

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 ANTIDUMPING DUTY
ADMINISTRATIVE REVIEW AND DETERMINATION NOT TO REVOKE

FILE NO. USA-MEX-01-1904-05

DECISION OF THE PANEL

January 27, 2006

Howard N. Fenton, Chair

Hector Cuadra y Moreno

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Appearances:

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Company, and Maverick Tube Corporation.

I. INTRODUCTION

History

This case has come before the current panel based on the request of two Mexican parties, Tubos de Acero de México, S.A. “TAMSA” and Hylsa S.A. de C.V. “Hylsa”, who have had antidumping duties imposed upon them by the United States Department of Commerce “the Department” or “Commerce”. The case initially began on June 30, 1994 when North Star Steel Company, an American company that produces Oil Country Tubular Goods “OCTG” filed a complaint with the Department of Commerce requesting the imposition of anti-dumping duties pursuant to Sections 731 and 732(b) of the Tariff Act of 1930 against TAMSA.¹ On July 20, 1994 the Department, after concluding that the Petition met all formal requirements, initiated its investigation.² The Period of Investigation “POI” was from January 1, 1994 to June 30, 1994.³ After discovery, the Department issued its preliminary determination on February 2, 1995, finding a dumping margin of zero based on a third country market comparison.⁴ After cost verification and a hearing, the Department published its Final Determination on June 28, 1995.⁵ In the Final Determination, the Department compared the U.S. sales prices to a constructed value for the Period of Investigation and concluded that TAMSA had a dumping margin of 23.79%.⁶ Pursuant to established Commerce Department practice, this rate was used to establish the cash deposit rate for “all other” Mexican exporters of OCTG, including Hylsa.⁷ TAMSA challenged the Final Determination under NAFTA, which resulted in a Panel Decision issued on July 31, 1996, remanding the matter to the Department to recalculate the margin.⁸ The dumping margin was subsequently reduced to 21.7%⁹ following the review.¹⁰

During the first year following the anti-dumping order, TAMSA did not ship OCTG to the U.S. and did not request a review.¹¹ Hylsa did have some small sales and requested a review, but the Department determined that the goods did not enter the United States until August 1996,

¹ See USA-MEX-95-1904-04, 7 (July 31, 1996).

² *Id.* at 7-8.

³ *Id.* at 6.

⁴ *Id.* at 14-15, see also 60 Fed. Reg. 6510 (Feb. 2, 1995).

⁵ *Id.* at 15-17, see also 60 Fed. Reg. 33567 (June 28, 1995).

⁶ *Id.* at 18, see also 60 Fed. Reg. 33567, 33575 (June 28, 1995).

⁷ 60 Fed. Reg. 33567 (June 28, 1995).

⁸ USA-MEX-95-1904-04 (July 31, 1996).

⁹ 62 Fed. Reg. 5612 (Feb. 6, 1997).

¹⁰ USA-MEX-95-1904-04 (July 31, 1996).

¹¹ USA-MEX-2001-1904-03, 3 (February 11, 2005).

after the close of the review period.¹² During the second administrative review requested by both TAMSA and Hylsa, August 1, 1996 to July 31, 1997, both were found to have a zero dumping margin.¹³ Notice to request an administrative review of the August 1, 1997 to July 31, 1998 period was published on August 11, 1998.¹⁴ Pursuant to TAMSA's request, the Department published a notice of initiation of review on September 29, 1998.¹⁵ Final Results of the third Administrative Review were published on January 11, 2000.¹⁶ TAMSA was found to have a zero dumping margin while Hylsa was not reviewed.¹⁷

In August of 1999 the Department published notice of an opportunity to request an administrative review for the period of August 1, 1998 to July 31, 1999.¹⁸ Both TAMSA and Hylsa requested reviews and revocation of the antidumping orders. On September 12, 2000 the Department published preliminary results of this fourth administrative review.¹⁹ The Department published the Final Results of the Antidumping Duty Administrative Review and Determination Not to Revoke on March 21, 2001.²⁰ In the Final Determination the Department found a dumping margin of zero for TAMSA, and a margin of 0.79% for Hylsa.²¹ The Department determined not to revoke the anti-dumping order with respect to TAMSA because the company did not ship in commercial quantities for the three (3) years prior to the revocation request.²² Because the Department found dumping by Hylsa, it did not address Hylsa's request for revocation as Hylsa did not have an absence of dumping for 3 consecutive years.²³ This Panel was instituted based on the requests of both TAMSA and Hylsa for review of the Department's determinations in the fourth administrative review and its decision not to revoke the antidumping orders.²⁴

¹² See *Oil Country Tubular Goods from Mexico: Notice of Termination of Antidumping Duty Administrative Review*, 62 Fed. Reg. 19309 (Apr. 21, 1997).

¹³ 64 Fed. Reg. 13962 (March 23, 1999).

¹⁴ 63 Fed. Reg. 42821 (August 11, 1998).

¹⁵ 63 Fed. Reg. 51893 (September 29, 1998).

¹⁶ 65 Fed. Reg. 1593 (January 11, 2000).

¹⁷ *Id.*

¹⁸ 64 Fed. Reg. 43649 (August 11, 1999).

¹⁹ 65 Fed. Reg. 54998 (September 12, 2000).

²⁰ 66 Fed. Reg. 15832 (March 21, 2001).

²¹ *Id.* at 15834.

²² *Id.*

²³ 66 Fed. Reg. 15832 (March 21, 2001).

TAMSA Arguments

TAMSA has requested this panel to review the Department's application of the commercial quantities requirement in determining whether or not to issue a revocation of the antidumping duty. TAMSA alleges that the Department has applied the commercial quantities requirement retroactively in this case and that the requirement was intended to be applied to cases in which there was an un-reviewed intervening year, not, as in this case where there were three consecutive review periods.²⁵ In the alternative, TAMSA argues that it shipped to the United States in commercial quantities.²⁶ TAMSA states that the market for OCTG was depressed and that the high cash deposit rates explained why its sales were less than during the POI.²⁷ TAMSA asserts that the commercial quantities requirement should be assessed to individual sales and not in the aggregate.²⁸

The Department, U.S. Steel, and IPSCO Tubulars, argue that TAMSA has failed to satisfy the requirements for revocation because it has failed to ship in commercial quantities for three consecutive years. They argue that the commercial quantities requirement is applicable during all three years that are the basis of revocation, not just during the intervening unreviewed years.²⁹ They also argue that the threshold requirement has not been retroactively applied to TAMSA, and is not "unfair."³⁰ The Department also argues that the commercial quantities requirement refers to the aggregate sales volume during the review period and not to individual sales as TAMSA contends.³¹

Hylsa Arguments

Hylsa argues that the export credit insurance that it purchased was incorrectly classified by the Department as a direct selling expense.³² Hylsa contends that the insurance was purchased not based on the volume of sales, but rather was set at a fixed amount for each year.³³ Hylsa does not contest that the premiums were increased when it added additional customers to

²⁴ 66 Fed. Reg. 22215 (May 3, 2001).

²⁵ See 66 Fed. Reg. 15832, 15834 (March 21, 2001).

²⁶ See *Id.*

²⁷ See *Id.*

²⁸ See *Id.*

²⁹ See *Id.*

³⁰ See 66 Fed. Reg. 15832, 15834 (March 21, 2001).

³¹ See *Id.*

³² See *Id.*

³³ See *Id.*

the policy, but not when it made additional sales to the customers already existing on the policy; Hylsa further stresses that no OCTG customers were added to the policy.³⁴

The Department contends that the export insurance was properly characterized as a direct selling expense because it is a direct and unavoidable expense of the sale.³⁵ The Department contends that although the insurance policy varies based on the number of customers, the number of customers is a rough indicator to the insurance company of the expected sales quantities.³⁶

Hylsa also argues that the Department double counted its packing costs. Hylsa contends that the packing costs were reported as both a packing cost and as part of the constructed value.³⁷ Hylsa contends that although the Department made adjustments to the double counting of the packing costs in its final determination, that nevertheless the packing costs were still overstated.³⁸ Hylsa also argues that the packing costs should only be based on the two months in which OCTG was actually produced, not during the twelve month period of review “POR.”³⁹

The Department asserts that the double counting of the packing costs was corrected, and that only a small portion of the packing costs overlapped and that it properly made the adjustments.⁴⁰ The Department argues that the average packing costs of all products produced during the year properly accounted for the restructuring and renovation of the packing line.⁴¹

Hylsa’s third argument is that the Department unreasonably applied different prices for the two sizes of OCTG produced during the POR.⁴² Hylsa contends that the Department should have applied an average of both products that it sold during the POR.⁴³ Hylsa’s accounting system does not allow the Department to distinguish production costs of different size products, and the two products were produced in the same mill, through the same process and sold in a single order for the same price.⁴⁴ Hylsa contends that the higher production costs during one month which dramatically affected the costs were due to a partial mill shutdown.⁴⁵ Hylsa argues

³⁴ *See Id.*

³⁵ *See* 66 Fed. Reg. 15832, 15834 (March 21, 2001).

³⁶ *See Id.*

³⁷ *See Id.*

³⁸ Hylsa’s Supplementary Materials at 6 (Non-Prop. Version, May 13, 2005).

³⁹ *Id.*

⁴⁰ Rule 57(2) Response Brief of the Investigation Authority at 47 (Pub. Version, November 5, 2001)..

⁴¹ *Id.* at 44.

⁴² Rule 57(3)Reply Brief of Complainant Hylsa at 13 (Non-Prop. Version, November 30, 2001).

⁴³ *See* 66 Fed. Reg. 15832, 15834 (March 21, 2001).

⁴⁴ *Id.*

⁴⁵ *See Id.*

that it is unreasonable to assign different costs to the two sizes that are otherwise identical and that undergo the exact same production process.⁴⁶

The Department argues that it has a consistent practice of calculating cost of manufacturing “COM” on a product specific basis.⁴⁷ The Department contends that “[a]lthough the two products are run through the same production process, a thinner product requires more processing to produce than a thicker one, and thus normally involves higher product related costs.”⁴⁸ The Department said that it was not “reasonable to average the costs incurred for all products in order to eliminate an unquantified, unrecorded cost difference.”⁴⁹

In its final argument Hylsa asserts, and Commerce acknowledges, that the Department calculated its dumping margins using the practice of “zeroing”, that is, treating a negative dumping margin as zero.⁵⁰ The result of this calculation was the margin found by the Department. Hylsa asserts that this practice is not mandated by the U.S. antidumping statute,⁵¹ and has been determined to be contrary to the obligations of the United States under the General Agreement on Tariffs and Trade by the WTO Dispute Settlement Body.⁵² Under the *Charming Betsy*⁵³ doctrine, Hylsa argues that the Department is obligated to act consistently with international law, especially when there exists no mandated conflict with U.S. municipal law.⁵⁴

The Department argues that “zeroing” is stipulated by the statutory language of the antidumping law, which “directs the Department to alleviate dumping by looking only to those sales where the price in the U.S. market falls below the price in the comparison market”.⁵⁵ Further, Commerce relies on Article 1904 (2) of NAFTA which states that a NAFTA panel sits in the place of a U.S. court, and must apply U.S. law when such panel reviews a determination by the Commerce Department.⁵⁶ Since U.S. courts have upheld the discretion of the Department to utilize zeroing in its dumping margin determinations, the Panel must similarly defer to the Department.⁵⁷ The Petitioners and the Department also argue that U.S. courts have specifically

⁴⁶ *See Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Rule 57(3)Reply Brief of Complainant Hylsa at 2 (Non-Prop. Version, November 30, 2001).

⁵¹ *Id.* at 2-3.

⁵² *Id.* at 5.

⁵³ *Murray v. Schooner Charming Betsy*, 6 Cranch 64, 2 L. Ed. 208 (1804).

⁵⁴ Rule 57(3)Reply Brief of Complainant Hylsa at 4-5 (Non-Prop. Version, November 30, 2001).

⁵⁵ Rule 57(2) Response Brief of the Investigation Authority at 35 (Pub. Version, November 5, 2001).

⁵⁶ Supplemental Brief of the Investigating Authority at 17 (Pub. Version, June 13, 2005).

⁵⁷ *Id.* at 15.

addressed the impact of WTO decisions on the validity of the zeroing practice, and have determined that the U.S. is under no present obligation to alter its practice.⁵⁸

Panel Proceedings

This Panel was finally constituted in December, 2004. It issued its first Order on April 13, 2005 granting the pending motion of the Department from December 2001 to file a Sur-Reply Brief, and incorporating the brief and reply from Hylsa into the record. The Order also gave TAMSA and Hylsa until May 13, 2005 to provide the Panel with supplementary materials to be considered. The Department and all other interested parties were given until June 13, 2005 to respond to the supplementary materials provided by TAMSA and Hylsa. On May 5, 2005, the Panel issued an Order stating that hearings would be held on July 20, 2005. The Panel issued an Order on July 13, 2005 requesting the parties to be prepared to discuss recent decisions by the WTO and a NAFTA panel during the July 20th hearings. The parties presented oral arguments before the Panel on July 20, 2005. The Panel subsequently issued an Order requesting additional information from the parties on July 28, 2005. The Department filed a Motion to Extend the Deadline for Filing a Response to the Panel's July 28, 2005 Order, which was granted by the Panel on August 16, 2005. On September 23, 2005, the Department filed two motions: a Motion for Leave to File a Reply to TAMSA's September 7, 2005 Response, and a Motion to Strike Portions of Hylsa's September 7, 2005 Response. On October 3, 2005, the Panel granted the Motion for Leave to File a Reply to TAMSA's September 7, 2005 Response, and denied the Motion to Strike Portions of Hylsa's September 7, 2005 response. On October 3, 2005 the Panel issued an Order revising the schedule by setting the date for the Panel to issue its decision as November 18, 2005. On November 18, 2005, the Panel issued an additional Order extending the time for its decision until January 18, 2006.

⁵⁸ *Id.* at 16-17.

II. PANEL'S JURISDICTION AND STANDARD OF REVIEW

This Panel has jurisdiction based on:

Chapter 19 of the North American Free-Trade Agreement [which] establishes a mechanism to replace domestic judicial review of final determinations in antidumping and countervailing duty cases involving imports from a NAFTA country with review by independent binational panels. When a Request for Panel Review is filed, a panel is established to act in place of national courts to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination.⁵⁹

Article 1904 of the NAFTA provides that “[t]he panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.”⁶⁰ Annex 1911 provides the standard of review that must be applied in the case of the United States, as the standard in “the relevant provisions of Title VII of the Tariff Act of 1930, as amended, and any successor statutes.”⁶¹ The Tariff Act of 1930 states that a 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.”⁶² Accordingly this panel will restrict its review to the administrative record and the legal arguments presented by the parties.

In determining the proper interpretation of a statute, the Panel must follow the standard that the Supreme Court of the United States set forth in *Chevron v. Natural Resources Defense Council*.⁶³

If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. . . . 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.⁶⁴

⁵⁹ 66 Fed. Reg. 22215 (May 3, 2001).

⁶⁰ North American Free Trade Agreement, Sep. 13, 1993, Part 7, Administrative and Institutional Provisions, Chapter 19, Review and Dispute Settlement in Antidumping and Countervailing Duty Matters, Article 1904(2).

⁶¹ *Id.* at Annex 1911.

⁶² 19 U.S.C. § 1516(a)(b)(1)(B).

⁶³ 467 US 837 (1984).

⁶⁴ *Id.* at 842-43.

