

ARTICLE 1904 BINATIONAL PANEL REVIEW

pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

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)	
)	

RULE 57(2) RESPONSE BRIEF OF THE
INVESTIGATING AUTHORITY

John D. McInerney
Elizabeth C. Seastrum
William J. Kovatch, Jr.

U.S. Department of Commerce
14th and Constitution Avenue, N.W.
Washington, D.C. 20230

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STATEMENT OF THE CASE

I. Administrative Determination to be Reviewed

This brief is filed on behalf of the United States Department of Commerce (“Commerce,” “the Department”), pursuant to Rule 57(2) of the North American Free Trade Agreement (“NAFTA”) Article 1904 Rules of Procedure for Binational Panel Reviews. Thereby, Commerce responds to issues raised by Tubos de Acero de Mexico, S.A. (“TAMSA”) and Hylsa, S.A. de C.V. (“Hylsa”) with respect to the final results in the fourth review of the antidumping duty order on oil country tubular goods (“OCTG”) from Mexico. This determination was published in the Federal Register as 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) (“Final Results”).

II. Statement of the Facts

A. Procedural History

Commerce initiated its fourth administrative review of the underlying antidumping duty order on September 24, 1999. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 64 Fed. Reg. 53318 (October 1, 1999). This review covered the fourth period of review (POR), August 1, 1998 through July 31, 1999. In requesting this administrative review, TAMSA and Hylsa submitted requests that the order be revoked in part as to TAMSA and Hylsa respectively. After receiving timely interested party submissions from TAMSA, Hylsa and domestic interested parties, the Department issued its preliminary results in this review. Oil Country Tubular Goods From Mexico: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent Not To Revoke in

Part, 65 Fed. Reg. 54998 (September 12, 2000) (“Preliminary Results”). Following the preliminary results, TAMSA, Hylsa and the domestic interested parties submitted case briefs and rebuttal briefs. Commerce then published the Final Results on March 21, 2000, adopting therein the analysis in its “Issues and Decision Memorandum” (“Decision Memo”) of March 21, 2001 of the issues raised by TAMSA and Hylsa.

B. Background

On July 20, 1994, Commerce initiated an antidumping duty investigation of OCTG from Mexico. Initiation of Antidumping Duty Investigations: Oil Country Tubular Goods From Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain, 59 Fed. Reg. 37962 (July 26, 1994). Commerce published its Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Mexico, 60 Fed. Reg. 33567, 33572 (June 28, 1995) (“LTFV”), finding a weighted-average margin of 23.79 percent for TAMSA.

During the investigation, Commerce requested that TAMSA submit its 1994 financial statements. These financial statements were not available at the beginning of the investigation, but became available during the course of the investigation. Although the 1994 financial statements were unaudited, TAMSA filed them with the Mexican Securities Exchange. TAMSA failed to provide these financial statements to Commerce when they became available, despite a specific request for the information at verification. Because TAMSA withheld information specifically requested by the Department, Commerce used the financial statements for the first two quarters of 1994 as best information available (“BIA”) in order to calculate interest expense. LTFV, 60 Fed. Reg. at 33572.

TAMSA challenged the decision to use BIA to calculate its interest expense before a

NAFTA binational panel. The panel sustained Commerce's decision to use the financial data from the first two quarters of 1994 as BIA. In the Matter of: Oil Country Tubular Goods from Mexico; Final Determination of Sales at Less Than Fair Value, USA-95-1904-04 at 65 (July 31, 1996) ("OCTG Panel Decision"). TAMSA had argued before the binational panel that the result of using BIA was punitive. The Panel responded that any adverse effect of the use of BIA was due to the failure of TAMSA to provide the information as requested by Commerce:

Despite the mandate of the statute and the breadth of discretion, that the courts have sanctioned, it is common for respondents to argue, as TAMSA has argued, that the Department's use and selection of BIA leads to inaccurate results and is "punitive." However, arguments that a particular BIA rate was punitive (or arbitrary, inaccurate, not the "best," etc.) have fared poorly in the courts. Undoubtedly, there is a natural tension between the goal of calculating accurate dumping margins, and the use of the BIA rule as "an investigative tool, which [ITA] may wield as an informal club over recalcitrant parties" to induce noncomplying respondents to provide the agency with data needed to calculate accurate dumping margins. **The way to have accurate dumping margins, however, is for respondents to comply with the Department's requests and to provide information which is both accurate and complete. Absent a respondent's having done so, the Department has no choice but to rely on what is, by direct implication, less than accurate information.**

Id. at 71-72 (footnotes omitted) (emphasis added).

The panel remanded the matter on unrelated issues. Id. at 55. The remand resulted in a reduction of TAMSA's margin from 23.79 percent to 21.70 percent. Oil Country Tubular Goods from Mexico: Notice of Panel Decision, Amended Order and Final Determination of Antidumping Duty Investigation in Accordance With Decision Upon Remand, 62 Fed. Reg. 5612, 5613 (Feb. 6, 1997). Because Hylsa was not a mandatory respondent in the investigation, Hylsa's entries were subject to the all others rate, which was also 21.70 percent. Id.

Neither TAMSA nor Hylsa exported subject merchandise to the United States during the first POR. Oil Country Tubular Goods From Mexico; Notice of Termination of Antidumping

Duty Administrative Review, 62 Fed. Reg. 19309, 19309 (April 21, 1997). In the administrative review of the second POR, August 1, 1996 through July 31, 1997, Commerce assigned both TAMSA and Hylsa a zero percent margin. Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 13962 (March 23, 1999). An administrative review of the third POR also resulted in a zero percent margin for TAMSA. Oil Country Tubular Goods From Mexico: Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 1593 (January 11, 2000). Commerce did not review exports from Hylsa during the third POR.

The Department initiated its administrative review of the fourth POR on September 24, 1999. Notice of Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 64 Fed. Reg. 53318 (October 1, 1999). Evidence submitted during the fourth review demonstrated that TAMSA's shipments of OCTG to the United States plunged after the issuance of the antidumping order. (TAMSA's May 17, 2000 Second Supplemental Response, Attachment 1 (Prop. Doc. #15)). Similarly, a submission by Hylsa concerning historical information on its exports of OCTG to the United States demonstrated a dramatic decline in Hylsa's exports in the three years prior to the revocation request. (Hylsa's August 16, 2000 submission, at Attachment 2 (Prop. Doc. #81)).

C. Cost Issues

1. Production Costs

Hylsa organizes its tubular products process into separate "cost centers," recording costs by each of these cost centers, but not calculating individual product costs or inventory values. (Hylsa's November 23, 1999 Section D Response, p. 28 (Prop. Doc. #3)). Hylsa then traces the

merchandise its produces through each cost center that processes the merchandise, and calculates a total of the costs incurred in those cost centers. Id.

With respect to the cost centers where OCTG was produced, Hylsa calculated a single cost of manufacturing for each month. That amount was then divided by the total quantity produced to calculate a per unit cost of manufacturing. To determine a total cost of manufacturing for OCTG, the total quantity of OCTG was multiplied by the per unit cost of manufacturing.

In this case, there were two models of OCTG produced by Hylsa. These models varied by outside diameter and wall thickness. Both were produced in the same manufacturing center. Each was assigned a different control number, or CONNUM. Hylsa only produced OCTG in June and July of 1999. Therefore, Commerce took the total quantity of each separate CONNUM produced in June and multiplied it by the per unit cost calculated for June. It then took the total quantity of each CONNUM produced in July and multiplied it by the per unit cost for July. Commerce then added the total costs for June and July, to establish the respective costs of manufacturing for the two separate products. That is, Commerce took the quantity of CONNUM 2 produced in June and multiplied it by the per unit cost for June. Commerce then took the quantity of CONNUM 2 in July and multiplied it by the per unit cost for July. Commerce then added these two numbers together to calculate the total cost of manufacturing for CONNUM 2. Commerce did the same for CONNUM 1.

Hylsa argued that the Department should have averaged the costs associated with the production of both products made during the POR, claiming that its production processes were the same for each product. Hylsa alleged that the differences in the costs of manufacturing was

due to the fact that CONNUM 1 was produced almost entirely in July, a month in which Hylsa alleged a shut-down occurred. For the Final Results, the Department rejected this argument, noting that while the products may have been run through the same process, smaller diameter pipe is made from a thinner product would normally require more processing, and thus involve higher costs. Decision Memo, at Hylsa Comment 4. Commerce further noted that Hylsa had failed to mention the alleged mill shut-down in its submissions, or attempted to explain how such a shut-down affected costs. Id.

2. Packing Costs

With respect to packing costs, Hylsa maintains three departments where packing takes place. Initially, Hylsa reported packing costs by month, for all three departments. At verification, Commerce learned that only one packing department, identified by Hylsa as cost center 2052, packs OCTG. Commerce therefore requested that Hylsa recalculate packing costs based solely on the one applicable cost center. (Hylsa Sales Verification Report, p. 25 (Prop. Doc. #43)).

During verification, the Department learned that Hylsa reorganized cost center 2052 during the POR, allowing more of the packing process to be automated. (Hylsa Sales Verification Report, p. 25 (Prop. Doc. # 43)). This reorganization resulted in a dramatic decrease in labor costs at cost center 2052 during the POR.

