ARTICLE 1904 PANEL REVIEW PURSUANT
TO THE NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter Of: **Secretariat File No. USA-CDA-98-1904-01** **CORROSION-RESISTANT CARBON** **STEEL FLAT PRODUCTS FROM CANADA**	**Before:** **Bruce Aitken** **(Chairperson)** **Martha Ries** **Leon E. Trakman** **Dale Tursi** **Wilhelmina K. Tyler**

PANEL DETERMINATION AND REMAND

Date: March 20, 2001

Appearances:

For Stelco, Inc.: Willkie Farr & Gallagher (Christopher Dunn and Daniel L. Porter)

For the U.S. Department of Commerce: Office of Chief Counsel for Import Administration (David Mason, Jr.)

For Certain Steel Producers: Skadden, Arps, Slate, Meagher & Flom, LLP (Ellen Schneider)

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I. INTRODUCTION

This binational NAFTA Panel ("Panel") was constituted pursuant to Article 1904 of the North America Free Trade Agreement ("NAFTA"). The Panel reviewed the United States Department of Commerce, International Trade Administration's ("DOC") valuation of Petitioner Stelco Inc.'s ("Stelco") input prices used in DOC's third administrative review of Stelco's antidumping order.[1] Certain U.S. Steel Producers ("Defendant-Intervenors") supported DOC's valuation methodology in this review.[2] As detailed below, Stelco challenged DOC's decision[3] on the grounds that:

(1) DOC improperly increased Stelco's actual costs of production for services performed by Stelco's affiliated suppliers, Baycoat and Z-Line;[4]

(2) DOC improperly calculated Stelco's U.S. imputed credit expense by using the Federal Reserve interest rate rather than Stelco's interest rate on its open line of credit in Canada;[5] and

(3) DOC improperly used the date of DOC's final determination as the payment date for sales, which decision resulted in missing payment dates, rather than the actual payment date for these unpaid sales.[6]

In its response, DOC contended that its calculation of Stelco's cost of production was proper, but requested a remand to determine properly the interest rate to be applied in calculating Stelco's U.S. imputed credit expense and to consider Stelco's arguments on the proper payment date for sales with missing payment dates.

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[1] 63 Fed. Reg. 12,725 (Mar. 16, 1998).

[2] The Defendant-Intervenors are named in the final DOC determination in the third administrative review. *See* 63 Fed. Reg. 12,725 at 12,725 (Mar. 16, 1998).

[3] Stelco Principal Brief at 19 (Jan. 7, 2000) [hereinafter "Stelco Brief"].

[4] Stelco Brief at 2. Although Z-Line has also been mentioned, neither party discussed it in detail. Z-Line was therefore not in contention during the proceedings and thus the relation of Stelco and Z-Line was not relevant to the Panel decision. However, given close correlation between the relationships between Baycoat and Stelco and Z-Line and Stelco, Z-Line is referenced when relevant.

[5] Stelco Brief at 5.

[6] Stelco Brief at 6.

For the reasons more fully set forth below, the Panel remands this matter to DOC for further consideration not inconsistent with this opinion. The grounds for the Panel remand to DOC are set out fully in the discussion below.

As discussed below, this is the second binational NAFTA Panel to review this case. The Prior Panel unanimously remanded the determination to DOC.[7] The current review arises out of DOC's determination in the investigative period immediately following the prior period of review. The Prior Panel reviewed DOC's determination regarding the investigative period of August 1, 1994 through July 31, 1995.[8] This Panel is presently reviewing DOC's determination regarding the investigative period made from August 1, 1995 through July 31, 1996. [9]

II. BACKGROUND

On August 19, 1993, DOC issued an antidumping duty order against Stelco, a Canadian manufacturer and exporter of certain corrosion-resistant carbon steel products.[10] In its investigation and first administrative review of the antidumping duty order, DOC accepted Stelco's methodology of utilizing Baycoat's fully allocated costs of production, including the profit remitted by Baycoat to Stelco at year-end, as the proper measure of Stelco's costs for the painting services.

These proceedings took place prior to the amendments made to the Tariff Act of 1930 ("the Act") by the Uruguay Round Agreements Act ("URAA"). New regulations arose from the Tariff Act upon which DOC relied to argue that there had been a change in the relevant U.S. law. These regulations, however, took effect after the investigative period which the Panel is reviewing, and therefore, are not applicable. DOC also relied on the Uruguay Round Amendments to the World Trade Organization (WTO) (formerly GATT) Antidumping Code, to argue that there had been a change in the relevant law.[11]

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[7] In the Matter of Corrosion-Resistant Carbon Steel Flat Products From Canada, Decision of the Panel, USA-97-1904-3, June 4, 1998, at 14 [hereinafter "Prior Panel Decision I"].

[8] Prior Panel Decision I at 3-4.

[9] Stelco Brief at 1.

[10] Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Steel Plate From Canada, 58 Fed. Reg. 44,162 (Aug. 19, 1993).

[11] *See infra* for further explanation as to DOC's reliance on both the Tariff Act amendments and the URAA.

In its second administrative review of the order, on April 15, 1997, after the URAA took effect in 1995, DOC reversed its prior methodology and did not accept Baycoat's costs of production, including the profits remitted by Baycoat to Stelco at year-end as Stelco's cost of production.[12] Instead, DOC used the average of sample invoice prices ("transfer prices") between Stelco and Baycoat, its affiliated painting supplier.[13] The original invoices upon which DOC relied were initially submitted by Stelco to DOC as estimated standard costs from which monthly variances were calculated. These original invoices included Baycoat's profits on a transaction-by-transaction basis. At year-end, profits were returned to Stelco. Therefore, due to this return of profit, the "sample invoice prices" included Baycoat's profits that were subsequently returned to Stelco, so that DOC included Baycoat's prices in Stelco's prices**.** DOC determined that the URAA provided new standards for determining costs of production pursuant to 19 U.S.C. § 1677b(f) in related party transactions that mandated the use of the transfer price between Stelco and Baycoat as Stelco's cost of production, rather than Baycoat's cost of production accounting for the year-end profit remittance to Stelco.[14]

On May 12, 1997, Stelco challenged this result before a prior binational NAFTA Panel (**?**Prior Panel I").[15] On June 14, 1998, Prior Panel I unanimously remanded the matter to DOC to reconsider and explain its "calculation of transfer price for the Baycoat inputs, and consider Stelco's argument that the transfer price of the Baycoat inputs should be recalculated to take account of Stelco's actual costs with regard to these inputs."[16] In its remand determination, DOC argued that it recalculated as instructed, but it did not provide reasons or provide any of its methodology in performing the recalculation.

DOC issued its Final Remand Determination on September 3, 1998,[17] a portion of which Stelco challenged because DOC again failed to adjust Stelco's cost of production downward to take into account the remission of profits from Baycoat to Stelco. On January 20, 1999, the Prior Panel, ("Prior Panel II") for a second time, remanded the matter to DOC "to consider the return of revenues to Stelco [by Baycoat at the end of the year] in calculating costs in this unusual

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[12] Certain Corrosion-Resistant Carbon Steel Flat Products From Canada, Final Results of Second Antidumping Duty Administrative Review, 62 Fed. Reg. 18,448, at 18,463-18,464 (Apr. 15, 1997).

[13] Id.

[14] Id.

[15] Prior Panel Decision I, *supra* note 7, at 4.

[16] Prior Panel Decision I, *supra* note 7, at 14.

[17] Certain Corrosion-Resistant Carbon Steel Flat Products From Canada, Commerce Department Final Remand Determination, submitted in Article 1904 of NAFTA First Binational Panel Review USA-97-1904-3 (Sept. 3, 1998).

circumstance, and the Prior Panel found that DOC's failure to do so was inconsistent with the requirements of the Act [19 U.S.C. § 1677]."[18]

In response to the second remand, from Prior Panel II, DOC did recalculate Stelco's costs of production, taking into consideration the remittance of profit from Baycoat, but again DOC claimed that under its interpretation of the law, it was not required to do so.[19] DOC argued it was not required to take into account the remittance of profit, because it was required to take the higher of the transfer price, market value or costs.[20] DOC contended that, per 19 U.S.C. § 1677, it was required to choose the highest of the prices, without regard to how it is calculated. On January 20, 1999, Prior Panel II affirmed DOC's determination to reduce the profit from the transfer prices. It reiterated that DOC's position that the remittance of profit need not be considered was "inconsistent with the clear and unanimous interpretation of law set forth by this [Prior] Panel in its initial opinion and in its decision on [DOC's] first remand determination."[21]

The present request for review resulted from the fact that the Prior Panels reached their decision, and DOC implemented it for the applicable investigative period. DOC agreed to, and contends it did, indeed, implement the decision of the Prior Panel. Stelco did not lodge any further challenges during that investigative period. In the succeeding investigative period, DOC returned to its prior calculation, by basing its determination on the invoice price, including Baycoat's profits. This new Panel was convened to deal with the challenge in this third investigative period, August 1, 1995 through July 31, 1996.

On September 17, 1996, DOC initiated its third administrative review of the antidumping duty order.[22] The period of review was August 1, 1995, through July 31, 1996.[23] As part of a standard review process, DOC issued a comprehensive antidumping questionnaire to Stelco, to

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[18] In the Matter of Certain Corrosion-Resistant Carbon Steel Flat Products From Canada, NAFTA Article 1904 Second Binational Panel Review, USA-97-1904-3 (Jan. 20, 1999) [hereinafter "Prior Panel Decision II"].

[19] Certain Corrosion-Resistant Carbon Steel Flat Products From Canada, Commerce Department Final Remand Determination, submitted in Article 1904 Binational Panel Review USA-97-1904-3, at 8-11 (June 14, 1999).

[20] DOC Response Brief at 19-20 (Mar. 7, 2000).

[21] Prior Panel Decision II at 15-16.

[22] Certain Corrosion-Resistant Carbon Steel Flat Products From Canada, 62 Fed. Reg. 48,882, at 48,882-48,883 (initiation of administrative review) (Sept. 17, 1996).

[23] Id.

assist DOC in determining Stelco's sales and cost data regarding the subject products.[24] The purpose of such a questionnaire is ordinarily to verify that the information provided by the responding company is accurate and a proper reflection of the costs of producing the merchandise under investigation.