Based on the court's analysis, the Panel may only overturn the agency's interpretation of the statute if it determines that the interpretation is unreasonable.⁶⁵ For the court to uphold the agency's decision it need not be the only reasonable interpretation, or indeed, even the most reasonable view. The fact that the court may have preferred a different approach is immaterial.⁶⁶

Judicial deference to agency interpretations of its own regulations is equally great.⁶⁷ For instance, the Federal Circuit has stated that:

When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order... The administrative interpretation...becomes...controlling...unless it is plainly erroneous or inconsistent with the regulation.⁶⁸

Both Congress and the courts have recognized that with regard to the antidumping laws, Commerce has wide discretion in implementing this complex statute. In the Senate Report accompanying the 1979 GATT reforms, the drafters noted that with regard to the antidumping laws Congress has "entrusted the decision making authority in a specialized, complex, economic situation to administrative agencies" (i.e. Commerce and the ITC)⁶⁹ With regard to the Commerce Department's interpretations of the antidumping laws, courts have found that judicial deference to the agency is at its peak.⁷⁰ As the Federal Circuit has observed, "the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor. The Secretary of Commerce...has broad discretion in executing the law."⁷¹

Articulations of this standard by the Court of International Trade have been equally deferential. The court (and thus the Panel) should defer to the Department's view "if it reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' express intent."⁷² Nor should the court "...reject the agency interpretation unless there are compelling reasons why it should not be followed."⁷³ Thus there is a strong bias in favor of the interpretations and applications of the antidumping law by the Department of Commerce.

⁶⁵ *Id.* at 843.

⁶⁶ *See Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

⁶⁷ *Oy v. United States*, 61 F. 3d 866, 873 (Fed. Cir. 1995).

⁶⁸ *Asociacion Colombiana de Exportadores de Flores v. United States*, 903 F.2d 1555, 1559-60 (Fed. Cir. 1990).

⁶⁹ S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979).

⁷⁰ *Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1516 (Fed. Cir. 1993). *See also Koyo Seiko Co., LTD. v. United States* (Fed. Cir. 1994).

⁷¹ *Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983).

⁷² *SKW Stickstoffwerke Piesteritz GmbH v. United States*, 989 F. Supp. 253, 256 (Ct. Int'l Trade 1997).

Although the Panel must uphold the agency interpretation if it is reasonable, this does not mean that an agency decision is upheld under all circumstances. “This deference, however, should in no way be construed as a rubber stamp for the government’s interpretation of statutory provisions.”⁷⁴ “At this stage, although we defer to agency statutory interpretations, ‘our judicial function is neither rote nor meaningless’ and we will reject an interpretation that ‘diverges from any realistic meaning of the statute.’”⁷⁵ The Panel has a duty to ensure that the agency has made “findings that support its decision, and those findings must be supported by substantial evidence.”⁷⁶ The agency also must “articulate [a] rational connection between the facts found and the choice made.”⁷⁷ “Normally, an agency rule would be arbitrary and capricious if an agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it cannot be ascribed to a difference in view or the product of agency expertise.”⁷⁸ Furthermore, “an administrative agency may not base its decision on the inadequacy of data collected,” to remedy this procedural defect the proper remedy is often a remand back to the agency in order to collect adequate data to support its decision.⁷⁹

The Panel must give deference to an agency interpretation of a statute or its own regulations; however, the agency also has a responsibility to give a well reasoned basis for its decision that is supported by substantial evidence in the record. Ultimately the level of deference given the Department’s determinations depends on “the thoroughness evident in [the agency’s] consideration, the validity of its reasoning, [and] its consistency with the earlier and later pronouncements...”⁸⁰ Thus the Panel has a vital role in assessing the legitimacy of the conclusion reached by the Department, but it is a role limited to adjudging the reasonableness of the determination in light of the various factors cited.

⁷³ Cabot Corp. v. United States, 694 F. Supp. 949, 953 (Ct. Int’l Trade 1988).

⁷⁴ A1 Tech Specialy Steel Corp. v. United States, 651 F. Supp 1421, 1424 (Ct. Int’l Trade 1986).

⁷⁵ Nuclear Energy Inst., Inc. v. EPA, 362 U.S. App. D.C. 204 (2004) (quoting Natural Res. Def. Council, Inc. v. Daley, 341 U.S. App. D.C. 119 (2000), and Mass. v. U.S. DOT, 320 U.S. App. D.C. 227 (1996)).

⁷⁶ Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962).

⁷⁷ *Id.*

⁷⁸ Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citation omitted).

⁷⁹ USX Corp. v. U.S., 11 C.I.T. 82, 86 (1987).

⁸⁰ Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (quoting Skidmore v. Swift, 323 U.S. 134, 140, (1944)), *aff’d* 810 F. 2d 1137 (Fed. Cir. 1987).

III. SUMMARY OF PANEL DECISION

TAMSA – Commercial Quantity

The panel upholds the Department’s determination that TAMSA did not meet the commercial quantity threshold for revocation of the antidumping order.

Hylsa

Packing Costs

The Panel remands the Final Determination to the Department with instructions for recalculating the amount of packing costs included in the calculation of constructed value.

Export Credit Insurance

The Panel upholds the Department’s inclusion of the cost of export credit insurance as a direct cost of sale.

Cost of Production

The Panel remands the Final Determination to the Department with instructions to recalculate the cost of production of the two sizes of pipe by averaging the costs and recalculating the constructed value.

Zeroing

The Panel upholds the Department’s rejection of the argument that zeroing is contrary to U.S. law.

IV. DISCUSSION

a. TAMSA

TAMSA argues that the Commerce Department’s application of the “commercial quantities” requirement to the request for revocation was contrary to law in that it cannot be used as a threshold test, and that alternatively it cannot be retroactively applied to TAMSA’s application. Second, TAMSA argues that the Department’s finding that TAMSA did not meet the commercial quantities requirement is unsupported by substantial evidence in the record. We will address each of these arguments in turn.

TAMSA's argument that the Application of the Commercial Quantities test to TAMSA is contrary to law

Threshold Requirement

TAMSA argues that the Commerce Department's regulations do not contemplate a *threshold* requirement that the exporter ship the subject merchandise in commercial quantities during the applicable review periods when seeking revocation of an order based upon an absence of dumping for a specified period of time.⁸¹ The pertinent regulation, 19 C.F.R. Part 351.222, explicitly mentions a commercial quantities requirement in two different places, firstly in Part 351.222(d) and secondly in Part 351.222(e).⁸²

In Part 351.222(d)(1), the regulation provides that "before revoking an order or terminating a suspended investigation, the Secretary must be satisfied that, during each of the three ... years, there were exports to the United States in commercial quantities of the subject merchandise to which a revocation or termination will apply."⁸³ While this language does appear to establish a threshold requirement, it is found in a subsection entitled, "Treatment of Unreviewed Intervening Years."⁸⁴ Accordingly, TAMSA contends that this is only a threshold requirement for years for which Commerce has not conducted a review.⁸⁵ Since Commerce actually conducted reviews for each of the years under consideration, and not just the first and last year of the period in question as is possible under Part 351.222(d), TAMSA argues that this section is wholly inapplicable to its case.⁸⁶

TAMSA's assertion is contrary to the plain language of the regulation, which explicitly requires that the Secretary be satisfied that exports were made in commercial quantities in *each* of the three years under consideration, not just the unreviewed year.⁸⁷ The general purpose of Part 351.222(d) is to create a work-saving mechanism under which the Secretary may consider revoking an order without having conducted an actual review of an intervening year, but this does not mean that the commercial quantity requirement is wholly inapplicable to a request for revocation under Part 351.222(b).

⁸¹ See 66 Fed Reg. 15832, 15834 (March 21, 2001).

⁸² See *Id.*

⁸³ 19 C.F.R. § 351.222(d)(1).

⁸⁴ *Id.*

⁸⁵ Rule 57(3) Brief of TAMSA at 5 (November 30, 2001).

⁸⁶ TAMSA's Response to the Panel's Order of July 28, 2005 at 3 (September 7, 2005).

⁸⁷ 19 C.F.R. § 351.222(d)(1).

Indeed, Part 351.222(d)(1) begins by stating that “[t]he Secretary *will not revoke an order* or terminate a suspended investigation *under paragraphs (b) or (c)* of this section *unless the Secretary has conducted a review under this subpart...*”⁸⁸. This clearly establishes the linkage between the requirements of the two subsections – including the requirement that sales be made in commercial quantities for *each* of the years under consideration when seeking revocation of an order under Part 351.222(b). Moreover, the Department emphasized this point when issuing the regulations in final form in 1997 when it rejected a comment requesting additional and more detailed certifications for years that were actually reviewed.⁸⁹

The second reference to commercial quantities, in 19 C.F.R Part 351.222(e)(1)(ii), requires the party requesting revocation to submit a “certification that, during each of the consecutive years referred to in paragraph (b) of this section, the person sold the subject merchandise to the United States in commercial quantities.”⁹⁰ This language also clearly shows that the commercial quantities requirement applies to all revocation requests under Part 351.222(b) and not just requests that include an unreviewed intervening year. However, TAMSA contends that to the degree a commercial quantities requirement is imposed by the regulations, under Part 351.222(e)(1)(ii) it is merely a procedural requirement that TAMSA fulfilled when it supplied the required certifications for each of the three years being reviewed.⁹¹ In other words, as TAMSA submitted the requisite certification, it argues that Commerce is precluded from determining whether TAMSA actually did ship in commercial quantities or, alternatively, that Commerce may only consider TAMSA’s shipments as one factor to be weighed with the rest of the evidence in determining whether it is likely to engage in dumping in the future.⁹² Commerce states that such a reading of “the regulations as requiring a certification of shipments in commercial quantities, but not require that the certification actually be true would render that requirement meaningless.”⁹³ Indeed, TAMSA’s proffered interpretation of the certification requirement of Part 351.222(e) again ignores the clear language of Part 351.222(d) that “before revoking an order...the *Secretary must be satisfied* that, during each of the three ...

⁸⁸ *Id.* (emphasis added).

⁸⁹ See 62 Fed. Reg. 27296, 27235 (May 19, 1997).

⁹⁰ 19 C.F.R. § 351.22(e)(1)(ii).

⁹¹ Supplemental Brief of TAMSA in Response to the Panel’s Order of April 13, 2005 at 4 (May 13, 2005).

⁹² *Id.* at 3.

⁹³ Supplemental Brief of the Investigating Authority at 4 (June 13, 2005).

years, there were exports to the United States in commercial quantities.”⁹⁴ TAMSA’s heavy focus on the caption of Part 351.222(d), which is at the core of these arguments, is misplaced and ignores the plain language of the regulatory scheme set forth in the actual provisions that comprise Part 351.222.

Accordingly, we conclude that the Commerce Department’s interpretation of the requirements of its regulations found in 19 C.F.R. Part 351.222, including the application of a commercial quantities requirement to each year of the period under consideration in a revocation request made under Part 351.222(b) is not erroneous but rather is consistent with the applicable U.S. law.

Retroactive Application

In a related alternative argument TAMSA claims that the application of the commercial quantities requirement was inappropriately applied retroactively in this case. TAMSA asserts that Commerce did not formally announce that the commercial quantities threshold requirement applied to each and every year being considered under a Part 351.222(b) revocation request – as opposed to only unreviewed intervening years – until it issued its Notice of Final Rulemaking regarding an amendment to Part 351.222(b) in 1999.⁹⁵ TAMSA participated in the three administrative reviews covering the periods beginning in August 1996 and concluding in July 1999. Therefore, TAMSA argues, it should reasonably expect the regulations and policies in effect in August 1996 to be applied to its case.⁹⁶ Additionally, TAMSA suggests that it would not have invested the substantial time and expense inherent in the administrative reviews had it known that this commercial quantities requirement would be applied to this case.⁹⁷

However, the commercial quantities requirement actually first appeared in the Notice of Proposed Rulemaking in 1996 regarding revocation of orders that eliminated the requirement that the Department actually conduct a review in each of the three years.⁹⁸ The Notice of Proposed Rulemaking stated:

However, to ensure that the lack of requests for reviews is not simply due to the absence of imports in commercial quantities, the Department will *require a certification* from a company seeking revocation (or each signatory in the case of a suspended investigation) *that it sold subject merchandise* to the United States in

⁹⁴ 19 C.F.R. § 351.222(d)(1). (Emphasis added).

⁹⁵ See 64 Fed. Reg. 51236 (September 22, 1999).

⁹⁶ Rule 57(1) Brief of TAMSA at 46 (September 4, 2001).

⁹⁷ TAMSA’s Response to the Panel’s Order of July 28, 2005 at 7 (Pub. Doc., September 7, 2005).

⁹⁸ See 61 Fed. Reg. 7308 (February 27, 1996).

*commercial quantities in each of the three ... years, including any unreviewed intervening years.*⁹⁹

The language of the proposed regulation quoted above, did not change between the Notice of Proposed Rulemaking and the issuance of the Final Rule. Significantly, these regulations were explicitly made effective to administrative reviews requested after July 1, 1997.¹⁰⁰

TAMSA did not participate in the first administrative review of the OCTG order, because it did not have any exports of OCTG to the United States during the period immediately following the original imposition of antidumping duties. The Department's Notice of Opportunity to Request Administrative Review for the second period of review of the OCTG order was not published until August 1997.¹⁰¹ Accordingly, while the second administrative review was aimed at examining exports between August 1, 1996, and July 31, 1997, the review was actually instituted after the revised regulations were published in proposed form, hearings held, comments solicited, final rules issued, and they became effective by their own terms. The third and fourth annual administrative reviews, of course, were also instituted and conducted after the date revised regulations became effective. TAMSA's subsequent revocation request under Part 351.222(b) was not made until August 1999, following the conclusion of the fourth administrative review.

The Department did issue proposed amendments to Part 351.222(b) and (c) in June of 1999,¹⁰² which became final in September,¹⁰³ in response to an adverse WTO panel decision in the *Dynamic Random Access Memory (DRAM) Semiconductors from Korea case*.¹⁰⁴ However, neither the WTO's *DRAM* decision nor the Department's amendments addressed the commercial quantities threshold requirement for a revocation request based upon an absence of dumping for three years, as stated in Part 351.222(d) and (e). In its responses to comments received concerning these amendments Commerce reiterated the preexisting threshold requirement for a

⁹⁹ *Id.* at 7320 (emphasis added).

¹⁰⁰ 19 C.F.R. 351.701; 62 Fed. Reg. 27296, 27417 (May 19, 1997).

¹⁰¹ See 62 Fed. Reg. 41925 (August 4, 1997).

¹⁰² See 64 Fed. Reg. 29818 (June 3, 1999).

¹⁰³ See 64 Fed. Reg. 51236 (September 22, 1999).

¹⁰⁴ WT/DS99/R (January 29, 1999).

revocation request, and specifically noted that the commercial quantities requirement was unaffected by the amendments.¹⁰⁵

Based on the foregoing, we reject TAMSA's assertion that the presence of the commercial quantities threshold requirement was not otherwise evident from the plain language of Part 351.222 as initially promulgated in 1996 and 1997.¹⁰⁶

TAMSA's argument that the decision not to revoke the anti-dumping order is unsupported by substantial evidence.

In addition to challenging the legal basis for denial of the revocation request by misapplication of the commercial quantities requirement, TAMSA argues that revocation was improperly denied because the conclusion is not supported by substantial evidence on the entire record. TAMSA offers two other reasons for this. Firstly, TAMSA argues that if the commercial quantities test is to be applied, it necessarily requires more than simply a comparison of aggregate volumes before and after the antidumping order. During each of the three administrative review periods leading up to its revocation request TAMSA engaged in a single transaction. TAMSA contends that its three individual transactions were comparable in tonnage, number of pieces, and length of pipe to other standard commercial transactions. It therefore asserts that it complied with the commercial quantities threshold requirement, notwithstanding the fact that these three post-order exports to the United States amount to less than 1% of its pre-order volumes and less than 2% of pre-order value. Secondly, TAMSA asserts that the Commerce Department failed to consider other factors beyond volume and value that would account for the precipitous decline in TAMSA's exports following the issuance of the antidumping order.

Precisely what constitutes "commercial quantities" for the purpose of a revocation request is not defined in either the Tariff Act or in the regulations themselves, nor has the term been the subject of litigation before the Court of Appeals or the Court of International Trade.¹⁰⁷ This then is precisely the kind of term that the Commerce Department is charged with

¹⁰⁵ 64 Fed. Reg. 51236, 51238 (September 22, 1999).

