.

The petitioners agree with the rationale set forth by the Department in the Draft Remand Redetermination, maintaining that the Department correctly concluded that there was no evidence on the record demonstrating that the prices of Fischer's U.S. NFC sales were set in a brix-neutral manner. According to the petitioners, the documentation submitted by Fischer is not a reliable basis on which to reach the conclusion sought by it, because: 1) Fischer submitted only an excerpt of the agreement; 2) this excerpt was dated well before the period of review and had no effective period; 3) the agreement does not reference a standard brix as claimed by Fischer, but rather only provides the customer a credit if the average brix in a particular crop year falls below a target figure; and 4) Fischer's reported prices do not tie to the agreement in a substantial number of instances.

In addition, the petitioners disagree that the actual brix of particular shipments of NFC is commercially irrelevant to Fischer. As evidence of this, the petitioners point out that at least some of Fischer's invoices for U.S. sales of NFC contain both the actual brix level and the quantity in pounds solid. See Exhibit 7 of Fischer's December 17, 2007, supplemental questionnaire response.

For the foregoing reasons, the petitioners contend that the Department acted reasonably in reaching its conclusion that the price of Fischer's U.S. sales of NFC was not set in a brix-neutral manner. The petitioners assert that, because the Department's determination is supported by substantial evidence, it should be upheld by the Court.

Department's Position:

After carefully considering Fischer's arguments, we continue to find that the new factual information submitted in Fischer's administrative case brief does not demonstrate that the prices of Fischer's NFC sales were set in a brix-neutral manner. As an initial matter, we disagree with Fischer that we failed to follow fully the Court's instructions in its remand order or that we oversimplified the issue in such a way as to render our analysis incomplete. In its opinion, the Court stated:

Simply put, Commerce has not yet considered whether Fischer's dumping margin is inaccurate due to having been calculated on the mistaken premise that Fischer priced its NFC based on sweetness, rather than volume regardless of sweetness. The Court therefore remands to Commerce to (1) examine the additional pages submitted by Fischer with its Case Brief dated May 8, 2008; (2) determine whether the agreement set the price for Fischer's NFC in the United States in a Brix-neutral manner; and (3) recalculate Fischer's dumping margin based upon consideration of the additional pages.

See Fischer, Slip Op.10-35, at 29.

Contrary to Fischer's contentions, we followed the Court's instructions. We examined the additional pages submitted by Fischer with its case brief and determined whether the agreement containing them set the price for Fischer's U.S. sales of NFC during the POR in a brix-neutral manner. Our conclusions are: 1) the agreement does not clearly set a "standard" brix at which Fischer sold NFC, but rather a general "target"; and 2) irrespective of the terminology used (i.e., "standard" vs. "target"), the agreement did not set the prices for a significant portion of Fischer's sales of NFC during the POR (i.e., the actual per-gallon prices of these sales differ

from the per-gallon prices set forth in the agreement). Thus, we continue to find that converting Fischer's NFC sales prices from gallons to pounds solid using this "target" brix would not yield a more accurate result than using the actual brix of Fischer's sales. Indeed, use of the "target" brix methodology for converting the U.S. sales prices to pounds solid would likely be distortive because it would result in an apples-to-oranges comparison with normal value, where the use of actual brix was already affirmed by the Court.

Fischer did not comment regarding the Department's conclusion that comparing home market prices per actual pounds solid would be distortive when compared to U.S. prices per theoretical pounds solid. Accordingly, Fischer has failed to address entirely our concerns that a distortion would result from using its preferred methodology.

As noted in the Court's opinion, the Department faced a similar situation in Timken U.S. Corp. v. United States, 28 CIT 329, 318 F. Supp. 2d 1271, 1277-79 (2004). In that case, as here, the CIT required the Department to consider untimely-filed new factual information and to recalculate the dumping margin for the respondent in question based upon consideration of the new information. After considering this information, as well as information submitted earlier, however, the Department determined that the new information did not adequately support the plaintiffs' position that certain sales were misclassified and, thus, did not perform any margin recalculations. This determination was upheld by the CIT and affirmed by the Federal Circuit. See Timken U.S. Corp. v. United States, 434 F.3d 1345, 1357 (Fed. Cir. 2006) ("Although this is a close case, we hold that Commerce's original determination was, on the balance of the old and new evidence, supported by substantial evidence and was not contrary to law."). Thus, a finding here that the new information is unreliable (i.e., the per-gallon prices in the agreement are different from the actual per-gallon prices for certain sales during the POR) and/or the use of the

“target” brix from the agreement would not render Fischer’s margin more accurate is consistent with the Court’s stated intent that the Department compute margins as accurately as possible.

