UNITED STATES – CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL

IN THE MATTER OF:	**)**	
	)	
CERTAIN CUT-TO-LENGTH	**)**	**USA-93-1904-04**
CARBON STEEL PLATE	**)**	
FROM CANADA	**)**	

OPINION AND ORDER OF THE PANEL

October 31, 1994

STELCO, INC., IPSCO, 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 Bethelehem Steel Corporation, Inland Steel Industries, Inc., and U.S. Steel Group (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 cut-to-length carbon steel plate from Canada (the "subject merchandise") is being sold in the United States at less than fair value.[1]

II. THE ADMINISTRATIVE PROCEEDINGS AND DETERMINATIONS

On June 30, 1992, Bethlehem Steel Corporation, Inland Steel Industries, Inc., and U.S. Steel Group (a unit of USX Corporation) ("Petitioners") filed a petition alleging sales at less than fair value of certain cut-to-length steel plate from Canada. The Department initiated an investigation on July 20, 1992.[2]

On January 27, 1993, the Department issued its preliminary determination that respondents Stelco, Inc. ("Stelco") and IPSCO, Inc. ("IPSCO") 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) (hereinafter "Final Determination").

[2] Certain Hot-Rolled Carbon Steel Flat Steel 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 corrosion-resistant flat products.

cut-to-length steel plate in the United States at less than fair value.[3] Following the preliminary determination, on February 9, 1993, the Department initiated a cost of production ("COP") investigation of IPSCO.[4] The Department had previously initiated a COP investigation of Stelco on July 20, 1992, simultaneously with its initiation of the less than fair value investigation.

On June 21, 1993, the Department issued its final determination that Stelco and IPSCO had sold, or were likely to sell, cut-to-length steel plate in the United States at less than fair value. The final weighted-average margins for Stelco and IPSCO were 68.70 percent and 1.47 percent, respectively. The "all others" rate was determined to be 61.95 percent.[5] Simultaneously with the final determination, the Department published a "General Issues Appendix" addressing issues common to the various steel investigations.[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) (hereinafter "Preliminary Determination").

[4] Pub. Doc. 427, Fiche 118, Frame 50. 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. __ or "Cost Verification Doc. _ ." As the administrative record is also on microfiche, such documents are also identified by their respective microfiche and frame numbers, ""File __," "Fiche __."

[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 cut-to-length steel plate from Canada,[7] the Department published an antidumping duty order regarding such imports.[8]

The Canadian parties, Stelco and IPSCO, filed separate requests for Binational Panel review of the Department's final determination.[9] The Petitioners in the underlying investigation ("U.S. Producers") also filed a complaint.

IPSCO, Stelco, and the U.S. Producers filed briefs in support of their complaints on March 22, 1994. On May 23, 1994, the Department filed response briefs in support of its final determination, and IPSCO and the U.S. Producers filed response briefs in support of various aspects of the final determination. IPSCO, Stelco, and the U.S. Producers filed reply briefs on June 7, 1994. A hearing was held in Washington, D.C., on July 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. 41734 (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-93-1904-01USA, at 14.

IV. SUMMARY OF HOLDINGS

A. Holdings on IPSCO Issues

1. **IPSCO Product Matches**: The Panel affirms the Department's product matches for IPSCO sales.

2. **Credit Expense Adjustment**: The Panel grants the Department's request for a remand to apply the LIBOR rate.

3. **Inclusion in IPSCO's COP of Certain Contingent Expenses**: The Panel remands this issue for recalculation of IPSCO's COP to reflect non-realization of certain contingent expenses.

4. **Foreign Exchange Gains Excluded from COP**: The Panel upholds the Department's treatment of IPSCO's net gain on foreign exchange transactions.

5. **Correct Methodology for Allocation of G&A**: The Panel upholds the Department's G&A allocation methodology.

6. **G&A Calculation/Ministerial Error**: The Panel orders a remand on the error made in the IPSCO calculation that the Department has agreed to correct. The Panel authorizes the Department to reexamine its treatment of IPSCO R&D expenses in the calculation of G&A. The Panel directs the Department to evaluate whether IPSCO's company-wide miscellaneous income figure should be used in the calculation of G&A, and to fully justify any refusal to do so.

B. Holdings on U.S. Producers Issues

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

2. **Credit Expense Adjustment**: The Panel grants the Department's request for a remand to apply the LIBOR rate.

3. **Ministerial Error**: The Panel remands this issue for recalculation of IPSCO's COP to remove the long-term interest income offset from IPSCO's consolidated interest expense.

C. Holdings on Stelco Issues

1. **Exhaustion of Administrative Remedies**: The Panel declines to interpose the exhaustion doctrine.

2. **Use of a Total "Best Information Available" Rate for Stelco's Cut-to-Length Plate**: The Panel upholds the Department's resort to total BIA and does not find the Department's selection of the total BIA rate to be punitive or otherwise in error.

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

V. HOLDINGS ON IPSCO ISSUES

A. IPSCO Product Matches

1. Background and Arguments

To make price comparisons, Commerce must match U.S. sales of subject merchandise with home market sales of "such or similar merchandise."[38] "Such merchandise" is defined as "merchandise which is identical in physical characteristics and in all relevant commercial respects" with subject merchandise.[39] "Similar merchandise" is "like [the subject merchandise] in component material or materials and in the purposes for which used. . . ."[40]

To match U.S. and home market sales, Commerce established a product hierarchy comprised of a rank-ordered list of carbon steel plate characteristics.[41] Commerce invited comments from all parties, including IPSCO, on the proposed hierarchy.[42] IPSCO replied that it did not believe any additional characteristics needed to be added to those proposed by Commerce.[43]

In reporting its sales, IPSCO modified Commerce's hierarchy. In the second position on the hierarchy, rather than distinguishing steel by "grade," IPSCO used its internal product codes

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[38] 19 U.S.C. §1677(16).

[39] 19 U.S.C. §1677(16)(A).

[40] 19 U.S.C. §1677(16)(B).

[41] General Issues Doc. 40, Fiche 11, Frame 44.

[42] See, e.g., General Issues Doc. 23, Fiche 3, Frame 48.

[43] See Pub. Doc. 85, Fiche 18, Frame 22.

to distinguish between coiled plate and heavy plate.[44] In its final determination, Commerce rejected IPSCO's modification, and corrected for it by collapsing the two IPSCO product codes into one Commerce product number. Thus, in the thickness range of .3125" to 1.000", Commerce pooled together coiled and heavy plate.[45]

IPSCO contends that even if the Department's hierarchy is relevant to the choice of similar merchandise, the hierarchy should not be used to match sales where IPSCO has used its product codes to match identical merchandise. IPSCO criticizes the Department's hierarchy for ignoring the physical differences between plate cut-to-length from coil and heavy plate. IPSCO specifically points to "edge"[46] and "thickness"[47] distinctions. IPSCO asserts the edge criterion is commercially relevant because it identifies plate cut-to-length from coil, which possesses a tendency to warp.

