

ARTICLE 1904 BINATIONAL PANEL REVIEW

pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

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In the Matter of:	)	PUBLIC VERSION
	)	
Oil Country Tubular Goods From Mexico:	)	Secretariat File No.
Final Results of Fourth Administrative Review	)	USA-MEX-01-1904-05
of Antidumping Duty Order and Determination	)	
Not to Revoke	)	
	)	

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SUPPLEMENTAL BRIEF OF THE  
INVESTIGATING AUTHORITY

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Table of Contents

Table of Contents ..... i

Table of Authorities ..... iii

I. Introduction ..... 1

II. Argument ..... 2

    A. Commerce’s Determination Not to Revoke the Order with respect to TAMSA Is Supported by Substantial Evidence and In Accordance with U.S. Law ..... 2

        1. Commerce Properly Applied its Threshold Requirement that TAMSA Ship in Commercial Quantities for Three Consecutive Years ..... 3

        2. Commerce Has Consistently Applied the Commercial Quantities Requirement ..... 4

        3. Commerce’s Definition of Commercial Quantities is in Accordance with Law ..... 5

        4. Recent Cases TAMSA Cites Are Inapposite ..... 7

        5. The Commercial Quantities Requirement Is Not a Retroactive Application of Commerce’s Regulation ..... 9

        6. This Panel’s Role is to Apply U.S. Domestic Law, Not Determine Whether Commerce’s Determination is Consistent with the WTO Agreements or WTO Dispute Settlement Reports ..... 11

            a. The WTO Appellate Body Japan Sunset Report Should Be Afforded No Weight Under U.S. Law ..... 12

            b. TAMSA’s Reliance on a WTO Report in This Forum Should Be Rejected ..... 14

    B. The Panel Should Affirm Commerce’s Final Results with Respect to Hylsa ... 15

        1. Hylsa’s Challenge to Commerce’s Offset Methodology Must Fail ... 15

        2. Commerce Properly Calculated the Cost of Production Separately for Two Distinct Products with Clear Physical Differences ..... 17

3.	Commerce Properly Included in the Cost of Production Restructuring Costs Incurred During the Period of Review that Benefitted the Entire Period of Review .....	18
4.	Commerce Properly Treated Hylsa’s Credit Insurance Expense as a Direct Selling Expense .....	19
5.	Hylsa Is Not Entitled to Revocation .....	20
III.	Conclusion .....	21

Table of Authorities

**Statutes and Regulations**

19 C.F.R. § 351.218(e)(2)(iii). . . . . 7

19 C.F.R. § 351.222(b)(2)(i). . . . . 7, 20

19 C.F.R. §§ 351.222(d)(1). . . . . 3, 5, 6, 7

19 C.F.R. § 351.222(e). . . . . 3, 5, 6, 7

19 C.F.R. § 353.25(b)(2) (1995). . . . . 10

19 U.S.C. § 1675(d)(1). . . . . 10

19 U.S.C. § 1675a(c)(2). . . . . 7

19 U.S.C. § 1677(17). . . . . 5-6

19 U.S.C. § 1677(35)(A). . . . . 15-16

19 U.S.C. § 1677b(a). . . . . 5

19 U.S.C. § 3533. . . . . 13

19 U.S.C. § 3538. . . . . 13

**Court Cases**

Corus Staal BV v. Department of Commerce, 395 F.3d 1343 (Fed. Cir. 2005). . . . . 12-17

Disabled American Veterans v. Secretary of Veterans Affairs, 327 F.3d 1339 (Fed. Cir. 2003). 9

Kearfott Guidance & Navigation Corp. v. Rumsfeld, 370 F.3d 1369 (Fed. Cir. 2002). . . . . 9

Landgraf v. USI Film Products, 511 U.S. 244 (1994). . . . . 9

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). . . . . 12-13

Pincess Cruises, Inc. v. United States, 397 F.3d 1358 (Fed. Cir. 2005). . . . . 9

Timken Co. v. United States, 354 F.3d 1334 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co.

v. United States, 160 L. Ed. 2d 352, 125 S. Ct. 412 (2004). . . . . 13, 15-17

**Administrative Cases**

Antidumping Duty Order: Oil Country Tubular Goods From Mexico, 60 Fed. Reg. 41056 (August 11, 1995). . . . . 1

Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not To Revoke Order in Part, 68 Fed. Reg. 35623 (June 16, 2003). . . . 4

Brass Sheet and Strip From Germany: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 61 Fed. Reg. 49727 (September 23, 1996). . . . . 10, 11

Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part , 65 Fed. Reg. 9243 (February 24, 2000) . . . . . 8-9

Certain Pasta from Turkey: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order in Part, 68 Fed. Reg. 6880 (February 11, 2003). . . . . 4

Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order in Part, 67 Fed. Reg. 51194 (August 7, 2002).4

Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People’s Republic of China: Final Results of Antidumping Duty Administrative Reviews, Partial Rescission of Antidumping Duty Reviews, and Determination Not to Revoke in Part, 69 Fed. Reg. 55581 (September 15, 2004). . . . . 4

Iron Construction Castings from Canada: Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 23274 (May 21, 1991). . . . . 6

Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value, 70 Fed. Reg. 9041 (February 24, 2005). . . . . 17

Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Malaysia, 69 Fed. Reg. 34128 (June 18, 2004). . . . . 17-18

Notice of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan, 61 Fed. Reg. 14064 (March 29, 1996). . . . . 18

Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order In Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above From the Republic of Korea, 62 Fed. Reg. 39808 (July 24, 1997). . . . . 8

Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Mexico, 70 Fed. Reg. 25809 (May 16, 2005). . . . . 19

Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from Thailand, 67 Fed. Reg. 76380 (December 12, 2002). . . . . 5

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). *passim*

Polyvinyl Alcohol From Taiwan: Final Results of Third Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part, 65 Fed. Reg. 60615 (October 12, 2000). . . . . 8

**Other Authorities**

NAFTA, Article 1904(2). . . . . 12, 17

NAFTA, Article 1904(9). . . . . 14, 17

NAFTA Binational Panel Report, Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination, Secretariat File No. USA-CDA-2002-1904-02 (June 9, 2005). . . . . 14-15, 17

NAFTA Binational Panel Report, Pure Magnesium from Canada, Secretariat File No. USA-CDA-00-1904-06 (March 27, 2002). . . . . 7

NAFTA Binational Panel Report, Oil Country Tubular Goods from Mexico – Final Results of Sunset Review of Antidumping Duty Order, Secretariat File No. USA-MEX-2001-1904-03 (February 11, 2005). . . . . 7

United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, report of the Appellate Body, adopted by the DSB August 31, 2004. . . 13, 15

United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R, Report of the Appellate Body, adopted January 9, 2004. . . . . 7, 12, 14, 15

## I. Introduction

After the United States Department of Commerce issued its antidumping order on oil country tubular goods (“OCTG”) from Mexico in August of 1995, see Antidumping Duty Order: Oil Country Tubular Goods From Mexico, 60 Fed. Reg. 41056 (August 11, 1995), shipments of OCTG from both Tubos de Acero de Mexico, S.A. (“TAMSA”) and Hylsa, S.A. de C.V. (“Hylsa”) plunged in the years leading up to the fourth administrative review. (TAMSA’s May 17, 2000 Second Supplemental Response, Attachment 1 (Prop. Doc. #15); Hylsa’s August 16, 2000 submission, at Attachment 2 (Prop. Doc. #81)). Despite this dramatic fall in aggregate shipping volumes, both TAMSA and Hylsa sought revocation of the antidumping order in the fourth administrative review, based on three consecutive years of no dumping.

The Department denied TAMSA’s request to revoke the antidumping order, noting that TAMSA had not fulfilled the requirement to export in commercial quantities for three consecutive years. 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), and accompanying Issues and Decision Memorandum (“Decisions Memo”), at TAMSA Comment 1. The Department considered the reasons TAMSA gave for the drop in export levels, and found that none provided the reassurance that if the order were revoked, TAMSA could participate in the U.S. market without dumping. Id.

With respect to Hylsa, in the fourth administrative review, the Department calculated a margin above *de minimis*. Decision Memo, at Hylsa Comment 7. Therefore, Hylsa failed to meet the requirement of exporting to the United States without dumping for three consecutive years. Id.

Both TAMSA and Hylsa challenge the results of the fourth administrative review before this NAFTA Binational Panel. The parties completed briefing in 2001. However, on April 13, 2005, in consideration of the time that elapsed since the filing of the briefs, the Panel issued an order that allowed TAMSA and Hylsa to file supplemental materials for the Panel's consideration. The Investigating Authority and the Petitioners were given the opportunity to respond to the respondents' supplemental submissions. This filing by the U.S. Department of Commerce responds to TAMSA's and Hylsa's May 13, 2005 supplemental submission in accordance with the Panel's April 13, 2005 order.

II. Argument

A. Commerce's Determination Not to Revoke the Order with respect to TAMSA Is Supported by Substantial Evidence and In Accordance with U.S. Law

After the issuance of the antidumping order, exports of OCTG from TAMSA plunged. (TAMSA's May 17, 2000 Second Supplemental Response, Attachment 1 (Prop. Doc. #15)). From January 1, 1994 through June 30, 1994, prior to the imposition of the order, TAMSA exported [ ] metric tons of merchandise, at a value of [ ]. (TAMSA's May 17, 2000 Second Supplemental Response, Attachment 1 (Prop. Doc. #15)). For the period of August 1, 1996 through July 31, 1997, TAMSA shipped only [ ] metric tons of OCTG, with a value of [ ]. Id. From August 1, 1997 to July 31, 1998, TAMSA exported [ ] metric tons of OCTG, with a total value of [ ]. Id. Finally, for the period of August 1, 1998 through July 31, 1999, TAMSA shipped a mere [ ] metric tons of OCTG, with a total value of [ ]. Id. This evidence demonstrates a drop of [ ]% in volume between the period immediately preceding the issuance of the order, and the fourth administrative review. Accordingly, the Department determined that TAMSA had failed to meet

the requirement that it ship without dumping in commercial quantities for three consecutive years. Decision Memo, at TAMSA Comment 1. See also 19 C.F.R. §§ 351.222(d)(1) and 351.222(e)(1)(ii). Commerce’s determination is supported by substantial evidence and in accordance with law. The Panel should uphold this determination.