As to the specifics of Fischer’s arguments, we disagree fundamentally with Fischer’s contention that the Department must confine its consideration to the four corners of the agreement without any analysis of whether the prices or targets stated within it are consistent with the data on the record in this review. Moreover, we disagree with Fischer that the absence of reported billing adjustments demonstrates that the purchase agreement remained in effect during the POR. The fact that there were no billing adjustments reported for these sales does not negate the central fact that the prices of these sales do not in all instances match the price set forth in the NFC purchase agreement.

We also disagree with Fischer’s contention that, because it did not report a price adjustment for any of its U.S. sales of NFC during the POR: 1) the average brix must have reached the “target” brix set forth in the NFC purchase agreement; and 2) consequently, the agreement was in force during the POR. As noted above, the absence of billing adjustments does not speak to the issue of whether the agreement was in effect during the POR. As a general matter, sales transactions may occur with or without any billing adjustments regardless of whether a particular sales agreement was in effect during a particular period. The mere absence of billing adjustments does not establish that a particular contract governed the transactions.

Pursuant to the purchase agreement, Fischer’s customer is entitled to a credit for low brix if the average brix of NFC delivered during a specific crop year is less than the “target” brix. Because Fischer reported its POR sales of NFC on a POR, not crop-year, basis, we are unable to determine whether Fischer sold NFC at its “target” brix level during each of the crop years

covered by the POR. Thus, there is insufficient evidence on the record to conclude that Fischer sold NFC at this “target” brix level, despite Fischer’s assertions to the contrary.

We also disagree with Fischer’s contention that our pricing analysis is flawed and/or inaccurate. Our calculations mathematically reversed Fischer’s own conversions from gallons to pounds solid using the actual brix level of each NFC sale. Under our calculation method, 10 out of the 14 prices derived matched those stated in the agreement and four prices differed from those stated in the agreement. In any event, we performed an alternative calculation under Fischer’s preferred methodology using the USDA conversion factor for the “standard” brix. Fischer’s alternative methodology yields per-gallon prices ranging from \$[] to \$[], none of which tie to the agreement. See the May 21, 2010, memorandum from Elizabeth Eastwood to the file entitled, “Alternative Calculation of Per-Gallon Gross Unit Prices for Fischer S.A. Comercio, Industria, and Agricultura (Fischer) in the 2005-2007 Antidumping Duty Administrative Review of Certain Orange Juice from Brazil.” Accordingly, the calculations under both methodologies yield prices that differ from that in the agreement.

Similarly, we disagree that the mere fact that the degree of deviation from the price stated in the agreement for two sales is small should change the outcome of our analysis. First, Fischer did not address the price for its remaining two U.S. NFC sales (i.e., \$[] per gallon), which differs considerably from the price set forth in the purchase agreement. Second, with respect to the two sales with the small degree of deviation, Fischer has provided no explanation for why these prices differ at all from that in the agreement. Thus, Fischer’s argument provides no basis to conclude that the purchase agreement remained valid during the POR, particularly where it is undisputed that certain sale prices during the POR differed from the price reflected in the agreement.

With respect to Fischer's final argument, we disagree that the history of this case, either in conjunction with the data submitted in this segment or alone, supports a finding that the agreement was in force during the POR. While Fischer claims that this purchase agreement is the same as that examined in the LTFV investigation, and is also on the record of 2007-2008 and 2008-2009 administrative reviews, we note that the LTFV investigation and the 2007-2008 and 2008-2009 administrative reviews covered different time periods and involved different facts. Moreover, each review stands on its own and the record of this 2005-2007 administrative review does not contain information from prior or future segments of this proceeding. See 19 CFR 351.104(a)(2) ("For purposes of section 516A(b)(2) of the Act the record is the official record of each segment of the proceeding"); 19 CFR 351.102(a)(47) ("Segment of a proceeding' or 'segment of the proceeding' refers to a portion of the proceeding that is reviewable under section 516A of the Act."). Moreover, in none of the prior segments did the Department rely on the "target" brix in the agreement when performing gallon-to-pounds solid conversions. Thus, the fact that the agreement or portions of the agreement may have been submitted in prior segments of this proceeding is not relevant here.