Hylsa argued that the Department had double-counted the packing costs in its Preliminary Results. Hylsa contended that it included the packing costs in its costs of manufacturing. Because constructed value involved adding the costs of manufacturing with an amount for selling, general and administrative expense, an amount for profits, and an amount for

packing expenses, Hylsa argued that the packing expenses had been included in the calculations twice. In the Final Results, the Department agreed with Hylsa that the overlapping costs should be excluded. Decision Memo, at Hylsa Comment 3.A. However, the Department noted that only a small portion of the packing expenses were included in the costs of manufacturing. Commerce, therefore, only deducted that small amount from the costs of manufacturing. Id.

Hylsa also argued that the packing costs should be based on only the two months in which OCTG was produced: June and July. Commerce, however, was faced with the issue of accounting for the restructuring and reorganization experienced in the packing line during the POR. Because the Department determined that these costs benefitted the entire POR, and not merely the month in which they occurred, the Department determined that the costs associated with restructuring and reorganizing should be allocated over the entire POR. Decision Memo, at Hylsa Comment 3.B.

D. Credit Insurance

Hylsa purchased an insurance policy to provide coverage against non-payment by its export customers, called credit insurance. (Hylsa's November 23, 1999 Section C Response, pp. 23-24 (Prop. Doc. #3) ("Section C Response")). Hylsa stated that it paid a fixed premium at the beginning of the year (Section C Response, p. 24). During the course of the POR, Hylsa amended its credit insurance coverage. Those amendments 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, Fiche #121)).

Hylsa argued that the credit insurance should have been classified as an indirect expense and not a direct expense. The Department concluded that the credit insurance expense was a

direct and unavoidable consequence of the sale, and varied depending on the number of customers. Accordingly, the Department continued to classify the credit insurance expense as a direct expense. Decision Memo, at Hylsa Comment 1.

E. Revocation

Both TAMSA and Hylsa requested revocation pursuant to 19 C.F.R. § 351.222, based on the absence of dumping for three consecutive years. With respect to Hylsa, the Department noted that the fourth POR constituted one of the years necessary for the requirement of three consecutive years without dumping. Because the Department calculated a margin of 0.79 percent, which was above *de minimis*, Hylsa did not qualify for revocation. Decision Memo, at Hylsa Comment 7.

The Department noted that TAMSA experienced a significant decline in exports after the issuance of the antidumping order. Due to this drop-off in exports, the Department determined that TAMSA had failed to satisfy the threshold requirement of shipments in commercial quantities for three consecutive years. Accordingly, the Department concluded that TAMSA did not qualify for revocation. Decision Memo, at TAMSA Comment 1.

F. Final Results

In conducting this administrative review, and in reaching its Final Results, Commerce made these determinations:

1. Due to the significant decline in TAMSA's exports of the subject merchandise after the issuance of the order, Commerce determined that TAMSA did not meaningfully participate in the U.S. market, and that its sales for the second, third and fourth PORs did not provide a meaningful basis for determining that it was unlikely that TAMSA would dump in the

future. Decision Memo, at TAMSA Comment 1.

2. Because only a small portion of the packing expenses included in the cost of manufacturing overlapped with the packing expenses reported separately, Commerce excluded only that portion of the packing expenses from the cost of manufacturing. Decision Memo, at Hylsa Comment 3.A.

3. Because Hylsa incurred reorganization and restructuring costs that benefitted the entire POR, the Department declined Hylsa's request to base the packing expenses only on the costs incurred in June and July, instead allocating the restructuring and reorganization costs over the entire POR. Decision Memo, at Hylsa Comment 3.B.

4. Because Hylsa produced two models of OCTG during the POR, with one model of OCTG having thicker walls and a different outside diameter than the other, the Department determined that it was reasonable to continue to use product-specific costs, instead of averaging the costs of both products. Decision Memo, at Hylsa Comment 4.

5. Because the premium of Hylsa's credit insurance varied depending on the number of customers, the Department determined that this was a direct expense, properly accounted for in a circumstances of sale adjustment. Decision Memo, at Hylsa Comment 1.

6. Because Hylsa did not have three consecutive years without dumping, Hylsa did not qualify for partial revocation. Decision Memo, at Hylsa Comment 7.

Both TAMSA and Hylsa filed this action, contesting the Final Results. In addition to the issues discussed above, TAMSA and Hylsa now raise, issues concerning the World Trade Organization ("WTO") obligations of the United States. Further factual information is provided in the issue-specific sections below.

STATEMENT OF THE ISSUES

Pursuant to Rule 59(1) of the NAFTA Article 1904 Panel Rules, the Department of Commerce provides below a statement and summary of the issues in this proceeding:

1. The Threshold Commercial Quantities Requirement for Revocation

Under 19 U.S.C. § 1675(e), and 19 C.F.R. §§ 351.222(d)(1) and (e)(1)(ii), should the determination of the Department that TAMSA did not export in commercial quantities be affirmed when the evidentiary record clearly shows that since TAMSA experienced a significant decline in exports after the issuance of the antidumping order it did not meaningfully participate in the U.S. market?

2. WTO Arguments

Should this Panel reject as non-justiciable TAMSA's argument concerning Article 11.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("WTO Antidumping Agreement"), and Hylsa's argument concerning the 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) ("Bed Linens"), when the clear terms of Article 1904 of the NAFTA obligate the Panel to apply U.S. law?

3. Production Costs

Under 19 U.S.C. § 1677(16) and the Department's normal practice, should this Panel affirm the Department's determination to use costs reported on a CONNUM-specific basis when the physical differences between the two different CONNUMs explain the differences in costs, and Hylsa has provided no sufficient justification to stray from Commerce's normal practice?

4. Restructuring of the Packing Line

Was the Department's decision to allocate Hylsa's costs associated with restructuring and renovating the packing line over the entire POR reasonable and in accordance with law, when such costs benefitted the entire POR, and not merely the months in which they were incurred?

5. Overlapping of Packing Costs

Was the Department's methodology to eliminate the double-counting associated with Hylsa's reporting of its packing costs both as a separate computer field, and as a cost of manufacturing reasonable and in accordance with law when only a small portion of the packing expenses included in the cost of manufacturing field actually overlapped with the separately reported packing field?

6. Credit Insurance

Under 19 U.S.C. § 1677b(a)(6)(C)(iii) and 19 C.F.R. § 351.410(c), should the Department's determination that Hylsa's credit insurance was a direct expense be affirmed when the insurance expense was a direct and unavoidable consequence of the sale, and the premiums varied depending on the number of customers?

7. Revocation With Respect to Hylsa

Under 19 U.S.C. § 1675(e), and 19 C.F.R. § 351.222, should the Department's determination not to revoke in part with respect to Hylsa be affirmed when Hylsa had not experienced three consecutive years without dumping, and Hylsa had not exported to the United States in commercial quantities during these three consecutive years?

SUMMARY OF ARGUMENT

First, Commerce properly determined that TAMSA did not qualify for partial revocation. TAMSA experienced a significant decline in its exports of OCTG to the United States after the issuance of the antidumping order. Thus, TAMSA failed to satisfy the threshold requirement that the exporter ship for three consecutive years in commercial quantities. This requirement was codified by regulation in 1997, and as such is entitled to maximum deference. The Department gave ample notice to the trade community that the commercial quantities requirement would be measured on an aggregate volume basis, and not on the basis of the size of individual sales. By not meeting this threshold requirement, TAMSA failed to meaningfully participate in the U.S. market. This meant that TAMSA's sales during this period did not provide a reasonable basis for determining that TAMSA would be unlikely to dump in the future.

Second, TAMSA's claim that the Department's determination is inconsistent with the WTO Antidumping Agreement is not an issue justiciable by this Panel. By the clear terms of Article 1904 of the NAFTA, this Panel is obligated to apply U.S. law. Whether the Department's determination was consistent with the WTO Antidumping Agreement is not an issue justiciable by the Panel. Furthermore, under U.S. law, TAMSA has no standing to raise an argument based on the WTO agreements. Similarly, Hylsa's claim that Department's determination is inconsistent with the WTO appellate division report in Bed Linens is not an issue justiciable by this Panel. Like TAMSA, under U.S. law, Hylsa has no standing to bring this argument. Additionally, U.S. law unambiguously instructs the Department to include in its weighted average margin calculations only sales made at less than fair value. Moreover, Bed Linens did not involve a U.S. practice, and therefore does not constitute the international

obligations of the United States.

Third, the Department's determination to use costs reported on a CONNUM-specific basis for Hylsa should be affirmed. The Department's normal practice is to calculate costs on such a basis. Here, clear physical differences exist between the products Hylsa produced during the POR. Such differences reasonably explain why, although both products undergo the same type of processing, one product requires more processing than the other. Moreover, Hylsa's contention that the production costs in the month of July were higher due to a mill shut-down is unsubstantiated by the administrative record.

Fourth, the Department's decision to allocate Hylsa's costs associated with restructuring and renovating the packing line over the entire POR was reasonable and in accordance with law. The issue for the Department was how to account for such costs which were incurred early in the POR. Restructuring and renovation costs benefit more than merely the month in which they were incurred. Thus, it was reasonable for Commerce to allocate these costs over the entire POR.

Fifth, the Department properly eliminated the double-counting that resulted from Hylsa's reporting of packing costs both as a separate computer field, and as a part of its costs of manufacturing. The actual amount of overlap between the "packing in finishing" line item in the cost of manufacturing field and the separate packing field was small. Therefore, to eliminate the double-counting, the Department excluded from the cost of manufacturing only those packing expenses listed in the separate packing field.

