

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

IN THE MATTER OF
OIL COUNTRY TUBULAR GOODS FROM MEXICO
FINAL RESULTS OF SUNSET REVIEW OF ANTIDUMPING DUTY ORDER
FILE NO. USA-MEX-2001-1904-03

FOURTH DECISION OF THE PANEL

January 17, 2007

Mr. Daniel A. Pinkus, Chair

Mr. Hernán García Corral

Mr. Jorge Miranda

Prof. Daniel G. Partan

Prof. Ruperto Patiño Manffer

The panel wishes to express its appreciation to Idalia Mestey-Borges for her excellent assistance in the work of the Panel.

Appearances:

Gregory J. Spak, Frank J. Schweitzer, White & Case, LLP, on behalf of Tubos de Acero de México, S.A.

Ada E. Bosque, John D. McInerney, Berniece Browne, on behalf of the United States Department of Commerce.

Michael J. Brown, Roger B. Schagrin, Schagrin Associates, on behalf of IPSCO Tubulars, Inc. and Lone Star Steel Co.

John J. Mangan, Robert E. Lighthizer, and Jeffrey D. Gerrish, Skadden, Arps, Slate, Meagher & Flom, LLP, on behalf of United States Steel Corporation.

I. History

For the fourth time since 2001, and after having issued three Decisions, this Panel has been asked to review the final results of the five-year review (“sunset review”) by the Department of Commerce (“Commerce,” “the Department,” or “the Investigating Authority”) of the antidumping duty order on Oil Country Tubular Goods (“OCTG”) from Mexico. In the sunset review, the Department found that revocation of the antidumping order would likely lead to continuation or recurrence of dumping at the margin of 21.70 percent *ad valorem*.

Even though the Sunset Review Determination was the result of an order-wide investigation that covered more than one Mexican producer, only one of them, *Tubos de Acero de México, S.A.* (“TAMSA”), contested it. In its initial challenge to the Determination TAMSA asserted that Commerce had relied solely upon the presumption arising from the decrease in export volume after the order. It was TAMSA’s position that the Department had improperly refused to consider the “other factors” TAMSA had brought to the Department’s attention, which factors outweighed the effect of the presumption. These “other factors,” TAMSA asserted, formed the factual basis for the original dumping finding, but were no longer likely events. Specifically, the factors were, the simultaneous massive Mexican peso devaluation and TAMSA’s considerable hard-currency (US dollar denominated) debt. According to TAMSA, their due consideration in the sunset review would overcome the presumption in favor of likelihood of dumping that the Department determined to have resulted from the decrease in TAMSA’s post-order exports.

In its First Decision, following a 2004 hearing, the Panel rejected the Department’s contention that TAMSA had failed to properly bring these factors to the attention of the Department. Not only had TAMSA made reference to the “other factors,” but it had asserted why it considered them relevant to the likelihood determination. Furthermore, the Department already had pertinent evidence in the record. The Panel therefore ordered the Department to consider the relevance and effect

of the “other factors” to the Department’s likelihood determination. It specifically asked the Department to explain its reasoning in the event it determined the “other factors” to be irrelevant.

However, in its First Redetermination, even though the Department appeared to have accepted that TAMSA had shown “good cause” for consideration of the “other factors,” it failed to provide a reasoned analysis in support of its interpretation of the role played by the pre-and post-order levels of TAMSA’s hard currency debt. Therefore, the Panel directed the Department to determine whether the decrease in the magnitude of TAMSA’s foreign currency denominated debt in the sunset review period outweighs the “likelihood” presumption that the Department asserted resulted from the decrease in TAMSA’s post-order export volumes. The Panel expressly asked the Department to explain its reasoning in the event it determined that the lower level of foreign currency denominated debt did not outweigh the “likelihood” presumption.