1. Commerce Properly Applied its Threshold Requirement that TAMSA Ship in Commercial Quantities for Three Consecutive Years

TAMSA continues to argue that the requirement that a respondent make sales in commercial quantities for three consecutive years is not a threshold requirement to revocation of an order. Rather, TAMSA argues that the requirement of 19 C.F.R. § 351.222(e) merely requires that an exporter certify that it sold in the U.S. market in commercial quantities. TAMSA Supplemental Submission, at 4.

TAMSA’s argument is simply absurd. Of what use is a certification if that certification is false? Indeed, the threshold requirement that an exporter ship in commercial quantities for three consecutive years stems not only from 19 C.F.R. § 351.222(e)(1)(ii), which does require a certification that the exporter sold the subject merchandise in the United States for three consecutive years. The threshold requirement also stems from 19 C.F.R. § 351.222(d)(1), which states that before an order can be revoked “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 . . . will apply.” (Emphasis added). Therefore, not only must an exporter provide the required certification pursuant to 19 C.F.R. § 351.222(e)(1)(ii), but also, Commerce must be satisfied pursuant to 19 C.F.R. § 351.222(d)(1) that the certification is true, and that there were exports in commercial quantities during the three consecutive years. To read 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. Such an absurd result would simply be untenable.

2. Commerce Has Consistently Applied the Commercial Quantities Requirement

Since this case was briefed in 2001, the Department has consistently applied exports in commercial quantities as a threshold requirement before granting revocation. See, e.g., Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Reviews, Partial Rescission of Antidumping Duty Reviews, and Determination Not to Revoke in Part, 69 Fed. Reg. 55581 (September 15, 2004), and accompanying Issues and Decision Memorandum, at Comment 11; Ball Bearings and Parts Thereof From France, Germany, Italy, Japan, and Singapore: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Review in Part, and Determination Not To Revoke Order in Part, 68 Fed. Reg. 35623 (June 16, 2003), and accompanying Issues and Decision Memorandum, at Comment 27; Certain Pasta from Turkey: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Duty Order in Part, 68 Fed. Reg. 6880, 6881 (February 11, 2003) (adopting the position of the preliminary results, Certain Pasta from Turkey: Notice of Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not to Revoke Order in Part, 67 Fed. Reg. 51194, 51198 (August 7, 2002)). Moreover, in all of these cases, Commerce has applied the commercial quantities requirement by comparing the aggregate amount shipped in a year, and compared it to the annual shipments made by an exporter prior to the imposition of the order. Commerce's commercial quantities requirement has not been the subject of any litigation before the CIT or the CAFC. This Panel should uphold

Commerce's consistent application of its regulations.

3. Commerce's Definition of Commercial Quantities is in Accordance with Law

TAMSA contends that "commercial quantities" as used in the regulations, 19 C.F.R. §§ 351.222(d)(1) and 351.222(e)(1)(ii), should be defined consistently with the statutory definition of "usual commercial quantities," as found in 19 U.S.C. § 1677(17). TAMSA Supplemental Submission, at 10. TAMSA's argument, however, is flawed.

As an initial matter, the statute does not use the term "commercial quantities," as TAMSA argues. Rather, the statute uses the term "usual commercial quantities." See 19 U.S.C. §§ 1677(17) and 1677b(a)(1)(B)(i). Specifically, the statute provides that in many situations normal value will be based on "the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the *usual commercial quantities* and in the ordinary course of trade . . . ." (Emphasis added). Moreover, the definitional section of the statute clearly defines the term "usual commercial quantities." 19 U.S.C. § 1677(17).

The addition of the adjective "usual" in the statute is important. The statute defines "usual commercial quantities" for the purpose of determining which price the Department should use to calculate normal value. Thus, the statute states:

The term "usual commercial quantities", in any case in which the subject merchandise is sold in the market under consideration at different prices for different quantities, means the quantity in which such merchandise is there sold at the price or prices for one quantity in an aggregate volume which is greater than the aggregate volume sold at the price or prices for any other quantity.

19 U.S.C. § 1677(17). This definition recognizes that the price that a producer charges may bear some relationship to the quantity being sold.

