UNITED STATES – CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF:	**)**	
	)	
CERTAIN CORROSION-RESISTANT	**)**	**USA-93-1904-03**
CARBON STEEL PRODUCTS	**)**	
FROM CANADA	**)**	

OPINION AND ORDER OF THE PANEL

October 31, 1994

STELCO, INC., CONTINUOUS COLOUR COAT, LTD., DOFASCO, INC., AND CERTAIN UNITED STATES STEEL PRODUCERS

Complainants

v.

INTERNATIONAL TRADE ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

Respondent

Before:

Brian E. McGill, Chairman
Harry B. Endsley
Maureen Irish
Ross Stinson
Steven S. Weiser

Appearances:

For Stelco, Inc.: Willkie, Farr, & Gallagher (Christopher Dunn and Edmund Sim).

For IPSCO, Inc.: Paul, Weiss, Rifkin, Wharton & Garrison (George Kleinfeld and Michael Velthoen); Brian Kelly, Inc. (Brian Kelly).

For National Steel Corporation, Inc.: Skadden, Arps, Slate, Meagher & Flom (Robert G. Lighthizer and John J. Mangan); Dewey Ballantine (Alan Wm. Wolff and Michael H. Stein).

For Bethelehem Steel Corporation, Inland Steel Industries, Inc., and U.S. Steel Groupn (a unit of USX Corporation): Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan, Ellen J. Schneider, and James C. Hecht); Dewey Ballantine (Alan Wm. Wolff and Michael H. Stein).

For the U.S. Department of Commerce: Office of Chief Counsel for Import Administration (Stephen J. Powell, Elizabeth C. Seastrum, and Thomas H. Fine).

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OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Panel was constituted pursuant to Article 1904(2) of the United States–Canada Free–Trade Agreement ("FTA") to review the final determination of the International Trade Administration, U.S. Department of Commerce ("the Department" or "Commerce") that certain corrosion-resistant carbon steel flat products from Canada are being sold in the United States at less than fair value.[1]

II. THE ADMINISTRATIVE PROCEEDINGS AND DETERMINATIONS

On June 30, 1992, Armco Steel Company, L.P.; Bethlehem Steel Corporation; Inland Steel Industries, Inc.; LTV Steel Company, Inc.; National Steel Corporation; and U.S. Steel Group (a unit of USX Corporation) ("Petitioners") filed a petition alleging sales at less than fair value of certain corrosion-resistant carbon steel flat products from Canada. The Department initiated its investigation on July 20, 1992.[2]

On January 26, 1993, the Department issued its preliminary determination that respondents Stelco, Inc. ("Stelco") and Dofasco, Inc. ("Dofasco") had sold, or were likely to sell,

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[1] 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 Canada, 58 Fed. Reg. 37099 (July 9, 1993) (final determination) (hereinafter "Final Determination").

[2] 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 Various Countries, 57 Fed. Reg. 33488 (July 29, 1992). Pursuant to separate petitions, Commerce also initiated dumping investigations regarding three other classes or kinds of carbon steel products from Canada, namely, hot-rolled, cold-rolled, and cut-to-length plate.

corrosion-resistant carbon steel flat products in the United States at less than fair value.[3] Following the preliminary determination, on February 8, 1993, the Department initiated a cost of production investigation regarding Stelco.[4]

On June 21, 1993, the Department issued its final determination that Stelco and Dofasco had sold, or were likely to sell, corrosion-resistant carbon steel flat products in the United States at less than fair value. In addition, the Department collapsed Stelco with its related party, Continuous Colour Coat, Ltd. ("CCC"), and collapsed Dofasco with its related party, Sorevco, Inc. ("Sorevco"). The final weighted-average margins for Stelco and Dofasco were 28.27 percent and 10.89 percent, respectively. The "all others" rate was determined to be 22.29 percent.[5] Simultaneously with the final determination, the Department published a "General Issues Appendix" addressing issues relevant to more than one steel investigation.[6]

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[3] 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 Canada, 58 Fed. Reg. 7085 (February 4, 1993) (preliminary determination) (hereinafter "Preliminary Determination").

[4] Pub. Doc. 423, Fiche 117, Frame 91. References to public documents in the administrative record are designated "Pub. Doc. __" or "General Issues Doc. __," while references to confidential documents in the administrative record are designated "Conf. Doc. __." As the administrative record is also on microfiche, such documents are also identified herein by their respective microfiche and frame numbers, "Fiche __," "Frame __."

[5] Final Determination, 58 Fed. Reg. at 37121.

[6] Certain Cold-Rolled Carbon Steel Flat Products From Argentina, Appendix I, 58 Fed. Reg. 37062, 37063 (July 9, 1993) (hereinafter "General Issues Appendix").

Following the U.S. International Trade Commission's final determination that the domestic industry was materially injured by reason of imports of corrosion-resistant steel products from Canada,[7] the Department published an antidumping duty order regarding such imports.[8]

The Canadian parties, Dofasco, Stelco, and Continuous Colour Coat, Inc. ("CCC"), filed separate complaints for Binational Panel review of the Department's final determination.[9] Petitioners in the underlying investigation ("U.S. Producers") also filed a complaint, as did National Steel Corporation ("National Steel").

Dofasco, Stelco, CCC, the U.S. Producers, and National Steel filed briefs on March 22, 1994. On May 23, 1994, the Department filed response briefs in support of the final determination, and Dofasco, Stelco, and the U.S. Producers filed response briefs in support of various aspects of the final determination. Dofasco, Stelco, CCC, the U.S. Producers, and National Steel filed reply briefs on June 7, 1994. A hearing was held in Washington, D.C., on July 11-12, 1994, where all parties that had filed briefs presented oral argument before the Panel.

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[7] Certain Flat-Rolled Carbon Steel Products From Argentina et al., 58 Fed. Reg. 43905 (August 18, 1993).

[8] Certain Corrosion-Resistant Carbon Steel Products and Certain Cut-to-Length Carbon Steel Plate from Canada, 58 Fed. Reg. 44162 (August 19, 1993).

[9] United States-Canada Free Trade Agreement, Article 1904 Binational Panel Reviews; Request for Panel Review, 58 Fed. Reg. 41733 (August 5, 1993).

III. THE STANDARD OF REVIEW

The FTA requires that this Panel apply the standard of review and "general legal principles" that a U.S. court would apply in its review of a Commerce determination.[10] The standard of review that must be applied requires the Panel to "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[11]

Substantial evidence has been defined by the Supreme Court of the United States as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[12] In a subsequent case, the Supreme Court elaborated on this standard, stating that substantial evidence is "something less than the weight of the evidence."[13]

In assessing the substantiality of the evidence, the Panel must consider the "the record in its entirety," including "the body of evidence opposed to the [agency's] view."[14] As noted by the Binational Panel in New Steel Rails from Canada, the Panel's role is "not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at

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[10] FTA Article 1904(3). General legal principles include "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." FTA Article 1911.

[11] 19 U.S.C. §1516a(b)(1)(B). For purposes of Panel review, the "law" consists of "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." FTA Article 1904(2). The same article expressly limits the Panel's review to the "administrative record."

[12] Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951), quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938); see also Matsushita Electric Industrial Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

[13] Consolo v. Federal Maritime Commission, 383 U.S. 607, 620 (1966).

[14] Universal Camera, 340 U.S. at 488.

that."[15] Rather, the Panel must take into account evidence which detracts from the weight of the evidence relied upon by the agency in reaching its conclusions.[16]

The Panel, however, is conscious of its obligation under the substantial evidence standard not to reweigh the evidence, or substitute its judgment for that of the Department.[17] It is well settled that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[18] The Panel, as a reviewing authority, therefore may not "displace the [agency's] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo."[19] Thus, the substantial evidence standard effectively "frees the reviewing [authority] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative agency and it helps promote the uniform application of the statute."[20] Nevertheless, a reviewing authority may not defer to an agency

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[15] New Steel Rails from Canada, USA-89-1904-09, 1990 FTAPD LEXIS 6, August 13, 1990, at 9.

[16] See Consolidated Edison, 305 U.S. at 229; Atlantic Sugar v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

[17] See Fresh, Chilled, or Frozen Pork from Canada, USA-89-1904-11, 1990 FTAPD LEXIS 10, August 24, 1990, at 8; see also Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989).

[18] Consolo, 383 U.S. at 620.

[19] Universal Camera, 340 U.S., at 488; accord American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), aff'd sub nom., Armco Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

[20] Consolo, 383 U.S. at 620.

determination that is premised on inadequate analysis or reasoning.[21] The extent of deference to be accorded is dependent upon "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[22] A rational connection must be present between the facts found and the choice made by the agency.[23]

On issues of statutory interpretation, "deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law."[24] The Supreme Court has stated 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.'"[25] A reviewing authority need not conclude that "[t]he agency's interpretation [is] the only reasonable construction or the one the [reviewing authority] would adopt had the question

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[21] See Chr. Bjelland Seafoods A/C, No. 92-196, slip op. at 15 (Ct. Int'l Trade, October 23, 1992); USX Corp. v. United States, 655 F. Supp. 487, 490, 498 (Ct. Int'l Trade 1987).

[22] Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (Ct. Int'l Trade 1986), aff'd, 810 F.2d 1137 (Fed. Cir. 1987), quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

[23] See Bando Chemical Industries v. United States, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992), citing Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974), and Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962); see also Avesta AB v. United States, 724 F. Supp. 974, 978 (Ct. Int'l Trade 1989), aff'd, 914 F.2d 233 (Fed. Cir. 1990), cert. denied, 499 U.S. 920 (1991).

[24] National R.R. Passenger Corp. v. Boston and Maine Corp., 503 U.S. ___, 112 S.Ct. 1394, 1401 (1992).

[25] Id., quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984).

initially arisen in a judicial proceeding."[26] Moreover, the Court of Appeals has emphasized that "deference to an agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws."[27] However, Commerce's efforts at statutory interpretation must, when appropriate, take into account the international obligations of the United States.[28]

Deference must also be given to the methodologies selected and applied by the agency to carry out its statutory mandate.[29] Deference to the Department's interpretation and implementation of the antidumping laws is grounded in express congressional intent. The U.S. Congress has stressed that in the antidumping field, it has "entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies."[30] Accordingly, reviewing courts have acknowledged that "the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has broad discretion in

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[26] American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986), citing Chevron, 467 U.S. at 843 n.11.

[27] Koyo Seiko v. United States, Nos. 93-1525 and 93-1534, slip op. at 9-10 (September 30, 1994), citing Daewoo Electronics Company v. United States, 6 F.3d 1511, 1516 (Fed. Cir. 1993).

[28] See Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Section 114, Restatement (Third) of the Foreign Relations Law of the United States.

[29] See Brother Industries v. United States, 771 F. Supp. 374, 381 (Ct. Int'l Trade 1991) ("Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.").

[30] S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638.

executing the law."[31] Indeed, the Court of Appeals recently reiterated its recognition of Commerce as "the 'master' of antidumping law, worthy of considerable deference."[32]

Nevertheless, "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."[33] A reviewing authority may not permit an agency, "under the guise of lawful discretion or interpretation, to contravene or ignore the intent of Congress."[34] Moreover, the methodology selected and applied by the agency to carry out its statutory mandate "still must be lawful, which is for the courts finally to determine."[35]

The Extraordinary Challenge Committee in Live Swine from Canada summarized the role of Chapter 19 binational panels in this way:

1. Panels must conscientiously apply the standard of review;[36]

2. Panels must follow and apply the law, not create it. . . . Panels must understand their limited role and simply apply established law. Panels must be mindful of changes in the law but must not create them;

3. Panels may not articulate the prevailing law and then depart from it in a clandestine attempt to change the law; and

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[31] Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984); see also id. at 1582; and Consumer Prod. Div. SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1038-39 (Fed. Cir. 1985).

[32] Koyo Seiko, Nos. 93-1525 and 93-1534, slip op. at 23, quoting Daewoo, 6 F.3d at 1516.

[33] Public Employees Retirement System of Ohio v. June M. Betts, 492 U.S. 158, 171 (1989).

[34] Cabot Corp. v. United States, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988).

[35] Brother Industries, 771 F. Supp. at 381.

[36] Live Swine from Canada, ECC-93-1904-01USA, 1993 FTAPD LEXIS 1, April 8, 1993, at 11; see also Fresh, Chilled, or Frozen Pork from Canada, ECC-91-1904-01USA, 1991 FTAPD LEXIS 7, June 14, 1991, at 21.

4. Panels are not appellate courts and must show deference to an investigating authority's determinations. In particular, panels must be careful not to unnecessarily burden an investigating authority on remand.[37]

The above mentioned principles have guided the Panel's review in this proceeding.

[37] Live Swine from Canada, ECC-93-1904USA, at 14.

IV. SUMMARY OF HOLDINGS

A. Holding on Dofasco's Challenge to the Department's Collapse of Dofasco and Sorevco: The Panel concludes that there is substantial evidence on the record to support the Department's decision to collapse Dofasco and Sorevco, and therefore affirms the Department's determination in this regard.

B. Holdings on CCC Issues

1. **Collapse with Stelco**: The Panel cannot find substantial evidence on the record to support the determination to collapse Stelco and CCC, and therefore remands this issue to the Department with instructions not to collapse Stelco and CCC.

2. **The Department's Resort to Partial "Best Information Available" Due to CCC's Failure of Verification**: Based on the Panel's review of the various bases supporting the Department's finding that CCC failed verification, the Panel affirms the Department's decision.

3. **Electrogalvanization as a Substantial Transformation**: A Panel majority remands this issue to the Department for further explanation, including citations to the administrative record, to support its finding that the electrogalvanization process substantially transforms steel sheet.

4. **Application of Antidumping Duties to American Goods Returned (HTSUS 9802.00.60)**: A Panel majority finds the Department's construction of the statute permissible and affirms the Department's determination.

C. Holdings on Stelco Issues

1. **The Department's Resort to Partial "Best Information Available" Due to Computer Tape Omission of Certain Stelco U.S. Sales**: A Panel majority upholds the Department's decision to invoke partial best information available.

2. **The Department's Selection of Stelco's "Highest Non-Aberrational Margin" as Partial Best Information Available**: The Panel upholds the Department's determination to use the highest non-aberrational Stelco sales margins as partial BIA.

3. **Rejection of Certain Stelco Related-Party Sales in the Calculation of Foreign Market Value**: The Panel affirms the Department's rejection of Stelco related-party sales in the calculation of foreign market value.

4. **Warehousing Expenses**: The Panel declines to assert jurisdiction over the warehouse expense issue based on the failure to exhaust administrative remedies.

5. **Weighted-Average Home Market Price vs. Individual U.S. Price**: The Panel affirms the Department's determination to use individual U.S. prices in calculating Stelco's dumping margin.

6. **Inclusion of Rockefeller Amendment Expenses in Stelco's Cost of Production**: The Panel affirms the Department's decision to include Rockefeller Amendment expenses in Stelco's cost of production.

7. **Inclusion of Z-line Interest Expenses in Stelco's COP**: The Panel declines to assert jurisdiction over the Department's treatment of Stelco's Z-line interest expenses based on the failure to exhaust administrative remedies.

8. **Inclusion of Coke Oven Start-Up Costs in Stelco's COP**: The Panel affirms the Department's treatment of Stelco's coke oven start-up costs.

9. **Amortization of Exchange Gains and Losses on Long-Term Debt**: The Panel remands this issue for the Department to apply Stelco's proposed methodology.

D. Holdings of Issues of Certain U.S. Steel Producers

1. **The Department's Indirect Tax Adjustment Methodology**: The Panel remands this issue to the Department for recalculation of indirect tax adjustments to United States price. The Department is instructed to utilize a methodology which takes into account the international obligations of the United States.

2. **Stelco Product Matches**: The Panel affirms the Department's decision to accept Stelco's reported product matches.

3. **FMV and USP Adjustments Related to Stelco Rebates**: The Panel remands this issue to the Department to reconsider the adjustments to FMV and USP for certain Stelco rebates.

4. **The Department's Treatment of Certain Loan Repayments to Dofasco as Direct Selling Expenses**: The Panel upholds the Department's decision to treat the loan repayments as direct selling expenses as a reasonable exercise of its discretion in the administration of the antidumping statute.

5. **The Department's Treatment of Dofasco's Technical Service Expenses as Indirect Expenses in Both U.S. and Canadian Markets**: The Panel affirms the decision of the Department to treat Dofasco's technical service expenses as indirect expenses in both markets.

6. **Ministerial Errors Relating to Dofasco and Stelco**: Where the Department has agreed to correct certain errors as ministerial, a remand is granted.

E. **Holding on National Steel's Challenge to the Department's Methodology for Applying Antidumping Duties to American Goods Returned**: The Panel majority finds the Department's statutory construction a permissible interpretation, and therefore, affirms the Department on this issue.

F. **Holdings on Other Issues**: The Panel affirms the Department's final determination in all other respects.

V. HOLDING ON DOFASCO'S CHALLENGE TO THE DEPARTMENT'S DETERMINATION TO COLLAPSE DOFASCO AND SOREVCO

1. Background and Arguments

In its final determination, the Department found that Dofasco, and its related party Sorevco,[38] had a relationship that warranted the collapse of Dofasco and Sorevco, such that they be treated as a single entity.[39] A significant portion of the briefs and arguments on this issue focused on the "standard" that must be met before companies will be collapsed. Dofasco maintains that the legal standard for determining when companies may be collapsed is whether the evidence demonstrates a "strong possibility" of price manipulation.[40] The Department disagrees, stating it may be appropriate to collapse ". . . so long as the parties are sufficiently related to present the possibility of price manipulation."[41]

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[38] As detailed below, Sorevco is essentially a joint venture by Dofasco and another company.

[39] Final Determination, 58 Fed. Reg. at 37107. Dofasco's challenge to the Department's use of best information available as the dumping margin for certain sales was withdrawn by Dofasco during the course of this proceeding. See Reply Brief of Dofasco, Inc. (hereinafter "Dofasco Reply Brief"), June 7, 1994, at 29.

[40] Canadian Complainant's Brief, Dofasco, Inc. (hereinafter "Dofasco Brief"), March 23, 1994, at 27, citing Nihon Cement Co. v. United States, No. 93-80, slip op. at 50 (Ct. Int'l Trade May 25, 1993). (Note: All citations herein to briefs filed before the Panel are to the public versions, unless otherwise specified. In all cases, public versions of briefs were filed one day after the proprietary versions.)

[41] Response Brief of the Investigating Authority to the Brief of Dofasco, Inc. (hereinafter "Commerce Response to Dofasco"), May 23, 1994, at 15, citing Nihon, at 51.

Rather than focusing on "possibility" language, the Department invites the Panel to review the factors that must be considered in reaching a finding on collapsing companies, *i.e.*, whether:

1. the companies are closely intertwined;

2. transactions take place between the companies;

3. the companies have similar types of production equipment, such that it would be unnecessary to retool either plant's facilities before implementing a decision to restructure either company's manufacturing priorities; and

4. the companies involved are capable, through their sales and production operations, of manipulating prices or affecting production decisions.[42]

The Department found that there were significant transactions between the two companies and that the companies prepared consolidated financial statements.[43] [ ] were from Dofasco, which held a [ ] percent ownership interest in Sorevco along with [ ].[44]

With respect to similar production facilities, the Department asserts that while the Sorevco and Dofasco facilities are not identical, they are substantially similar.[45] The Department found no evidence to support Dofasco's contention that its facilities are designed to produce higher quality products.[46]

With respect to the ownership and control factors, Dofasco maintains it was prejudiced by the Department's failure to place in the investigation record documents examined at verification.

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[42] Commerce Response to Dofasco, at 15.

[43] Final Determination, 58 Fed. Reg. at 37107.

[44] Conf. Doc. 270, Fiche 421, Frame 22.

[45] Commerce Response to Dofasco, at 17.

[46] Id. at 17.

Dofasco claims the documents, including a joint venture agreement, would provide important information about Sorevco.[47] The Department responds that evidence from Dofasco at verification was new evidence, not timely presented by Dofasco, and was therefore properly refused by the Department.[48]

The Department indicates that if Sorevco had a different dumping rate than that of Dofasco, there would be an incentive to shift production toward the company with the lower dumping rate.[49] Dofasco maintains that the Department's concern about circumvention of dumping duties by Dofasco shifting production to Sorevco is non-existent, because without the collapse of Dofasco and Sorevco, Sorevco would be subject to a higher "all others rate," and that in any event, circumvention of duties could be remedied at the first administrative review.[50]

The U.S. Producers support the Department's determination to collapse Dofasco and Sorevco, and indicate that there was extensive evidence that Dofasco was in a position to manipulate Sorevco's pricing and production decisions. The U.S. Producers point to

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].[51] The U.S. Producers indicate that Dofasco and Sorevco both have hot dipped galvanized equipment to produce galvanized steel.[52]

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[47] Dofasco Brief, at 37-43.

[48] Commerce Response to Dofasco, at 24-29.

[49] Commerce Response to Dofasco, at 21-22.

[50] Dofasco Brief, at 34-37.

[51] Brief in Support of Certain Sections of the Final Determination Submitted on Behalf of Certain United States Producers (hereinafter "U.S. Producers Response Brief"), May 24, 1994, at 147-48.

[52] Id. at 150.

2. Analysis and Decision

As stated above, the Department asserts that neither the "strong possibility" nor "possibility" language establishes a test. Nevertheless, the Panel can see where confusion has arisen on this matter. The Nihon Court examined whether a "strong possibility" of price manipulation was present, because that was the "standard" the Department articulated in the underlying determination in that case. As stated in that underlying final determination: "[I]t is the Department's practice *not* to collapse related parties except . . . where the type and degree of relationship is so significant that the Panel finds there is a strong possibility of price manipulation."[53] Nevertheless, elsewhere in the Nihon opinion, the Court cited a string of Commerce precedents, which included the statement that "all these factors need not be present as long as the parties are sufficiently related to present the possibility of price manipulation."[54]

The situation was not clarified by the Department's contemporaneous offering of differing statements on the issue in the recent steel determinations. In the Decision Memorandum analyzing the Sorevco/Dofasco relationship, the Department stated:

> The standard that the Department uses in determining whether to collapse related manufacturers is to determine whether the relationship between the related parties is such that one company is in a position to manipulate another company's prices and/or production decisions.[55]

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[53] Gray Portland Cement From Japan, 56 Fed. Reg. 12167 (March 22, 1991), quoting Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18992, 19089 (May 3, 1989) (emphasis in original).

[54] Nihon, No. 93-80, slip op. at 51, citing Cellular Mobile Telephones and Subassemblies From Japan, 54 Fed. Reg. 48011 (November 20, 1988).

[55] Pub. Doc. 695, Fiche 181, Frame 94, citing Brass Sheet and Strip from France, 52 Fed. Reg. 812, 814 (January 9, 1987); Certain Iron Construction Castings from Canada, 55 Fed. Reg. 460 (January 5, 1990).

Nevertheless, in the final determination in another steel case, the Department used the "strong possibility" language at the beginning, middle and end of a detailed discussion of its analytical method used to evaluate whether companies should be collapsed. In that case, the Department found that the relationships were "sufficiently close to create the strong possibility of price manipulation between the companies."[56]

The Department has authority to develop tests (consistent with the statute) to aid fulfillment of its statutory duties. The Department should strive to apply these tests in a uniform manner. The Panel does not attempt to formulate here the "standard" language for the Department. Nevertheless, the Panel believes collapsing related companies is not the usual practice of the Department.[57] Moreover, the Department's decision to collapse related enterprises is not "based solely on their financial relations."[58] Similarly, the Department "does not focus only on the degree of voting control one company has over another when determining whether to collapse entities."[59] Rather, the Department considers all the established criteria for determining whether to collapse companies. The Panel has accepted the Department's invitation to examine

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[56] Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products From Japan, 58 Fed. Reg. 37154, 37159 (July 9, 1993), citing Commerce Decision Memorandum (November 6, 1992).

[57] The complete quotation of Commerce policy from Antifriction Bearings provides that, "It is the Department's general practice *not* to collapse related parties except in relatively unusual situations where the type and degree of relationship is so significant that we find there is a strong possibility of price manipulation." Nihon, No. 93-80, slip op. at 50, quoting Antifriction Bearings, 54 Fed. Reg. at 19089.