On December 5, 1996, and May 16, 1997, DOC issued supplemental questionnaires to Stelco to clarify certain information submitted by Stelco concerning Stelco's costs of production.[25] During the week of July 14, 1997, DOC also conducted a comprehensive verification of Stelco's questionnaire responses on its cost of production. In this review, DOC compared the transfer prices between Stelco and Baycoat (a firm that is fifty percent owned by Stelco) and between Stelco and Z-Line (a firm that is fifty-eight percent owned by Stelco) with Baycoat and Z-Line's costs of painting and galvanizing services respectively.

Based on its review, DOC determined that Stelco reported Baycoat and Z-Line's actual costs and also provided invoice values less profit between Baycoat and Stelco and Z-Line and Stelco.[26] In both its preliminary and final determinations during the third administrative review, DOC used the unadjusted invoice [transfer] prices to determine Stelco's costs of production rather than Baycoat and Z-Line's actual costs of production without taking account of the profit remitted by Baycoat and Z-Line to Stelco.[27]

On April 10, 1998, Stelco submitted its request for this Panel to review DOC's final determination.[28] All parties submitted briefs prior to the Panel hearing held on June 12, 2000, and submitted post-hearing briefs on certain issues as requested by the Panel.

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[24] Letter from Jean Kemp, Program Manager, AD/CVD Enforcement, Office 9, dated Sept. 19, 1996, enclosing a questionnaire for the administrative review of Corrosion-Resistant Carbon Steel Flat Products From Canada (Pub. Docs. 7 & 10) [hereinafter "DOC Questionnaire"].

[25] Letter from Jean Kemp, Program Manager, AD/CVD Enforcement, Office 9, dated Dec. 5, 1996, enclosing a supplemental questionnaire (Prop. Doc. 15) for the administrative review of Corrosion-Resistant Carbon Steel Flat Products From Canada [hereinafter "DOC Supplemental Questionnaire"]; Letter from Jean Kemp, Program Manager, AD/CVD Enforcement, Office 9, dated May 16, 1997, enclosing a second supplemental questionnaire (Prop. Doc. 41) for the administrative review of Corrosion-Resistant Steel Flat Products From Canada [hereinafter "DOC Second Supplemental Questionnaire"].

[26] DOC's Cost Verification Report, dated Sept. 2, 1997, Non-Pub. R. Doc. 81, at 18-19.

[27] 62 Fed. Reg. 47,429 (Sept. 9, 1997) (preliminary results); 63 Fed. Reg. 12,725 (Mar. 16, 1998) (final results).

[28] Stelco Brief at 18.

III. SUMMARY OF POSITIONS

A. Stelco

1. Collateral Estoppel

Stelco's first contention is that this Panel should adopt the Prior Panel's decisions because both panels dealt with the same legal and factual issues. It argues that DOC is precluded by the doctrine of collateral estoppel from disregarding the Prior Panel's decisions.[29]

2. Interpretation of Applicable International Law

a) Actual Costs Versus Transfer Price

Stelco contends that, even if this Panel is required to reach a decision on the merits of the case, DOC inappropriately rejected Stelco's reported actual costs of production by using the invoice price. It contends that calculation improperly increased Stelco's actual costs of painting and galvanizing because DOC did not take into account the remittance of profits from Baycoat and Z-Line to Stelco. Stelco considers profits included in Baycoat and Z-Line's invoice prices as a cost that should be eliminated from Stelco's cost of production because the profits are remitted by Baycoat and Z-Line.[30] Although Stelco did provide documentation to show that it received year-end profits back from Baycoat, DOC did not ask for any information about the relationship between the year-end profits and the transactions to which they were related.[31]

The Parties thus disagree as to the effect of this profit remittance scheme. DOC argues that because the year-end profits were not attributed to specific transactions, those profits represent a return on Stelco's investment in equity in Baycoat.[32] Stelco, on the other hand, maintains that the return of profits should have been attributed to the invoices, so that invoice prices should have been reduced by the amount of profits returned.[33] Stelco maintains that DOC's use of an

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[29] Stelco Brief at 40-50; Stelco Reply Brief at 4-9 (Mar. 22, 2000), NAFTA Binational Panel Hearing Transcript at 11-15 (June 12, 2000).

[30] Stelco Brief at 28-32; Stelco Reply Brief at 10-12.

[31] Stelco's Response to the Commerce Department's Supplemental Questionnaire, dated December 24, 1996, Prop. Doc. 24, at 23-26 [hereinafter "Stelco's Supplemental Questionnaire Response"]; *See also* Stelco Brief at 13-14.

[32] DOC Post-hearing Brief at 10-15 (Aug. 21, 2000).

[33] Stelco Post-hearing Brief at 6-9 (Aug. 21, 2000).

unadjusted invoice price during the current administrative review is contrary to 19 U.S.C. § 773(f)(1) because DOC's valuation does not consider all available evidence of Stelco's actual costs of production. In particular, Stelco maintains that this does not reduce Stelco's costs by the profits remitted by Baycoat and Z-Line. As a result, it contains that this does not reasonably reflect the costs associated with the production and sale of the produce under consideration as required by that section of the Act.[34]

In its supplemental questionnaire response, Stelco stated that its "records do not normally cost Baycoat's services at the face value of the invoice. Rather, the cost of painting is costed at *standard* (budgeted) costs, with the difference between the sum of all invoices and standard costs being taken as a variance. These costs are then adjusted by the full amount of profits incurred by Baycoat on its sales. Using the face value of the invoice to cost Baycoat's services, therefore, would not conform to Stelco's records."[35] A similar argument was made for Z-line.[36] DOC verified the data submitted by Stelco on Baycoat and Z-Line's actual costs and the adjusted transfer prices that Stelco claimed should be used.[37]

At oral argument before this Panel, Stelco explained that the monthly calculation of its consolidated cost of production is based upon a determination of the costs and profits of the parent company and all of the subsidiaries. It maintained that the remittance of profits from Baycoat and Z-Line to Stelco is therefore accounted for monthly and is an integrated part of Stelco's monthly cost of production determination.[38]

b) Major Input Rule

Stelco further argues that DOC's use of an unadjusted transfer price is not mandated by § 773(f)(3) (the "major input" rule) of the Act. Stelco alleges that the language of that section is discretionary, not mandatory, and that nothing in the statutory language requires an application of the major input rule to calculate a cost of production higher than an exporter's actual cost.[39] Therefore, the dispute is over DOC's contention that it is required to apply 19 U.S.C. § 1677 b(f)(2). Stelco contends that, although DOC had discretion to apply that section, it was not mandated to do so.

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[34] Stelco Brief at 28-32.

[35] Stelco's June 6, 1997, Response to DOC's Supplemental Questionnaire, Prop. R. Doc. 45, at 24-25.

[36] *Id.* at 28-29.

[37] DOC's Cost Verification Report at 18-19. *See* note 26.

[38] Panel Hearing Transcript at 38-42 (June 12, 2000); DOC's Cost Verification Report at 11.

[39] Stelco Reply Brief at 12-14.

Stelco also contends that DOC's determination that the major input rule requires the calculation of an unadjusted transfer price to represent Stelco's cost of production is inconsistent with the Act and its legislative history.[40]

3. Collapsed Affiliates

Finally, Stelco contends that the major input rule should not apply here because Stelco satisfied the then-pertinent DOC criteria for the collapsing of its affiliated suppliers (Baycoat and Z-Line). Thus, Stelco claims that both Baycoat and Z-line should be considered as de facto divisions of Stelco itself, and treated as collapsed affiliates.

B. DOC and Defendant-Intervenors

1. Collateral Estoppel

In response to Stelco's contentions, DOC and the Defendant-Intervenors contend that the determinations of the Prior Panel are not binding on this Panel.[41]

2. Interpretation of Applicable International Law

a) Profit Not Included in Cost of Production Calculation

DOC contends that the profits remitted to Stelco by Baycoat and Z-Line is not a cost that should be considered in Stelco's cost of production calculation. It contends that it represents a return of equity to Stelco on its investment in Baycoat and Z-Line and is unrelated to sales between the parties.

b) The Transfer Price and The Major Input Rule

DOC argues as well that, consistent with Stelco's initial responses to DOC's questionnaires,[42] DOC considered that the unadjusted invoice price (with profits included) from

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[40] Id. at 16-18.

[41] DOC Post-hearing Brief at 22-26; Certain US Steel Producers ("Defendant-Intervenors") Post-hearing Brief at 26-30 (Aug. 21, 2000).

[42] Stelco's Response to Section A of DOC's Antidumping Duty Questionnaire in the Third Administrative Review of Certain Corrosion-Resistant Carbon Steel Flat Products From Canada [hereinafter "Section A Questionnaire Response"], at A-7 and A-8, Pub. R. 25 (Oct. 21, 1996); and Stelco's Response to Section D of DOC's Antidumping Duty Questionnaire in the Third Administrative Review of Certain Corrosion-Resistant Carbon Steel Flat Products From Canada [hereinafter "Section D Questionnaire Response"] at CORR-D-53 and D-57 (Nov. 4, 1996).

Baycoat and Z-Line to Stelco represented the invoice (transfer) price, so that the invoice price is determinative of Stelco's costs. DOC argues that no further adjustments to the costs are necessary. DOC maintains further that, under the major input rule, DOC properly used this transfer price in valuing Baycoat's inputs to Stelco because it was higher than the market value or Baycoat's cost of production.[43]

3. Collapsed Affiliates

Finally, DOC contends that it properly refused to collapse Stelco with its affiliates because Baycoat and Z-Line are not producers of the subject merchandise as required by DOC's practice.[44]

IV. STANDARD OF REVIEW

Under Articles 1904(2) and 1904(3) and Annex 1911 of NAFTA, a binational panel is required to determine whether a challenged antidumping determination was made in accordance with the laws of the importing country. NAFTA defines the importing country antidumping duty or countervailing duty law as "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."[45] A panel may uphold a final determination or remand it for action not inconsistent with the panel's decision.[46]

In applying Articles 1904(2) and 1904(3) and Annex 1911 of NAFTA to the facts of this case, this Panel is guided by 19 U.S.C. § 1616A(b)(1)(B), particularly the relationship between a panel and an agency's factual findings. Under 19 U.S.C. § 1616A(b)(1)(B), a reviewing authority is required 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."[47]

[43] Id. DOC Brief at 14-28; Defendant-Intervenors' Brief at 12-25. DOC and the Defendant-Intervenors claim that section (f)(1) of the Act must be read in conjunction with the more specific provisions of (f)(2) and (f)(3) and the latter apply in the valuation of an affiliated supplier's input, such as Baycoat and Z-Line.