¹⁰⁶ Because we conclude that the commercial quantity standard was not applied retroactively, we do not have to address TAMSA's arguments that it was adversely affected by such application.

¹⁰⁷ Mexico unsuccessfully raised many of TAMSA's arguments regarding the commercial quantities threshold requirement in a parallel challenge to the facts of this case before the World Trade Organization in *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (WT/DS282) (June 20, 2005).

interpreting and applying in its administration of the law. In its 1996 Notice of Proposed Rulemaking, Commerce declared:

The Department will establish whether sales were made in commercial quantities based upon examination of the normal sizes of sales by the producer/exporter and other producers of subject merchandise. In deciding commercial quantities, the Department will consider natural disasters and other unusual occurrences which might affect the potential for production or exportation.¹⁰⁸

The announcement of the Final Rule in 1997 did not specifically elaborate further upon what constituted commercial quantities, but did reiterate that:

The underlying assumption behind a revocation based on the absence of dumping ... is that a respondent, by engaging in fair trade for a specified period of time, has demonstrated that it will not resume its unfair trade practice following the revocation of an order.¹⁰⁹

The Department begins its commercial quantity assessment by comparing pre-order and post-order volumes/values when they are present, absent “unusual occurrences,” in an effort to assess whether the temporary absence of dumping during the period of review is a sound indicator as to whether dumping might recur were the order revoked. This was described in more detail in the *Cut-To-Length Carbon Steel Plate from Canada* case – the first administrative determination applying the commercial quantities requirement in a Part 351.222 revocation proceeding:

[I]n determining whether the three years of no dumping are a sufficient basis to make a revocation determination, the Department must be able to determine that the company has continued to participate meaningfully in the U.S. market during each of the three years at issue. See *Pure Magnesium from Canada*, 63 FR 26147 (May 12, 1998) ... For purposes of revocation, the Department must be able to determine that past margins are reflective of a company's normal commercial activity. Sales during the POR which, in the aggregate, are an abnormally small quantity do not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping.¹¹⁰

Applying this approach to TAMSA, the Department ruled:

¹⁰⁸ 61 Fed. Reg. 7308, 7320 (February 27, 1996).

¹⁰⁹ 62 Fed. Reg. 27296, 27326 (May 19, 1997).

¹¹⁰ *Final Results of Antidumping Duty Administrative Reviews and Determination To Revoke in Part: Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada*, 64 Fed. Reg. 2173, 2175 (January 13, 1999).

Based on the evidence of record, and using the discretion granted to the Department, we determine that TAMSA did not sell the subject merchandise in the United States in commercial quantities in each of the three years cited by TAMSA to support its request for revocation. In the instant case, the total quantity and value are so small in each of the review periods, both in absolute terms and in comparison with the period of investigation, that the Department cannot conclude that TAMSA's sales to the United States during the second, third and fourth review periods reflected the company's normal commercial activities.

Therefore, the Department determines that TAMSA has not met the threshold criterion outlined in 19 CFR 351.222 requiring sales in commercial quantities in each of the three years forming the basis of the revocation request, because the sales for each of the three years cited were well below the benchmark for TAMSA's commercial behavior prior to the issuance of the antidumping order. Because TAMSA did not meaningfully participate in the market, its sales during these periods do not provide a reasonable basis for determining that it is unlikely that TAMSA will dump in the future. Therefore, we find that TAMSA does not qualify for revocation of the order on OCTG under 19 CFR 351.222(e)(1)(ii) and 19 CFR 351.222(d)(1).¹¹¹

Thus, the approach Commerce takes regarding the commercial quantities test reflects the presumptions underlying the revocation procedure found in Part 351.222(b) and the function of that particular section in the larger regulatory scheme. Part 351.222 provides several, alternative, means for requesting revocation of an antidumping order each with different requirements – but all aimed at assessing whether dumping will recur if the order is lifted.¹¹² As noted above, Part 351.222(b) creates a rebuttable presumption in favor of revocation when there has been no dumping over the course of three years of export sales in commercial quantities. Once the presumption in favor of revocation is properly triggered, the burden shifts such that the Department can only retain the order if there is “positive evidence” on the record supporting why continuing to impose the antidumping duties is necessary to offset dumping.¹¹³ This second prong of the Part 351.222(b) revocation analysis was never reached in TAMSA’s case, because its minimal post-order exports were deemed insufficiently reliable evidence of TAMSA’s “normal commercial practices” to be able to assess whether it could “meaningfully participate”

¹¹¹ *Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 66 Fed. Reg. 15832 (March 21, 2001), Issue and Decision Memorandum at Comment 1 (March 21, 2001).

¹¹² See 19 C.F.R. § 351.

¹¹³ See 19 C.F.R. § 351.222(b)(1)(i)(B) and (b)(2)(i)(C).

in the U.S. market without dumping, and therefore reliance upon the presumption that might otherwise be drawn from the three year absence of dumping was deemed inappropriate.

In comparison, a “changed circumstances” review under Part 351.222(g), for example, does not require satisfying any commercial quantity threshold requirements.¹¹⁴ However the burden on a party seeking revocation of an order is arguably higher under Part 351.222(g) because it also lacks the presumption in favor of revocation that is created when the threshold requirements of Part 351.222(b) are met. There is nothing that would prevent an exporter who does not satisfy the commercial quantities threshold from making its best case for revocation – without relying upon such a presumption – under some other provision, such as the Part 351.222(g) changed circumstances provision. Seeking to benefit from the presumption created by Part 351.222(b), however, requires satisfying the commercial quantities threshold requirement.

Determining whether the commercial quantities threshold is met is a decision that is made on a case-by-case basis, but the process begins by comparing pre and post-order volumes/values.¹¹⁵ Under the Department’s practice a significant drop in exports following the imposition of an order, absent “unusual occurrences” that might otherwise account for the decline, indicates that the exporter should not be *presumed* to be able to participate in the market without engaging in unfair trade practice if the order were revoked under Part 351.222(b).¹¹⁶ The commercial quantities requirement also prevents an exporter from engaging in strategic behavior that might undermine the legitimacy of the presumption built into Part 351.222(b), for example by making token sales at a high price for a period of time simply to satisfy the test.¹¹⁷ The Department’s practice in beginning its analysis in this manner reflects the not unreasonable assumption that the greater the post-order volumes/values are relative to pre-order levels, the less likely it is that the exporter is acting strategically.

The Department has applied the commercial quantities threshold requirement for a Part 351.222(b) revocation in more than fifty final administrative rulings and a further handful of cases that did not, or have not, proceeded beyond the preliminary result stage.¹¹⁸ These decisions

¹¹⁴ *Id.* at 351.222(g).

¹¹⁵ 66 Fed. Reg. 15832, 15834 (March 21, 2001).

¹¹⁶ *Id.*

¹¹⁷ Rule 57(2) Response Brief of the Investigating Authority at 25, (Non-Prop. Version, November 2, 2001).

¹¹⁸ *See* Response of the Investigating Authority to the Panel’s July 28, 2005 Order at 1-6 (September 7, 2005); Attachment to TAMSA’s Response to the Panel’s Order of July 28, 2005 (September 7, 2005); Exhibit 1 to US Steel

show that Commerce's analysis of the commercial quantities requirement is neither arbitrary nor capricious but rather based upon the facts of the case under consideration. While the Department's practice begins with the benchmark established by pre-order volumes/values, its approach involves more than a mechanical comparison with those levels. In slightly more than half of the decisions cited by the parties, the Petitioner satisfied the commercial quantities threshold requirement, sometimes even when sales were substantially less than pre-order volumes/values¹¹⁹.

However, the lower the volumes/values are during the three year period of review prior to making a revocation request, compared to pre-order levels, the more difficult it is to establish that the commercial quantities threshold requirement has been satisfied. The analysis employed by at least one party to a revocation proceeding suggests that "the Department generally finds that sales are not in commercial quantities in cases where the sales volume during the POR [period of review] is less than three percent of that during the POI [the period of investigation that led to the imposition of the antidumping order]."¹²⁰ Other decisions similarly show, for

Corporation's Response to the Panel's July 28, 2005 Order Requesting Additional Information from the Parties (September 8, 2005).

¹¹⁹ See e.g. *Notice of Final Results of Antidumping Duty Administrative Review, Final Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Review: Fresh Atlantic Salmon From Chile*, 68 Fed. Reg. 6878 (February 11, 2003) Issues and Decision Memorandum at Comment 6 (where the Department said that "post order shipments never declined to the point of being inconsiderable."); *Notice of Preliminary Results and Partial Rescission of the Antidumping Duty Administrative Review and Intent to Revoke Antidumping Duty Order in Part: Certain Pasta from Italy*, 65 Fed. Reg. 48467 (August 8, 2000)(where the Department said that "[a]lthough both the quantity and number...shipments to the United States of subject merchandise have decreased since the imposition of the antidumping duty order, they have remained at sufficiently high levels to be considered commercial quantities."); *Professional Electric Cutting Tools from Japan: Final Results of the Fifth Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order, in Part*, 64 Fed. Reg. 71411 (December 21, 1999) (where the Department stated "[a]lthough ... sales to the United States have decreased substantially since the imposition of the antidumping order, ... exports of subject merchandise to the United States ... remain significant and reflect ... normal commercial practice."); *Professional Electric Cutting Tools From Japan: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order, in Part*, 64 Fed. Reg. 43346, 43351 (August 10, 1999)(where the Department stated "although ... sales to the United States have decreased substantially since the imposition of the antidumping order...exports to the United States remain significant. Thus, regardless of any decrease in shipments during the course of this proceeding [the exporter] is currently selling in commercial quantities."). Moreover, while defending against similar arguments raised concerning the commercial quantities requirement in an unsuccessful WTO challenge to Commerce's decision not to revoke the order for TAMSAs, the Department publicly stated that it has "considered sales of 32 percent of annualized [pre-order] sales to have been made in commercial quantities and revoked on that basis." See *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico (WT/DS282)*, U.S. Second Written Submission, (July 9, 2004) at 18.

¹²⁰ See *Notice of Final Results of Antidumping Duty Administrative Review, Final Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Review: Fresh Atlantic Salmon From Chile*, 68 Fed. Reg. 6878 (February 11, 2003), Issues and Decision Memorandum at Comment 6; citing e.g. *Final Results of Antidumping Duty Administrative Review: Silicon Metal From Brazil*, 65 Fed. Reg. 7497 (February 15, 2000)

example, shipments in one year amounting to only 4.59% of pre-order values were insufficient to satisfy the commercial quantity requirement.¹²¹

In sum, the Department has interpreted and consistently applied the commercial quantities threshold requirement for a revocation request to be a flexible, case-by-case assessment not of the legitimacy of the individual transactions but rather as a tool to examine whether the proffered three year absence of dumping is a sufficiently reliable indicator of future activity as to entitle the Petitioner to the presumption in favor of revocation afforded by Part 351.222(b). Neither its use of pre-order volumes/values as a starting benchmark for this analysis, nor the skepticism which it applies to the validity of this indicator as the disparity between pre and post-order volume/values grows, is unwarranted or clearly erroneous. The commercial quantities requirement is not a mechanical test, and it is not being mechanically applied by the Department. When there is a disparity between the pre and post-order volumes/values, Petitioners are afforded the opportunity of offering further explanations or detailing “unusual circumstances” that might explain the disparity.¹²² In appropriate cases Commerce will adjust either the starting benchmark for comparison, or consider other explanations that might explain an apparent disparity. For example, in *Pure Magnesium*, the Department stated:

[T]he Department's threshold requirement does not mean . . . that the Department is effectively disqualifying companies from revocation if there is a sales drop-off following the imposition of an antidumping order. The issue that is analyzed by the Department is the magnitude of the drop-off. In this regard, the Department has expressed its intent to revoke an antidumping duty order even where the sales drop-off has been substantial, so long as the sales used to demonstrate a lack of price discrimination are reflective of the companies' normal commercial experience.

* * *

When determining whether a company's sales have been made in commercial quantities, we must look at each case on an individual basis. In many instances, when making such an assessment, we will use the original period of investigation as a benchmark for a company's normal commercial behavior.... Where a company has experienced a substantial and unusual change in business practice

(where the annualized volume sold during the period under review was less than 2 percent of the volume sold prior to the imposition of the order); and *Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part: Pure Magnesium From Canada*, 64 Fed. Reg. 12977 (March 16, 1999) (where the volume sold in each year under review was less than 0.5 percent of the volume sold prior to the imposition of the order).

¹²¹ See, e.g. *Preliminary Results of Third Antidumping Duty Administrative Review and Intent Not To Revoke Order in Part: Polyvinyl Alcohol From Taiwan*, 65 Fed. Reg. 35896 (June 6, 2000).

¹²² Rule 57(2) Response Brief of the Investigating Authority at 23 (Non-Prop. Version, November 2, 2001).

since the imposition of the order that may explain a substantial sales drop-off in U.S. sales, a more recent POR that is reflective of the company's normal commercial experience may provide a more appropriate benchmark.

* * *

A company seeking revocation need not prove that it is selling at the same levels at which it sold during the benchmark period; rather, the purpose of the commercial quantities analysis is to ensure on a case-by-case basis that the company's aggregate sales volume in the three years forming the basis of the revocation request are reflective of that company's normal commercial activity.¹²³

While conceding that there is a significant disparity between its pre- and post-order volumes/values, TAMSA also contends that market factors explain the precipitous decline in its exports to the United States during the three review periods.¹²⁴ TAMSA offers evidence of a high cash deposit rate and a collapse in the underlying oil market to support its assertion that shipping to the United States at pre-antidumping duty levels would have been “commercially irrational” and asserts that Commerce erroneously ignored these factors within the record when determining whether TAMSA met the commercial quantities threshold requirement.¹²⁵

It might not be unreasonable or clearly erroneous for the Department to conclude that at some point the disparity between the pre-order benchmark period and the post-order volumes/values demonstrated in the record is so great that there can be no adequate explanation of “unusual circumstances” that sufficiently explains the disparity that would be compatible with the purpose of the commercial quantities threshold requirement and the presumption in favor of revocation created under Part 351.222(b). Commerce might well establish that at that point it need not consider additional explanations for the disparity, refuse to apply the Part 351.222(b) presumption, and suggest that if a case for revocation is to be made it should be made under some other provision. That, however, is not what occurred with TAMSA.

¹²³ *Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Antidumping Duty Order in Part: Pure Magnesium From Canada*, 65 Fed. Reg. 55502 (September 14, 2000), Issues and Decision Memorandum at Comments 4, 5 and 9.

¹²⁴ *See* 66 Fed. Reg. 15832, 15834 (March 21, 2001).

¹²⁵ *See Id.*

To the contrary, the record shows that the Department considered TAMSA's arguments purporting to justify exporting at less than 1% of pre-order volumes, and rejected them in accordance with its practice in other cases.¹²⁶

TAMSA was given the opportunity to explain the "unusual circumstances" surrounding the precipitous decline in its exports. Commerce explicitly considered and explained its rejection of TAMSA's arguments, and its conclusion that TAMSA failed to satisfy the commercial quantities threshold requirement that is a prerequisite to earning the presumption in favor of revocation afforded under Part 351.222(b). While the Department conceivably could have considered TAMSA's rationalizations for its minimal sales in more detail, or been more elaborate in explaining its reasoning, the Department did appropriately consider TAMSA's arguments given that the disparity is as great as it was in this case.

Bearing in mind the deference owed to an agency in interpreting and applying its own regulations, we do not find that the commercial quantities requirement has been erroneously or illegally applied in this case, and that there is substantial evidence supporting the conclusion that TAMSA failed to satisfy the requirements necessary for the application of Part 351.222(b).

a. HYLSA

Introduction

Hylsa has raised four challenges to the Final Determination by the Department. First it argues that the packing costs were incorrectly calculated, second that export credit insurance was incorrectly treated as a direct selling expense rather than an indirect expense; third that the production costs of the subject good was incorrectly determined because the Department failed to average the costs of the different size pipe for the two months in which it was produced; and finally, that the Department's practice of "zeroing" is contrary to law. These arguments will be discussed below in that order.