[58] Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Steel Flat Products, and Certain Corrosion-Resistant Carbon Steel Flat Products From Japan, 58 Fed. Reg. 37154, 37159 (July 9, 1993), quoting Cellular Mobile Telephones (CMTs) and Subassemblies from Japan, 54 Fed. Reg. 48011, 48015 (1989).

[59] Id., citing Nihon.

the evidence marshalled under those criteria to support the determination to collapse Dofasco and Sorevco.

In this case, there is a clear and direct share ownership whereby Dofasco owns [ ] percent of Sorevco. In addition, Dofasco occupies [ ] percent of the Sorevco board positions, in what is apparently a joint venture between Dofasco and another entity. The Panel does not have before it specifics concerning the joint venture agreement, as the information was not supplied to the Department until verification. The Department reasonably found that the joint venture agreement constituted new factual information, as opposed to material in the nature of a verification document relating to previously submitted factual information. If evidence is not submitted in accordance with the Department's regulations and within proper time limits, then the Department is entitled to exclude such evidence as new evidence.[60]

[ ] transactions take place between Dofasco and Sorevco. Moreover, there was [ ]. Finally, Sorevco facilities anneal steel in a significant manufacturing process, which makes its facilities somewhat like those of Dofasco.

Considering these factors, the Panel concludes that there is substantial evidence on the record to support the Department's decision to collapse Dofasco and Sorevco, and therefore affirms the Department's determination in this regard.

[60] See Tianjin Machinery Import & Export Corp. v. United States, 806 F. Supp. 1008, 1015 (Ct. Int'l Trade 1992) (Commerce need not "seek out new information in the guise of 'verification.'")

VI. HOLDINGS ON CCC ISSUES

A. The Department's Determination to Collapse CCC and Stelco

1. Background and Arguments

In its final determination, the Department determined that Stelco and its related party, CCC, had a relationship that warranted the collapse of Stelco and CCC.[61] The legal background for evaluation of a determination to collapse companies was outlined in Section V of this opinion.

No cross-ownership of Stelco and CCC stock is present. But Stelco, [

].[62] Although Stelco [

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].[63] The Department found this [

]. CCC maintains that the two companies are operated completely independently of one another. While Stelco may [

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[61] Final Determination, 58 Fed. Reg. at 37117.

[62] Conf. Doc. 284, Fiche 428, Frame 13.

[63] Conf. Doc. 284, Fiche 428, Frame 12.

[64] Conf. Doc. 214, Fiche 394, Frame 22.

].[65] [

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Stelco is a large steel mill manufacturing many steel products; CCC is essentially a coating company that does not manufacture steel. The Department concedes [

],[66] but notes that all factors need not be present to collapse companies.[67] The U.S. Producers assert that because of Stelco's admission that Stelco and CCC produce competing products, production could be shifted from one facility to the other, and that therefore the criterion concerning similar production facilities also indicates that collapsing Stelco and CCC was appropriate.[68]

2. Analysis and Decision

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]. This is a prudent and normal business relationship between the parties considering Stelco's [[

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[65] Conf. Doc. 214, Fiche 394, Frame 23.

[66] Conf. Doc. 284, Fiche 428, Frame 13.

[67] Response Brief of the Investigating Authority to the Brief of Continuous Colour Coat, Ltd. (hereinafter "Commerce Response to CCC"), May 23, 1994, at 23, citing Nihon at 51.

[68] U.S. Producers Response Brief, at 111.

]. The CCC processing operations are rudimentary in relation to the extensive manufacturing conducted by Stelco. A shift in production from Stelco to CCC is highly unlikely.

Substantial evidence must exist on the record that supports the Department's determination to collapse Stelco and CCC, and the Panel cannot find such evidence on the record here. This issue is remanded to the Department with the instruction not to collapse Stelco and CCC.

B. The Department's Resort to Partial "Best Information Available" Due to CCC's Failure of Verification

The Department must "verify all information relied upon in making . . . a final determination in an investigation."[69] If the Department "is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action . . ."[70] Moreover, best information available ("BIA") is required where a party "refuses or is unable to produce information requested in a timely manner and in the form required."[71]

In the context of investigating Stelco, the Department determined that its related company, CCC, had failed verification.[72] The Department cited four independent grounds supporting its conclusion that CCC had failed verification:

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[69] 19 U.S.C. §1677e(b); see also 19 C.F.R. §353.36(a).

[70] 19 U.S.C. §1677e(b); see also 19 C.F.R. §353.37(a)(2).

[71] 19 U.S.C. §1677e(c); see also 19 C.F.R. §353.37(a)(1).

[72] The Department questionnaire's General Instructions state that "[c]ompanies are considered to be related when one owns, directly or indirectly, any of the stock of the other, or when one or more of the same individuals are members of the board of directors of both companies or other entities which control those companies." General Issues Doc. 40, Fiche 10, Frame 44, footnote. The questionnaire further requires the party to whom the questionnaire is issued to answer on behalf of such related parties. Id. Thus, as part of its own response, Stelco compiled and provided Commerce with information on CCC sales.

> In contrast to Stelco's information, CCC's data was highly unreliable. We were *not* able to verify CCC's information on volume or value and were unable to find a way to tie the sales data to CCC's audited financial statements. Second, CCC only provided estimates, not actual costs, with respect to corrosion-resistant products. Third, CCC only reported sales of merchandise it had purchased from Stelco. CCC did not report its sales of subject merchandise that were made from material other than Stelco's. Finally, during verification we found that information regarding the sales price, quantity, commissions, rebates, as well as product characteristics were frequently reported incorrectly.[73]

The Panel considers each of these several bases below.

1. Inability to Tie CCC's Sales Data to its Financial Statements

a. Background and Arguments

The Department specifically found that it could not tie the CCC sales value reported in Stelco's questionnaire response to the sales value reported in CCC's books of account. CCC emphasizes, and the Department's verification report confirms,[74] that the difference between the sales value reported in the questionnaire response and the sales value reported in the financial statements was small. Nevertheless, the Department argues that "[t]he real issue . . . is that CCC reported a figure which it could not substantiate."[75]

The Department was also unable to establish (or confirm to its satisfaction) at verification the full volume of sales that CCC had reported.[76] CCC argues that it "does not keep records of

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[73] Final Determination, 58 Fed. Reg. at 37116-17 (emphasis in original).

[74] Pub. Doc. 600, Fiche 153, Frame 94.

[75] Commerce Response to CCC, at 33. See 19 U.S.C. §1677e(b).

[76] The Verification Report states that "[o]ther than the information derived from the invoices which CCC identified as sales of subject merchandise, there were no documents through which we could establish CCC's volume of sales." Pub. Doc. 600, Fiche 153, Frame 95. While it appears from the verification report that one or more internal documents might have been available to confirm the total volume of sales, these were not made available to Commerce. Id. at Frames 94-95.

sales quantities on its books of account"[77] and that it "is not, in fact, even in the business of selling steel. It is a coating company which sells production line time for coating steel products."[78] CCC asserts that the Department was asking for information that did not exist and then inappropriately imposing BIA when it failed to receive the information requested.[79] The Department argues that, at least with respect to the Stelco resales, "CCC was selling steel, and there was no reason for it not to know the quantity it sold."[80] The U.S. Producers assert that "[w]hile CCC may perform some coating operations on a tolling or contract basis, the record is replete with evidence showing that CCC is also in the business of selling steel."[81]

b. Analysis and Decision

The burden is on the respondent, not the Department, to supply accurate data[82] and create an "adequate record."[83] The Court of International Trade has upheld the Department's decision to reject a response and use total BIA where the "principal basis" for its decision was the conclusion

[77] Brief Submitted on Behalf of Continuous Colour Coat, Ltd. (hereinafter "CCC Brief"), March 23, 1994, at 18.

[78] Id. (emphasis in original).

[79] Id. at 19, citing Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1573-74 (Fed. Cir. 1990).

[80] Commerce Response to CCC, at 34.

[81] U.S. Producers Response Brief, at 120.

[82] Respondents "cannot expect Commerce, with its limited resources, to serve as a surrogate to guarantee the correctness of submissions." Sugiyama Chain Co., Ltd. v. United States, 797 F. Supp. 989, 994-95 (Ct. Int'l Trade 1992).

[83] Chinsung Indus. Co., Ltd. v. United States, 705 F. Supp. 598 (Ct. Int'l Trade 1989).

that the respondent "could not substantiate the total volume and value of sales."[84] Respondents in an antidumping investigation understand that information submitted in response to a questionnaire will be subject to verification by the Department.[85] One of the primary purposes of verification is to ensure accounting for all relevant sales.[86] Even if the inaccuracies in CCC sales value were "small," they were still inaccuracies, tainting the data under consideration.

CCC's inability to report its sales volume by tonnage is not excused by Olympic Adhesives. This is not a situation where the event for which data was requested never occurred and the respondent could not provide the information requested for that reason. Here, the steel was sold, but CCC apparently did not routinely record the volume of sales.

2. CCC's Use of Estimates As Opposed to Actual Costs

a. Background and Arguments

CCC was required to submit data on costs actually incurred for the manufacture of the products, quantified and valued in accordance with Generally Accepted Accounting Principles ("GAAP"). The Department's questionnaire instructed that submitted data should be based on "[a respondent's] cost accounting records to the extent that those records accurately reflect the costs incurred to produce the subject merchandise."[87] The questionnaire went on to advise that if for

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[84] Sugiyama Chain Co., Ltd. v. United States, No. 94-78, slip op. at 17 (Ct. Int'l Trade May 12, 1994).

[85] Verifications are statutorily mandated. 19 U.S.C. §1677e(b).

[86] See Florex v. United States, 705 F. Supp. 582, 588 (Ct. Int'l Trade 1988). To test completeness Commerce both traces back from the questionnaire response to primary source documents such as invoices, and traces forward from the universe of primary source documents to the questionnaire response. See Roller Chain Other Than Bicycle From Japan, 57 Fed. Reg. 43697, 43699 (Sept. 22, 1992).

[87] General Issues Doc. 40, Fiche 11, Frames 54-55.

any reason a respondent did not intend to use these records to prepare the responses, that respondent should contact Import Administration's Office of Accounting.

CCC informed the Department at verification that "time constraints precluded it from reporting its actual costs."[88] Therefore, CCC's costs for the processes that it performs — painting, laminating, electrogalvanizing and slitting — were based not only on actual costs, but on "estimated cost worksheets."[89] Although CCC concedes on appeal that it "did not . . . possess cost information in the precise format required by the Commerce Department,"[90] it argues that it did provide information on all of its costs of producing galvanized sheet, which it tied to actual company worksheets and to its financial statements.

The Department stresses that it "must apply BIA when information is not reported accurately, even in situations where a respondent has provided the best response which it is able."[91] Moreover, "CCC did not reveal that its reported costs were only estimates until the Department arrived at the verification site."[92]

b. Analysis and Decision

The Panel appreciates that it might be difficult for a respondent to provide information that is not readily available in the form requested by the Department. Nevertheless, the

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[88] Pub. Doc. 610, Fiche 157, Frame 21.

[89] Id. at Frames 2, 21.

[90] CCC Brief, at 25.

[91] Commerce Response to CCC, at 38, citing Allied-Signal Aerospace v. United States, 996 F. 2d 1185 (Fed. Cir. 1993), and 19 C.F.R. §353.37.

[92] Id. at 38-39.

Department is entitled to receive the information it requests and to receive it in the form requested.[93]

The threshold remedy for a respondent is to promptly contact the Department, as the questionnaire specifically asks for it to do, to discuss the situation. There is no evidence on the record here, nor is there any claim by CCC, that it made such an attempt. The Department requested actual costs and CCC provided estimated costs, without first obtaining the Department's approval of the cost estimation methodology. Thus, CCC did not comply with the Department's request for information.

3. CCC's Failure to Report All Sales

a. Background and Arguments

CCC first notes that the Department rejected CCC's request to be allowed to submit a voluntary response to the Department's questionnaire.[94] CCC argues that Commerce's questionnaire to Stelco expressly sought information only as to two types of sales: first, Stelco's

[93] 19 U.S.C. §1677e(c). N.A.R., S.p.A. v. United States, 741 F. Supp. 936, 941 (Ct. Int'l Trade 1990) (Party's production of cost data by classes of colors rather than, as requested by Commerce, by length of tape rolls, justified Commerce resort to BIA: "It is for Commerce to conduct its antidumping investigations the way it sees fit, not the way an interested party seeks to have it conducted."). See also Ansaldo Componenti, S.p.A. v. United States, 628 F. Supp. 198, 205 (Ct. Int'l Trade 1986). "It is Commerce, not the respondent, that determines what information is to be provided for an administrative review." Accord, Olympic Adhesives, 899 F.2d at 1571-72 ("Commerce cannot be left merely to the largesse of the parties at their discretion to supply [Commerce] with information.... Otherwise, alleged unfair traders would be able to control the amount of antidumping duties by selectively providing the Department with information").

[94] General Issues Doc. 39, Fiche 10, Frames 8, 11-13. CCC was described therein as a "fabricator and coater of steel products," a company type Commerce implied would not normally be examined in an antidumping investigation.

direct sales of its own products, and second, resales of Stelco's products through its related parties, one of which was CCC.[95]

CCC also cites correspondence from Stelco to the Department,[96] in which Stelco requested that the Department not require complete reporting of CCC's "resales" of Stelco merchandise as evidence that only CCC resales of Stelco merchandise were to be reported. The Department responds that it rejected Stelco's request, stating at that time that it expected a full reporting of all sales.[97]

b. Analysis and Decision

The "capture of all U.S. sales at their actual prices is at the heart of the Department's investigation" and the omission of even one U.S. sale is a "serious error."[98] It is a fundamental obligation of the Department in an antidumping investigation to determine the extent of the dumping. It is not reasonable to interpret the two questionnaire passages relied on by Stelco in a manner that would exclude, at the very outset of the investigation and without a clearly expressed

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[95] CCC Brief at 12. CCC points to the General Instructions of the Department's questionnaire propounded on Stelco: "Throughout this questionnaire, whenever we refer to the product(s) under investigation, or the subject merchandise, we are referring to all products within the scope of the investigation that your company produces." General Issues Doc. 40, Fiche 10, Frame 43; Id. at Frame 61 (emphasis added). Elsewhere, the questionnaire instructs that: "[I]f you sell to a related party who resells the merchandise to an unrelated party, you must report the sale by the related party to the unrelated party." Id. at Frame 61.

[96] Pub. Doc. 168, Fiche 45, Frame 76; Pub. Doc. 184, Fiche 46, Frame 71.

[97] "The sampling methodology outlined in the memorandum does not apply to you, because you have failed to demonstrate that reporting of ESP sales of corrosion-resistant sheet constitutes an extraordinary reporting or analysis burden. Therefore, we expect a full reporting of all U.S. and home market or third country sales with the exception of the ESP sales of hot rolled sheet and further processing for ESP sales of corrosion-resistant sheet mentioned above." Pub. Doc. 201, Fiche 47, Frame 89 (emphasis added).

[98] Florex, 705 F. Supp. at 588.

intention to do so, entire categories of sales. The Panel declines to read the Department instruction to report resales by a related party as a jurisdictional limitation on the otherwise reportable sales. Indeed, other language in the questionnaire, referring to reporting of all sales to unrelated purchasers, states that "[t]hroughout this questionnaire, whenever we refer to 'you,' 'your company,' 'your firm,' etc., answer on behalf of all related entities."[99]

To the extent that there was any confusion on this point, the questionnaire expressly invited respondents to contact the Department to clarify the scope of any provisions.[100] The burden was on Stelco and CCC to consult with the Department, in as prompt a time frame as possible, to clarify any ambiguities or doubts. Stelco's questionnaire response, which stated that Stelco was including CCC's "resales" in its listings of U.S. and home market sales,[101] was not sufficient to alert the Department to Stelco's narrow reading of the scope of the questionnaire.

While the Department's correspondence with Stelco may have less than ideal clarity overall, it in no way encouraged Stelco and CCC in their purported belief that CCC had to report only a portion of its sales (*i.e.*, the Stelco resales). Neither does the Department's preliminary determination, which stated that it would not accept a voluntary antidumping response from CCC because it was related to Stelco during the period of investigation and "its [CCC's] sales would be investigated as part of Stelco's response," support the Stelco/CCC reporting assumptions.

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[99] General Issues Doc. 40, Fiche 10, Frame 44, footnote.

[100] The General Instructions state: "If the intent of these investigations is not then clear to you, please consult the Import Administration representative named on the title page," and "Please do not hesitate to contact the Import Administration representative named on the cover page of this questionnaire with any questions you may have regarding your responses to the questions contained herein." General Issues Doc. 40, Fiche 10, Frames 43, 44.

[101] Pub. Doc. 228, Fiche 50, Frame 84; Pub. Doc. 228, Fiche 51, Frame 25.

The Panel can accept CCC's averments that there was a misunderstanding on this point. Nevertheless, for the Panel to accept CCC's position, it must conclude that the questionnaire reporting requirements were not susceptible to any interpretation other than the one adopted by CCC. The Panel does not find that to be the case.[102]

4. Other Reporting Errors

a. Background and Arguments

The Department also "found that information regarding the sales price, quantity, commissions, rebates, as well as product characteristics were frequently reported incorrectly" by CCC.[103] For its part, CCC concedes that "there were errors found in CCC's response,"[104] but argues that they were not wilful in nature, nor were they representative of the totality of CCC's response.

CCC emphasizes that it is a small company, with limited computer and staff support; that hard copy data had to be manually keypunched (which led to a number of errors); that certain errors were promptly reported to the Department after they were discovered; that the discrepancies were of a relatively minor nature, not affecting the overall integrity of the response; and that the apparent frequency of the errors was "exaggerated by the Department's decision to focus on 'outliers.'"[105]

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[102] Panel Member McGill notes that, by so finding, he does not imply that the Department may in all situations require a respondent to report all sales of subject merchandise by all related parties.

[103] Final Determination, 58 Fed. Reg. at 37117.

[104] CCC Brief, at 19.

[105] CCC argues that "the Department overemphasized [the] outliers in its verification," CCC Brief, at 23, and that the verification process highlighted "the aberrations, rather than the total consistency of a response. Hence, the verification report by intention did not consider the

The Department disputes the relevancy of CCC's focus on the minor nature of the errors and the fact that there was no attempt to willfully mislead the Department. The Department points to the statutory language requiring the Department to use BIA whenever it cannot verify submitted information, "regardless of whether the errors were caused by a willful attempt to mislead, or were merely inadvertent."[106]

2. Analysis and Decision

Even if the Panel accepts that CCC, by virtue of its lack of infrastructure, staffing or accounting capacities, had difficulty in responding to the intense demands of an antidumping investigation, the burdens of furnishing accurate data and of creating an adequate record are not thereby diminished, nor are they shifted to the Department.[107]

Commerce counsel defined "outliers" as "sales which appear on their face to be unusual, such as sales with extremely high or low selling prices," and then admitted that "Commerce does look for such sales to determine the accuracy of the response overall."[108] The Panel does not view the Department examination of "outliers" to be unreasonable. Verification is a spot check of respondent's information and is not intended to be an exhaustive examination of the respondent's business or of the entirety of the respondent's submissions.[109] The Department has broad

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overwhelming portion of the response where there were no aberrations." Id. at 22.

[106] Commerce Response to CCC, at 35.

[107] Sugiyama, 797 F. Supp. at 994-95; Chinsung, supra, n.83.

[108] Commerce Response to CCC, at 36, n. 15. Nevertheless, "the verification report reveals that many aspects of Stelco's response were verified randomly, and that the Department did not rely exclusively on 'outliers.'" Final Determination, 58 Fed. Reg. at 37116.

[109] Monsanto Company v. United States, 698 F. Supp. 275, 281 (Ct. Int'l Trade 1988).

discretion in determining how to conduct its verifications,[110] and has considerable latitude in picking and choosing which items it will examine in detail.[111]

Based on our review of the various bases which support the Department's finding that CCC failed verification, the Panel affirms the Department's decision.

C. Electrogalvanization As A Substantial Transformation

1. Majority Opinion

a. Background and Arguments

"Substantial transformation" is the accepted United States Customs Service and the Department test for determining country of origin.[112] CCC complains that the Department's determination that electrogalvanizing alone substantially transforms U.S. cold-rolled sheet steel into a Canadian product is unsupported by substantial evidence on the record and is otherwise not in accordance with law.[113] CCC points to several U.S. Customs Service rulings finding that electrogalvanization does not substantially transform sheet unless it is performed in conjunction with annealing operations.

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[110] Hercules, Inc. v. United States, 673 F. Supp. 454 (Ct. Int'l Trade 1987).

[111] Monsanto, 698 F. Supp. at 281. See also PPG Industries, Inc. v. United States, 781 F. Supp. 781 (Ct. Int'l Trade 1991). These principles are consistent with the general proposition that "Congress has afforded Commerce considerable latitude and discretion in implementing the antidumping duty laws, especially during the investigative fair value phase." Melamine Chemicals, Inc. v. United States, 732 F.2d 924, 929 (Fed. Cir. 1984).

[112] General Issues Appendix, 58 Fed. Reg. at 37066. The Department states: "[I]n determining country of origin for scope purposes, the Department applies a 'substantial transformation' rule." Id. at 37065. Customs applies a substantial transformation test in a variety of contexts relating to determine country of origin, *e.g.*, marking, quotas, preferential duty programs, and most-favored-nation treatment.

[113] CCC Brief, at 28.

The final determination described the basis for the Department's substantial transformation finding:

> During verification in Mexico and Canada we reviewed the process of producing galvanized sheet. The process of galvanizing does not involve simply painting cold-rolled sheet with zinc. It is a bonding process, which changes the character and use of the sheet. The galvanizing transforms the physical character of the cold-rolled sheet from a non-corrosion resistant to a corrosion-resistant material. The galvanized sheet is intended for use in applications where corrosion-resistance is important because of the exposure to the elements, such as construction or the production of certain products (*e.g.*, air conditioners). Cold-rolled sheet cannot be used for such applications. Thus, galvanizing changes the character and use of the steel sheet, *i.e.*, results in a new and different article. In fact, the differences between cold-rolled sheet and galvanized sheet are so significant they fall within different classes or kinds of merchandise. In addition, galvanizing adds substantial value.[114]

The Department found that "[d]espite Customs' ruling, there are more similarities than differences in the extent to which galvanizing and full anneal/galvanizing affect the steel sheet."[115] The Department also dismisses contrary Customs precedent as non-binding on the agency.

[114] General Issues Appendix, 58 Fed. Reg. at 37066.

[115] Id.

b. Analysis and Decision

Summarizing the case law, the Court of International Trade stated that the issue of substantial transformation is "whether operations performed on products in the country of exportation are of such a substantial nature to justify the conclusion that the resulting product is a manufacture of that country."[116]

Because Ferrostaal examined whether annealing and galvanization ("continuous hot-dip galvanizing") of cold-rolled steel sheet was a "substantial transformation," it also provides guidance on the level of specificity required to support a substantial transformation determination here.[117] The Court made detailed findings on aspects of the manufacturing process and changes in the product character.[118] The Court also considered value and price differences as well as interchangability between the non-galvanized sheet steel and hot-dip galvanized sheet.[119]

The Department cited to no such specific record evidence here. To the contrary, in its final determination, the Department summarily equates the (apparently quite different) process of

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[116] Ferrostaal Metals Corp. v. United States, 664 F. Supp. 535 (Ct. Int'l Trade 1987).

[117] The Ferrostaal court counseled that the test for determination of country of origin should be the same in all contexts. "As a practical matter, multiple standards in these cases would confuse importers and provide grounds for distinguishing useful precedents. Thus, the Court applies the substantial transformation test using the name, character and use criteria in accordance with longstanding precedents and rules." Ferrostaal, 664 F.Supp. at 539. Commerce has applied essentially the same test here. General Issues Appendix, 58 Fed. Reg. at 37066 and Commerce Response to CCC at 46-47.

[118] For example, it noted that annealing does not change the actual chemical composition of the sheet, but grain re-crystallization eliminated defects in the sheet. The hot-dip galvanized sheet was found to have ten times the life of ungalvanized sheet. Ferrostaal, 664 F. Supp. at 539.