Commerce responded by issuing a Second Redetermination in which it avoided considering the decrease in TAMSA’s foreign currency denominated debt during the sunset review period by creating and considering a hypothetical financial expense ratio instead of the uncontested financial expense ratio established in the record. The term “financial expense ratio” in the context of this case is an expression of the financial burden resulting from the combination of the peso devaluations and the resultant dollar denominated debt service losses. The Panel found that use of a hypothetical financial expense ratio constituted an unreasonable methodology. Accordingly, the Panel again directed the Department to reconsider its likelihood determination and explain why TAMSA’s high financial expense ratio is likely to recur in the future, considering the decrease in TAMSA’s foreign currency debt during the sunset review period as evidenced by the actual financial expense ratio established in the record of this proceeding.

Now, in its Third Redetermination, Commerce once again refused to consider the effect of the “other factors” on its likelihood determination and again found that the

continuation of recurrence of dumping was likely. Instead, it supported its likelihood determination with arguments it did not make in support of its original determination. Specifically, it pointed to dumping during the review period by another shipper from Mexico. Additionally, it created another hypothetical expense ratio, and concluded that any changes observed in the ratio were not entirely due to the reduction in TAMSA's foreign debt, and that, in any event, the financial expense ratio is not relevant to its finding. Commerce discussed at length the lack of significance of the zero margins obtained by TAMSA during the review period, and the insignificance of the data concerning sales below Cost of Production ("COP").

II. The Relevant Law

A. The Panel's Standard of Review

The authority of this Panel flows from NAFTA Chapter 19. Chapter 19 Article 1904.1 provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Article 1904.2 requires that a panel apply the "statutes, legislative history, regulations, administrative practice and judicial precedents" upon which a court of the importing country (in this case, the United States) would rely in reviewing a final determination of the investigating authority. The standard of review to be applied by such a court (in this case, the U.S. Court of International Trade ("CIT")) is set forth in §516a(b)(1)(B)(i) of the *Tariff Act of 1930*,¹ as amended, codified at 19 U.S. Code §1516a(b)(1)(B)(i), which requires that the reviewing court "shall hold unlawful any determination, finding, or conclusion, found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Under this standard, the reviewing court (in this case, the Panel) does not engage in *de novo* review, and restricts its review to the administrative record.

¹ Hereinafter references to provisions of the *Tariff Act of 1930*, as amended, are cited to the codification of the statutory provisions in Title 19 of the United States Code.

In reviewing the interpretation of statutes, the Panel follows the two-stage approach set forth by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). When reviewing an agency’s construction of a statute that the agency administers, the Panel is confronted with two questions:

[First,] ... whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the [Panel], as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the [Panel] determines that Congress has not directly addressed the precise question at issue, the [Panel] does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to a specific issue, the question for the [Panel] is whether the agency’s interpretation is based upon a permissible construction of the statute. [*Chevron, U.S.A., Inc.* at 842-43.]

An agency’s statutory interpretation is to be upheld if it is “sufficiently reasonable” even if it is not “the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding.” *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). The U.S. Court of Appeals for the Federal Circuit has held that Commerce’s statutory interpretations enunciated in an administrative determination are “entitled to deference under *Chevron*.” *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). And the Department’s regulations, adopted pursuant to notice and comment rulemaking are also entitled to a high level of deference. *See Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1347 (Fed. Cir. 2001). Nonetheless, a panel must “assure that the agency has given reasoned consideration to all the material facts and issues” and that Commerce has explained how its legal conclusions follow from the facts in the record. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the

choices made.” *Avesta AB v. United States*, 724 F.Supp. 974, 978 (CIT 1989) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)), *aff’d*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 403 U.S. 1308 (1991). In addition, when an agency does need to fill in gaps in a statute, it must act consistently with the underlying purpose of the law it is charged with administering. A reviewing panel must “reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement.” *Hoescht Aktiengesellschaft v. Quigg*, 917 F.2d 522 (Fed. Cir. 1990) (quoting *Ethicon Inc. v. Quigg*, 849 U.S. 1422, 1425 (Fed. Cir. 1988), and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).

Finally, the reviewing court has the power to define the parameters as to what an administrative agency is to consider in a particular remand. *See Chung Ling Co., Ltd. v. United States*, 829 F. Supp. 1353, 1358 (Ct. Int’l. Trade 1993). The agency has “no power or authority” to deviate from a court’s remand order. *See in re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988) *citing Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Federal Power Comm’n v. Pacific Co.*, 307 U.S. 156, 160 (1939)).

