

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

DECISION OF THE PANEL

July 28, 2006

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 exemplary assistance

Appearances:

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

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

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

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

I. THE PANEL'S STANDARD OF REVIEW

The authority of this Panel flows from NAFTA 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.” Pursuant to this standard, the court (in this case, the Panel) does not engage in *de novo* review, and restricts its review to the administrative record.

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, id.*, at 842-43.]

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.

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)).

II. PROCEDURAL HISTORY

On Wednesday, March 1, 2006, the Department circulated a draft of its Second Redetermination on Remand (hereinafter “Draft”) to all Interested Parties for review.² The Department invited the Interested Parties to issue comments on the Draft, limiting their response period to five (5) days, two (2) of which fell on a weekend.³ TAMSA filed its comments on the deadline date: Monday, March 6, 2006.⁴ At the time, TAMSA expressed its disagreement with the Department’s reasoning and conclusion and specifically commented that the Draft: (1) “place[d] in doubt the role of the Mexican peso devaluation and TAMSA’s level of indebtedness in the original dumping determination;”⁵ (2) was “unclear in terms of the Department’s views as to whether TAMSA significantly reduced its indebtedness during the sunset period;”⁶ (3) did not clearly explain “the purpose for the recalculation of the financial expense ratios from the different periods;”⁷ and (4) engaged in the “[s]elective [i]ncorporation of [i]nformation into the [r]ecord to [s]upport the Department’s [s]tatements.”⁸

On March 17, 2006, the Department filed its Second Redetermination on Remand.⁹ This Redetermination did not address all the issues presented by TAMSA. On April 11, 2006, TAMSA filed its Submission in Support of its Rule 73(2) Challenge to

² Draft Second Redetermination on Remand Oil Country Tubular Goods from Mexico: Sunset Review (Mar. 1, 2006).

³ Letter with Attachment from Program Manager to Interested Parties re Draft Remand Redetermination Five Year Sunset Review (Mar. 1, 2006).

⁴ Letter from Law Firm of White & Case to Secretary of Commerce re TAMSA Comments on Draft Second Remand Determination (Mar. 6, 2006).

⁵ Id. at 2.

⁶ Id. at 3.

⁷ Id. at 3.

⁸ Id. at 3.

⁹ Second Redetermination on Remand Oil Country Tubular Goods from Mexico: Sunset Review (Mar. 17, 2006).

the Department of Commerce's Second Remand Determination further elucidating the issues previously raised.¹⁰ In response, the Department filed a Motion to Strike portions of TAMSA's brief under the exhaustion of administrative remedies doctrine.¹¹ TAMSA responded in disagreement.¹²

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. THE PARTIES' ARGUMENTS

1. DEPARTMENT OF COMMERCE

In its Motion to Strike portions of TAMSA's brief, the Department argues that TAMSA did not exhaust the administrative remedies available to it before contesting the agency's decision.¹³ Thus, the Department asks this Panel to strike the portions of TAMSA's Rule 73(2) Challenge which were "not presented to the agency [by TAMSA], despite having and exercising the opportunity to comment upon a draft of the agency's Second Redetermination."¹⁴

According to the Department, TAMSA "did not question the manner in which the agency calculated its cost of goods or foreign denominated debt level" when the Department circulated its Draft.¹⁵ Thus, "the agency did not consider, or address, TAMSA's *new* allegations that the agency's calculations are faulty" in its Second

¹⁰ Submission of TAMSA in Support of its Rule 73(2) Challenge to the Department of Commerce's Second Remand Determination (Apr. 11, 2006).

¹¹ Notice of Motion to Strike Portions of TAMSA's April 11, 2006 Rule 73(2) Brief and Investigating Authority's Rule 73(2) Brief (Apr. 27, 2006).

¹² See TAMSA's Response to the Investigating Authority's Motion to Strike Portions of TAMSA's Rule 73(2) Brief (May 8, 2006).

¹³ Notice of Motion to Strike Portions of TAMSA's April 11, 2006 Rule 73(2) Brief and Investigating Authority's Rule 73(2) Brief (Apr. 27, 2006), at 2-5.