[119] Id. at 539-540.

hot-dipped galvanization in Mexico with the process of electrogalvanization in Canada.[120] The Department simply states that there is a "bonding process, which changes the character and use of the sheet."[121] Commerce then concludes that there has been a substantial transformation because the galvanization provides corrosion-resistance not possessed by steel sheet.[122]

Findings of fact are critical in adducing whether a substantial transformation has occurred.[123] Commerce properly stated in the final determination that "[t]he term 'substantial transformation' generally refers to a degree of processing resulting in a new and different article."[124] The Panel is concerned that, at apparent odds with this statement, Commerce counsel opined at the hearing before the Panel that the specifics relating to the processing in Canada (*i.e.*, whether hot-dipped or electrogalvanization) are irrelevant,[125] as the Department's focus is whether

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[120] General Issues Appendix, 58 Fed. Reg. at 37066. In the investigation of certain carbon steel products from Mexico, a Mexican exporter argued that U.S. steel subject to hot-dip galvanizing (without annealing) in Mexico was a U.S.-origin product not properly subject to the antidumping investigation. See General Issues Doc. 171, Fiche 34, Frame 70 et seq.

[121] General Issues Appendix, 58 Fed. Reg. at 37066.

[122] Id.

[123] Superior Wire v. United States, 867 F.2d 1409, 1414 (Fed. Cir. 1989). Commerce's statements that full annealing and galvanizing are "done on the same production line, using the same material and labor, and the costs of production are essentially the same" appear to be conclusions that are not substantiated by specific record evidence.

[124] General Issues Appendix, 58 Fed. Reg. at 37065.

[125] Commerce concedes it "did not distinguish between various processes by which steel is galvanized, *e.g.*, hot-dipping or electrolytic deposition." Commerce Response to CCC, at 45, n. 17.

the end product competes with corrosion-resistant steel.[126] This new focus conflicts with past agency practice.[127]

A finding of a mere change in the use of sheet steel alone is not sufficient to support a substantial transformation determination in this case.[128] Painting steel also provides for added corrosion-resistance, but no party in this appeal has contended that painting is a substantial transformation.

The Department may not be bound by U.S. Customs substantial transformation precedent, but it has the responsibility to approach substantial transformation findings in the same detailed fashion. Commerce's obligation to explain its findings is particularly important where a well-

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[126] Hearing Transcript, July 11, 1994, Panel Doc. 238, at 44-45.

[127] For instance, Commerce has previously considered whether finishing or assembly operations are "sophisticated" and involve an "extremely high degree of technical precision," Final Determination of Sales At Less Than Fair Value: 3.5" Microdisks and Coated Media Thereof From Japan, 54 Fed. Reg. 6433, 6435 (February 10, 1989) (hereinafter "Microdisks From Japan"); whether such operations require a "substantial capital outlay," Microdisks From Japan, 54 Fed. Reg. at 6435, Erasable Programmable Read Only Memories (EPROMs) From Japan, 51 Fed. Reg. 39680, 39692 (Oct. 30, 1986) (hereinafter "EPROMS From Japan"); whether such operations add significant value to the imported merchandise, Microdisks From Japan, 54 Fed. Reg. at 5435, EPROMs From Japan, 51 Fed. Reg. at 39692; and whether such operations have changed the end use of the imported merchandise, EPROMs From Japan, 51 Fed. Reg. at 39692.

[128] There may be instances where merely evidence of a change in a product prima facie constitutes a substantial transformation and no further factual findings are necessary. For instance, if corrosion-resistant sheet steel was sent to Canada and made there into complete air conditioners or such other appliances, the name, character and use tests employed by the courts would be so patently met that proofs of added value, technical specifications, etc. would merely be superfluous. Moreover, the Panel cannot even be certain as to the nature of the change in the use of the sheet steel as there is no citation to the record to support the proposition that electrogalvanization is a process which yields sufficient corrosion-resistance of steel such that the material could be used in "air conditioners," the sole example provided in the Department's final determination. General Issues Appendix, 58 Fed. Reg. at 37066.

developed body of U.S. precedent exists on the specific substantial transformation issue being addressed.[129]

Finally, the Department's observation that cold-rolled sheet and galvanized sheet fall within different classes or kinds of merchandise[130] is of limited analytic assistance. While the facts supporting a class or kind finding may have some relevance, a substantial transformation analysis is a distinct exercise, the conclusion of which must be supported by substantial evidence.

In sum, the Department's conclusory finding that electrogalvanization changed the character and use of sheet cannot support the substantial transformation determination. This issue is remanded to the Department for further explanation, including citations to the administrative record, to support a finding that the electrogalvanization process substantially transforms steel sheet.

2. Dissenting Views of Panel Member Endsley

I dissent from the majority's conclusion that a remand of the Department's determination that galvanization in Canada of U.S. cold-rolled sheet steel gives rise to a "substantial transformation" of such steel for purposes of the antidumping laws is necessary, even if such remand is limited to requiring the Department to merely further explain, with citations to the administrative record, its finding.

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[129] The Department concedes that, although Customs also applies a substantial transformation rule in determining country of origin, Customs has concluded that the electrogalvanization process alone does not constitute such a transformation. Id. See, e.g, Customs Ruling 555511 (September 13, 1990), Ruling 081888 (August 1, 1988), Ruling 080648 (September 11, 1987), and Ruling 076342 (July 25, 1986).

[130] General Issues Appendix, 58 Fed. Reg. at 37066.

Although the majority is sending this determination back for further explanation, the majority appears for the most part to dismiss the rather clear explanation that the Department does give. In addition to the portion of the final determination quoted by the majority in its opinion, the following additional remarks by the Department are quite helpful in understanding its position on this issue:

> Despite Customs' ruling, there are more similarities than differences in the extent to which galvanizing and full anneal/galvanizing affect the steel sheet. Both processes are done on the same production line, using the same material and labor, and the costs of production are essentially the same. As noted above, some heat treatment is done in converting cold-rolled sheet into galvanized sheet. The only difference in the process is that the full annealed product is heated to a higher temperature. Thus, we see no basis to conclude that, for AD/CVD purposes, the full annealing and galvanizing is a significant process but galvanizing alone is not. Furthermore, both processes change the character of the product: Galvanizing gives the sheet corrosion resistant properties, and full annealing/galvanizing adds the additional characteristic of formability (*i.e.*, reduces the yield and tensile strength). Both processes also change the use: Galvanizing results in a product intended for applications requiring corrosion resistance, and full anneal/galvanized results in a product intended for similar applications, but which requires more formability. Galvanizing results in a product intended for applications requiring corrosion resistance, and full annealing results in a product intended for applications requiring more formability (e.g., appliances).
>
> Based on the foregoing, the Department has determined that galvanizing constitutes substantial transformation.[131]

I find the Department's position on this issue to be adequately explained, readily understandable, and fully within its discretion. For my part, I do not need a "further explanation" that non-corrosion-resistant steel exposed to the elements may corrode or that corrosion-resistant steel is generally utilized in situations (*e.g.*, in construction activities or in the production of

[131] General Issues Appendix, 58 Fed. Reg. at 37066. The reference to "Customs' ruling" is intended to refer to the Court of International Trade's opinion in Ferrostaal and similar decisions made by the U.S. Customs Service to the effect that galvanization alone does not, for purposes of the tariff laws, constitute substantial transformation—full annealing is also required.

certain products such as air conditioners) where such exposure may occur. These facts are known to laymen and most certainly are known to an agency which has extensive experience and expertise in the steel industry. In addition, I take note that the metallurgical characteristics of steel, as well as the physical organization or characteristics of various types of steel production lines, discussed by the Department in this portion of the final determination have not been disputed by any party and are no doubt accurate. More to the point, I would not be willing to overturn the finding made by the Department simply because the administrative record did not happen to include some elementary textbook type discussion of what happens to cold-rolled sheet steel when it is galvanized, or some elementary textbook type discussion of various steel production processes. The conclusions drawn by the Department on these points, particularly when they have not been disputed by any party, fall demonstrably within the agency's expertise to which, under the applicable standard of review, this Panel must defer. The Supreme Court requires only that an agency articulate a "rational connection between the facts found and the choice made,"[132] and has stated that "we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[133] For my part, I have no difficulty in ascertaining the Department's path of reasoning and I conclude that there is the requisite "rational connection" between the facts found and the choice made by the Department.

With respect to the application of the "substantial transformation" test, the majority appears to concede that Commerce is not bound by precedents reached under the tariff laws, a

[132] Burlington Truck Lines, 371 U.S. at 168.

[133] Bowman Transportation, 419 U.S. at 286.

conclusion which, again, no party disputes.[134] Although in the past the Department has considered a number of criteria for determining country of origin of goods,[135] the basic "substantial transformation" test entails consideration of whether a processing operation alters the essential "character" or the ultimate "use" of the production in question.[136] Reviewing the Department's analysis in the final determination, I believe that the Department has adequately explained the facts that galvanization has indeed changed both the "character" and the "use" of the cold-rolled sheet steel. In addition, the Department has noted, within the framework of the Anheuser-Busch decision, that the "name" has changed as well. Certainly, the Department's conclusions in this regard fall well within its discretion.

Since the Department's analysis rests on the distinction between galvanized and ungalvanized steel, I also do not join the majority in seeking more explanation about the various

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[134] In the Final Determination, the Department states: "The Department has consistently taken the position that it is not bound by Customs rulings on substantial transformation. The Department's authority to make its own country of origin determinations is inherent in its independent authority to determine the scope of AD/CVD investigations. The Department's country of origin determinations, which have not always been consistent with Customs, reflect concerns specific to enforcement of the AD/CVD laws, such as the potential for the circumvention of orders. See EPROMS from Japan, 51 FR 39680 (October 30, 1986); DRAMS of 256 Kilobits and Above from Japan, 51 FR 28396 (August 7, 1986)." General Issues Appendix, 58 Fed. Reg. at 37066.

[135] See Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01, 1992 FTAPD LEXIS 7, October 28, 1992, at 14, noting that the Department has applied or considered relevant seven different criteria; Superior Wire Co. v. United States, 867 F.2d 1409 (Fed. Cir. 1989).

[136] Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556, 562 (1908) ("[t]here must be a transformation; a new and different article [of Commerce] must emerge, 'having a distinctive name, character or use.'").

types of galvanization. To that extent, the majority is simply seeking more information about distinctions which, in the Department's view, make no legal difference.[137]

D. Application of Antidumping Duties to American Goods Returned (HTSUS 9802.00.60)

Both CCC and National Steel challenge the Department's methodology for applying antidumping duties to American Goods Returned ("AGR imports"). Although the Panel Members possess distinct views on the matter, a majority of the Panel finds the Department's statutory construction to be a permissible one. Therefore, the Department's determination respecting the application of antidumping duties to AGR imports is affirmed. The Panel's discussion of this issue can be found in Section IX of this opinion.

[137] These statements are made on the assumption that the Department does not regard mere painting as "galvanization," an assumption which appears warranted under the language of the final determination.

VII. HOLDINGS ON STELCO ISSUES

A. The Department's Resort to Partial "Best Information Available" Due to Computer Tape Omission of Certain Stelco U.S. Sales

1. Background and Arguments

In the final determination, the Department used partial BIA because Stelco "omitted certain information on U.S. sales of corrosion-resistant steel from its corrected data tape submitted May 11, 1993."[138] This action by the Department was an outgrowth of the following facts.

Stelco submitted a response which included a computer tape (the "October tape") containing a listing of Stelco's home market and U.S. sales and a concordance of those sales.[139] On November 3, 1992, Stelco timely filed a revised computer tape (the "November tape") containing corrections to the October tape, one of which involved the inclusion of a set of corrosion-resistant sales to the United States that were absent from the October response.[140] The November tape therefore included more U.S. sales than did the October tape.[141] In its cover letter to the tape, Stelco described the corrections to the October tape as being "very minor," not materially altering the first submission.

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[138] Final Determination, 58 Fed. Reg. at 37101.

[139] Pub. Doc. 228, Fiche 50, Frame 15.

[140] Pub. Doc. 253, Fiche 74, Frame 15.

[141] Id. The cover letter to the questionnaire stated that Stelco would "be permitted one opportunity to correct technical problems with computer tapes within 10 business days of filing the tapes." General Issues Doc. 40, Fiche 10, Frame 18.

Following publication of the preliminary determination, Stelco wrote to Commerce seeking correction of ministerial errors, but also noting that the Department may have erroneously relied on the October tape instead of the corrected November tape for purposes of the preliminary determination.[142]

Stelco subsequently submitted a response to an Commerce request for clarification of certain factual information, which again addressed the differences between the October tape and the November tape, including the fact that the number of observations differed between the two tapes.[143] Stelco requested that Commerce "confirm that the computer tape used for the preliminary determination was indeed submitted by Stelco on November 3",[144] stating immediately thereafter that "Stelco is using the data from its November 3 computer tape submission as the basis for its responses to the Department and for verification."[145]

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[142] Pub. Doc. 425, Fiche 118, Frame 6. Stelco suggested, particularly, that the number of data entries utilized by Commerce for the preliminary determination did not match the number of data entries in the November tape, and opined that Commerce's exclusion of certain sales to related parties in the preliminary determination "could not account for this discrepancy." (In the preliminary determination, Commerce apparently combined CCC and Stelco sales, as well as deleted certain home market sales to related parties. These intervening calculations would clearly make for some discrepancy in the figures and would no doubt make precise tracking of the data observations from tape to tape difficult.) Stelco also noted two other sets of observations which contained data not in accordance with the November tape. Id., at Frame 10.

[143] Pub. Doc. 455, Fiche 120, Frame 40.

[144] Id. at Frame 49.

[145] Id. In its brief to the Panel, reiterated at the hearing, Stelco argues that it continued to rely on the October tape: "Stelco, however, understood [following Commerce's decision on ministerial errors, confirming that it was utilizing the November tape] that the Department had used the October response in some form and based all [of Stelco's] future submissions and its preparations for verification on that filing." Brief Submitted on Behalf of Stelco, Inc. (hereinafter "Stelco Brief"), March 23, 1994, at 22. In the above letter, Stelco clearly informed

On March 11, 1993, Commerce made its finding on Stelco's ministerial errors submission and asserted it had used the November tape in making the preliminary determination.[146]

During preparations for verification, Stelco discovered other errors in its responses and reported those errors to Commerce.[147] Thereafter, Commerce instructed Stelco to submit replacement computer tapes to update certain information to correct certain errors. The itemized corrections to be made by Stelco were specifically set out by Commerce and none involved the addition to, or subtraction from, the number of sales observations. Commerce specifically requested Stelco's counsel to "certify that no changes other than those listed above were made to the data or concordance files."[148] Commerce warned that "[m]aking any other corrections, or altering the contents of the tapes in any way which is not specified in this letter, may result in our returning the tapes to you and resorting to the use of best information available (BIA). . . ."[149]

In addition, Commerce's senior case analyst, in a contemporaneous telephone call to Stelco's counsel, informed counsel that "no corrections to the tape were to be other than those specifically requested in the letter." In her Memorandum to File, the case analyst stated: "Due to the previous problems in this investigation with updating tapes, the Department provided

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the agency that it was relying on the November tape, not the October tape.

[146] Pub. Doc. 485, Fiche 125, Frame 36. On January 5, 1993, Stelco's case handler at Commerce informed Stelco by telephone that the November tape had been mislaid and requested a replacement. Stelco immediately provided an identical copy of the November tape. Pub. Doc. 425, Fiche 118, Frame 8.

[147] Pub. Doc. 536, Fiche 142, Frame 53.

[148] Pub. Doc. 591, Fiche 152, Frame 1.

[149] Pub. Doc. 591, Fiche 151, Frame 98.

printouts containing the minimum, maximum, mean and number of observations in the current datasets to ensure clarity as to which datasets were to be changed and resubmitted."[150]

Stelco responded to Commerce's request for a replacement computer tape (the "May tape").[151] Based on Stelco's interpretation of Commerce's telephone call[152] and its ostensible belief that Commerce was relying on the original October tape, the May tape was based on the data sets included in the October tape, which tape had erroneously omitted the set of U.S. sales observations noted above. Thus, in correcting certain more recently discovered errors, the May tape reinstituted the error of omitting certain sales.

Subsequently, Commerce informed Stelco that it had noticed a difference in the number of sales observations between printouts Commerce had provided to Stelco in conjunction with its requested certain revisions to the computer tape and the recently submitted May tape. Commerce's Memorandum to File states that Stelco did not inform Commerce of this discrepancy when it submitted the May tape, despite "clear instructions not to make any changes to the tape other than those specified by the Department."

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[150] Pub. Doc. 592, Fiche 153, Frame 1.

[151] Pub. Doc. 621, Fiche 158, Frame 88.

[152] Stelco argues on appeal that Commerce's May 3rd telephone communication informed Stelco that it "should use the tape identified by the number of data records indicated on the printout." Stelco Brief, at 23. Using that printout, Stelco apparently found there to be "an extremely high correlation between the identifying information for the October response and that of the Department's database." Id. at 24. For its part, the Panel observes that [

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Stelco responded that it had submitted the data set in question because Commerce was continuing to use the October tape "except for the Stelco, Inc. U.S. sales data base, which, in their view, matched their November 1992 submission."[153] Commerce reiterated to Stelco that it had found that based on its records, Commerce was using the November tape. Because the May tape omitted the same sales which the October tape had erroneously omitted, and because it was clear to all parties that such sales should have been included in the antidumping calculation, Commerce resorted to partial BIA for these missing sales.

Stelco argues that Commerce should not have applied BIA to sales that were not in fact "missing." The November tape, in conjunction with the March 31st submission, were sufficient, in Stelco's view, to permit Commerce to perform the "minor corrections" required.[154] Second, Stelco argues that Commerce's own ineptitude in handling the data caused the original error, for which Stelco cannot be held responsible.

2. Analysis and Decision

Although the correlation anomalies noted by Stelco are not answered on the record before us, the Panel believes that when Commerce decided, after specific investigation, that it had been utilizing, and was continuing to utilize, the November tape, this answered the question that Stelco had asked and defined the issue for all future purposes. Notwithstanding what it now asserts on appeal, it also appears that Stelco expressly committed itself to use of the November tape.

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[153] Pub. Doc. 692, Fiche 181, Frame 80.

[154] Stelco Brief, at 27.

When Commerce submitted its final request for a replacement computer tape, that request was proffered with the data set established by the November tape in mind. Although Stelco apparently drew yet more confusion, rather than clarity, from the attempt, the Panel does not find that the computer printouts submitted by Commerce's senior case analyst on that date in any way led Stelco astray.[155]

While not disputing Stelco's good faith in the matter, the end result is that the May tape improperly eliminated certain sales about which Commerce had requested information and as to which all parties agree should have been included. It was improper for Stelco, irrespective of its good faith, to attempt to appropriate control over the investigation conducted by Commerce. The Panel also believes that it was improper for Stelco to "solve" its perceived problem by reintroducing into the record, at the very end of a final investigation — just prior to the issuance of the final determination, data that was acknowledged by it and Commerce at the outset of the preliminary investigation to have been in error. Other solutions were available to Stelco to deal with this issue.[156] Thus, the Panel upholds Commerce's decision to invoke partial BIA.[157]

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[155] The U.S. sales observations for Stelco in the corrosion-resistant steel investigation were exactly the same number in that printout as the number contained in the November tape.

[156] Response Brief of the Investigating Authority to the Brief of Stelco, Inc. (hereinafter "Commerce Response to Stelco"), May 23, 1994, at 39-40. The Department suggests that Stelco could have: (a) complied exactly with the terms of Commerce's May 3rd request, which was submitted on the basis of the November tape, preventing any application of BIA under the rule of Olympic Adhesives; (b) submitted two alternative computer tapes with an explanation of the purpose in doing so; and (c) sought a meeting with the Department, or otherwise specifically explained the problem perceived by Stelco to exist with the data.

[157] Panel Member Irish dissents from this decision. She is unable to find substantial evidence on the record to support a determination that Stelco refused to produce information in the form

B. The Department's Selection of Stelco's "Highest Non-Aberrational Margin" as Partial Best Information Available

1. Background and Arguments

In its final determination, the Department calculated dumping margins on CCC's sales and on a portion of Stelco's sales (those Stelco sales to the United States that were compared to CCC home market sales), as well as Stelco sales that were omitted from the May tape on the basis of partial BIA.[158] From the universe of Stelco's sales, the Department selected a margin of 129.91 percent as its partial BIA rate, which it characterized as the "highest non-aberrant transaction margin."[159]

Stelco argues that the Department must articulate in the record how it arrived at a specific BIA rate and that its choice must be supported by substantial evidence on the record.[160] Stelco

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required. 19 U.S.C. §1677e(c). Stelco reported the sales in question in the November tape. After that tape was lost, the Department did not use the replacement tape which Stelco forwarded in January, but took information that it already had in storage. Pub. Doc. 485, Fiche 125, Frame 37. The datasets identified by the senior case analyst [

]. Panel Member Irish concludes that Stelco was put in the position of being instructed to do an impossibility.

[158] Commerce utilizes total BIA in situations where a respondent completely fails or refuses to supply data and Commerce must then rely wholly on BIA for the determination of the dumping margin. Partial BIA is utilized to substitute for some, but not all, of a respondent's transactions, particular costs, or other discrete categories of data. Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, et al., 56 Fed. Reg. 31692, 31705 (July 11, 1991).

[159] Final Determination, 58 Fed. Reg. at 37101.

[160] Stelco relies primarily on Asociacion Colombiana de Exportadores de Flores, et al. v. United States, 704 F. Supp. 1068, 1071 (Ct. Int'l Trade 1988) ("In order to ascertain whether action is arbitrary, or otherwise not in accordance with law, reasons for the choices made among various potentially acceptable alternatives usually need to be explained.") and Bowman Transportation,

asserts that the Department did not define the word "non-aberrant," nor was any sort of statistical analysis of the data conducted, which is "normally used to determine what constitutes aberrant data."[161]

Stelco argues that the Department's selection of the 129.91 percent margin was flawed because it was not a "reasonably accurate" dumping margin. Stelco asserts that a reasonably accurate rate would be one bearing some relationship to the company's overall sales (utilizing, for example, Stelco's weighted average margin or the rate from the petition as a basis for comparison).

Stelco also claims that the margin usually applied in BIA cases to non-cooperative respondents is the highest margin alleged in the petition,[162] which in this case was 31 percent for Stelco's sales of corrosion-resistant steel.[163] Hence, Stelco reasons, if it had failed to provide any response to the Department questionnaire, it would have received a 31 percent margin based on the petition's allegation for Stelco. In this case, the Department applied a margin of almost 130 percent to those sales for which BIA was used. As this rate is more than four times the rate alleged in the petition, Stelco argues that it is an inappropriately punitive application of BIA.

The Department responds that the rate selected by Commerce was a dumping margin calculated for an actual sale by Stelco, not a rate based on a sale by a third party or a rate

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419 U.S. at 285-286 (agency must articulate a rational connection between the facts found and the choice made).

[161] Stelco Brief, at 6.

[162] Id. at 3.

[163] Pub. Doc. 11, Fiche 11, Frame 22.

determined on some other basis. Even then, the selected margin was not the highest margin among the universe of Stelco's sales.[164] Indeed, the dumping margins on certain sales were so high that the Department deemed them to be "aberrant," deciding therefore to disregard them for purposes of selecting the partial BIA rate.[165]

Once selected, the BIA-determined margin was then weight-averaged with the calculated margins derived from usable data supplied by Stelco. This resulted in a final weight-averaged dumping margin that was in fact lower than if the Department had applied total BIA,[166] and lower than the margin alleged in the petition. Thus, the Department argues it left most of the information provided by Stelco intact, but did not "reward" Stelco for failing to provide usable information in connection with certain Stelco sales.[167]

The Department also criticizes Stelco's repeated assertions that Stelco was a "cooperative" respondent and such must control the Department's application of partial BIA in this case. The Department notes that partial BIA is used for responses which are deficient in limited respects, yet which are still reliable in other respects. When choosing a partial BIA rate, the Department does

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[164] The Department often selects the highest information which a respondent does report as the basis for selecting a partial BIA rate. See Pressure Sensitive Plastic Tape from Italy, 54 Fed. Reg. 13091, 13092 (March 30, 1989); Television Receivers Monochrome and Color, from Japan, 54 Fed. Reg. 35517, 35524 (August 28, 1989).

[165] Commerce Response to Stelco, at 15 ("Commerce's experience instructed that the highest of these were probably not typical sales.").

[166] The Department notes that its methodology for non-cooperative respondents is that they will normally be given the highest margin in the petition for any respondent. In the present case, the highest margin alleged in the petition was against Dofasco, and was 45.1 percent. Pub. Doc. 4, Fiche 5, Frames 59-60.