B. Title 19, U.S. Code, Statement of Administrative Action, and Department of Commerce’s Sunset Policy Bulletin

1. Title 19, U.S. Code

The Department’s sunset review was undertaken pursuant to Title 19 U.S. Code §1675(c), entitled “Five-year review.” The statute provides, in relevant part, that five years after the publication of an antidumping order,

(1) In general

...[T]he administering authority [Commerce] ... shall conduct a review to determine, in accordance with [§1675a of this title], whether revocation of the ... antidumping duty order ... would be likely to lead to continuation or a recurrence

of dumping...

Further, Title 19 U.S. Code §1675(d)(2) provides in pertinent part:

In the case of a review conducted under subsection (c) of this section, the administering authority [Commerce] shall revoke ... an antidumping duty order or finding ... unless --

(A) the administering authority makes a determination that dumping ... would be likely to continue or recur

Title 19 U.S. Code §1675a(c), entitled “Determination of likelihood of continuation or recurrence of dumping,” provides in relevant part:

(1) In general

In a review conducted under section 1675(c) of this title, the administering authority [Commerce] shall determine whether revocation of an antidumping order ... would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider --

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping order...

(1) Consideration of other factors

If good cause is shown, the administering authority [Commerce] shall also consider such other price, cost, market, or economic factors as it deems relevant.

...

(4) Special rule

(A) Treatment of zero or *de minimis* margins. A dumping margin described in paragraph (1)(A) that is zero or *de minimis* shall not by itself require the administering authority to determine that revocation of an antidumping duty order ... would not be likely to lead to continuance or recurrence of sales at less than fair value.

2. Statement of Administrative Action

In addition to the provisions of Title 19, the Statement of Administrative Action (“SAA”) gives Commerce specific guidance on how it should interpret the factors which, under the statute, it must consider in conducting a sunset review. According to the Uruguay Round Agreements Act (“URAA”), which adopted amendments to the then existing U.S. trade legislation and specifically “approved” the SAA, the provisions of the SAA are authoritative interpretations of the statute. URAA §102(d), 19 U.S. Code §3512(d), provides that the SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of [both] the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” Accordingly, the Department must interpret and apply the relevant provisions of the statute in light of the authoritative interpretations expressed in the SAA. Relevant to sunset reviews, SAA, H.R. Doc. No. 103-316, vol. 1, at 879 (1994) states that sunset review determinations will be made by the Department of Commerce on an order-wide, rather than a company-specific, basis.

The SAA, H.R. Doc. No. 103-316, vol. 1, at 899 (1994), adds:

[D]eclining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent

an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.

Further, the SAA continues:

The Administration believes that the existence of dumping margins after the order or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the US without dumping and that, to reenter the U.S. market, they would have to resume dumping.

New section 752(c)(2) [19 U.S. Code § 1675a(c)(2)] provides that, for good cause shown, Commerce also will consider other information regarding price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates ...; [and] any history of sales below cost of production [*inter alia*]. In practice this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis.

Under new section 752(c)(4) [19 U.S. Code § 1675a(c)(4)], the existence of zero or *de minimis* dumping margins at any time while the dumping order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping. Exporters may have ceased dumping because of the existence of an order ... Therefore, the present absence of dumping is not necessarily indicative of how exporters would behave in the

absence of the order ... [SAA, H.R. Doc. No. 103-316, vol. 1, at 890 (1994).]