Sixth, the Department's determination that Hylsa's credit insurance was a direct expense is supported by substantial evidence and otherwise in accordance with the law. Although Hylsa

reported that it paid a fixed premium at the beginning of the year, the evidentiary record demonstrates that when customers were added, or the amount of coverage amended, the premiums changed. This expense, therefore, varied depending on the amount of customers. Thus, the Department determined that this expense was a direct and unavoidable consequence of the sale.

Finally, the Department properly determined that Hylsa had not qualified for revocation. In order to qualify, Hylsa first had to demonstrate that it did not dump the subject merchandise for three consecutive years. Because the fourth review resulted in a dumping margin of 0.79 percent, Hylsa did not meet this requirement. Furthermore, Hylsa failed to meet the threshold requirement of shipments in commercial quantities during the three consecutive years.

STANDARD OF REVIEW

The standard of review to be applied by binational panels under the North American Free Trade Agreement (“NAFTA”), Dec. 17, 1992, United States-Canada-Mexico, 31 I.L.M. 289 (entered into force Jan. 1, 1994) in their review of Commerce’s determination is specified in Articles 1904(2)-(3) and Annex 1911 of the NAFTA. These provisions, in turn, require that the applicable standard of review is that set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a(b)(1)(B)). This standard of review requires that a Panel “hold unlawful any determination, finding, or conclusion not supported by substantial evidence on the record, or otherwise not in accordance with **law**.” 19 U.S.C. § 1516a(b)(1)(B) (emphasis added). The law at issue in this case is U.S. law. See NAFTA, Art. 1904(2).

There are several elements to this standard of review. First, the requirement that the review be “on the record” means a Panel’s review must be limited to only “information presented

to or obtained by [Commerce] . . . during the course of the administrative proceeding . . .” 19 U.S.C. § 1516a(b)(2)(A)(i). Material that is extraneous to the record may not be considered by the Panel, and any inquiry beyond the record constitutes an impermissible substitution of the Panel's judgment for that of the agency.¹

Second, the requirement that a determination be supported by “substantial evidence” does **not** mean that a determination must be supported by the weight of the evidence. Instead, “[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison Co. v. N.L.R.B., 305 U.S. 206, 229 (1938). The U.S. Supreme Court has reaffirmed that under the substantial evidence standard “[a] court reviewing an agency's adjudicative action should accept the **agency's** factual finding if those findings are supported by substantial evidence on the record as a whole . . . The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.” Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992) (emphasis in original; citation omitted). The court must accept those findings, even if the court would have reached a different conclusion if it had been the ultimate trier of fact. Shandong Huarong Gen. Corp. v. United States, Consol. Court No. 00-08-00393, Slip Op. 2001-88, 2001 Ct. Intl. Trade LEXIS 93 at *22 (Ct. Int’l Trade July 23, 2001).

Third, on issues of statutory interpretation, where the “not in accordance with law” aspect of the standard of review of section 1516a is involved, “[i]f 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.” Chevron U.S.A., Inc. v. Natural Resources Defense Council,

¹ See, e.g., Beker Industries Corp. v. United States, 7 CIT 313, 316-17 (1984).

Inc., 467 U.S. 837, 842-43 (1984). Where Congress has explicitly left a gap for the agency to fill, or legislative delegation is implied, “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” Id. at 844. An implied delegation may be apparent from the agency’s generally conferred authority. United States v. Mead Corp., 121 S.Ct. 2164, 2172 (2001). In applying Mead, the Federal Circuit has held that Commerce’s regulations adopted after notice-and-comment rulemaking are entitled to maximum deference. Koyo Seiko Co. v. United States, 258 F.3d 1340, 1347 (Fed. Cir. 2001). Additionally, the Federal Circuit has held, “Even where Commerce has not engaged in notice-and-comment rulemaking, its statutory interpretations articulated in the course of antidumping proceedings draw Chevron deference.” Shakeproof Assembly Components Division of Illinois Tool Works, Inc. v. United States, Crt. No. 97-12-02066, Slip Op. 00-1521 (Fed. Cir. Oct. 12, 2001) (citing Mead, 121 S.Ct. at 2171). See also Pesquera Mares Australes Ltda. v. United States, 2001 U.S. App. LEXIS 20914 at *17-*28 (Fed. Cir. 2001); American Silicon Technologies v. United States, 2001 U.S. App. LEXIS 18518 at *15-*16 (Fed. Cir. 2001).

“Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law.” National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992). Various decisions of the Supreme Court “mandate that when a court is reviewing an agency decision based on a statutory interpretation, ‘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.’” Id. (quoting Chevron, 467 U.S. at 843 (1984)). The Supreme Court has also stated that “the

resolution of ambiguity in a statutory text is often more a question of policy than of law,” and “[w]hen Congress, through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policymaking authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.” Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, 696 (1991). It is sufficient that an agency's interpretation of a statute “is plausible, if not preferable” in order to be sustained. National R.R. Passenger Corp., 503 U.S. at 419. In other words, the agency's decision need only be a reasonable interpretation of the statute. It need not be “the **only** reasonable interpretation or the one which the court views as the most reasonable.” Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). The Federal Circuit has consistently adhered to the principle of deference articulated in Chevron. See, e.g., Pesquera Mares Australes, 2001 U.S. App. LEXIS 20914 (Fed. Cir. 2001); American Silicon, 2001 U.S. App. LEXIS 18518 (Fed. Cir. 2001); Georgetown Steel Corp. v. United States, 801 F.2d 1308 (Fed. Cir. 1986). Panels must apply this general legal principle of deference pursuant to Articles 1904(2) and 1904(3) of the NAFTA.

In addition, in determining Congressional intent, courts should look not only to the words of the URAA, but to the Statement of Administrative Action (URAA), H.R. Doc. No. 103-316, Vol. 1 (1994), reprinted in U.S.C.C.A.N. 3773 (“SAA”), that accompanied the statute. See, e.g., AK Steel Corp. v. United States, 226 F.3d 1361, 1372-74 (Fed. Cir. 2000). The statute itself states that the SAA is “an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application.” 19 U.S.C. § 3512(d) (1994).

Finally, decisions of the U.S. Supreme Court and of the U.S. Court of Appeals for the Federal Circuit are binding on Article 1904 Binational panels. NAFTA Article 1904(2)-(3).

ARGUMENT

A. Commerce Properly Determined Not to Revoke the Order with Respect to TAMSA Because TAMSA Failed to Ship in Commercial Quantities for Three Consecutive Years.

Raising several arguments, TAMSA challenges the Department's determination not to revoke the antidumping order with respect to its imports because of TAMSA's failure to export in commercial quantities for three consecutive years. TAMSA does not, and cannot, challenge the fact that after the issuance of the antidumping order its exports to the United States plunged dramatically. Rather, TAMSA argues that there is no regulatory requirement that the Department make a threshold determination of whether shipments were made in commercial quantities. TAMSA further argues that whether shipments were made in commercial quantities can only be considered in the context of determining "whether the continued application of the antidumping duty order is otherwise necessary to offset dumping" pursuant to 19 C.F.R. § 351.222(b)(2)(i)(C).

This argument ignores the clear regulatory requirements that the party requesting revocation must certify that it sold the subject merchandise in the United States in commercial quantities for three consecutive years, 19 C.F.R. § 351.222(e)(1)(ii), and that the Department must be satisfied that there were shipments in commercial quantities for those three consecutive years, 19 C.F.R. § 351.222(d)(1). Accordingly, the Department's determination not to revoke is consistent with law, and supported by substantial evidence.

1. TAMSA Failed to Export the Subject Merchandise to the United States in Commercial Quantities for Three Consecutive Years.

The statute states, “The administering authority **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). The Court of International Trade has held that the use of the word “may” in the statute grants the Department discretion in determining the criteria for revocation. See Hyundai Elec. Corp. v. United States, 53 F. Supp. 2d 1334, 1340 (Ct. Int’l Trade 1999); Matsushita Elec. Indus. Co. v. United States, 688 F. Supp. 617, 623 (Ct. Int’l Trade), aff’d, 861 F.2d 257 (Fed. Cir. 1988). Commerce adopted a regulation governing the criteria for revocation, 19 C.F.R. § 351.222, after engaging in notice-and-comment rulemaking. See generally Antidumping Duties; Countervailing Duties: Final Rule, 62 Fed. Reg. 27296 (May 19, 1997) (“1997 Regulations”). This regulation, therefore, is entitled to maximum deference. See Koyo Seiko, 258 F.2d at 1347.

Under this regulation, Commerce may revoke an order if an exporter has not dumped for three consecutive years. See 19 C.F.R. § 351.222(b)(2)(i)(A). However, the person requesting revocation must submit a certification that “during each of the consecutive years . . . the person sold subject merchandise to the United States in **commercial quantities**” 19 C.F.R. § 351.222(e)(1)(ii) (emphasis added). Thus, the regulations impose a threshold requirement that “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 revocation . . . will apply.” 19 C.F.R. § 351.222(d)(1) (emphasis added). The Department announced, “Commercial quantities is a threshold requirement applicable to all respondents seeking revocation, in part, of an antidumping duty order.” 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, Comment 1a (“Third Review of Polyvinyl Alcohol From Taiwan”).

The record evidence clearly indicates a significant decrease in TAMSA’s exports of the subject merchandise since the issuance of the antidumping order. TAMSA’s exports from January 1, 1994 through June 30, 1994, before the imposition of the order, set the benchmark. During that period, 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.