Packing Costs

Hylsa disagrees with the way the Commerce Department took into account the costs of packing the subject matter goods when it calculated Hylsa's normal value based on constructed

¹²⁶ See, *Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 66 Fed. Reg. 15832 (March 21, 2001), Issues and Decision Memorandum at Comment 1.

value.¹²⁷ Pursuant to the Statute, Commerce calculated constructed value by adding to the COM, an amount for selling, general and administration expenses, profits, and an amount for packing expenses.¹²⁸ The disagreement is sharply reflected over the Department's use of weighted monthly average packing costs to capture restructuring costs of the packing line. The disagreement is less clear regarding the so called "double counting" of packing costs by the Department. These questions will each be addressed in turn.

First Issue: Restructuring of the Packing Line

Hylsa restructured its packing line in January during the POR.¹²⁹ The OCTG that was sold during the POR was packed in June and July, months after the restructuring and at a significantly lower cost as a result of the automation.¹³⁰ The Department decided to allocate Hylsa's costs associated with restructuring and renovating the packing line over the entire POR because it assumed that such costs benefited the entire POR, and not merely the months in which they were incurred.¹³¹ Commerce also asserted that its treatment of packing expenses was consistent with Hylsa's methodology for allocating depreciation costs.¹³²

In disputing this approach, Hylsa explained that OCTG products that Hylsa exported to the United States were all packed in the "packing in finishing" area, which was assigned cost

¹²⁷ On March 21, 2001, the U.S. Department of Commerce ("Commerce") published the *Final Results of the Antidumping Duty Fourth Administrative Review and Determination Not to Revoke in Part, regarding oil country tubular goods ("OCTG") from Mexico*. The review under consideration covered the period from August 1998 to July 1999. Since Hylsa did not have any sales of OCTG in the domestic market or in any third-country markets during the review period, in accordance with the requirements of the U.S. antidumping statute, the "normal value" for Hylsa's U.S. sales was based on a cost-based "constructed value".

¹²⁸ 19 U.S.C. § 1677b(e).

¹²⁹ Rule 57(3) Reply Brief of Hylsa at 12, (Non-Prop. Version, December 3, 2001).

¹³⁰ *Id.* at 11-12.

¹³¹ Commerce Issues and Decision Memorandum at 19.

"We consider costs associated with restructuring and renovating a facility or line to be related to more than just the month in which they are incurred. Although such expenses are infrequent, they benefit company operations for a longer period of time than normal operating expenses and therefore should be included in the cost build-up for anything produced during the longer period. Thus, we consider it unreasonable not to spread these costs across all products passing through the restructured and renovated line during the entire year." (emphasis added).

¹³² *Id.* "Although the company only produced the merchandise under review during two months of the POR, various COM elements were incurred outside this two-month period but were allocated to it (e.g., depreciation expense). Our treatment of the packing restructuring and renovation costs incurred early in the POR but allocated across all months throughout the year is analogous to such expenditures and consistent with Hylsa's cost reporting of similar items."

center number 2052 in Hylsa's normal accounting system.¹³³ The operations in such cost center were reorganized in January 1999 in order to increase the automation of the work and thus reduce labor costs.¹³⁴ At first, Hylsa calculated the reported unit packing cost by dividing the total annual cost of packing in its three packing cost centers by the total annual quantity of pipe products that it packed.¹³⁵ At verification, Commerce concluded that this methodology was not accurate, because it included costs for cost centers that were not involved in packing the subject merchandise.¹³⁶ Commerce directed Hylsa to recalculate the reported packing costs by dividing the total annual costs for cost center 2052 by the total annual quantity packed in that cost center.¹³⁷ Hylsa complied with this request.¹³⁸ After doing this however, Hylsa stated that it discovered that the use of annual costs was inconsistent with Commerce's cost-calculation methodology, which used only the costs for the months in which the product at issue was actually produced.¹³⁹

In its case brief, Hylsa argued that the Department should calculate packing costs for its OCTG products based on the costs in the months in which the OCTG was actually packed: June and July, and not using data for other months of the year in which no OCTG had been produced.¹⁴⁰ Hylsa stated that "there was substantial restructuring of Hylsa's operations in January 1999 (five months before Hylsa produced the OCTG under review) that reduced the packing labor costs for the cost center where OCTG was packed"¹⁴¹

¹³³See Sales Verification Report at 24. See also Section D Response of Hylsa (November 23, 1999) at Appendix D-16. ("Section D Response") (The other two packing areas are assigned different cost center numbers in Hylsa's accounting system.)

¹³⁴ See Verification of Sales and Constructed Value Data of Hylsa in the Fourth Antidumping Duty Administrative Review of OCTG from Mexico, from John K. Drury, Import Compliance Specialist, to Linda Ludwig, Program Manager (August 30, 2000) at 25 ("We asked why the labor cost decreased dramatically during the POR, to which the company responded that the area was reorganized and more of the process was automated."). ("Sales Verification Report").

¹³⁵ See Section C Response at Appendix C-10.

¹³⁶ Brief of Complainant Hylsa at 28 (September 5, 2001).

¹³⁷ See Sales Verification Report at 25.

¹³⁸ See *Id.*. See also Sales Verification Report Exhibit 16.

¹³⁹ Brief of Complainant Hylsa at 29 (September 5, 2001).

¹⁴⁰ *Id.* at 30.

¹⁴¹ Hylsa's Case Brief, at 17 (Prop. Doc. #51, October 16, 2001).

In its final determination, Commerce rejected Hylsa's claim and asserted that the use of a calculation based on annual costs was necessary in order to capture the costs "of implementing the reorganization of Hylsa's packing cost center."¹⁴²

Hylsa argues that the costs of cost center 2052 included only the following items: direct materials, indirect materials, equipment and building preservation, wages, salaries, office supplies, safety equipment and ideas implementation.¹⁴³ Thus, there was no line item for that cost center in which reorganization or restructuring costs might be recorded.¹⁴⁴ Hylsa said that a review of the monthly packing costs reported by the company for cost center 2052 contradicts the claim that the cost center costs include amounts for restructuring.¹⁴⁵ The labor costs for that cost center remained constant from August to December 1998.¹⁴⁶ They then fell in January 1999 — which was the month in which the reorganization occurred.¹⁴⁷ And, they fell to even lower levels in February, where they remained throughout the remainder of the review period.¹⁴⁸

Hylsa continued arguing that even if the reported costs for cost center 2052 had included restructuring charges, that would not have provided a basis for including the higher pre-restructuring labor costs in the calculation of the packing cost per unit for June and July.¹⁴⁹ If Commerce had identified additional restructuring costs which Hylsa had not reported as part of general and administrative expenses, it might have been reasonable for Commerce to allocate those restructuring costs over total production during the year.¹⁵⁰ But it would not have been reasonable to allocate the other costs in earlier months — which related solely to packing

¹⁴² Brief of Complainant Hylsa at 29 (Non-Prop. Version, September 5, 2001).

¹⁴³ See Sales Verification Exhibit 16 at 6-8. See also Section D Response at Appendix D-17-A.

¹⁴⁴ See Appendix D-17A to Hylsa's D Section Response, Fiche #73. By contrast, Hylsa states that there was an entirely separate cost center (2160) in which restructuring costs were recorded. The costs recorded in that cost center were included by Hylsa in the reported general and administrative expenses (which were calculated on an annual basis). And, more generally, Hylsa considers that it demonstrated at verification that all of the costs of the Tubular Products Division (which produced the OCTG) had been included somewhere in the cost calculations. See Section D Response at Appendix D-17. However, the Panel, cannot find any way to consider this assertion as proven, considering specifically that the record only shows a few entries for that cost center for the month of July 1999, which obviously does not allow for the possibility to analyze the impact the restructuring costs may have had.

¹⁴⁵ Brief of Complainant Hylsa at 31 (September 5, 2001).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 31-32

¹⁴⁹ *Id.* at 33.

¹⁵⁰ *Id.*

activities.¹⁵¹ That is, the wages for packing workers who were packing other types of pipe from August to December 1998 have no bearing on the cost of packing OCTG in June and July 1999.

In addition, Hylsa pointed out that in its initial questionnaire, the Department specifically asked the company to explain its financial accounting practices with respect to restructuring costs.¹⁵²

Hylsa responded as follows:

“Any costs incurred for modifications or improvements to existing productive assets would be included in the value of the asset that was modified or improved, and depreciated over the remaining estimated useful life of the asset. Other restructuring costs would be expensed during the period in which the costs were incurred.”¹⁵³

Under this practice, if the restructuring of Hylsa’s packing operations was a modification or improvement to an existing productive asset, the costs “would be included in the value of the asset that was modified or improved, and depreciated over the remaining estimated useful life of the asset.”¹⁵⁴

Hylsa also stated that the Department’s questionnaires did not specifically ask Hylsa to address the restructuring of its packing operations.¹⁵⁵ However, at verification, the Department’s verifiers did ask Hylsa orally to describe how the costs of the restructuring of the packing operations had been accounted for, and Hylsa explained that the equipment was upgraded and considered an overhead fixed asset.”¹⁵⁶ The Department verified the accuracy and reasonableness of this methodology and found no discrepancies.¹⁵⁷ There was no other evidence on the record concerning the nature of the restructuring to Hylsa’s packing operations or the accounting treatment of the restructuring costs. Likewise, Hylsa stated that there was an entirely separate cost center (2160) in which restructuring costs were recorded.¹⁵⁸ The costs recorded in that cost center were included by Hylsa in the reported general and administrative expenses (which were calculated on an annual basis).¹⁵⁹

¹⁵¹ *Id.*

¹⁵² See October 4, 1999 Initial Questionnaire at D-5 (Pub. Doc. #7, Fiche #05-06).

¹⁵³ See Hylsa’s Section D. Response, November 23, 1999, at 19 (Prop. Doc. #3, Fiche #68-76).

¹⁵⁴ *Id.*

¹⁵⁵ Rule 57(3) Reply Brief of the Complainant Hylsa at 12 (Non-Prop. Version, December 3, 2001).

¹⁵⁶ See Sales Verification Report at 25 (emphasis added) (Prop. Doc. #43, Fiche #105).

¹⁵⁷ See, e.g., Cost Verification Report at 25 (Prop. Doc. #36, Fiche #104).

¹⁵⁸ Rule 57(1) Brief of Hylsa at 31, n. 81 (Non-Prop. Version, November 5, 2001).

¹⁵⁹ *Id.*

Commerce for its part, insists that based on the evidentiary record, its decision to average the packing costs from cost center 2052 for the entire POR is reasonable. This methodology captures the restructuring and reorganization that Hylsa admitted occurred during the POR.¹⁶⁰ Commerce has previously included costs, such as maintenance costs, that benefit production during the entire period under investigation in the overall reported production costs.¹⁶¹ Although the packing of the subject merchandise occurred in June and July of 1999, Commerce found it appropriate to include the costs that it associated with the restructuring in the overall cost of production because of the benefits that accrued during the months in which the goods were packed.¹⁶²

Petitioners stated that the argument given by Hylsa that the costs associated with this automation were not the type of costs that would have been allocated to Cost Center 2052 at any time during the POR, and that the use of full POR packing costs does not achieve that which the Department intended to do, i.e., capture Hylsa's automation costs, was without merit.¹⁶³ Petitioners continue that if indeed Hylsa failed to include automation expenses in the costs reported to the Department, then its costs were understated, as was the dumping margin, and that Hylsa's reporting failure did not render the Department's methodology unreasonable.¹⁶⁴ Petitioners also asserted that the statute requires only that, in calculating cost of production "COP" and constructed value "CV", the Department use costs "during a period which would ordinarily permit the production" of the foreign like product or the merchandise, "in the ordinary course of business."¹⁶⁵ Since the period to be used is not further defined in the statute, nor does the statute dictate the methodology Commerce must use to calculate COP or CV, the Petitioners point to the Court of International Trade "CIT" position that the court (and thus the panel) must defer to the agency's reasonable interpretation of the statute.¹⁶⁶

The Petitioners believe that, consequently, the Panel must defer to the Department's construction of this statute so long as "it reflects a plausible construction of the plain language of

¹⁶⁰ Rule 57(2) Response Brief of the Investigating Authority at 44 (Pub. Version, November 5, 2001).

¹⁶¹ See *Notice of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan*, 61 Fed. Reg. 14064, 14073 (March 29, 1996) Hylsa Sales Verification Report, p. 25 (Prop. Doc. #43).

¹⁶² Rule 57(2) Response Brief of the Investigating Authority at 43 (Pub. Version, November 5, 2001).

¹⁶³ See U.S. Steel's Response Brief (Prop. Version, November 5, 2001).

¹⁶⁴ *Id.* at 32-33.

¹⁶⁵ 19 U.S.C. § 1677b(b)(3)(A),(e)(1).

¹⁶⁶ *Thai Pineapple Canning Indus.* 2000 Ct. Int'l. Trade LEXIS 17 at 9-10 (Feb. 10, 2000) citing *Chevron v. NRDC* (citations omitted).

the statute and does not otherwise conflict with Congress' express intent,"¹⁶⁷ and that, as the court held in *Thai Pineapple* "the statute permits Commerce to determine the period 'which would ordinarily permit the production' of the foreign like product or the merchandise, 'in the ordinary course of business.'"¹⁶⁸ The reasoning of the Petitioners leads them to state that, pursuant to the statute, the Department's "normal practice for a respondent in a country that is not experiencing high inflation is to calculate a single weighted-average cost for the entire POR."¹⁶⁹ There was no suggestion in this case that Mexico experienced high inflation during the POR. Indeed, the Department's antidumping duty questionnaire in this case instructed that the "COP and CV figures that you report . . . should be calculated based on the actual costs incurred by your company during the period of review."¹⁷⁰ As the Department noted in its final results, "Although the company only produced the merchandise under review during two months of the POR, various COM elements were incurred outside of this two-month period but were allocated to it (e.g., depreciation expense)."¹⁷¹ "Hylsa claims that, in preparing its response, the company actually allocated monthly depreciation costs only to products produced during that month."¹⁷² "If Hylsa did in fact use such a methodology, it was wrong to do so. The Department's practice is to base costs — including depreciation costs — on those incurred during the full POR. Hylsa's own reporting deficiencies, however, do not render unreasonable the Department's methodology."¹⁷³ The Department's treatment, therefore, of the packing costs "incurred early in the POR but allocated across all months throughout the year is analogous to such expenditures and consistent with Hylsa's cost reporting of similar items."¹⁷⁴

One of the reasons the Department argues it basis packing costs upon the weighted-average costs incurred during the entire POR is that using monthly costs would be distortive. *In Welded Stainless Steel Pipe from Malaysia* for example, respondent KT "reported an average home market packing labor expense for the POI based on the packing labor expenses incurred

¹⁶⁷ SKW Stickstoffwerke Piesteritz GmbH, 989 F. Supp. at 256.

¹⁶⁸ *Thai Pineapple Canning Indus*, 2000 Ct. Int'l. Trade LEXIS 17 at 9-10 (Feb. 10, 2000).

¹⁶⁹ *Brass Sheet and Strip from the Netherlands* 65 Fed. Reg. 742, 747 (Dep't Commerce Jan. 6, 2000).

¹⁷⁰ Questionnaire at D-2, PR. 7.

¹⁷¹ U.S. Steel's Response Brief at 34 (Prop. Version, November 5, 2001).

¹⁷² Hylsa's Brief at 30, n. 79.

¹⁷³ U.S. Steel's Response Brief at 34, n. 121 (Prop. Version, November 5, 2001).