[167] Commerce Response to Stelco, at 13.

not consider the level of cooperation, but only the size of the deficiency, and the degree to which the deficiency affects the rest of the response.[168]

2. Analysis and Decision

Neither the statute nor its legislative history defines what constitutes best information available ("BIA") or dictates a particular methodology for the Department to follow.[169] Substantial precedent confirms that the Department's selection of BIA rate should be given "considerable deference."[170] So long as the agency has acted reasonably in selecting between cooperative and non-cooperative total BIA rates,[171] has acted reasonably in choosing between total and partial BIA,[172] has selected a rate which does not "reward" the respondent for its

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[168] Id. at 13.

[169] See H.R. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 98 (1979), reprinted in 1979 U.S.C.C.A.N. 381.

[170] Timken v. United States, No. 94-150, slip op. at 10 (September 23, 1994), citing Allied Signal, 996 F.2d at 1191-92. See also list of authorities provided in Replacement Parts for Self-Propelled Bituminous Paving Equipment From Canada, USA-90-1904-01, 1991 FTAPD LEXIS 6, May 24, 1991, at 44, n.33; and Krupp Stahl A.G. v. United States, 822 F. Supp. 789, 792 (Ct. Int'l Trade 1993) (courts have granted the Department "broad discretion in determining what constitutes BIA in a given situation.").

[171] See Allied Signal (concluding that Commerce improperly applied non-cooperative total BIA rate to respondent which had demonstrably attempted to cooperate but was nevertheless unable to satisfy information request).

[172] Persico Pizzamiglio v. United States, No. 94-61, slip op. at 22 (Ct. Int'l Trade April 14, 1994) (if requested data is not provided, Commerce has authority to reject response in total even if it is "substantially complete"); Replacement Parts for Self-Propelled Bituminous Paving Equipment From Canada, USA-90-1904-01, 1992 FTAPD LEXIS 2, May 15, 1992 (hereinafter "Paving Equipment II"), at 76 (Commerce has "discretion to use BIA in place of all or part of the information furnished to it"); Brother Industries, 771 F. Supp. at 383 (upholding use of BIA: "The law does not permit a party to pick and choose information it wishes to present to the agency, and

conduct,[173] and has selected a rate from among the universe of possible BIA rates that are actually contained on the administrative record,[174] the courts have been disinclined to overturn the agency's decision. Thus, the "U.S. courts have consistently affirmed the discretion of the administering agencies to choose what is the 'best information available.'"[175]

One additional element to this case, however, is the fact that the Department employed a standard ("highest non-aberrant transaction margin") which it made no serious attempt to define. This standard has been utilized by the Department in other cases, and represents a modification of its previous use of the highest single transaction margin standard.[176] It is within the Department's "discretion not to choose BIA most adverse to non-cooperating parties."[177] This Panel finds that it was reasonable here for the Department to exercise its discretion and disregard certain high-

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a deficient response may lead to an undesired result.").

[173] Rhone Poulenc v. United States, 899 F.2d 1185 (Fed. Cir. 1990), reh'g denied, 1990 U.S. App. LEXIS 6258 (Fed. Cir. Apr. 20, 1990); and Krupp, 822 F. Supp. at 793 (respondent "should not find itself in a better position as a result of its noncompliance....").

[174] 19 U.S.C. §1516a(b)(1)(B). The law also requires the agency to consider the most recent information on the record. See Rhone Poulenc, 899 F.2d at 1190 ("What is required is that the Department obtain and consider the most recent information in its determination of what is best information.") (emphasis in original).

[175] New Steel Rail, Except Light Rail, From Canada, USA-89-1904-08, 1990 FTAPD LEXIS 5, August 30, 1990, at 31.

[176] See, e.g., Certain Carbon Steel Butt-Weld Pipe Fittings from the People's Republic of China, 57 Fed. Reg. 21058, 21059, 21064 (May 18, 1992); Certain Stainless Steel Wire Rods from France, 58 Fed. Reg. 68865, 68869 (Dec. 29, 1993); and Certain Helical Spring Lock Washers from the People's Republic of China, 58 Fed. Reg. 48833, 48839 (Sept. 20, 1993).

[177] Timken v. United States, No. 94-150, slip op. at 20 (Ct. Int'l Trade, September 23, 1994), citing Saha Thai Steel Pipe Co. v. United States, 828 F. Supp. 57, 62-64 (Ct. Int'l Trade 1993).

margin ("aberrant") sales by Stelco in selecting a partial BIA rate, as this helped achieve a "fair comparison."

There is a natural tension between the acknowledged desire to have accurate dumping margins[178] and the use of the BIA rule as "an investigative tool, which [the Department] 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.[179] But arguments by respondents that a particular BIA rate is "punitive," arbitrary, inaccurate, not the "best," etc. have not fared well in the courts.[180]

The way to have accurate dumping margins is for respondents to furnish the Department with accurate information. Absent their having done so, the Department has no choice but to rely upon what is, by definition, inaccurate information.[181] While the choice might have existed at one

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[178] See, e.g., Smith-Corona, 713 F.2d 1571.

[179] Atlantic Sugar v. United States, 744 F. 2d 1556 (Fed. Cir. 1984).

[180] The courts have declined to require that Commerce prove that its selected BIA is the "best" in any absolute sense, and instead have applied the substantial evidence test. See U.H.F.C. Co. v. United States, 706 F. Supp. 914, 922 (Ct. Int'l Trade 1989), modified on other grounds, 916 F.2d 689 (Fed. Cir. 1990) (concurring with view that "the issue is not which, of all the information Commerce has to choose from, is the best information available, but rather, whether the information chosen by Commerce is supported by substantial evidence on the record"); accord Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1128 (Ct. Int'l Trade 1988); see also Chinsung, 705 F. Supp. at 601 (rejecting view that Commerce must use information that can "reasonably be considered best"). The courts have also been disinclined to determine that a BIA rate was "punitive." Rhone Poulenc, 899 F.2d at 1190-91.

[181] See, e.g., Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114, 1126 (Ct. Int'l Trade 1989), rev'd in part upon remand, 717 F. Supp. 834 (Ct. Int'l Trade 1989), aff'd on other grounds, 901 F.2d 1089 (Fed. Cir. 1990), cert. denied, 498 U.S. 848 (1990) (BIA is "not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information"); and Uddeholm v. United States, 676 F.

time for the courts to insist that the Department attempt to make a refined calculation of what is the "least inaccurate information," they have not done so. So long as the agency acts reasonably, stays within the record, and does not reward the respondent for its failure to respond, it enjoys substantial discretion in its selection of a BIA rate.

The partial BIA rate (129.91 percent), applicable to some Stelco sales, was weight-averaged with the actual results provided for other Stelco sales, producing a final rate of 28.27 percent. Considering that the partial BIA rate was a verified rate for one of Stelco's own current sales; that this rate, when weight-averaged with Stelco's calculated margins, was substantially below the highest petition rate and below even Stelco's own petition rate; that the Department eliminated all aberrant rates as a potential basis for comparison; that the Department selected partial BIA as opposed to total BIA; that the rate properly does not reward Stelco for its failure to comply with the Department's information requests; and that Stelco had full opportunity to counter the adverse impact of the selected BIA rate by so complying, the Panel is unwilling to find that the selected rate was "punitive."

The Panel, therefore, upholds the Department's determination to use the selected 129.91 percent Stelco sales margin as partial BIA.

Supp. 1234, 1236 (Ct. Int'l Trade 1987).

C. Rejection of Certain Stelco Related-Party Sales in the Calculation of Foreign Market Value

1. Background and Arguments

In calculating foreign market value ("FMV"), the Department normally uses sales to unrelated parties. Sales to related parties may be used if the Department is "satisfied that the price is comparable to the price at which the producer or reseller sold such or similar merchandise to a person not related to the seller."[182] In its final determination, the Department rejected certain sales by Stelco to related parties.[183] These sales failed the test the Department used to determine whether the related party prices were comparable to unrelated party prices.

The Department's test to determine if prices charged to a related party were comparable to those charged to unrelated parties was detailed in the preliminary determination's General Issues Appendix:

> [F]or each related customer, we compared total related party sales (weight averaged for each product tested) to unrelated party sales of identical merchandise. In effect, we calculated customer-specific total average related/unrelated price ratios.
>
> If the customer-specific related/unrelated price ratio was greater than or equal to 99.5 percent (which rounds to 100 percent), we determined that all sales to that related customer were made at arm's length, including sales of individual products to that customer that we were unable to test (because there were no sales of that product to unrelated customers). Conversely, if the customer-specific related/unrelated price ratio was less than 99.5 percent, we determined that all sales to that related customer were not arm's length transactions, because, on

[182] 19 C.F.R. §353.45(a).

[183] Final Determination, 58 Fed. Reg. at 37117.

> average, that customer was paying less than unrelated customers for the same merchandise.[184]

In the final determination, Commerce used the same test, with an additional adjustment to recognize certain differences in levels of trade.[185]

Stelco maintains that the Department's test is not rationally connected with the goal of determining whether a sales price reflects an arm's length transaction. Moreover, Stelco complains that use of the test creates an irrebuttable presumption, which causes the Department to ignore record evidence that related party sales are at market levels.

Stelco criticizes the test for employing average prices, which are not accurate indicators of comparability since they do not account for price volatility due to currency fluctuations and market shifts. Stelco argues that the Department should have compared price ranges instead, using a standard deviation analysis.[186]

The Department argues that the regulation mandates an examination of price comparability, not the overall relationship between the parties. Moreover, Commerce argues the

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[184] Certain Cold-Rolled Carbon Steel Flat Products From Argentina, 58 Fed. Reg. 7066, 7069 (February 4, 1993).

[185] If the unrelated comparison sales were at both the same and different trade levels as the sales to the related party, Commerce adjusted its calculations to use only comparison sales at the same trade level. If none of the unrelated comparison sales were at the same trade level as the sales to the related party, Commerce continued to use those unrelated comparison sales. General Issues Appendix, 58 Fed. Reg. at 37077, Final Determination, 58 Fed. Reg. at 37117.

[186] Stelco Brief, at 9-17.

test does not reject low-value related party prices, since all sales to the related party are used if the weighted average is comparable to the weighted average in sales to unrelated parties.[187]

2. Analysis and Decision

The Department's regulation specifically requires an examination of price comparability. It would be inconsistent with the regulation to require an examination of factors other than prices. While other methods of making comparisons could also be acceptable, Commerce's chosen methodology is reasonable and is entitled to deference from the Panel.[188] The Department's test is a reasonable means of applying the regulation on price comparability. The Panel affirms the Department's rejection of these Stelco related-party sales.

D. Warehousing Expenses

1. Background and Arguments

Stelco challenges the Department's determination that warehousing expenses incurred by Stelco's related U.S. customer, Stelco U.S.A., on its resales of Stelco merchandise, were incurred post-sale and, hence, deductible from USP as direct selling expenses.[189]

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[187] Commerce Response to Stelco, at 27-36. The U.S. Producers support Commerce's decision to exclude related party sales. They argue that the methodology chosen is reasonable. The 99.5 percent ratio mirrors the de minimis standard concerning comparability of foreign market values and United States prices in the calculation of dumping margins. U.S. Producers Response Brief, at 48-62.

[188] PPG Industries, Inc. v. United States, 928 F.2d 1568, 1573 (Fed. Cir. 1992); Daewoo, 6 F.3d at 1516.

[189] Stelco Brief, at 30-35.

The Department argues that Stelco failed to exhaust its administrative remedies on this issue because it did not raise any arguments in rebuttal to Petitioners' arguments in their administrative case brief on warehousing expense issues.[190] Stelco asserts the exhaustion doctrine does not apply here because Commerce had not yet made an adverse determination on this issue. Stelco argues that, in any event, its claim in its questionnaire response that the expenses were indirect sufficiently raised the issue before Commerce.[191] Stelco, Commerce, and U.S. Producers make further arguments on the merits not recited here because the Panel disposes of the issue on exhaustion grounds.

2. Analysis and Decision

Both the FTA and the pertinent U.S. case law require that parties exhaust their administrative remedies before seeking panel review of an issue.[192] The exhaustion requirement serves important purposes "and should not be lightly regarded."[193] Moreover, in considering

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[190] Commerce Response to Stelco, at 43-46.

[191] Reply Brief Submitted on Behalf of Stelco, Inc. (hereinafter "Stelco Reply Brief"), June 8, 1994, at 29.

[192] See FTA Article 1911 (including "exhaustion of administrative remedies" among general principles of law to be applied by panel); Unemployment Compensation Commission of Alaska v. Aragon 329 U.S. 143, 155 (1946); United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952) ("[a] reviewing court usurps the agency's function when it sets aside an agency determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."); accord Rhone Poulenc v. United States, 710 F. Supp. 348, 359 (Ct. Int'l Trade 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990).

[193] Encon Industries, Inc. v. United States, No. 94-145, slip op. at 4 (Ct. Int'l Trade September 19, 1994).

exhaustion, a reviewing body should evaluate whether a complaining party objected "at the time appropriate under [agency] practice."[194] Thus, this Panel must consider whether Stelco "has utilized the prescribed administrative procedures for raising the point."[195]

Stelco made a claim as to the nature of the warehouse expenses in its questionnaire response. The U.S. Producers contested Stelco's characterization and briefed the issue. Stelco did not rebut their argument. Commerce regulations provide that "only written arguments in case or rebuttal briefs filed within the time limits" shall be considered in reaching the final determination.[196] The mere classification of an expense in a questionnaire response is insufficient to preserve the issue where the complainant failed to respond to the arguments made in the underlying investigation. The limited exceptions to the exhaustion requirement do not apply to the circumstances at hand.[197]

The Panel declines to assert jurisdiction over the warehouse expense issue because of the failure to exhaust administrative remedies.

E. Weighted-Average Home Market Price vs. Individual U.S. Price

1. Background and Arguments

Stelco alleges that the Department improperly compared a weighted-average of Canadian prices to individual U.S. prices when it calculated Stelco's dumping margin. According to Stelco,

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[194] L.A. Tucker Truck Lines, 344 U.S. at 37.

[195] Sharp Corp. v. United States, 837 F.2d 1058, 1062 (Fed. Cir. 1988) (citations omitted).

[196] 19 C.F.R. §353.38(a).

[197] See, e.g., McKart v. United States, 395 U.S. 185 (1969).

this case involves a unique factual situation that warrants the use of an average of U.S. prices, namely, the existence of an integrated North American steel market that is characterized by: (1) close proximity of Canadian mills to their customers;
(2) preferentially low tariff rates between the two countries; (3) the existence of customers with locations on both sides of the border who purchase at the same price for all locations; and (4) thousands of individual transactions on both sides of the border.[198] Stelco claims that this situation is "almost guaranteed" to produce the same or very similar average transaction prices for both markets but, given the large number of transactions, is likely to produce individual U.S. prices lower than average home market prices.[199] Because the Department does not permit U.S. sales that are above fair value to offset U.S. sales found to be below fair value, Stelco argues that the Department's methodology has resulted in artificial or inflated dumping margins.[200] Thus, Stelco asserts that "Canadian mills are uniquely in the position of having possible dumping margins generated solely by virtue of the comparison of individual [U.S.] prices against average [home market] prices."[201]

The Department emphasizes that the pertinent statute expressly affords it broad discretion to determine when to use averaging.[202] The Department notes that its practice of comparing a

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[198] Stelco Brief, at 63.

[199] Id.

[200] Id.

[201] Id. at 65 (emphasis in original).

[202] 19 U.S.C. §1677f-1; Commerce Response to Stelco, at 63-64.

weighted-average foreign market value to individual U.S. prices is longstanding and necessary in order to avoid the potential masking of selective dumping.[203] The Department argues that because it reasonably determined in this case that comparing a weighted-average foreign market value to a weighted-average U.S. price would allow such masked dumping, its methodology should be sustained.[204] The U.S. Producers arguments essentially parallel those made by the Department.[205]

2. Analysis and Decision

The relevant statute permits the Department to "use averaging or generally recognized sampling techniques whenever a significant volume of sales is involved or a significant number of adjustments to prices is required."[206] It is not disputed by any of the parties that the statute vests the Department with exclusive discretion whether to employ averages in its analysis. The question, therefore, is whether the Department's refusal to use an average of U.S. prices here was an abuse of discretion.

The purpose of the antidumping law is to protect the domestic industry against foreign manufacturers who sell at less than fair value.[207] Averaging U.S. prices may defeat this purpose by allowing foreign manufacturers to offset sales made at less-than-fair-value with higher priced

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[203] Id.

[204] Id. at 67-68.

[205] U.S. Producers Response Brief, at 87-97.

[206] 19 U.S.C. §1677f-1.

[207] Smith-Corona, 713 F.2d at 1575-76.

sales, the practice which the Department calls "masked dumping."[208] The Department does average U.S. prices in rare circumstances involving perishable products, where low prices may reflect necessity rather than unfair competition (such products will sometimes be sold at unusually low prices lest they become unsalable). Significantly, however, the Federal Circuit has not required Commerce to depart from its well-established practice of using individual U.S. prices in other circumstances.[209]

The Panel is not persuaded that this case involves the kind of highly unusual circumstances which warrant the averaging of U.S. prices. There is no indication in the record that Stelco's prices are affected by exigencies of any kind or that Stelco otherwise lacks some element of control over its pricing practices which would indicate that less-than-fair-value prices are due to factors other than unfair competition. Nor has Stelco demonstrated that there are significant price fluctuations which must be accounted for by averaging U.S. prices.

As no compelling reasons exist for requiring the Department to compare weighted-average Canadian prices with weighted-average U.S. prices, the Department's determination to use individual U.S. prices in calculating Stelco's dumping margin is affirmed.

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[208] Koyo Seiko Co. and Koyo Corporation of U.S.A. v. United States, 20 F. 3d 1156, 1159 (Fed. Cir. 1994).

[209] See Id. ("Because TRB's are not perishable and subject to distress sales, Commerce properly followed its longstanding practice of not averaging the U.S. price.").

F. Inclusion of Rockefeller Amendment Expenses in Stelco's Cost of Production

1. Background and Arguments

In calculating FMV, the Department will exclude sales made at prices below cost of production ("COP"), which are made over an extended period of time, in substantial quantities and at prices which do not permit recovery of costs in the normal course of trade.[210] Calculation of COP is based on "the cost of materials, fabrication, and general expenses," but excludes profit.[211]

In October 1992, the U.S. Congress passed the Coal Industry Retiree Health Benefit Act of 1992, colloquially known as the "Rockefeller Amendment." This Act requires certain operators of coal mines to pay health benefits for retired coal miners. Due to an ownership interest in U.S. coal mines, Stelco is subject to the Act. Although assessments under the Rockefeller Amendment were not to begin until February 1993, Stelco calculated the total payments it would be required to make for retired workers from non-operational mines, and recognized this total in its financial statements for 1992. In the final determination, Commerce included half of this amount in Stelco's COP for the period of investigation, January 1, 1992 to June 30, 1992.[212]

Stelco argues that the Rockefeller Amendment expenses should not be included in the COP, as the expenses did not arise from operation of the mines during the period of investigation.

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[210] 19 U.S.C. §1677b(b).

[211] 19 C.F.R. §353.51(c).

[212] Final Determination, 58 Fed. Reg. at 37120.

Although the expenses were shown on the financial statements, Stelco maintains that they were not shown as a cost of goods sold or a manufacturing cost, but rather as a non-operational adjustment to income, similar to income taxes. Finally, Stelco notes that it would not begin to incur any actual expense under the Rockefeller Amendment until 1993 and thereafter.[213]

Commerce maintains that it followed its practice of accepting accrued liabilities as shown on financial statements, where the accrual is in accordance with local GAAP. Unless there is strong evidence that the accrual distorts costs, Commerce will accept the expense. Moreover, Commerce argues that the expenses are part of the cost of maintaining an available supply of coal, which is a major input into the production of steel. Commerce does not accept the characterization that the Rockefeller Amendment expenses are like income taxes.[214]

2. Analysis and Decision

The Panel agrees with Commerce that it is not required to look behind financial statements to determine when non-contingent expenses are actually paid. Commerce was satisfied that the accrual in 1992 was in accordance with Canadian GAAP and was not distortive.

The Panel also agrees with Commerce that it is reasonable to treat the Rockefeller Amendment expenses as part of the COP of steel. The obligation was imposed on Stelco because it owns shares in existing U.S. coal mines. Although the accrued expense related to non-operational mines, the obligation is derived from its ownership of mines.[215] Ownership of coal

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[213] Stelco Brief, at 35-40.

[214] Commerce Response to Stelco, at 49-54.

[215] Stelco Brief, at 35-36.

mines is not an unrelated real estate investment on the part of Stelco, but rather an investment related to its steel-producing operations. Commerce's interpretation that the expense is part of the cost of coal in an integrated steel manufacturing operation is reasonable.[216]

The Panel affirms the Department's decision to include Rockefeller Amendment expenses in Stelco's COP.

G. Inclusion of Z-line Interest Expenses in Stelco's COP

1. Background and Arguments

The Z-line is a joint venture company in which Stelco is involved. In reporting its COP, Stelco asserted that interest expense for its Z-line had been offset by interest earned from a U.S. tax refund. In its verification report, Commerce noted that "interest income derived from an income refund may not be an appropriate offset against [sic] because it relates to taxes which are not part of the COP for anti-dumping purposes."[217]

Petitioners argued before the Department that the offset was improper and the interest expense should be included as part of Stelco's COP. Stelco did not address Petitioners' argument

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[216] The Panel is aware of another FTA panel opinion, not cited by any of the parties, which reviewed inclusion by Revenue Canada of Rockefeller Amendment expenses, holding that such expenses should not be included in a COP calculation. Final Determination of Dumping Regarding Certain Cold-Rolled Steel Sheet Originating in or Exported from the United States of America, CDA-93-1904-08, June 14, 1994. The respondent in question was no longer an owner of coal mines, but had been party to earlier union agreements concerning retirement funds. The circumstances, therefore, differed significantly from those of Stelco in this review, as Stelco remains an owner of coal mines.

[217] Pub. Doc. 610, Fiche 157, Frame 15.

in its rebuttal brief. The Department denied the offset in reaching its final determination.[218] Stelco now challenges the Department's denial of the offset.

The Department responds to Stelco's claim before the Panel by charging that Stelco failed to argue the interest expense issue below, and therefore failed to exhaust its administrative remedies.[219] Stelco complains that there was no indication that the Department intended to deny Stelco's adjustment and that the adjustment was not a point of contention during the investigation.[220]

2. Analysis and Decision

As detailed above, both the FTA and the pertinent U.S. case law require that parties exhaust their administrative remedies before seeking panel review of an issue.[221] Moreover, a party must utilize the prescribed administrative procedures for raising an issue. As also stated, Commerce regulations provide that "only written arguments in case or rebuttal briefs filed within the time limits" shall be considered in reaching the final determination.

It was Stelco's burden to establish entitlement to the adjustment claimed.[222] The verification report on Stelco specifically questioned the appropriateness of the adjustment. This alone should have warranted briefing the issue. Stelco was certainly required to respond to

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[218] Final Determination, 58 Fed. Reg. at 37119.

[219] Commerce Response to Stelco, at 56-58.

[220] Stelco Brief, at 52-54.

[221] See discussion accompanying footnote 192 and following.

[222] See, e.g., Timken Co. v. United States, 673 F. Supp. 495, 513 (Ct. Int'l Trade 1987).

petitioner's arguments if it wished to preserve its viewpoint for review. Accordingly, the Panel declines to assert jurisdiction over the Department's treatment of Stelco's Z-line interest expenses because of the failure to exhaust administrative remedies.

H. Inclusion of Coke Oven Start-Up Costs in Stelco's COP

1. Background and Arguments

The Department included in Stelco's COP the full cost of Stelco's repair of one of its coke ovens.[223] Stelco complains that the expense of relining its coke oven is a start-up cost and should be amortized over the life of the oven. Stelco points to prior cases where the Department has allowed amortization of start-up expenses.[224] The Department responds that Stelco recognized the expense on its financial statements for 1992, such recognition was in accordance with Canadian GAAP, and there was no strong evidence that Stelco's reporting distorted the COP. The Department's practice is to include such items as a COP when carried on the company's financial statements, and in accordance with GAAP.[225]

2. Analysis and Decision

The Panel can agree with Stelco that coke oven relining costs should be amortized over the lining life. Nevertheless, this was a non-contingent cost that Stelco fully expensed in 1992.