In addition, while Fischer is correct that page 16 of the NFC purchase agreement pages contained in Fischer's administrative case brief is the same as page 16 which had been provided in Fischer's section C supplemental questionnaire response, the fact that a respondent submitted the same information with its case brief and its section C supplemental questionnaire response has no bearing on whether the agreement was in force during the POR. We also disagree that all information not specifically subject to a question in a supplemental questionnaire is deemed reliable or that all characterizations of this information are accepted as valid. See Sugiyama Chain Co. v. United States, 797 F. Supp. 989, 994 (CIT 1992) ("This Court observes that if the

burden of compiling, checking, rechecking, and finding mistakes in the submission of Plaintiffs were placed upon Commerce, it would transform the administrative process into a futility.”). As noted above, the Department had reviewed the agreement in prior segments but had declined to use it to perform conversions.

Similarly, we recognize that both Fischer and its counsel certified as to the accuracy of each of Fischer’s submissions made during this segment of the proceeding. This is rather unremarkable. Our regulations require parties and their legal counsel to certify the accuracy of each submission of factual information. See 19 CFR 351.303(g). Thus, virtually every submission of factual information in every proceeding contains certification as to its accuracy, but these certifications do not render submissions immune to mistakes, ambiguities, inaccuracies, or misstatements. Notwithstanding the requirement that company officials and counsel sign certifications of accuracy for every response submitted to the Department, the Department routinely finds and corrects data errors and misstatements of fact. Thus, simply because Fischer and its counsel signed certifications of accuracy does not demonstrate that the NFC purchase agreement was in force during the POR.

We give greater weight to the fact that in several instances the actual prices of Fischer’s U.S. NFC sales did not match the price set forth in the agreement and that some sales were made in pounds solid. In this case, record evidence indicates that not only do the prices for almost a third of Fischer’s sales of NFC differ from the price in the agreement, but also Fischer appears to set the price for NFC on at least one of its invoices during the POR in terms of pounds solid derived using the actual brix of the shipment (contrary to Fischer’s statements otherwise). See Exhibit 7 of Fischer’s December 17, 2007, supplemental questionnaire response. Regarding this latter point, Fischer submitted a copy of invoice number [] (a POR U.S. sale of NFC to

[] which lists both the quantity of the shipment and the corresponding unit price -- in actual pounds solid -- and which also indicates the actual brix level, not the standard. At a minimum, this invoice demonstrates that: 1) the actual brix of the sale is commercially relevant to Fischer; and 2) Fischer recognizes that the price per pound solid varies by actual brix.¹⁴

Given the information outlined above, we continue to find that there is no basis to rely on the “target brix” set forth in Fischer’s NFC purchase agreement when converting prices from per-gallon to per-pound solid amounts. As a result, we find that the purchase agreement provides an insufficient basis to: 1) establish that the prices for POR sales of NFC to Fischer’s U.S. customer were set in a “brix neutral” manner, especially when information on the record demonstrates that at least some of Fischer’s POR U.S. sales of NFC were sold on a pounds-solid, not gallon, basis (and the quantity conversion on the invoice was done using the actual brix for that particular sale as opposed to the “target brix” reflected in the agreement); or 2) change the conclusion in the OJ Final Results that gallons-to-pounds solid conversions made using actual brix are more accurate than conversions using theoretical or “target” brix.¹⁵

E. FINAL RESULTS OF REDETERMINATION

As directed by the Court, we examined the agreement pages provided in Fischer’s administrative case brief, as outlined above. Because we find that this information does not

¹⁴ Because the total quantity in gallons is also listed on the invoice, it is possible to determine that Fischer converted the quantity in gallons to pounds solid using the actual brix level of the sale. As noted in footnote 5, above, the quantity in gallons is derived from the quantity in pounds solid based on the following formula: quantity in gallons = quantity in pounds solid ÷ (actual brix ÷ 100) ÷ pounds per gallon specific to each actual brix. Specifically, this calculation is as follows: [] gallons = [] pounds solid ÷ ([] ÷ 100) ÷ [] pounds per gallon. We note that Fischer’s invoice lists both the quantity in gallons and the quantity in pounds solid used in this formula.

¹⁵ We note that the Court has upheld the Department’s conversion of Fischer’s home market sales of NFC from kilograms to pounds solid using the actual brix level of each sale. See Fischer, Slip Op. 10-35, at 30; see also OJ Final Results at Comment 11.

demonstrate that the price of Fischer's NFC sales was set in a brix-neutral manner, we have not recalculated Fischer's margin.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

(Date)