After reviewing the record evidence, Commerce found that revocation was not appropriate with respect to TAMSA:

TAMSA's overall record of sales to the United States during these three years, when viewed in terms of both volume and value, do not provide a reasonable basis for determining that the discipline of the order is no longer necessary to offset dumping.

Decision Memo, at TAMSA Comment 1. Specifically, the Department found that TAMSA’s shipments in the three years where there was no dumping were not made in commercial quantities:

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).

Id. This determination was consistent with the regulations, and supported by substantial evidence from the record.

2. The Regulatory Requirement of Shipments in Commercial Quantities is a Reasonable Interpretation of the Statute.

In the preamble to the Department's regulations, Commerce explained the rationale behind the commercial shipments requirement:

The underlying assumption behind a revocation based on the absence of dumping or countervailable subsidization 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 the order. If the respondent is not selling in commercial quantities of that company or industry for the duration of the specified period, this assumption becomes weaker.

1997 Regulations, 62 Fed. Reg. at 27326. Thus, even when a producer or exporter achieves a zero percent margin, if that producer or exporter cannot sell subject merchandise at fairly traded prices in the U.S. market in quantities commensurate with its pre-order quantities, it is logical to conclude that without the discipline of the order the producer or exporter will resume dumping.

3. Commerce Defines "Commercial Quantities" by Looking to the Aggregate of the Exporter's Sales Prior to the Issuance of the Antidumping Order.

TAMSA argues that commercial quantities should be defined by looking at the volume of

each separate sale made during the three years prior to the revocation request, to determine whether these were “*bona fide*” sales. TAMSA Br., at 14-17, 33. TAMSA further contends that the Department should not define commercial quantities by looking at the aggregate sales volume, and comparing this to the aggregate sales volume made prior to the issuance of the order. TAMSA Br., at 33. TAMSA’s argument, however, ignores Commerce’s established practice that in determining whether sales were made in commercial quantities, Commerce will look to the aggregate volume of sales the exporter made in the year prior to the issuance of the order, and compare that to the aggregate volume of sale made in the three years preceding the revocation request. As discussed below, this practice is consistent with the Department’s practice prior to the issuance of the 1997 Regulations.

During the process of adopting new regulations in 1996 and 1997, the Department announced its practice of defining “commercial quantities” based on the volume and value of the shipments made prior to the issuance of the order. For example, when Commerce requested comments on its proposed regulations, it stated that it would “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.” Antidumping Duties; Countervailing Duties: Notice of Proposed Rulemaking and Request for Public Comments, 61 Fed. Reg. 7308, 7320 (February 27, 1996) (“1996 Proposed Regulations”). One commenter on 19 C.F.R. § 351.222(d)(1) suggested that the Department require the person requesting revocation to submit “information concerning the volume and value of exports of subject merchandise during the initial period of investigation and each of the last three . . . consecutive years” along with the request for revocation. 1997 Regulations, 62 Fed. Reg. at 27325.

Commerce declined to adopt this suggestion, noting “the Department intends to request this type of information in the course of its review” Id. Commerce stated, “Such information would be necessary to fulfill the requirement of § 351.222(d)(1)” Id. Thus, Commerce clearly indicated that it would look to the exporter’s behavior prior to the issuance of the order in establishing a baseline for commercial quantities. If that exporter’s shipments after the issuance of the order fell below that baseline, then the shipments would not be considered commercial quantities.

Moreover, in applying the commercial quantities requirement of 19 C.F.R. § 351.222, the Department has consistently looked to the aggregate quantity of the exporters’ shipments in the years at issue, and compared them to the aggregate quantity of shipments made prior to the issuance of the order. See, e.g., 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, 9249 (February 24, 2000) (“Corrosion-Resistant Carbon Steel Flat Products From Canada”); Pure Magnesium From Canada; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part, 64 Fed. Reg. 12977, 12978 (March 16, 1999); 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 To Revoke in Part, 64 Fed. Reg. 2173, 2175 (January 13, 1999) (“Carbon Steel Flat Products From Canada”). In reviewing its commercial quantities requirement, the Department announced:

[A]bsent an extraordinary occurrence which would cause the Department to consider other measures of commercial quantities . . . , it has been the

Department's practice to examine the aggregate volume of total sales to the United States (in absolute terms and in comparison with the POI or other appropriate benchmark period) in determining whether sales have been made in commercial quantities.

Third Review of Polyvinyl Alcohol From Taiwan, Issues and Decision Memorandum at Comment 1c (citation omitted) (emphasis added).

The Department's interpretation that sales in commercial quantities requires a comparison between the aggregate volume of the exporter's sales prior to the issuance of the order and the aggregate volume of sales is consistent with its prior practice. In 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) ("Brass Sheet and Strip From Germany"), an exporter requested a revocation based on the absence of dumping for three consecutive years. The Department examined whether there would be no likelihood of a resumption of dumping under 19 C.F.R. § 353.25(a)(2)(ii) of the pre-URAA regulations. The Department stated that in making this determination, it considered the exporter's ability to compete in the U.S. market without dumping. 62 Fed. Reg. at 49730. The Department determined that it could not conclude that there was no likelihood of a resumption of dumping by noting that there had been a dramatic decline in the exporter's aggregate shipments of the subject merchandise following the issuance of the antidumping order. Id. at 49730-31. Thus, even prior to the promulgation of 19 C.F.R. § 351.222 in 1997, the Department's practice had been to compare the volume of shipments prior to the issuance of the order to the volume of shipments in the three years where there had been no dumping.

In the Decision Memo, Commerce explained the rationale for its practice:

The commercial quantities standard is evaluated on a case-by-case basis, with the

goal of basing our revocation determination on a company's normal commercial practice. In other words, if a company is found to have sold subject merchandise in the United States for three consecutive years at not less than normal value, the Department must be satisfied that the respondent's participation in the U.S. market was meaningful. Sales during the POR which, in the aggregate, represent a very limited quantity do not provide a reasonable basis for establishing the rebuttable presumption that the discipline of the order is no longer necessary to offset dumping.

TAMSA Comment 1. In order to determine a company's normal practice, it is necessary to look back to the behavior of the company without the discipline of the order. Such behavior is established by the shipments made during the POI. Once the Department has determined a benchmark, it then compares that benchmark to the aggregate sales in the three years prior to the revocation request. This is a reasonable approach to determine whether the company's behavior during these three consecutive years reflects the company's behavior without the discipline of an order.

Accordingly, the Department's practice is to define "commercial quantities" by looking to the aggregate volume of shipments both during the POI, and in the three years prior to the revocation request. This practice is consistent with the preamble to the 1997 Regulations, as well as with prior practice. Moreover, this is a reasonable approach to determine whether dumping would be likely if the order were revoked.

4. The Department's Commercial Quantities Requirement Was Applicable at the Time of TAMSA's Request for Revocation, and Therefore is Not a Retroactive Application of a New Rule.

TAMSA argues that Commerce's requirement of shipments in commercial quantities in three consecutive years is a retroactive application of a new rule. TAMSA Br., at 35. This accusation is unfounded.

The regulations applicable to TAMSA's request for revocation are the regulations that

were in effect at the time that the request was made. 19 C.F.R. § 351.701. TAMSA submitted a request for this administrative review as well as for partial revocation on August 31, 1999.

(TAMSA's August 31, 1999 Request for Antidumping Administrative Review and Revocation in Part of Antidumping Duty Order on Oil County Tubular Goods from Mexico (Pub. Doc. # 1)) ("TAMSA's Revocation Request"). The Department properly applied the regulations, 19 C.F.R. §§ 351.222(d)(1) and (e)(1)(ii), which had been in effect since July 1, 1997, over two years prior to TAMSA's request for revocation. See 19 C.F.R. § 351.701.

TAMSA itself demonstrated at the administrative level that it understood that the commercial quantities requirement applied to its revocation request. In its request, TAMSA specifically referred to the certification requirements of 19 C.F.R. § 351.222(e)(1) and submitted the required certification that it shipped in commercial quantities. (TAMSA's Revocation Request (Pub. Doc. # 1)). Having submitted the certification of shipments in commercial quantities, TAMSA's own actions demonstrate that it understood that the commercial quantities requirement was in effect when it requested revocation.

Moreover, the application of the commercial quantities provision, as applied in this review, has no "retroactive" effect. A law does not operate retroactively merely because it is applied in a case arising from conduct antedating the law's existence, or because it upsets expectations based on the prior law. See Landgraf v. USI Film Products, 511 U.S. 244, 269 (1994). Rather, a retroactive effect occurs when the law impairs the rights a party possessed when it acted, increases the party's liability for past conduct, or imposes new duties or sanctions with respect to transactions that have already been completed. See id. at 280; Fernandez v. Department of the Army, 234 F.3d 553, 557 (Fed. Cir. 2000). Justice Scalia explained, "A rule

with exclusively future effect (taxation of future trust income) can unquestionably affect past transactions (rendering the previously established trust less desirable in the future), but it does not cease to be a rule” Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 219 (1988) (Scalia, J., concurring).

Commerce explained that the application of the commercial quantities requirement has only future effect:

The effect of the Department's revocation decision is solely prospective, as it determines whether future entries will be subject to the discipline of the order. The fact that information from a prior period is considered in making a decision does not render that decision a retroactive one.