¹⁷⁴ *Id.* at 34.

during each month of the period.”¹⁷⁵ Petitioner in that case, however, argued that “the Department should use the monthly packing labor expenses in calculating KT’s home market packing expenses instead of the POI average.”¹⁷⁶ In response, KT argued that: using monthly packing labor costs would distort KT’s per unit packing expenses.¹⁷⁷ KT maintains that it is appropriate to spread packing labor expenses over the sales quantities during the entire six-month POI because of fluctuations in monthly sales volumes. KT asserts that this methodology yields a more representative per unit expense for the POI because packing labor is a fixed cost.¹⁷⁸ The Department agreed with KT, stating that:

...because KT’s packing labor expenses are fixed, they do not vary by sales volume. Therefore, fluctuations in the monthly sales volumes create differences in the monthly average expense amounts. Because these fluctuations in sales expenses are not translated into changes in the per unit prices, they distort the margin calculation. We agree with KT that using the POI-average minimizes the effect of these fluctuations. Therefore, we find that the POI average is more representative of KT’s per unit packing labor costs.¹⁷⁹

The Petitioners assert that the methodology proposed by Hylsa — using only two months of packing costs — would result in similar distortions.¹⁸⁰ First, it would permit fluctuations in monthly sales volumes to distort per-unit packing costs.¹⁸¹ Second, to the extent Hylsa’s packing expenses at the beginning of the POR include the costs associated with automation, use of only June and July costs would unfairly exclude this cost element.¹⁸² In effect, for the Petitioners, Hylsa seeks to reap the benefits of lower labor costs in June and July, without recognizing the automation costs incurred in January that made those labor savings possible, and therefore its proposed methodology is unreasonable.¹⁸³

However, according to the Petitioners, even if the Panel were to find Hylsa’s methodology to be reasonable, it cannot reverse the Department’s determination unless the

¹⁷⁵ *Welded Stainless Steel Pipe from Malaysia* 59 Fed. Reg. 4023, 4028 (Dep’t. Commerce Jan. 28, 1994) (final determ.) (emphasis added).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ U.S. Steel’s Response Brief at 35 (Non-Prop. Version, November 5, 2001).

¹⁸¹ *Id.* at 34-35.

¹⁸² *Id.* at 36.

¹⁸³ *Id.*

Department's methodology was unreasonable.¹⁸⁴ Hylsa has failed to show that the Department's established practice of basing costs on the full POR is based on a impermissible construction of the statute.¹⁸⁵ In the Petitioners' view, the Department intended to properly account for the restructuring costs in Hylsa's per unit packing costs and any failure by the Department to do so would have resulted in the packing costs being understated.¹⁸⁶ Moreover, the Department's calculation of the packing costs for the entire POR was in accordance with its normal practice and Hylsa's arguments to the contrary must be rejected.¹⁸⁷

This Panel does not consider that this is a plausible construction of the plain language of the statute nor a reflection of Congress' intent. First, there is no evidence in the record supporting the assumption that the restructuring costs were allocated to the monthly packing costs during the POR, including the months of August, September, October, November and December 1998 (prior to the restructuring). Second, there is evidence that during the referenced months no OCTG products were packed. Third, Commerce did not consider in its calculation the fact that in January 1999 a restructuring of the packing line was carried out, which changed the packing process for OCTG, making it more automated. And fourth, there is evidence that the subject goods were packed in June and July 1999 under a new packing process. Therefore, this Panel cannot understand Commerce's assertion that it arrived at a more representative OCTG unit expense by using this methodology, which did not reasonably reflect the actual costs associated with the production and sale of the merchandise.

The Panel considers that in calculating OCTG packing costs, Commerce did not make a reasonable interpretation of the statute that requires it to use costs "*during a period which would ordinarily permit the production*" of the foreign like product or the merchandise, "*in the ordinary course of business*"¹⁸⁸ in calculating COP and CV. This Panel acknowledges that Commerce is granted some level of deference, but in the present case, the period in which the packing of OCTG took place was clearly identified in the record: June and July 1999. It was during these months that the packing of the subject goods occurred, and therefore in the ordinary course of business, and in the Panel's opinion this is the period that Commerce should consider to make its calculations. The Department's explanation for not using this period, to capture the

¹⁸⁴ *Id.*

¹⁸⁵ U.S. Steel's Response Brief at 36 (Non-Prop. Version, November 5, 2001).

¹⁸⁶ *Id.* at 32-33.

¹⁸⁷ *Id.* at 33-34.

costs of restructuring, is not supported by the record, and cannot justify its choice of approaches. Moreover the Department itself acknowledges that its general practice may not be the most appropriate "...in unusual cases where this preferred method would not yield an appropriate comparison."¹⁸⁹ The present case presents one of those circumstances, especially given the fact that the record shows clearly that the subject merchandise was manufactured and packed only in June and July 1999.

Based on the foregoing, this Panel concludes that:

- (i) there is evidence in the record that Hylsa informed Commerce that the costs of the restructuring were classified as overhead costs and that they were included in the "cost of manufacture" and that Commerce did not take that information into account, nor did it take the proper steps to assess its truthfulness ;
- (ii) there is no evidence in the record to support the assertion that the materials and labor costs for cost center 2052 include any restructuring costs. To the contrary, the record indicates that Hylsa showed that there is no line item for that cost center in which reorganization or restructuring costs might be recorded;
- (iii) Commerce's methodology to recalculate Hylsa's packing costs by dividing the total annual costs for cost center 2052 by the total annual quantity packed in that cost center, whether OCTG products were packed or not, in order to reflect restructuring costs, is not

¹⁸⁸ 19 U.S.C. § 1677b(b)(3)(A),(e)(1).

¹⁸⁹ See, e.g., *Brass Sheet and Strip from the Netherlands* (dividing POI into three periods because of the effect metal price fluctuations had on the margin calculations and finding that metal portion of price was a pass through); *Brass Sheet and Strip Italy* (using monthly costs to resolve the distortive effects the fluctuating metal prices had on the margin calculations); *Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 64 Fed. Reg. 30664, 30676 (June 8, 1999) (concluding that weighted-average costs for two periods were permissible where major declines in currency valuations distorted the margin calculations); *Final Determination of Sales at Less than Fair Value: Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8909, 8925 (February 23, 1998) (stressing that the Department will utilize shorter cost periods if markets experience significant and consistent price declines); *Final Determination of Sales at Less than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 58 Fed. Reg. 15467, 15476 (March 23, 1993) (determining that the Department may use weighted-average costs of shorter periods where there exists a consistent downward trend in both U.S. and home market prices during the period); *Final Determination of Sales at Less than Fair Value: Erasable Programmable Read Only Memories from Japan*, 51 Fed. Reg. 39680, 39682 (October 30, 1986) (finding that significant changes in the COP during a short period of time due to technological advancements and changes in production process justified the use of weighted-average costs of less than a year)."

consistent with the evidence existing in the record - because such cost center does not include any restructuring costs - or with Commerce's practice, since there are cases where Commerce has applied weighted average costs for periods of less than a year;

The Panel concludes therefore that the Department's methodology used to calculate packing costs overstated Hylsa's actual costs, and it is necessary to remand the matter to the Department to correctly determine these costs.

Second issue: Double Counting of Packing Costs

This Panel is presented with an issue that seems to defy easy description. Not only do the parties not agree on the nature of the problem, if there is one, but Hylsa itself has taken different positions, appearing for all intents and purposes to waive this argument in its November 30, 2001 reply brief in this proceeding, and in its May 13, 2005 submission to the Panel, only to resurrect it in its September 7, 2005 response to the Panel's request for additional information.

In summary, Hylsa initially reported its packing costs as part of the cost of manufacture, overstating it in fact by including packing costs for non-subject goods because of the way it kept its records.¹⁹⁰ The packing costs of the subject goods were also included as separate costs to be added into the final constructed value.¹⁹¹ Hylsa discovered its error and requested the Department to eliminate the broader packing costs from the COM.¹⁹² The Department acknowledged this "double counting" and represented that it had calculated a formula to correct the problem in its final determination.¹⁹³ In its initial brief in this matter, Hylsa objected to this formula as inadequate to fully eliminate the double counting.¹⁹⁴ The Department defended its formula, but apparently misstated what in fact it had done. Instead of using the formula, the Department had, in fact, removed all of the packing costs initially reported as part of the COM, leaving only the subject matter packing costs added in to the constructed value. Hylsa acknowledged this in its reply brief,¹⁹⁵ urging however that annualizing the packing costs still

¹⁹⁰ See Hylsa Proprietary Brief at 27-29 and accompanying notes (September 4, 2001); Investigating Authority Proprietary Brief at 44-47 and accompanying notes (November 5, 2001).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ "Upon reviewing the underlying data, however, we have found that it appears that Commerce's explanation of its final determination was not correct. In particular, it appears that Commerce did not deduct only the costs reported in

constituted a form of double counting.¹⁹⁶ This is where the matter stood when this Panel was constituted.

In response to the Panel's request for updated filings, Hylsa reiterated its argument about overstated packing costs, repeating that the overstatement constituted a form of double counting.¹⁹⁷ Following the oral arguments, this Panel requested the parties to provide it with references in the record that showed where and how "the costs of restructuring the packing process..." were taken into account, to assist the Panel in determining if these costs were accurately reflected in the Departments constructed value calculation.¹⁹⁸ In response to this request, Hylsa returned to some of its arguments from its original brief about the formula the Department had developed to adjust the packing costs included in the COM, but shed no light on specific references to restructuring costs.¹⁹⁹

It is the Panel's position that Hylsa has dropped its argument that the Department double counted packing costs except insofar as the higher annualized costs inflate the actual packing costs. The language of Hylsa's reply brief and its statement to this panel leave little room for doubt that as a separate issue, Hylsa chose not to pursue it. The double counting aspects of the higher annualized packing costs have been fully developed by the Panel's discussion above, and any double counting will be corrected by the Department's calculations following our remand.

the "PACKU" field from its cost of manufacture calculation. Instead it appears that Commerce deducted the total materials and labor costs incurred in cost center 2052 during the relevant month (*See* Sales Verification Exhibit 16). To the extent that the arguments presented in our initial brief were based on Commerce's incorrect explanation, we hereby withdraw them." Hylsa Proprietary Reply Brief at 14 (November 30, 2001).

¹⁹⁶ "At the same time, Commerce also used an inflated figure for "packing costs"— which greatly exceeded the actual materials and labor costs incurred by Hylsa to pack the OCTG products under review – ostensibly to account for the same restructuring costs. In other words, Commerce double-counted the restructuring costs, by including the actual restructuring costs in the cost of manufacture, and by using inflated costs that allegedly reflect the same restructuring costs in its "packing cost" calculation." *Id* at 15.

¹⁹⁷"In this regard, it should be noted that the overhead costs of the packing cost center – including these restructuring costs – were included in Commerce's calculation of the cost of manufacture. Consequently, Commerce's decision to include overstated packing labor costs to "reflect" the restructuring costs actually resulted in double-counting of the restructuring costs." Hylsa Response to Panel Request for Supplemental Materials at 6-7 (May 13, 2005).

¹⁹⁸Panel Order, July 28, 2005 ("The exact location and reference in the record to any and all information concerning Hylsa's packing costs, specifically costs of the restructuring of its packing process for the subject goods, related labor costs, and how those figures do or do not show double counting of packing costs by the Department.")

¹⁹⁹ Hylsa's Proprietary Response to the Panel's July 28 Request for Additional Information at 9-12 and accompanying notes and appendices (September 7, 2005).

Export Credit Insurance

This Panel has been asked to determine whether Commerce properly classified the cost of Hylsa's insurance coverage against default by export customers as a direct selling expense. In its initial Brief Hylsa argued that during the Period of Review it held a separate OCTG insurance policy providing coverage against default by export customers.²⁰⁰ The premium for this insurance was set at the start of each year, based on Hylsa's estimated export sales to a designated list of customers²⁰¹ and was not adjusted if the actual sales to those customers differed from the estimated amounts. Hylsa argued that this was a fixed cost that should be treated as an indirect expense by the Department.²⁰²

The Questionnaire sent by Commerce to Hylsa explains that the same expense may be classified as fixed or variable depending on how the expense is incurred. The consequences of this classification can be significant. Direct selling expenses can be used to adjust normal value differences in the circumstances of sale between the U.S. market and the comparison market, but indirect selling expenses are deductions from normal value if the seller qualifies for a constructed export prices offset.²⁰³

In the challenged decision Commerce established that it has been its practice to treat insurance against non-payment as a direct selling expense.²⁰⁴ In a recent case, the Department stated that "export credit insurance is not a movement expense under section 772(c)(2)(A) of the Act; rather it is a direct selling expense that we would treat as a circumstance of sale ("COS") adjustment."²⁰⁵ Hylsa argued in its Brief²⁰⁶ that in *Flat Steel Products from France*, Commerce decided that credit insurance expenses are direct selling expenses when they are assessed on a sale-by-sale basis and are indirect expenses if they cannot be tied to specific claims. Hylsa

²⁰⁰ Brief of Complainant Hylsa at 9 (September 5, 2001).

²⁰¹ See Section C Response at 23-24

²⁰² Brief of Complainant Hylsa at 36 (September 5, 2001).

²⁰³ Compare 19 U.S.C. § 1677b(a)(6)(C)(iii) and 19 C.F.R. § 351.410(b) to U.S.C. § 1677(a)(7)(B) and 19 C.F.R. § 351.412(f).

²⁰⁴ See *Notice of Preliminary Results of Antidumping Administrative Review: Certain Pasta from Turkey*, 64 FR 43157, 43159 (August 9, 1999).

²⁰⁵ See *Notice of Final Results of Antidumping Duty review: Porcelain-on-Steel Cooking Ware from the People's Republic of China*, 65 FR 31301 (May 17, 2000), and accompanying Decision Memorandum, at Comment 4.

²⁰⁶ See Brief of Complainant, at 37.

asserted that in the present case, the credit insurance premium was paid annually, regardless of whether any claims were made, and the expenses could not be tied to specific sales.²⁰⁷

Commerce assumed that variations in customers were equivalent to variations in sales and therefore considered Hylsa's credit insurance as a direct expense; that is a direct and unavoidable consequence of the sale. The Petitioners IPSCO and U.S. Steel concurred with Commerce's arguments.²⁰⁸ U.S. Steel cited numerous cases where the Department treated export insurance as a direct expense to support its position.²⁰⁹

Having studied the cases cited by the Parties, the Panel notes that they all consider insurance costs as a direct selling expense although they do not change the rationale articulated in *Flat Steel Products from France*, nor do they provide any significant factual detail to distinguish them from that case or each other. They do demonstrate a consistent practice by the Department of Commerce in the sense of general treatment of export insurance expenses.

Commerce argues that the administrative record demonstrates that the insurance coverage did bear a direct relationship to the particular sales in question.²¹⁰ The reason for that assertion is that the amount of the premium Hylsa paid was established based both on the number of customers identified, and on specific levels of coverage for each customer. Since Hylsa amended its credit insurance coverage during the course of the POR, although only for non-subject matter

²⁰⁷ *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold Rolled Carbon Steel Flat Products, Certain Corrosion – Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate From France*, 58 Fed.Reg.37125,37134 (July 9, 1993). See also *Certain Hot-Rolled Lead and Bismuth Products from the United Kingdom*, 58 Fed.-Reg. 6207, 6208-09 (Jan 27, 1993) (“We made a circumstances of sale adjustment for differences in credit insurance expense. Verification revealed that for U.S. sales, credit insurance charges are assessed on a sale-by-sale basis, while in the home market, a single global amount is assessed, regardless of the level of sales. We therefore determined that credit insurance is a direct expense in the U.S market, a single global amount is assessed, regardless of the level of sales. We therefore determined that credit insurance is a direct expense in the U.S. market, and an indirect expense in the home market. Accordingly, we made this adjustment by adding the amount of credit insurance expense assessed on each U.S. sale to the FMV.”)