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[223] Final Determination, 58 Fed. Reg. at 37120.

[224] Stelco Brief, at 54-59.

[225] Commerce Response to Stelco, at 60-63.

The Department is not required to accept Stelco's alternative treatment of the relining cost. The Panel, therefore, affirms the Department's treatment of Stelco's coke oven start-up costs.

I. Amortization of Exchange Gains and Losses on Long-Term Debt

1. Background and Arguments

Stelco challenges the Department's refusal to accept Stelco's amortization of foreign exchange gains and losses on certain "sinking fund" debentures, which were payable over a ten-year period. As of the close of Stelco's 1992 fiscal year, Stelco had three years of liability remaining in this sinking fund.[226] Although such amortization is in accordance with Canadian GAAP, the Department included as a COP the full amount of the exchange gain or loss on the unpaid portion of the sinking fund.[227]

As it is the Department's longstanding policy to follow a respondent's method of recording an expense on its financial statements, where it is in accordance with local GAAP and does not distort costs, the Department has requested a remand in order to accept Stelco's amortization methodology.[228] The U.S. Producers have taken no position on this issue.

2. Analysis and Decision

The Panel remands this issue for Commerce to apply Stelco's methodology.

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[226] Stelco Brief, at 41-42.

[227] Final Determination, 58 Fed. Reg. at 37120.

[228] Commerce Response to Stelco, at 55-56.

VIII. HOLDINGS ON ISSUES OF U.S. PRODUCERS

A. The Department's Indirect Tax Adjustment Methodology

1. Background and Arguments

In its final determination,[229] Commerce made an adjustment to U.S. price ("USP") to account for the Canadian Goods and Services Tax,[230] which had been reported by Dofasco and Stelco.[231] The relevant statute, 19 U.S.C. §1677a(d)(1)(C) (hereinafter referred to as the "Tax Clause"), provides:

> The purchase price and the exporter's sales price shall be adjusted by being —
>
> (1) increased by —
>
> > (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. . . .

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[229] Final Determination, 58 Fed. Reg. at 37102; see also General Issues Appendix, Appendix II, 58 Fed. Reg. at 37078.

[230] The Canadian Goods and Services Tax ("GST"), a consumption tax similar to European value-added taxes, is assessed on goods consumed or services performed in Canada at the specified rate of seven percent. Goods and services in Canada are taxable at this rate unless they are either (i) tax-exempt or (ii) zero-rated. Goods destined for export are zero-rated and thus the GST is not collected on exports of either goods or services from Canada into the United States. Price Waterhouse, *Doing Business in Canada*, 1994, at 239-43, 280-81. Thus, while a good sold in the home market in Canada will be subject to GST, the identical good sold in an export market will not be subject to GST.

[231] This opinion shall also be considered to apply, mutatis mutandis, to the Provincial Sales Tax ("PST") reported by Dofasco.

As summarized by the U.S. Producers, the basic purpose of this statute is to "provide an offsetting adjustment to U.S. price in order to protect against the creation of a dumping margin merely because taxes are assessed on home market sales, but forgiven on export sales."[232]

The form of the tax adjustment made by Commerce in the final determination was the following:

> For the preliminary determinations of these investigations, the Department added to U.S. price an amount for foreign taxes that would have been collected had the merchandise not been exported, calculated on the basis of the price of the U.S. product, and made a circumstance-of-sale adjustment to FMV for the difference between the tax on home market sales and the tax added to U.S. price. On March 19, 1993, the United States Court of Appeals for the Federal Circuit, in affirming the decision on the Court of International Trade in Zenith Electronics Corporation v. United States, Slip Op. 92-1043, -1044, -1045, -1046, ruled that section 772(d)(1)(C) of the Tariff Act provides for an addition to U.S. price to account for taxes which the exporting country would have assessed on the merchandise had it been sold in the home market, and that section 773(a)(4)(B) of the Tariff Act does not allow circumstance-of-sale adjustments to FMV for differences in taxes. Accordingly, for the final determinations of these investigations, the Department has changed its methodology for foreign taxes from that used in the preliminary determinations and has not made a circumstance-of-sale adjustment to FMV. Also, we have not calculated a hypothetical tax on the U.S. product, but have added to U.S. price the absolute amount of tax on the comparison merchandise sold in the country of exportation. By adding the amount of home market tax to U.S. price, absolute dumping margins are not inflated or deflated by differences between taxes included in FMV and those added to U.S. price. This policy has been articulated in Gray Portland Cement and Clinker from Mexico; Final Results of Antidumping Duty Administrative Review (58 FR 25803, April 28, 1993).[233]

The U.S. Producers argued in their opening brief that this method of adjusting for indirect taxes was in error, and that instead of increasing USP by the amount of the tax actually incurred on the sales of the comparison home market merchandise, Commerce should have increased USP

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[232] Brief in Support of Complaint Submitted on Behalf of Certain United States Steel Producers (hereinafter "U.S. Producers Brief"), March 23, 1994, at 36.

[233] General Issues Appendix, 58 Fed. Reg. at 37078; see also Final Determination, 58 Fed. Reg. at 37101.

by the hypothetical amount of the tax that would have been incurred if the tax had been collected on the exports to the United States, as they believe the Tax Clause plainly requires.[234]

In its response brief, Commerce noted that this issue has "long been a source of controversy" and attempted to place the issue in an historical context.[235] Commerce's comments make it clear that the tax methodology employed by Commerce prior to the Zenith III decision

[234] U.S. Producers Brief, at 35. In support of their argument, the U.S. Producers assert that Commerce's position was inconsistent with the recent Federal Circuit decision in Zenith Electronics Corp. v. United States (hereinafter "Zenith III"), 988 F.2d 1573 (Fed. Cir. 1993), as well as a number of other recent Court of International Trade decisions, such as Federal-Mogul v. United States, 834 F. Supp. 1391 (Ct. Int'l Trade 1993), and Avesta Sheffield, Inc. v. United States, 838 F. Supp. 608 (Ct. Int'l Trade 1993).

[235] Response Brief of the Investigating Authority to the Brief of Certain United States Steel Producers (hereinafter "Commerce Response to U.S. Producers"), May 24, 1994, at 21. Commerce commented that until March of 1993, when the Court of Appeals issued the Zenith III decision, it had been its practice to implement the adjustment required by the Tax Clause by adding to USP a hypothetical amount for consumption taxes calculated by multiplying the tax rate by the price of the U.S. product. Commerce then adjusted FMV for the difference between the tax actually collected on the home market side and the hypothetical tax calculated by Commerce on the U.S. side (in effect, Commerce "capped" the actual amount added to FMV so that it did not exceed the hypothetical amount added to USP). Commerce made this second adjustment pursuant to a separate statute, 19 U.S.C. §1677b(a)(4), which gives Commerce the authority to adjust FMV for "differences in circumstances of sale" between sales used to establish USP and those used to establish FMV. In this way, Commerce ensured that both sides of the equation (FMV and USP) included identical amounts for consumption taxes. The procedure utilized was the functional equivalent of Commerce simply adding the same absolute amount to both FMV and USP.

neither created nor inflated dumping margins. It avoided the so-called "multiplier effect"[236] and was, in effect, "tax neutral."

In Zenith III, however, the Court of Appeals ruled that Commerce's use of the circumstances-of-sale clause to adjust the FMV side was inconsistent as a matter of law with the Tax Clause, which explicitly states that the adjustment is to be made to USP, rather than to FMV. However, in a footnote, the Court also stated:

> The statute by its express terms allows adjustments of USP in the amount of taxes on the merchandise sold in the country of exportation. While perhaps cumbersome, Commerce may eliminate the multiplier effect by adjusting USP by the amount, instead of the rate, of the *ad valorem* tax.[237]

At the time of the final determination, Commerce was following the methodology suggested by "Footnote 4," which involves the addition to USP of a hypothetical fixed amount, that number being the same as the actual amount of taxes calculated as an addition to FMV. As noted by the Court of Appeals itself, this approach also neither created nor inflated dumping margins; it too was tax neutral.

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[236] The multiplier effect has been discussed by the parties in their briefs and in numerous prior cases. In the Canadian context, the multiplier effect arises because the 7% GST tax rate is applied to a FMV number that is higher because of the imposition of the GST on home market sales and to a USP number that is lower because of the forgiveness of this tax on export sales. The larger the pre-tax discrepancy between FMV and USP, the greater will be the multiplier effect. Respondents have also pointed out that the multiplier effect can not only inflate existing dumping margins (where pre-tax dumping is taking place) but create margins where none would otherwise exist (where pre-tax dumping is not taking place). This would occur, for example, in situations where the home market product and export product are not identical and a difference-in-merchandise adjustment would be appropriate. In Zenith III the Court of Appeals indicated that "the Antidumping Act protects against the creation or inflation of a dumping margin due to taxes assessed on home market sales but forgiven on export sales." Zenith III, 988 F.2d at 1577 (emphasis added).

[237] Zenith III, 988 F.2d at 1582, n.4 (emphasis in original).

Since the time of the final determination, however, the Court of International Trade has substantially criticized, if not ruled against, the Footnote 4 methodology. These decisions of the Court have asserted that the statement in Footnote 4 of Zenith III is dicta, thus not binding on lower courts, and is inconsistent with the body of the opinion in Zenith III as well as with the statute. Moreover, they have substantially criticized the very principle of tax neutrality.[238]

In response to these very recent holdings, Commerce has again decided to change its tax adjustment methodology.[239] This new methodology was first explained by Commerce in Ferrosilicon from Brazil,[240] which Commerce requests this Panel to now uphold. Commerce notes that the Court of International Trade approved the use of this new methodology in Avesta Sheffield v. United States,[241] and now requests a remand so that it may apply this new methodology in the case at hand. Significantly, it appears that this latest methodology, in contrast to its predecessors, will not be tax neutral, and counsel for Commerce admitted as much at the hearing before the Panel.

In its response brief, Stelco requests the Panel to uphold the position taken by Commerce in the final determination, noting that the methodology used by Commerce therein is consistent with Commerce's longstanding practice to calculate dumping margins in a manner that will be unaffected by indirect taxes. Stelco states that both Commerce and its predecessor, the

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[238] See, e.g., Federal-Mogul, 834 F. Supp. at 1395-1397; and Avesta Sheffield, 838 F. Supp. at 614-615.

[239] Commerce did not choose to appeal Federal-Mogul and has formally decided to acquiesce in its holdings. See Notification of the Government's Intent with Respect to the Value-Added Tax Issue, Court No. 93-01-0062 (Ct. Int'l Trade December 6, 1993).

[240] 59 Fed. Reg. 732, 733 (January 6, 1994).

[241] No. 94-53 (Ct. Int'l Trade March 31, 1994).

Department of the Treasury, have consistently applied the Tax Clause so that indirect taxes "will have a neutral effect on the calculation of dumping margins."[242] In Stelco's view, Commerce has quite consciously pursued the principle of "tax neutrality," whose purpose is "to achieve a comparison of prices in the home and U.S. markets that accurately identifies the respondent's pricing practices, free of distortions caused by factors outside the respondent's control."[243] Thus, Stelco asserts that not only is the principle of tax neutrality fair and reasonable, it is consistent with the fundamental purpose of the antidumping law, which is to achieve "fair comparisons."

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[242] Brief in Support of the Investigating Authority Submitted on Behalf of Stelco, Inc. (hereinafter "Stelco Response Brief"), May 24, 1994, at 33.

[243] Id.. Stelco cites Commerce's determination in Grand and Upright Pianos from the Republic of Korea, 50 Fed. Reg. 37561, 37564 (September 16, 1985), for its clear statement as to the principle underlying Commerce's long-standing tax neutrality position:

> We believe that the antidumping duty law is intended to remedy situations in which a foreign producer accepts a lesser return on his U.S. sales than on his home market sales. Where the costs of production and sales are identical in both markets, any difference in price will represent a difference in return. Where the costs of production and sale differ between markets, any difference in price will represent a difference in return only after the price differential has been adjusted by the net amount of the differences in cost. A difference in final stage tax liability is just as much a difference in the cost of production and sale as any difference in material cost or credit expenses. Therefore, just as we have always adjusted the price differential by the amount of any difference in material costs and credit expenses, we believe we should also make such an adjustment for any difference in final stage tax liability.

See also Television Receiving Sets, Monochrome and Color, From Japan, 50 Fed. Reg. 24278, 24279 (June 10, 1985) ("Congress, the courts, and the agencies charged with administration of the antidumping law have emphasized the statutory purpose of achieving a comparison of the merchanise (sic) on a fair basis, 'comparing apples to apples.' Neither the method advocated by the petitioners nor that advocated by the respondents would achieve a tax neutral comparison.").

In addition, however, Stelco argues that tax neutrality is also required by the relevant provisions of the General Agreement on Tariffs and Trade ("GATT")[244] and the GATT Antidumping Code.[245] The following two provisions of Article VI of the GATT, pertaining to antidumping and countervailing duties, are cited as relevant:

> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.[246]
>
> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.[247]

The GATT Antidumping Code also contains language dealing with the subject of adjustments (for taxation and other items), stating in pertinent part:

> In order to effect a fair comparison between the export price and the domestic price in the exporting country..., the two prices shall be compared at the same level

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[244] General Agreement on Tariffs and Trade, opened for signature October 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55-61 U.N.T.S. 104, IV B.I.S.D., 1, 4 Bevans 639 (entered into force January 1, 1948). The Panel would note here that the GATT and the GATT Antidumping Code are binding international obligations of the United States. See, e.g., Vienna Convention on the Law of Treaties, Art. 26 ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith."). While the United States is not a party to the Vienna Convention, it has acknowledged the Convention to be an "authoritative guide to current treaty law and practice." Treaties and Other International Agreements: The Role of the United States Senate, 103d Cong., 1st Sess., at 20 (S. Prt. 103-53 1993).

[245] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("Antidumping Code"), Doc. No. MTN/NTM/W/232, opened for signature April 9, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650, B.I.S.D. 26th Supp. 127-145 (entered into force January 1, 1980).

[246] GATT, art. VI(1), 61 Stat A11, 55 U.N.T.S. 187, 194-195. (emphasis added)

[247] Id., art. VI(4).

> of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability.[248]

Relatedly, citing Section 1 of, and certain legislative history to, the Trade Agreements Act of 1979,[249] Stelco asserts that the re-enactment of the antidumping law in 1979 "supports the conclusion that Congress intended to give effect to the Department's policy of achieving tax neutral dumping margins in accordance with the requirements of the GATT."[250] The Panel would also observe in this connection that in section 2(a) of the 1979 Act, Congress expressly approved the GATT Antidumping Code and made such changes in federal law as were necessary to bring it into conformity with the Code.[251]

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[248] Antidumping Code, art. II(6), 31 U.S.T. 4919, 4926, 1186 U.N.T.S. 2. (emphases added)

[249] Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. §§2501-2582). Section 1 of the 1979 Act states that one of the purposes of the Act was "to improve the rules of international trade and to provide for the enforcement of such rules...." (emphasis added). The House Report to the 1979 Act described it as "encompass{ing} those changes to the current ... antidumping law necessary or appropriate to the implementation of the international agreements on these subjects." H.R. Rep. No. 317, 96th Cong., 1st Sess. 45 (1979).

[250] Stelco Response Brief, at 38.

[251] 19 U.S.C. §2503(a) states that "Congress approves the trade agreements [including the GATT Antidumping Code] ... and the statements of administrative action proposed to implement such trade agreements...." In the Statement of Administrative Action, H.R. Doc. No. 153, 96th Cong., Part II, at 392, it is stated that "[t]he Trade Agreements Act of 1979 approves and implements the trade agreements negotiated in the MTN [Multilateral Tariff Negotiations]. The trade agreements negotiated are not self-executing and accordingly do not have independent effect under U.S. law. However, the provisions of the Trade Agreements Act and the provisions of this statement regarding the administration of U.S. law have been developed to be fully consistent with the trade agreements negotiated in the MTN, and when the Act becomes effective, will permit the United States to carry out fully its obligations under the agreements." (emphasis added); accord H.R. Rep. No. 317, 96th Cong., 1st Sess. 59 ("The provisions of Title I relating to the imposition of antidumping duties are intended ... to make U.S. law and practice consistent with the [GATT Antidumping Code]..."); see also id. at 2.

Finally, Stelco argues that the methodology utilized by Commerce in the final determination was consistent with the recent opinions of the Court of Appeals in Zenith III and Daewoo,[252] and should be affirmed.[253] Stelco also asserts that the recent Federal-Mogul decision is wrongly decided, is currently on appeal to the Federal Circuit, and in any event is not binding on this Panel.[254]

For its part, Dofasco supports the position taken by Stelco that the final determination should be upheld in its current form[255] and agrees that the adjustment methodology used in the final determination was clearly consistent with Zenith III. Dofasco additionally supports Stelco's argument that the principle of tax neutrality is embodied in the applicable GATT provisions, but also raises a relevant and important issue of statutory construction. Dofasco states: "Where the Department is faced with a choice between two methodologies—an approach which conflicts with

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[252] 6 F.3d at 1511.

[253] Stelco Response Brief, at 40. Stelco argues that the footnote 4 methodology avoids the making of a circumstances-of-sale adjustment, as prohibited by Zenith III, and adjusts for indirect taxes in a manner consistent with Commerce's longstanding principle of tax neutrality and the antidumping statute overall. Stelco observes that over the years a variety of interpretations have been made of the Tax Clause and that petitioners are wrong in stating that their interpretation is the only reasonable one. In any event, under the Panel's standard of review, it must give effect to the agency's reasonable interpretation as expressed in the final determination.

[254] The Panel observes that decisions of the Court of Appeals of the Federal Circuit, and the Supreme Court, are binding on Article 1904 Binational Panels and are thus of special relevance to our deliberations. FTA Article 1904(2). In contrast, decisions of the U.S. Court of International Trade do not constitute binding precedent. See Rhone Poulenc v. United States, 583 F. Supp. 607, 612 (Ct Int'l Trade 1984) (A decision of the Court of International Trade is "valuable, though non-binding, precedent unless and until it is reversed."); Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA 89-1904-03, 1990 FTAPD LEXIS 3, March 7, 1990, at 3-5. Likewise, a decision of one Article 1904 Binational Panel is not binding on future Panels. FTA Article 1904(9).

[255] Dofasco Inc.'s Response Brief (hereinafter "Dofasco Response Brief"), May 23, 1994, at 6.

the GATT, and the methodology used in the final determination which conforms with the GATT—this Panel must affirm the methodology that best enables the Department to comply with the international obligations of the United States."[256] Finally, Dofasco also criticizes any reliance on the Federal-Mogul line of cases.[257]

2. Analysis and Decision

The Panel agrees that there should be a remand to Commerce to reconsider its tax adjustment methodology. However, the Panel orders this remand on a somewhat different basis than that requested by Commerce.

Initially, the Panel notes that the question of the interpretation of the Tax Clause is a question of pure statutory construction, and that the Panel must be guided in its decision by the principles of statutory construction laid down by the Supreme Court, which has often addressed

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[256] Id., at 19. Dofasco cites Fundicao Tupy S.A. v. United States, 652 F. Supp. 1538, 1543 (Ct. Int'l Trade 1987) ("An interpretation and application of the statute which would conflict with the GATT Codes would clearly violate the intent of Congress"); and Matsushita Elec. Indus. v. United States, 569 F. Supp. 853, 859 (Ct. Int'l Trade 1983) ("Another important factor is the necessity and desirability whenever possible, of harmonizing this law with the international agreements it was intended to implement.").

[257] Dofasco cites to the apparent disagreement within the Court of International Trade regarding the effect of Zenith III's Footnote 4, noting that Avesta Sheffield, in contrast to Federal-Mogul, did not necessarily find a conflict between Footnote 4 and the body of Zenith III. Although conceding that Footnote 4 appears to be dicta, the Court in Avesta Sheffield stated "[Footnote 4] is a clear statement to [Commerce] that it is permitted to do something. It is not a statement ... that ITA must do something." Avesta Sheffield, 838 F. Supp. at 615. Accord Hyster Co. v. United States, Slip Op. 94-34 (Ct. Int'l Trade March 1, 1994). Dofasco also asserts that Federal-Mogul is simply not dispositive on the issue since the word "amount", as used in the Tax Clause, can reasonably be construed to refer either to the Footnote 4 interpretation or to the interpretation advanced by the U.S. Producers, particularly since the Tax Clause does not specifically require, or even refer to, the use of an *ad valorem* rate.

this issue. Under Chevron, a two-step process is contemplated.[258] First, if the intent of Congress in enacting a particular statute is clear, if the statute has a plain meaning as to the issue in question, both the agency and the courts must apply that intent or meaning. If, however, the intent is not clear or the statute is silent on the issue in question, then the reviewing court or panel must determine whether the agency's construction of the statute is a reasonable and permissible one.

The Panel has reflected carefully on the language of the Tax Clause, the lengthy history of litigation involving that clause, and the excellent arguments of the parties, and finds the intent of Congress with respect to the Tax Clause not to be clear. Contrary to the position requested of us by the U.S. Producers, the Panel finds the statute to be without a plain meaning on the issue in question, which question involves the calculation of the hypothetical addition to USP to account for differences in taxation. The Tax Clause appears to the Panel to contain room for different or alternative reasonable interpretations to be made as to this calculation.[259]

In the typical case, this conclusion would then shift the Panel to an inquiry whether Commerce's (current) interpretation of the statute is based on a permissible construction of the statute. Under the applicable standard of review, as Chevron makes clear, the Panel must not substitute its judgment for a reasonable judgment of the agency, even if we clearly would have taken a different position had the issue come to us at the outset.

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[258] 467 U.S. at 842-43.

[259] Certainly the fact that Commerce has taken so many different positions under the Tax Clause over a period of so many years, and that these different positions have generated a very substantial amount of hotly contested litigation, with different answers by different courts, supports the Panel's view in this regard.

Nevertheless, as Dofasco has pointed out, a different issue of statutory construction arises in this case because of the law requiring ambiguous statutes to be interpreted consistently with the international obligations of the United States. This principle was established by the Supreme Court over 200 years ago and as Supreme Court law, it is manifestly binding on Commerce, this Panel, and all lower courts. The principle was first expressed in Murray v. The Schooner Charming Betsy: "[A]n act of Congress ought never to be construed to violate the law of Nations, if any other possible construction remains. . . ."[260]

Recently reiterated by the Supreme Court in Weinberger v. Rossi[261] ("It has been a maxim of statutory construction since the decision in [Charming Betsy] that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . ."), it is also set out in Section 114 of the 1986 Restatement (Third) of the Foreign Relations Law of the United States: "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." The decisions specifically cited by Dofasco are of course to the same effect and establish that this principle also applies in the context of the GATT.[262]

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[260] 6 U.S. (2 Cranch) at 118.

[261] 456 U.S. 25, 32 (1982).

[262] See Fundicao Tupy, 652 F. Supp. at 1543; Matsushita Elec., 569 F. Supp. at 859; and see also Select Tire Salvage Co. v. United States, 386 F.2d 1008, 1013 (Ct. Cl. 1967) ("An unambiguous statutory command, contrary to the GATT, would of course prevail, but the [statute] here involved can be construed to harmonize [with GATT]."); United States Steel Corp. v. United States, 618 F. Supp. 496, 501-02 (Ct. Int'l Trade 1985) ("It appears that Congress would not use inaction or implication in varying domestic countervailing duty law from that envisioned by GATT.").