¹⁴ Id. at 2-3.

¹⁵ Id. at 3.

Redetermination.¹⁶ And, according to the Department, this Panel should not consider these new allegations because “TAMSA’s failure to exhaust its administrative remedies should preclude it from presenting new information and argument to the Panel.”¹⁷

2. TAMSA

In its Response to the Department’s Motion, TAMSA argues that “the exhaustion doctrine is inapplicable in this case” because TAMSA did “put the Department on notice of TAMSA’s disagreement with the Department’s recalculation of the financial expense ratio and its concern that the Department was no longer using the actual financial expense ratios from the original investigation and its subsequent reviews.”¹⁸ In support, TAMSA cites its March 6 Comments on Draft Letter to the Department (hereinafter “March 6 Letter”).¹⁹

TAMSA also argues that there is no absolute requirement of exhaustion of administrative remedies in non-classification cases; that it did not know nor should it have known about the Department’s calculation error within the five (5) day comment period; and that requiring exhaustion in this case would result in a miscarriage of justice.²⁰

¹⁶ Id. at 3. (emphasis added)

¹⁷ Id. at 5, citing N.A.R., S.p.A. v. U.S., 741 F.Supp. 936, 944-45 (CIT 1990).

¹⁸ TAMSA’s Response to the Investigating Authority’s Motion to Strike Portions of TAMSA’s Rule 73(2) Brief (May 8, 2006), at 4.

¹⁹ See Id.

²⁰ TAMSA’s Response to the Investigating Authority’s Motion to Strike Portions of TAMSA’s Rule 73(2) Brief (May 8, 2006).

B. UNITED STATES ADMINISTRATIVE LAW

1. APPLICATION OF U.S. LAW

The authority of this Panel flows from NAFTA Chapter 19. Article 1904.2 requires that a panel apply the “statutes, legislative history, regulations, administrative practice and judicial precedents” upon which U.S. Courts would rely in reviewing a final determination of the Department of Commerce.

As stated by the Court of Appeals for the Federal Circuit, when the Court of International Trade reviews a final determination of the Department,

[p]roper subject matter jurisdiction does not finish the jurisdictional inquiry. In the Court of International Trade, a plaintiff must also show that it exhausted its administrative remedies, or that it qualifies for an exception to the exhaustion doctrine. See 28 U.S.C. § 2637(d) (2000) (“the Court of International Trade shall, *where appropriate*, require the exhaustion of administrative remedies”). [Consolidated Bearings Co. v. U.S., 348 F.3d 997, 1003 (Fed.Cir. 2003) (emphasis supplied).]

The phrase “where appropriate” in 28 U.S.C. § 2637(d) invokes judicially developed conditions for application of the doctrine requiring exhaustion of administrative remedies (hereinafter “exhaustion doctrine”).

2. APPLICATION OF THE EXHAUSTION DOCTRINE

Writing for a unanimous Supreme Court in 1941, Justice Black articulated a broad framework for judicial review of agency decisions:

Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifice of the rules of fundamental justice. ... [W]hile recognizing the desirability and existence of a general practice under which [reviewing] courts confine themselves to the issues raised below, ... [such practices] should not be applied where the obvious result would be a plain miscarriage of justice.” Hormel v. Helvering, 312 U.S. 552, 557-58 (1941) (case citations omitted).

The exhaustion doctrine generally requires a party to present its claims to the pertinent administrative agency for that agency's consideration of the claims before raising them to the reviewing court. See Timken Co. v. U.S., 166 F.Supp.2d 608, 627-28 (CIT 2001), citing to Unemployment Compensation Comm'n of Alaska v. Aragon, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."). As stated by the D.C. Circuit, the exhaustion doctrine serves four (4) primary purposes: (1) it ensures that interested parties do not disregard legally established administrative processes; (2) it protects the autonomy of the agency decision-making process; (3) it aids judicial review by permitting factual development of issues relevant to the dispute; and (4) it serves judicial economy by avoiding repetitious administrative and judicial fact-finding and by resolving claims without judicial intervention. Public Citizen Health Research Group v. Comm'r, FDA 740 F.2d 21, 29 (D.C. Cir. 1984) (case citations omitted). See also Timken Co. v. U.S., 166 F. Supp. 2d 608 at 628 (CIT 2001).