[44] DOC Brief at 36-46; and Defendant-Intervenors Brief at 29-31.

[45] NAFTA Art. 1904(2).

[46] NAFTA Art. 1904(3).

[47] NAFTA, Annex 1911.

Substantial evidence on the record is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[48]

Although an agency's factual findings must be supported by substantial evidence on the record as a whole, "[a] reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light of the entire record, including the body of evidence opposed to [agency's] view."[49] The reviewing authority ought not to defer to an agency determination which is premised on inadequate analysis or reasoning.[50]

The Panel must also determine whether DOC's determination was otherwise in accordance with domestic law of the importing country. The standard for when a determination is in accordance with U.S. law is set forth in *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*[51] The standard of review is as follows:

> [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[52]

Applied to the instant case, *Chevron* requires that DOC must give effect to "the unambiguously expressed intent of Congress." In the event that the statute is silent or ambiguous, the Panel must determine whether DOC's determination constitutes a "permissible construction of the statute." Although there was some disagreement over whether the plausibility or the reasonableness standard applied to this case, the issue became moot as both parties agreed that a reasonableness standard applies to this case.[53]

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48 Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), citing Consolidated Edison Company v. NLRB, 305 U.S. 197, 229 (1938).

49 Id. at 488.

50 U.S.X. Corp. v. United States, 655 F. Supp. 487, 492 (Ct. Int'l. Trade 1987).

51 467 U.S. 837 (1984).

52 Id. at 842-43.

53 Panel Hearing Transcript at 148-150 and 172.

However, given the emphasis placed by counsel on issue of "plausibility," the Panel will address it here. Citing *National Railroad Passenger Corp. v. Boston & Maine Corp.* above,[54] DOC appears to maintain that its actions must be sustained by this Panel if they are merely "plausible." The Panel notes that *National Railroad Passenger Corp.* specifically cites the reasonableness test set out in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*[55] Moreover, in the Panel's opinion, were DOC's actions sustainable merely for being "plausible," as distinct from "reasonable," this would substantially expand upon the authority of DOC under NAFTA. It would also nullify much of the NAFTA review process. The Panel feels that an alternative, consistent with legislative history and past practice of administrative agencies, including the Panel review process, is to apply a "reasonableness" standard of review to the actions of DOC. Given, too, that the disputing parties agree that the reasonableness standard applies to their dispute, the Panel adopts the reasonableness standard of review.[56]

V. **DISCUSSION OF THE ISSUES**

The Panel will address the following issues raised by the Parties: collateral estoppel, interpretation of applicable international law, the implications of 19 U.S.C. §1677b(f)(1)-(2), and collapsed affiliates.

A. **Collateral Estoppel**

Stelco argues that the doctrine of collateral estoppel should be applied to this review on the basis of the Prior Panels' decisions.[57] The essence of its argument is that since there has already been a determination on the same facts, DOC is barred from bringing a new claim.[58] DOC argues that the doctrine of collateral estoppel does not apply because there are different facts in this case and a different investigative period.[59] This Panel disagrees with Stelco. Collateral estoppel should have limited application in the review of NAFTA decisions because it estops DOC from performing its dual functions, to determine the facts in each case *de novo* and to apply the law to the facts. The Panel concludes that estoppel ought not to be applied to preclude DOC from performing these dual functions.

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[54] 503 U.S. 407, 417 (1992) (referring to the "permissible construction of the Statute").

[55] 467 U.S. 837, 842-43 (1984).

[56] Panel Hearing Transcript at 150 and 172.

[57] Stelco Brief at 40-50; Stelco Reply Brief at 4-9; and Stelco Post-hearing Brief at 21.

[58] Stelco Reply Brief at 6-7.

[59] DOC Post-hearing brief at 22-26.

Moreover, DOC is charged by statute with reaching a determination over distinct investigative periods. This Panel has been formed for the purpose of reviewing DOC's determination in the investigative period of August 31, 1995 through July 31, 1996. The Prior Panel looked into the investigative period of August 1, 1994 through July 31, 1995.[60] It is true that the main issues, of the return on profit from Baycoat to Stelco and the use of the invoice price, are identical in both cases. However, there are several factors that are different, including the different investigative periods, the different arguments made by counsel and methods used to interpret the statute and apply the common law. The fact that the investigative period in issue is distinctive and its record includes issues of fact that differ from *previous* periods of review is sufficient alone to deny the application of collateral estoppel.

The Panel notes that, absent the application of collateral estoppel, NAFTA panels are not bound by decisions reached by prior NAFTA panels.[61] If collateral estoppel is applied, the Panel would negate that general principle of law. However, the decisions of those prior panels may have persuasive authority.

In conclusion, given the significant similarities between the current case and that reviewed by the expert Prior Panel, this Panel accords significant persuasive authority to the decisions of that Panel. The instant Panel is unwilling, however, to consider itself bound by the decisions of that Prior Panel on grounds of collateral estoppel.

B. <u>The Application of International Law</u>

1. <u>The Relationship Between 19 U.S.C. §1677 b(f)(1)-(3) and U.S. Obligations Under the 1994 Uruguay Round Agreement Antidumping Code</u>

The second issue for the Panel to determine is how to interpret the 1994 Uruguay Round Agreement Antidumping Code ("1994 Antidumping Code"). Specifically, the Panel, through the parties' opposing views in the post-hearing briefs, must determine the United States' international obligations regarding antidumping in relation to the 1995 United States statute implementing the revised 1994 Antidumping Code.[62]

DOC argues that, in the event of an inconsistency between the Act and international law, such as DOC's alleged inconsistency between 19 U.S.C. § 1677 and the 1994 Antidumping

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60 Prior Panel Decision I at 3, Prior Panel Decision II at 4.

61 NAFTA Art. 1904(9).

62 Art. 2.2.1.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994).

Code, the statute prevails. DOC concludes that the statute is clear and therefore, there is no need to consider whether there is a conflict with international law: "[I]n light of the clear intent of Congress expressed in the legislative history, there is no need to address the issue of whether the interpretation is in conflict with international obligations."[63]

Stelco argues that the 1994 Antidumping Code was binding under U.S. law. Stelco also argues that 19 U.S.C. §1677 was not in conflict with the 1994 Antidumping Code, and that the Act should be interpreted so as to be consistent with the United States' international obligations.[64] "[U]nless there is clear indication of Congressional intent, a domestic statute should never be construed to violate the law of nations [international obligations]."[65]

The Panel finds that the statute is both clear and consistent with the United State's international obligations under the 1994 Antidumping Code**.** In particular, the principles stated in 19 U.S.C. §1677b(f)(1) are contained in Art. 2.2.1.1 of the 1994 Antidumping Code.[66] Enforcement of these principles is obligatory, so long as no restrictions have been placed on the incorporation of the 1994 Antidumping Code into domestic law, by the 1994 GATT signatories. The U.S. has adopted the principles of the 1994 Antidumping Code, without express restriction. It has also adopted the general principles of the Code set out in 19 U.S.C. §1677b(f)(1).[67] These principles, and the United States' implementation law, require DOC to assess actual costs, to the extent possible. The fact that the 1994 Antidumping Code does not include the equivalent of 19 U.S.C. § 1677(f)(2)-(3) does not render the statute inconsistent with that Code, nor should it be inferred that United States law has placed restrictions on WTO obligations which it has adopted without restriction.[68]

In addition, the Panel finds that 19 U.S.C. § 1677b(f)(2) and (f)(3) do apply to affiliated parties, but only in limited circumstances. The Panel holds that it would be inconsistent with the underlying principles of U.S. law, including its consonant international obligations, to automatically apply a provision designed to address below-cost transactions to a situation involving above cost transactions, absent an evaluation of all information on a petitioner's cost

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[63] DOC Post-hearing Brief at 18.

[64] Stelco Brief at 24-28.

[65] Stelco Post-hearing Brief at 13.

[66] Article 2.2.1.1, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

[67] 19 U.S.C. §1677b(f)(1).

[68] For a detailed analysis of (f)(1), *see* VI. U.S.C. 19 §1677 b(f).

of production. These particular circumstances are not present in the case before us. Therefore, the Panel finds that the general provision stated in 19 U.S.C. §1677b(f)(1) is controlling with respect to the calculation of the costs of production.

C. <u>19 U.S.C. § 1677 b(f)(1)-(3)</u>

1. <u>Applicable Law</u>

19 U.S.C. §1677b(f) provides for the calculation of costs of production in antidumping investigations by DOC. This article provides, under § 1677b(f)(1), the general method of calculating the costs of production.[69] In two subsequent subsections, § 1677b(f)(2) and (f)(3), it addresses the limited situation of "transactions disregarded" and the "major input rule."[70]

19 U.S.C. §1677b(f)(1)(A) provides the "normal" method of calculating the costs of production:

> 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 expenditure and other development costs.[71]

19 U.S.C. §1677 b(f)(1)(A) provides that costs of production are "normally" calculated on the basis of the records of the exporter or producer if these are kept in accordance with the generally accepted accounting principles (GAAP) of the exporting country, here Canada, and if they reasonably reflect the costs of production and sale. §1677 b(f)(1)(A) stipulates further that the Administering Authority, DOC in this case, "shall consider all available evidence on the

[69] 19 U.S.C. §1677 b(f)(1).

[70] 19 U.S.C. § 1677b(f)(2) and 19 U.S.C. § 1677b(f)(3).