It may be worth emphasizing that the Charming Betsy doctrine requires only that ambiguous statutes be construed, where fairly possible, in a manner consistent with the international obligations of the United States. It is not a doctrine that suggests that GATT is superior to domestic law (it is not); or that GATT is part of domestic law (it is not); or that GATT has a clear conflict with domestic law (it does not). It is simply a principle of statutory construction, albeit a longstanding and important one, that requires ambiguous statutes to be interpreted in conformity with the international obligations of the United States.[263]

As to the question of the apparent conflict between the rule of Chevron, giving deference to the agency's construction of a statute unless clearly contrary to the intent of Congress, and the rule of Charming Betsy, requiring where "fairly possible" U.S. statutes to be construed in conformity with international obligations, the Supreme Court has indicated that Chevron must yield. In DeBartolo Corp. v. Fla. Gulf Coast Trades Council,[264] the Supreme Court noted that

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[263] Of course, if a court or agency, in carrying out this responsibility, determines that the conflict between the domestic statute and the international obligation is unavoidable, that the two cannot be reconciled, then clearly U.S. domestic law prevails and must be applied. See 19 U.S.C. §1504. However, that statute appears not to come into effect unless the two are in fact irreconcilable. See United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) ("Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.") (emphasis added). The Supreme Court merely insists, and the Panel believes appropriately so, that an intermediate step be undertaken to determine if that conflict can be avoided. If it cannot be avoided, both the domestic result and the international result are clear. U.S. domestic law must be applied, with the implication, however, that the U.S. law in question has been determined to be in conflict with U.S. international obligations. Although certain repercussions might flow from that situation in the international context (the United States might seek a waiver; another Party to the agreement might seek dispute resolution), these repercussions would have no necessary bearing or impact on the scope, the applicability, or the enforcement of U.S. domestic law. U.S. domestic law would continue to be applied in the form interpreted by the agency, court or panel.

[264] 485 U.S. 568, 574 (1988).

ordinarily, under Chevron, the statutory interpretation made by the National Labor Relations Board in that case must be given deference. However, the Supreme Court then stated:

> Another rule of statutory construction, however, is pertinent here: where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in Murray v. The Charming Betsy and has for so long been applied by this Court that it is beyond debate.[265]

These references to the Supreme Court's rules of statutory construction are important because the Panel believes that respondents have made a fair argument, which it is inclined for purposes of this opinion and our remand order to accept, that the cited provisions of the GATT and the GATT Antidumping Code were intended to establish the principle of tax neutrality. The Panel observes that the general goal, and the specific language, of GATT Articles VI:1 and VI:4, and of Article 2:6 of the GATT Antidumping Code, are not in any way limited or circumscribed. These provisions appear to call for any differences in taxation to be fully accounted for, and it seems not to have been their intent to permit less than full tax neutrality.[266]

Certainly, the consequences of not pursuing the goal of tax neutrality are clear enough. For exporters operating in countries that impose consumption taxes, U.S. dumping margins will

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[265] The Panel notes that the Supreme Court in DeBartolo was disposed to invoke the doctrine of the Charming Betsy even in a case involving a constitutional issue. Obviously, the Supreme Court would have no difficulty in invoking that doctrine in a case involving an international issue, which the Charming Betsy itself involved and which, of course, is involved in this case.

[266] While the Panel makes no attempt to divine the precise contours of the above-cited provisions of the GATT and the GATT Antidumping Code, it does seem clear that countries which have become party to the GATT Antidumping Code have committed themselves thereby to the goal of making fair comparisons between domestic prices (FMV) and export prices (USP). Moreover, it would seem to follow from the language of the Code that a failure by their antidumping administrators to fully account for differences in taxation in particular cases would be an action palpably contrary to this goal.

be created by virtue of the tax system itself, irrespective of the pricing decisions made by the exporter. Absent some form of fully effective adjustment for this phenomenon, the exporter would be—and will be—compelled by the antidumping laws to answer not only for its pricing decisions but for the form and magnitude of taxation selected by its home government.[267] This strikes the Panel as being contrary to both the GATT provisions cited above and to what has traditionally been considered to be U.S. antidumping law.[268]

While the Panel has stated its own preliminary views as to the meaning of the applicable GATT provisions, the Panel wishes to make it clear that the appropriate step at this juncture is not for it to directly rule on the question of the interpretation of the Tax Clause, but to allow Commerce to derive its own reading of U.S. international obligations and whether its current interpretation and methodology for the implementation of the Tax Clause is consistent with those

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[267] See Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01, 1992 FTAPD LEXIS 2, May 15, 1992, at 37, n.24. As stated by that Panel:

> If [Commerce] is provided no means of equalizing or eliminating the impact of consumption taxes, foreign exporters that have made the exact same pricing decisions but are resident in different countries will find that each has become subject to a different dumping margin, depending on the consumption tax rate and the method of calculating the consumption tax rate and the method of calculating the consumption tax base chosen by the exporter's home country.

[268] Until this latest decision by Commerce on its tax methodology, which resulted from certain decisions handed down by the Court of International Trade, U.S. antidumping law appears to have been fully in harmony with this expressed goal of tax neutrality. See n. 249 *supra*. U.S. law is replete with expressions of the necessity to make fair comparisons or to make "apples to apples" comparisons when calculating dumping margins. See Smith-Corona, 713 F.2d at 1578. In its administration of the Tax Clause, Commerce has consistently attempted to eliminate dumping margins that have been created or enlarged "merely because the country of exportation taxes home market sales but not exports." Daewoo, 6 F.3d at 1513. In deference, no doubt, to the language of the GATT Antidumping Code, as well as the often-expressed rule of U.S. courts to make "apples to apples" or fair comparisons, Commerce has long pursued the goal of tax neutrality. In the opinion of the Panel, this was, and remains, a proper goal and, indeed, it may constitute an international obligation of the United States.

obligations. The Panel therefore directs Commerce to first consider its current methodology within the context of the applicable rules of statutory construction as commanded by the Supreme Court, as set out by the Panel above, and, particularly within the context of the possible conflict between that methodology and the relevant provisions of the GATT and the GATT Antidumping Code.

Commerce is further instructed to utilize, if fairly possible, a methodology that is consistent with its reading of the international obligations of the United States. However, if, after this analysis, Commerce concludes that the Tax Clause is irreconcilable with the applicable GATT provisions, then it is directed to apply the methodology it believes is mandated by U.S. law or is otherwise within its discretion. Commerce shall provide a full explication of its reasoning.

B. Stelco Product Matches

1. Background and Arguments

The calculation of antidumping margins involves a comparison between home market prices for goods and U.S. prices for goods. To facilitate accurate product comparisons, the Department establishes a hierarchy of product characteristics. Utilizing the hierarchy, the Department identifies home market sales for comparison to U.S. sales. In its final determination, the Department accepted certain product matches reported by Stelco that did not conform to a strict application of the Department's prescribed model match hierarchy.

Specifically, Stelco did not always follow the middle-ranked product characteristics in the hierarchy, but selected matches with the simplest cost differences or used a numerical calculation to choose the product with the fewest characteristics that differed from those of the imported

goods. The U.S. Producers argue that the Department abdicated its statutory duty and permitted Stelco to control the choice of the most similar product matches.[269]

The Department contends that it retains discretion in accepting product matches even after the model match hierarchy is established. The Department permitted the deviations from strict application of the hierarchy as criteria of lesser importance were involved. The Department distinguished Stelco's situation from the fundamental restructuring of the hierarchy attempted by a respondent in another investigation.[270]

Stelco contends that the situation is similar to the facts in another case where the Department had required respondents to report only sales of identical goods, but had demanded full technical descriptions of the goods and had verified the selection.[271]

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[269] U.S. Producers Brief, March 23, 1994, at 27-28, citing Timken Company v. United States, 630 F.Supp. 1327, 1338 (Ct. Int'l Trade 1986).

[270] Certain Hot-Rolled Carbon Steel Flat Products and Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands, 58 Fed. Reg. 37199 (July 9, 1993). Further, a number of the Stelco "mismatches" occurred in sales by CCC, a related party. Commerce did not use these matches in the final determination because it had decided for other reasons to apply BIA to all CCC sales.

[271] Torrington Company v. United States, 786 F.Supp. 1011, 1015-16 (Ct. Int'l Trade 1992).

2. Analysis and Decision

In the Timken case, the Department improperly delegated the choice of comparison products to a respondent and had collected no data on other home market products.[272] That was not the situation for Stelco, which reported all sales of subject merchandise. The Department has the expertise necessary to verify product selection and determine whether Stelco made acceptable choices in adapting its internal product classification system to the requirements of the matching hierarchy. The Department could accept slight variances if satisfied that the products chosen were appropriate matches.

The Department did not abdicate its responsibility for product selection as in the Timken case. The Department retained its discretion in matching products even after a product characteristic hierarchy was established. The Panel affirms the Department's decision to accept Stelco's reported product matches.

C. FMV and USP Adjustments Related to Stelco Rebates

1. Background and Arguments

In its final determination, the Department allowed deductions for certain rebates which, while not tied to specific transactions, could be allocated among sales by Stelco. The Department found the adjustments were sufficiently direct because the allocation pool consisted of subject merchandise.[273] The U.S. Producers complain that such adjustments to the home market price departed from the Department's practice of requiring a direct link to specific sales. They maintain that this resulted in a partial averaging of Stelco's home market prices, purportedly reducing or

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[272] Timken, 630 F. Supp. at 1338.

[273] Final Determination, 58 Fed. Reg. at 37119.

eliminating dumping margins. They argue that the Department should have treated the adjustments as indirect selling expenses in the home market.[274]

The U.S. Producers agree that the rebates should be treated as direct in the U.S. market, but argue that the adjustment amount was not adequately established by Stelco, and such adjustment should have been based on best information available.[275]

Stelco contends that the Department properly accepted Stelco's price adjustments. Stelco maintains that the rebates were customer-specific and product-specific. Stelco argues that it has demonstrated a reasonably direct relationship to sales, as the rebates were correlated with actual cost and sales records and this correlation was verified by the Department.[276]

The Department agrees with the U.S. Producers and requests a remand in order to treat Stelco's home market price adjustments as indirect expenses, and to make a direct expense deduction to USP based on best information available.

2. Analysis and Decision

The danger of accepting expense allocations is that allocations will not reflect actual prices and dumping margins may be artificially reduced. Nevertheless, in Smith Corona, volume rebates were accepted as direct expenses even though they were allocated across total sales. The rebates

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[274] U.S. Producers Brief, at 45-61. Indirect selling expenses are normally deducted from home market prices only in exporter's sales price situations, and then only up to the amount of indirect expenses deducted from United States prices. 19 C.F.R. §353.56(b)(2).

[275] U.S. Producers Brief, at 45-61. Since direct selling expenses are deducted from U.S. prices, dumping margins are increased. Indirect selling expenses are normally deducted only in the case of exporter's sales prices. 19 U.S.C. §1677a(e)(2).

[276] Stelco Response Brief, at 19-31.

were actually paid by the manufacturer and were apportioned on the basis of verified cost and sales figures.[277]

> The rebates in question on the Stelco sales covered various adjustments, including:
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> changes in freight rates, mill clerical errors, claims adjustments, rebilling, canceled invoices, clerical pricing errors, returned container system errors, duty and brokerage charges, duplicative invoices, weight adjustments, price adjustments, customer-initiated price reductions, tax adjustments and other miscellaneous price reductions.[278]

The Stelco rebates differ from those at issue in Smith Corona in that it is unlikely that each type actually arose in all of the individual sales over which it was allocated. The adjustments are more like the adjustments for invoicing errors and retroactive price changes which were not accepted as direct expenses in Koyo Seiko v. United States in that they were incurred on a transaction-specific basis but allocated on a customer-specific basis.[279] There is nothing to indicate that the various Stelco adjustments actually arose in approximately equal percentages in all of the sales involved.

In accordance with the standard of review, the Panel acknowledges the expertise of the Department to evaluate expense adjustment claims. The Department has requested a remand, as it is entitled to do,[280] and the Panel defers to that request.

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[277] Smith Corona, 713 F.2d at 1580.

[278] Stelco Response Brief, at 23-24.

[279] Koyo Seiko v. United States, 796 F.Supp. 1526 (Ct. Int'l Trade 1992). See also Torrington Company v. United States, 832 F.Supp. 365 (Ct. Int'l Trade 1993); Torrington Company v. United States 832 F.Supp. 393 (Ct. Int'l Trade 1993).

[280] Ford Motor Co. v. NLRB, 305 U.S. 364, 375 (1939); Torrington, 832 F.Supp. 365; Torrington, 832 F.Supp. 393; AOC International, Inc. v. United States, 721 F.Supp. 314, 321 (Ct. Int'l Trade 1989).

The Panel remands this issue to the Department to reconsider, in accordance with the above, the adjustments to FMV and USP for certain Stelco rebates.[281]

D. The Department's Treatment of Certain Loan Repayments to Dofasco as Direct Selling Expenses

1. Background and Arguments

In its final determination, the Department adjusted Dofasco home market prices to reflect a customer's loan repayments that were spread out across a number of purchases. The Department treated the repayments as direct selling expenses and deducted them from each sale to which they were applied.[282]

The U.S. Producers argue that the adjustment should not be allowed because the loan was not directly related to sales. They contend that the loan was in the nature of a goodwill, promotional gesture and thus should not be deductible.[283]

The Department argues that as the repayments reflect circumstances that differ from the circumstances of the U.S. sales, the adjustments were permissible.[284] The Department verified the adequacy of the repayment system, which involves monthly statements to the customer and linked loan repayments to specific sales. The Department argues that it is simply recognizing the economic reality of the transactions, since the repayments do reduce the amount of the loan.[285]

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[281] Panel Member Irish concurs in the grant of a remand, but believes that the Department should consider whether the expenses in the U.S. market are indirect selling expenses, as they relate only to subject goods and have been verified.

[282] Final Determination, 58 Fed. Reg. at 37108.

[283] U.S. Producers Brief, at 62-76.

[284] 19 U.S.C. §1677b(a)(4)(B).

[285] Commerce Response to U.S. Producers, at 32-41.

2. Analysis and Decision

The calculation of antidumping margins involves a comparison between home market prices for goods and U.S. prices for goods. When there are several sales to one customer, the Department must always be alert to the danger of manipulation through price allocation. Nevertheless, once the Department verified that the loan principal was actually reduced with each repayment, then adjustment was appropriate so that FMV would reflect the real price of the merchandise. "One of the goals of the statute [is to achieve] a fair comparison between foreign and domestic market prices or values."[286] The Panel does not find the Department's application of the adjustment provisions to be arbitrary or illogical.[287] Thus, the Panel upholds the Department's decision to treat the loan repayments as direct selling expenses as a reasonable exercise of its discretion in administration of the antidumping statute.

[286] Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033, 1037 (Fed. Cir. 1985); see Smith-Corona, 713 F.2d at 1578.

[287] Koyo Seiko, Nos. 93-1525 and 93-1534, slip op. at 17.

E. The Department's Treatment of Dofasco Technical Service Expenses as Indirect Expenses in Both U.S. and Canadian Markets

1. Background and Arguments

Despite Dofasco's assertions that certain technical service expenses were direct selling expenses, the Department found that Dofasco had not tied the expenses to specific customers, sales or groups of sales, but had allocated them across sales in both markets on a tonnage basis. In its final determination, the Department treated Dofasco's after-sale technical service expenses as indirect expenses in both the Canadian and U.S. markets.[288]

The U.S. Producers argue that Dofasco failed to provide available information to divide the expenses between the two markets and that Dofasco failed to provide available information to link the expenses to specific customers or sales. The U.S. Producers argue that it is respondents' burden to prove that expenses are direct in the home market and indirect in the U.S. market, as these assumptions are adverse to respondents and oblige them to provide information. The U.S. Producers conclude that since Dofasco did not provide available information, Commerce should presume adversely that all the expenses were incurred in the U.S. market and that all the expenses were direct.[289]

The Department responds that the technical service expenses were verified and were properly treated as indirect because they were not tied to particular sales. The expenses consisted of salaries and benefits for technical staff as well as other selling expenses. The Department contends that the allocation across both markets on a tonnage basis was reasonable. While

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[288] Final Determination, 58 Fed. Reg. at 37108.

[289] U.S. Producers Brief, at 80-88.

Dofasco had not shown that the expenses were direct, Commerce argues that technical service expenses that have been verified and properly allocated can be treated as indirect expenses.[290]

2. Analysis and Decision

When dumping margins are calculated on the basis of individual transaction prices in both markets, expenses must be adequately tied to transaction prices in order to prevent distortion of margins. In some circumstances, technical service expenses might be recorded by a specific transaction or transactions. In many cases, however, the volume of sales and other factors could lead respondents to record these expenses on other bases. If the expenses are sales-related, are verified, and are allocated on a reasonable basis, Commerce is justified in accepting them as indirect expenses.

While it is useful for Commerce to use adverse presumptions to encourage respondents to provide information, those presumptions should not create insurmountable burdens of proof or unreasonably restrict the Department's discretion. The Panel affirms the decision of the Department to treat Dofasco's technical service expenses as indirect expenses in both markets.

F. Ministerial Errors Relating to Dofasco and Stelco

1. Background and Arguments

After the final determination, petitioners filed letters alleging that the Department made certain ministerial errors in calculating the margins for both Stelco and Dofasco. Commerce has statutory authority to correct ministerial errors.

> The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the

[290] Commerce Response to U.S. Producers, at 41-47; Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318 (Ct. Int'l Trade 1984).

> determinations are issued under this section. ... As used in this subsection, the term "ministerial error" includes errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial.[291]

As a request for binational panel review had already been filed, the Department did not have jurisdiction to make corrections pursuant to its own authority while the matter was under review.[292] The allegations are therefore before the panel for decision.

Concerning the Dofasco margin calculations, the U.S. Producers argue that Commerce erred in failing to make currency conversions for packing costs and technical service expenses in the home market, in failing to use the currency field properly in the computer program, in failing to add U.S. commissions to the calculation of foreign unit price in dollars, and in double-counting certain Dofasco rebates.[293] Commerce agrees with the U.S. Producers' arguments and requests a remand to correct the identified errors.[294]

Dofasco presents an alternative method of correcting for use of the currency field in the computer program, which the U.S. Producers in reply accept. Dofasco further maintains that the currency problem affecting packing costs and technical service expenses also appears in relation to warehousing expenses in the U.S. market. Dofasco requests a remand directing Commerce to make currency conversions for warehousing expenses in the calculation of direct selling

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[291] 19 U.S.C. §1675(f); see also 19 C.F.R. §353.28(d).

[292] Zenith Electronics Corp. v. United States, 884 F. 2d 556, 560-63 (Fed. Cir. 1989).

[293] U.S. Producers Brief, at 93-96.

[294] Commerce Response Brief to U.S. Producers, at 48.

expenses.[295] The U.S. Producers oppose this request, as they argue Dofasco did not raise the matter in its complaint before the panel in accordance with Binational Panel Rule 7.

Concerning the Stelco margin calculations, the U.S. Producers argue that the Department erred in failing to convert U.S. dollar sales into Canadian currency for the calculation of net home market price, in failing to deduct all rebates from U.S. prices in exporter's sales price situations, and in failing to add U.S. commissions to foreign market value in the calculation of foreign unit price in dollars in purchase price situations. The Department agrees with the U.S. Producers' arguments and requests a remand to correct the identified errors.

2. Analysis and Decision

It is well-established law that clerical errors should be corrected, in the interests of achieving fair and accurate determinations.[296] Therefore, where the Department has agreed to correct certain errors as ministerial, a remand is granted.

The allegation concerning the currency conversion for warehousing costs was not set out in Dofasco's complaint before this Panel.[297] The Panel therefore does not have jurisdiction to grant Dofasco's request for a remand on this point.[298] The Panel notes, however, that once the determination has been returned to Commerce on a remand, Commerce's authority for the

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[295] Dofasco Response Brief, at 34-35.

[296] Brother Industries, 771 F. Supp. 374; Federal-Mogul Corp. v. United States, 809 F. Supp 105, 110-111 (Ct. Int'l Trade 1992).

[297] Complaint of Dofasco, Inc., August 9, 1993.

[298] Under the 1994 Binational Panel Rules, a panel review shall be limited to: "(a) The allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review; and (b) Procedural and substantive defenses raised in the panel review." Binational Panel Rule 7; 58 Fed. Reg. 5897.

correction of ministerial errors will revive. Dofasco would be free to present its request to the Department at that time.[299]

IX. HOLDING ON NATIONAL STEEL'S CHALLENGE TO THE DEPARTMENT'S METHODOLOGY FOR APPLYING ANTIDUMPING DUTIES TO AMERICAN GOODS RETURNED

A. Opinion of Panel Members McGill and Stinson

1. Background and Arguments

U.S. customs law provides for a partial exemption of duty for U.S. metal products sent abroad for processing and returned to the United States. Specifically, qualifying goods are assessed a "duty upon the value of the repairs or alterations."[295] National Steel and CCC contest Commerce's finding that the merchandise imported under the United States Customs Service American Goods Returned ("AGR") program, pursuant to subheading 9802.00.60, HTSUS, is subject to collection of antidumping duties on the full value of the merchandise, including the U.S. portion.[296] National Steel and CCC argue that the statute permits antidumping duties to be collected solely on the value added to the AGR goods in Canada.[297]

The Department asserts that assessing an antidumping duty on the full value of the import, inclusive of the U.S. component, is consistent with U.S. Note 6, subchapter II, chapter 98, HTSUS.[298] Note 6 provides:

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[299] See Paving Equipment II, USA 90-1904-01.

[295] Subheading 9802.00.60, HTSUS.

[296] General Issues Appendix, 58 Fed. Reg. at 37065.

[297] National Steel Brief, at 26; CCC Brief, at 44.

[298] Commerce Response to National Steel, at 24-25. U.S. Note 6 was enacted as Section 479A of the Customs and Trade Act of 1990, Pub. L. 101-382, 104 Stat. 629 (1990).

> Notwithstanding the partial exemption from ordinary customs duties on the value of the metal product exported from the United States provided under subheading 9802.00.60, articles imported under subheading 9802.00.60 are subject to all other duties, and any other restrictions or limitations, imposed pursuant to title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) . . . .

The Department takes the position that Note 6 plainly draws a distinction between antidumping duties (Title VII) and ordinary customs duties and provides an exception to the general rule that antidumping duties are considered ordinary customs duties.[299] The Department insists that Note 6 is clear on its face and requires the imposition of antidumping duties on the full value of a product classifiable within the AGR provision.

The Department claims that an interpretation which limits application of antidumping duties on AGR goods to the foreign value added would be inconsistent with the Department's statutory mandate (under 19 U.S.C. §1673e), to assess antidumping duties "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise."[300] In the Department's view, application of antidumping duties only on the value of foreign processing might mean that the dumping would not be fully offset.

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[299] Commerce Response to National Steel, at 14; Hearing Transcript, July 12, 1994, Panel Doc. 235, at 18.

[300] General Issues Appendix, 58 Fed. Reg. at 37065; Commerce Response to CCC, at 64-69.

2. Analysis and Decision

This issue of statutory construction appears to be one of first impression. As stated earlier, in reviewing an agency's statutory construction, the first step is an inquiry into whether the statute has a plain meaning. If so, both the agency and the courts must apply that intent or meaning.[301] If, however, the intent is not clear or the statute is silent on the issue in question, then the reviewing body must determine whether the agency's construction of the statute is a "permissible" one.[302]

We do not find the statutory language, including Note 6, to be plain and unambiguous on its face. Thus, we examine whether the Department's statutory interpretation is a permissible one.

Note 6 does affirm that AGR metal products are subject to the imposition of antidumping duties. But the Senate legislative history of Note 6 states that it "does not address the method by which such duties are calculated or assessed."[303] Indeed, while we do not view the statutory analysis offered by Panel Members Weiser and Irish as required, their interpretation of congressional intent may be better than the one advocated by Commerce. Moreover, we have sympathy for the argument that complainants' interpretation best implements the policy, implicit in the AGR provision, of fostering U.S. manufacturing. Nevertheless, the Supreme Court recently reiterated 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

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[301] Chevron, 467 U.S. at 842-43.

[302] Id. at 843.

[303] S. Rep. 252, 101st Cong., 2d Sess. (1990) at 7, reprinted in 1990 U.S.C.C.A.N. 928, 934.

interpretive gap in the statutory structure, has delegated policymaking authority to an adminsistrative agency, the extent of judicial review of the agency's policy determinations is limited."[304] It is sufficient that an agency's interpretation of a statute "is plausible, if not preferable" in order to be sustained.[305]

We believe the AGR statutory framework is susceptible to the construction adopted by the Department. Because we find the Department interpretation a permissible construction of the statute, our opinion, together with that of Panel Member Endsley, has the effect of affirming the Department on this issue.

B. Concurring Opinion of Panel Member Endsley

I join in the final results of the opinion of Panel Members McGill and Stinson regarding the question whether HTSUS item 9802.00.60 has an impact on the calculation of antidumping duties, and thus I vote to uphold the Department's conclusion, expressed in the final determination, that the partial exemption from ordinary customs duties provided for under

[304] Pauley v. Bethenergy Mines, Inc., 501 U.S. 680, ____, 111 S. Ct. 2524, 2534 (1991).