As applied to sunset reviews, the Supreme Court's *Chevron* decision dictates that to the extent that the combination of the statute and the SAA provide the "unambiguously expressed intent of Congress," "that is the end of the matter."² Both the Department and the Panel must give effect to the intent of Congress.³ Where there is ambiguity, the Panel must ensure that the Department's actions are consistent with the underlying purposes of the law.⁴

3. The Department's Sunset Policy Bulletin

In 1998 Commerce issued a "Policy Bulletin," in which Commerce proposed "Policies Regarding the Conduct of Five-year ('Sunset') Reviews" of antidumping and countervailing duty orders.⁵ The Department's Sunset Policy Bulletin quotes the statutory standards from 19 U.S. Code § 1675a(c) and the provisions of the SAA quoted above. The Bulletin adds, in pertinent part:

[T]he Department normally will determine that revocation of an antidumping order ... is likely to lead to continuation or recurrence of dumping where --

- (a) dumping continued at any level above de minimis after the issuance of the order...;
- (b) imports of the subject merchandise ceased after issuance of the order...; or
- (c) dumping was eliminated after the issuance of the order..., and import volumes for the subject merchandise declined significantly.⁶

² *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

³ *See id.*

⁴ *Id.*

⁵ DOC International Trade Administration, "Policies Regarding the Conduct of Five-year ('Sunset') Reviews of Antidumping and Countervailing Duty Orders," 63 Fed. Reg. 18871-77 (Apr. 16, 1998) (hereinafter "Sunset Policy Bulletin").

⁶ *Id.* at 18872.

With respect to relevant “other factors” that the Department must also consider “if the Department determines that good cause is shown,” the Sunset Policy Bulletin states:

[T]he Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question.⁷

The Sunset Policy Bulletin published in 1998 in the Federal Register “for comment” remains in effect today.⁸ According to the Department, “[t]he proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.” Thus, the policies stated in the Bulletin are applied by the Department in its decision-making process, but the Bulletin does not have the formal status of a Department regulation.

III. The Panel’s Analysis of TAMSA’s Challenge to the Department’s Third Redetermination

In reconsidering its likelihood determination for a third time, the Department’s conclusion was:

“After addressing the question posed by the Panel, and in accordance with the statute and regulations governing sunset reviews, [the Department] continue[s] to determine that the revocation of the antidumping duty order on OCTG from Mexico would be likely to lead to continuation or recurrence of dumping.”⁹

⁷ *Id.* at 18874.

⁸ At the Panel Hearing, counsel for the Department affirmed that the Department has made no response to any comments received and has not altered the 1998 text of its Sunset Policy Bulletin. Hearing Transcript at 122.

⁹ Third Redetermination on Remand Oil Country Tubular Goods from Mexico: Sunset Review, USA-MEX-2001-1904-03, at 1 (Aug. 17, 2006) (hereinafter “Third Redetermination”).

As noted, Commerce found “that the export volumes and [an] administrative review finding [of dumping] for Hylsa are highly probative that dumping would likely continue or recur.”¹⁰ It noted that “while consideration of the financial expense ratio [is] relevant, it [is] not the sole factor under consideration nor the most critical”¹¹ and that “regardless of its level or even existence, [the financial expense ratio] is not predictive of whether dumping will continue or recur.”¹² The Department dismissed TAMSA’s explanations of the reasons for the decrease in export volumes as “without merit.”¹³

In its challenge to the Department’s Third Redetermination, TAMSA argues that the Department failed to follow the Panel’s order, and asks the Panel to direct the Department to issue a negative determination in order to avoid the issuance of yet another futile remand.¹⁴

TAMSA argues that the Department had changed the basis of the original sunset review likelihood determination it issued in 2001.¹⁵ TAMSA notes that whereas the Department then based its determination solely on volume, it has changed its argument regarding the basis of its determination to include a theory of continued dumping by another exporter, namely Hylsa S.A. de CV (“Hylsa”).¹⁶

A. The Order-Wide Basis for a Likelihood Determination

The Department noted that the determination of likelihood of continuation or recurrence of dumping is to be made on an order-wide basis.¹⁷ Thus, it considered the

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ TAMSA Rule 73(2) Challenge to the Department of Commerce’s Third Remand Determination pursuant to Article 1904 of the North American Free Trade Agreement, In re Oil Country Tubular Goods (“OCTG”) from Mexico: Final Results of Sunset Review of Antidumping Duty Order, File No. USA-MEX-2001-1904-03, at 1 (Sept. 13, 2006) (hereinafter “TAMSA Challenge Brief”).

¹⁵ *Id.* at 11.