"While a plaintiff cannot circumvent the exhaustion doctrine's requirements by merely mentioning a broad issue without raising a particular argument, plaintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it." Timken Co. v. U.S., 166 F. Supp. 2d 608 at 628 (CIT 2001).

Application of the exhaustion doctrine is compulsory only in classification cases. See Alhambra Foundry Co. v. U.S., 685 F. Supp. 1252, 1256 (CIT 1988); Timken Co. v. U.S., 630 F. Supp. 1327, 1334 (CIT 1986). In non-classification cases its application must instead be determined on a case-by-case basis. Id. In such reviews, the CIT has identified several circumstances in which application of the exhaustion doctrine is not warranted. One such circumstance is where pursuing an administrative solution would not lead to relief or would yield "manifestly inadequate remedies." Alhambra Foundry Co. v. U.S., 685 F. Supp. 1252, 1256 (1988). Another is where a determination might be

based on a questionable record. Maui Pineapple Co., Ltd. v. U.S., 264 F.Supp.2d 1244, 1263-64 (CIT 2003); Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce, 696 F.Supp. 665, 673 (CIT 1988). In Maui, the CIT regarded as a questionable record one which contained a clerical error in Commerce's final margin program language, the correction of which Maui contended would cause Defendant Dole's final dumping margin to rise above the *de minimis* level. Maui Pineapple Co., 264 F.Supp.2d 1244, 1263-64 (CIT 2003). And in Serampore, the CIT regarded as a questionable record one which contained an alleged computer input error even though the alleged error did not fall within the scope of the remand. Serampore Indus. Pvt. Ltd., 696 F.Supp. 665, 673 (CIT 1988). There, the court stated that it was "loathe to affirm a determination that might be based on a questionable record." Id. The CIT has also decided to exercise the judicial discretion granted to it by 28 U.S.C. § 2637(d) "where the obvious result [of requiring the exhaustion of administrative remedies] would be a plain miscarriage of justice." PPG Industries, Inc. v. U.S., 702 F.Supp. 914, 916(CIT 1988) (citing Hormel v. Helvering, 312 U.S. 552, 558 (1941)).

3. PANEL'S EXHAUSTION DECISION

Since this is a not a classification case, the Panel is not compelled to apply the exhaustion doctrine. We must instead determine the doctrine's applicability according to the facts presented to us in light of the doctrine's primary purposes and of judicial precedents.

Here, TAMSA specifically commented on the Second Redetermination Draft in its March 6 Letter. At that time, TAMSA raised three interrelated issues. TAMSA asserted that the Draft: (1) "place[d] in doubt the role of the Mexican peso devaluation and TAMSA's level of indebtedness in the original dumping determination;"²¹ (2) was "unclear in terms of the Department's views as to whether TAMSA significantly reduced

²¹ Letter from Law Firm of White & Case to Secretary of Commerce re TAMSA Comments on Draft Second Remand Determination (Mar. 6, 2006) at 2.

its indebtedness during the sunset review period;”²² and (3) did not clearly explain “the purpose for the recalculation of the financial expense ratios from the different periods.”²³ These were not general comments, but brief summary statements of the arguments further elaborated by TAMSA in its Rule 73(2) Challenge.

The Panel finds that TAMSA’s March 6 statements were sufficient because they alerted the Department with reasonable clarity to the issues raised by TAMSA concerning changes in methodology applied by the Department in its Redetermination. That the issues raised by TAMSA in its March 6 Letter were stated with sufficient specificity is amplified by the limited amount of time granted to it by the Department for its review of the Draft.²⁴ The brief statements made by TAMSA on March 6 provided the Department with an opportunity to address the three arguments.

The purposes of the exhaustion doctrine are not undercut by this Panel’s decision not to apply it. By submitting its summary comments on the Draft on March 6, TAMSA did not disregard the draft comment procedure. By remanding the case, the Department’s decision-making autonomy is not being usurped by this Panel. By directing the Department to use a reasonable methodology in its Redetermination, the Panel aids the factual development of issues relevant to the dispute. And by trying to avoid repetitious administrative and judicial fact-finding and trying to allow the Department to resolve its claims without judicial intervention when it commented on the Draft, TAMSA properly sought to further judicial economy.