[71] 19 U.S.C. §1677 b(f)(1)(A).

proper allocation of costs," including evidence made available by the exporter or producer "on a timely basis."[72]

2. The Parties' Contentions

DOC and the Defendant-Intervenors, on the one hand, and Stelco on the other, argue for a very different construction of § 1677b(f)(1)(A). Stelco contends that (f)(1)(A) is determinative of the costs of production in this case and that (f)(2) on "Transactions Disregarded" and (f)(3) on the "Major Input Rule" ought not to apply.[73] In support of these contentions, Stelco argues that (f)(1)(A) sets out the normal method in which to calculate the costs of production, that this rule is applicable and that DOC ought to have applied this method in this case.[74] Stelco contends, in particular, that DOC ought to have taken account of the return to Stelco of year-end profits returned to Stelco by its subsidiary, Baycoat. Stelco maintains further, that its records of such profits were submitted to DOC in a timely manner and complied with the GAAP.[75] Stelco concludes that, had DOC complied with §1677b(f)(1)(A), then DOC would have complied also with the international law obligations adopted by the U.S. Congress and incorporated into U.S. law.[76]

DOC and the Defendant-Intervenors argue to the contrary. They contend that 19 U.S.C. §1677b(f)(1) is inapplicable in this case.[77] They also contend that (f)(2) applies here because the transaction involves the "affiliated persons" of Stelco, Baycoat and Z-Line. Finally, they contend that (f)(3), the "major input rule," also applies. DOC argues that it is statutorily required to apply (f)(2) and (3).[78]

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[72] *See* 19 U.S.C. § 1677b(f)(1)(A), encompassing "Special rules for calculation of cost of production and for calculation of constructed value."

[73] Stelco Brief at 32-40; Stelco Response Brief at 12-16; and Stelco Post-hearing Brief at 1-6.

[74] Stelco Response Brief at 18-20; Stelco Post-hearing Brief at 1-6.

[75] *See e.g.,* Stelco Brief at 28-31; Transcript of Hearing at 50-55.

[76] In its Post-hearing Brief, Stelco states that "unless there is clear indication of Congressional intent, a domestic statute should never be construed to violate the law of nations (international obligations)." Stelco Post-hearing Brief at 13.

[77] DOC Post-hearing Brief at 1-10.

[78] *See e.g.,* Transcript of Hearing at 73-78.

3. Panel Determination Regarding Applicability of 19 U.S.C. §1677 b(f)(1)(A)

The Panel has examined Article 19 U.S.C. §1677b(f)(1)(A) in light of these arguments. As discussed below, the Panel concludes that both the purpose and the language of §1677 (b)(f)(1) are clear.[79] However, even were this Panel to find that the section is ambiguous, it nevertheless concludes that, by failing to take account of the remittance of profit, DOC's determination is at variance with the actual cost language of the Act. DOC's action is consequently not reasonable and is not accorded the deference ordinarily given DOC's determinations.

The Panel determines further that § 1677b(f)(1)(A) is applicable here for various reasons. The statute provides the means for determining the normal method of calculating costs of production, which requires DOC to consider Stelco's records in determining the cost of production. Stelco did, in fact, provide such records "on a timely basis,"[80] and Stelco's records "reasonably reflect the costs associated with the production" required by (f)(1)(A). The record shows that DOC did not take into account all evidence before it in determining Stelco's actual costs of production. Despite the fact that Stelco produced records reflecting Baycoat's remittance of profit, DOC ignored the effect of that remittance on Stelco's costs of production. Instead, DOC used as Stelco's cost of production an invoice price that was simply an estimate of standard costs and was recalculated monthly by Stelco. Thus, Stelco did provide information that DOC should have used in reaching its determination.

This Panel's determination is grounded in the plain language of (f)(1)(A).[81] That Article requires DOC to consider all available evidence, giving particular emphasis to that which is made available for the exporter or producer, stating explicitly: "The Administrative Authority *shall* consider *all available evidence* on the proper allocation of costs, including that which is made available by the exporter or producer ..."[82] This construction of (f)(1)(A) is contained in the Federal Circuit's decision in *Torrington v. U.S.* in which the Federal Circuit required DOC to consider all elements of cost, including costs not attributed to specific transactions.[83] The Panel concludes that DOC is bound by the plain word meaning of such language. Congress gave specific instructions to DOC to consider all of Stelco's evidence under (f)(1).

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[79] *See* discussion of the Panel, *infra*, in this opinion.

[80] *See* above section 19 U.S.C. § 1667 (b)(f)(1)(A)

[81] *See* immediately above for the text of b(f)(1)(A).

[82] 19 U.S.C.§1677b(f)(1)(A).

[83] 82 F.3d. 1039, 1051 (Fed. Cir. 1996).

Moreover, DOC is statutorily required to determine Stelco's actual cost of production. This requirement, provided for in the legislative history of (f)(1), stipulates explicitly that the investigating authority must use those costs "that most accurately reflect the resources actually used in the production of the merchandise in question." The Senate Committee report relative to that history provides that it "expects DOC, in determining whether a producer's or exporter's records reasonably reflect the costs associated with the production and sale of the product in question, to examine the recorded production costs with a view to determining *as closely as possible the costs that most accurately reflect the resources actually used in the production of the merchandise in question*."[84] In citing these comments by the Senate Committee, the Panel in *Corrosion-Resistant Carbon Steel Flat Products From Canada*, concluded: "This does not mean that Commerce must utilize Baycoat's costs nor does it compel DOC to use invoice prices. Rather, it reinforces the position that DOC should try to ascertain Stelco's normal practice in costing painting services. The 1994 report language also suggests that DOC should seek accuracy..."[85] The return of profit by Baycoat to Stelco is evidence of such costs. DOC's failure in this regard contrasts with its treatment of costs in the *Friction Bearing* case in which it increased the transfer price in light of losses arising from a joint venture.[86]

The record in this case also does not support the contention that Stelco and Baycoat somehow intended to manipulate the costs of production through the year-end return of profits.[87] Whatever their motive for returning profits on a year-end basis, for the purpose of calculating the costs of production, that return entitled Stelco to application of the normal principle, enunciated in § 773(b)(f)(1), and DOC should have included the returned profits in arriving at the actual cost of production. By failing to discount Baycoat's profits returned to Stelco, DOC arrived at an inflated cost figure, as those profits should not have been included. The plain language of the statute embodies the principle that the cost figure arrived at by DOC should resemble, as closely as reasonable, the actual cost of production. This principle is directed against the inflation of costs of production and the ensuing effect of raising dumping margins. This principle is reflected in international law, notably, under the WTO Codes, as incorporated into the US law.[88]

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[84] 19 U.S.C.§1677b(f)(1)(A); Senate Committee Report, S. Rep.412, 103d Cong., 2d Sess., Pt.1, at 75 (1994) (emphasis added), cited in Stelco Post-hearing Brief at 5.

[85] Prior Panel Decision I at 9, n.15.

[86] Final Determination of Sales at less than Fair Value: Anti-Friction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From The Federal Republic of Germany, 54 Fed. Reg. 18992, 19078 (May 3, 1989).

[87] *See* C.F.R. §351.402(f); 63 Fed. Reg. 12,742 (final results).

[88] *See infra* Part V, Interpretation of Applicable International Law.

Nor is it reasonable to infer from the language of (f)(2) that DOC is entitled not to consider "all available evidence ... including that which is made available by the Exporter or Producer." The plain language of b(f)(2) is to accord DOC discretion to disregard a transaction between "affiliated persons"where the amount in issue "does not fairly reflect the amount usually reflected in sales of merchandise." This discretion does not entitle DOC to avoid conducting a comprehensive cost of production inquiry under (f)(1). Nor does it require DOC to apply (f)(2) in place of (f)(1). As is discussed below, (f)(2) is applicable in this case, but as a supplement to (f)(1), not to its exclusion.

Nevertheless, the Panel concludes that it can be inferred from the record and from DOC's analysis of the cost of production, that DOC did consider (f)(1), despite argument by Counsel for DOC that (f)(1) is inapplicable.[89] In particular, DOC examined Stelco's records setting out the invoice price (based upon estimated standard costs) of painting services provided by Baycoat and the monthly variances from those invoice prices.[90] DOC also received further documentation from Stelco, indicating the return of profits to Stelco of Baycoat's profits arising from such services.[91] Accordingly, the Panel is satisfied that DOC had on the record information made available by Stelco by which to calculate cost of production. However, the Panel is not satisfied that DOC paid adequate attention to such information. Nor is the Panel persuaded, in particular, that DOC reasonably considered the relationship between Stelco's costs of production and the profits returned to Stelco by Baycoat.

The Panel is not persuaded by DOC's claim that Baycoat's return of profit constituted a return to Stelco of its investment in Baycoat and was unrelated to Stelco's costs. While Baycoat's return of profits did not take place on a transaction-by-transaction basis, nevertheless, the profits were returned in a lump sum during the course of the review and did lower Stelco's costs. Baycoat returned all its profits to its two owners, Stelco and Dofasco, on a 50-50 basis, although the relationship between the profit sharing and the profits per transaction remains uncertain. Because of this uncertainty, DOC should not simply take account of all the profits returned to Stelco. Rather it must take account of the profits according to a reasonable methodology, and one which the Panel must be able to evaluate.

It may be that the method Baycoat and Stelco used to return profits to Stelco would give rise to a different calculation of cost of production than had a calculation transaction by

[89] 19 U.S.C.§1677b(f)(1)(A); DOC Brief at 50-54; DOC Post-hearing Brief at 8-10; Transcript of Panel Hearing at 13-78. The Panel also holds that the policy enunciated in 19 C.F.R. § 351.402(f) regarding the possible inapplicability of (b)(f)(1), for which DOC argued, is not applicable here.

[90] Section D Questionnaire Response at CORR-D-53 and D-57, cited in DOC Post-hearing Brief at 14 n.34, Stelco Post-hearing Brief at 7.

[91] Id. At 14.

transaction been used. It may also be that, had DOC taken account of the method used to return profit, it would have arrived at a different cost of production than had profit been returned to Stelco transaction by transaction. But DOC did not consider either method of calculating Stelco's actual costs when it is statutorily required to do so.[92] Moreover, had DOC been concerned that not all profits returned to Stelco ought to be attributed to the transactions in dispute, to arrive at a proper cost of production determination under (f)(1)(A), DOC ought to have determined a proper allocation of profit among the transactions rather than ignore them altogether. It chose not to construct such a value. It ought reasonably to have done so under (f)(1) (A) .

D. 19 U.S.C. § 1677(b)(f)(2)

1. Applicable Law

19 U.S.C. § 1677b(f)(2) reads:

> …transactions directly or indirectly between affiliated persons may be disregarded if, in case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in the sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated.