The Department engages in a two-step process to determine the “usual commercial quantities” in calculating normal value. See Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from Thailand, 67 Fed. Reg. 76380 (December 12, 2002), and accompanying Issues and Decision Memorandum, at Comment 1 (“Furfuryl Alcohol from Thailand Decision Memo”). “The first step requires that there be a clear price to quantity correlation among sales in the home market.” Id. (citing Iron Construction Castings from Canada: Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 23274 (May 21, 1991)). “The second step of the process requires a comparison of the aggregate volumes of merchandise sold at each quantity, with the quantity at which the greatest aggregate volume of merchandise is sold being deemed ‘usual commercial quantities.’” Furfuryl Alcohol from Thailand Decision Memo, Comment 1. Thus, in determining the “usual commercial quantities,” and accordingly the appropriate price to use for normal value, the Department looks whether sales are sold at different quantities, the aggregate volumes at those different quantity levels, and the prices charged at each different quantity level.

By contrast, 19 C.F.R. § 351.222 does not address the calculation of normal value. It addresses the situations where the Department may revoke an antidumping order. The regulation does not use the term “usual commercial quantities.” It only uses the term “commercial quantities.” See 19 C.F.R. §§ 351.222(d)(1) and 351.222(e)(1)(ii). Thus, the term “commercial quantities,” as used in the regulations, is being used for an entirely different purpose than the term “usual commercial quantities” as defined by the statute.

#### 4. Recent Cases TAMSA Cites Are Inapposite

TAMSA contends that NAFTA panel decisions in Pure Magnesium from Canada<sup>1</sup> and OCTG from Mexico,<sup>2</sup> and a WTO panel report in the Japan Sunset<sup>3</sup> case supports its argument that the Department must consider the totality of the circumstances in determining whether to revoke an order. TAMSA's reliance on these cases is misplaced.

The cases to which TAMSA cites are inapposite. All three cases involve determinations made in a sunset review, and do not address Commerce's commercial quantities requirement. In a sunset review, the Department is required to consider price, cost, market and economic factors if good cause is shown. 19 U.S.C. § 1675a(c)(2); 19 C.F.R. § 351.218(e)(2)(iii). By contrast, when a respondent has not dumped for three consecutive years, the Department may revoke an order, provided the antidumping order is not otherwise necessary to offset dumping. 19 C.F.R. § 351.222(b)(2)(i)(C). The regulations specifically impose a threshold requirement that exports of the subject merchandise be made in commercial quantities. 19 C.F.R. §§ 351.222(d)(1) and 351.222(e)(1)(ii). Failure to meet this threshold requirement is itself sufficient reason to deny a request for revocation.

Moreover, Commerce addressed both the level of the cash deposit rate, and the claimed depression in the U.S. market for OCTG in its final results. With respect to the argument that the

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<sup>1</sup> NAFTA Binational Panel Report, Pure Magnesium from Canada, Secretariat File No. USA-CDA-00-1904-06 (March 27, 2002).

<sup>2</sup> NAFTA Binational Panel Report, Oil Country Tubular Goods from Mexico – Final Results of Sunset Review of Antidumping Duty Order, Secretariat File No. USA-MEX-2001-1904-03 (February 11, 2005).

<sup>3</sup> United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan, WT/DS244/AB/R, Report of the Appellate Body, adopted January 9, 2004 (“Japan Sunset”). As stated below, the Japan Sunset Appellate Body report made no adverse findings against the United States which required implementation through either section 123 or 129 of the URAA. Japan Sunset, at paras. 213-14. Accordingly, the Japan Sunset case is not binding under U.S. law, and should be afforded no weight by this Panel. Corus Staal, 395 F.3d at 1348-49.

level of the cash deposit rate prevented TAMSAs from exporting to the U.S. market in volumes comparable to its sales levels prior to the antidumping order, the Department noted that while the cash deposit rate was not reduced until March of 1999, “TAMSAs nonetheless was able to sell subject merchandise to the United States during these review periods.” Decision Memo, at TAMSAs Comment 1. Citing Polyvinyl Alcohol from Taiwan, the Department stated that “a cash deposit rate does not qualify as the type of unusual occurrence that the Department might accept as appropriate rationale for reduced sales volume.” Id. (quoting Polyvinyl Alcohol From Taiwan: Final Results of Third Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part, 65 Fed. Reg. 60615 (October 12, 2000), and accompanying Issues and Decision Memorandum, at Comment 1c.

With respect to TAMSAs’s argument that the market for OCTG became depressed after the issuance of the antidumping order, the Department similarly found that such fluctuations in the market for the subject merchandise was not the type of unusual occurrence that would impact the commercial quantities requirement. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order In Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above From the Republic of Korea, 62 Fed. Reg. 39808, 39810 (July 24, 1997). “In order for {the Department} to determine that there is an unusual occurrence, there should be a permanent change that is not based on an easily-altered decision.” Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada: Final Results of Antidumping Duty Administrative Reviews, and Determination Not To Revoke in Part , 65 Fed. Reg. 9243, 9250 (February 24, 2000 ). Indeed, the Department concluded that such a depression in the market for OCTG may

actually make dumping more likely:

If it became necessary to make fewer sales at more fairly traded prices while the discipline of the order was in place, it is reasonable to infer that dumping would be likely to resume if such disciplines ceased to exist, especially if TAMSAs were again to encounter a “depressed market” in this very cyclical industry.