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[44] Pub. Doc. 229, Fiche 64, Frame 14.

[45] This is the only thickness range in which home market sales of heavy plate and cut-to-length plate could have been matched interchangeably with U.S. sales of subject merchandise, given the specific dimensions of heavy plate and cut-to-length plate produced by IPSCO. See Reply Brief Submitted on behalf of IPSCO, Inc. (hereinafter "IPSCO Reply Brief") June 7, 1994, at 27 n.12; see also Conf. Doc. 240, Fiche 405, Frame 62.
(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.)

[46] "Edge" was a characteristic in Commerce's proposed and final hierarchies for hot-rolled but not for cut-to-length plate. See General Issues Doc. 23, Fiche 3, Frames 49-52; General Issues Doc. 40, Fiche 11, Frames 37, 44.

[47] IPSCO points out that its thickest coiled plate product is thinner than its thinnest discrete plate product. See Conf. Doc. 248, Fiche 410, Frame 70. Therefore, when Commerce matched sales of coiled plate to sales of discrete plate, Commerce matched sales of merchandise of different thicknesses.

IPSCO concludes that only its internal product classification system includes all the commercially relevant characteristics of the subject merchandise.[48]

Commerce argues that it must match products in accordance with characteristics that are commercially relevant for the steel industry as a whole, not just for IPSCO customers. Commerce set out those characteristics in its hierarchy, which it used to match both identical and similar subject merchandise.[49] Commerce contends that IPSCO cannot be allowed to add or modify a characteristic to suit IPSCO's own internal product coding system. The Department points to its statutory duty to choose product matches, which it may not abdicate to a respondent.[50]

The U.S. Producers support Commerce's decision. They contend that IPSCO's distinction between coiled and heavy plate is based on the use and value of the merchandise, which are irrelevant in identifying identical merchandise, and that any physical difference between coiled and heavy plate was adequately captured by Commerce's thickness and width categories.

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[48] Any particular IPSCO product code describes merchandise with seven or eight characteristics. See Hearing Transcript, July 12, 1994, Panel Doc. 212, at 17.

[49] See id. at 30, 46, 58.

[50] See Timken Company v. United States, 630 F. Supp. 1327, 1338 (Ct. Int'l Trade 1986).

2. Analysis and Decision

To consider whether merchandise is identical (or similar), Commerce must define the merchandise.[51] Commerce has discretion in the establishment of a product characteristic hierarchy as an aid in its selection of product matches.[52]

Commerce defends the accuracy of the plate hierarchy by asserting that it included an edge criterion (which corresponds exactly with the "warp" characteristic).[53] The Panel's review of the Department questionnaires disclosed that while an edge criterion was part of the hierarchy for hot-rolled sheet, no edge criterion appears in the cut-to-length plate matching hierarchy.[54] Nevertheless, the Panel accepts that the plate hierarchy was established based on the expertise of the Department and the parties. IPSCO was given an opportunity to contribute to the development of the hierarchy. IPSCO's asserted belief that the hierarchy would simply not apply given its internal matches of identical merchandise is misguided. The hierarchy is developed with the goal of identifying all important characteristics for matching purposes.

IPSCO's argument rests on the contention that its internal product classification system identifies identical goods, and by law must be elevated over the Department matches of non-identical goods resulting from the use of the product characteristic hierarchy.

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[51] Identical merchandise is defined solely by physical characteristics. Monsanto Company v. United States, 698 F. Supp. 275, 277 (Ct. Int'l Trade 1988).

[52] United Engineering & Forging v. United States, 779 F. Supp. 1375, 1380-82 (Ct. Int'l Trade 1991), aff'd without op., 996 F.2d 1236 (Fed. Cir. 1993).

[53] Reponse Brief of the Investigating Authority to the Brief of IPSCO, Inc. (hereinafter "Commerce Response to IPSCO"), May 23, 1994, at 43-44.

[54] General Issues Doc. 40, Fiche 11, Frame 44.

Rarely are two objects exactly the same in all physical respects. The Panel cannot say that IPSCO's proposed matches identify identical goods any better than do the Department's matches. For example, despite IPSCO's complaint that Commerce has matched goods of different thicknesses, IPSCO's internal product coding system also apparently matches goods within a range of product dimensions.[55]

Indeed, it is not clear that IPSCO's proposed matches are better than those produced by application of the Department hierarchy. The Panel does not consider whether a tendency to warp is an important physical distinction between plate cut from coil and heavy plate because such information was not considered by the Department.[56] The Department possesses discretion to modify an established hierarchy to achieve more accurate product matches.[57] Nevertheless, it does not abuse its discretion by adhering to a hierarchy established in the course of an investigation. The Panel affirms the Department's product matches for IPSCO sales.

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[55] See IPSCO Reply Brief at 27, n.12; and Hearing Transcript, July 12, 1994, Panel Doc. 212, at 18-19.

[56] IPSCO first presented evidence of coiled plate's tendency to warp on May 21, 1993, in its administrative rebuttal brief. Commerce specifically rejected this evidence, given the late stage in the administrative proceeding at which it was presented. See Pub. Doc. 663, Fiche 175, Frame 50; see also Hearing Transcript, July 12, 1994, Panel Doc. 212, at 30. This Panel's review is limited to evidence on the administrative record. See 19 U.S.C. §1516a(b)(2)(A)(i); see also Star-Kist Foods v. United States, 600 F. Supp. 212, 215 (Ct. Int'l Trade 1984) ("[T]he scope of the record for purposes of [Panel] review [is] 'information which was before the relevant decision-maker at the time the decision was rendered.'").

[57] See, e.g., Certain Corrosion-Resistant Carbon Steel Products From Canada, USA-93-1904-03 (October 31, 1994), Section VII. C.

B. Credit Expense Adjustment

1. Background and Arguments

In calculating U.S. price ("USP"),[58] Commerce deducts an imputed credit expense, which expense is related to the delay on receipt of payment for goods sold and shipped to customers. Before 1990, Commerce always used the home market credit rate for a respondent in imputing this expense. Following several court cases, Commerce now uses a U.S. or other rate if a party can demonstrate access to funds at that rate.[59] Here, Commerce used a U.S. credit expense rate on purchase price sales to impute credit expense for IPSCO. IPSCO maintains that the Department applied the wrong interest rate in calculating its U.S. credit expense adjustment, applying the higher U.S. rate, rather than the London Interbank Borrowing Rate ("LIBOR"). IPSCO maintains that the Department is required to use the lowest borrowing rate to which a respondent had access, even looking across international borders, and even if the respondent did not draw on such credit during the period of investigation.[60] Commerce agrees and requests a remand to apply LIBOR for IPSCO's imputed interest expense.

The U.S. Producers complain that Commerce's use of a U.S. interest rate was based on [ ].[61] The U.S. Producers also criticize the remand request, complaining that the record lacks

[58] 19 U.S.C. §1677a.