²⁰⁸ IPSCO and US Steel concur that the export credit insurance is an item of variable expense in two respects. First, the premium of the insurance increases as new export customers are added. The Department also verified that there had been amendments to the basic policy during the course of the year and that Hylsa had paid additional insurance premiums for each amendment. Therefore, the inherent variability of the export premium costs that Hylsa incurred demonstrates that Hylsa's export credit insurance costs were not a fixed expense that would remain constant regardless of the level of Hylsa's export sales.

²⁰⁹ *Decision Memorandum in Porcelain-on-Steel Cooking Ware from China* 65 Fed. Reg. 31144 (May 16, 2000) (final results) ; *Certain Pasta from Turkey* 64 Fed. Reg. 43157, 43159 (August 9, 1999) (Prelim. Results) (unchanged in final results, 64 Fed. Reg. 69493); *Stainless Steel Round Wire from Canada, India, Japan, Spain, and Taiwan* 63 Fed. Reg. 64042, 64047 (Nov. 18, 1998) (Prelim. Determ.) (unchanged in final determ., 64 Fed. Reg. 17319), and *Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom* 61 Fed. Reg: 65022, 65024 (Dec. 10, 1996) (Prelim. Results) (unchanged in final results, 62 Fed. Reg. 18744).

goods, Commerce assumed in the Issues and Decision Memorandum, that the number of customers identified at the beginning of the year served as a rough indicator for the insurance company of the expected sales quantities.²¹¹

Hylsa acknowledged that during the fourth review period, it did add certain customers to this insurance coverage,²¹² but none of these additional customers were customers for OCTG products. Instead, these additional customers purchased only non- subject merchandise.²¹³ Thus, it argued that the final insurance premium regarding OCTG sales was the amount fixed at the start of the year.²¹⁴

After reviewing all the arguments, information, documents and references made to the administrative record by the parties in this section, as well as the applicable provisions and precedents, this Panel defers to the Department's decision to consider the export credit insurance as a direct selling expense. Under 19 C.F.R. § 351.410(c), direct selling expenses are defined as "expenses ... that result from, and bear a direct relationship to, the particular sale in question". The Department's practice, in accordance with the referenced provision has been to treat insurance against non-payment as a direct selling expense²¹⁵.

The Panel analyzed whether the final insurance premium relating to OCTG sales customers could be considered as a fixed amount. This Panel found that the amount of the premium paid by Hylsa varied both, according to the number of customers and depending on the specific levels of coverage for each customer. During the POR Hylsa did add certain customers to this insurance coverage, although none of these were OCTG customers. However, the premium would have changed if Hylsa made a separate decision to modify its coverage in order to add new customers or increase the coverage limit for the existing customers, as indeed it did for non subject goods.

²¹⁰ See Hylsa's November 23, 1999 Section C Response at 23-24 (Prop. Doc. #3) ("Section C Response").

²¹¹ See Decision Memo. at Hylsa Comment 1.

²¹² See Sales Verification Report at 2.

²¹³ See Case Brief of Hylsa at 11.

²¹⁴ *Id.*

²¹⁵ Decision Memorandum in *Porcelain-on-Steel Cooking Ware from China* 65 Fed. Reg. 31144 (May 16, 2000) (final results); *Certain Pasta from Turkey* 64 Fed. Reg. 43157, 43159 (August 9, 1999) (Prelim. Results) (unchanged in final results, 64 Fed. Reg. 69493); *Stainless Steel Round Wire from Canada, India, Japan, Spain, and Taiwan* 63 Fed. Reg. 64042, 64047 (Nov. 18, 1998) (Prelim. Determ.) (unchanged in final determ., 64 Fed. Reg. 17319); *Certain Hot Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom* 61 Fed. Reg. 65022, 65024 (Dec. 10, 1996) (Prelim. Results) (unchanged in final results, 62 Fed. Reg. 18744).

The substantial evidence standard governs judicial review of Commerce's factual findings and requires that these findings be supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²¹⁶ In this case, the evidence of Hylsa varying its policy coverage and cost for non-subject matter sales and customers supports the Department's conclusion that Hylsa could have added more OCTG customers or increased its coverage, linking the insurance expense to the volume of its sales. Commerce has the discretion to interpret the statute²¹⁷ and apply its regulations on this basis.²¹⁸

Accordingly, the Panel does not find arguments compelling enough to dismiss the Department's position, and considers that Commerce acted within the boundaries of the Agency's regulatory discretion.

Production Costs

The only sale of Oil Country Tubular Goods during the period of review by Hylsa was of two different sizes of pipe to one American customer.²¹⁹ Because there were no domestic sales or third country sales, the Department utilized the cost-based "constructed value" to establish "normal value" for purposes of determining the presence of dumping, and the dumping margin.²²⁰ Central to this determination is the Department's calculation of the cost of production of the two sizes of pipe produced and sold during the POR.

Hylsa produced the smaller, 2 $\frac{3}{8}$, pipe during the month of June 1999, and the larger, 2 $\frac{7}{8}$, pipe during both June and July, 1999.²²¹ The Department questionnaire required Hylsa to report

²¹⁶ See: *Shandong Huarong general Corp. v. United States*, 2001 WL 832361, * 2 (Ct. Int'l Trade) (quoting consolidated *Edison Co. R. NLRB*, 305 U.S. 197, 229 (1938)).

²¹⁷ "If however, the court determines Congress has not directly addressed the precise question at issue, the court 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 the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

²¹⁸ "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order... [T]he administrative interpretation...becomes...controlling...unless it is plainly erroneous or inconsistent with the regulation." *Asociacion Colombiana de Exportadores de Flores*, 903 F.2d 1555,1559-60 (Fed. Cir. 1990)

²¹⁹ On June 17, 1999, this customer purchased two sizes of pipe (2 $\frac{3}{8}$ inch and 2 $\frac{7}{8}$ inch diameter) on the same purchase order and for the same price. To fill the June 17, 1999 order, Hylsa produced OCTG during two months of the review period, June and July 1999. Hylsa's Brief at 7, September 4, 2001.

²²⁰ 19 U.S.C. §1677b.

²²¹ Hylsa's Rule 57(1) Brief at 23 (Non-Prop. Version, September 5, 2001).

the costs of the two sizes of pipe separately.²²² The Department calculated the cost of production using Hylsa's cost figures that reflect the total costs of production for the manufacturing facility for a given month, divided by the total amount of product produced at that facility.²²³ This process yielded identical cost figures for the production of any size pipe produced from the same mother pipe at the facility during a given month. Using this methodology the Department calculated the same unit costs for both sizes of pipe produced in July, and a lower unit cost for the 2 7/8 pipe produced in June. The Department then averaged the costs for the 2 7/8 pipe for June and July to achieve an average cost figure for that size, and took the June figure for the smaller pipe since that was the only month in which it was produced. This resulted in a cost figure for the smaller pipe only produced in the higher cost month, greater than the average cost of the larger pipe produced in both months. The Department cited as its authority the definition of "foreign like product" at 19 U.S.C. §1677(16), compelling it to separately calculate cost figures for the two different sizes. "[T]he Department must segregate the different products based on the characteristics of those products."²²⁴

Hylsa objected to this approach and argued instead for a single average cost of production for both sizes as a more accurate reflection of actual production costs.²²⁵ Hylsa argues that the cost differences for June and July do "not derive from changes in Hylsa's production processes or material costs," but rather are due to the fact "that production of pipe products on Hylsa's pipe-forming mill was significantly reduced in July, because that mill was temporarily shut down in July for the installation of new equipment."²²⁶ Therefore, the "labor and overhead costs of the pipe-forming mill . . . were [] allocated over a much smaller volume of production in July – which led to dramatically higher unit costs in that month."²²⁷ Hylsa argues that the "differences in the cost – and dumping margins – for each product were the result not of any difference in the products themselves, but simply of the timing of their production."²²⁸ Hylsa argues that averaging the two products Commerce will "avoid distortions in its calculations due solely to

²²² The Department's October 4, 1999 Questionnaire to Hylsa, at D-1 (Pub. Doc. #7).

²²³ Under this approach, the unit cost of an item varies only with the total production costs for the month of the facility, not any individual characteristics of the item. Thus all pipe produced during a given month from a particular facility will have the same unit cost regardless of the dimensions of the pipe.

²²⁴ The Department's Response Brief at 39 (November 5, 2001).

²²⁵ Brief of Complainant Hylsa at 24 (September 4, 2001).

²²⁶ *Id.* at 7-8.

²²⁷ *Id.* at 8.

²²⁸ *Id.* at 24.

fluctuations in monthly production costs.”²²⁹ The Department and Petitioners insisted that Commerce’s general policy was to use average prices for different products (control number or “CONNUM specific”) and that the cost of reducing the pipe size from the “mother pipe” to 2³/₈ was greater than the costs of reducing it to 2⁷/₈, and therefore the difference in average cost was justified.²³⁰ The Department further contends that “Hylsa’s claims that its reported CONNUM-specific costs for the two CONNUMs differ largely due to a mill shutdown for a few days is not supported in the record.”²³¹ The Department admits that “[a]lthough we would generally allocate the costs associated with a shutdown across a longer period of time if they had been specified, this would not change our normal practice of calculating COM on a product-specific basis.”²³² Furthermore, the Department does “not consider either sales price or common invoice numbers to be indicators of the difference in cost.”²³³

While the Department may, as a general practice, use CONNUM specific averages in calculating production costs, its primary obligation is to use a process that will provide the most accurate cost figures in its calculations. In approving the use of averaging for identical products produced at different sites, the CIT stated that Commerce utilized it to arrive at “actual, rather than theoretical, costs of production” in *Koenig & Bauer-Albert AG v. United States*.²³⁴ This would justify the Department’s use of averaging of June and July production costs for the larger pipe. However, the goal of accuracy is defeated by Commerce’s refusal to average the costs of both sizes of pipe for June and July in light of the absence of information in the record reflecting cost difference factors other than the months of production.

In *IPSCO, Inc. v. United States*,²³⁵ the Department calculated constructed value of two different quality grades of pipe to be identical since they came through the same manufacturing process. IPSCO and the lower court argued that because the pipes had different commercial value they should have different constructed costs of production.²³⁶ The Federal Circuit agreed with the Department that the actual cost of production should be used rather than differences in

²²⁹ *Id.*

²³⁰ The Department’s Response Brief at 39 (November 5, 2001).

²³¹ *Issues and Decisions Memorandum for the 1998-1999 Administrative Review of Oil Country Tubular Good from Mexico: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 15832, 15834 (Mar. 21, 2001).

²³² *Id.*

²³³ *Id.*

²³⁴ 90 F. Supp. 1284, 1290 (CIT 2000).

²³⁵ 965 F.2d 1056 (Fed. Cir. 1992).

²³⁶ *Id.*

sales costs based on the grades of the pipe.²³⁷ Thus the Department was upheld in using the same cost of production for pipe that differed significantly in its commercial value because of its quality.²³⁸ In this case the Department is arguing that the differences in the pipe justify different constructed value, but without evidence in the record to demonstrate any actual differences in the production costs.

Commerce stated that it relied on the physical differences in the types of pipe in rejecting averaging of costs for the two types of pipe.²³⁹ Commerce justifies its position on the fact that “the evidence on the record demonstrates that clear physical differences existed between CONNUM 1 and CONNUM 2.”²⁴⁰ The difficulty with this position is that there is no evidence in the record to support the assertion that the process of extruding smaller pipe is significantly more expensive than the extrusion of the ½ inch larger pipe. The Department relies on an intuitive argument that “a thinner product requires more processing to produce than a thicker one”²⁴¹ but points to no place in the record to support that assumption. Thus its approach to achieving greater accuracy is to adopt assumptions outside the record.

Hylsa on the other hand offers lengthy descriptions of the process that reflects minimal cost differences, in addition to its explanation of its cost accounting practices that does not capture such differences. The statute provides that “[c]osts 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 producing country where appropriate) and reasonably reflect the costs associated with the production and sale of the merchandise.”²⁴² There is no indication that the Department challenges the accounting procedures employed by Hylsa in this case.

Perhaps most significantly the Department’s own calculation of costs contradicts its position regarding cost differences based on pipe size. Hylsa reported two different cost figures in June and July for the 2⅞ pipe.²⁴³ The Department averaged those costs in calculating Hylsa’s

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Rule 57(2) Response Brief of the Investigating Authority at 40.

²⁴⁰ *Id.* at 41.

²⁴¹ *Issues and Decisions Memorandum for the 1998-1999 Administrative Review of Oil Country Tubular Good from Mexico: Final Results of Antidumping Duty Administrative Review*, 66 Fed. Reg. 15832, 15834 (Mar. 21, 2001).

²⁴² 19 U.S.C. § 1677b(f)(1)(A).

²⁴³ Hylsa’s Rule 57(1) Brief at 24 (Prop. Version, September 5, 2001).

production costs for the larger size pipe.²⁴⁴ If the Department did not believe that the identical cost figures for the 2³/₈ and 2⁷/₈ sizes of pipe produced in June were accurate, it should not have used that number in reaching an average cost of the 2⁷/₈ pipe.

When the Department's action contradicts its own reasoning, the decision on its face fails to meet the requirement of substantial evidence based on the record. There is no basis in the record to justify different treatment of the two classes of pipe, and the Department itself acknowledges this through its actions in using the same cost figures for the two different sizes for the month of June. Thus in this case the interests of accuracy are better served by averaging costs for both sizes rather than rigid adherence to the CONNUM specific figures. The Department observed in its Issues and Decision Memorandum that the fact that the adoption of Hylsa's averaging suggestion would result in a lower margin was not an acceptable reason for ignoring the differences between the two categories of pipe.²⁴⁵ By the same token however, finding differences where there are none to establish a higher margin is equally unacceptable. Therefore, the Panel determines that the Department must recalculate the average cost of production of the pipe manufactured during June and July in a manner that properly reflects the costs reported by Hylsa without distinctions not based in the record.

Zeroing

Hylsa's Position

Hylsa and the Commerce Department agree that Commerce calculated its dumping margins using the practice of "zeroing", that is, treating a negative dumping margin as zero. Hylsa asserts, and the Department does not contest the fact, that the application of zeroing to the facts in this case resulted in a positive dumping margin of 0.79%.²⁴⁶ Hylsa argues that although zeroing has been used by Commerce for years, such practice is not mandated by the U.S.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at Comment 4.

²⁴⁶ Hylsa's Rule 57(1) Brief at 22 (Non-Prop. Version, September 5, 2001).

Hylsa sold only two OCTG products to the United States market during the POR, one with an outside diameter of 2⁷/₈ inches, sold primarily in June and the other with an outside diameter of 2³/₈ inches, sold primarily in July. The final determination of Commerce found a dumping margin of -17.98 percent for the sales of the 2⁷/₈ product, and a positive margin of 1.15% for the 2³/₈ product. The effect of the zeroing was to eliminate the negative margin, and average the positive margin over the entire production for the POR, resulting in an overall dumping margin of 0.79%. Hylsa argues that if Commerce had combined the dumping margins of both products, rather than zeroing the negative margin, dumping would not exist.

antidumping statute, but rather is a discretionary administrative practice of the Department.²⁴⁷ It quotes the decision of the U.S. Court of International Trade in *Bowe Passat v. United States*, in which it is stated that the antidumping statute “is silent on the question of zeroing negative dumping margins.”²⁴⁸

Hylsa further argues that the practice has been strongly criticized in recent years by the WTO and that its continued use by the Commerce Department is contrary to U.S. obligations under the General Agreement on Tariffs and Trade.²⁴⁹ In support of this argument, Hylsa cites a report of the WTO Appellate Body on a decision of the European Commission imposing antidumping duties on bed linens from India.²⁵⁰ In such decision, says Hylsa, the Appellate Body stated that the practice of “zeroing” is not consistent with the international obligations of the parties to the WTO Antidumping Agreement and with a “fair comparison”, although acknowledging that the Panel is not required to follow this Body’s position on “fair comparison”.²⁵¹ Hylsa also cites the subsequent WTO Appellate Body decision reaffirming this holding and directly applying it to the U.S. in the *Canadian Softwood* case.²⁵²

In its arguments, Hylsa emphasizes that the doctrine derived from the *Schooner Charming Betsy* case,²⁵³ is helpful for statutory interpretation in cases of ambiguous statutes, stating that it is a cardinal principle of U.S. Law that statutes should be interpreted, whenever possible, to be in consistence with international law.²⁵⁴ Thus, the U.S. antidumping statute should be interpreted to forbid “zeroing”, in order to avoid conflict with the international obligations of the United States.²⁵⁵ Hylsa acknowledges in its arguments that recent U.S. courts and NAFTA panel decisions have held that WTO Appellate Body Decisions are not binding

²⁴⁷ Hylsa’s Rule 57(1) Brief at 20 (Non-Prop. Version, September 5, 2001).