Decision Memo, at TAMSAs Comment 1. Because the decision to revoke is left to the discretion of the Department as guided by the criteria set forth in 19 C.F.R. § 351.222, TAMSAs did not possess a right to revocation when it exported the subject merchandise after the issuance of the order.² The decision concerning revocation did not affect the amount of antidumping duties owed on the prior entries. Thus, the decision did not impose greater liability on TAMSAs for past actions, nor did it impose greater sanctions with respect to a completed transaction. The only effect of the application of this regulatory requirement was on future entries, because Commerce decided not to revoke the order. Therefore, because the effect of the application of this regulatory threshold requirement is on future entries, the Department is not applying this rule in a retroactive manner.

² The regulation in effect prior to July 1, 1997, 19 C.F.R. § 353.25(a)(2) (1996), provided that Commerce “may” revoke an order in part if a company had not dumped in three consecutive years. Such language indicates that the Department had discretion under the prior regulations on whether to revoke an order in part, even if it was shown that it was not likely that the company would sell the merchandise at less than foreign market value. See Hyundai, 53 F. Supp. 2d at 1340; Matsushita, 688 F.Supp. at 623. Therefore, even if TAMSAs made export decisions during the second POR based on the regulation that existed when that POR began, August 1, 1996, TAMSAs did not have a right to revocation if it did not dump for three consecutive years.

In essence, TAMSA argues that this rule was not developed until 1999 with the issuance of the final results of Carbon Steel Flat Products From Canada, and the publication of the amended regulation in 1999. TAMSA Br., at 37-45. However, the regulations which contain the commercial quantities requirement, 19 C.F.R. §§ 351.222(d)(1) and (e)(1)(ii), were proposed in 1996, 1996 Proposed Regulations, 61 Fed. Reg. at 7317, and adopted in 1997, 1997 Regulations, 62 Fed. Reg. at 27399. These regulations became effective with respect to administrative reviews on July 1, 1997. 19 C.F.R. § 351.701. Thus, the commercial quantities requirement became a threshold requirement **pursuant to regulation** in 1997.

Moreover, cases prior to the 1997 Regulations considered the aggregate quantity of exports both prior to and after the issuance of the antidumping order. In Brass Sheet and Strip From Germany, 61 Fed. Reg. at 49730-31, for example, in determining whether an exporter had the ability to compete in the U.S. market without dumping, Commerce compared the aggregate volume of exports prior to the order to the aggregate volume of sales in the three consecutive years prior to the revocation request. This determination was published in 1996. Thus, while the requirement that exporters ship in commercial quantities for three consecutive years was first codified by regulation in 1997, support for this requirement existed in the Department's practice prior to the promulgation of the 1997 Regulations.

TAMSA refers to an amendment to the Department's regulations in 1999 in an attempt to paint the commercial quantities requirement as a new rule that was not adopted until 1999. This reference to the 1999 amended regulation is unavailing. In 1999, Commerce amended 19 C.F.R. § 351.222(b). Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 64 Fed. Reg. 51236, 51240 (September 22, 1999) ("1999 Amended

Regulation”). This amendment was in response to the WTO panel decision, United States -- Antidumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabyte or Above, WT/DS99/R, Report of the Panel (January 29, 1999). In the announcement of the amended regulation, the Department specifically noted that the WTO panel decision did not address the commercial quantities requirement:

The threshold requirement **continues to be** that respondents not sell at less than normal value for at least three consecutive years and that, during each of those years, **respondents exported subject merchandise to the United States in commercial quantities**. See 19 CFR 351.222(d)(1). **The Panel did not disturb this aspect of the Department’s revocation practice.**

1999 Amended Regulation, 64 Fed. Reg. at 51238 (emphasis added). Thus, nothing in the 1999 Amended Regulation changed the Department’s requirement that the exporter show shipments in commercial quantities for three consecutive years. Accordingly, TAMSA’s argument that this was an unlawful retroactive application of Commerce’s regulation is unfounded.

5. TAMSA Failed to Present Any Evidence of an Extraordinary Circumstance Sufficient to Deviate from the Department’s Practice.
 - a. TAMSA’s High Cash Deposit Rate After the Investigation Was a Situation That It Could Have Easily Altered, and Therefore Is Not an Extraordinary Circumstance.

TAMSA argues that the high cash deposit rate of 21.70 percent, established in the investigation, precluded TAMSA from meaningfully participating in the U.S. market until the cash deposit rate was reduced to zero percent. TAMSA Br., at 18. This, however, is not a sufficient reason to depart from Commerce’s normal practice.

The Department will only consider measures other than the aggregate volume of sales to define commercial quantities when extraordinary circumstances exist. Third Review of Polyvinyl Alcohol From Taiwan, Issues and Decision Memorandum at Comment 1c. Moreover,

“[i]n 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.” Corrosion-Resistant Carbon Steel Flat Products From Canada, 65 Fed. Reg. at 9250.

Commerce has previously considered whether a cash deposit rate of almost 20 percent is the type of circumstance that would adequately explain a low level of sales after the imposition of an antidumping order:

[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. Therefore, the purported effects of the antidumping duty deposits do not impact our commercial quantities analysis.

Third Review of Polyvinyl Alcohol From Taiwan, Issues and Decision Memorandum at Comment 1c (citation omitted). In its Decision Memo in this case, therefore, Commerce rejected TAMSA’s argument concerning the impact of the high cash deposit rate. TAMSA Comment 1. In doing so, Commerce was merely following its established practice.

Indeed, a high cash deposit rate is not an unusual occurrence as defined by the Department, because it is easily altered. For example, the imposition of the 21.70 percent cash deposit rate was due to TAMSA’s lack of cooperation during the investigation. Commerce applied BIA in the investigation because TAMSA withheld its 1994 financial statements, despite repeated requests for this information, even after the financial statements had been reported to the Mexican Securities Exchange. LTFV, 60 Fed. Reg. at 33572. This use of BIA was upheld in a prior NAFTA panel Decision, which noted that any inaccuracies in the resulting dumping margin was due to TAMSA’s failure to provide the requested information. OCTG Panel Decision, at 55, 65-75. Therefore, had TAMSA cooperated during the investigation, the Department would not have needed to resort to BIA.

Furthermore, the length of time that this 21.70 percent cash deposit rate was in effect was a situation easily altered by TAMSA. If TAMSA had simply exported to the United States without dumping during the first POR, it could have reduced the cash deposit rate to zero percent as a result of an administrative review of that POR. TAMSA, however, did not export **any** subject merchandise to the United States during the first POR. Oil Country Tubular Goods From Mexico; Notice of Termination of Antidumping Duty Administrative Review, 62 Fed. Reg. 19309, 19309 (April 21, 1997). Accordingly, the Department terminated this administrative review. Id. at 19311. If TAMSA were capable of selling in the U.S. market without dumping, or at a lower dumping margin, during the first POR, an administrative review would have resulted in a lower deposit rate. See 19 U.S.C. § 1675(a)(2)(C). However, without entries of subject merchandise during the POR, the Department could not conduct an administrative review, and thus the cash deposit rate of 21.70 percent remained in effect.

The request for an administrative review does not depend on importation of a significant quantity of subject merchandise. An administrative review could have been triggered by a single sale in the U.S. market. Indeed, the administrative review concerning the second POR involved but a single sale in the U.S. market by TAMSA. See Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 13962, 13964-65 (March 23, 1999). Because TAMSA did not export subject merchandise during the first POR, its own conduct resulted in the continued application of a 21.70 percent deposit rate until the completion of the administrative review for the second POR. At that point, and for the succeeding reviews, TAMSA benefitted from a zero percent cash deposit rate.

- b. A Market Fluctuation in a Cyclical Business Is an Insufficient Justification for TAMSA's Significant Decline in Exports.

TAMSA next argues that the decline in oil prices led to a reduction in the demand for OCTG, thus explaining its inability to ship. TAMSA Br., at 19. Market fluctuations, however, do not constitute “extraordinary circumstances.”

As stated above, whether a situation qualifies as an extraordinary circumstance depends on whether it is “a permanent change that is not based on an easily-altered decision.” Corrosion-Resistant Carbon Steel Flat Products From Canada, 65 Fed. Reg. at 9250. Business cycles and fluctuations in prices do not constitute such a situation. See 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).

Commerce addressed this argument in the Final Results, and determined that the presence of a “depressed market” in OCTG was not a sufficient explanation for the decline in export volumes. Indeed, such a situation only strengthened the conclusion that dumping would be likely if the order were revoked:

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 TAMSA were again to encounter a “depressed market” in this very cyclical industry.

Decision Memo, at TAMSA Comment 1. Accordingly, the Department’s determination is supported by substantial evidence, consistent with the law, and should be upheld.

B. This Panel Should Decline to Consider Both TAMSA’s and Hylsa’s Arguments Based on the WTO Agreements and Dispute Resolution Decisions.

Both TAMSA and Hylsa raise arguments based on WTO agreements. TAMSA argues that the Department’s revocation regulations are inconsistent with the WTO Antidumping

Agreement. Hylsa argues that the WTO appellate body decision on a European Union practice, 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), applies to the practice of the United States. Both arguments should be rejected as inappropriate for this NAFTA Panel to decide.

1. Arguments Concerning the WTO Agreements, and Dispute Resolution Decisions Are Not Justiciable by This Panel.

Article 1904 (2) of the NAFTA establishes that binational panels are obligated to apply U.S. law:

An involved Party may request that a panel review, based upon the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party **to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.** Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made part of this Agreement.