[59] See, e.g., LMI-La Metalli Industriale v. United States, 912 F.2d 455, 460-61 (Fed. Cir. 1990); United Engineering & Forging, 779 F. Supp. at 1386-87.

[60] See United Engineering & Forging, 779 F. Supp. at 1386-87.

[61] See Conf. Doc. 58, Fiche 276, Frame 73.

reference to LIBOR, and that [

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2. Analysis and Decision

The Panel has examined the record evidence and found numerous references to the availability of LIBOR funds.[62] We do not find that [

]. Furthermore, calculating imputed interest is a purely hypothetical exercise. We find that Commerce could reasonably conclude, after reviewing IPSCO's records, that IPSCO had access to funds at the LIBOR rate. For this reason, we do not address U.S. Producers' arguments respecting the selection by Commerce of the U.S. rate. The Department's request for a remand to apply the LIBOR rate is granted.

C. Inclusion in IPSCO's COP of Certain Contingent Expenses

1. Background and Arguments

In its final determination, Commerce included in IPSCO's cost of production ("COP") certain contingent expenses reported in IPSCO's financial statements. IPSCO complains that the expenses were reported for financial accounting purposes but were never realized as actual expenses. IPSCO notes that the Department verified IPSCO documentation that for one contingency (potential layoff expenses), IPSCO had no expense, and with respect to the second contingency (management incentive bonuses), IPSCO had a much smaller expense than reported.[63]

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[62] See id.

[63] IPSCO Brief in Support of Complaint (hereinafter "IPSCO Brief"), March 23, 1994, at IV-15.

Commerce responds that it must tie a respondent's reported data to its audited financial statements. The Department points out that IPSCO did not change its book entries to reflect the fact that the expenses had not been realized.

The U.S. Producers support the Department's final determination as being consistent with Commerce practice, under accrual based accounting, of recognizing expenses as they are incurred, regardless of when the actual cash payments are made.[64]

2. Analysis and Decision

The Panel recognizes the importance of linking a respondent's reported data to its financial statements. The objective of linking reported data to a company's financials is to test the accuracy of the reported data. That objective is not served by the Department's actions here.

The expenses at issue were not actual costs. Moreover, because IPSCO did not incur an obligation to pay the costs in the past or the future, the Panel does not believe they are properly characterized as accrued expenses.[65] Rather, the costs were contingent, but reflected in their full estimated amount in the IPSCO financials. The Department verified that the two contingent

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[64] Brief in Support of Certain Sections of the Final Determination Submitted on Behalf of Certain United States Steel Producers (hereinafter "U.S. Producers Response Brief"), May 24, 1994, at 75, citing Polyethylene Terephthalate Sheet and Strip from Korea ("PET Film from Korea"), 56 Fed. Reg. 16305 (April 22, 1991).

[65] See R.A. Anthony & J.S. Reese, *Accounting: Text and Cases*, 40, 256 (Seventh edition) (1983). Accrued expenses represent due and payable claims. *Black's Law Dictionary*, 37, 38 (Fourth edition) (1968). Compare our companion decision, where we upheld the Department's inclusion in COP of a respondent's accrued costs, which the respondent had elected to fully expense in a single year. See Certain Corrosion-Resistant Carbon Steel Products From Canada, USA-93-1904-03, Section VII. F.

expenses were, in fact, not incurred as estimated.[66] The estimates in the financials serve no utility in testing the documentation of whether the contingent expenses were in fact incurred.

Having accepted the veracity of IPSCO documentation that the contingent costs had not been realized, the Department should not have included the expenses in IPSCO's COP. The Panel notes that its finding is a narrow one which turns on the Department's verification of actual expenses incurred and the contingent nature of the financial reporting.

A remand to the Department to correct calculation of IPSCO's COP effects fairness because the non-occurrence of the contingent expenses cannot be recognized in the first administrative review. Commerce will refuse to consider a reversal booked for overstatement of a previous liability, because such does not relate to the merchandise under investigation in the administrative review.[67] The Panel believes Commerce's policy of relating costs to subject merchandise is reasonable. Thus, where the respondent can substantiate, and the Department can verify, non-realization of booked contingent costs, such should be considered in calculating COP to the extent they relate to subject merchandise.

The Panel remands this matter for recalculation of IPSCO's COP to reflect non-realization of the contingent expenses at issue.

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[66] See Conf. Doc. 240, Fiche 405, Frames 68-71; see also IPSCO Cost Verification Doc. C-1, Fiche 22, Frame 4; Cost Verification Doc. C-61, Fiche 33, Frame 58; Cost Verification Doc. C-39, Fiche 30, Frame 8.

[67] See, e.g., Flat-Rolled Carbon Steel Products from France, 58 Fed. Reg. 37125, 37135 (July 9, 1993).

D. Foreign Exchange Gains Excluded from COP

1. Background and Arguments

Investigating a timely allegation that IPSCO was selling in its home market at less than its COP,[68] the Department instructed IPSCO to include general and administrative ("G&A") expenses in its COP calculations.[69] As part of its G&A expenses, IPSCO reported a single figure representing a net foreign exchange gain in the Canadian dollar value of its U.S. dollar payables, receivables, and other operating accounts associated with the production of carbon steel plate.[70] IPSCO offset this net foreign exchange gain against interest expense, one of its general expenses.[71]

IPSCO produces both subject merchandise (carbon steel plate) and non-subject merchandise (other steel products) in the same mill.[72] Because IPSCO's input materials are consumed in the melt process, IPSCO cannot trace from a particular melt to a particular purchase of materials.[73] Accordingly, IPSCO did not record, and was unable to record, foreign exchange

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[68] 19 U.S.C. §1677b(b).

[69] "G&A expenses are those expenses which relate to the activities of the company as a whole rather than to the production process." Pub. Doc. 428, Fiche 118, Frame 66.

[70] See Pub. Doc. 664, Fiche 176, Frames 26-27 (reporting that "[t]he exchange gains arise from purchases of raw materials in the United States in U.S. currency, and sales of product in the United States in U.S. currency."); see also Conf. Doc. 227, Fiche 398, Frame 51.

[71] See Pub. Doc. 503, Fiche 130, Frame 63 ("Interest expense was calculated net of consolidated exchange gains, which are realized on company operations such as raw material purchases and sales of finished goods."). IPSCO also suggests that the exchange gain could alternatively have been applied as an offset to materials cost. See IPSCO Brief, at IV-9.

[72] IPSCO Reply Brief, at 13-14.

[73] IPSCO Reply Brief, at 10 n.5.

gains and losses on a product-specific basis.[74] IPSCO's accounting system instead allocated foreign exchange gains and losses, as well as other cost items, over all sales.[75] IPSCO divided the net foreign exchange gain by the total cost of goods sold and then allocated the final amount *pro rata* over both the subject and non-subject merchandise.