Decision Memo, at TAMSAs Comment 1.

5. The Commercial Quantities Requirement Is Not a Retroactive Application of Commerce’s Regulation

Recent decisions of the CAFC reaffirm the principle as enunciated in Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994), that in order for a rule to be retroactive, the rule must “impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.” Disabled American Veterans v. Secretary of Veterans Affairs, 327 F.3d 1339, 1344 (Fed. Cir. 2003) (quoting Landgraf, 511 U.S. at 280); Kearfott Guidance & Navigation Corp. v. Rumsfeld, 370 F.3d 1369, 1374 (Fed. Cir. 2002) (same). In addition, courts must consider “the ‘nature and extent of the change of the law,’ ‘the degree of connection between the operation of the new rule and a relevant past event,’ and ‘familiar considerations of fair notice, reasonable reliance, and settled expectations.’” Pincess Cruises, Inc. v. United States, 397 F.3d 1358, 1362-63 (Fed. Cir. 2005) (quoting Landgraf, 511 U.S. at 270).

Commerce’s commercial quantity requirement impairs no right that TAMSAs possessed prior to the regulation’s effective date. Prior to the effective date of the regulations, exporters had no automatic right to revocation after receiving a zero or *de minimis* margin for three consecutive years. The statute merely states that Commerce “*may* revoke, in whole or in part, . . . an antidumping order . . . after review under subsection (a) or (b) of this section.” 19 U.S.C.

§ 1675(d)(1) (emphasis added). Similarly, the regulations that were in effect in 1995 (when Commerce issued this antidumping order) stated that “the Secretary *may* revoke an order in part if the Secretary concludes that . . . {o}ne or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years . . . .” 19 C.F.R. § 353.25(b)(2) (1995) (emphasis added). The Secretary was further charged with concluding whether it was likely that the producers or resellers would sell merchandise at less than foreign market value in the future. 19 C.F.R. § 353.25(b)(2)(ii) (1995). Therefore, even when a respondent had received a zero or *de minimis* margin for three consecutive years, the statute and the regulations gave Commerce the discretion to revoke the order. But, revocation was not automatic. When exercising this discretion, Commerce considered, among other things, the effect the imposition of the antidumping order had on aggregate export volumes. See, e.g., Brass Sheet and Strip From Germany; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 61 Fed. Reg. 49727, 49730-31 (September 23, 1996). Therefore, the application of the commercial quantities requirement could not upset settled expectation.

The commercial quantities requirement imposes no new liability on past conduct. Antidumping duties have already been assessed on the entries made prior to the fourth administrative review. Commerce cannot assess any additional antidumping duties on those entries. The only effect of the regulation will be on future entries, which will remain subject to the antidumping order. Nonetheless, if Commerce concludes in an administrative review that those future entries are not sold at less than normal value, there will be *no* liability for antidumping duties.

The commercial quantities requirement creates no new obligation for past conduct. The regulation imposes on TAMSA no legal requirement to act in any specified manner.

The changes in the law as a result of the commercial quantities requirement are minimal. One change that the new regulations did make is that a respondent no longer needs to request three consecutive administrative reviews, so long as that respondent continues to export at or above normal value, and in commercial quantities for three consecutive years. Instead of imposing the burden of requesting the three consecutive administrative reviews, the new regulations provide for the certification of shipments in commercial quantities. Thus, this change in the law actually relieves a burden on respondents.

Moreover, as stated above, even prior to the effective date of the new regulations, Commerce considered the effect that the antidumping order had on the aggregate export volumes. See Brass Sheet and Strip From Germany, 61 Fed. Reg. at 49730-31. Thus, the commercial quantities requirement was consistent with Commerce's prior practice.

Accordingly, the commercial quantities requirement is not a retroactive application of a new rule. This Panel should reject TAMSA's argument to the contrary.

6. This Panel's Role is to Apply U.S. Domestic Law, Not Determine Whether Commerce's Determination is Consistent with the WTO Agreements or WTO Dispute Settlement Reports

TAMSA continues to argue that the Department's regulations should be interpreted so as to avoid an alleged conflict with U.S. obligations under the World Trade Organization ("WTO") Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Antidumping Agreement"). TAMSA Supplemental Submission, at 33-34. In support of its argument, TAMSA cites to the pending WTO dispute between Mexico and the United States

over OCTG from Mexico, and a WTO Appellate Body report, adopted by the WTO Dispute Settlement Body (“DSB”), Japan Sunset.

Because this is the wrong forum to make such arguments, TAMSA’s continued reliance on WTO reports is misplaced. Pursuant to Article 1904(2) of NAFTA, this Panel’s role is to sit in the place of the U.S. Court of International Trade (“CIT”), and review Commerce’s determination by applying U.S. law. Any argument that Commerce’s determination is inconsistent with the WTO Agreements or WTO reports should be brought to a WTO dispute settlement panel. Indeed, as stated above, Mexico has challenged the consistency of Commerce’s determination with the WTO Agreement before a WTO panel. A report in that matter is still pending. Arguments based on the inconsistency with the WTO Agreements and WTO reports should therefore be dismissed by this Panel.

a. The WTO Appellate Body Japan Sunset Report Should Be Afforded No Weight Under U.S. Law

Moreover, under U.S. law, WTO reports are not binding, and, if not implemented by the U.S. Government, entitled to no deference. In Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005), the U.S. Court of Appeals for the Federal Circuit (“CAFC”) rejected the argument that when the WTO Dispute Settlement Body (“DSB”) adopts a report adverse to the United States, that the United States is obligated under the Charming Betsy doctrine<sup>4</sup> to alter its practice. Specifically, the CAFC reaffirmed its previous holding that “WTO decisions are ‘not binding on the United States, much less this court.’” Id. at 1348 (quoting Timken Co. v. United States, 354 F.3d 1334, 1344 (Fed. Cir.), cert. denied sub nom., Koyo Seiko

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<sup>4</sup> The Charming Betsy doctrine holds that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .” Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

Co. v. United States, 160 L. Ed. 2d 352, 125 S. Ct. 412 (2004)).

At issue in Corus was the WTO Appellate Body's report in United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, report of the Appellate Body, adopted by the DSB August 31, 2004 ("Softwood Lumber"), which found the Department of Commerce's offset methodology to be inconsistent with its obligations under the WTO Anti-Dumping Agreement. Specifically, the appellant in Corus argued that under the Charming Betsy doctrine, Commerce's offset methodology had become unreasonable due to the adverse Appellate Body report in Softwood Lumber.

The CAFC rejected this argument, noting "Congress has enacted legislation to deal with the conflict presented {when the DSB adopts a report adverse to the United States}." 395 F.3d at 1349 (footnote omitted). The court continued:

It has authorized the United States Trade Representative {"USTR"}, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation.

Id. (citing 19 U.S.C. §§ 3533(f), 3533(g) and 3538 (2000)) .

The CAFC specifically referred to sections 123 and 129 of the Uruguay Round Agreements Act ("URAA") (19 U.S.C. § 3533 and 19 U.S.C. § 3538 respectively). Those statutory provisions create a deliberative process involving both the Executive and Legislative Branches of Government that must be followed before a WTO report can have any affect on U.S. law.

Based on this statutory scheme, the CAFC afforded no deference to WTO reports in its review of Commerce's interpretation of the antidumping statute. Corus Staal, 395 F.3d at 1349. The court concluded:

The conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government. In this case, section 1677(35) presented Commerce with a choice as to how it calculates weighted-average dumping margins. We give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination. *We will not attempt to perform duties that fall within the exclusive province of the political branches*, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.

395 F.3d at 1349 (internal quotations and citations omitted).

b. TAMSA's Reliance on a WTO Report in This Forum Should Be Rejected

The Appellate Body in the Japan Sunset case made no findings adverse to the United States which required implementation under U.S. law. Japan Sunset, at paras. 213-14. As such, there has been no need for the United States to follow the statutory procedures, either section 123 or 129 of the URAA, response to the Appellate Body's report. Accordingly, under Corus Staal, the Japan Sunset case is entitled to no weight in interpreting U.S. law. 395 F.3d at 348-49.<sup>5</sup>

B. The Panel Should Affirm Commerce's Final Results with Respect to Hylsa

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<sup>5</sup> A NAFTA binational panel recently found that Corus Staal does not apply to the situation where the United States has adopted an adverse WTO report. NAFTA Binational Panel Report, Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination, Secretariat File No. USA-CDA-2002-1904-02, at 28, 32, 33 (June 9, 2005) ("NAFTA Softwood Lumber"). As an initial matter, NAFTA binational panel decisions are not binding precedent under U.S. law. See NAFTA, Article 1904(9) (NAFTA panel decisions binding only "with respect to the particular matter between the Parties that is before the panel."). Moreover, the NAFTA panel relied on a statement from Corus Staal that the CAFC would not overturn Commerce's practice "based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme." Corus Staal, 395 F.3d at 1349. See NAFTA Softwood Lumber, at 33. Key to the NAFTA Panel's decision was the fact that the United States had implemented a report intended to bring Commerce's determination into conformity with the WTO Appellate Body's report, United States - Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R, adopted 31 August 2004. NAFTA Softwood Lumber, at 32-39. Because the Appellate Body in the Japan Sunset case made no findings adverse to the United States which required implementation under U.S. law, even if NAFTA Softwood Lumber were binding precedent on this Panel's review, it would have no application to TAMSA's argument.

Commerce calculated a weighted-average dumping margin of 0.79 percent in the fourth administrative review. As a result, Hylsa failed to receive a zero or *de minimis* dumping margin for three consecutive years. Commerce, therefore, denied Hylsa's request to revoke the antidumping order. Decision Memo, at Hylsa Comment 7.

In an attempt to reduce its calculated margin to below *de minimis* levels, Hylsa challenges various aspects of Commerce's calculation. As shown below, Commerce's final results should be upheld as supported by substantial evidence and in accordance with law.

1. Hylsa's Challenge to Commerce's Offset Methodology Must Fail

Commerce will not allow parties to offset dumping with distinct sales made at greater than normal value. That is, when Commerce calculates the weighted-average dumping margin in an antidumping review, Commerce will include the value of all sales during the period of review in the denominator of the equation. However, the numerator will only include the sales made at less than normal value.

The CAFC held that this practice is a reasonable interpretation of the statute. Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir.), cert. denied sub nom., Koyo Seiko Co. v. United States, 160 L. Ed. 2d 352, 125 S. Ct. 412 (2004). Specifically, 19 U.S.C. § 1677(35)(A) defines the "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." While the CAFC did not find the use of the word "exceeds" to be unambiguous, the court did conclude that the language permitted Commerce's practice. 354 F.3d at 1342. The court stated, "Basically, one number 'exceeds' another if it is 'greater than' the other, meaning it falls to the right of it on the number line." Id. The court further concluded, "Commerce's methodology for calculating dumping margins makes

practical sense.” Id. Recognizing that Commerce calculates antidumping duties on an entry-by-entry basis, the court noted that the practice “neutralizes dumped sales and has no effect on fair-value sales.” Id. Thus, the CAFC has sustained Commerce’s offset methodology both in the context of an administrative review, Timken, 354 F.3d at 1342, and in an antidumping investigation, Corus Staal, 395 F.3d at 1347.

The CAFC has also clearly rejected the argument that the inclusion of the words “fair comparison” in the antidumping statute imposes some independent requirement of “fairness” that prohibits Commerce’s offset methodology. Timken, 354 F.3d at 1344. Rather, the “fair comparison” language is descriptive of the calculations contemplated by the statute:

Thus, “in order to achieve a fair comparison with the export price or constructed export price,” id., the statute particularly sets out how to calculate “normal value.” See {19 U.S.C.} § 1677b(a)(1)-(8). We agree with the government’s position that this is an exhaustive list, and that the “fair comparison” requirement upon which Koyo now relies is specifically defined in the normal-value-calculation instructions. As such, the “fair comparison” requirement of § 1677b(a) does not impose any requirements for calculating normal value beyond those explicitly established in the statute and does not carry over to create additional limitations on the calculation of dumping margins.

Id. The CAFC reaffirmed this holding in Corus Staal, 395 F.3d at 1347-48.

The CAFC, therefore, has clearly and unambiguously held that Commerce’s offset methodology is a reasonable interpretation of the statute, and further has clearly rejected the argument that the “fair comparison” language of the statute renders this methodology invalid. Pursuant to Article 1904(2) of NAFTA, a decision by the CAFC is binding precedent on this panel. Hylsa’s continued reliance on this argument, in the face of clear CAFC precedent, is

nothing more than frivolous.<sup>6</sup>

2. Commerce Properly Calculated the Cost of Production Separately for Two Distinct Products with Clear Physical Differences

Hylsa continues to argue that Commerce should have calculated a single cost for two different products, namely 2 3/8 inch OCTG and 2 7/8 OCTG. The Department's practice continues to be to calculate the cost of production on a control number (CONNUM) specific basis. See, e.g., Magnesium Metal from the Russian Federation: Notice of Final Determination of Sales at Less Than Fair Value, 70 Fed. Reg. 9041 (February 24, 2005), and accompanying Issues and Decision Memorandum, at Comment 23. Hylsa is correct that the Department's practice is only to grant an adjustment to the reported cost of production for cost differences attributable to physical differences. Notice of Final Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags From Malaysia, 69 Fed. Reg. 34128 (June 18, 2004), and accompanying Issues and Decision Memorandum, at Comment 5.

Hylsa's request in this instance was to stray from Commerce's long-standing practice to calculate CONNUM-specific costs of production. Rather, Hylsa requested that Commerce calculate an average cost of production for two different products, CONNUM-1 and CONNUM-2. As Hylsa admits, these two products differ with respect to diameter. One is 2 3/8 inches in

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<sup>6</sup> Hylsa concedes that WTO Appellate Body reports are not binding under U.S. law. Hylsa Supplemental Submission, at 2. Nonetheless, Hylsa brings WTO reports to the attention of the Panel, and persists in its argument that the calculation of the dumping margin was not "fair." Hylsa Supplemental Submission, at 2-4. Hylsa appears to be inviting this Panel to revisit the issue of whether to use the mentioned WTO reports to interpret the "fair comparison" language under U.S. law. This Panel should decline Hylsa's invitation, and apply the binding CAFC precedent directly on point: Corus Staal and Timken.

The NAFTA panel's decision in NAFTA Softwood Lumber does not alter this analysis. As stated above, the NAFTA panel's decision is not binding precedent under U.S. law. See NAFTA, Article 1904(9). Moreover, the NAFTA Softwood Lumber decision addressed only the situation where Commerce refused to permit an offset to dumping *in an investigation*, not in an administrative review. NAFTA Softwood Lumber, at 43-44. As such, Timken, which found Commerce's offset methodology to be a reasonable interpretation of the statute in an administrative review, 354 F.3d at 1342, remains the controlling precedent that this Panel is bound to follow. See NAFTA, Article 1904(2).

diameter, while the other is 2 7/8 inches in diameter. Commerce explained in its final results that the physical differences between these two products justified the denial of Hylsa's request to calculate an average cost of production:

Although 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. Thus, it is reasonable to maintain separate COPs {cost of production} for products of different wall thickness.

Decision Memo at Hylsa Comment 4. The clear physical differences between the two products, both outside diameter and wall thickness, justified following Commerce's normal practice in this case.

3. Commerce Properly Included in the Cost of Production Restructuring Costs Incurred During the Period of Review that Benefitted the Entire Period of Review

When costs benefit production for the entire period reviewed, Commerce will include those costs in the overall reported production costs. See Notice of Sales at Less Than Fair Value: Polyvinyl Alcohol From Taiwan, 61 Fed. Reg. 14064, 14073 (March 29, 1996). Due to reorganization and automation of Hylsa's packing operations in January of 1999, packing costs for the entire period of review increased. (Hylsa Sales Verification Report, p. 25 (Prop. Doc. # 43). Although the packing of the subject merchandise occurred in June and July of 1999, Commerce found it appropriate to include the costs associated with the restructuring in the overall cost of production:

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.

Decision Memo, at Hylsa Comment 3.B (citation omitted). This methodology ensured that costs benefitting the entire period of review were captured in the overall cost of production instead of simply in the month that the expenses were paid.

Hylsa contends that Commerce double-counted the restructuring costs. As demonstrated in the Investigating Authority's initial brief, however, Commerce's final results employed a methodology that eliminated the double-counting. Investigating Authority Brief, pp. 44-47. See also Decision Memo, at Hylsa Comment 3.A.

4. Commerce Properly Treated Hylsa's Credit Insurance Expense as a Direct Selling Expense

Commerce's practice continues to be that it treats credit insurance as a direct selling expense. Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod From Mexico, 70 Fed. Reg. 25809 (May 16, 2005), and accompanying Issues and Decision Memorandum, at Comment 3.<sup>7</sup> The insurance coverage at issue here bears a direct relationship to the particular sales in question. The amount of the premium Hylsa paid varied both on the number of customers identified, and on specific levels of coverage for each customer. (Hylsa's November 23, 1999 Section C Response, pp. 23-24 (Prop. Doc. #3) ("Section C Response")). Amendments Hylsa made during the period of review indicate that the premiums changed when Hylsa added new customers, or when the amount of coverage sought increased. (Hylsa Sales Verification Exhibit 19, pp. 50-55 (Prop. Doc. #26)). Therefore, while Hylsa paid a fixed premium at the beginning of the year (Section C Response, p. 24), that premium was based on a specific list of customers, and an established level of

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<sup>7</sup> Interestingly, it was Hylsa itself who argued in Carbon and Certain Alloy Steel Wire Rod From Mexico that credit insurance should be treated as a direct selling expense.

coverage for each customer. The number of customers identified at the beginning of the year serves as a rough indicator for the insurance company of the expected sales quantities. Decision Memo at Hylsa Comment 1. While the premium for OCTG exports to the United States did not vary because Hylsa did not add customers during the period of review, Hylsa could have added more customers or changed the amount of the sales. If it did, Hylsa would be required to seek an amendment to the insurance policy in order to cover those additional customers and sales. Hylsa would then have had to pay a higher premium. Thus, the price of the insurance premium was directly variable, and dependent on sales made during the period of review. Commerce's determination should therefore be upheld.

#### 5. Hylsa Is Not Entitled to Revocation

As stated above, Hylsa did not receive a dumping margin of zero or *de minimis* for three consecutive years. As such, Hylsa is not eligible for revocation. See 19 C.F.R. § 351.222(b)(2)(i)(A).

Moreover, even if Hylsa prevailed on some of its challenges, and the result were a zero or *de minimis* margin, the Department expressly did not address the issue of whether Hylsa exported in commercial quantities in the final results. Decision Memo, at Hylsa Comment 7. The Department would still be required to address this issue before Hylsa could be granted a revocation of the antidumping order.

### III. Conclusion

For the above stated reasons, the final results of the fourth administrative review of OCTG from Mexico should be upheld by this Panel.

Respectfully submitted,

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