¹⁶ *Id.*

¹⁷ Third Redetermination at 9.

exporting and pricing behavior of all producers and exporters subject to the order, namely TAMSA and Hylsa.¹⁸

The Department explained that imports of OCTG from Mexico fell from a level of 43,695 net tons for the pre-order period to a level of 1,297 net tons for the post-order period beginning in Aug. 1998 and ending in Jul. 1999. It added that on an annual basis, imports of OCTG from Mexico to the U.S. for consumption fell from 36,275 MT in 1994 (pre-order) to 1,448 MT in 1998 and 5,160 MT in 1999 (post-order). Therefore, according to the Department, on an order-wide basis, import levels decreased substantially from their pre-order levels to the last year of the sunset review period.¹⁹

On an individual basis, the Department explained that TAMSA shipped approximately 10,000 MT of OCTG for the first six months of 1994,²⁰ 100 MT during the 1996/97 (2nd) administrative review period, 120 MT during the 1997/98 (3rd) administrative review period, and 50 MT during the 1998/99 (4th) administrative review period.²¹ Thus, the Department showed, TAMSA shipped at most 0.6% of its pre-order shipment levels.²²

Similarly, Hylsa's shipments in 1996 decreased to approximately 1.1% of the shipment levels in 1995, disappeared in 1997, and decreased to approximately 2.4% of the 1995 level in 1998, bouncing back to 72% of 1995 levels in 1999.²³ Thus, the Department affirmed that post-order import levels decreased dramatically for Hylsa as well.²⁴

Based on the data summarized above, the Department concluded that exports to the U.S. of OCTG from Mexico as a whole and TAMSA and Hylsa individually

¹⁸ *Id.* at 9-10.

¹⁹ *Id.* at 10.

²⁰ 20,000 MT when annualized

²¹ Third Redetermination at 10-11.

²² *Id.* at 11.

²³ *Id.*

²⁴ *Id.*

decreased dramatically once the discipline of the order was imposed.²⁵ Thus, the Department asserted, imports from Mexico “appear to have ceased” after the imposition of the order.²⁶ The SAA states that the cessation of imports is highly probative of the likelihood of continuation or recurrence of dumping. The Department equated the significant decline or “virtual cessation” of TAMSA’s and Hylsa’s OCTG exports with the statutory reference to “cessation” and concluded that, just as with “cessation,” such “virtual cessation” is highly probative of the likelihood of continuation or recurrence of dumping.²⁷

The Department added that TAMSA’s post-order sales were different from its pre-order sales in terms of their commercial quantity sales patterns and thus “do not reflect the commercial activity likely to prevail if the antidumping duty order were revoked.”²⁸

While the Department found no dumping margins for TAMSA during the sunset review period, it did find a 0.79% dumping margin for Hylsa²⁹ in the fourth administrative review period.³⁰ Since the SAA states that the existence of post-order dumping margins is highly probative of the likelihood of continuation or recurrence of dumping, the Department concluded that this margin, found during a period when Hylsa’s export volumes of the subject merchandise had decreased to approximately 2.4% of the 1995 level, is highly probative of the likelihood or recurrence of dumping.³¹

The SAA clearly states that determinations in sunset reviews are to be made on an order-wide basis. Therefore the consideration volumes of exports by Hylsa may be relevant to the Department’s determination where they form a part of the record. But the Department cannot determine likelihood *de novo*, supporting a *new* determination with information that remains outside the record of these proceedings. It cannot rely upon a

²⁵ *Id.*

²⁶ *Id.* at 12 & 36.

²⁷ *Id.* at 13.

²⁸ *Id.*

²⁹ which is presently subject to litigation in front of a different NAFTA Panel

³⁰ Third Redetermination at 11.

³¹ *Id.* at 12 & 36.

finding of dumping by Hylsa in a sale during the review period which remains outside the record. This Panel has already indicated in its Second Decision that it will not consider information not in the record regarding sales by Hylsa. The Panel therefore rejects the Department's reliance upon the assertion that Hylsa was dumping during the review period.