²⁴⁸ *Bowe Passat Reinigungs-und Waschereitechnik GMBH v. United States*, 962 F. Supp. 1138, 1150 (Ct. Int’l Trade 1996).

²⁴⁹ Hylsa’s Rule 57(1) Brief at 20 (Non-Prop. Version, September 5, 2001).

²⁵⁰ *Report of the Appellate Body: European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen From India*, WT/DS141/AB/R, March 1, 2001.

²⁵¹ Response of Complainant Hylsa, to the Panel’s Request for Supplementary Materials at 2.

²⁵² *United States-Final Dumping Determination on Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS264/AB/R, 11 August 2004.

²⁵³ *Murray v. Schooner Charming Betsy*, 6 Cranch 64, 118, 2 L.Ed.208 (1804).

²⁵⁴ *Id.*

²⁵⁵ Hylsa’s Rule 57(1) Brief at 22 (Non-Prop. Version, September 5, 2001).

under U.S. law.²⁵⁶ However, Hylsa asserts that such decisions do not affect the substantive criteria of fairness and accuracy which must accompany the review of dumping margins.²⁵⁷

Commerce's Position

In the investigating authority's Rule 57 (2) Response Brief, of November 5, 2001, Commerce argued that "zeroing," its practice of using only transactions with price below fair value in the calculation of the weighted average margin, is stipulated by the U.S. Statute language.²⁵⁸ Thus, according to Commerce, "the plain language of the statute directs the Department to alleviate dumping by looking only to those sales where the price in the U.S. market falls below the price in the comparison market."²⁵⁹ The investigating authority relies in the wording of the statute which defines the "weighted average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."²⁶⁰

Likewise, Commerce relies on Article 1904 (2) of NAFTA which states that a party may request that a panel determine whether an importing party's final determination on antidumping or countervailing duty was in conformity with the applicable statute of the importing country.²⁶¹ Thus, a NAFTA panel sits in the place of a U.S. court, and must apply U.S. law when such panel reviews a determination by the Commerce Department.

Regarding Hylsa's argument under *The Charming Betsy* doctrine, Commerce states that, according to Statement of Administration Active pursuant to the Uruguay Round Agreements Act "URAA", "reports issued by panels or the Appellate Body under the Dispute Settlement Understanding "DSU" have no binding effect under the law of the United States."²⁶² Moreover, Commerce argues, it is the power of the executive branch to decide whether to implement a WTO panel decision, having the option of not altering its law or practice and offering instead

²⁵⁶ Response of Complainant Hylsa, to the Panel's Request for Supplementary Materials at 2.

²⁵⁷ *Id.* at 3.

²⁵⁸ Rule 57(2) Response Brief of the Investigating Authority (November 5, 2001).

²⁵⁹ *Id.* at 35.

²⁶⁰ 19 U.S.C. § 1677(35)(B).

²⁶¹ See North American Free Trade Agreement, Sep. 13, 1993, Part 7, Administrative and Institutional Provisions, Chapter 19, Review and Dispute Settlement in Antidumping and Countervailing Duty Matters, Article 1904(2).

²⁶² Commerce's November 5, 2001 Brief, at 37.

compensation to the complaining party.²⁶³ Finally, Commerce argues that according to U.S. law, Hylsa lacks standing to challenge any action or inaction by any instrumentality of the United States on the ground that such action or inaction is inconsistent with any of the Uruguay Round Agreements, including the WTO Antidumping Agreement.²⁶⁴ Therefore, the Department of Commerce demands that the Panel “declines to address Hylsa’s arguments based on the WTO obligations of the United States as non-justiciable.”²⁶⁵

Petitioners’ Positions

The Petitioners maintain that the Department properly calculated Hylsa’s dumping margin in accordance with U.S. Law, and that WTO law is not binding in NAFTA’s chapter 19 panels.²⁶⁶ They argue that the application of decisions of the WTO’s Appellate Body have been consistently rejected by US courts, and that these courts have found the use of “zeroing” by the Department to constitute a permissible interpretation of the U.S. antidumping statute.²⁶⁷

The Petitioners cite the January, 2005, *Corus Staal* decision²⁶⁸, in which the Federal Circuit, relying on the decision in the *Timken* case,²⁶⁹ upheld the use of zeroing as a permissible construction under the U.S. Statute, notwithstanding WTO decisions questioning the practice. Thus, Petitioners argue, the Court held that WTO Appellate Body’s decisions in the *EC Bed Linen*, *Corrosion-Resistant Steel*, and *Softwood Lumber*, have no legal effect in U.S. law and are owed no deference by this Panel.²⁷⁰ Petitioners’ position is best summarized that “Hylsa’s argument against the Department’s methodology in calculating weighted-average dumping margins both ignores the requirements of U.S. Antidumping law and attempts to subvert U.S. law by applying an inapposite determination of the WTO appellate body that has no binding effect on U.S. law.”²⁷¹ Therefore, assert the Petitioners, the arguments of the complainant Hylsa

²⁶³ Response Brief of Investigating Authority at 38 (November 5, 2001).

²⁶⁴ *Id.* at 36-37.

²⁶⁵ Rule 57(2) Response Brief of the Investigating Authority at 33.

²⁶⁶ US Steel’s Response Brief in Support of the Administrative Review Final Results and Determination not to Revoke at 16, 19 (November 5, 2001).

²⁶⁷ US Steel’s Response to Supplementary Materials Submitted by Hylsa at 3 (Non-Confidential Version, June 14, 2005).

²⁶⁸ *Corus Staal*, 395 F.3d at 1348-49.

²⁶⁹ *Timken v. United States*, 354 F.3d 1334 (Fed. Cir. 2004).

²⁷⁰ US Steel’s Response to Supplementary Materials Submitted by Hylsa at 3 (Non-Confidential Version, June 14, 2005).

²⁷¹ Domestic Interested Parties Response Brief in Opposition to Complainant Hylsa at 3 (November 6, 2001).

should be rejected, and the Panel should uphold Commerce's calculation of a weighted-average dumping margin for Hylsa in the corresponding review.²⁷²

Panel Discussion

The practice of zeroing in the administration of antidumping laws has become a focal point of criticism before the WTO, and the subject of litigation in United States domestic courts and NAFTA panels. The question presents itself to this Panel through the arguments of Hylsa that the weight of recent WTO decisions against zeroing compels the Panel to find the Department's practice unlawful under the time-honored principal of respect for international law articulated in the *Charming Betsy* decision of the U.S. Supreme Court. The Panel finds two problems with this argument. The first is that the WTO has found that the U.S. application of zeroing in administrative reviews of antidumping orders is, in fact, not inconsistent with U.S. obligations under the GATT. The second is that even if the WTO were clear in its determination that zeroing was contrary to the GATT, WTO decisions cannot be applied by this Panel under well-defined U.S. statutory and judicial standards. The Panel will briefly survey the WTO decisions offered by Hylsa and those that fatally undercut its argument, and then note the legal standards that bind the panel in its decision.

The WTO Appellate Body's Report on European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India

Along with [and the basis for] the WTO Appellate Body's Report on United States-Final Dumping Determination on Softwood Lumber from Canada, the case most critical of the "zeroing" practice is the WTO Appellate Body's Report on EC-Bed Linen.²⁷³ India challenged the imposition of antidumping duties by the EC, contending that the determination of standing, the initiation, the determination of dumping and injury as well as the explanations of the EC authorities' findings were inconsistent with WTO law.²⁷⁴ Among other conclusions, the WTO

²⁷² US Steel's Response to Supplementary Materials Submitted by Hylsa at 4 (Non-Confidential Version, June 14, 2005).

²⁷³ *European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, Report of the Appellate Body, WT/DS141/AB/R, March 1, 2001.

²⁷⁴ *Id.* (On 3 August 1998, India requested consultations with the EC in respect of Council Regulation (EC) No. 2398/97 of 28 November 1997 on imports of cotton-type bed-linen from India. India asserted that the EC initiated anti-dumping proceedings against imports of cotton-type bed-linen from India by publishing a notice of initiation in September 1996. Provisional anti-dumping duties were imposed by EC Council Regulation No 1069/97 of 12 June

Panel opined that the EC acted inconsistently with its obligations under Articles 2.4.2 of the AD Agreement, in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing.²⁷⁵

The EC appealed certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, particularly with regard to the discretion of the EC to use zeroing in determining antidumping margins.²⁷⁶ India argued that the terms of the GATT did not permit that degree of discretion.²⁷⁷ The United States participated as a third party to the case, and supported the methodology of the European Communities for calculating the overall margin of dumping.²⁷⁸ The Appellate Body upheld the finding of the Panel that the practice of “zeroing” when establishing “the existence of margins of dumping”, as applied by the EC in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.²⁷⁹ In its analysis, the Appellate Body found that the practice of zeroing

1997. This was followed by the imposition of definitive duties in accordance with the above-mentioned EC Council Regulation No 2398/97 of 28 November 1997. On 7 September 1999, India requested the establishment of a panel. The DSB established a panel at its meeting on 27 October 1999, and the panel report was circulated on 30 October 2000).

²⁷⁵ *Id.*

²⁷⁶ *Id.* (Essentially, the European Communities argued that the interpretation of the Panel failed to give proper meaning to the word “comparable” in Article 2.4.2, which requires only that weighted average normal value be compared with weighted average export prices for “comparable” transactions. The European Communities determined a dumping margin for individual product types for “comparable” transactions, according to the mentioned requirement).

²⁷⁷ *Id.* at 13.

(The European Communities further contended that the calculation of the overall rate of dumping for the product under investigation did not fall within the express terms of Article 2.4.2, which provides no guidance as to how the dumping margins determined for individual product types should be combined in order to calculate the overall rate of dumping for the product under investigation.

The European Communities claimed that the Panel’s interpretation “would distort price comparability and disregard the notion of ‘normal value’, as the existence of dumping margins would depend on the product mix sold by the exporter. By requiring ‘positive dumping margins’ to be offset by ‘negative dumping margins’, the Panel is effectively requiring comparison of a weighted average normal value for all product types of bed linen with a weighted average export price for all product types.” EC Bed Linen at 13.

India argued that the Panel correctly interpreted the word “comparable” in Article 2.4.2 of the Anti-Dumping Agreement. India sustained that “even assuming that the word ‘comparable’ carries with it a different meaning in Article 2.4.2, it does not follow that zeroing of these ‘comparable’ data is allowed.” EC Bed Linen at 13.

India also claimed that the Panel rightly applied Article 2.4.2 to the calculation of the overall rate of dumping for the product under investigation. India argued that the calculation of the amount of dumping for various models or types of the product under investigation is not separate from the calculation of the dumping margin for the product under investigation.

India also argued that the Panel correctly determined that the concept of “dumping margin” in Article 2.4.2 of the Anti-Dumping Agreement refers only to the dumping margin established for each product, and for each model of that product, or for each individual transaction).

²⁷⁸ *Id.*

²⁷⁹ *Id.*

did not accurately capture the margins because it did not reflect actual prices. In this regard, the Appellate Body opined that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions –such as the practice of “zeroing” at issue in the dispute– is not a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2.²⁸⁰ The Dispute Settlement Body “DSB” adopted the Appellate Body report and the Panel report, as modified by the Appellate Body report, on March 12, 2001.²⁸¹

United States-Final Dumping Determination on Softwood Lumber From Canada. World Trade Organization. Report of the Appellate Body.

In the second critical case, the United States and Canada appealed certain issues of law and legal interpretations with respect to the Panel Report *United States-Final Dumping Determination on Softwood Lumber from Canada* (the “Panel Report”).²⁸² The Panel reviewed a complaint by Canada concerning anti-dumping duties imposed by the United States on imports of certain softwood lumber products from Canada.²⁸³ The Panel heard, among other issues, the complaint of Canada that the United States used the practice known as “zeroing” which Canada argued, is forbidden by the Antidumping Agreement.²⁸⁴ The Panel agreed, and found, on the issue of zeroing, that the United States had acted inconsistently with Article 2.4.2 of the

²⁸⁰ *Id.* In its decision, the Appellate Body recalled that Article 2.4.2, first sentence, provides that “the existence of margins of dumping” for the product under investigation shall normally be established according to one of two methods. At issue in the case was the first method set out in that provision, under which “the existence of margins of dumping” must be established “on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions.”

Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of all comparable export transactions. As explained above, when “zeroing”, the European Communities counted as zero the “dumping margins” for those models where the “dumping margin” was “negative”. As the Panel correctly noted, for those models, the European Communities counted “the weighted average export price to be equal to the weighted average normal value ... despite the fact that it was, in reality, higher than the weighted average normal value.” By “zeroing” the “negative dumping margins”, the European Communities, therefore, did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where “negative dumping margins” were found.

Instead, the European Communities treated those export prices as if they were less than what they were. The Appellate Body concluded that this, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did not establish “the existence of margins of dumping” for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions – that is, for all transactions involving all models or types of the product under investigation.

²⁸¹ *Id.*

²⁸² *United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R at § 1 (August 11, 2004).

²⁸³ *Id.* at § 3.

Antidumping Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing.²⁸⁵

The United States appealed the Panel Report and challenged the Panel's finding that it acted inconsistently with Article 2.4.2 of the Antidumping Agreement in its determination of the existence of margins of dumping on the basis of the use of the practice known as zeroing.²⁸⁶ The U.S. challenged the substance of the finding,²⁸⁷ as well as the reliance of the Panel on the *EC Bed Linens* decision.²⁸⁸ Canada defended the use of *EC Bed Linens*,²⁸⁹ and supported the finding of the Panel on the merits.²⁹⁰

The Appellate Body, in its Report, upheld the Panel's finding that the United States acted inconsistently with Article 2.4.2 of the Antidumping Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing and, thus, recommended that the DSB request the United States to bring its measure into

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ *Id.* at § 7.

²⁸⁷ The United States argues that Article 2.4.2 does not contain any guidance as to how results of multiple comparisons are to be aggregated in order to calculate an overall margin of dumping. It also contends that the term "margins of dumping" in such article refers only to results of comparisons in which the normal value exceeds the export price. Others are simply not "dumping margins", it says.

The United States thirdly contends that "the Panel's interpretation is not supported by the context of Article 2.4.2. Thus, although the Panel appeared to agree that average-to-average and transaction-to-transaction comparison should be subject to the same rule with respect to aggregation, the text on which the Panel relied in finding a rule applicable to the average-to-average comparison methodology -namely, the phrase "all comparable export transactions"- has no textual equivalent for the second methodology." *Id.* at § 15.

The United States also gives a historical perspective in the sense that at the time of the Uruguay Round, contracting parties relied on "asymmetrical" comparisons as well as on zeroing in order to establish dumping margins, and that in the case of the latter the text was not modified so it persists. *Id.* at § 16.

Finally, the United States "requests that, in the event that the Appellate Body reaches the question of whether the aggregation methodology applied by the United States is consistent with Article 2.4 of the Antidumping Agreement, the concept of fair comparison under that provision should be interpreted as referring to a comparison that is made in accordance with the specific rules set out in Article 2.4. Thus, a fair comparison is ensured by making due allowance for differences that affect price comparability, including the level of trade, physical characteristics as well as terms and conditions of sale." *Id.* at § 18.