In its final determination, the Department refused to include the net foreign exchange gain in the calculation of IPSCO's COP because IPSCO "was unable to [specifically] identify the transaction gains to the subject merchandise."[76] IPSCO complains that its allocation to the subject merchandise of a proportional share of its net foreign exchange gain was reasonable and the most specific allocation method possible, given the realities of its production process.[77] IPSCO also asserts that Commerce has allocated data spread over categories broader than the subject merchandise in past investigations.[78] Finally, IPSCO suggests that Commerce is following the *de facto* and unfair practice of allowing losses to be allocated over all products, but refusing to allow gains to be so allocated.[79]

The Department argues in response that a respondent must establish that a foreign exchange gain is related to the cost of producing the subject merchandise in order to include the gain in its COP.[80] The Department further argues that it could not determine, from the single

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[74] IPSCO Reply Brief, at 14. See also Conf. Doc. 228, Fiche 398, Frames 46-48.

[75] IPSCO Reply Brief, at 11.

[76] Final Determination, 58 Fed. Reg. at 37113.

[77] See Conf. Doc. 240, Fiche 405, Frame 73.

[78] IPSCO Brief, at IV-5.

[79] IPSCO Brief, at IV-9 to IV-10.

[80] Commerce Response to IPSCO, at 12.

figure that IPSCO reported, what portion of IPSCO's net exchange gain was attributable to payables (which are properly included in COP), as opposed to receivables (which are not).[81] Moreover, some of IPSCO's reported foreign exchange gains appear to have occurred outside the period of investigation.[82]

2. Analysis and Decision

The COP calculation is "based on the cost of materials [("COM")], fabrication, and general expenses . . . incurred in producing such or similar merchandise."[83] If their validity is properly established, foreign exchange transaction gains and losses incurred on the purchase of materials used to produce subject merchandise will be included in COP as an adjustment to COM.[84] But it is essential that the cost item be attributable to the subject merchandise.[85]

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[81] Id. The final determination focused on IPSCO's inability to attribute the foreign exchange gains to subject merchandise and did not discuss the payables/receivables rationale. Nevertheless, foreign exchange transaction gains and losses on receivables could only be part of the cost of sales, not the cost of manufacture. Therefore, the payables/receivables rationale is implicit in Commerce's exclusion of cost of sales from the rest of COP. See General Issues Doc. 40, Fiche 11, Frame 46.

[82] Pub. Doc. 616, Fiche 158, Frame 26.

[83] 19 C.F.R. §353.51(c).

[84] Small Business Telephone Systems from Korea, 54 Fed. Reg. 53141, 53149 (December 27, 1989) (Commerce "recognizes gains/losses . . . on foreign currency transactions . . . only if specifically identified by the manufacturer as part of the manufacturing costs incurred to produce the products under investigation."). See also Commerce Response to IPSCO, at 14 ("Such 'exchange gains' [incurred with respect to the purchase of input materials] affect the cost of producing the merchandise; therefore, Commerce takes such 'exchange gains' or 'exchange losses' into account when determining the cost of producing the subject merchandise.").

[85] See Final Determination, 58 Fed. Reg. at 37113, citing Dynamic Random Access Memory Semiconductors From Korea (hereinafter "DRAMs from Korea"), 58 Fed. Reg. 15467, 15480 (March 23, 1993); see also Torrington Company v. United States, 818 F. Supp. 1563, 1578 (Ct. Int'l Trade 1993) (Commerce may not make any adjustment to foreign market value that is attributable to merchandise not covered by the investigation.); Certain All-Terrain Vehicles from

It is respondent's burden to establish the validity of any requested adjustment.[86] IPSCO did not provide information from which Commerce could determine the total number of all input purchases, or the total number of input purchases for subject merchandise, that incurred such foreign exchange gains or losses. Therefore, Commerce could not calculate an accurate ratio for IPSCO, and thus could not properly allocate a portion of its net foreign exchange gain to the subject merchandise.

If a respondent's records do not specifically apportion a cost item to the subject merchandise, Commerce, in limited instances, will make a *pro rata* allocation.[87] However, a *pro rata* allocation is appropriate only when a cost item is, "by its very nature, not attributable to a particular product,"[88] or when the cost item is uniformly attributable to subject and non-subject merchandise and the total amount of the cost item is known.[89] Nothing on the record suggests

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Japan, 54 Fed. Reg. 4864, 4866-67 (January 31, 1989) (Commerce rejected the respondent's claim to include foreign exchange gains in COP because "they were not demonstrated to be directly related to the production of [the subject merchandise]."); Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan, 58 Fed. Reg. 28556, 28560 (May 14, 1993) (Commerce refused to make an adjustment for exchange gains because the respondent "did not identify the exchange rate gains to the materials used for the products under investigation.").

[86] See Timken Company v. United States, 673 F. Supp. 495, 513 (Ct. Int'l Trade 1987); see also NTN Bearing Corp. of America v. United States, 835 F. Supp. 646, 652 (Ct. Int'l Trade 1993) ("[I]t is the respondent who bears the burden of establishing that it is entitled to an adjustment by supplying the agency with adequate information upon which to base its decision.").

[87] See, e.g., Welded Stainless Steel Pipe from Malaysia, 59 Fed. Reg. 4023, 4027 (January 28, 1994) ("In light of the specific circumstances of this case," Commerce allowed an allocation across product lines of the fabrication costs associated with machinery used to manufacture both subject and non-subject merchandise.).

[88] Commerce Response to IPSCO, at 21, citing Antifriction Bearings from France, 58 Fed. Reg. 39729, 39751 (July 26, 1993).

[89] See, e.g., Smith-Corona, 713 F.2d at 1580.

that foreign exchange transaction gains and losses were uniform across all products. Therefore, allocating IPSCO's net foreign exchange gain on a *pro rata* basis across all products would inaccurately gauge its impact on the COP of the subject merchandise.

The record also indicates that IPSCO's foreign exchange transaction gains and losses were not incurred exclusively on purchases of materials and inputs.[90] The Panel agrees with Commerce that it could not determine from the information reported by IPSCO how much of the reported net foreign exchange gain was attributable to payables, which are properly a part of COM and therefore of COP, and how much was attributable to receivables, which affect the cost of sales.

IPSCO has cited certain cases as being on their face inconsistent with the position taken by Commerce in this case, arguing that it was proper for IPSCO to include an adjustment to G&A for the net foreign exchange gain.[91] The Panel, however, regards the cases cited by IPSCO involving the inclusion of foreign exchange translation gains and losses in the general expenses category of COP to be inapposite.[92] Translation gains or losses will be properly included in COP if they were incurred on an asset or liability that was part of COP and the local Generally

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[90] See Pub. Doc. 664, Fiche 176, Frames 26-27; see also IPSCO Cost Verification Doc. C-66, Fiche 33, Frame 76; Pub. Doc. 636, Fiche 165, Frame 77.