Furthermore, this Panel will not strike TAMSA’s arguments on the Department’s changed methodology because affirming a Department Redetermination that is based on a flawed and unreasonable methodology will not lead to lawful relief. Here, as in Maui and Serampore, TAMSA identified the error present in the record, namely the methodological flaws present in the Department’s re-calculation of the financial expense

²² Id. at 3.

²³ Id. at 3.

²⁴ Five (5) days, only three (3) of which were working days

ratio. And as in Maui, TAMSA also argued that correction of this error would change the Department's analysis. Thus, after a careful reading of the Department's exposition of its hypothetical methodology and analysis, the Panel concludes that, if borne out, the Department's methodological flaws would render its Redetermination record questionable. This Panel, like the CIT, is loathe to affirm a determination based on a questionable record, which would lead to a miscarriage of justice. Accordingly, the Panel rejects the Department's argument that TAMSA failed to exhaust administrative remedies, and denies the Department's motion to strike portions of TAMSA's brief.

IV. THE DEPARTMENT'S LIKELIHOOD DETERMINATION

Throughout this "sunset" review, TAMSA has argued that the Department failed to examine certain "other factors" relevant to its determination on the likelihood of continuation or recurrence of dumping as required by law.²⁵ TAMSA has claimed that the original dumping finding resulted from the convergence of two factors: (1) substantial long-term dollar-denominated debt, and (2) a massive peso devaluation, which impacted TAMSA's financing expense and Cost of Production (COP), causing TAMSA's COP to rise above home market prices; circumstances which TAMSA has argued never recurred in subsequent administrative reviews and are not likely to recur in the foreseeable future.²⁶

In the hearing held in Washington, D.C. on Nov. 17, 2004, the Department stated it had not considered these "other factors" because even though TAMSA had brought them to the Department's attention in the substantive response of its "Initiation of the Five-Year ('Sunset') Reviews" notice, it had raised them in response to the wrong question.²⁷

²⁵ TAMSA has based its claim on the statutory scheme pertinent to sunset reviews, *i.e.*, 19 U.S.C. § 1675a(c)(1)-(2), the *Statement of Administrative Action*, and the Department of Commerce's *Sunset Policy Bulletin*.

²⁶ See First Decision of the Panel, *Final Results of Sunset Review of Antidumping Duty Order on Oil Country Tubular Goods ("OCTG") from Mexico*, USA-MEX-2001-1904-03, at 17 (Feb. 11, 2005).

²⁷ See Hearing Transcript, *Final Results of Sunset Review of Antidumping Duty Order on Oil Country Tubular Goods ("OCTG") from Mexico*, USA-MEX-2001-1904-03, at 64-66 (Nov. 17, 2004).

After conducting a careful examination of TAMSA's substantive response, this Panel directed the Department to "determine whether the 'other factors' raised [by TAMSA in its] substantive response [were] relevant and, if so, how those factors would affect the Department's 'likelihood' determination."

In its First Redetermination on Remand the Department concluded: "[E]ven if the Department finds that [TAMSA's 'other factors'] are relevant to the Department's analysis, TAMSA has not demonstrated that these 'other factors' should change the Department's likelihood determination."²⁸ In the proceedings on remand, TAMSA had extensively argued that TAMSA no longer had large hard currency debt in the sunset review period, and that there is no basis to expect additional massive peso devaluation.