[305] National R.R. Passenger Corp., ___ U.S. at ___, 112 S. Ct. at 1402.

HTSUS item 9802.00.60[306] does not extend to cover antidumping duties.[307] However, I offer these concurring views to show my own reasoning as respects this issue.

As I understand it, Commerce has in effect held, in the final determination, that if input merchandise (*e.g.*, cold-rolled steel) is exported from the United States to Canada, undergoes there a "substantial transformation" such that it becomes a product of Canada subject to an antidumping duty order, and is then re-imported into the United States, the re-imported steel *(e.g.*, corrosion-resistant steel) is subject to antidumping duties in the full amount calculated, just as if it were any other import of Canadian processed steel.[308] In Commerce's view, HTSUS item 9802.00.60 simply has no impact on the antidumping duty calculation, although it recognizes that if the processing requirements of the statute are met, the importer would nevertheless continue to enjoy a limitation on the application of ordinary customs duties.

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[306] Under HTSUS item 9802.00.60, articles of metal (except precious metal) that are manufactured or processed in the United States, exported for further processing abroad and then returned to the United states for still further processing, are eligible upon entry to have duties assessed only on the value of the foreign processing. (In the duty column, HTSUS item 9802.00.60 states: "A duty upon the value of such processing outside the United States.") Thus, the dutiable portion of imports under HTSUS item 9802.00.60 is the value added to the imported product by processing (or the cost of processing) in the foreign country; the nondutiable portion is the value of the U.S.-origin metal. This particular tariff provision has the effect of encouraging the use of U.S.-origin metal in foreign metal processing operations. Its principal use is by U.S. manufacturers with subsidiaries in Canada and Mexico, although the statute is not limited to border situations. The provision benefits these firms by reducing their tariff obligation.

[307] General Issues Appendix, 58 Fed. Reg. at 37065.

[308] Conversely, re-imported steel from Canada would not be subject to antidumping duties at all if the processing in Canada was insufficient to cause a "substantial transformation" of the product. For example, cold-rolled steel taken from the United States to Canada, and then returned with little or no processing having been done, will remain a product of the United States and will not be subject to either ordinary customs duties or antidumping duties.

Commerce's rationale for this interpretation of the statute was stated in the final determination:

> We also disagree with the position advocated by both petitioners and respondents that AD and CVD duties on AGR imports should be assessed only on the foreign value added. Normal customs duties are *ad valorem*, i.e., the amount of duties is determined by the value of the goods. In contrast, AD and CVD duties are not an assessment against value. They are expressed as a percentage of value merely for estimated deposit purposes and to facilitate the mechanics of implementing assessment. Section 736 of the [*Tariff Act of 1930*] requires that the Department assess antidumping duties in an amount "equal to the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise ***." With respect to CVD duties, section 706 of the Act requires that the Department assess duties "equal to the amount of the net subsidy ***." Therefore, the amount of AD and CVD duties is determined by the amount of price discrimination or subsidy, not by the value of the good. Moreover, the statute mandates that the Department assess AD/CVD duties in a manner that will fully offset any price discrimination (the dumping margin) or subsidy.
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> In contrast, the approach suggested by the parties would require that the Department allocate a portion of AD and CVD duties on AGR merchandise to the value of the U.S. origin content and leave that portion of the AD/CVD duties uncollected.... We must reject such an approach because it directly contradicts the statutory mandate to fully offset the dumping margin or subsidy.[309]

As suggested by the above, both petitioners and respondents argue that HTSUS item 9802.00.60 also affects the antidumping duty calculation.[310] Concurring with Commerce that the critical issue is the meaning of the word "duty" in HTSUS item 9802.00.60, they assert that the plain language of this statute does not differentiate ordinary customs duties from AD/CVD duties

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[309] General Issues Appendix, 58 Fed. Reg. at 37065.

[310] In its Concurrence Memorandum on Treatment of Imports under HTS 9802.00.60, General Issues Appendix, Pub. Doc. 205, Fiche 45, Frame 51, Commerce noted that "[t]he methodology advocated by the parties would require that the Department allocate a portion of AD and CVD duties on AGR merchandise to the value of the U.S. origin content and leave that portion of the AD/CVD duties uncollected." In footnote, Commerce then offered the following example: "For example, if FMV is $10 and USP is $8, the dumping margin is $2, or 25% ($2/8). Under the parties' methodology, if the foreign value added is $4, we would collect only $1 in AD duties ($4 x 25%)."

and assert, as well, that a 1990 amendment to the HTS, discussed *infra*, does not compel such a differentiation. National Steel and respondents also argue that the purposes of HTSUS item 9802.00.60 and the unfair trade statutes are better served by an interpretation that applies the limitation on duties introduced by the former to unfairly traded imports.

Standard of Review

I recognize this issue to be purely one of statutory interpretation, in this case the statutory interpretation of HTSUS item 9802.00.60 as it may impact the calculation of antidumping duties under the antidumping laws. Under the Supreme Court's decision in Chevron, my initial inquiry must be whether the meaning of the relevant statutes is plain, whether "Congress has directly spoken to the precise question at issue."[311] If so, that ends the matter and I must apply that plain meaning. On the other hand, if I find the relevant statutes to be "silent or ambiguous" with respect to this issue, the question becomes whether Commerce's interpretation is "based on a permissible construction of the statute."[312]

Both Commerce, on the one hand, and petitioners and respondents, on the other hand, argue that the meaning of the relevant statutes, particularly HTSUS item 9802.00.60, is plain and that such plain meaning must be applied by this Panel. The "plain" meanings they offer, however, are diametrically opposed. The latter's plain meaning is that HTSUS item 9802.00.60 has *pro tanto* amended the antidumping duty laws so that any antidumping duties determined by Commerce to be applicable to unfairly traded AGR imports must be limited to the amount of the foreign value added and may not be applied against the value of the U.S.-origin parts and

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[311] Chevron, 467 U.S. at 843.

[312] Id.

materials. For its part, Commerce's plain meaning is that HTSUS item 9802.00.60 clearly and expressly has no bearing whatever on the calculation of antidumping duties, which are not calculated on the basis of value in any event.

I have carefully reviewed the statutory language for HTSUS item 9802.00.60, as well as the language of the antidumping statutes,[313] and am compelled to conclude that there is not a single "plain meaning" of the relevant statutes—most particularly HTSUS item 9802.00.60—which I must accordingly apply. HTSUS item 9802.00.60 employs the single word "duty" which, in the present context, could mean either (i) ordinary customs duties alone, or (ii) such ordinary customs duties plus duties arising under the unfair trade laws. Despite the attention that Congress has given to "special dumping duties" since the enactment of the *Antidumping Act of 1921*,[314] it clearly did not refer to such "special dumping duties" in HTSUS item 9802.00.60 itself, and thus the only way that one can conclude that the simple term "duty" covers such "special dumping duties" is through an exercise of statutory construction, which would not be necessary if the meaning were in fact "plain."

Because a single plain meaning of the statutes is lacking, I am required then to examine the second aspect of Chevron, namely, to determine whether "the agency's answer is based on a permissible construction of the statute." As stated in Chevron, the issue for a court or binational panel is not whether the court's or the panel's interpretation of the relevant statutes is correct, but

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[313] See VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1579 (Fed. Cir. 1990), cert. denied, 499 U.S. 922 (1991) ("It is axiomatic that statutory interpretation begins with the language of the statute.").

[314] Pub. L. No. 67-10, 42 Stat. 9 (1921). See Section 202(a).

whether the agency's interpretation is reasonable and "permissible."[315] This has been confirmed in a very recent opinion of the Court of Appeals for the Federal Circuit:

> To survive judicial scrutiny, an agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. See Zenith Radio Corp. v. United States, 437 U.S. 443, 450 (1978). Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another. Id. Deference to an agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws. Daewoo Elecs. Co. v. United States, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994).

Koyo Seiko, Nos. 93-1525 and 93-1534, slip op. at 9-10 (emphasis in original).

With respect to the quantum of deference required, I note that National Steel has argued in this case that the Panel should minimize the deference it affords to Commerce's interpretation of HTSUS item 9802.00.60 since that item is a statutory provision administered by the U.S. Customs Service, not by Commerce. In addition, it has argued that a "heightened sense of scrutiny" is appropriate in this case because this issue is one of first impression and there has been no protracted reliance by either the government or by private parties on Commerce's policy.[316]

In response to the first point, I would note that what are being applied in this case are antidumping duties imposed pursuant to the antidumping duty laws. These are the province of Commerce, and the fact that HTSUS item 9802.00.60 is most often construed by the U.S.

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[315] See National R.R. Passenger Corp., ____ U.S. ____, 112 S.Ct. at 1401 ("Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law."). See also PPG Industries, 928 F.2d at 1573 ("Given these circumstances, appellant's burden on appeal is a difficult one, for it must convince us that the interpretation ... adopted by the ITA is effectively precluded by the statute.").

[316] National Steel Corporation Brief in Support of Complaint (hereinafter "National Steel Brief"), March 22, 1994, at 16-18.

Customs Service, in carrying out its responsibilities under the tariff laws,[317] in no way diminishes Commerce's responsibilities to consider whether the scope or other aspect of the antidumping duty laws has been somehow impacted by HTSUS item 9802.00.60. Clearly, Commerce cannot avoid interpreting that statute once the issue has been fairly raised and, under the applicable standard of review, it remains entitled to the usual amount of deference in doing so.

As to the point regarding first impression, while that does seem to be the case, this fact does not appear to alter fundamentally the standard of review that is recognized by the courts to be applicable to our deliberations.[318] Commerce is compelled to fill an "interpretive gap" whenever the issue first arises, and it does not seem to me that Commerce's authority in that regard—or the deference that I must pay to that authority—is substantially diminished by the fact that the policy selected by Commerce is being applied by it for the first time.

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[317] In interpreting HTSUS item 9802.00.60 for purposes of the tariff laws, the U.S. Customs Service would not be examining the question whether antidumping duties are to be calculated in a special manner; thus, the Service would have no obvious or recognized expertise as regards that issue.

[318] See Pauley, 501 U.S. at ___, 111 S.Ct. at 2534 ("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.").

Statutory Background

Because the plain language of HTSUS item 9802.00.60 is not, for me, dispositive of the issue presented, I have relied heavily on the legislative history behind HTSUS item 9802.00.60 and the earlier iterations of that metals processing provision in an effort to determine, first, whether Congress has in fact "directly addressed the precise question at issue"[319] and, second, to assess the reasonableness of Commerce's interpretation of the statute.[320]

The tariff laws' metals processing provision, currently enacted as HTSUS item 9802.00.60, was initiated in 1953 in the U.S. House of Representatives to provide tariff relief to manufacturers in Michigan who, because of local capacity constraints, had to use metal processing facilities in Ontario.[321] The Senate Finance Committee concurred with the thrust of the bill but expanded the eligibility from Canada to all countries before the proposed legislation became law.[322]

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[319] Chevron, 467 U.S. at 843. See also Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 667 (Fed. Cir. 1992) (attempting to discern intent of Congress from legislative history).

[320] See Zenith Radio, 437 U.S. at 450-51 ("The question is thus whether, in light of the normal aids to statutory construction, the Department's interpretation is 'sufficiently reasonable' to be accepted by a reviewing court.")

[321] *Production Sharing: U.S. Imports Under Harmonized Tariff Schedule Subheadings 9802.00.60 and 9802.00.80, 1986-1989*, USITC Pub. 2365 (March 1991), at 1-1. According to its sponsor, the purpose of the provision was to facilitate the processing of U.S. metal articles in contiguous areas of Canada during breakdowns or other emergencies at nearby plants in the United States. Cong. Rec., July 13, 1953, at 8850-8859.

[322] Debate on the floor of the United States Senate focused on whether the provision would tend to encourage importations of metal articles from low-wage countries. However, the Finance Committee, in reporting favorably on the bill, made no argument about limiting the benefit of the bill to imports from contiguous countries. See S.Rep. No. 2326, 83rd Cong., 2d Sess. (1954), reprinted in 1954 U.S.C.C.A.N. 3900, 3903 ("Section 202 added to the bill by the Finance Committee will permit manufacturers of metal articles processed in the United

The provision in question was ultimately contained in the *Customs Simplification Act of 1954,*[323] which amended the *Tariff Act of 1930* in several different respects.[324] 19 U.S.C. § 1201, ¶ 1615(g)(2) provided in principal part:

> (2) If —
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> (A) any article of metal (except precious metal) manufactured in the United States or subject to a process of manufacture in the United States is exported for further processing; and
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> (B) The exported article as processed outside the United States, or the article which results from the processing outside the United States, as the case may be, is returned to the United States for further processing, then such article may be returned upon the payment of a duty upon the value of such processing outside the United States at the rate or rates which would apply to such article itself if it were not within the purview of this subparagraph (g).

The legislative history of the *Customs Simplification Act of 1954*, therefore, clearly supports the view that the term "duty," as used in the metals processing provision, referred solely to ordinary customs duties. The expressed legislative purpose of the provision in both the House and the Senate was to relieve manufacturers with plants along the Canadian border from the ordinary customs duties that would normally apply should they be compelled to undertake some manufacture of their products in Canada on an emergency basis. In neither the House nor the Senate was there <u>any</u> <u>discussion</u> <u>whatever</u> concerning the possibility that not only would ordinary customs duties be ameliorated by the metals processing provision, but that duties imposed under

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States to export such articles for further processing abroad without payment of duty when they are reimported, except on the cost of the processing done in the foreign country.").

[323] Pub. L. 83-768, 68 Stat. 1136 (1954)

[324] The *Customs Simplification Act of 1954* contained six titles. Title II, entitled in part "Certain Metal Articles Returned to United States," amended Paragraph 1615(g) of the *Tariff Act of 1930*, as amended (codified at 19 U.S.C. § 1201 ¶ 1615(g)), and Title III made certain amendments to the *Antidumping Act of 1921*.

the unfair trade laws (*e.g.*, the *Antidumping Act of 1921*) would be relieved as well.[325] In my judgment, if Congress had wanted to use the metals processing provision to depart (with respect to AGR imports) from the method of calculating antidumping duties that had been in force since 1921, it would have availed itself of this opportunity and done so in "clear and unequivocal terms."[326]

In this regard, it is instructive to note that Title III of the *Customs Simplification Act of 1954* included several amendments to the basic antidumping statute, the *Antidumping Act of 1921*. One of these amendments was made to subsection (a) of Section 202 of that Act limiting the retroactive aspect of unappraised entries, but which continued in effect the original 1921 statutory terminology referring to an antidumping duty as "a special dumping duty." In consecutive provisions, therefore, the *Customs Simplification Act of 1954* refers to "a duty" in the title enacting the metals processing provision and "a special dumping duty" in the title amending the antidumping laws.

Manifestly, the Congress regarded these two items as different and, despite the opportunity to do so, made no attempt in the metals processing provision to refer to these "special dumping duties." By failing to do so, Congress clearly manifested its intention that the metals processing provision not be considered to impact the antidumping laws. In my judgment, therefore, it was Congress's intention in 1954 that the metals processing provision operate to

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[325] See VE Holding Corp., 917 F.2d at 1581 ("It can be presumed that Congress is knowledgeable about existing law pertinent to legislation it enacts.").

[326] Cf. Koyo Seiko, Nos. 93-1525 and 93-1534, slip op. at 16 ("[W]e believe that if the drafters of the 1958 Act had wanted to depart from the existing definition of exporter's sales price by precluding adjustments thereto for direct selling expenses, they would have said so in clear and unequivocal terms.")

allow importers to reduce the amount of ordinary customs duties otherwise payable, while leaving the operation of the antidumping laws unchanged and unaffected. If Congress had had a contrary intent, it would have taken the simple and obvious step of either defining the word "duty," in HTSUS item 9802.00.60, to include the words "special dumping duties," as used elsewhere in the 1954 Act, or of simply adding the words "special dumping duties" directly to HTSUS item 9802.00.60.

In 1963, the metals processing provision was incorporated—substantively unchanged—in the Tariff Schedules of the United States (TSUS) as TSUS item 806.30.[327] I have found nothing in the legislative history of the enactment of the TSUS suggesting that Congress, by substituting TSUS item 806.30 for its predecessor provision, intended thereby for such item to henceforth be construed as applying to the unfair trade laws. There is no language of any kind to this effect. Thus, the situation in 1963 remained exactly as it had been in 1954.

Moreover, it appears to have been widely acknowledged at this time that TSUS item 806.30 had no impact on at least certain of the unfair trade laws. In a report produced for Congress, the U.S. International Trade Commission stated (and continued to state in future such reports) that "it is to be noted that the entry of an article under either of these tariff items does not relieve it from quantitative limitations imposed under other provisions of law, such as certain textile and apparel articles covered by the Arrangement Regarding International Trade in Textiles."[328]

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[327] The tariff treatment of particular American goods returned from other countries (AGR imports) was specified in items 806.30 and 807.00, part 1B, schedule 8 of the TSUS. See *Imports Under Items 806.30 and 807.00 of the Tariff Schedules of the United States, 1984-87*, USITC Pub. 2144 (December 1988), at A-2.

[328] Id., at A-4.

The conversion of the TSUS to the HTSUS[329] resulted in the replacement of TSUS item 806.30 by HTSUS item 9802.00.60. The converted schedule became effective January 1, 1989, pursuant to Section 1217 of the *Omnibus Trade and Competitiveness Act of 1988* and to Presidential Proclamation 5911. Once again, I have found nothing in the legislative history of the HTSUS or the 1988 Act to suggest that Congress then considered HTSUS item 9802.00.60 as henceforth applying to the unfair trade laws. The situation again remained in 1988 as it had in 1954.

In 1990, Congress directly spoke to the question of the scope of HTSUS item 9802.00.60, removing it beyond peradventure that entries under that item will not be exempted from antidumping and countervailing duties, nor from the safeguard and section 301 provisions of the trade laws. New U.S. Note 6 to HTSUS chapter 98, added as Section 1106 of the *Customs and Trade Act of 1990*, Pub. L. 101-382, 104 Stat. 629, provided:

> Notwithstanding the partial exemption from ordinary customs duties on the value of the metal product exported from the United States provided under subheading 9802.00.60, articles imported under subheading 9802.00.60 are subject to all other duties, and any other restrictions or limitations, imposed pursuant to title VII of the Tariff Act of 1930 (19 U.S.C. 1671 *et seq.*), or chapter 1 of title II or chapter 1 of title III of the Trade Act of 1974 (19 U.S.C. 2251 *et seq.*, 19 U.S.C. 2411 *et seq.*). [330] (emphases added)

The legislative history supporting this item is minimal but informative:

> "Subheading 9802.00.60 of the HTSUS provides that the duty rates applicable to metal articles that are exported for processing and then returned to the United States for further processing will be assessed only on the value of the foreign processing. This section provides that such entries will not be exempted from the application of antidumping and countervailing duties or any duties and restrictions

[329] 19 U.S.C. § 1202, *et seq.* (1988) (enacted as Pub. L. 100-418, title I, § 1204(a), 102 Stat. 1148); see also 19 U.S.C. §3001.

[330] HTSUS, U.S. Note 6, Chapter 98.

> applicable under Chapter 1 of Title II, or Chapter 1 of Title III, of the Trade Act of 1974. The bill does not address the method by which such duties are calculated or assessed."[331] (emphasis added)

This history confirms the express language of U.S. Note 6 that HTSUS item 9802.00.60 does not exempt AGR imports, partially or otherwise, from the unfair trade laws and states, further, that the provision also does not impact the methods then being used by Commerce to calculate antidumping or countervailing duties.[332]

Discussion

The reasons for introducing the legislation that became U.S. Note 6 are not clear on the record nor from the legislative history of the *Customs and Trade Act of 1990*. In its response brief, Commerce noted obliquely that this amendment was offered originally by the U.S. metal industries.[333] Whatever the motivation, it does not appear to me to have occasioned a change in the law.

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[331] S. Rep. No. 252, 101st Cong., 2d Sess. 7 (1990), reprinted in 1990 U.S.C.C.A.N. 928, 934.

[332] It is worth noting at this juncture that the only "method" for calculating antidumping duties of which the Senate and the House was aware of in 1990, at the time this provision was adopted, was the method set out in the *Antidumping Act of* 1921 and practiced fundamentally unchanged by Commerce and its predecessor since that date. It should not be forgotten that the argument that HTSUS item 9802.00.60 (and its predecessor provisions) calls for an amendment to that methodology in the case of AGR imports only appears to have been raised in this case and thus has been a methodological change called for by *theory* alone. It has never once been put into practice.

[333] Commerce Response to CCC, at 70 ("Although originally offered by U.S. metal industries as an 'amendment in the nature of a substitute' for H.R. 1700, the language of Note 6 was added to H.R. 1594, which was passed in the summer of 1990 (Pub. L. 101-382, Sec. 479A)").

By statutory command, antidumping duties have been calculated in a particular fashion since 1921[334] and, in my view, that method was not impacted in 1954 when the metals processing provision was first enacted; nor was it impacted in 1963 when TSUS 806.30 was substituted for the original provision; nor was it impacted in 1988 when HTSUS item 9802.00.60 was substituted for TSUS 806.30. Certainly, there is no legislative history to suggest that the various iterations of the metals processing provision were intended to affect, or did affect, the scope or operation of the antidumping laws. The only legislative history available clearly supports the contrary view.[335]

Thus, it is my judgment that Congress has consistently kept the "special dumping duties" involved in the antidumping laws separate from the "duties" involved in the tariff laws, construing them together only in specially defined situations.[336] U.S. Note 6 simply made the "line" a good deal brighter, but left that line in exactly the same position as before.

National Steel, and the minority of this Panel, have argued that the early case of C.J. Tower & Sons v. United States[337] provides authority for the view that antidumping duties should be considered duties for purposes of HTSUS item 9802.00.60. In that case, the Court stated:

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[334] I would accept Commerce's argument in the Final Determination that antidumping duties are required under the statute (currently Section 736 of the *Tariff Act of 1930*) to be calculated on the basis of the difference between FMV and USP and that Commerce must assess antidumping duties in a manner that will fully offset this difference. Since the metals processing provisions have never been applied to affect this calculation, the foregoing has remained true—without a single exception—since 1921.

[335] See legislative history to the 1954 Act, discussed *infra*.

[336] See discussion of Section 211 of the *Antidumping Act of 1921 infra.*

[337] 71 F.2d 438 (C.C.P.A. 1934)

"We conclude, rather, that this language [citing Section 211 of the *Antidumping Act of 1921*][338] indicates that the Congress desired and intended that the additional duties provided for in this act should be considered as duties for all purposes."[339] (emphasis added)

I am not persuaded by the citation to C.J. Tower. When faced with the task of considering the scope of a 1954 statute (and successor statutes), I am prepared to give only limited weight to language contained in a 1934 case.[340] Moreover, I am prepared to give even less weight to such language when it manifestly goes beyond the clear holding of the case at Bar and is therefore dicta. The court in C.J. Tower was asked to examine whether antidumping duties could be considered as "penalties" within the meaning of the Fifth Amendment of the United States Constitution; if so, they would amount to a taking of property without due process of law. The court held that antidumping duties were not unconstitutional under the Fifth Amendment, a narrow holding which in no way supported the need for, or the appropriateness of, a grand statement that antidumping duties are "duties for all purposes [present and future]."[341] The

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[338] Section 211 of the *Antidumping Act of* 1921 provides: "The special dumping duty imposed by this title shall be treated in all respects as regular customs duties within the meaning of all laws relating to the drawback of customs duties." Thus, in 1921, by this provision, Congress was willing to permit drawback of even antidumping duties.

[339] Id., at 445.

[340] There is no indication in the 1954 Act's legislative history that the Congress placed any reliance on the language of C.J. Tower as respects its understanding of the meaning of the term "duty" in the metals processing provision.

[341] While one might argue that the court's holding in C.J. Tower was that antidumping duties are duties for drawback purposes, that would simply repeat the language of Section 211 of the 1921 Act itself, which hardly serves as a credible basis for a "general rule" that, forevermore, antidumping duties must be considered duties "for all purposes." This language is dicta whatever the measure of the actual holding of C. J. Tower.

minority's argument is not improved by citation to more recent cases which themselves add nothing to C.J. Tower.[342]

Also cited by petitioners and the minority is 19 U.S.C. § 1677h, which currently provides:

> For purposes of any law relating to the drawback of customs duties, countervailing duties and antidumping duties imposed by this title shall not be treated as being regular customs duties.

The minority of this Panel argue that in this statute Congress has provided separate treatment for antidumping duties and ordinary customs duties and that Congress's failure to provide such separate treatment in HTSUS item 9802.00.60 is "persuasive." For my part, however, I am not in fact persuaded.

In my judgment, 19 U.S.C. § 1677h should be construed in light of its historical context and its clearly limited purpose; it provides negligible support for the purpose to which the minority has put it. As quoted in footnote above, Section 211 of the *Antidumping Act of 1921* permitted the "special dumping duties" involved in that Act to benefit from the "laws relating to the drawback of customs duties." Thus, in 1921, it was Congress's judgment that drawback could apply to both regular customs duties and special antidumping duties. In 1988, however, Congress changed its mind. In the *Omnibus Trade and Competitiveness Act of 1988,*[343] Congress added a provision, Section 1334, codified at 19 U.S.C. § 1677h, which expressly reversed the old

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[342] The minority cites, for example, National Knitwear & Sportswear Association, 779 F. Supp. 1364, 1372 (Ct. Int'l Trade 1991), which again held that "dumping duties are remedial, not penal, in nature," noting that they were "'additional duties' to equalize competitive conditions between the exporter and American industries affected." (quoting Imbert Imports, Inc. v. United States, 331 F. Supp. 1400, 1406 n.10 (Ct. Int'l Trade 1971), in turn citing C.J. Tower.) These two points are true and obvious, and of course have absolutely nothing to do with the question of the interpretation of HTSUS item 9802.00.60 and its predecessor provisions.

[343] Pub. L. 100-418, 102 Stat. 1107 (1988).

rule—drawback will no longer apply to both regular customs duties and special antidumping duties; only the former need apply.[344] Considering the long-standing but steadily increasing sensitivity of Congress to the problems of unfair trade, the only surprise in this situation is that Congress waited as long as it did to change the rule.[345]

Petitioners and the minority also argue that it was the manifest purpose of HTSUS item 9802.00.60 to benefit American manufacturers and that construing that provision not to impact the antidumping laws runs counter to that statutory purpose. This too is not persuasive. In the first place, it is not for binational panels to independently determine what is "good" for American business and then interpret the statutes accordingly; in the United States, only Congress has the prerogative of calculating what benefits American business is to receive from its government, which it does by carefully calculating what the costs of providing those benefits are likely to be.[346] Congress had the opportunity to make such a calculation in 1954, when the metals processing

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[344] Section 1334 of the 1988 Act stated that "Section 779 (19 U.S.C. 1677h) is amended by striking out 'shall be treated as any other customs duties." and inserting "shall not be treated as being regular customs duties.".

[345] I would note that it has only been since 1988 that the minority could argue that the failure of Congress to provide separate treatment for antidumping duties and ordinary duties in HTSUS item 9802.00.60, as was done in 19 U.S.C. §1677h, was "persuasive." In fact, from 1921 until 1988, the situation was exactly the opposite. Commencing with the *Antidumping Act of 1921* through the *Trade and Tariff Act of 1984*, Pub. L. 98-573, 98 Stat. 2948, Congress saw the need to affirmatively declare that, for drawback purposes, antidumping duties should be considered the same as ordinary customs duties. Section 211 of the *Antidumping Act of 1921* is quoted above, while Section 779 of the latter Act provides: "For purposes of any law relating to the drawback of customs duties, countervailing duties and antidumping duties imposed by this title shall be treated as any other customs duties." For 67 years, therefore, Congress apparently felt the need to statutorily declare that, in this limited situation, antidumping and countervailing duties should be considered as ordinary customs duties, recognizing that absent such a declaration, they would not be so considered. It is in this context that the current language of 19 U.S.C. § 1677h should be understood.

[346] This is clearly a role that binational panels are unable, as well as unauthorized, to play.

provision was first enacted; and it had similar opportunities when the successor provisions were enacted. In each of these instances, however, the record is absolutely barren of any showing that Congress intended to provide importers with additional antidumping benefits (*i.e.*, reducing the amount of antidumping duties payable on unfairly traded metals imports) to the ordinary tariff benefits that would accrue to importers from the use of the metals processing provisions.

Secondly, I believe the Panel should take cognizance of the appropriate rule of statutory construction. As stated in Nassau Smelting and Refining Co. v. United States,[347] "the general rule is that, where grant of a privilege of free entry is concerned, the customs laws are to be construed 'most strongly in favor of the grantor.'" (citations omitted). In the context of the present issue, therefore, the presumption is not in favor of limiting the amount of antidumping duties that can be calculated by Commerce but against such limitation. Clear language in the statute or, if the statute is ambiguous, clear language in the legislative history would be necessary to support such a limitation; it cannot be presumed simply because to do so would be "good" for American business.

Finally, I have considered but am not persuaded by petitioners' argument that Commerce's present position is inconsistent with its treatment of "tolling" transactions and that this Panel should require consistent treatment.[348] Commerce argues that petitioners did not make this claim

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[347] 725 F. Supp. 544, 548 (Ct. Int'l Trade 1989)

[348] Panel Member Irish notes that Commerce's treatment in past tolling situations was in existence at the time that Congress enacted U.S. Note 6, with the apparent implication that Congress intended thereby to implement that past practice. The short answer to this argument is that Congress is fully capable of stating in express terms what it relies on in enacting legislation, and freely does so. In this case, however, it has not taken any note of the "rare" tolling situations, and there is no basis whatever for a conclusion that Congress intended that U.S. Note 6 should be interpreted in their light.

a part of the administrative record and states that "National has refused to permit Commerce to conduct a full investigation of this claim."[349] While Commerce admits that the antidumping duty calculations in tolling cases may "resemble" AGR import tariff calculations, Commerce distinguishes the tolling situations as "rare" and as situations where Commerce requires that the merchandise not be owned by the party performing the tolling.[350] Under these circumstances, even assuming that the issue was ripe for consideration by the Panel, I am not prepared to adhere to an interpretation of the statute that otherwise appears not to be supported by the language of the relevant statutes and the legislative history of those statutes.

In sum, therefore, I have not been persuaded by National Steel's arguments nor by the minority's views on this issue. Not only has Commerce advanced a statutory interpretation of HTSUS item 9802.00.60 that is reasonable and permissible, within the applicable standard of review, it has advanced an interpretation that is almost certainly correct. In the end, I am convinced that a straight-forward reading of HTSUS item 9802.00.60, holding that it applies to the calculation of ordinary customs duties, and a straight-forward reading of the antidumping laws, holding that Commerce should calculate antidumping duties in the manner that has been consistently required by the antidumping statutes since 1921, is correct. Thus, I have no hesitation in upholding Commerce's interpretation and the position taken by it in the final determination.

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[349] Commerce Response to National Steel, at 13, n.9.

[350] Id, at 13, n.10.

C. Dissenting Opinion of Panel Member Weiser

For the reasons stated below, I respectfully dissent from the panel majority which has affirmed the Department's determination that the partial exemption from duties, provided for under subheading 9802.00.60, HTSUS, does not extend to antidumping duties. It is my view, with which Panel Member Irish agrees, that the partial exemption afforded by subheading 9802.00.60 is applicable to antidumping duties and, accordingly, I would reverse the Department's determination on this issue.

Analysis

The point of departure from the majority's view is its observation that the language of the relevant statutes yields an ambiguous issue of statutory construction with no single plain meaning, thus requiring a finding as to whether the Department's interpretation is permissible. Because I find, upon viewing subheading 9802.00.60 in conjunction with the applicable legal notes, that the statutory mandate (and Congressional intent) is clear,[351] the question of whether the agency's construction of the statutory language is "permissible" does not arise. Rather, one must determine whether the Department's interpretation of the unambiguous words of the statute is contrary to law. In sum, I find that it is.

Subheading 9802.00.60 provides for a partial exemption of duty for U.S. metal products sent abroad for processing; specifically, the duty assessed against goods entered under this provision is "A duty upon the value of the repairs or alterations." Subheading 9802.00.60,

[351] Interestingly, all parties, including Commerce, agree that the statute is unambiguous on its face. CCC Brief, at 44; Commerce Response to CCC, at 55-56; National Steel Brief, at 31.

HTSUS.[352] (emphasis added). It is settled law that antidumping duties are "duties" as used within statutory references. C.J. Tower & Sons v. United States, 71 F.2d 438, 445 (C.C.P.A. 1934) (". . . the Congress desired and intended that the additional duties provided for in this [antidumping] act should be considered as duties for all purposes.") (interpreting the precursor to 19 U.S.C. §1673i (1982), current version at 19 U.S.C. §1677h (Supp.III 1985)). As there is no reason to believe that the "duty" referred to in the text of subheading 9802.00.60 excludes antidumping duties from its purview, it follows that such antidumping duties must also be assessed only upon the value of the repairs or alterations.

Further support for this conclusion is found in U.S. note 3(c), Subchapter II, Chapter 98, HTSUS, which provides, inter alia:

> 3. Articles repaired, altered, processed or otherwise changed in condition abroad. - - The following provisions apply only to subheadings 9802.00.40 through 9802.00.60, inclusive:
>
> * * *
> * * *
>
> (c) The duty, if any, upon the value of the change in condition shall be at the rate which would apply to the article itself, as an entirety without constructive separation of its components, in its condition as imported if it were not within the purview of this subchapter . . .

Note 3(c) explains the manner in which duty is calculated and assessed for merchandise classifiable under the AGR provision by contrasting treatment of such merchandise with that "not within the purview" of Subchapter II, Chapter 98. The rate assessed against both types of merchandise must be the same, but for AGR merchandise that rate is applied "upon the value of

[352] The origins of this provision trace back to Section 1615(g)(2) of the Tariff Act of 1930, which was added by the Customs Simplification Act of 1954, Pub. L. No. 83-768, § 202, 68 Stat. 1136, 1137-38 (1954), and which became item 806.30 of the Tariff Schedules of the United States (TSUS), the immediate predecessor to the HTSUS, in 1963.

the change in condition", whereas for all other merchandise the rate applies to the value of "the article itself, as an entirety without constructive separation of its components. . . ." To hold that Congress nevertheless intended to apply antidumping duties to the full value of AGR merchandise would require the reading of language into the statute that simply is not there. This I must decline to do.

Indeed, where Congress has wished to provide separate treatment for antidumping duties, it has explicitly done so. For instance, 19 U.S.C. § 1677h provides:

> For purposes of any law relating to the drawback of customs duties, countervailing duties and antidumping duties imposed by this subtitle shall not be treated as regular customs duties.[353]

The majority chooses to ignore the explicit statement in the C.J. Tower case that "the Congress desired and intended that the additional duties [antidumping duties] provided for in this act should be considered as duties for all purposes." C.J. Tower, 71 F.2d at 445. Likewise, it opts to give little or no weight to the fact that § 1677h removes antidumping duties from treatment as regular Customs duties for the limited purposes of drawback.[354]

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[353] In his concurring opinion, Panel Member Endsley correctly points out that the addition of this provision within the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1334, 102 Stat. 1107 (1988), made clear that drawback will no longer apply to antidumping duties. What he fails to explicate is why there is an absence of similar language in subheading 9802.00.60 or note 3(c). Looking at the two provisions (§ 1677h and subheading 9802.00.60) side by side, due weight must be given to the omission of language in the latter in terms of Congressional intent. Russello v. United States, 464 U.S. 16, 23 (1983) (citing United States v. Wong Kim Bo, 472 F.2d 720, 722); Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398 (Fed. Cir. 1994).

[354] Panel Member Endsley argues that a 1934 case (Tower) should not be dispositive of the scope of a 1954 statute and seeks to limit the effect of the C.J. Tower case in some unstated manner. Although Panel Member Endsley here seeks to portray the language in Tower as mere dicta, the court's position on this issue goes well beyond such a characterization. The Court of Customs and Patent Appeals reasoned that it was unable to distinguish how antidumping duties differed in nature from other "additional", "regular" duties for Customs purposes. Specifically, the Court

Nor does the majority consider relatively recent and repeated judicial and Congressional references to antidumping duties as "additional" "regular" duties. In National Knitwear & Sportswear Association v. United States, 779 F. Supp. 1364, 1372 (Ct. Int'l Trade 1991), the U.S. Court of International Trade characterized such duties as "additional", citing C.J. Tower. (See also Imbert Imports, Inc. et al. v. United States, 331 F.Supp. 1400, 1406 n. 10 (Cust.Ct. 1971)). Of particular note is the legislative history of 19 U.S.C. § 1677h, wherein in House Conference Report No. 576, the below was stated:

> *Present law*
>
> Duties paid on imported merchandise which is used in the manufacture of goods for export, may be refunded upon the exportation of such goods. To receive benefit of drawback, the completed article must have been exported within five years of the date of importation of the relevant duty-paid merchandise. The amount of refund is equal to 99 percent of the duties attributable to the foreign, duty-paid content of the exported article. Both antidumping and countervailing duties are treated as regular custom [sic] duties and thus are eligible for drawback.
>
> *House Bill*
>
> The House bill amends section 779 to prohibit antidumping and countervailing duties paid on imported merchandise from being eligible for refund under drawback provisions.

H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 625 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1658 (emphasis added).[355] The above Congressional and judicial pronouncements leave no

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likened such duties to marking duties which provided for an additional 10% ad valorem exaction on goods which were not properly marked and labelled. C.J. Tower, 71 F.2d at 445. The clarity of the reasoning of the court could not have been greater.

[355] In view of this cited legislative history, the observation of Panel Member Endsley to the effect that C.J. Tower cannot stand for the proposition that antidumping duties should be considered regular Customs duties as that would be chronologically illogical, is simply not borne out. The quoted legislative history indicates that, as recently as 1988, Congress regarded antidumping duties as regular Customs duties. Judicially, the courts have recognized this view as recently as 1991 (e.g., National Knitwear, supra).

room for any distinction to be made in the treatment of antidumping duties and regular Customs duties in the AGR context.

Commerce opines that its position assessing antidumping duties on the full value of the Canadian product, inclusive of the U.S. component, is consistent with U.S. note 6, subchapter II, chapter 98, HTSUS.[356] Commerce Response to National Steel at 24-25. Note 6 provides:

> Notwithstanding the partial exemption from ordinary customs duties on the value of the metal product exported from the United States provided under subheading 9802.00.60, articles imported under subheading 9802.00.60 are subject to all other duties, and any other restrictions or limitations, imposed pursuant to title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.), or Chapter 1 of title II or Chapter 1 of title III of the Trade Act of 1974 (19 U.S.C. 2251 et seq., 19 U.S.C. 2411 et seq.).

Commerce takes the position that Note 6 plainly draws a distinction between antidumping duties and ordinary Customs duties and provides an exception to the general rule that antidumping duties are considered ordinary Customs duties. Commerce Response to National Steel at 14; Hearing Transcript, July 12, 1994 (Panel Document 235) at 18. Commerce insists that note 6 is clear on its face and requires the imposition of antidumping duties on the full value of a product classifiable under subheading 9802.00.60, HTSUS. CCC and National Steel claim that, while note 6 mandates the imposition of dumping duties on AGR merchandise, it does not impose such duties on the full value of the goods.

I do not agree with Commerce's interpretation of note 6. The legislative history to note 6 provides:

> Subheading 9802.00.60 of the HTS provides that the duty rates applicable to metal articles that are exported for processing and then returned to the United States for

[356] U.S. Note 6 was enacted as Section 479A of the Customs and Trade Act of 1990, Pub. L. 101-382, 104 Stat. 629, 705 (1990).

> further processing will be assessed only on the value of the foreign processing. This section provides that such entries will not be exempted from the application of antidumping and countervailing duties, or any duties and restrictions applicable under Chapter 1 of title II, or Chapter 1 of title III, of the Trade Act of 1974. The bill does not address the method by which such duties are calculated or assessed.

S. Rep. No. 252, 101st Cong., 2d Sess. 7 (1990), reprinted in 1990 U.S.C.C.A.N. 928, 934 (emphasis added).

The language of the report emphasized above is most telling in that it expressly states that, while AGR entries are not to be exempted from the application of antidumping duties, the method of calculation or assessment is simply not addressed by the bill. Contrary to Commerce's view, this is wholly consistent with a reading of note 6 as merely confirming that AGR products are subject to the imposition of antidumping duties as a general matter. To find that note 6 affirmatively requires that antidumping duties are to be calculated or assessed against the full value of AGR merchandise is to read a meaning into the statute which does not exist. By the same token, the fact that note 6 is silent as to the calculation or assessment of antidumping duties in the AGR context does not mean that Congress has not addressed the issue at hand through the operation of subheading 9802.00.60 and note 3(c).

In short, nothing in note 6 or in the legislative history indicates that Congress desired a modification of the AGR assessment for goods subject to antidumping duties. Given Congress' studied silence, I cannot fashion a reading beyond that which may be discerned from the plain text of the pertinent HTS provisions; to do so would be contrary to acceptable and appropriate norms of statutory construction.[357]

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[357] Panel Member Endsley apparently goes well beyond the foregoing position of the Department in that he believes that note 6 merely confirms a dichotomy between dumping duties and regular

As regards another Commerce concern, Commerce claims, both in the General Issues Appendix to the final determination (58 Fed. Reg. at 37065) and in its Response to CCC (at 64-69), that an interpretation of subheading 9802.00.60 which limits application of antidumping duties to the foreign value added would be inconsistent with Commerce's statutory mandate under 19 U.S.C. §1673e, which provides that antidumping duties must be assessed "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." In other words, such application would, according to Commerce, mean that the dumping margin would not be fully offset.

It is my view that Commerce must be cognizant of the limitations imposed by the AGR provision when it requires the deposit of estimated antidumping duties and calculates antidumping margins for assessment purposes so that such duties are not applied against U.S. origin

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duties; ergo, importations under subheading 9802.00.60 are not, and have never been, exempted under the antidumping laws. This departure from the Department's position that note 6 was the instrument by which AGR goods would not be exempt from the working of the antidumping laws is noteworthy. As discussed above, nothing in note 6 speaks to any kind of dichotomy or separation as between dumping duties and regular duties, which Panel Member Endsley states to consistently exist since the advent of the Antidumping Act of 1921. Rather, the only logical reading of note 6 is that it simply reaffirms that AGR products are, in fact, subject to the imposition of antidumping duties, however calculated or assessed.

Mr. Endsley also states that antidumping duties have been calculated in the same fashion since 1921, unchanged (with respect to AGR goods) in 1954, when the first AGR provision was enacted, through the present. I am at a loss to fathom how he has divined the manner in which dumping duties on AGR merchandise has, in fact, been calculated. Nor is any support therefor proffered. In addition, I have particular difficulty gleaning how Panel Member Endsley arrives at the conclusion that Congress could possibly have intended such a negative impact upon American business by denying it the AGR exemption in the antidumping framework. Thus, in examining the statutory language and the Congressional intent behind it, I cannot ignore the apparent discrepancy which results when one gives note 6 the effect which Panel Member Endsley has accorded it.

components.[358] Accordingly, under this panel member's interpretation, Commerce would assess antidumping duties in a manner which fully offsets the dumping margin attributable to foreign processing. I recognize that such application of the AGR provision may mean that, in certain limited circumstances, a foreign manufacturer sourcing its input material in the United States may sell processed steel at dumped prices without incurring antidumping duties which may be attributable to the U.S. components. However, the law must be interpreted as written. Indeed, it is well settled that a court's task is interpretation, not legislation. See e.g., Hobbs v. McLean, 117 U.S. 567, 579 (1886) ("When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe."); Schaper Mfg. Co. v. U.S. ITC, 717 F.2d 1368, 1373 (Fed. Cir. 1983) ("If, as appellants suggest, present-day 'economic realities' call for a broader definition to protect American interests (apparently including many of today's importers) it is for Congress, not the courts or the Commission, to legislate that policy."). Therefore, it is for the Congress, not this Panel, to resolve any inconsistency with the purpose of the antidumping law which may be brought about by application of the plain language of the AGR provision.

Thus, based upon all the foregoing, I would hold that subheading 9802.00.60 and the applicable legal notes provide that antidumping duties are only assessable upon the value of the change of condition in Canada and not on the full value of the imported product. Therefore, sheet steel which has been substantially transformed in Canada should be assessed with duty accordingly and I would remand this determination to the Department for proceedings consistent therewith.

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[358] I express no opinion as to the method by which Commerce must make such calculations.

D. Dissenting Opinion of Panel Member Irish

Panel Member Weiser and I dissent from the majority decision to uphold Commerce's determination on this issue. I am in substantial agreement with the analysis contained in Panel Member Weiser's opinion, which I adopt as my own except in certain respects set out below.

The relationship between the anti-dumping provisions and HTS 9802.00.60 presents some ambiguity. I am persuaded, however, that priority must be given to the specific language of the AGR provisions and that antidumping duties are not applicable to the full value of imported AGR goods.

It is odd that, after forty years, this appears to be the first time this precise question has arisen. In fact, the Department on several occasions has dealt with a very similar question concerning the application of antidumping duties to tolled sales. In tolled transactions, goods are sent outside the country for processing and return without a change in title. On re-entry of the goods, Commerce has a longstanding practice of comparing tolled sales to tolled sales and calculating antidumping margins on the difference between the foreign value added and the tolling charge.[359] The practice was in place in 1990, when Note 6 was added to the AGR item. It seems to me that this practice cannot be ignored when Note 6 is interpreted: Chevron, U.S.A., Inc. v.

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[359] Brass Sheet and Strip from Canada (Preliminary Determination of Dumping), 51 Fed.Reg. 30093 (August 22, 1986); Brass Sheet and Strip from Canada (Final Determination of Dumping), 51 Fed.Reg. 44319 (December 9, 1986); Brass Sheet and Strip from the Federal Republic of Germany (Final Determination of Dumping), 52 Fed.Reg. 822 (January 9, 1987); Color Television Receivers ... from Taiwan (Final Results of Administrative Review), 55 Fed.Reg. 47093 (November 9, 1990); Chrome-Plated Lug Nuts from Taiwan (Final Determination of Dumping), 56 Fed.Reg. 36130 (July 31, 1991); Brass Sheet and Strip from Canada (Final Determination of Circumvention), 58 Fed.Reg. 33610, 33612 (June 18, 1993). The treatment of tolling in Chrome-Plated Lug Nuts from Taiwan was approved by the Court of International Trade: Consolidated International Automotive, Inc. v. United States, 809 F.Supp. 125, 129 (Ct.Int'l Trade, 1992).

Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer...").

If the statutory scheme calls for a comparison of foreign value added and the processing charge for tolled sales, why is a similar construction not called for under HTS 9802.00.60? AGR goods differ from tolled goods in that title is transferred and, in addition, AGR goods must be subjected to a process of manufacturing in the United States both before and after the foreign processing. In its brief before the panel, Commerce argued that to construe 9802.00.60 as limiting the application of antidumping duty on AGR goods would permit foreign manufacturers to mask dumping by sourcing their inputs in the United States.[360] It is difficult to see why this danger would be present for AGR goods and not for the existing treatment of tolled goods, a practice affirmed in the same brief.[361]

In this dissenting opinion, I do not wish to imply that an agency can never change its statutory constructions. When an ambiguity must be resolved, however, it seems to me that greater deference should be given to considered, longstanding and still current agency interpretations than to interpretations in isolated, although important, matters.

IX. HOLDINGS ON OTHER ISSUES

The Panel affirms the Department's final determination in all other respects.

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[360] Commerce Response to National Steel, at 26.

[361] Id. at 13-14. In both cases, of course, the amount of foreign processing must be sufficient to effect a substantial transformation in order for any antidumping duties to apply.

UNITED STATES – CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW

IN THE MATTER OF:	)	
	)	
CERTAIN CORROSION-RESISTANT	)	SECRETARIAT FILE NO.
CARBON STEEL PRODUCTS	)	USA-93-1904-03
FROM CANADA	)	

REMAND ORDER

The Panel orders the Department of Commerce to make a determination on remand consistent with the instructions and findings of this opinion. The remand determination shall be made within 60 days.

ISSUED ON OCTOBER 31, 1994

SIGNED IN THE ORIGINAL BY:

_____
Brian E. McGill, Chairman

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Harry B. Endsley

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Maureen Irish

_____
Ross Stinson

_____
Steven S. Weiser