[91] In support of this argument, IPSCO cites DRAMs from Korea, in which respondent Goldstar included its foreign exchange transaction losses on materials purchases in the general expense category of COP. Although Commerce disapproved, it did not reclassify the losses, stating: "[F]oreign exchange losses arising from the purchase of raw materials should be included in material cost because this is a component of the COM. However, we have not reclassified these losses from general expenses to COM as it would have no impact on the submitted costs." DRAMS from Korea, 58 Fed. Reg. at 15475; see also id., at 15478.

[92] See Flat-Rolled Carbon Steel from Korea, 58 Fed. Reg. 37176, 37187 (July 9, 1993) (Commerce "included all foreign currency translation losses and gains in [respondent's] financing expense calculation.") (emphasis added).

Accepted Accounting Principles ("GAAP") recognizes them as "real."[93] In contrast, transaction gains and losses are properly included in COP only if they are incurred on the purchase of inputs used to produce the subject merchandise."[94] Because IPSCO did not show that its transaction gains were incurred on the purchase of inputs, much less the purchase of inputs used to produce the subject merchandise, the Department had no choice but to reject IPSCO's reported net gain in its entirety.

The Panel upholds Commerce's treatment of IPSCO's net gain on foreign exchange transactions.

E. Correct Methodology for Allocation of G&A Expenses

1. Background and Arguments

As part of its COP response, IPSCO reported G&A expenses to the Department on a divisional basis. In its final determination, the Department rejected IPSCO's divisional reporting of G&A expenses and recalculated G&A. The Department first aggregated IPSCO's G&A expense and then allocated G&A by cost of sales to determine the amount attributable to the subject merchandise.[95]

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[93] Commerce's longstanding policy is to follow local GAAP. In both DRAMs from Korea, 58 Fed. Reg. at 15472, and Flat-Rolled Steel from Korea, 58 Fed. Reg. at 37187, Commerce included respondents' foreign exchange translation losses in G&A because Korean GAAP required such translation losses to be expensed; in other words, the losses were "real."

[94] Commerce Response to IPSCO, at 26.

[95] Final Determination, 58 Fed. Reg. at 37113.

IPSCO claims its allocation method was more accurate than the Department's approach. IPSCO argues that Commerce has permitted divisional reporting of G&A expenses in past cases.[96] The Department responds that its consistent practice has been to have G&A expenses reported on a company-wide basis. The Department argues that divisional reporting could result in excessive assignment of expenses to divisions not producing subject merchandise. Commerce also believes that IPSCO's allocation methodology is inappropriate because allocations based on sales prior to the period of investigation do not reflect current costs.

[96] IPSCO Brief, at IV-19, citing High Information Content Flat Panel Displays from Japan, 56 Fed. Reg. 32376, 32399 (July 16, 1991); Antifriction Bearings from Germany, 54 Fed. Reg. 18992, 19076 (May 3, 1989); Color Picture Tubes from Japan, 52 Fed. Reg. 44171, 44182 (November 18, 1987).

2. Analysis and Decision

The Department must include an allocation for G&A expenses when calculating a company's COP. The Department's practice of requiring G&A expenses to be reported on a company-wide basis is a reasonable exercise of its authority. IPSCO's situation is not similar to those instances in which the Department has allowed reporting by a parent of a subsidiary's G&A expense where the parent and subsidiary G&A expenses could be segregated.[97]

The Panel is not persuaded that IPSCO's approach to the allocations produces a more accurate result here than the Department's allocation methodology. Regardless, the Panel believes the Department's methodology is reasonable and in accordance with law. Therefore, the Panel upholds the Department's G&A allocation methodology.

F. G&A Calculation/Ministerial Error

1. Background and Arguments

IPSCO complains that, although the Department purported to use company-wide figures in its G&A allocation, it included only the miscellaneous income that IPSCO had reported for its steel and fabricated products divisions, rather than the company-wide figure for miscellaneous income that IPSCO had also provided. IPSCO also complains that the Department's G&A figure included research and development ("R&D") costs for products outside the scope of investigation. Finally, IPSCO argues, and Commerce agrees, that it was a ministerial error not to include in the denominator of IPSCO's G&A expense calculation the R&D for the divisions IPSCO reported, the accuracy of which the Department has verified.

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[97] See, e.g., Antifriction Bearings from Germany, 54 Fed. Reg. at 19076; Flat Panel Displays, 56 Fed. Reg. at 32399.

The Department refuses to acknowledge the first two errors cited by IPSCO as clerical errors.[98] Because IPSCO "disregarded" the Department's instructions and reported its R&D and miscellaneous income figures on a divisionalized basis, the Department argues that it was only able to verify the divisional amounts and not the company-wide amounts. The Department states it can only make adjustments that it has verified to be accurate.[99]

2. Analysis and Decision

It is well-established law that clerical errors should be corrected, in the interests of achieving fair and accurate determinations.[100] Many cases recognize the necessity for a mechanism to allow for such corrections, provided the errors are indeed of a ministerial nature.[101] In the context of antidumping reviews, Congress has provided guidance that 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."[102] Therefore, a remand is ordered on the error made in the IPSCO calculation that the Department has agreed to correct.

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[98] Commerce Response to IPSCO, at 39-40.

[99] 19 U.S.C. §1677e(a).

[100] See, e.g., Brother Industries, 771 F. Supp. at 384; Federal-Mogul Corp. v. United States, 809 F. Supp. 105, 110-111 (Ct. Int'l Trade 1992).

[101] "'[F]air and accurate determinations are fundamental to the proper administration of our dumping laws' and . . . 'courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination.'" Federal-Mogul, 809 F. Supp. at 110, quoting Koyo Seiko Co. v. United States, 746 F.Supp. 1108, 1110 (Ct. Int'l Trade 1990) (citations omitted).

[102] 19 U.S.C. §1675(f).

IPSCO's other two allegations, relating to R&D and miscellaneous income adjustments (in the Department's calculation of G&A), are not properly characterized as ministerial errors. We have upheld the Department's rejection of IPSCO's divisional reporting.[103] IPSCO must suffer the implications of its reporting failure. Identifying and transferring product-specific R&D from G&A is a task best performed by the respondent and then verified by the Department. Therefore, we do not require the Department to segregate product-specific R&D as requested by IPSCO. Nevertheless, we authorize the Department to reexamine this issue in reaching its remand determination.

The record provides more support for IPSCO's claim on miscellaneous income. The Panel acknowledges that COP calculations must be based on verified information. Nevertheless, IPSCO Cost Verification Doc. C-57 reports company-wide miscellaneous income in addition to divisional miscellaneous income.[104] The Department did not specifically verify the company-wide miscellaneous income figure, but did tie total G&A expenses to IPSCO's 1992 financial statement.[105] In performing the remand, Commerce should evaluate whether the company-wide miscellaneous income figure should be used, and fully justify any refusal to do so.

[103] See section V. E. of this opinion.

[104] IPSCO Cost Verification Doc. C-57, Fiche 33, Frame 18.

[105] Conf. Doc. 227, Fiche 398, Frame 51.

VI. HOLDINGS ON U.S. PRODUCERS ISSUES

A. Commerce's Indirect Tax Adjustment Methodology

1. Background and Arguments

In its final determination,[106] Commerce made an adjustment to U.S. price ("USP") to account for the Canadian Goods and Services Tax,[107] which had been reported by IPSCO and Stelco. 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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[106] Final Determination, 58 Fed. Reg. at 37102; See also General Issues Appendix, 58 Fed. Reg. at 37062.

[107] 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.

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."[108]

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).[109]

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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[108] Brief in Support of Complaint submitted on Behalf of Certain United States Steel Producers (hereinafter "U.S. Producers Brief"), March 23, 1994, at 14.

[109] 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.[110]

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.[111] Commerce's comments make it clear that the tax methodology employed by Commerce prior to the Zenith III decision

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[110] U.S. Producers Brief, at 13. 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).

[111] 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 11. 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"[112] 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.[113]

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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[112] 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).

[113] 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.[114]

In response to these very recent holdings, Commerce has again decided to change its tax adjustment methodology.[115] This new methodology was first explained by Commerce in Ferrosilicon from Brazil,[116] 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,[117] and now requests a remand so that it may apply this new methodology in the case at hand.[118] Significantly, it appears that this latest methodology, in

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

[115] 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).

[116] 59 Fed. Reg. 732, 733 (January 6, 1994).

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

[118] 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).

contrast to its predecessors, will not be tax neutral, and counsel for Commerce admitted as much at the hearing before the Panel.

IPSCO does not object to the Department's newly-revised methodology to extent it "attempts to prevent the creation of artificial dumping margins."[119] However, IPSCO urges the Panel to reject the methodology proposed by the U.S. Producers, because it is "contrary to legislative intent," and to reject any other "distortive or margin-creating formulation that might be proposed as an alternative."[120]

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 this issue. Under Chevron, a two-step process is contemplated.[121] 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

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[119] IPSCO Brief in Support of Portions of the Final Determination (hereinafter "IPSCO Response Brief"), May 23, 1994, at IV-9.

[120] Id.

[121] 467 U.S. at 842-43.

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 and the lengthy history of litigation involving that clause, 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.[122]

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.

Nevertheless, 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

[122] 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.

Congress ought never to be construed to violate the law of Nations, if any other possible construction remains . . . ."[123]

Recently reiterated by the Supreme Court in Weinberger v. Rossi[124] ("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."[125]

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

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[123] 6 U.S. (2 Cranch) at 118.

[124] 456 U.S. 25, 32 (1982).

[125] See Fundicao Tupy, 652 F. Supp. at 1543 ("An interpretation and application of the statute which would conflict with the GATT Codes would clearly violate the intent of Congress"); Matsushita Elec., 569 F. Supp. at 859 ("Another important factor is the necessity and desirability whenever possible, of harmonizing this law with the international agreements it was intended to implement."); 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.").

construction, albeit a longstanding and important one, that requires ambiguous statutes to be interpreted in conformity with the international obligations of the United States.[126]

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,[127] the Supreme Court noted that 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

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[126] 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.

[127] 485 U.S. 568, 574 (1988).

> Charming Betsy and has for so long been applied by this Court that it is beyond debate.[128]

These references to the Supreme Court's rules of statutory construction are important because the General Agreement on Tariffs and Trade ("GATT")[129] and the GATT Antidumping Code[130] appear to establish the principle of tax neutrality. The following two provisions of Article VI of the GATT, pertaining to antidumping and countervailing duties, are 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.[131]

> 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.[132]

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[128] 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.

[129] 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).

[130] 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).

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

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

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 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.[133]

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.[134] Moreover, 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.[135]

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

[134] 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.

[135] 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,

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 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.[136] 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.[137]

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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.

[136] See Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01, 1992 FTAPD LEXIS 2, May 15, 1992, n.24 at 37. 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.

[137] 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 Electronics Co. v. United States, 6 F.3d 1511, 1513 (Fed. Cir. 1993). 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.

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 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. Credit Expense Adjustment

The Panel grants the Department's request for a remand to apply the LIBOR rate, for the reasons given in Section V. B. of this opinion.

C. Ministerial Error

1. Background and Arguments

After the final determination, the U.S. Producers filed a letter alleging that the Department made a ministerial error in calculating the margins for IPSCO. As a request for binational panel

review had already been filed, the Department did not have jurisdiction to make a correction pursuant to its own authority.[138] The allegations are therefore before the Panel for decision.

The Department includes an interest expense factor in calculating COP. This factor is derived by dividing consolidated interest expense by the consolidated cost of sales. The resulting percentage is then applied to the COM for each product. The Department deducted IPSCO's long-term interest income from its consolidated interest expense in reaching its final determination.[139] The U.S. Producers argue, and the Department now agrees, that in making the COP calculation, IPSCO's consolidated interest expense should not have been offset by long-term interest income.[140]

IPSCO contends that there is no evidence that the Department intended to exclude long-term interest income from the offset, and any error the Department may have committed was not ministerial in nature.

2. Analysis and Decision

As stated in Section V. F. of this opinion, 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

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

[139] See Conf. Doc. 283, Fiche 428, Frame 1.

[140] Commerce Response to U.S. Producers, at 23-24.

authority considers ministerial."[141] Such errors should be corrected, in the interests of achieving fair and accurate determinations.[142]

The Department does not offset consolidated interest expense with long-term interest income, because income from long-term investments is not related to the manufacture of subject merchandise.[143] The Department's Antidumping Questionnaire in the underlying investigation establishes that the Department intended to follow this policy here. The Questionnaire instructed respondents to calculate interest expense as follows:

> Interest expense should be derived from the total borrowing costs incurred by the consolidated group companies. In calculating your interest expense for COP/CV, include the expense incurred for both long-term and short-term borrowings. Total interest expense may be reduced by any interest earned from your company's short-term investments of its working capital.[144]

IPSCO has mounted no challenge to the substance of the Department's policy of excluding long-term interest income in calculating consolidated interest expense. Whether Commerce's error at issue here is properly characterized as ministerial need not be decided. It is enough that the Department apparently made an inadvertent error, and its wish to correct that error on remand is supported by an established policy whose legality has not been challenged. The Panel remands this issue to permit the recalculation requested by the Department.

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[141] 19 U.S.C. §1675(f); see also 19 C.F.R. §353.28(d).

[142] See, e.g., Brother Industries, 771 F. Supp. at 384; Federal-Mogul, 809 F. Supp. at 110-111.

[143] See, e.g., Television Receivers from Japan, 56 Fed. Reg. 56189, 56192 (November 1, 1991).

[144] General Issues Doc. 40, Fiche 11, Frame 83 (emphasis added).

VII. HOLDINGS ON STELCO ISSUES

A. Exhaustion of Administrative Remedies

1. Background and Arguments

Stelco has challenged the Department's resort to a total best information available ("BIA") rate for certain Stelco plate sales. Both the FTA and the pertinent U.S. case law require that parties exhaust their administrative remedies before seeking panel review of an issue.[145] The Department criticizes the single sentence Stelco points to in its rebuttal brief filed in the underlying investigation as inadequate to meet the requirement of exhaustion of administrative remedies. Stelco emphasizes that it discussed the issue in some detail at the administrative hearing held by the Department.

In considering exhaustion, a reviewing body should evaluate whether a complaining party objected "at the time appropriate under [agency] practice."[146] Thus, this Panel will consider whether Stelco "has utilized the prescribed administrative procedures for raising the point."[147]

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[145] See FTA Article 1911, supra n.10; see also United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37 (1952); see also Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action."); Rhone Poulenc v. United States, 710 F. Supp. 348, 350 (Ct. Int'l Trade 1989), aff'd, 899 F.2d 1185 (Fed. Cir. 1990). The limited exceptions to the exhaustion requirement do not apply to the circumstances at hand. See, e.g., McKart v. United States, 395 U.S. 185 (1969).

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

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

2. Analysis and Decision

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.[148] Briefing is the sole opportunity for the parties to address the issues in a case in a comprehensive fashion.

The Department hearing following the filing of briefs is also important to the parties' right to be heard. Commerce regulations provide that an interested party may make an affirmative presentation at the hearing "only on arguments included in that party's case brief and may make a rebuttal presentation only on arguments included in that party's rebuttal brief."[149]

Despite Stelco's failure to brief the issue, the Department permitted Stelco to specifically raise and discuss the issue at the administrative hearing.[150] The Panel cannot overlook the extensive discussion of the issue by Stelco on the administrative record. Thus, the Panel will not interpose the exhaustion doctrine to ignore the hearing testimony based on Commerce regulations the agency itself has chosen to waive.

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[148] 19 C.F.R. §353.38(a).

[149] 19 C.F.R. §353.38(b) (emphasis added).

[150] See Pub. Doc. 664, Fiche 176, Frames 62-64.

B. Use of a Total "Best Information Available" Rate for Stelco's Cut-to-Length Plate

1. Background and Arguments

The petition requesting the underlying investigation alleged that Stelco was selling cut-to-length steel plate in its home market at prices below its COP.[151] Commerce initiated a sales-below-cost investigation and requested COP data in addition to sales, pricing, and other information from Stelco.[152]

Stelco responded to portions of the Department's questionnaire, but as the Department noted in its final determination, Stelco informed the Department that it could not provide the COP information because Stelco "would have to reconstruct a completely new standard cost accounting system . . . [and] . . . the company did not have the resources to accomplish such a project, nor could it be accomplished within the Department's time frame for these investigations."[153] The Department emphasizes that, although the questionnaire "explicitly instructs respondents to contact the Department's Office of Accounting to discuss any problems in responding . . . Stelco did not do so before the [response] due date."[154] The Department found

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[151] Final Determination, 58 Fed. Reg. at 37100-01.

[152] The Department must disregard home market sales made at less than COP if it determines that such sales: "(1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade." 19 U.S.C. §1677b(b).

[153] Final Determination, 58 Fed. Reg. at 37116. Stelco does not dispute this characterization of the underlying facts.

[154] Id.

that Stelco's failure to respond "was so significant as to render the entire response inadequate," and justified the Department's "resort to the BIA for its analysis of these sales."[155]

Stelco argues that Commerce's immediate resort to total BIA was unlawful because the antidumping statute requires a sales-below-cost analysis[156] where other cost information is available on the administrative record.[157] In effect, Stelco argues that the sales-below-cost statute limits Commerce's discretion to a selection among partial BIA alternatives and precludes Commerce's resort to total BIA.

As BIA, the Department used the highest antidumping margin alleged in the petition for any producer of cut-to-length plate from Canada.[158] Stelco complains that the petition information Commerce used was not accurate and was so high a margin as to be punitive.[159]

2. Analysis and Decision

This statute requires Commerce to resort to BIA "whenever a party . . . refuses or is unable to produce information requested in a timely manner and in the form required . . . ."[160] The Department possesses broad discretion to use BIA in a particular case. As a recent Binational Panel stated:

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[155] Id.

[156] 19 U.S.C. §1677b(b).

[157] Brief on Behalf of Stelco, Inc. (hereinafter "Stelco Brief"), March 23, 1994, at 2.

[158] Final Determination, 58 Fed. Reg. at 37116.

[159] Stelco Brief, at 1.

[160] 19 U.S.C. §1677e(c). A related provision, 19 U.S.C. §1677e(b), also requires Commerce to use BIA "if [Commerce] is unable to verify the accuracy of the information submitted." These statutory rules are reflected in Commerce's regulations. See 19 C.F.R. §353.37(a).

> [Commerce]'s discretion to resort to BIA stems not only from the variety of statutory grounds for the use of BIA -- refusal to produce information, inability to produce information in a timely manner, inability to produce information in the required form, significantly impeding an investigation [ ] -- but also from the need for [Commerce] to control the fact-gathering process. The courts have viewed [Commerce]'s authority to resort to BIA as essential to the fulfillment of [Commerce]'s responsibility to determine in a timely manner an accurate dumping margin, both in antidumping investigations and in administrative reviews.[161]

Numerous Federal Circuit[162] and Court of International Trade[163] decisions establish the reluctance of courts to overturn a Commerce decision to resort to BIA. Situations in which the courts have questioned Commerce's decision to use BIA have all involved unusual sets of circumstances.[164]

Once Commerce decides upon and makes its information requests, it is the obligation of respondent then to answer those requests or face the prospect that BIA will be utilized either as a

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[161] Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01 (hereinafter "Paving Equipment II"), 1992 FTAPD LEXIS 2, May 15, 1992, at 74 (footnote omitted).

[162] See, e.g., Allied-Signal Aerospace v. United States, 996 F.2d 1185, 1990-1991; Atlantic Sugar, 744 F.2d at 1562; Rhone Poulenc v. United States, 899 F.2d 1556 (Fed. Cir. 1984).

[163] See, e.g., Chinsung Indus. Co. v. United States, 705 F. Supp. 598, 601 (Ct. Int'l Trade 1989); Florex v. United States, 705 F. Supp. 582, 588 (Ct. Int'l Trade 1989); Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1126-28 (Ct. Int'l Trade 1988); Pistachio Group of the Ass'n of Food Indus. v. United States, 671 F. Supp. 31, 40 (Ct. Int'l Trade 1987); Ansaldo Componenti, S.p.A. v. United States, 628 F. Supp. 198, 205 (Ct. Int'l Trade 1986).

[164] See, e.g., U.H.F.C. Co. v. United States, 916 F.2d 689, 701 (Fed. Cir. 1990) (Commerce may not resort to BIA where a party has failed to provide information that does not exist); Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1574 (Fed. Cir. 1990) (Commerce may not resort to BIA where complete answer to question is given but answer does not resolve issue being considered); Floral Trade Council v. United States, 775 F. Supp. 1492, 1498 (Ct. Int'l Trade 1991) (Commerce may not resort to BIA in the absence of an information request); Daewoo Electronics Co. v. United States, 712 F. Supp. 931, 944-45 (Ct. Int'l Trade 1989) (Commerce may not resort to BIA where Commerce has requested information without using its normal questionnaire procedure and without providing the respondent appropriate instructions needed to compile the information).

substitute for absent or inadequate data or as the sole method of calculating the final dumping margin.[165] Indeed, a failure to answer a Commerce information request is sufficient in and of itself to support a Commerce decision to use BIA.[166]

No unusual circumstances exist in this case. Even if one accepts Stelco counsel's characterization that Stelco "attempted to the best of its abilities to provide the COP/CV information requested by the Department,"[167] Stelco nevertheless failed to provide the requested information. Thus, the facts at hand fall paradigmatically within the statute. Stelco failed to "produce information requested in a timely manner."[168] Moreover, Stelco did not contact Commerce prior to the due date for the COP response to discuss the problems it was having despite Commerce's questionnaire form expressly inviting such contact.

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, costs, or other discrete categories of data.

The failure to supply any COP information whatever is a fundamental deficiency, not one where partial BIA may be used to substitute for narrow categories of data. As Commerce argued, "[w]ithout this information, [Commerce] could not tell whether any sale by Stelco was useable for

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[165] N.A.R., S.p.A. v. United States, 741 F. Supp. 936, 942 n.5 (Ct. Int'l Trade 1990).

[166] Ansaldo, 628 F. Supp. at 205.

[167] Stelco Brief, at 1.

[168] 19 U.S.C. §1677e(c).

purposes of calculating FMV."[169] The absence of the cost information made the price information unusable.

The operation of the sales-below-cost statute does not limit Commerce's discretion to use total BIA. By its express terms, Commerce's BIA authority applies to all "determinations [made by Commerce] under this subtitle," including COP findings.[170] The Panel believes that the statutorily required COP analysis refers to cost data submitted by a particular respondent, data Stelco failed to provide here. Therefore, the Panel upholds the Department's application of total BIA to Stelco.

As to Stelco's claim that the petition margin rate used was an inaccurate, punitive rate, it has been recognized that "[Commerce's] choice of BIA . . . must strike a balance between the ideal of an accurate dumping margin and the practical need to induce the timely cooperation of those parties in possession of relevant information."[171] While neither the statute nor its legislative history defines the term "best information available,"[172] courts have been consistently deferential to Commerce's BIA methodologies.[173] As recently reiterated by the Court of International Trade,

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[169] Response Brief of the Investigating Authority to the Brief of Stelco, Inc., May 23, 1994, at 18 (emphasis in original).

[170] 19 U.S.C. §1677e(c).

[171] Paving Equipment II, USA-90-1904-01, at 81 (citation omitted).

[172] See S. Rep. No. 249, 96th Cong., 1st Sess. 98 (1979); see also Allied-Signal, 996 F.2d, at 1191 ("Although Congress expressly mandated that the [Department] use the best information available when faced with a party who is unwilling or unable to participate in the administrative review proceedings, it did not explicitly define what type of information constituted the 'best' information.").

[173] Allied-Signal, 996 F.2d at 1190 ("[B]ecause Congress has 'explicitly left a gap for the agency to fill' in determining what constitutes the best information available, the Department's construction of the statute must be accorded considerable deference," citing Chevron, 467 U.S. at

"best information 'is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information.'"[174] These decisions and the Department's regulations specifically permit Commerce to use the petition information as BIA.[175]

Respondents cannot be allowed to control the investigation by selectively providing information to Commerce in the hope that partial BIA will be utilized which will actually be more favorable than the information not provided by respondent.[176] Since the universe of possible BIA rates in any particular case is fairly limited, not "rewarding" a respondent may involve the selection of a rate that may be dated and that may be high.[177] The courts have not shown any inclination to overturn the Department's selection of a particular BIA rate as being "punitive."[178]

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843).

[174] Krupp Stahl A.G. v. United States, 822 F. Supp. 789, 792-93 (Ct. Int'l Trade 1993), quoting Asociacion Colombiana, 704 F. Supp. 1114, 1126 (Ct. Int'l Trade 1989); see also 19 C.F.R. §353.37(b); Chinsung, 705 F. Supp.; Hercules v. United States, 673 F. Supp. 454, 470-71 (Ct. Int'l Trade 1987); Pistachio, 671 F. Supp at 31.

[175] Id.

[176] See Chinsung, 705 F. Supp. at 601. The Court rejected "out of hand" plaintiff's argument against Commerce's decision to reject plaintiffs' responses *in toto* and to substitute as the basis for its final determination the petitioners' data, finding that plaintiff's argument would "undermine the administrative process and shift the burden of creating an adequate record from respondents to Commerce." See also 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 a deficient submission may lead to an undesired result."); Rhone Poulenc, 710 F. Supp. at 346, (total BIA applied where response was only partially complete); Persico Pizzamiglio v. United States, No. 94-61, slip op. at 16 (Ct. Int'l
Trade April 14, 1994).

[177] See Paving Equipment II, USA-90-1904-01, at 90 (ten-year old antidumping margin of 30.61 percent selected as BIA upheld); Rhone Poulenc, 899 F.2d at 1191 (selection of 60 percent LTFV rate upheld).

[178] See, e.g., Rhone Poulenc, 899 F.2d at 1190-91 ("We need not and do not decide the difficult question of whether the agency may use the best information rule to 'penalize' a party which

On these facts and on this record of authority, the Panel is simply unable to agree that Commerce's section of the highest petition rate as total BIA was punitive or was otherwise in error.

IX. HOLDINGS ON OTHER ISSUES

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

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submits deficient questionnaire responses. . . . Here, the agency only presumed that the highest prior margin was the best information of current margins. . . . [i]f it were not so, the importer, knowing of the rule, would have produced current information showing the margin to be less. The agency's approach fairly places the burden of production on the importer, which has in its possession the information capable of rebutting the agency's inference.") (emphasis in original).

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

IN THE MATTER OF:	)	
	)	
CERTAIN CUT-TO-LENGTH	)	SECRETARIAT FILE NO.
CARBON STEEL PLATE	)	USA-93-1904-04
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
Brian E. McGill, Chairman

Harry B. Endsley
Harry B. Endsley

Maureen Irish
Maureen Irish

Ross Stinson
Ross Stinson

Steven S. Weiser
Steven S. Weiser