19 U.S.C. § 1677b(f)(2) is one of the special rules that may apply if a respondent purchases an input from an affiliated party. This rule, known as the "transaction disregarded" rule, provides that, in a case of a "transaction … between affiliated persons," the transaction " may be disregarded" if it does not "fairly" represent market value. While this rule appears to accord discretion to DOC, (f)(2) must nevertheless be interpreted in the context of the general rule found in (f)(1) and the second special rule, known as the major input rule, found in (f)(3).

The legislative history pertaining to these sections supports the argument that the purchases from an affiliated party must be taken into account to reach a fair assessment of costs. A House Report explained that the Committee, in establishing the rules, did not intend for the

[92] 19 U.S.C.§1677b(f)(1).

provisions to be applied "in a rigid, arbitrary manner which mandates unfair results."[93] The Senate Committee also stated that DOC, when examining the recorded production costs, should try to determine the costs that most accurately reflect the resources used in production, as noted by this Panel, in discussing the correct determination of costs.[94] These statements reflect the intention of the Act to be used to accurately account for the costs of the manufacturer in a fair and reasonable manner.

2. <u>The Parties' Contentions</u>

Stelco advances three arguments contending that DOC erred in its interpretation of (f)(2). First, it argued that DOC's construction of the statute in general, and (f)(2) specifically, violates the rules of statutory construction because (f)(2) is interpreted in such a way as to deprive (f)(1) of its meaning.[95] Second, in a related argument, Stelco contends that DOC incorrectly increased Stelco's costs beyond what reasonably reflects its true cost of production, as required in (f)(1).[96] Third, Stelco argued that (f)(2), by its very wording, does not apply in these circumstances because there is no allegation or information on the record to indicate that there is any market price for this input in Canada.[97]

DOC argues that law, cases, legislative history and agency practice support DOC's interpretation of (f)(2) as a permissible construction of the statute. They argue that the plain meaning of (f)(2) mandates the use of transfer price between affiliates unless the amount does not reflect market price. They argue further that, by operation of (f)(3), the transfer price may be disregarded in favor of cost of production only when the transfer price is lower than cost and the cost is greater than market value established under (f)(2).[98]

DOC goes on to argue that, to the extent the statute is found to be silent or ambiguous, the legislative history supports DOC's interpretation of (f)(2). DOC cites the Conference Report as indicative of Congressional intent that express conditions must be met in order for DOC to use the cost of the input.[99]

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93 House Committee Report, H.R. Rep. No. 40, 100th Cong. 1st Sess., pt. 1, at 137 (1987), cited in Stelco brief at 34.

94 S. Rep. 412, 103rd Cong., 2d Sess., pt. 1, at 75 (1994), cited in Panel Decision at 10.

95 Stelco Post-hearing Brief at 2.

96 Stelco Post-hearing Brief at 3-4.

97 Stelco Post-hearing Brief at 5-6.

98 DOC Post-hearing Brief at 1-2.

99 DOC Post-hearing Brief at 3-4.

Finally, DOC argues that the court in *Mannesmann* supports DOC's interpretation of (f)(2), to the extent that the law and the applicable legislative history leave any doubt. They argue that the *Mannesmann* court upheld DOC's practice of using the highest of transfer price, cost of production, or market value.[100]

The Defendant-Intervenors support DOC's interpretation of (f)(2). DOC and the Defendant-Intervenors argue that (f)(2) is the general rule for dealing with affiliated parties and, as such, is the proper starting point of any analysis dealing with the value of inputs between related parties.[101] Furthermore, DOC, relying in part on *Mannesmann*, argues that the plain meaning of (f)(2) restricts any discretion DOC may have in rejecting transfer price to situations where the transfer price is found to be less than market value. That is, DOC argues, that it may reject a transfer price when it is below market value, but that it has no discretion to reject a transfer price when it does not determine that the transfer price is less than market value.[102]

3. Panel Determination

In the Panel's view, DOC's analysis in the Final Determination on the Baycoat input issue with respect to Stelco was not adequately explained. DOC held that "it is appropriate to use the transfer price to value Stelco's major inputs."[103] Without explaining the relevance of (f)(1), DOC simply stated that "under § 773(f)(2) of the Act, DOC's current practice is to request information on both the transfer price and the market value of the input and to choose the higher of the two valuations."[104] Without further analysis of (f)(2), DOC proceeded directly to discuss (f)(3).

The Panel determines that (f)(2) does not apply to this case because it does not encompass circumstances envisaged by Congress in enacting the applicable legislation. Even

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[100] DOC Post-hearing Brief at 5-6.

[101] Intervener Post-hearing Brief at 2.

[102] Intervener Post-hearing Brief at 4-5.

[103] Final Results of the Third Administrative Review of Anti-Dumping Duty Order on Certain Corrosion Resistant Flat Products From Canada (63 Fed. Reg. 12725) (March 16, 1998) at 1294.

[104] Federal Register, Vol. 63, No. 50, Monday, Mar. 16, 1998 at 12741. [Section 733 encompasses the regulations which pertain to the calculation of various values employed in § 1677, such as fair value, normal value, etc.]

were (f)(2) to apply, there are certain preconditions in the application of the sub-section which DOC must demonstrate it has satisfied. These preconditions include the need to evaluate the context under (f)(1)(A), as well as preconditions under (f)(2). These preconditions include the requirement that in order for DOC to determine whether an amount required to be considered does not fairly reflect the amount usually reflected in sales... it must determine that which actually and that which usually reflects value.[105] This determination is not to be reached arbitrarily. DOC ought not to have endorsed Stelco's invoice price without duly evaluating the context surrounding the return of profits. In particular, DOC failed to make a comparison between transfer price and market price. Even if DOC was justified in applying (f)(2) and using the transfer price to determine Stelco's cost of production, DOC did not consider all evidence of record in calculating the value of that transfer price.

In coming to its conclusions, this Panel must address the specific meaning of (f)(2) in light of all evidence arising out of the application of 19 U.S.C. § 1677b. Both DOC and the Defendant-Intervenors acknowledge this obligation. DOC states that it has:

> discretion to use the cost of production where certain conditions are satisfied.... The determination of whether these statutory conditions are satisfied rests upon a factual determination in each case. *In making a proper determination, Commerce must conduct a full review and evaluate all of the evidence on record.* Accordingly, a factual examination is required where, as here, the proper value of inputs purchased from affiliated parties is at issue.[106]

The Panel agrees. It is necessary for DOC to "conduct a full review and evaluate all of the evidence on record." DOC has failed to conduct such a full review. Nor has DOC properly evaluated all such evidence in accordance with the plain meaning of (f)(2).

The Panel holds further that DOC's interpretation of the statute, including the plain meaning it attributes to (f)(2), is unreasonable. Sub-section (f)(2) is a limited exception to the rule governing cost of production. According to the pertinent legislative history, the purpose is to ensure that affiliated parties do not manipulate prices.[107] Indeed, there is no reasonable evidence on the record that the return to Stelco of profits was intended to manipulate the cost of production. Although Stelco did not initially provide information on adjusted transfer prices, it

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[105] 19 U.S.C.§1677b(f)(2).

[106] DOC Response Brief at 22-23 (emphasis added). The Defendant-Intervenors have concurred in this reasoning: "The Department was required to evaluate the facts on record to see if the necessary conditions had been met. " Defendant-Intervenors's Post-hearing Brief at 21 (Aug. 21, 2000).

[107] H.R. Conf. Rep. No. 576, 100th Cong., 2nd Sess. 1988.

did so in supplemental questionnaires from DOC. DOC was never required to resort to the use of adverse facts available. In being provided with such information on adjusted transfer prices, DOC could not thereafter reasonably disregard it on grounds that Stelco had not provided it at the outset. Nor could it disregard that information if it is to reach a determination in light of a proper evaluation of the statutory context, including evidence arising under it.

Even assuming that there was evidence of manipulation or that DOC was concerned because Stelco and Baycoat were affiliated, DOC still had to satisfy the factual prerequisite for the application of (f)(2). Sub-section (f)(2) accords DOC discretion to disregard a transaction, but only: "[I]n the case of any element of value required to be considered,. . .the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration..."[108] DOC has not reasonably satisfied this proviso. In particular, in determining value, DOC has failed reasonably to establish on the record that the costs of transactions in issue do not fairly reflect the amount usually reflected in such sales. There is no evidence on the record, however, of the market price to be used as a standard.

DOC claims that it is statutorily required to use Stelco's invoice prices in determining dumping margins.[109] The Panel does not find this interpretation of the statute to be reasonable. The language of (f)(2), through the use of the word "may" provides DOC with discretion. However, for the reasons stated above, DOC is entitled to invoke this discretion only if it has established that the amount, here Stelco's invoice prices less profits returned from Baycoat, "did not fairly reflect" the amount usually reflected in sales. DOC has not reasonably complied with this requirement. Even were DOC to be entitled to rely on Stelco's invoice prices, which the Panel does not sanction, DOC still has not established that it has taken due account of all material factors in arriving at a reasonable calculation of costs. Contrary to its acknowledged mandate that DOC consider all relevant circumstances, DOC failed to take due account of the material evidence submitted by Stelco as to how Stelco calculated transfer price in these unique circumstances.

The Panel further finds, that in relying on invoice prices, DOC was relying on an inaccurate determination of cost. The record demonstrates that Stelco's monthly invoice prices were estimates only which are subject to monthly variances.[110] It is questionable for DOC to insist that it is statutorily required to rely on such invoices prices which do not themselves reflect Stelco's costs of production, or a proper transfer price. The transfer price that DOC applied bears no relationship to the actual value of the merchandise Baycoat sold to Stelco.

[108] 19 U.S.C.§1677b(f)(2).

[109] DOC Response Brief at 16-19.

[110] DOC Post-hearing Brief at 14.

DOC has acknowledged that as a general practice it takes account of a rebate system in calculating costs of production.[111] The Panel is of the opinion that, given the return of profits from Baycoat to Stelco, it is even more reasonable to take account of this "rebate" to Stelco in calculating costs of production. If a variable rebate system qualifies for consideration in arriving at "fairly" determining costs, surely a more comprehensive rebate system returning profits, as was done here, is even more justified.