B. “Virtual Cessation” of TAMSA’s Exports

As indicated, the SAA states that the cessation of imports during the Period of Investigation (“POI”) is “highly probative” that dumping would recur if the order were revoked. Commerce concluded that because TAMSA and Hylsa did not ship in commercial quantities during the POI, and thus shipped in a pattern of sales that differed from the pre-order pattern, shipments are to be considered as having virtually ceased. According to the Department, this virtual cessation is in turn to be treated as the cessation scenario contemplated by the SAA.

TAMSA asserts that although exports of the subject merchandise did decrease following imposition of the antidumping order, OCTG exports did not completely cease for the length of the review period.³² TAMSA argues that since neither the statute nor the SAA refers to a “virtual cessation” of exports, they “certainly [do not authorize] the Department to consider ‘virtual cessation’ to be ‘highly probative’ of likely dumping.”³³

As acknowledged by the Department, both TAMSA and Hylsa continued to participate in the U.S. market after the imposition of the order.³⁴ Nevertheless, the Department insists that the diminished level of post-order exports warrants a presumption that dumping would continue if the order were revoked. Such a presumption would be justified according to the SAA in cases where post-order exports cease.

³² TAMSA Challenge Brief at 13-15.

³³ *Id.* at 15.

³⁴ *Id.* at 14.

But Commerce provides no support for its interpretation of “virtual cessation” as synonymous with “cessation,” and cites no authority in the CIT or elsewhere on the question. In these circumstances, the Panel is unable to read the term “cessation” in the SAA as synonymous with “virtual cessation.” The SAA provides for a likelihood presumption if exports have ceased, not if they have virtually ceased. It is also observed that the argument presented by Commerce on this issue goes considerably beyond the issue which our remand decision directed the Department to consider, namely the impact of TAMSA’s foreign debt on the COP and consequently on the likelihood of dumping upon revocation of the order.

Nonetheless, for purposes of the present review, the Panel accepts that the post-order volume decrease of TAMSA’s exports establishes a presumption that dumping is likely to resume if the order were revoked. However, in the context of this Panel’s previous decisions, the Department must still determine whether that presumption is outweighed by the change in TAMSA’s “other factors” during the sunset review period as compared with the initial investigation.

C. The Effect of TAMSA’s Zero Margins

In spite of its contention that imports “ceased,” i.e., “virtually ceased,” in its Third Redetermination, the Department considered TAMSA’s review period zero dumping margins. It concluded that since TAMSA’s post-order sales were different from its pre-order sales in terms of their commercial quantity sales patterns, “[t]he zero margins obtained by TAMSA, . . . , are not predictors of likelihood.”³⁵ TAMSA rejects this proposition, arguing that the Department’s refusal to ascribe *any* probative value to TAMSA’s consecutive zero margins is contrary to law and not supported by substantial evidence in the record.³⁶

³⁵ Third Redetermination at 14.

³⁶ TAMSA Challenge Brief at 18-25.

In the Panel's view, the Department's nullification of the probative value of the zero dumping margins found in sunset review period is an unreasonable interpretation of the Statute and the SAA. The Statute provides that a zero margin "shall not *by itself* require [the Department] to determine that revocation of an antidumping duty order ... would not be likely to lead to continuance or recurrence" of dumping.³⁷ The SAA repeats the statutory language, adding that:

Exporters may have ceased dumping because of the existence of an order ... Therefore, the present absence of dumping is not necessarily indicative of how exporters would behave in the absence of the order ...³⁸

Thus both the Statute and the SAA acknowledge that post-order zero dumping margins may have probative value. If an exporter can export without dumping in the sunset review period, it may be possible for the exporter to continue exporting without dumping upon revocation of the order. Thus, while the Panel does not weigh the probative value of the zero margins, in the present circumstances, it is clearly unreasonable to give them no weight. As pointed out by TAMSA, during the reviews, the Department was given data on some 7,000 sales, and was able to completely analyze TAMSA's COP. Accordingly, the Department's nullification of the probative value of zero margins fails to reasonably reflect the intent of Congress and is therefore rejected by the Panel.