(Emphasis added). Thus, when a NAFTA panel reviews a determination by the Department, it stands in the place of the U.S. court, and must apply U.S. law.

Both TAMSA and Hylsa raise arguments concerning the interpretation of a WTO agreement or a WTO appellate body report. The Department maintains that U.S. law, as implemented through the URAA, is fully consistent with its WTO obligations. See SAA at 669. Nonetheless, this is not the appropriate forum to contest whether U.S. law is consistent with its WTO obligations. These arguments should be addressed to a WTO panel by a WTO Member

government, not by a private party to this NAFTA Panel, which is obligated to apply U.S. law. Moreover, as the Court of International Trade has held, issues concerning the interpretation of the United States' WTO obligations are not justiciable. See Hyundai Elec. Co. v. United States, 53 F. Supp. 2d 1334, 1343 (Ct. Int'l Trade 1999). Specifically, interpretations of the WTO panel reports are "the prerogative of the executive branch, not the judiciary, because it implicates political decisions." Id. (citing Footwear Distributors and Retailers of America v. United States, 852 F. Supp. 1078, 1096 (Ct. Int'l Trade 1994)).

2. Neither TAMSA Nor Hylsa Have Standing Under U.S. Law to Raise These Arguments.

U.S. law expressly precludes a private right of action on the grounds raised by TAMSA and Hylsa. "No person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with such agreement" (*i.e.*, any of the Uruguay Round Agreements, including the WTO Antidumping Agreement). 19 U.S.C. § 3512(c)(1)(B). Therefore, under U.S. law, TAMSA lacks standing to raise an argument concerning the interpretation of the WTO Antidumping Agreement. Similarly, Hylsa has no standing to bring an action based on a WTO panel decision.

3. The Statute Unambiguously Requires the Department to Include Only Sales Made at Less Than Fair Value in the Margin Calculation.

Hylsa argues that the Department should not have engaged in “zeroing.” “Zeroing” is the term Hylsa uses to describe the Department’s practice of using only transactions where the sales price fell below fair value in calculating the weighted average margin. The Department’s practice, however, is mandated by the unambiguous language of the U.S. statute.³

Here, the statute unambiguously requires the Department to consider only the transactions where the sales price falls below fair value in calculating the weighted average dumping margin. The statute defines “dumped” and “dumping” as “the sale or likely sale of goods at **less than** fair value,” and “dumping margin” as “the amount by which the normal value **exceeds** the export price or constructed export price of the subject merchandise.” 19 U.S.C. §§ 1677(34) and (35)(A) (emphasis added). Thus, 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.

The statute defines the “weighted average dumping margin” at issue here 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.” 19 U.S.C. § 1677(35)(B). Because “dumping margin” is defined as “the

³ Hylsa states that this practice has never been found to be compelled by the statute. Hylsa Br., at 10 (citing Bowe Passat Reinigungs-und Waschereitechnik GMBH v. United States, 926 F. Supp. 1138, 1150 (Ct. Int’l Trade 1996); Serampore Indus. v. United States, 675 F. Supp. 1354, 1360-61 (Ct. Int’l Trade 1987)). Past cases, however, have focused on whether the statute provides for an “offset” for sales made at or above fair value, not whether the methodology was required by statute. See, e.g., Serampore, 675 F. Supp. at 1360-61; Drycleaning Machinery From Germany; Final Results of Antidumping Duty Administrative Review, 56 Fed. Reg. 66838, 66839-40 (Dec. 26, 1991) (this portion of Commerce’s determination was upheld in Bowe Passat, 926 F. Supp. at 1150). Nonetheless, decisions of the Court of International Trade are not binding precedent on this Panel. Algoma Steel Corp. v. United States, 865 F.2d 240, 243 (Fed. Cir. 1989); International Trading Co. v. United States, 110 F. Supp. 2d 977, 984 (Ct. Int’l Trade 2000).

amount by which the normal value **exceeds** the export price or constructed export price of the subject merchandise,” 19 U.S.C. § 1677(35)(A) (emphasis added), the statute clearly directs the Department to consider only the sum of the margins of sales for which normal value exceeds U.S. price when it determines the weighted-average dumping margin (the aggregate dumping margin) for each exporter.

This is, furthermore, a reasonable means of collecting dumping duties. The Customs Service no longer normally keeps track of dumping margins on individual entries, and thus does not know the absolute amount of dumping tied to a given entry. Because dumping margins are rarely assessed using entry-specific “master lists,” the weighted-average dumping margin allocates liability for dumping across the exporter’s total entries, for each importer, for the period of review. It is important to note that the margin applied to such entries will reflect any “non-dumped” merchandise entered during the period: the value of such entries is included in the denominator of the dumping rate, while no dumping amount for “non-dumped” merchandise is included in the numerator. Thus, a greater amount of “non-dumped” merchandise results in a lower weighted average margin. It is through this mechanism that liability for any dumping found on individual sales is spread across all POR entries. For this reason, the statute does not permit the Department to include in this calculation, or to subsequently offset, any margins of sales for which U.S. price is above normal value.

U.S. law, as implemented through the URAA, is fully consistent with its WTO obligations. See SAA at 669. Nonetheless, under U.S. law, when a provision of any WTO Agreement conflicts with any U.S. statute, the agreement is not given effect of law. 19 U.S.C. § 3512(a)(1). Accordingly, even if a U.S. court were faced with a conflict between an

unambiguous statute and an international agreement, the statute prevails. Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581 (Fed. Cir. 1995); Hyundai Elec. Co., Ltd. v. United States, 53 F. Supp. 2d 1334, 1343-44 (Ct. Int'l Trade 1999).

4. The Authority Upon Which Hylsa Relies Does Not Constitute the International Obligations of the United States.

Hylsa argues that under Murray v. Schooner Charming Betsy, 10 U.S. (6 Cranch) 64, 118 (1804), a U.S. statute should not be interpreted to violate international law if there is another possible construction. Hylsa cites to the WTO Appellate Body case, 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), as constituting such a rule of international law.

Hylsa's argument, however, reveals a complete misunderstanding of U.S. obligations under international law. The SAA specifically provides that "[r]eports issued by panels or the Appellate Body under the DSU (*i.e.*, the WTO Dispute Settlement Understanding) have no binding effect under the law of the United States." SAA at 1032. The SAA also states that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures" Id. Furthermore, any decision by a WTO body on how a government may bring laws or practices found to violate provisions of the WTO agreements "into conformity" with it are, likewise, "non-binding." SAA at 1015.

Moreover, the Bed Linen cases involve a dispute between **India and the European Communities**. European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Panel, WT/DS141/R (October 30, 2000); European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Report of the Appellate Body, WT/DS141/AB/R (March 1, 2001). To date no comparable case has been

decided concerning U.S. practice with respect to the calculation of weighted-average margins. If such a case were to be decided, it would allow the issue to be revisited, perhaps with a different outcome. Accordingly, because the Bed Linens case did not involve a measure of the United States, it does not constitute the international obligations of the United States. Therefore, Charming Betsy has no applicability to the Department's "zeroing" practice.

Moreover, even if the United States were to lose a case before a WTO panel on this issue, it is the prerogative of the executive branch to determine whether to implement the panel decision, and how such implementation would take place. Hyundai, 53 F. Supp. 2d at 1343; SAA at 1015. For example, if there is an adverse panel decision, the United States may choose not to alter its law or practice, and instead offer the complaining party compensation. SAA at 1016. Accordingly, because the decision concerning the implementation of an adverse panel decision is the executive branch's prerogative, Charming Betsy does not apply to a WTO panel decision.

C. Hylsa Failed to Offer a Justification to Abandon Commerce's Normal Practice of Calculating Separate Costs for Each Product Category.

Under the statute, the Department is charged with comparing normal value with either the export or constructed export price. 19 U.S.C. § 1673. Normal value is determined by looking at sales of the foreign like product in the comparison market. 19 U.S.C. § 1677b(a)(1)(B). In making this comparison, the Department matches sales of the subject merchandise in the United States with sales of identical merchandise in the comparison market. Where sales of identical merchandise do not exist, the Department compares U.S. sales with the next most similar foreign like product. 19 U.S.C. § 1677(16).

In order to define the different models of the foreign like product, the Department must

segregate the different products based on the characteristics of those products. See 19 U.S.C. § 1677(16). The characteristics that the Department uses in categorizing each product is defined by Sections B and C of the Department's questionnaire. (The Department's October 4, 1999 Questionnaire to Hylsa, Sections B and C (Pub. Doc. #7)). Each specific model of foreign like product is assigned a separate control-number ("CONNUM").

The Department also requires information concerning the costs involved in producing each separate foreign like product. This information is used to determine whether sales were made at less than the cost of production, 19 U.S.C. § 1677b(b), or to calculate constructed value, 19 U.S.C. § 1677b(e). The Department's normal practice is to compute costs on a CONNUM specific basis. See Koenig & Bauer-Albert AG v. United States, 90 F. Supp. 2d 1284, 1288 (Ct. Int'l Trade 2000); Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products from Turkey, 65 Fed. Reg. 15123 (March 21, 2000), and accompanying Issues and Decision Memorandum at Comment 1.1. In Section D of its questionnaire, Hylsa was instructed to report costs on a model-specific basis. (The Department's October 4, 1999 Questionnaire to Hylsa, at D-1 (Pub. Doc. #7)).