The Panel is also of the opinion that it is not reasonable for DOC to disregard the return of profits to Stelco on grounds that DOC is statutorily mandated to do so. The plain language of (f)(2) does not require that DOC apply the highest of the transfer, market and cost of production in this case. Congress has stated: "It is not the intent of the conferrees that foreign market value be based on constructed value solely for the purpose of using this provision to increase dumping margins."[112]

Based on this language, the prior Panel I stated that, "Congress did not intend the statute to mandate a hard and fast rule that Commerce must choose the highest of the amounts found in sub-sections (f)(2) and (f)(3), if the result would unrealistically inflate the cost of production."[113]

The Panel also finds support in the reasoning on remand of the prior Panel I: "Sub-section (f)(2) gives DOC the option to disregard a transaction between Stelco and Baycoat if the transaction is not at market value or is not equivalent to an arm's length transaction." Stated differently, DOC is *not required* to disregard the transaction if it is not at market value. Rather, it *may* disregard it.

The Panel does not conclude that DOC should have reduced Stelco's costs of production to the full extent of profits returned to it by Baycoat. This is a determination of fact for DOC to reach reasonably. However, the Panel has concluded that it was not reasonable for DOC to fail to take account of that return of profit and relate it to the value of the merchandise in issue in reaching a cost of production determination.

Having evaluated the application, but without second guessing DOC or substituting its reasoning for theirs, this Panel finds that DOC's application of (f)(2) to be unreasonable on the record and not in accordance with law. As such, this Panel remands the matter to DOC, as set out below in its "Remand."

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[111] *See* Rebuttal Statements of Ellen J. Schneider, Hearing Transcript at 187-188.

[112] H. Rep. 576, 596, 100th Cong., 2d Sess., *reprinted in* 1988 U.S.C.C.A.N. 1547, 1629.

[113] See Panel Decision at 10, footnote 15.

E. Collapsed Affiliates and the Major Input Rule

1. Collapsed Affiliates

(a) Applicable Law

Preliminary to an analysis of (f)(3), the Panel will consider whether to treat Stelco, Baycoat and Z-line as collapsed parties for the purposes of applying the major input rule set out in (f)(3).

The Major Input Rule establishes that DOC shall value inputs supplied by affiliated persons at the transfer price between the entities, unless that price is below the cost of producing the input.[114] In that case, DOC may value the input at the cost of production according to available information.[115] DOC applied the Major Input Rule in this case.[116] It treated Baycoat and Z-Line as persons affiliated to Stelco and applied the transfer price to their inputs.[117]

(b) The Parties' Contentions

Stelco argues that DOC ought to have applied the transaction price less profits returned to Stelco, not the Major Input Rule.[118] In particular, DOC ought to have collapsed Baycoat and Z-Line with Stelco in determining the costs of production under the statute.[119] Stelco contended that the transfer price is inapplicable in determining antidumping duties because "group companies record actual costs incurred for inter-company purchases and sales."[120] Stelco reasons that "[i]f the companies are collapsed for the purposes of applying a single antidumping rate, §773(f)(b)(2) and (3) cannot apply because there are no transactions between affiliated persons."[121] Stelco argues, further, that Baycoat should be recognized as a collapsed entity

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[114] Sec. 773(f)(3).

[115] 19 U.S.C. § 1677 (b)(f)(3).

[116] Final Results at 12741.

[117] Final Results at 12742.

[118] Stelco Brief at 32-40.

[119] *Id.*, § 1677(b)(f)(1).

[120] Stelco Brief at 50-51.

[121] Stelco Brief at 55, citing Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea and 62 Fed. Reg.18431.

because Baycoat "was established for the express and sole purpose of supplying painting services to Stelco (and Dofasco, Stelco's joint venture party)."[122]

Stelco cites, in its support, a prior Commerce Department determination, *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea.*[123] There, DOC collapsed the party under investigation and its so-called "affiliated" suppliers where the party under investigation had a 50% ownership interest.[124] It declined to apply the Major Input Rule.[125]

DOC contends that it acted reasonably in declining to "collapse" Stelco with Baycoat and Z-line.[126] It argues that it complied with C.F.R. § 351.401(f) which provides that, in order for two companies to be treated as a single entity for the purpose of an antidumping investigation, they shall both be able to produce the subject merchandise.[127] DOC contends that this policy is reasonable in attempting to avoid manipulation by affiliated suppliers that do not produce the subject merchandise.[128]

Stelco contends, in its reply brief, that C.F.R. § 351.401(f) is inapplicable because its adoption postdates the period of investigation. Stelco argues further, that were this section to apply, Stelco and Z-line would still be a single entity because they both can produce the subject merchandise. Stelco cites *Offshore Platform Jackets and Piles From Japan* in support.[129] In that case, the parties were collapsed where different products were manufactured internally, but by different divisions.[130]

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[122] Stelco Brief at 55.

[123] 62 Fed. Reg. 13170 (Mar. 18, 1998) (final results).

[124] Stelco Brief at 52-53.

[125] In its Reply Brief, Stelco also cited SRAM's from Taiwan, Static Random Access Memory Semiconductors From Taiwan, 63 FR 8909, 8915-6 (final determination of SLTFV) (Feb. 23, 1998) and the NAFTA Panel decision in Certain Forget Stainless Steel Flanges From India, 58 Fed. Reg. 68853 (final determination of SLTFV) (Dec. 29, 1993).

[126] DOC Brief at 36-40.

[127] § 351.401(f).

[128] C.F.R. § 351.402(f); Final Results, 63 Red. Reg. Art.12742.

[129] 51 Fed. Reg. 11788, 11791 (Apr. 7, 1986).

[130] Stelco Brief at 51.

DOC, in its response brief, distinguishes *Offshore Platform Jackets and Piles From Japan* on grounds that affiliated parties are not treated as a single entity because they "function as divisions."[131] It argues, further that "[c]ommerce does not collapse companies as a single entity because the companies "function as divisions."[132]

(c) Panel Determination

The Panel determines, in the instant case, that DOC acted reasonably in declining to collapse Baycoat and Z-Line with Stelco for the purposes of applying a single antidumping rate. Baycoat was a wholly owned subsidiary of Stelco and Dofasco that remitted profits to it. It operated as a division of Stelco, fulfilling a distinct function, painting. It was not substantively a separate entity.[133] Nor did it have its own profit seeking goals distinct from those of Stelco.

Nevertheless, Baycoat remained, formally at least, a separate entity from Stelco. The transactions in issue were between "affiliated persons."[134]

2. <u>The Major Input Rule</u>

19 U.S.C. §1677 (b)(f)(3) provides for the major input rule as follows:

> If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, than the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (2).

19 U.S.C. §1677(b)(f)(3), being §773(b)(f)(3) of the Trade Act, covers major inputs from an affiliated party. A major input is in issue in this case. §1677(b)(f)(3) applies in circumstances in which the value of the major input is less than the costs of production. Under DOC's current analysis, the costs of production are lower than the value of the major input. As

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[131] Rule 57(2), Response Brief of the Investigating Authority at 38-39 (Mar. 7, 2000).

[132] *Id.* at 39.

[133] DOC Response Brief at 2-6.

[134] DOC Response Brief at 16-27.

a result, §1677(b)(f)(3) is not generally applicable.[135] However, in accordance with the Panel's determination under (f)(1) and (2), DOC is required to recalculate the transfer price accounting for the remittance of profits from Baycoat to Stelco. Following from this requirement, DOC may be required to apply (f)(3).[136]

The application of (f)(3) is subject to DOC having "reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input..." For the same reasons provided in the Panel's analysis of (f)(2), DOC has failed to provide reasonable evidence that it has compared the transfer price to the cost of production. Accordingly, we will remand for DOC to compare Baycoat's transfer price without profits to Stelco's cost of production.

As discussed above, there is no evidence in this record that the value of Baycoat's inputs were below the costs of producing the inputs. This fact distinguishes this case from *Mannesmann*. There, DOC found that the foreign company did not provide requested information on sales of the subject merchandise to unaffiliated parties where such information was available.[137] Moreover, in that case DOC rejected the use of transfer prices and instead, used constructed market values.[138] Finally, the issue in *Mannesmann* was whether §1677b(f)(3) is a condition precedent to the application of § 1677b(f)(2). This is distinguishable from the instant case in which the issue is the proper relationship of § 1677b(f)(1) to § 1677b(f)(2) and (f)(3). Because of these distinctions, *Mannesmann* is inapposite to the issue at hand.

Congress actually intended the Major Input Rule to be an exception to the general rule set out in § 773 (e)(2) of the Trade Act [19 U.S.C. § 1677(b)(f)(2) (1994)]. Like the language of the major input itself, the Conference Report makes it clear that this exception only has relevance when Commerce has "reasonable grounds to believe or suspect" that both the transfer price and the arm's length price would be less than the affiliated party's cost of production.[139] The Panel holds that there are no reasonable grounds to so believe or suspect in this case.

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[135] DOC Response Brief at 16-27.

[136] However, there is evidence on the record of a class of product in which the invoice price is higher than the cost of production for a particular class of paint *See* Cost Verification Exhibit, dated Sept. 2, 1997, Non-Pub. R., Doc. 81, at 19.

[137] *Mannesmann*, 77 F .Supp. 2nd at 1302 (Court Int. Trade [1999]).

[138] *Id.* at 1310.

[139] *Id.* at 1312**.**

VI. THE RATE OF INTEREST APPLICABLE TO COMPLAINANT'S IMPUTED CREDIT EXPENSES IN THE UNITED STATES

At issue is whether DOC erred in calculating Stelco's Imputed Credit Expenses and whether DOC should recalculate in accordance with the interest rate negotiated by Stelco to borrow in the United States during the review period.

DOC applied the Federal Reserve rate in calculating Stelco's Imputed Credit Expense in the United States during the period of review. Stelco contends that DOC should have used the rate which Stelco negotiated for in its open line of credit.[140] Stelco argues that DOC is not mandated to use the Federal Reserve Rate in all cases where no U.S. dollar borrowing has occurred.[141] Stelco maintains, further, that it paid monthly fees to maintain access to a negotiated line of credit, even when no U.S. loans were secured during the period of review.[142] Stelco argues, too, that this negotiated line of credit satisfies the three requirements of DOC's Policy Bulletin.[143] Stelco maintains the surrogate rate was reasonable, readily obtainable and predictable, and constituted a short-term interest rate that could actually be realized by borrowers in the usual course of behavior in the United States.[144]

In its Response Brief, DOC requests the Panel to remand on this issue so that it can properly determine the interest to be applied in calculating Stelco's Imputed Credit Expense in the United States.[145] DOC argues, in support that, if there is substantial evidence on the record that an error has occurred, the Panel is authorized to grant DOC a remand in order to correct the error.[146]

Given the willingness of DOC to review the issue of interest rate for error, the Panel grants its request, as is set out below.