In the Panel's Second Decision on Remand we observed that the only basis for the Department's conclusion on the likelihood of continuation or recurrence of dumping was the presumption resulting from the post-order record of exports. Although the presumption would be sufficient to sustain a "likelihood" determination in the absence of offsetting "other factors" already deemed relevant by the Department, the Panel concluded that the Department had failed to provide an adequate reasoned analysis in support of its interpretation of the role played by TAMSA's hard currency debt. We noted that the Investigating Authority did not provide a sufficient analysis showing that the result of the confluence of factors raised by TAMSA, namely the high financial expense ratio found in the original investigation, was likely to recur. We based our observation on the record, which showed that the financial expense ratio calculated in the initial investigation was 39.5%, but fell to 1.96%, 1.96%, and 0% during three annual reviews. The Panel therefore remanded the matter to the Department directing the Department to determine whether the decrease in the magnitude of TAMSA's foreign

²⁸ First Redetermination on Remand, *Final Results of Sunset Review of Antidumping Duty Order on Oil Country Tubular Goods ("OCTG") from Mexico*, USA-MEX-2001-1904-03, at 47 (May 13, 2005).

currency denominated debt in the sunset review period outweighed the “likelihood” presumption that resulted from the decrease in TAMSA’s post-order exports.²⁹

Now, in its Second Redetermination on Remand, Commerce notes that during the review period TAMSA experienced significant debt and that the peso was significantly devalued several times. Thus, Commerce concludes that the combination of the “other factors” raised by TAMSA had recurred during the sunset review period because during the period three devaluations of at least 9% took place. In addition, in an appendix to its Second Redetermination on Remand, the Department shows that TAMSA had considerable debt during the review period³⁰ and states it finds nothing in the record to indicate that these circumstances will not recur in the future.

The Investigating Authority argues that the decline in TAMSA’s financial expense ratio should not be attributed to TAMSA’s lower debt, but to the increase in its cost of goods sold (COGS). As the financial expense ratio is derived from a fraction, the numerator of which is the actual financial expense (essentially, the interest paid on debt and the effect of currency revaluations on this interest), and the denominator of which is the COGS, the Department asserts that it was the increase in the denominator, rather than the decrease in the numerator that caused TAMSA’s financial expense ratio to decline. To arrive at this view, Commerce constructed an unnecessary “hypothetical” financial expense ratio that artificially eliminated all foreign exchange rate gains and losses but still adjusted the COGS according to the actual numbers in the record. According to the Department’s fictitious analysis, in 1997 (the second review period) the COGS was six times higher than the COGS in 1994.

Putting its artificial analysis into operation, the Department recalculated the financial expense ratio for the investigation period at approximately 20%, while the

²⁹ See Second Decision of the Panel, *Final Results of Sunset Review of Antidumping Duty Order on Oil Country Tubular Goods (“OCTG”) from Mexico*, USA-MEX-2001-1904-03, at 11 (Feb. 3, 2006).

³⁰ It is not clear from this appendix how much, if any, of this debt was dollar-denominated. In addition, the chart shows a significant decline in long-term debt during the period. In 1999, TAMSA apparently had no long-term debt.

financial expense ratio for the second, third, and fourth administrative review periods was 3.5%, 3.9%, and 3.3%, respectively. The Department then determined that the fall in the ratio was due to the change in the COGS.

The Investigating Authority also concluded that it is not possible to say at what level TAMSA might borrow in the future, and what the effect of subsequent peso devaluations might be.

Commerce also challenged TAMSA's argument that the high dollar-denominated debt and peso devaluations in the review period directly resulted in the dumping finding, noting that there have been instances in which the Department has found dumping where there were no sales below cost of production.

Petitioners continue to argue that there was not good cause for the Department's consideration of the "other factors", and that it is simplistic to argue that the Department's initial determination was based solely on the combination of these factors. There are, Petitioners assert, many other factors which could trigger a dumping finding.

Petitioners concluded that TAMSA has not demonstrated the effect of the "other factors"; and that the "other factors" do not affect the likelihood of dumping in view of the cessation of exports in commercial quantities that occurred during the review period, since the SAA requires that the decline in exports be taken as highly probative of the likelihood of the continuation or recurrence of dumping.

Petitioners stress the significance of the statements in the SAA and in the legislative history of the SAA giving rise to the "Sunset Policy Bulletin," specifically:

...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. [Quoting from the SAA, at 889; H.R. Rep. No. 103-826, vol. 1, at 63 (94); S. Rep. No. 103-412, at 52 (1994).]