D. TAMSA's Financial Expense Ratio

The decision of the Panel to which the Third Redetermination responds directed the Investigating Authority to either issue a determination of no likelihood, or:

..to explain why TAMSA's high financial expense ratio is likely to recur

³⁷ 19 U.S. Code §1675a(c)(4). (emphasis supplied)

³⁸ SAA, H.R. Doc. No. 103-316, vol. 1, at 890 (1994).

considering the decrease in TAMSA's foreign currency denominated debt during the sunset review period as evidenced by the actual financial expense ratio established in the record of this proceeding.

Commerce has done neither.

The Department's response seems to be that the decline in the financial expense ratio is not due to the decline in TAMSA's foreign debt (or, at least not solely not due to the decline), and that the decline in the ratio is irrelevant and not predictive of whether dumping might recur.

With regard to TAMSA's financial expense ratio, the Department again concluded in its Third Redetermination that there is no "direct correlation between the zero [dumping] margins [obtained by TAMSA in the administrative reviews] and the decrease in the financial expense ratio due to the decrease in debt and absence of a currency devaluation."³⁹ The Department further determined that TAMSA's analysis regarding the combination of its "other factors" is flawed.⁴⁰

As it has throughout this proceeding, TAMSA argues that dumping was determined in the original investigation through the combination of peso devaluation and high levels of foreign currency denominated debt held by TAMSA. This combination of factors raised TAMSA's cost of production ("COP"), which in turn created artificial sales below cost and a consequent dumping margin.

According to the Department, this argument misstates the issue at hand.⁴¹ Furthermore, since the use of the financial expense ratio and its effect on the dumping margin has been upheld by a different NAFTA Panel, the Department considers that the issue has been adjudicated and cannot be either relitigated or revisited "by speculating on the results of the investigation using a different fact pattern."⁴²

³⁹ Third Redetermination at 19.

⁴⁰ *Id.*

⁴¹ *Id.* at 20.

⁴² *Id.*

Nevertheless, the Department goes on to state that the combination of peso devaluation and foreign currency debt did in fact recur in that, during the sunset review period, TAMSA did have long-term debt and there were additional peso devaluations.⁴³ The Department adds that there could be further peso devaluations and TAMSA may take on long-term debt in the future. On this analysis, the Department put forth a new methodology to calculate yet another hypothetical financial expense ratio in an effort to demonstrate that the significance of TAMSA's financial expense ratio to the dumping determination would not change as a consequence of the disappearance of the combination of the "other factors" raised by TAMSA.⁴⁴ Using its new methodology, the Department's conclusion was that there is no correlation between TAMSA's financial expense ratio and the likelihood of post-revocation continuation or recurrence of dumping.⁴⁵ Thus, according to Commerce, "the likelihood of dumping continuing or recurring is not dependent upon the level or even the existence of a financial expense ratio."⁴⁶

The record does not show a recurrence of the combination of the "other factors" that occurred at the time of the antidumping duty order investigation. Commerce's speculations that there *could be* further peso devaluations because such devaluations do occur and that TAMSA *may* take on foreign currency-denominated debt in the future because companies often do, are speculations that do not rise to the legal standard of "likely" occurrences. In addition, Commerce has unreasonably repeated its effort to change the original uncontested financial expense ratio methodology to reach an artificial conclusion. The financial expense ratio is simply a convenient way to express the basis for the original finding of a dumping margin. Since the record contains uncontested information as to TAMSA's *actual* financial expense ratio, The Department's use of yet another artificial ratio is not reasonable and not supported by the record, and therefore contrary to law.

⁴³ *Id.* at 20-24.

⁴⁴ *Id.* at 24-26.

⁴⁵ *Id.* at 31.

⁴⁶ *Id.*

E. TAMSA’s “Business Decision” Argument

Finally, TAMSA argues that the Department’s decision to unilaterally reject TAMSA’s “business decision” justification for the decrease in its post-order export volumes is further evidence of the Department’s decision to disregard the arguments made in support of TAMSA’s contention regarding the relevance of the “other factors” to the likelihood determination.⁴⁷

The Department found that TAMSA’s allegations regarding its business decision not to export in pre-order quantities were not credible. It explained that although TAMSA had obtained the benefit of a zero deposit rate during the last four months of the sunset review period, TAMSA did not take advantage of the zero deposit rate and the alleged absence of the “other factors” at a time when U.S. demand for OCTG was healthy.⁴⁸

The Panel has not altered its view of TAMSA’s business decision arguments. TAMSA has not produced evidence to demonstrate its contention. Simply stating that withdrawal from the market constituted a “business decision” will not rebut the presumption in favor of a likelihood finding, especially when the Department has made opposing reasonable assertions regarding the healthy market conditions that existed during the sunset review period.

IV. The Panel’s Decision

The Statute, the SAA, and the Sunset Policy Bulletin create a presumption in favor of the likelihood of the recurrence of dumping where post-order volumes decline. This presumption remains only a starting point for analysis. Absent any other considerations contained in the record, such a presumption might be the sole basis for a

⁴⁷ TAMSA Challenge Brief at 22.

⁴⁸ Third Redetermination at 15-18.

determination of recurrence of dumping, but not in cases where “other factors” have been raised by the exporters. In this case, the Department has once again failed to measure the effect of the decline in TAMSA’s expense ratio on its likelihood determination. In addition, Commerce has given no weight at all to the zero margins which it calculated during the review period, which according to Congress may have predictive value. Commerce’s continued evasion of a proper analysis together with its changed methodology render its Third Redetermination unsupported by substantial evidence and not in accordance with law.

Nonetheless, we deny TAMSA’s request that the Panel order the Department to enter a negative likelihood determination. As observed by the Softwood Lumber Injury Extraordinary Challenge Committee, ECC-2004-1904-01USA, paragraphs 122-123(2005):

(A NAFTA) panel’s power is similar to that of the CIT, which, like other courts performing judicial review functions, is *normally* limited to remanding an administrative agency’s decision for reconsideration in a manner not inconsistent with the court’s decision, and does not authorize the court to, in effect, reverse the agency’s decision: see *SEC v. Chenery Corp.* 318 U.S. 80 (1943).

However, it is also clear that a court need not remand when to do so “would be an idle and useless formality”, and that “*Chenery* does not require that we convert judicial review of an agency action into a ping-pong game”: *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 note 6 (1969), *per* Brennan J. Hence, it is common ground that, “in rare circumstances”, a court may direct the agency under review to enter a particular decision: *Florida Power and Light Co.*, *supra* at 744. None of the cases cited to us excludes from the category of “rare circumstances” situations in which the reviewing court has remanded for lack of substantial evidence.

At the present stage in this proceeding, the Panel is not prepared to find that

remand “would be an idle and useless formality”. Thus at this juncture we are not willing to direct the Department to enter a negative likelihood determination.

V. The Panel’s Remand Orders

For the reasons stated above, the Panel again directs the Department to:

1. Reconsider its likelihood determination and either issue a determination of no likelihood or give a reasoned analysis to support the conclusion that TAMSA’s dumping is likely to continue or recur on revocation of the antidumping duty order.
2. In the event that the Department reissues a likelihood determination, to explain in detail why the elimination of TAMSA’s foreign debt does not outweigh the likelihood presumption derived from the post-order reduction of TAMSA’s exports. In its evaluation of TAMSA’s “other factors,” the Department is directed to utilize the actual financial expense ratio established in the record of this proceeding. The Department is also directed to provide an explanation supported by sunset review law indicating why TAMSA’s zero margin calculations have no predictive value.

The Panel will not affirm the Department’s Fourth Redetermination if the Department continues to be disrespectful of the Panel’s review authority under Chapter 19 of the NAFTA by issuing affirmative remand determinations which cannot be supported by the record and that continue to rely on evidence that the Panel has already held to be insufficient.

The Department is further directed to issue its Final Redetermination on Remand within twenty days from the date of this Panel Decision.

ISSUED ON JANUARY 17, 2007

SIGNED IN THE ORIGINAL BY:

Daniel A. Pinkus

Daniel A. Pinkus, Chair

Hernan Garcia Corral

Hernán García Corral

Jorge Miranda

Jorge Miranda

Daniel G. Partan

Daniel G. Partan

Ruperto Patino Manffer

Ruperto Patiño Manffer