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[140] Stelco Brief at 65.

[141] *Id.* at 63.

[142] *Id.* at 59.

[143] *Id.* at 63.

[144] Bulletin 98:2.

[145] DOC Response Brief at 47.

[146] *Id.* at 46.

VII. PAYMENT DATE

The payment date is determined according to the number of days between the date the merchandise is shipped to its customers and the date that those customers remit payment. In situations in which payment is not remitted at the time of the submission, DOC uses a surrogate payment date. In this case, DOC used as the surrogate date for unpaid sales the date of DOC's final determination.

Stelco argues that to resort to the date of the final determination as the surrogate date is arbitrary and unfair.[147] DOC responds that, since this was the first time Stelco had raised this argument, DOC needed an opportunity to evaluate Stelco's arguments on the proper payment. DOC therefore requested a remand.[148]

The Panel grants DOC's request and remands the issue to it for further consideration.[149]

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[147] Stelco Brief at 69.

[148] DOC Brief at 47-49.

[149] *See* remand instructions, *infra*.

VIII. REMAND

The Panel remands to DOC with the following instructions:

(1) DOC is required to recalculate Stelco's costs of production, taking account of the year-end return of profits by Baycoat to Stelco. The Panel requires DOC to provide the Panel with the method by which DOC recalculates that cost of production in light of such return of profits. The Panel further requires that DOC explain their methodology in light of the statutory requirements and attendant legislation as interpreted by this Panel.

(2) DOC is required to reevaluate the application of 19 U.S.C. § 1677(b)(f)(3) in light of the requirement that DOC adjust the transfer price in accordance with the recalculation set out under (1) immediately above.

(3) In its Response Brief, DOC requests a remand to correct any errors on the imputed credit expense and payment date issues, in light of Stelco's complaint. The Panel grants DOC's request and so remands.

(4) DOC is required to provide the Panel with its response to the aforementioned remand instructions within sixty (60) days from the date of this remand.

Bruce Aitken
Bruce Aitken, Chairperson

Martha Ries
Martha Ries, Panelist

Leon E. Trakman
Leon E. Trakman, Panelist

Wilhelmina K. Tyler
Wilhelmina K. Tyler, Panelist

IX. CONCURRENCE IN PART AND DISSENT IN PART

I concur in part and dissent in part.

I concur in the majority's determination of the issues of collateral estoppel, rate of interest, and imputed credits. I concur with the result reached by the majority on the issue of collapsing affiliates, though I would have restricted my conclusion to the grounds determined by DOC. However, I must respectfully, and reluctantly, dissent from my learned colleagues' remand of DOC's application of the fair value rule to the dispositive facts herein.

The majority has chosen to reject what DOC, the Court of International Trade, and I, perceive to be the plain language of the relevant statutes, therewith creating an apparent ambiguity. It then substituted its preferential construction for that of DOC. Next, the majority holds that DOC has failed to consider all the available evidence on costs. My reading of the record as a whole does not support that holding. See, Certain Corrosive-Resistant Steel Flat Products from Canada, 64 Fed. Reg. 2173 (January 13, 1999) (final results); Certain Corrosive-Resistant Carbon Steel Flat Products from Canada, 62 Fed. Reg.18448 (April 15, 1997) (final results); Certain Corrosive-Resistant Carbon Steel Flat Products from Canada, 62 Fed. Reg. 47429 (September 9, 1997) (preliminary results); Certain Corrosive-Resistant Carbon Steel Flat Products from Canada, 63 Fed. Reg. 12725 (March 16, 1998) (final results). In each of these matters, DOC would set out the specific contentions of the parties, and then give its considered decision on these contentions. Weight and credibility to be given evidence is strictly within the province of DOC, the factfinder.

It is our obligation as a binational panel to determine whether DOC's interpretation of the statute in question is a permissible one and whether its factual conclusions are supported by substantial evidence in the record as a whole. To be a permissible construction it must be reasonable. Hence, to stay within the rule of Chevron, infra, I chose to use the phrase-permissively reasonable. It is not our role to determine whether the Complainant's or the prior Panel's interpretation of the statute is superior to that of DOC's, nor whether we may craft a preferable interpretation. This is a limited review which calls for a deferential approach to the review of a specialized agency's administrative determinations.

Our duty is to determine whether the antidumping duty determination is in accord with the antidumping duty law of the importing country, the United States. For our purposes, the antidumping duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that our courts would rely on such materials in reviewing a final determination of a competent investigating authority. See, NAFTA Article 1904(2). The standard of review we must apply are those set out in NAFTA Article 1904(2) and (3), and Annex 1911. Thus, we are obligated to apply the general legal principles that a court of this country would apply in construing the relevant statutes.

The relevant statutes are U.S.C. 19 s. 1677 b (f1) and (f2) and (f3).

The judicial precedents that must be followed by Binational Panels are found in the case law of the United States Supreme Court and the Federal courts. The controlling authority is Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The court held that when reviewing an agency's construction of a statute it administrates, if Congress has spoken directly to the precise issue, that is the end of the matter. Because, when the intent of Congress is clear, the court, as well as the agency, must give effect to that intent. Thus, if a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise issue, that intention is the law and must be given effect.

If a statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the determination is based on a permissible construction of the statute. Chevron, supra. In National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407(1992), the court went on to hold that it is sufficient that an agency's interpretation of a statute "is plausible, if not preferable" in order to be sustained. The federal courts have long recognized the considerable weight and deference which must be given to agency interpretations. The International Trade Administration, DOC, has not only been accorded considerable deference, but also has been recognized as "masters" of antidumping law. See Daewoo Electronic Co. Ltd. v. United States, 6 F.3d 1511, at 1516 (Fed. Cir. 1992) citing Consumer Prod. Div., SCM Corp. v. Silver Reed Am., Inc., 763 F.2d 1033 (Fed. Cir. 1985). In sum, the test of "in accordance with law," is that the interpretation need not be the only interpretation, nor need it be one that the reviewing body would have preferred, rather, the question is whether the interpretation is permissively reasonable.

Paragraph (f)(1) provides that (A) in **general** cost 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 administrative authority shall consider all available evidence on the proper allocation of costs. (Emphasis added)

Paragraph (f)(2) provides: That a transaction directly or indirectly between **affiliated** persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence and no other transactions are available for consideration, the determination shall be based on the information available as to what the amount would have been if the transaction had occurred between persons who are not affiliated. (Emphasis Added)

Paragraph (f)(3) provides: If, in the case of a transaction between affiliated persons involving the production by such persons of a major input to the merchandise, the administrative authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is **less** than the cost of production of such input, **then** the administrative authority may determine the value of the major input on the basis of the information available regarding such cost of production, if such cost is greater than the amount that would be determined for such input under paragraph (f)(2).

Paragraph (f)(1) applies generally to the normal calculation of cost between non-affiliated parties, dealing in the market place at arm's length. It relies on the pressure of the market place to establish a fair price. Not only does it require that the records be kept in accordance with generally accepted accounting principles, but it also requires that the costs reasonably reflect the costs associated with the production and **sale** of the merchandise. It does not apply to affiliated parties, because in affiliation there lies greater opportunity to manipulate prices. Although, in the first instance (f)(1) does not apply, were we to assume it did, the cost submitted, without inclusion of normal profits, clearly does not **reasonably** reflect costs associated with the sale of merchandise.

Paragraph (f)(2) applies precisely to the **value** of the element in transactions between affiliated persons (parties). Paragraph (f)(3) applies specifically to transactions between affiliated parties involving a major input produced by one of the parties.

Legislative history clarifying legislative intent concerning (f)(2) and (f)(3) is found in H.R. Conf. Rep. No. 100-576 et seq. This history is consistent with DOC practice. Stelco's dismissive evaluation of legislative history can be found in the June 12, 2000 Panel Hearing Transcript at page 52. After being corrected on a misstatement of legislative history, counsel for Stelco stated, "...and the Supreme Court, by the way, has said that legislative history isn't worth a whole lot anyway, that you have to look at the statute." I certainly agree that we must look at the language of the statute. Further support for DOC's position can be found in the act implementing the URAA incorporating the Administrative Action Statement, P.L. 103-465, AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION. Referenced therein is section 102(a) of the act which reads,

"No provision of any of the Uruguay Round agreement,..., that is inconsistent with any law of the United States shall have effect."

This provision is said to be consistent with the long standing GATT practice.

Since the 1994 enactment of the URAA, when investigating a complaint of dumping, DOC first identifies, under the facts presented, which subsections of 19 s. 1677 b(f) may be applicable. If the transaction is between affiliates and involves a major input, as here, DOC is initially guided by the plain and precise language of paragraphs (f)(2) and (f)(3). If the value represented by the respondent is less than the fair market value or actual transfer price, DOC may disregard the Respondent's represented value and on the information available determine what the fair market price would be in an arm's length transaction. If, as here, the element is a major input then (f)(3) must be considered.

DOC's practice as it construes (f)(2) and (f)(3) is to apply the higher of the transfer price, the market price or the cost of production. The practice of determining the value at the higher of the transfer price, the market price or the cost of production has now been codified in 19 C.F.R. Sec. 351.407(b). Although this regulation was not applicable in the period of review here, the proposal therefor was clear evidence of the policy which DOC understood was proper to assist in the implementation of the legislative intent. Regulations are entitled to controlling weight, unless arbitrary, capricious, or manifestly contrary to the statute.

Congress has made clear that its intent is to require affiliate transactions be measured by the value that would normally reflect an "arm's length" price. When a major input is involved, paragraph (3) provides that the actual cost may be applied only "...if such cost is greater than the amount that would be determined for such input under paragraph (2)."

This Panel may not affirm a determination by DOC that is not supported by substantial evidence or in accordance with law. Article 1904.2, Annex 11 and 19 U.S.C. Sec. 1516a(b)(1)(B). Conversely, it may not reject a factual finding by DOC when the record as a whole contains relevant evidence which a reasonable mind might accept as adequate to support a conclusion. Nor may a panel reject DOC's application of a statute when its construction of law is a reasonably permissible one. See Consolidated Edison Co. V. N.L.R.B., 305 U.S. 206 (1938), see also Arkansas v. Oklahoma, 503 U.S. 91 (1992). As a Binational panel reviewing a final antidumping determination by a competent investigating authority, we must accord that authority substantial deference in its construction of the law and its finding of facts, unless the record fails to contain relevant supporting evidence.

Discussion of Dispositive Facts

Baycoat Corp. is a business entity that is owned jointly and equally by Stelco and Dofasco, Canadian Steel producers and exporters. It is undisputed that Baycoat and Stelco are affiliated and that the transaction here involved a major input. There are admissions of record that Baycoat provides painting services to the co-owners at a transfer price which is invoiced out at market price and inventoried in at market price. There is an admission that the invoices contained an element of profit. There is no claim that **Baycoat** rebated, discounted, or otherwise deducted the profit element in the transaction as it invoiced and shipped its "major input" to Stelco and Dofasco. There are admissions by Stelco, the producer and exporter of the subject merchandise, that it includes the invoiced or scheduled price without record of profit remittance from Baycoat or Z-Line on its unconsolidated financial statement. Rather, annually Baycoat, as a separate entity, computes its profit and remits it equally to the co-owners. These profits appear separately on a consolidated financial statement because it includes the profit and loss statements of Stelco and the proportional share of profits or losses of all the affiliated entities. The equal division by the co-owners is based solely on ownership share rather than individual purchases of subject merchandise, and is entered as **equity** income.

Administrative History

In the August 19, 1993 antidumping order, first administrative review, Stelco did not submit its original records as they revealed inventory cost, not did it submit the original records showing its accounting of its profit in the Baycoat joint venture. Rather, it submitted what it entitled a net cost of the purchase from Baycoat which had factored in a reduction for the profit from the annual disbursement of the joint venture's profits. This was prior to the passage of the URAA and its adoption and implementation by Congress.

In the second administrative review, DOC exercised its broadened investigative authority pursuant to URAA and applied the statutes on costs, U.S.C. 19s. 1677 b (f), as amended, to include (f)(2) and (f)(3). These paragraphs now applied (f)(2) and (f)(3) to cost of production as well as the previous application to constructed value. In transactions between affiliated parties these two provisions were designed to facilitate a "fair comparison" between export price and normal value and are known as the fair value doctrine. Here, DOC was reviewing transactions between affiliated parties involving a major input, therefore, it was only logical that it would look to (f)(2) and (f)(3). And, inasmuch as Stelco was representing the price at a level which was facially less than the transfer and market price, DOC correctly concluded that (f)(2) and (f)(3) applied.

By the third administrative review, persistent inquiry by the DOC developed further admissions that at purchase Stelco recorded costs according to Baycoat's invoice charges and factored the invoice price into its cost of production. As so recorded, Stelco's individual business unconsolidated financial statements also reflected unadjusted invoice price. This is consistent with normal cost accounting. Ultimately, the claimed profits appear on the Consolidated Stelco financial statement as equity income on investment. See DOC's Response to the Panel's Questions of July 17, 2000, page 14, and its record reference.

Conclusion

The predicate facts upon which this case rests are, 1) Stelco and Baycoat are affiliated entities, 2) the service that Baycoat provides to Stelco is a major input. If the transactions being investigated by DOC are between affiliate parties, Congress has specifically directed that those transactions must be for a fair value. Paragraph (f)(2) provides that if DOC has reasonable grounds to believe the amount represented for a major input is less than the cost of production it **may** determine the value on the basis of information available. If such costs is greater than what would be determined under (f)(2), then pursuant to (f)(3) DOC **may** determine the value on the cost of production. If the value represented is less than fair value as would be determined under (f)(2), then DOC "shall", on the information available, determine what the amount would have been had the transaction occurred between parties who were not affiliated.

Here, DOC looked at all the evidence of the affiliate's actual cost of production, and determined that it was, in fact, less than the transaction/invoice price and less than the fair market value. It is not unreasonable for DOC to conclude that in transactions between unaffiliated parties, vendors do not **generally or normally** forfeit all their profits. Baycoat's input is major, hence (f)(2) and (f)(3) apply. Whether the profits are or are not deducted from the inventory price, the adjusted price Stelco represented does not include an element of profit, and, therefore, creates a reasonable basis to conclude that the price represented is below the fair market value. The statute provides that if the DOC has reasonable grounds to believe the amount represented for a major input is less than the cost of production it **may** determine the value on the basis of information available. If such cost is greater than what would be determined under (f)(2), then pursuant to (f)(3) DOC **may** determine the value on the cost of production. If the value represented is less than fair value as would be determined under (f)(2), then DOC shall, on the information available, determine what the amount would have been had the transaction occurred between parties who were not affiliated. Here, DOC looked at all the evidence of the affiliate's actual cost of production, and determined that it was, in fact, less than the transaction/invoice price and of the fair market value. A factfinder **might** reasonably conclude that in transactions between unaffiliated parties, a vendor does not **generally or normally** forfeit all its profit.

Costs in general, should normally be calculated on the record of the producer if kept in accordance with GAAP, (f)(1)(a). Stelco's initial accounting for the costs of subject merchandise entered the purchase at invoice in its inventory and so cost accounted the price within its cost of production. However, it was not these records which were relied upon by Stelco when representing the value of the element under consideration. Nor is there any evidence showing that the *post hoc* spread sheet adjustments to inventory costs by deduction of equity income is so compliant. Indeed, if Baycoat's individual sales to Stelco and Dofasco were, as it proposes, at "actual cost", without profit, there would have been no profits at the end of the year to be divided equally between the co-owners. DOC further noted that in some cases, Stelco's adjustments to invoice price reduced such prices to below Baycoat's cost of production. See Investigating Authority Response to Panel's Questions, fn. 31.

Thus, DOC as the finder of fact and weigher of evidence had ample and substantial evidence on the record as a whole that might lead reasonable minds to conclude that the transactions as invoiced were at market/arm's length price, that the value represented by Stelco was below market, and that the money received annually by the co-owners was not a rebate on the subject matters sales, but was, in fact, an equity return on their coequal investment in Baycoat. See Consolidated Edison v. U.S., and Arkansas v. Oklahoma, supra.

It is undisputed that we are dealing with affiliated persons. (f)(2) specifically addresses transactions between affiliated persons. In such transactions, Congress in plain language delegated authority to the DOC to disregard the represented value of an element (e.g., coating) if that value does not fairly reflect sales of the merchandise in the market under consideration. The value represented by Stelco does not reasonably reflect Baycoat's costs usually associated with production and sale of the merchandise. Compare (f)(1). Stelco's construction of the statutes requires a *sub silencio* repealing of the congressional intent as enacted in (f)(2) and (3). That is not within the prerogatives of federal courts or of binational panels. Indeed, applying general rules or statutory construction, we are instructed that if there is an apparent conflict between an amendment to a statute and the statute as it existed at the time of the amendment, the later language will control.

Once DOC, pursuant to (f)(2), exercises its discretion to disregard the represented value, it applies the second sentence which provides that the determination **shall be based** on what the amount would have been had the transaction occurred between persons who were not affiliated. Hence, on the information available, DOC constructed an arm's length transaction value. This construction is consistent with the plain language of the statute and has legislative history in its support. See also, Mannesmannrohren-Werke AG v. United States, 77 F.Supp. 2d 1302, 1309 (Ct. Int'l Trade 1999), (The sole federal law on the issue here, affirmed DOC's construction of (f)(2) and (f)(3) in a comparable situation.) To reach its conclusion, the court properly applied the appropriate rules of statutory construction, plain language, the specific over the general, and legislative history.

Because the prior Panel's decisions, though not binding, are deserving of deference, I have again reviewed its decision of June 11, 1998. The Panel found that the DOC had discretion to utilize the inventory price in transactions between Stelco and Baycoat rather than using Baycoat's costs. Additionally, the Panel found that with the implementation of the URAA, DOC had the right to request the transfer prices and had a reasonable basis for changing its methodology. Then, the prior Panel dismissed the DOC's finding of facts and substituted its own. In so doing the prior Panel ignored admissions of record as to actual transfer price, the nature of the profits, and the (f)(2) fair value doctrine that Congress had adopted for transactions between affiliates. It also chose to ignore admissions of record relating to transfer price and equity accounting. However, in United States courts, admissions of record made in the course of a judicial or quasi-judicial proceeding need no further foundation, are admissible and may be conclusive and binding in proceedings between the parties. (See FRE 801 (d)(2), and notes. See also IX Wigmore, Evidence Sec. 2588 (3rd ed. 1940) (judicial admissions made in the course of a judicial or quasi-judicial proceeding conclusive and binding in proceedings between the parties.)

Annually Baycoat computes its profits and remits them equally to the owners. The equal division is based on ownership share rather than purchase of subject merchandise and on Stelco's books it is entered as equity income. Stelco represented that it, and assumably, Dofasco, deduct the profit element from each transaction and that Baycoat was never paid for those profits, but nevertheless, profits commensurate therewith appeared at the end of the year to be divided equally by the co-owners. The reappearance of these profits, in toto, is unexplained. Stelco's accounting for the costs of the subject merchandise purchase at inventory and the accounting for the profits remitted as equity income are well within GAAP, there is no claim nor showing that the post hoc reduction of inventory costs by equity income is so compliant. It may not be gainsaid that the DOC, as the finder of fact and weigher of evidence, had ample and substantial evidence with which to find Stelco's "adjustment" unpersuasive.

Here DOC has worked with and considered Stelco's and Petitioners' arguments on the facts and law for the fourth time. This remand on costs introduces nothing new to the facts or the law, and inasmuch as subsequent reviews will be subject to 19 C.F.R. Sec. 1516 a(b)(1)(B) which codifies DOC's practice, it seems to be an exercise in futility.

Therefore, I would reject Stelco's challenge to DOC's construction of the applicable statutes and to its findings of fact. In all other respects, I agree with the remand.

Dale Tursi
Dale Tursi, Panelist