According to Petitioners, the consequent failure of TAMSA to export in commercial quantities establishes that it could not export to the U.S. without dumping. This, Petitioners claim, raises the presumption that dumping would recur if the order were lifted. Petitioners continue by arguing that when the cash deposit rate declined to zero in 1999, it would have been reasonable to assume that TAMSA would have exported, if it could do so without dumping. Thus, Petitioners reject TAMSA's contention that it did not export because of market conditions, and argues, again, that cessation of TAMSA's exports even when market conditions were favorable, has not been properly explained.

TAMSA's position is that nothing in the Department's Remand Determination supports the "likely" standard. TAMSA argues that in light of the Panel's Decision on Remand, it is appropriate to focus on TAMSA's *actual* financial expense ratio during the review period. TAMSA agrees with Commerce that the ratio can be affected by a number of factors, but states that in this case, the actual ratio is significantly impacted by the actual interest paid and TAMSA's exchange rate losses caused by peso devaluations. TAMSA adds that no party has disputed the actual financial expense ratios for the three review periods, as noted by the Panel in its Second Remand. Hence, according to TAMSA, there is no basis for the Department to have constructed a "hypothetical" financial expense ratio and to have then based its "likelihood" analysis on this "hypothetical" ratio.

In its discussion on the "hypothetical" financial expense ratio, TAMSA disputes the conclusion that the sharp reduction in the ratio was due to an increase in the COGS. TAMSA asserts that the flaw in the analysis undertaken by the Department is that "the Department has compared a cost of goods sold expressed in 1994 pesos with a cost of goods sold in subsequent years expressed in December 31, 1999 pesos."³¹ If you take the 1994 COGS expressed in 1999 purchasing power, the increase in COGS during the review period is approximately 28%, and not the 282% claimed by the Department.

³¹ Submission of TAMSA in Support of its Rule 73(2) Challenge to the Department of Commerce's Second Remand Determination (April 11, 2006), p. 7 (emphasis omitted).

TAMSA shows that if you calculate the COGS in constant pesos of the same year, it is clear that the changes in COGS did not significantly affect the financial expense ratio, and that the dramatic reduction in the financial expense ratio from 1994 is the result of changes in the financial and debt servicing costs.

TAMSA also asserts that the Department has incorrectly analyzed TAMSA's debt during the review period, and that it has failed to appreciate the elimination of its long term debt by 1999, a time particularly probative of what might occur if the order were to be retroactively revoked, *i.e.*, effective August 2000.

V. PANEL DECISION

Notwithstanding Commerce's own determination that TAMSA has shown good cause for the consideration of "other factors," the Department has failed to support its likelihood of continuation or recurrence of dumping determination in light of the "other factors" presented. Commerce's Second Redetermination on Remand has failed to consider the decrease in TAMSA's foreign currency denominated debt during the Sunset review period as evidenced by the Department's consideration of a fictitious financial expense ratio in place of its consideration of the actual uncontested financial expense ratio in the record.

As noted in our previous decision, TAMSA's financial expense ratio for the three years in the review period was extremely low. This, notwithstanding that, as the Department has shown, TAMSA had considerable (presumably dollar-denominated) debt for several years during the review period.

The Department has unreasonably attempted to explain away this situation by constructing a fictitious financial expense ratio using unreasonable methodology. The Department's conclusion that the decrease in TAMSA's financial expense ratio was the consequence of increased COGS is an error based upon the Department's unreasonable methodology. Thus, the Department's "likelihood" determination is in turn a reflection

of its unreasonable methodology. Accordingly, the Panel concludes that the Department's "likelihood" determination is unreasonable and not in accordance with the law.

VI. REMAND ORDER

The Department is directed to reconsider its likelihood determination and either issue a determination of no likelihood or give a reasoned analysis to support a conclusion that TAMSA's dumping is likely to continue or recur. In particular, the Department is directed to explain why TAMSA's high financial expense ratio is likely to recur 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.

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

ISSUED ON July 28, 2006

SIGNED IN THE ORIGINAL BY:

Danie A. Pinkus
Daniel A. Pinkus, Chair

Ruperto Patino Manffer
Ruperto Patiño Manffer

Daniel G. Partan
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