Hylsa argues that Commerce should have calculated an average costs of the two models of foreign like products its produced during the POR. Hylsa Br., at 22-27. These two products, designated CONNUM 1 and CONNUM 2, differed with respect to outside diameter and wall thickness. Hylsa contends that the production process for these two types of foreign like products were exactly the same, with the exception that CONNUM 1 was produced almost entirely in July of 1999, while CONNUM 2 was produced almost entirely in June of 1999. Hylsa Br., at 23. Hylsa further alleges that costs in July were substantially higher due to a

temporary shut-down of its mill. Hylsa Br., at 23.

Hylsa has failed to present sufficient reason to justify straying from the Department's normal practice of calculating costs on a CONNUM-specific basis. First, as Hylsa admits in its brief, there are clear physical differences between the two types of products. Hylsa Br., at 23-27. Hylsa refers only to the outside diameters, which measured 2 3/8" and 2 7/8". Hylsa fails to disclose in its brief that these two products also differed with respect to wall thickness. Commerce explained why maintaining its normal practice of calculating CONNUM-specific costs was reasonable in this circumstance:

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 difference here involved more than merely the month in which the products were produced. There was a clear difference in the physical characteristics of the products. These clear physical differences between the two products, both outside diameter and wall thickness, justified following Commerce's normal practice in this case.

Moreover, Hylsa makes a bald assertion in its brief before this Panel that the higher costs associated with production in July were due to a temporary shut-down of its pipe forming mill. Hylsa Br., at 23. Hylsa made this same bald assertion in its case brief before the Department. (Hylsa's October 16, 2000 Case Brief, at 6, 20 (Prop. Doc. #51)). However, as the Department recognized in its Decision Memo, there is no evidence on the record to support this assertion:

In addition, 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 by the record. Hylsa never made mention of this point in its factual submissions, never provided data on the alleged cost impact of the claimed mill shutdown, and did not provide details on how the cost effect of the shutdown should be

quantified and accounted for, other than arguing that the Department should simply average the reported COMs [cost of manufacturing] across different CONNUMs. . . . We do not find it reasonable to average the costs incurred for all products in order to eliminate an unquantified, unrecorded cost difference.

Hylsa Comment 4. Indeed, Hylsa fails to cite to any portion of the administrative record to support its assertion concerning the alleged shut-down in its brief before this Panel. Hylsa similarly failed to make such citations in its case brief before the Department.⁴ Therefore, there is no evidence on the record to justify abandoning its normal practice of calculating costs on a CONNUM-specific basis.

The chart contained in Hylsa's brief does not require a different result. The chart merely demonstrates that there was a difference in the per unit costs in June and July. The chart offers no alternative explanation of that difference. Hylsa asserts that the difference is due to the mill shut-down. However, as explained above, there is no evidence on the record to substantiate this claim. Rather, the evidence on the record demonstrates that clear physical differences existed between CONNUM 1 and CONNUM 2. CONNUM 1 was produced almost exclusively in July, and CONNUM 2 was produced almost exclusively in June. Thus, the only evidence on the record that explains the difference in the per unit costs in June and July are the physical differences between the products primarily produced in those months.

Furthermore, even if it were demonstrated that some portion of the difference in cost reflected costs associated with a shut-down, this not would justify abandoning the Department's normal practice of distinguishing costs by CONNUM. As the Department stated, "Although we

⁴ In its administrative case brief, Hylsa did cite to an alleged utterance made to cost verifiers. (Hylsa's October 16, 2000 Case Brief, at 20, n. 22 (Prop. Doc. #51)). However, this alleged utterance is not substantiated anywhere in the evidentiary record. Furthermore, merely mentioning during verification that the mill was shut-down without offering any other specific evidence of how this alleged shut-down affected its costs does not sufficiently support Hylsa's argument. In other words, there is not even a scintilla of evidence to support Hylsa's argument.

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.” Decision Memo, at Hylsa Comment 4.

D. Commerce Properly Calculated Hylsa’s Packing Costs.

1. Commerce Properly Accounted for the Restructuring and Renovation of the Packing Line that Occurred During the POR.

In its case brief before the Department, Hylsa argued that the packing cost calculation should include only two months of the POR, June and July, noting “there was substantial restructuring of Hylsa’s packing 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.” (Hylsa’s October 16, 2000 Case Brief, at 17 (Prop. Doc. #51)). For the Final Results, then, Commerce was faced with the question of “how to account for the impact of the restructuring and renovation of the packing line which occurred early in the POR.” Decision Memo, at Hylsa Comment 3.B. Commerce has previously included costs, such as maintenance costs, that benefit production during the entire period under investigation 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). Commerce therefore concluded that it was reasonable to account for Hylsa’s restructuring costs by allocating them over the entire POR:

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). Commerce specifically rejected

Hylsa's attempt to allocate these restructuring costs over only the months in which they were implemented. Id. In essence, Hylsa argues that Commerce should have only used the relatively low packing labor costs it specifically incurred in June and July. The Department's methodology of calculating and applying an average packing labor cost for the entire POR, however, is more accurate and reasonable. Commerce's methodology ensured that discrete costs incurred benefitting the entire POR were captured.

In a dramatic change of story, Hylsa now contends in its brief before this Panel that there is no evidence to support the claim that Hylsa recorded restructuring costs in cost center 2052. Hylsa Br., at 31. Hylsa apparently ignores the argument it made and evidence it cited in its own case brief before the Department. (Hylsa's October 16, 2000 Case Brief, at 17-19 (Prop. Doc. #51)). Specifically, during verification, Department officials noticed a dramatic decrease in labor costs at cost center 2052 during the POR. This decrease was documented by the Hylsa Sales Verification Exhibit No. 16 (Prop. Doc. #26, Fiche 120)⁵, and summarized in Hylsa's case brief at page 18 (Prop. Doc. # 51). Commerce officials asked Hylsa during verification why labor costs had decreased so dramatically during the POR. "[T]he company responded that the area was reorganized and more of the process was automated." (Hylsa Sales Verification Report, p. 25 (Prop. Doc. # 43)). Therefore, contrary to Hylsa's present contention, ample evidence exists to support the claim that cost center 2052 underwent a restructuring.

Furthermore, Hylsa's contention that there is no line item for cost center 2052 from which the reorganization and restructuring costs might be recorded, Hylsa Br., at 31, is incorrect. This issue was addressed during verification. "We asked where the cost for automation was

⁵ An index to the Verification Exhibits is contained in Prop. Doc. #26. The actual exhibits themselves are located on a separate fiche.

captured and were told that the equipment was upgraded and considered an overhead fixed asset.” (Hylsa Sales Verification Report, p. 25 (Prop. Doc. #43)).

Accordingly, the evidentiary record amply supports Commerce’s decision to average the packing costs from cost center 2052 for the entire POR as reasonable. This methodology captures the restructuring and reorganization that Hylsa admitted occurred during the POR.

2. The Department Eliminated All Double-Counting of the Packing Costs.

Hylsa’s normal value was based on constructed value. Pursuant to the statute, Commerce calculates constructed value by adding the cost of manufacturing (“COM”), an amount for selling, general and administrative expenses, profits, and an amount for packing expenses. See 19 U.S.C. § 1677b(e).

In its case brief before the Department, Hylsa argued that the Department should eliminate the double-counting of its packing costs. (Hylsa’s October 16, 2000 Case Brief, at 13 (Prop. Doc. #51)). According to Hylsa, it had included these packing costs both in its reported cost of manufacture (“COM”), as well as in its packing field (“PACKU”). (Hylsa’s October 16, 2000 Case Brief, at 14 (Prop. Doc. #51)). Hylsa failed to address this double-counting issue at any time prior to, or during, verification.

Commerce re-examined the data, and determined that the overlapping packing costs should be excluded. Decision Memo, at Hylsa Comment 3.A. However, Commerce determined that the entire packing expense included in the COM was larger than the PACKU field. Thus, Commerce declined to deduct the entire amount listed in the line item for “packing in finishing” in the reported COM. Id.

Commerce embarked on a reasonable method to eliminate the double-counting of

packing expenses. Commerce determined that the amount listed in the PACKU field, [], amounted to [] of the amount listed for “packing in finishing” line item in the COM, []. (March 12, 2001 Memorandum from Gina K. Lee to Neal M. Halper, Constructed Value Adjustments for Final Results, Attachment 1 (Prop. Doc. #63)). Therefore, Commerce excluded [] of the “packing in finishing” costs contained in the COM.

Hylsa’s argument that the Department only remedied part of the double-counting is misleading. Hylsa’s argues that the Department should not have deducted only the amount of packing costs attributable to OCTG, but all of the packing costs incurred in cost center 2052. Hylsa Br., at 34-35. Hylsa’s argument ignores its own accounting methodology.

Hylsa organizes its tubular products process into separate “cost centers.” Hylsa’s on-line accounting system records costs by each of these cost centers, but does not “calculate individual product costs or inventory values.” (Hylsa’s November 23, 1999 Section D Response, p. 28 (Prop. Doc. #3)). Individual costs and inventory values are calculated separately, using the information from the on-line accounting system. Id.