²⁸⁸ With respect to the precedent quoted by Canada –Appellate Body Report in *EC – Bed Linen*, the United States refers to the Appellate Body Report in *Japan-Alcoholic Beverages II*, in which the Appellate Body stated that dispute settlement reports are not binding, except to the parties to the specific dispute. Thus, it contends, the United States was not a party to the *Bed Linen* case and its practice of zeroing was not an issue in that appeal.

²⁸⁹ Canada contended that due to the similarities of this case and the one of *Bed Linen*, there is not a justifiable reason for the Appellate Body to arrive to a different conclusion. *Id.* at § 17.

²⁹⁰ Canada argued that zeroing should be found inconsistent with the terms of Articles 2.4 of the Antidumping Agreement since it distorts dumping findings, not allowing a fair comparison. It also contends that the Panel rightly limited its analysis to the weighted-average normal value to the weighted-average export price methodology, since it is the only methodology at issue in this controversy. Finally, Canada "submits that the example provided by the United States seeking to demonstrate that averaging of multiple comparisons will always be equivalent to comparing a single average normal value to a single average export price is wrong, as a mathematical matter." *Id.* at § 23-24.

conformity with its obligations under the Antidumping Agreement.²⁹¹ Like the decision in *EC Bed Linens* however, this decision focused on the use of zeroing in the initial finding of dumping by the Investigating Authority.

The Panel notes that the same determination of the Commerce Department subject to the WTO/DSB review in this case was also subject to a NAFTA Chapter 19 Panel review.²⁹² That Panel concluded that relying upon the decision of the WTO/DSB Panel under the particular facts of that case was consistent with the requirements of the Uruguay Round Agreements Act as well as with *The Charming Betsy* doctrine and directed the Department to eliminate zeroing in its margin calculation.²⁹³ This Panel observes that the circumstances of this case are materially different. The WTO Panel in *Softwood* categorically declared the zeroing practices at issue as contrary to U.S. obligations under the WTO Agreements, while here there is no WTO/DSB determination that the specific type of Commerce Department determination at issue here (see discussion immediately below) violates U.S. WTO obligations. Moreover, without such a specific “on point” WTO/DSB decision, invocation of the URAA “incorporation” process similar to the Chapter 19 *Softwood* Panel, would be inappropriate.

The WTO Panel’s Report United States-Antidumping Measures on Oil Country Tubular Goods from Mexico

The WTO/DSB was provided an opportunity to review Mexico’s arguments against zeroing in reviewing the same dispute pending before this Panel. The WTO Panel Report decision following Mexico’s request²⁹⁴ discusses several claims related to the fourth administrative review whose final resolution is under review by this Panel.

At issue in the *US-Anti-Dumping Measures on OCTG* case were a number of determinations by the U.S. Department of Commerce and the U.S. International Trade Commission, including various laws, regulations, procedures, administrative provisions and

²⁹¹ *United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R at § 1 37-38 (August 11, 2004).

²⁹² Decision of the Panel Following Remand, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Dumping Determination*, USA-CDA-2002-1904-02, June 9, 2005.

²⁹³ *Id.* at 24-28.

²⁹⁴ Request to establish a panel pursuant to Article XXIII of the GATT 1994, Article 6 of the Dispute Settlement Body and Article 17 of the Anti-Dumping Agreement in July, 2003. *US-Anti-Dumping Measures on OCTG*, WT/DS/282/R, June 20, 2005.

practice governing reviews of anti-dumping duties on imports of OCTG from Mexico.²⁹⁵ Specifically, Mexico challenged the determinations of both the Department of Commerce and the International Trade Commission in the sunset review, and the determination of the Department of Commerce in the fourth administrative review, which determined that neither of the two exporters of OCTG from Mexico requesting the review –TAMSA and Hylsa– qualified for revocation of the anti-dumping duty.²⁹⁶

Among the requests for findings and recommendations to the WTO Panel, Mexico requested the WTO Panel to find that the Department of Commerce had violated Articles 11.2, 2.4 and 2.4.2 of the Anti-Dumping Agreement, “because [the Department of Commerce] “zeroed” Hylsa’s negative margins and relied on the positive margin that resulted from this unlawful methodology as justification for not revoking the anti-dumping duty on OCTG from Mexico with respect to Hylsa.”²⁹⁷ The Panel however, reached a decision on the other issues before it that precluded it from considering the zeroing challenge.²⁹⁸ In the end it concluded that “in light of our finding that the reviews undertaken by [the Department of Commerce] at the request of TAMSA and Hylsa are not subject to requirements of Article 11.2, we consider that it is not necessary for us to make findings on Mexico’s claims under Articles 11.2, 2.4. and 2.4.2 regarding the specific basis of the [Department of Commerce] determinations with respect to

²⁹⁵ *US-Anti-Dumping Measures on OCTG*, WT/DS/282/R at § 2.1 (June 20, 2005).

²⁹⁶ *Id.*

²⁹⁷ *Id.* at § 3.1.

²⁹⁸ The Panel Report on US-Anti-Dumping Measures on OCTG concentrates primarily on Mexico’s claim that U.S. law is inconsistent with Article 11.3 of the Anti-Dumping Agreement because it establishes a presumption that dumping is likely to continue or recur in certain factual situations, allegedly because U.S. practice demonstrates that the Department of Commerce gives a determinative weight to historical dumping margins and import volumes.

Essentially, the WTO Panel found that those two factors are treated as conclusive or determinative in sunset reviews, and concluded that current U.S. administrative provisions establish an irrebuttable presumption in this regard, and consequently agreed with Mexico’s allegation that such practice is inconsistent with Article 11.3 of the Anti-Dumping Agreement. Likely, the WTO Panel found that the Department of Commerce’s determination that dumping was likely to continue or recur was not supported by reasoned and adequate conclusions based on the facts before it.

However, when discussing the claims under Articles 11.2, 2.4 and 2.4.2 of the Anti-Dumping Agreement, including Mexico’s argument that the Department of Commerce had failed to make a fair comparison between export price and normal value, by “zeroing” Hylsa’s negative margins, the WTO Panel took a first approach to determine whether the Department of Commerce acted inconsistently with Article 11.2 by deciding not to revoke the anti-dumping order with respect to TAMSA and Hylsa individually.

The WTO Panel found that Article 11.2 of the Anti-Dumping Agreement does not require a company-specific revocation reviews, and that a decision that the factual prerequisites required by U.S. regulation have not been demonstrated –*i.e.*, that the requesting company has not dumped for three years and made sales in the U.S. market in commercial quantities during that period– does not establish a violation of Article 11.2.

TAMSA and Hylsa.”²⁹⁹ Accordingly, the Appellate Body’s Report on the same case, delivered on November 2, 2005 did not address the “zeroing”-related claims for this reason.³⁰⁰ Thus, unlike the situation that the *Softwood* Chapter 19 Panel confronted, we do not have a WTO/DSB decision on the zeroing issue in this proceeding.

The WTO Panel’s Report United States-Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)

The most significant WTO decision on “zeroing” by the United States grew out of a complaint by the European Communities with regard to several U.S. laws, regulations and methodologies for calculating dumping margins, including the so-called “zeroing.”³⁰¹ The European Communities requested the Panel to make several findings on the inconsistency of the “zeroing” practice, both as stated in the U.S. regulations, and as applied in various specific cases, including original investigations, period reviews, new shipper events, changed circumstances reviews and sunset reviews.³⁰²

Accordingly, the European Communities’ claims took a differentiated approach to “zeroing”-related inconsistencies, either “as such” or “as applied.” Among other issues, the European Communities contended that the use of “simple zeroing” (essentially by comparing a weighted average normal value with individual export transactions) and the “Standard Zeroing Procedures” in periodic reviews was inconsistent with *inter alia* Articles 2.4, 2.4.2 and 9.3 of the Antidumping Agreement.³⁰³

The Panel made different findings and determinations for (i) original investigations, (ii) administrative reviews and (iii) new shipper, changed circumstances, and sunset reviews.³⁰⁴

²⁹⁹ US-Anti-Dumping Measures on OCTG, at § 7.177.

³⁰⁰ Hylsa also cites to *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, Report of the Appellate Body, WT/DS244/AB/R, December 15, 2003, to support its argument that the WTO/DSB has found zeroing in administrative reviews improper. In that decision however, the Appellate Body ultimately did not address the question of zeroing in the context of the administrative reviews. It stated that it “reverses the Panel’s findings, in paragraphs 7.170, 7.184, and 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying, in the CRS sunset review, on dumping margins calculated in previous administrative reviews allegedly using a “zeroing” methodology; but finds that there is not a sufficient factual basis to complete the analysis of Japan’s claims on this issue.” (emphasis added) § 212 (b).

³⁰¹ *United States- Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R 31 (October 31, 2005).

³⁰² *Id.* at § 3.1.

³⁰³ *Id.* at § 4.7.

³⁰⁴ *Id.*

Essentially, the Panel determined that the U.S. “zeroing” methodology, as it relates to original investigations, is a norm which, as such, is inconsistent with Article 2.4.2 of the Antidumping Agreement.³⁰⁵ The Panel also found that the U.S. acted inconsistently with that provision in certain anti-dumping investigations at issue, by not including in the numerator used to calculate weighted average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.³⁰⁶

The findings were different for the administrative reviews. There the Panel stated that (i) U.S.’ asymmetrical comparisons between export price and normal value, in which no account was taken of any amount by which export prices exceeded normal value, and (ii) calculation of dumping margins by comparing average monthly normal value with prices of individual export transactions (by not including in the numerator of the dumping margins any amounts by which export prices of individual transactions exceeded the normal value), did not constitute a performance contrary to the WTO’s Antidumping Agreement, as alleged by the European Communities. A similar finding was made in connection with new shipper reviews, changed circumstances reviews and sunset reviews.³⁰⁷

Thus, while the Panel made a finding of inconsistency of the U.S. “zeroing” methodology in relation to original investigations (and accordingly recommended that the Dispute Settlement Body request the U.S. to bring its measures into conformity with its obligations under the Antidumping Agreement), it determined that zeroing procedures as used in administrative reviews (as well as in new shipper reviews, changed circumstances reviews and sunset reviews) are not inconsistent with the relevant provisions of the anti-dumping measures.³⁰⁸ In the first and only case in which the WTO/DSB addressed the question of zeroing in the specific context of administrative reviews it concluded that zeroing was not contrary to any obligation owed under the Anti-Dumping Agreement of the GATT/WTO.

Analysis and Conclusions

This Panel considers that it is not necessary to determine if zeroing is or is not mandated by the U.S. antidumping statute. U.S. courts have consistently upheld the Department’s practice

³⁰⁵ *Id.* at § 8.1.

³⁰⁶ *United States- Laws, Regulations and Methodology for Calculating Dumping Margins*, WT/DS294/R 31 at § 8.1.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

as a reasonable interpretation of the applicable statutory language that serves legitimate objectives in addressing dumping that would otherwise be masked by the negative margins.³⁰⁹ Moreover, that position was recently reiterated in a series of cases before the Court of International Trade and the Court of Appeals for the Federal Circuit, cases that expressly rejected applying WTO decisions to the Department's use of zeroing under U.S. law in the manner that Hylsa advocates.³¹⁰ Under NAFTA Article 1904 this Panel is obliged to follow the laws, legislative antecedents, rules, administrative practices and judicial precedents of the importing country to the same extent as a reviewing court sitting in that country would. Furthermore, the Panel follows these rules pursuant to the standard of review described in Section II of this opinion above. Under that standard the Department was well within its discretion in applying zeroing to its margin determination in this case.

As Hylsa presented the issue to this Panel however, the new challenge to zeroing was whether the WTO Appellate Body decisions which resolved that the practice of zeroing is inconsistent with Article 2.4 of the WTO Antidumping Agreement, are precedents that are binding on the United States in accordance with the *Charming Betsy* doctrine. Since Hylsa made this argument however, the decisions of the WTO/DSB, particularly the *U.S. Zeroing* case³¹¹ discussed above, have rendered it moot. The underlying premise of the *Charming Betsy* doctrine is that there exist recognized international legal norms that should be conformed to by the United States whenever possible. According to the *Charming Betsy* doctrine, a common law statutory interpretation tool, U.S. courts should interpret statutes in accordance with the international obligations of the United States, whenever possible. However, the most recent WTO/DSB decisions establish that the use of zeroing in administrative reviews of antidumping orders is consistent with the legal norms of the GATT/WTO. Therefore, there can be no argument that the *Charming Betsy* doctrine requires any different outcome in this matter than what the Commerce Department determined insofar as it utilized the zeroing procedure in determining the dumping

³⁰⁹ See e.g., *Bowe Passat Reinigungs-Und Washereitechnik v. U.S.*, 926 F. Supp. 1138 (Ct. Intl. Trade 1996) (zeroing “combats masked dumping, an apparently legitimate goal consistent with the antidumping statute”); *Serampore Industries v. U.S. Dept. of Commerce*, 675 F. Supp. 1354 (Ct. Intl. Trade 1987)(interpreting 19 U.S.C. 1673 (1982) the predecessor provision to what is now found in 19 U.S.C. 1677(35)(a)).

³¹⁰ *Corus Staal*, 395 F.3d. 1343 (Fed Cir. 2005); *NSK, Ltd. v. U.S.*, 358 F. Supp. 2d. 1276 (Ct. Intl. Trade 2005); *SNR Roulements v. U.S.*, 341 F. Supp. 2d 1334 (Ct Intl. Trade. 2004); *Timken Co*, 354 F.3d.1334(Fed. Cir. 2004) (upholding *Timken Co.*, 240 F. Supp. 2d. 1228 (Ct. Intl. Trade 2002)); *PAM, S.P.A. c. U.S. Dept of Commerce*, 265 F. Supp. 2d 1362 (Ct. Intl. Trade 2003); *Corus Staal*, 259 F. Supp 2d. 1253 (Ct. Intl. Trade 2003).

³¹¹ *United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, Report of the Panel, WT/DS294/R (Oct. 31, 2005).

margins for Hylsa. Put another way, Commerce's statutory interpretation is consistent with U.S. obligations under international law, and thus consistent with the *Charming Betsy* doctrine.

Therefore, it is unnecessary for this Panel to analyze the various arguments and decisions relating to the manner of incorporation of WTO/DSB determinations into U.S. law. The Panel determines that there is no legal basis in either U.S. or international law to challenge the Commerce Department's use of zeroing in this administrative review.

V. DECISION AND ORDER

For the reason set forth herein, the Panel hereby concludes and orders as follows:

- (1) The Panel affirms the Department's decision to deny TAMSA's request for revocation of the antidumping order.
- (2) The Panel affirms the decision of the Department as it relates to Hylsa regarding the treatment of export insurance as a direct expense, and in rejecting Hylsa's challenge to the Department's "zeroing practice".
- (3) The Panel remands the case as it relates to Hylsa to the Department to recalculate the final antidumping margins by:
 1. Recalculating the packing costs by (a) taking into account that the cost for automation was captured as an overhead fixed asset; (b) not averaging the packing costs from cost center 2052 for the entire POR because it is not reasonable; and (c) taking into consideration only the packing costs reported by Hylsa for cost center 2052 and only for the two months in which OCTG products were packed.
 2. Recalculating the cost of production by averaging the costs of production for both sizes of pipe and for both months to determine a

single average cost given the absence of any basis in the record justifying different production costs based on size.

- (4) In the event the recalculation results in a zero or *de minimis* antidumping margin, the Panel directs the Department to address Hylsa's request for revocation of the antidumping order.

The department shall report the results of its remand decision within 45 days of this decision.

SIGNED IN THE ORIGINAL BY:

Howard N. Fenton, Chair

Hector Cuadra y Moreno

Peter L. Fitzgerald

Jaime Horacio Galicia Briseno

Arturo J. Lan Arredondo