In calculating the costs for this administrative review, Hylsa used a methodology called “product-specific cost calculation.” Id. at 29. This methodology calculated the costs for individual items “by tracing the items through the cost centers in which they [were] produced, and totaling the costs incurred in those cost centers.” Id. This methodology tracked the merchandise through twenty-three direct cost centers. (Hylsa Cost Verification Report, p. 12 (Prop. Doc. #36)).

In essence, Hylsa calculated a single cost for each cost center. Hylsa used this cost to calculate a per unit cost for each cost center. Hylsa then took the quantity of the specific

product, multiplied that quantity by the per unit cost for each cost center that the product went through, and added those numbers together to calculate the costs for each product. (See Hylsa's November 23, 1999 Section D Response, pp. 28-29 (Prop. Doc. #3); Hylsa Cost Verification Report, pp. 11-13 (Prop. Doc. #36)).

Thus, in calculating the COM for cost center 2052, Hylsa included in the calculation all costs incurred in that cost center, including costs for non-subject merchandise. Hylsa then calculated a per unit cost for each category of merchandise, regardless of whether it was OCTG. Therefore, every line item included in the COM was calculated on the basis of all products that went through cost center 2052, not just OCTG.

The packing costs in the PACKU field included only costs related to cost center 2052, the only cost center that packs OCTG. (Hylsa Sales Verification Report, p. 25 (Prop. Doc. #43)). As discussed above, through Hylsa's accounting methodology, it calculated a single cost for cost center 2052, which would have included costs for both OCTG and non-subject merchandise. Likewise, the "packing in finishing" line item in the COM included packing costs related to both OCTG and non-subject merchandise, as did all line items in the COM. Thus, the only amount double-counted was the amount included in the PACKU field. To exclude all costs listed in the "packing in finishing" line item in the COM would vastly understate the actual per unit packing expense. Put simply, because all line items that made up the COM were calculated based on all products processed in cost center 2052, to be consistent with Hylsa's chosen accounting methodology, the "packing in finishing" expense should also include all costs related to all merchandise that went through cost center 2052. Therefore, the only amount that was double-counted was that included in the PACKU field in the constructed value.

Accordingly, Commerce's methodology to eliminate the double-counting is reasonable and supported by substantial evidence from the record.

E. The Department Properly Treated Hylsa's Insurance Coverage Costs as Direct Selling Expenses.

Under 19 U.S.C. § 1677b(a)(6)(C)(iii), the Department adjusts normal value by differences in the circumstances of sale between the U.S. market and the comparison market. Pursuant to 19 C.F.R. § 351.410(b), the Department makes a circumstances of sale adjustment only with respect to direct selling expenses and assumed expenses. By contrast, under 19 U.S.C. § 1677b(a)(7)(B) and 19 C.F.R. § 351.412(f), an indirect selling expense would be deducted from normal value if the respondent qualified for a CEP offset. The regulations define direct selling expenses as "expenses . . . that result from, and bear a direct relationship to, the particular sale in question." 19 C.F.R. § 351.410(c). As the Department stated in the glossary to its questionnaire to Hylsa, "Direct expenses are typically variable expenses that are incurred as a direct and unavoidable consequence of the sale (*i.e.*, in the absence of the sales these expenses would not be incurred). (The Department's October 4, 1999 Questionnaire to Hylsa, p. I-6 (Pub. Doc. #7)). The Department's practice is to treat insurance against non-payment as a direct selling expense. See Porcelain- on-Steel Cooking Ware From China; Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 31144 (May 16, 2000) and accompanying Issues and Decision Memorandum, at Comment 4; Notice of Final Determination of Sales at Less Than Fair Value: Open-Ended Spun Rayon Singles Yarn from Austria, 63 Fed. Reg. 43701, 43704 (August 15, 1997).

The administrative record demonstrates that the insurance coverage at issue here did bear a direct relationship to the particular sales in question. Hylsa purchased an insurance policy to

provide coverage against non-payment by its export customers, called credit insurance. (Hylsa's November 23, 1999 Section C Response, pp. 23-24 (Prop. Doc. #3) ("Section C Response")). The amount of the premium Hylsa paid varied both on the number of customers identified, and on specific levels of coverage for each customer.

During the course of the POR, Hylsa amended its credit insurance coverage. Those amendments 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, Fiche #121)). 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 coverage for each customer. As we noted in the Issues and Decision Memo, 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.

Hylsa argues that in this POR the premium for OCTG exports to the United States did not vary because it did not add customers of OCTG during the POR. This, however, does not change the analysis. The evidence clearly demonstrates that during the course of the year, Hylsa could have added more OCTG customers. If it did, Hylsa would be required to seek an amendment to the insurance policy in order to cover those additional customers. Additionally, the amount of the orders could change through the course of the year. Again, if that new amount exceeded the amount for which Hylsa initially sought coverage, Hylsa would have to seek an amendment and pay higher premiums. Therefore, because the credit insurance expense could have changed, depending on the number of customers and level of coverage, this expense was a result from, and bore a direct relationship to, the sale in question.

Hylsa cites to Final Determination of Sales at Less Than Fair Value: 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) and Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Lead and Bismuth Products from the United Kingdom, 58 Fed. Reg. 6207, 6208-09 (January 27, 1993) for the proposition that the Department's practice is to treat credit insurance as a direct selling expense only when the premiums vary on a sale-by-sale basis. The facts of this case, however, differ from those Hylsa has cited. For example, in Certain Hot-Rolled Lead and Bismuth Products from the United Kingdom, the Department determined that because a single global amount was assessed, regardless of the level of sales, for credit insurance in the home market, the credit insurance expense was an indirect selling expense. 58 Fed. Reg. at 6208-09. Here, the Department determined that a single global amount was not assessed. Rather, the amount of the premium depended on the number of customers identified and the level of coverage sought for each customer. Thus, the evidentiary record supports the Department's conclusion that the credit insurance expense was a direct selling expense, not an indirect selling expense.

F. Hylsa Failed to Qualify for Revocation.

Pursuant to 19 C.F.R. § 351.222, the Department may revoke an order in part if: (1) the exporter has not dumped the subject merchandise for three consecutive years; (2) the exporter agrees in writing to the immediate reinstatement of the order if that exporter dumps the subject merchandise after the order is revoked; and (3) the continued application of the order is not otherwise necessary to offset dumping. 19 C.F.R. § 351.222(b)(2)(i). Additionally, "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 revocation . . . will apply.” 19 C.F.R. § 351.222(d)(1) (emphasis added).

Here, the Department calculated a weighted-average margin of 0.79 percent for Hylsa. Decision Memo, at Hylsa Comment 7. The fourth review would have been included in the three consecutive years Hylsa needed to qualify for revocation. Id. Therefore, because Hylsa failed to establish three consecutive years without dumping, Hylsa did not qualify for revocation.

Moreover, even if Hylsa had been assigned a weighted-average margin of zero percent for the fourth review, it still would not have qualified for revocation because Hylsa did not meet the threshold requirement of shipments in commercial quantities for three consecutive years. Hylsa’s August 16, 2000 submission concerning historical information on its exports of OCTG to the United States demonstrates a dramatic decline in Hylsa’s exports in the three years prior to the revocation request. (Prop. Doc. #81). Specifically, this submission shows that in July to December of 1994, Hylsa shipped [] metric tons of OCTG to the United States, with a value of []. Id. at Attachment 2. In January to June of 1994, Hylsa shipped [] metric tons of OCTG, with a value of []. Id. Similarly, in January to June of 1995, Hylsa shipped [] metric tons of OCTG to the United States, with a value of []. Id. However, after the issuance of the order, these shipments dropped dramatically. From August 1, 1996 through July 31, 1997, Hylsa only shipped [] metric tons of OCTG, with a value of []. Id. From August 1, 1997 through July 31, 1998, Hylsa only shipped [] metric tons of OCTG, with a value of []. Id. Accordingly, this dramatic decline in shipments demonstrates that Hylsa has not shipped in commercial quantities since the Department issued

the order. Accordingly, because Hylsa cannot meet the threshold of three consecutive years with shipments in commercial quantities, Hylsa cannot qualify for revocation under the regulations.

RELIEF REQUESTED

In accordance with Rule 59(1) of the NAFTA Article 1904 Panel Rules, the Department of Commerce respectfully requests that the Panel grant the following relief:

(1) Determine that the Department's determination that TAMSAs did not qualify for revocation because it failed to export in commercial quantities was supported by substantial evidence on the record, and otherwise in accordance with law;

(2) Decline to address either TAMSAs's or Hylsa's arguments based on the WTO obligations of the United States as non-justiciable;

(3) Determine that the Department's determination to require CONNUM-specific costs for each of Hylsa's different OCTG products was supported by substantial evidence on the record, and otherwise in accordance with law;

(4) Determine that the Department's determination to allocate Hylsa's restructuring and renovation costs associated with the packing line over the entire POR was supported by substantial evidence on the record, and otherwise in accordance with law;

(5) Determine that the Department's determination to eliminate double-counting by excluding from Hylsa's cost of manufacturing only that portion of its "packing in finishing" line item that was included in the separate PACKU field;

(6) Determine that the Department's determination that Hylsa's credit insurance was a direct expense was supported by substantial evidence on the record, and otherwise in accordance with law; and

(7) Determine that the Department's determination not to revoke the order with respect to Hylsa was supported by substantial evidence on the record, and otherwise in accordance with law.

Respectfully submitted,

William J. Kovatch, Jr.
Attorney
Office of Chief Counsel for
Import Administration
U.S. Department of Commerce

Dated: