

ARTICLE 1904 BINATIONAL PANEL
pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:)
PORCELAIN -ON-STEEL COOKWARE) Secretariat File No.
FROM MEXICO) USA-95-1904-01

DECISION OF THE PANEL
APRIL 30, 1996

CINSA, S.A. DE C.V.
Complainants
v.

INTERNATIONAL TRADE ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE
Respondent

and

GENERAL HOUSEWARES CORP.
Intervenor

Before:

*O. Thomas Johnson, Chairman
Victor Carlos Garcia-Moreno
Lewis H. Goldfarb
Kathleen F. Patterson
Alejandro Castaneda Sabido*

Appearances:

*Irwin P. Altschuler, David R. Amerine, Ronald M. Wisla, for
CINSA, S.A. DE C.V.*

*Stephen J. Powell, Michelle Behaylo, for International Trade
Administration, U.S. Department of Commerce*

*Joseph W. Dorn, Michael P. Mabile, Gregory C. Dorris, Stephen
A. Jones, for General Housewares Corp.*

A Mexican manufacturer exporting porcelain-on-steel cooking ware to the United States brings before this Binational Panel its challenge to the results of an antidumping duty review that the U.S. Department of Commerce conducted. The U.S. manufacturer that had petitioned the Department of Commerce also appeals in this forum the results of that review. The decision of the Panel follows.

I. FACTS

On December 2, 1986, the United States Department of Commerce, International Trade Administration ("Commerce" or the "Department") entered an anti-dumping duty order against Cinsa, S.A. de C.V. ("Cinsa") and another Mexican exporter, Acero Porcelanizado, S.A. de C.V. ("Apsa") in Porcelain-on-Steel Cooking Ware from Mexico, 51 Fed. Reg. 43,415 (1986). On January 23, 1992, at the request of petitioner, General Housewares Corporation ("GHC"), Commerce initiated this fifth administrative review of the antidumping duties imposed upon Cinsa and Apsa. Porcelain-on-Steel Cooking Ware from Mexico, 57 Fed. Reg. 2704 (1992). The review covered United States imports from Cinsa and Apsa from December 1, 1990 through November 30, 1991. Id.^{1/} The products at issue were

^{1/} Apsa is not a party to this Binational Panel appeal.

porcelain-on-steel cooking ware, such as tea kettles that lacked self-contained electric heating elements. Id.

In the preliminary results of the fifth administrative review, Commerce established dumping margins of 45.59 percent on Cinsa's products. Porcelain-on-Steel Cooking Ware from Mexico, 59 Fed. Reg. 6616, 6618 (1994). These results reflected the Department's use of the best information available ("BIA") to calculate Cinsa's depreciation expenses. Commerce had made an adverse assumption for revalued depreciation because Cinsa had not provided a methodology to enable the Department to process the data that Cinsa had submitted concerning its fixed overhead cost during the period of review. The Department's choice of BIA significantly increased Cinsa's fixed overhead expenses as adjusted for depreciation.

The Department's use of BIA in the preliminary results prompted Cinsa to provide a "Proposed Depreciation Adjustment" methodology to enable the Department to generate accurate figures for Cinsa's depreciation cost based upon the revaluation of the Company's assets. Commerce found Cinsa's proposed methodology acceptable for calculating depreciation expenses given the data originally submitted in Cinsa's questionnaire responses.

Commerce published the final results of its fifth administrative review on January 9, 1995, and imposed dumping

margins of 27.96 percent. Porcelain-on-Steel Cooking Ware from Mexico, 60 Fed. Reg. 2378, 2381 (1995). The final results reflected the Department's abandonment of the BIA methodology as well as certain adjustments made in response to other comments that the parties had submitted. On January 13, 1995, Cinsa notified Commerce that the final results contained a computation error. Commerce agreed and published an amended version of its final results on February 8, 1995. Porcelain-on-Steel Cooking Ware from Mexico, 60 Fed. Reg. 7521 (1995). The amended results of the fifth administrative review imposed a dumping margin of 13.35 percent on Cinsa's exports of the covered products. Id. at 7522.

In this appeal to the Binational Panel established pursuant to Chapter 19 of the North American Free Trade Agreement ("NAFTA"), both GHC and Cinsa challenge certain aspects of the methodology that the Department employed in the fifth administrative review. GHC challenges (1) the Department's departure from BIA in calculating Cinsa's depreciation expenses in the final results of the review, as well as (2) the Department's amendment of the final results to correct a computation error.

Cinsa supports the Department's position on those issues but challenges the Department's methodology with respect to (1) the use of revalued depreciation rather than historical-cost depreciation, (2) the inclusion of mandatory

profit-sharing payments to employees as a cost of labor in calculating the cost of production ("COP") and constructive value ("CV"), (3) the offset of Cinsa's short-term interest income only to the extent of interest expense, (4) the addition of the full amount of value-added taxes to Cinsa's COP, (5) the failure to consider the color of Cinsa's products in calculating foreign market value ("FMV"), and (6) the failure to correct an alleged error in cost data for item number 10158.

Cinsa had also challenged (1) the Department's determination that pre-sale inland freight charges did not constitute expenses directly related to sales, (2) the Department's use of similar merchandise rather than CV as a basis for calculating foreign market value, and (3) the Department's failure to make a tax-neutral adjustment for all Mexican value-added taxes that were rebated or uncollected on exported products. Cinsa subsequently withdrew its claims before the Panel with respect to the first two of these issues. With respect to the issue of uncollected value-added taxes, the Department requested in its brief to the Panel that this question be remanded for administrative application of an appropriate tax-neutral methodology.

II. STANDARD OF REVIEW

Under Articles 1904(2) and 1904(3) and Annex 1911 of NAFTA, a Binational Panel is to determine whether a challenged antidumping determination was made in accordance with the laws of the importing country. NAFTA defines the importing country antidumping duty or countervailing duty law as "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." Art. 1904(2). The Panel may uphold a final determination or remand it for action not inconsistent with the Panel's decision. Art. 1904(8). NAFTA obliges each Panel to issue written opinions supporting its positions with reasons for its conclusions. Annex 1901.2. These conclusions of its decision must be based "solely on the arguments and submissions of the two Parties." Annex 1903.2.

Article 1904.3 of NAFTA provides that a Binational Panel "shall apply the standard of review set out in Annex 1911." In challenges to determinations by United States authorities, Annex 1911 requires that a panel "hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.A.

§ 1516a(b)(1)(B) (1994 & Supp. 1996) (incorporated by reference into NAFTA, Annex 1911).

"Substantial evidence" is that which "a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938); see also Torrington Co. v. United States, 745 F. Supp. 718, 723 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1276 (Fed. Cir. 1991) (holding that Department determinations should be set aside only if they fail reasonableness test); Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). The Panel may not reweigh the evidence or substitute its judgment for that of the Department, even if the evidence could support alternative factual inferences and conclusions. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966); Metallwerken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989).

Although review under the substantial evidence standard is limited, the Panel nonetheless must conduct a meaningful review of the Department's determination. Thus, the Panel must satisfy itself that an agency determination is supported by the administrative record as a whole, including evidence that detracts from the weight of the evidence upon which the agency relies. Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 477 (1951). Moreover, an agency's determination must have a reasoned basis. American Lamb Co. v. United

States, 785 F.2d 994, 1004 (Fed. Cir. 1986). The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning. USX Corp. v. United States, 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987).

Like a reviewing court, a binational panel must extend deference to reasonable agency interpretations of a statute that the agency administers. National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 417 (1992). But when a statute remains silent or ambiguous with respect to a particular issue, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. (quoting Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984)). So long as the agency's methodology and procedures constitute a reasonable means of effectuating the statutory purpose, a panel can neither substitute its judgment for that of the agency nor impose its own standards with respect to the sufficiency of the agency's investigation or methods. Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1540 (Fed. Cir. 1994); Budd Co., Wheel & Brake Div. v. United States, 773 F. Supp. 1549, 1553 (Ct. Int'l Trade 1991).

III. DISCUSSION

Part A: Issues for Petitioner GHC

1. Use of Administrative Record Instead of Best Information Available

In the preliminary results of the fifth administrative review of February 11, 1994, Commerce made an adverse assumption for revalued depreciation and resorted to best information available ("BIA") pursuant to 19 U.S.C.A. § 1677e(c) (1994 & Supp. 1996). The Department's use of BIA in the preliminary results prompted Cinsa to provide a "Proposed Depreciation Adjustment" methodology to enable Commerce to use the record evidence to arrive at an accurate determination of Cinsa's depreciation cost based upon the revaluation of assets. Cinsa also provided a shorthand calculation that would yield a fixed overhead factor that included revalued depreciation.

Reviewing Cinsa's administrative case brief, Commerce decided to calculate depreciation expenses based upon information that Cinsa had submitted, having found that the Company had "provided an acceptable methodology to arrive at a revised fixed overhead/direct labor ratio that incorporates revalued depreciation" Prop. Doc. 14.

GHC argued during the administrative review that the Department's use of BIA was "justified and reasonable" because

Cinsa's supplemental questionnaire response failed to report the revalued depreciation data that Commerce had requested on a "product-by-product basis." GHC also argued that BIA was appropriate because Cinsa had failed to report other fixed overhead costs on a revalued, as opposed to a historical, basis.

However, the Department confirmed in the final results that it had:

"reviewed the information contained in Cinsa's responses and found that adequate data was available for a more accurate calculation of COP. Therefore, BIA was not required since the COP questionnaire responses provided the necessary information for calculating an appropriate fixed overhead factor."

60 Fed. Reg. at 2378.

GHC argued before this panel that Commerce erred in not using BIA as the Department had in the preliminary results. The antidumping-duty statute provides, GHC contended, that the Department "shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available." 19 U.S.C. §1677e(c). Because Cinsa never broke down the fixed overhead costs and failed to submit revalued depreciation expenses in the form requested, GHC maintains, the Department was obligated to use BIA.

Commerce has stated that it agrees with the account of the procedural history of the case set forth in GHC's brief but does not otherwise accept GHC's statement of facts. According to the Department, the use of BIA significantly increased Cinsa's fixed overhead expenses. The Department maintains that it was legally correct in calculating depreciation expenses based upon information that Cinsa submitted.

The Panel's review of the law and the administrative record supports the Department's interpretation. The BIA requirement only arises when the Department has determined that a respondent has failed to comply with an information request. The Department has considerable discretion in arriving at a determination of noncompliance. E.g., Daido Corp. v. United States, 893 F. Supp. 43 (Ct. Int'l Trade 1995). In this case, the Department determined that Cinsa had provided the information in an acceptable manner. Thus, no reason existed for Commerce to apply BIA. Cinsa provided data on depreciation expenses derived on a historical basis in addition to data necessary for computing any increase in fixed overhead costs attributable to the calculation of revalued depreciation. In short, there was no justification for Commerce to resort to BIA because Cinsa provided in its supplemental questionnaire response the requested revalued

depreciation cost as a factor to be applied on a "product-specific" direct labor cost basis.

The Panel does not agree with GHC that the methodology that Cinsa submitted in its administrative case brief constituted new factual information that the Department should have rejected as untimely. The methodology constituted only a means of analyzing existing data -- data that Cinsa had filed in a timely fashion -- that had not occurred to the Department's investigators. The investigators reviewed the methodology that Cinsa submitted and found that it was sound. The decision to adopt the methodology was, therefore, reasonable. Moreover, GHC's argument that BIA should have been used because other assets may not have been revalued is unpersuasive and speculative. The Department never asked Cinsa about the revaluation of fixed costs other than depreciation. BIA, therefore, would have been inappropriate.

Thus, the Panel agrees that Commerce reasonably exercised its discretion in determining whether Cinsa's questionnaire answers were responsive. The Department has broad discretion to determine when and how to apply BIA. In this instance, Commerce found that Cinsa's responses adequately responded to its requests for information. Cinsa responded in a timely manner to the Department's questionnaire by reporting depreciation expenses based on historical and revalued cost.

2. Ministerial Error

After the final results were released on January 9, 1995, Cinsa alleged that the Department had made a "ministerial error" in calculating the cost of revalued depreciation for inclusion in fixed overhead. As described in the preceding section, Commerce decided not to use BIA in the final results and to rely instead upon inflation information and a methodology that Cinsa submitted in its administrative brief in order to calculate the cost of depreciation on a revalued, rather than historical, basis. Cinsa argued that Commerce had inadvertently applied a factor that revalued not only depreciation but also all fixed overhead items. Over GHC's objection that no unintended ministerial error had occurred, Commerce agreed with Cinsa and, on February 8, 1995, released amended final results stating:

"We reviewed our calculation and have determined that the computer instructions applied an incorrect factor to total fixed overhead. Our intent was to account only for the effects of inflation on depreciation expense because all other fixed overhead costs already reflected inflation. We have, therefore, amended our calculation of fixed overhead by applying a factor to fixed overhead to account only for the effects of inflation on depreciation expense."

60 Fed. Reg. at 2378, Pub. Doc. 74.

By statute, the Department may correct ministerial errors in final determinations. The term "ministerial error" is defined to include "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." 19 U.S.C.A. § 1675(h) (1994 & Supp. 1996).

GHC, relying heavily upon the statutory term "unintentional" error, asks the Panel to find that Commerce erred in amending the final results because Commerce had fully intended to increase not only depreciation but also all items of fixed overhead by a revaluation factor that Cinsa supplied in its administrative brief. GHC refers the Panel to language in several Department memoranda stating that Commerce increased the "reported fixed overhead, which includes depreciation expenses, by [a percentage calculated on the basis of Cinsa's information] rather than by [the BIA percentage used by Commerce in the preliminary results.]" Prop. Doc. 16; see also Prop. Doc. 14. GHC notes that the final results stated that the "Department has revised the calculation of fixed overhead based on information contained in Cinsa's responses." 60 Fed. Reg. at 2378.

The preceding record citations prove, according to GHC, that Commerce fully intended to revalue all of fixed

overhead, and not only the depreciation variable, by the factor. Thus, GHC argues, the "error" did not fall within the narrow category of clerical and unintentional errors that Commerce may correct following release of the final results. Rather the purported error, GHC maintains, reflects the Department's revisitation of its judgment in selecting a particular methodology.

Commerce explains that due to the sheer volume of calculations required to produce the final results, it unintentionally failed to adapt Cinsa's revised factor for revalued depreciation to the Department's own computer program. As a result, the factor that the Department used was much higher than it had intended. The Department had sought to revalue depreciation according to the methodology that Cinsa suggested and not to revalue all other fixed overhead costs. After learning of its error, the Department had the discretion to make the correction.

The Panel's review of the record and the factual setting in which this issue arises supports the Department's explanation. Indeed, the thrust of Cinsa's argument in its administrative brief was that the Department did not need to use BIA, which required a revaluation of all fixed overhead items in order to calculate revalued depreciation, a component of fixed overhead. Prop. Doc. 11 at 8-11 and Ex. 2. Cinsa furnished a methodology that would revalue depreciation alone

within the context of the fixed overhead cost. The Department's accountants wrote that they found that Cinsa "provided an acceptable methodology to arrive at a revised fixed overhead/direct labor ratio that incorporates revalued depreciation" Prop. Doc. 14. Another memorandum, one upon which GHC relied, repeats that Cinsa "had provided acceptable information with which to calculate cost of production." Prop. Doc. 16. The final results stated: "The Department has reviewed the information contained in Cinsa's responses and found that adequate data was available for a more accurate calculation of COP." 60 Fed. Reg. at 2378, Pub. Doc. 74.

These documents support the Department's view that it agreed with the thrust of Cinsa's argument and intended to revalue depreciation but not every item of fixed overhead cost. Because the final results applied a factor increasing all fixed overhead items, it follows that the result was unintended. Commerce exercised its discretion to correct "ministerial errors" and corrected the computer program.

The Court of International Trade has stated that "[u]nder the statute, Commerce is given fairly broad discretion to determine what constitutes an unintentional ministerial error." Aimcor v. United States, No. 95-130, slip op. at 8 (July 20, 1995). Administrative determinations that both GHC and Commerce have cited demonstrate how this

discretion has been exercised. The Panel has reviewed those determinations and does not agree with GHC that the discretion was exercised in an inappropriate manner in this case.

Part B: Issues for Respondent Cinsa

1. Calculation of Depreciation of Assets and Fixed Overhead Costs: Historical v. Revalued Methods

In determining the fixed overhead expense component of cost of production and constructed value, the Department's practice is to include asset depreciation expenses and other fixed overhead expenses. Cinsa reported depreciation expenses to Commerce using a historical method based upon the actual price paid for the fixed asset. See Cinsa's Questionnaire Response at 63-64, Exhibit 27; Prop. Doc. 2. Cinsa admitted that Mexican generally accepted accounting principles ("Mexican GAAP") also required the firm to use a revalued method of depreciation but asserted that this method should be employed only in the preparation of financial statements. See Cinsa's Questionnaire Response at 38, 63-64 and Exhibit 31; Prop. Doc. 2.

Before publication of the preliminary results, Commerce requested, and Cinsa provided, additional information showing depreciation expenses calculated on both the historical-cost and revalued-cost basis. See Cinsa's Supplemental Questionnaire Response at 20-22, Exhibit 4; Prop.

Doc. 5. Cinsa defended its use of the historical method stating that its internal cost and accounting records reflected the historical method, as Mexican income tax law requires. See id. at 21.

In the preliminary results, Commerce calculated depreciation using the revalued method, basing its decision upon the fact that Mexican GAAP required Cinsa to revalue its assets and that the Company's financial statements reflected these revalued assets. 59 Fed. Reg. 6616, 6618 (1994); Pub. Doc. 38.

In response to the preliminary results, Cinsa argued that Commerce should have calculated depreciation expenses using the historical method. See Cinsa's Case Brief to the preliminary results at 3-4 & Exhibit 1; Prop. Doc. 11. Cinsa claimed that the Department's practice was to calculate depreciation using the revalued cost only in cases involving a hyperinflationary economy and asserted that price levels in Mexico during the period of review ("POR") were not hyperinflationary. Id. Cinsa also stated that the revalued method "overstated" actual depreciation costs. Id.; Exhibit 1 at 2-4.

In its final results, Commerce rejected Cinsa's hyperinflation argument, stating,

"The Department followed Mexican GAAP and adjusted Cinsa's COP data to reflect the revalued depreciation. This approach

coincided with Cinsa's financial statements which were also prepared in accordance with Mexican GAAP. It is the Department's policy to adhere to the home market GAAP as long as the home market GAAP reasonably reflects actual costs. Thus, Commerce has determined that when a foreign country allows a company to revalue its assets, as opposed to relying upon historical cost, and when a company reflects the revalued basis in its financial statements, it is appropriate to accept the financial statements as reflecting actual cost."

60 Fed. Reg. at 2378 (Comment 1).

a. Exhaustion of Administrative Remedies

On appeal from the Department's final results, Cinsa argues that Commerce incorrectly applied its depreciation cost test and that the revalued method "distorted" actual costs of production. GHC and Commerce argue that Cinsa is barred from raising this argument for failure to exhaust administrative remedies. Thus, before reaching this claim, the Panel must decide whether Cinsa adequately raised the argument during the administrative proceedings.

Both GHC and Commerce claim that Cinsa is barred from arguing that the use of revalued depreciation "distorted" actual depreciation costs because Cinsa did not raise this argument during the administrative proceedings. See Cinsa Case Brief to the preliminary results at 2-10 and Exhibit 1; Prop. Doc. 11. The Department's regulations state that for final determinations in antidumping-duty reviews Commerce will

only consider "written arguments in case or rebuttal briefs filed within the time limits." 19 C.F.R. § 353.38(a) (1995). With respect to the presentation of arguments following preliminary results, the regulations state:

The case brief shall separately present in full all arguments that continue in the submitter's view to be relevant to the Secretary's final . . . results, including any arguments presented before the date of publication of the preliminary . . . results.

19 C.F.R. § 353.38(c)(2). Cinsa asserts that it raised this argument during the administrative proceeding. Cinsa now contends that although it did not use the term "distorted," it claimed in its administrative brief that the revalued method "overstated" the depreciation expense. See Cinsa Case Brief at 8-25; Cinsa Final Reply Brief at 2-22.

On appeal from the administrative decision of the Department, the Panel must follow the "general legal principles" that would apply to the corresponding national court. NAFTA, Art. 1904, Annex 1911; see Certain Cut-To-Length Carbon Steel Plate From Canada, USA-93-1904-04 (1994). The Rules of the Court of International Trade state that the court, "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C.A. § 2637(d) (1994). Numerous court decisions have recognized this requirement. See, e.g., United States v. L.A. Tucker Truck Lines Inc., 344 U.S. 33, 37 (1952); Rhone Poulenc, Inc. v. United States, 899

F.2d 1185, 1189-90 (Fed. Cir. 1990); Timken Co. v. United States, 795 F. Supp. 438, 442 (Ct. Int'l Trade 1992); Budd Co., Wheel & Brake Div. v. United States, 773 F. Supp. 1549, 1555 (Ct. Int'l Trade 1991); Koyo Seiko Co. v. United States, 768 F. Supp. 832 (Ct. Int'l Trade 1991), aff'd, 972 F.2d 1355 (Fed. Cir. 1992); N.A.R., S.P.A. v. United States, 741 F. Supp. 936, 945 (Ct. Int'l Trade 1990); LMI-La Metalli Industriale, S.P.A. v. United States, 712 F. Supp. 959, 968 (Ct. Int'l Trade 1989). Moreover, the exhaustion rule is held to be particularly important in cases, such as this one, in which the action under review involves exercise of the agency's discretionary power. See McCarthy v. Madigan, 503 U.S. 140, 145 (1992). Thus, if the Panel finds that Cinsa did not raise an argument in the administrative proceedings, the Panel will not consider that argument.

Both Commerce and GHC rely upon the decision in Rhone Poulenc, Inc. v. United States, in which the Court of Appeals for the Federal Circuit upheld the finding of the Court of International Trade that the respondent had not exhausted its administrative remedies. 899 F.2d 1185, 1191 (Fed. Cir. 1990). In Rhone Poulenc, the sole argument that the plaintiff presented during the administrative proceeding was that Commerce should not rely upon "best information otherwise available." On appeal, plaintiff argued that even if Commerce used BIA (taken from the administrative

investigation four years earlier), Commerce should have revised the data to reflect for interest and exchange rates. Before the Court of Appeals, plaintiff stated,

Rhone Poulenc concedes that it never raised this *argument* before the ITA, but contends it is simply another angle to an *issue* which it did raise before the ITA, whether the 1980 data were the best information. It argues that the Supreme Court's decision in Hormel v. Helvering authorized appellate courts to consider new arguments so long as the general issue was raised at the agency level.

Id. (citation omitted) (emphasis in original). In rejecting plaintiff's argument, the Court of Appeals recognized that in exceptional cases, or particular circumstances when injustice might otherwise result, a reviewing court will consider new questions of law. Id. (citing Hormel, 312 U.S. at 556-57). The court did not agree, however, that an exception to the general rule was warranted in the circumstances of the case before it. The court relied in part upon its finding that plaintiff did not raise the argument at the administrative level "for tactical reasons." Rhone Poulenc, 899 F.2d at 1191 (citing 710 F. Supp. at 348-50). The court stated, "[f]ar from it being unjust to Rhone Poulenc, it would have been unjust to the ITA and wasteful of public resources to allow Rhone Poulenc to belatedly raise the argument under these circumstances." Rhone Poulenc, 899 F.2d at 1191.

There are recognized exceptions to the general rule of exhaustion of administrative remedies. For example, reviewing courts have held that exhaustion is not required when the Department's proceeding did not afford an adequate opportunity for the party to raise the contested issue at the administrative level. American Permac, Inc. v. United States, 10 Ct. Int'l Trade 535, 642 F. Supp. 1187, 1188 (1986); Philipp Bros., Inc. v. United States, 10 Ct. Int'l Trade 76, 630 F. Supp. 1317, 1324 (1986); Al Tech Specialty Steel Corp. v. United States, 11 Ct. Int'l Trade 372, 661 F. Supp. 1206, 1210 (1987); Suramericana de Aleaciones Laminadas, C.A. v. United States, 14 Ct. Int'l Trade 560, 746 F. Supp. 139 (1990), rev'd on other grounds, 966 F.2d 660 (Fed. Cir. 1992).

None of the exceptions to the general exhaustion rule applies in this case, however, because Cinsa claims only that its argument in the administrative proceeding below was "sufficiently specific" to satisfy the exhaustion rule. Cinsa admits that it did not use the term "distorted" in the administrative proceedings below but emphasizes that it clearly objected to the use of revalued depreciation in its comments to the preliminary results due to the company's position that it believed the revalued method "overstates Cinsa's normal production costs attributable to the subject

merchandise." Cinsa's Brief to the preliminary results, Exhibit 1 at 4.^{2/}

In support of its position, Cinsa relies upon NACCO Materials Handling Group, Inc. v. United States, a recent decision of the Court of International Trade. No. 95-134 (July 26, 1995). At issue in NACCO Materials was the inclusion of credit revenue in the short-term interest income offset to the financial expense component of COP and CV. During the administrative proceedings, the respondent had argued that credit revenue from end-users should not be merged with the sales price. On appeal, respondent extended its argument for the first time to the credit revenue from dealers. In that case, Commerce claimed that the argument concerning credit revenue from dealers was barred by the rule on exhaustion of administrative remedies. The court, however, disagreed, stating:

"[T]his Court finds plaintiffs do appear to have raised the issue in their brief to the agency. Although plaintiffs' brief below does not explain that its argument captioned "The Financing Arrangement Is A Separate Transaction That Should Not Be Merged With The Sales Price For The Forklift" is leveled against adjustments for credit revenue generated on transactions with both end-users and dealers, the brief also does not expressly limit

^{2/}The Panel does note, however, that the main thrust of Cinsa's argument following the preliminary results was that the Department's practice was only to use revalued depreciation in hyperinflationary economies.

plaintiffs' argument only to revenue earned in relation to end-users. Furthermore, this generalized argument falls within a section in plaintiffs' brief titled "THE DEPARTMENT SHOULD REJECT TOYOTA'S CLAIMED CREDIT REVENUE FOR ITS U.S. SALES." Thus, this Court rejects defendant's contention."

Id. at 16-17. Although the NACCO Materials decision was issued (August 1, 1995) before the deadline for submission of opposition briefs (November 3, 1995), neither Commerce nor GHC distinguish the case.

The Panel finds that Cinsa's argument in response to the preliminary results was sufficiently specific to satisfy the exhaustion of administrative remedies rule. The Panel relies on the court's analysis in NACCO Materials Handling Corp. v. United States and finds that Cinsa raised the argument at issue in its brief to the agency. The company stated that although its "audited financial statement, prepared for purposes of Mexican taxation, utilized revalued depreciation, it is inappropriate for the ITA to use revalued depreciation for purposes of COP and CV when Cinsa's historical depreciation, as reported in its financial statement, was also part of the administrative record." Furthermore, although the section captioned, "THE ITA INCORRECTLY INCREASED CINSA'S REPORTED COST OF PRODUCTION AND CONSTRUCTED VALUE BY USING REVALUED DEPRECIATION RATHER THAN HISTORICAL DEPRECIATION" addressed the use of revalued

depreciation in a non-hyperinflationary economy, Cinsa was clearly arguing that the revalued method did not accurately reflect costs of production.

b. Methodology for Calculating Depreciation

Cinsa argues that the Department's decision to calculate the depreciation component of COP and CV using the revalued method was contrary to law and not supported by substantial evidence. Neither the antidumping statute nor the regulations instruct Commerce on the calculation of depreciation. See e.g., 19 U.S.C.A. § 1677b(b) (1994 & Supp. 1996); 19 C.F.R. § 353.50(a) (1995); 19 C.F.R. § 353.51(c) (1995). Because the statute is silent regarding the treatment of the depreciation expense, Commerce has broad discretion to make a reasonable interpretation of the statute and to make a reasonable choice among competing methodologies. Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984); U.H.F.C. Co. v. United States, 916 F.2d 689, 698 (Fed. Cir. 1990); IPSCO, Inc. v. United States, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

Cinsa argues that, in the case at hand, Commerce applied an incorrect legal test in determining whether use of revalued depreciation reasonably reflected the actual costs of production. Cinsa states in its brief that the Department

"failed to analyze whether application of revalued depreciation in accordance with Mexican GAAP distorted Cinsa's actual production costs, but merely assumed that since Mexican GAAP allowed for revalued depreciation, and such revaluation of assets appeared in Cinsa's financial statements, those financial statements reflected actual costs."

Cinsa Brief at 11.

The Panel finds that Cinsa has not succeeded in demonstrating that Commerce did not correctly apply its methodology or that the Department's determination to use revalued depreciation, as required by Mexican GAAP and as reflected in the company's financial statements, was unreasonable. Cinsa admits that Mexican GAAP does require Mexican companies to use the revalued method but insists that this requirement applies only to the Company's preparation of its financial statements. Cinsa observes that the Mexican Income Tax Law requires that depreciation deductions be calculated using the historical method and that the internal cost and accounting books of the Company reflect use of the historical method.

The Panel finds no cases that would support the claim that Commerce is restricted to the depreciation methodology required for income tax purposes or to the methodology contained in the Company's internal cost and accounting records. Contrary to Cinsa's position, the Court of International Trade explicitly stated in NTN Bearing Corp.

of Am. v. United States that Commerce is to refer to the home-market GAAP utilized in financial statements. Id., 826 F. Supp. 1435, 1441 (Ct. Int'l Trade 1993).

The Department's reliance upon home market GAAP used for financial statements was most recently upheld by the Court of International Trade in Laclede Steel Co. v. United States, No. 94-160, slip op. at 29 (Oct. 12, 1994). In Laclede Steel, the plaintiff, a Korean steel producer, argued that Commerce should use historical costs because it was required by home-market GAAP as well as United States GAAP. The court disagreed with the plaintiff and supported the Department's decision to use the revalued method relying, in part, upon a Korean law permitting domestic companies to revalue their depreciation costs for financial-statement purposes. Id. Furthermore, the court found that use of the historical method in that case would distort the production costs facing the Company:

"[U]se of Hyundai's reported depreciation expenses at historical value would be distortive because such a methodology would overlook the significant impact that revaluing assets has had on Hyundai. The ripple effects caused by revaluation of Hyundai's assets include, inter alia, a decrease in tax liabilities due to increased amounts of depreciation; an increase in equity reflected on the company's balance sheets; a potentially enhanced stock value resulting from more available equity; and, an improved ability to acquire debt resulting from an increase

in equity Hyundai seeks to reap the benefits of revaluation with respect to additional available liquidity, a lower tax liability, etc., and yet turn back the clock to take advantage of diminished depreciation expenses solely for purposes of this antidumping investigation."

Id. at 23-24 (citation omitted).

The Panel finds the court's analysis in Laclede Steel instructive with respect to the case at hand. Due to the revaluation of assets as reflected on the company's financial statements, Cinsa should have enjoyed several benefits. Revalued assets translate into an increase in the equity values reflected on a company's balance sheet, a potentially enhanced stock value resulting from greater equity, and an improved ability to acquire debt. Thus, the Panel finds that the Department's decision to base depreciation expenses upon the revalued costs of assets and fixed overhead, as set forth in Cinsa's financial statements, was reasonable.

Cinsa's argument also asserts that Commerce failed to analyze whether application of revalued depreciation distorted Cinsa's actual production costs. Cinsa claims that Commerce "merely assumed" that the use of revalued depreciation for financial statement purposes reflected Cinsa's actual production costs.

In support of its position that Commerce did not properly analyze whether use of revalued costs would be

distortive, Cinsa cites two recent decisions of the Court of International Trade that specifically discuss the Department's reliance upon home-market GAAP for the depreciation expense, Laclede Steel Co. v. United States (No. 94-160, slip op. at 29 (Oct. 12, 1994)) and NTN Bearing Corp. of Am. v. United States (17 Ct. Int'l Trade 713, 826 F. Supp. 1435, 1441-42 (1993)). In both of these decisions, however, the court upheld the Department's analysis as a reasonable reflection of actual costs. Most notably, in Laclede Steel, the court upheld the Department's analysis as set forth in the final determination, which stated:

"We find in this case that Hyundai's financial statements were prepared in accordance with Korean GAAP using a revaluation of its fixed assets. In their submissions, however, Hyundai deviated from its own accounting practice by reporting depreciation on a historical cost basis. Although in the United States assets are not normally revalued, U.S. GAAP states that when fixed assets are written up to market or appraisal value, the depreciation should be based on the written-up amount (ARB-43). Therefore, we consider revaluation to be an accurate methodology for valuing depreciation, and we have relied on it for purposes of this investigation."

Circular Welded Non-alloy Steel Pipe From the Republic of Korea, 57 Fed. Reg. 42,942, 42,952 (1992) (Comment 33) (hereinafter Korean Pipe).

The Panel does not find in the final determination of Korean Pipe any fundamental difference from the case at

hand in the Department's discussion of its analysis used in determining that revalued assets reasonably reflected actual costs. The reference to U.S. GAAP in Korean Pipe applies equally to the facts of the present case. Moreover, as is clear from the court's discussion in Laclede Steel, Commerce was relying upon expenses as recorded in the firm's financial statements. No. 94-160, slip op. at 23-24 (Oct. 12, 1994).

Furthermore, the Panel finds that respondents have failed to demonstrate that the Department's decision to use Cinsa's revalued depreciation expenses results in distortion of the company's costs. The Panel finds substantial evidence on the record supporting the Department's determination that revalued depreciation reasonably reflected actual costs.

The Panel refers to Cinsa's Supplemental Questionnaire Response, which clearly shows Mexico was experiencing substantial inflation (at a rate of more than 25 percent) during the period of review. Cinsa noted the effects of the high inflation rate on depreciation expenses in its case brief, which illustrated how the use of revalued depreciation significantly increased the company's depreciation expense. Moreover, Mexican GAAP recognizes the effect of inflation upon the value of assets and requires companies to revalue assets to compensate for the change.

The Department has addressed the issue of the impact of high inflation upon depreciation expenses in several cases.

In Silicomanganese From Venezuela, Commerce decided to use revalued depreciation despite the fact that home market GAAP had permitted use of historical depreciation values during the period of review. 59 Fed. Reg. 55,436, 55,440 (1994) (Comment 10). In that case, the Department stated,

"Depreciation enables companies to spread large expenditures on purchases of machinery and equipment over the expected useful lives of these assets. Not adjusting for the devaluation of currency due to high inflation results in the depreciation deferred to future years being understated in constant currency terms, and, therefore, distorts the Department's COP and CV calculations."

Id. Moreover, Commerce has found in other antidumping cases involving Mexico that revaluation of assets was appropriate due to high inflation rates. See, e.g., Oil Country Tubular Goods from Mexico, 60 Fed. Reg. 33,567, 33,574 (1995); Gray Portland Cement and Clinker from Mexico, 58 Fed. Reg. 25,803, 25,806 (1993) (Comment 4).

Cinsa argues that Commerce's practice is to use revalued depreciation only if the home market economy was experiencing hyperinflation during the period of review. To support this claim, Cinsa cites two cases in which Commerce calculated depreciation using revalued assets in the presence of hyperinflation. Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina, 49 Fed. Reg. 48,588 (1984); Certain Carbon Steel Products from Brazil, 49 Fed. Reg. 28,298 (1984).

Furthermore, Cinsa cites the final determination in Certain Fresh Cut Flowers from Peru, which defined a hyperinflationary economy as, "one experiencing an annual inflation rate of more than 50%." 52 Fed. Reg. 7000 (1987). Cinsa points out that, by this standard, Mexico's rate of inflation during the period of review was not hyperinflationary.

The Panel finds that Cinsa's hyperinflation argument is without merit because it misstates the Department's practice in choosing between historical and revalued costs for the calculation of the depreciation expense.

As explained by Commerce and upheld by the Court of International Trade, the choice of methodology for calculating depreciation expense is based upon home market GAAP and turns upon whether the methodology adequately represents costs of production. In a hyperinflationary economy, use of a revalued method would be the preferred means of calculating depreciation. The Panel finds no cases, however, that support Cinsa's position that Commerce only uses the revalued method in the context of a hyperinflationary economy. As noted by the Court of International Trade in Laclede Steel, when a company reaps the many advantages of revaluing its assets, it would be distortive to "turn back the clock" for purposes of an antidumping investigation. No. 94-160, slip op. at 23-24.

In conclusion, the Panel holds that Cinsa's arguments during the administrative proceedings below were

sufficiently specific to satisfy the exhaustion of administrative remedies rule, but the Panel does not agree with Cinsa's claim that Commerce may only use the revalued method of calculating depreciation expenses when the home market country is experiencing hyperinflation. The Panel finds that the Department's use of revalued depreciation is supported by substantial evidence in the record and is in accordance with applicable law.

2. Profit-Sharing

Mexican law directs Cinsa to distribute ten percent of its taxable income to its employees at the close of any fiscal year during which the Company has earned a profit through its operations. Cinsa recorded profits during the two fiscal periods subject to the Department's review. Cinsa did not include profit-sharing payments as part of its reported labor costs for COP or CV. In the fifth administrative review, however, Commerce adjusted Cinsa's COP and CV to include mandatory profit-sharing payments to its employees. 60 Fed. Reg. at 2378.

Cinsa argues that such payments should not be included as labor costs in COP or CV because they are profit-based distributions unrelated to the manufacture of the products at issue. The Department defends its methodology as a reasonable exercise of agency discretion, maintaining that

the payments made to employees are analogous to wages or other compensation to labor.

The antidumping statute offers no explicit guidance about whether profit-sharing expenses should be added to COP or CV. See 19 U.S.C.A. § 1677b(b)(3) (1994 & Supp. 1996); 19 U.S.C.A. § 1677b(e) (1994 & Supp. 1996). Moreover, the Department's regulations, although specifically excluding "profit" from COP, do not address the treatment of mandatory profit-sharing payments. See 19 C.F.R. § 353.51(c) (including in COP "the cost of materials, fabrication, and general expenses, but excluding profit, incurred in producing such or similar merchandise"). Given the absence of legislative or regulatory guidance, the Panel agrees with the Department that its choice of methodology regarding profit-sharing payments is entitled to substantial deference. See Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994).

The assignment of profit-sharing expenses to COP and CV calculations is consistent with the Department's administrative practice. See Oil Country Tubular Goods from Austria, 60 Fed. Reg. 33,551, 33,557 (1995). See also Certain Corrosion Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Mexico, 58 Fed. Reg. 37,192, 37,193 (1993); 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 Steel Plate from Canada, 58 Fed. Reg. 37,099, 37,113 (1993); Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany, 57 Fed. Reg. 44,551, 44,553 (1992). However, no court has addressed the reasonableness of the Department's methodology.

In determining COP and CV, Commerce does not include, as a general principle, "income or expenses that are unrelated to the product's manufacture." Television Receivers, Monochrome and Color, from Japan, 56 Fed. Reg. 56,189, 56,192 (1991). Thus, the issue is whether mandatory profit-sharing payments are expenses related to the production of Cinsa's products.

The parties dispute the critical attributes of a company's cost of production. Commerce argues that the appropriate focus of inquiry is the recipient of corporate payments. Because, in the case of Cinsa, employees receive these payments, they are properly categorized as a cost of labor and, thus, an appropriate component of COP and CV. Cinsa, by contrast, asks this Panel to consider only the process for determining the amount of profit-sharing due to employees. Cinsa argues that, like income taxes and dividend payments, profit-sharing is an income-based expense derived solely from the amount of profit a company enjoys in a given fiscal year and is independent of the costs of production or labor.

In fact, profit-sharing payments are hybrid transfers of value, bearing certain similarities to wages and transfers such as interest expenses on one hand and to income taxes and dividend payments on the other. Wages and interest payments constitute part of COP and CV. Income taxes and dividend distributions do not. See Oil Country Tubular Goods from Austria, 60 Fed. Reg. at 33,557; High Information Content Flat Panel Displays and Display Glass Therefor from Japan, 56 Fed. Reg. 32,376, 32,392 (1991); Timken Co. v. United States, 852 F. Supp. 1040, 1049 (Ct. Int'l Trade 1994). The Panel must determine which type of payment exhibits the closest resemblance to the profit-sharing payments at issue.

Cinsa argues that profit-sharing payments are not a labor cost because they are not tied to hours worked or units produced and are, thus, unrelated to production of the subject merchandise. But, as the Department has observed, other forms of employee compensation included in COP and CV, such as group health insurance, payroll taxes, and company-paid life insurance, are tied neither to hours worked nor to the amount produced.

Cinsa also argues that profit-sharing payments are more like dividends than wages. Given the risk that employees assume in any profit-sharing plan, this is not an unreasonable argument. Given imperfect information, workers who accept reduced wages in exchange for profit-sharing payments risk

discovering at year-end that the return on their "investment" of labor will not meet their expectations.

Profit-sharing payments are distinct from dividends in several key respects, however. First, as suggested, profit-sharing payments represent a legal obligation of the firm, contingent only upon whether the firm posts a profit for the fiscal year. Second, and most important, the right to participate in profit-sharing conveys no ownership rights in the company. Profit-sharing is a payment to a productive factor in the production process, not a payment of profit to the owners of the firm.^{3/}

Moreover, accounting principles distinguish between profit-sharing payments and dividends. Like income taxes, profit-sharing payments appear as an expense featured on the income statement. By contrast, dividends affect only the equity side of the balance sheet and do not originate on the income statement. Oil Country Tubular Goods from Austria, 60 Fed. Reg. at 33,557. On the balance sheet, profit is the

^{3/} In countervailing-duty cases, Commerce has adopted a methodology for classifying hybrid instruments as debt or equity, and this methodology was recently upheld by the Court of International Trade. Geneva Steel v. United States, No. 93-09-00566-CVD, 1996 WL 19112, at *3 (Ct. Int'l Trade Jan. 3, 1996). Recognizing that many payments could share characteristics of both debt and equity, Commerce set forth a four-tiered hierarchy of considerations. These factors are: 1) expiration/maturity date/repayment obligation, (2) guaranteed interest or dividends, (3) ownership rights, and (4) seniority. Id.

value remaining after reductions to income, including profit-sharing and income taxes. Dividends are true distributions of profits paid to the owners of the company, and "profit" is explicitly excluded from COP calculations under 19 C.F.R. § 353.51(c). Thus, the Department's disparate treatment of profit-sharing and dividends accords with fundamental accounting principles.

The argument on which Cinsa places greatest reliance is that profit-sharing payments are analogous to income taxes and, therefore, like income taxes, should be excluded from COP and CV. In explaining why income taxes are not included in COP or CV, the Department has consistently cited the fact that income taxes are based on the level of income that a corporation realizes. E.g., High Information Content Flat Panel Displays and Display Glass Therefor from Japan, 56 Fed. Reg. at 32,392 ("Department does not consider income taxes based on the aggregate profit/loss of the corporation to be a cost of producing the product."); Color Picture Tubes from Japan, 55 Fed. Reg. 37,915, 37,925 (1990); Television Receivers, Monochrome and Color, from Japan, 54 Fed. Reg. 13,917, 13,928 (1989). Cinsa notes correctly, however, that this does not distinguish income taxes from profit-sharing

because both constitute mandatory payments that are tied to a firm's fiscal results.^{4/}

Profit-sharing payments are unlike income taxes in two critically important ways, however. First, profit-sharing payments are paid to labor. Thus, unlike income taxes paid to the government, profit-sharing payments flow directly to a factor of production. Second, because workers receive these payments, the firm may use the expected, risk-discounted value of future profit-sharing payments to maintain its worker compensation at the market-clearing level, thus avoiding any increase in its cost of capital.

It is reasonable to assume that, rather than seeing its cost of capital and, ultimately, its marginal costs rise, a rational firm will attempt to keep its employee compensation levels at the market-clearing level, and will attempt to pass the cost of profit-sharing on to those workers who benefit from it -- rather than to shareholders.

^{4/}Income taxes and mandatory profit-sharing payments are also alike in that both reduce a firm's return on equity, thus increasing the firm's costs of capital and, in time, the firm's marginal cost. Prices of corporate goods may rise as a result, and output may also be affected. See Douglas R. Fletcher, The International Argument for Corporate Tax Integration, 11 Am. J. Tax Policy 155, 160 & n.19 (1994); D.A. Auld and F.C. Miller, Principles of Public Finance 111 (2d ed. 1975); Augh Gravelle & Ray Reese, Microeconomics 244-45 (2d ed. 1992). The net effect on price and quantity will depend on the elasticities of supply and demand. Fletcher at 10 & n.19.

The firm and its workers will negotiate wage contracts in light of the firm's legal obligation to make profit-sharing payments. The firm's projected profits for the coming period, as well as the chance that such profits will be greater or less than actual profits, should play a role in determining the fixed wage.

In short, despite similarity in the methods for calculating profit-sharing payments and income taxes, these two obligations differ fundamentally. Profit-sharing is paid to labor, a factor of production. Income taxes are paid to the government, which is not a factor in the production process. Although both income taxes and profit-sharing payments are mandatory and based upon the firm's year-end results, their basic purpose and effect are sufficiently dissimilar to make the Department's disparate treatment of them in its COP and CV methodology a reasonable administrative action.

There is one difficulty with the preceding analysis that must be acknowledged. Firms and workers should consider only the expected value of profit-sharing payments, discounted for risk, in determining fixed wages. Commerce, however, bases its COP calculations on actual profit-sharing payments. In any given year, a firm's actual profit-sharing payments almost certainly will differ from the expected amount that was considered in setting fixed wages and prices. Nevertheless,

because Cinsa has not challenged Commerce's action on this basis, and because the Department's use of actual profit-sharing payments does not strike us as prima facie unreasonable, the Panel upholds Commerce's methodology.

Cinsa also argues that Commerce counted profit-sharing payments twice by including them in the CV calculations. This argument adds nothing to Cinsa's other contentions. The Panel has determined that profit-sharing payments are not part of the firm's profit, as that term is understood according to general accounting principles. The "profit" included in CV represents the amount that remains after reductions to income, such as those taken for profit-sharing and income taxes. Thus, the Department's decision to include profit-sharing payments and an amount for profit in CV did not result in double counting.^{5/}

The Panel finds that Commerce made a reasonable determination to characterize profit-sharing as a cost of labor and to include it in COP and CV in the fifth administrative review.

^{5/} In its brief, Cinsa argues that profit-sharing should not be included in CV because it is not a cost "incurred prior to exportation" as required by 19 U.S.C.A. § 1677b(e)(1). (1994 & Supp. 1996). In light of the fact that the current version of that statute does not contain this language, as well as the fact that Cinsa did not raise this argument in the administrative review, we decline to consider this issue.

3. Cap Upon Interest Income Offset at the Amount of Interest Expense

During the period of review Commerce, according to established policy, calculated Cinsa's financial expenses for addition to COP and CV by referring to the financial expenses of Cinsa's parent company, Grupo Industrial Saltillo, S.A. de C.V. ("GIS"). GIS's short-term interest income exceeded its interest expense, resulting in net financial income for the company. However, in its COP and CV calculations, Commerce entered a zero amount for interest expense, thus disregarding the excess interest income. The Department's reasons for imposing a cap upon the use of interest income follow:

"It is the Department's normal practice to allow short-term interest income to offset financing costs only up to the amount of such financing costs. The Department reduces interest expense by the amount of short-term income to the extent finance costs are included in COP. Using total short-term interest income in excess of interest expense to reduce production cost, as suggested by Cinsa, would permit companies with large short-term investment activity to sell their products below the COP."

60 Fed. Reg. at 2379, Pub. Doc. 69 (citations omitted).

Cinsa alleges that the Department's decision to ignore all excess short-term interest income was arbitrary and not supported by substantial evidence. Cinsa argues that it is inconsistent to treat short-term interest income that exceeds interest expense differently from that which does not.

Short-term interest income has been considered by Commerce and the Court of International Trade to finance production and therefore to be a variable in the COP/CV calculations. Cinsa argues that this is true whether the interest income exceeds interest expense or not. The income still remains a component of financial expense.

The Department's position is that the purpose of COP and CV is to calculate cost. One element of cost is interest expense. Once short-term interest income has reduced interest expense to zero, it would be unreasonable to use excess interest income to offset other unrelated actual expenses. To do so might mean that certain companies with large short-term investment capabilities could sell at less than COP because their actual costs would be reduced by interest.

The Court of International Trade considered the Department's interest-income offset policy in general and stated that:

"[T]his Court finds that neither 19 U.S.C. § 1677b(e) [constructed value] or 19 C.F.R. § 353.51(c) [cost of production] precludes the ITA from making necessary adjustments for various sources of income and expenses in its calculations of constructed value and COP. The starting point for [Commerce] in its calculations of constructed value and COP is to determine as accurately as possible the true cost to the respondent of manufacturing the subject merchandise. This requires that offsets be made for such sources of income as the sale of scrap left over from the production

process and various types of short-term interest income which is used in the firms' manufacturing operations."

Timken Co. v. United States, 852 F. Supp. 1040, 1048-49 (Ct. Int'l Trade 1994).

The court thus affirmed the offset of certain income, ruling that nothing in the relevant statute and regulation precluded such action. The court also approved the Department's central focus on calculating the actual cost of manufacturing. The court did not address and has not addressed in other cases,^{6/} the issue of how the income should be offset and whether a certain type of income can be used to offset any cost of production in addition to the one to which it is most logically related.

The Panel concludes from its review of the statute, regulations and court precedent that nothing in the relevant law invalidates the Department's interest-capping policy. The Panel next turns to the Department's administrative decisions to determine if the policy is arbitrary, inconsistent with past practice, or unreasonable.

^{6/}In Floral Trade Council v. United States, 775 F. Supp. 1492, 1504 (Ct. Int'l Trade 1991), the court acknowledged the Department's policy of allowing "interest income if that income is earned from short-term investments related to current operations of the company." It did not discuss the reasoning behind the policy other than to recognize that interest income cannot be considered unless it is related to production of the merchandise in question.

All parties agree that Commerce has followed the income capping policy for some time. Most determinations merely state the policy without explanation.^{2/} However, in addition to the reasoning given in the decision under review, Commerce has discussed its reasons in several other decisions.

^{2/}E.g., Small Diameter Circular Seamless Carbon And Alloy Steel, Standard, Line and Pressure Pipe From Italy, 60 Fed. Reg. 31,981, 31,991 (1995); Frozen Concentrated Orange Juice From Brazil, 55 Fed. Reg. 26,721 (1990); Brass Sheet and Strip From Canada, 55 Fed. Reg. 31,414, 31,416 (1990); Sweaters Wholly or in Chief Weight of Man-Made Fiber From Taiwan, 55 Fed. Reg. 34,585, 34,599 (1990) ("We do not offset other elements of G&A expenses with interest income for purposes of calculating CV."); Titanium Sponge from Japan, 52 Fed. Reg. 4797, 4799 (1987) (Comment 17).

In Steel Wire Rope From Korea, 58 Fed. Reg. 11,029, 11,038

(1993), Commerce explained the policy as follows:

"Short-term interest income related to production is an offset to interest expense, not to COP and, therefore, can only be used to reduce total interest expense to not less than zero."

In Portable Electric Typewriters from Japan, 56 Fed. Reg. 736

58,031, 58,040 (1991) (Comment 8), Commerce explained that

"[W]e allowed the offset of interest income against interest expense only to the extent of interest expense. Interest income which exceeds interest expense represents Brother's involvement in investment activities which are not required for daily manufacturing operations. The interest income is not related to production, and, therefore, may not be an offset against other production costs."

Finally, in the fourth administrative review of Cinsa's cooking ware, Commerce stated that

"The Department does not reduce production cost by the excess because income derived from long-term investments is unrelated to the production of the subject merchandise Using total short-term interest income to reduce production cost, as suggested by CINSA, would permit companies with large short-term investment activity to sell their products below the cost of production and also avoid the full imposition of antidumping duties."

Porcelain-On-Steel Cooking Ware From Mexico, 58 Fed. Reg.

43,327, 43,332 (1993) (citation omitted).

The Panel finds that the Department's policy as articulated in the final results is not inconsistent with prior administrative decisions and that it is not unreasonable or arbitrary in its application. Commerce has used different language to explain its policy in the various administrative determinations, but its consistent position is that excess interest income is related to investment activities, not to production costs. To apply that excess to production costs would distort a company's actual costs.

Short-term interest income is relevant to determining whether a company has interest expenses. Since money is fungible, it would not be accurate to charge a company with interest expense if, in fact, it also enjoyed short-term interest income during the same period. That income, however, does not itself become a cost or lessen the burden of other costs. Regardless of how much excess interest income there is, labor will still cost a certain amount, so will materials and factory overhead.

Moreover, although a company may have short-term investments related to the daily operations of the company, it is not clear that the full amount of the return on that investment is needed for the production of the subject merchandise. In contrast, interest expense is surely a cost necessary for the daily business operation of the company. Otherwise, a firm would not have incurred it. If the extra

interest income is allocated to costs, then a company could arbitrarily subsidize a product by realizing financial activities not necessarily related to the production of the subject merchandise and the COP/CV calculations would be distortive. Thus, the Panel does not find it unreasonable or arbitrary for Commerce to limit the interest offset.

4. Addition of the Full Amount of IVA Collected on Home Market Sales to COP

As Cinsa reported to Commerce, all of its home market sales included in the invoice price an amount for Mexico's value added tax, the "Impuestos Valor Agregado" ("IVA"). In addition, Cinsa reported to Commerce the actual amount of IVA that it paid on inputs used in the production of subject merchandise. No IVA is charged on labor, fixed overhead costs, or other items of COP such as selling, general and administrative costs and financial expenses. The amount of IVA paid on inputs is less than the amount charged in the sales price.

When Commerce tested Cinsa's home market prices against the COP, it included the same amount of IVA in COP as was in the home market price, rather than the amount of IVA actually paid on inputs. Commerce explained its action as follows:

"Value added taxes are paid on inputs and, therefore, are costs incurred in production. Upon the sale of the product, value added taxes are reimbursed to CINSA by the ultimate consumer. Any amount of tax which is in excess of the amount reimbursed is payable to the Mexican government. The Department's calculations must reflect the economic reality that CINSA does not receive a benefit from collecting and paying IVA. Therefore, because COP is compared to home market price which includes the entire IVA paid, to be neutral, our calculations of COP must take into account the entire IVA paid (a portion of which is paid on the inputs, and the remainder of which is due to the government)."

60 Fed. Reg. at 2380.

Cinsa originally argued that the COP statute expressly requires the construction of "all costs" of production. 19 U.S.C. 1677b(b) (1994 and Supp. 1996). Commerce arguably overstated Cinsa's IVA costs, and thus its COP, by including the larger amount of IVA charged on home market sales in the COP calculation. Cinsa argued that Commerce must follow the express language of the statute and cannot alter the statutory scheme to achieve "tax neutrality."

In Cinsa's reply and subsequently at oral argument, the company referred to a recent opinion by the Court of Appeals for the Federal Circuit approving Commerce's approach to tax neutrality in making adjustments for value added taxes under another statutory provision. Federal Mogul Corp. v. United States, 63 F.3d 1572 (Fed. Cir. 1995). Cinsa suggested

that the Panel could remand the issue to Commerce to adopt a tax-neutral treatment of the IVA. According to Cinsa, the method adopted by Commerce in the final results is not tax-neutral. Two tax-neutral approaches would be to add the absolute amount of IVA paid by Cinsa on production inputs to both the COP and the home market sales price or to strip the IVA out of both sides of the equation.

In Federal Mogul Corp. v. United States, supra, the Court of Appeals considered the Department's numerous attempts to adjust purchase price pursuant to 19 U.S.C. § 1677a(d) by value added taxes which are included in the exporter's home market sales price. Various methods to make tax-neutral adjustments had been tried and found by the reviewing court not to satisfy statutory language. Ultimately, Commerce simply added the tax amount included in the home market sales price to purchase price. The Court of International Trade still found this method statutorily deficient.

The Court of Appeals reversed, concluding:

"Commerce's long-standing policy of attempting tax-neutrality in its administration of [the statutory provision] is not precluded by the language of § 1677a, nor do we find the particular proposed methodology to be an unreasonable way to pursue that policy in light of the statutory language."

63 F.3d at 1580.^{8/}

Similarly this Panel finds that nothing in the relevant statute prevents Commerce from treating the IVA in a tax-neutral manner. All parties, moreover, apparently agree that a tax-neutral method is acceptable. The Panel agrees with Commerce's explanation of the effect of the IVA. The firm collects IVA from each sale that the firm makes and this amount is given back to the government. The firm, however, subtracts from its IVA payment to the government, the amount of IVA the firm paid on its inputs. Because of this subtraction, it is as if Cinsa did not incur those IVA expenses on inputs. If the home market price includes the full IVA received from the firms, then to be neutral, it is reasonable for Commerce to add the full amount of IVA due on sales to the COP. Since the IVA revenue will be transferred completely to the government, it is like an expense that the firm has to incur.

At oral argument, Commerce submitted that there was no difference in Cinsa's margin of dumping if Commerce substituted either one of the tax-neutral methods proposed by Cinsa for the method actually used by Commerce in the final results. Counsel for Cinsa argued that there was a

^{8/} As amended by the Uruguay Round Agreements Act, the statute now excludes taxes from normal value. 19 U.S.C. § 1677b(a)(6)(B) (1994 & Supp. 1996). The amendment was not in effect for the review before this Panel.

difference; it would be tax-neutral to add the IVA imposed on inputs to COP and to home market price, but it was not tax-neutral to add the full-price-based amount of IVA to both sides.

The Panel is not persuaded that there is a difference in results among any of the three methods suggested. Each one appears to achieve tax-neutrality without changing Cinsa's dumping margin. The Panel, therefore, affirms the tax-neutral result without discussion of whether one method is preferable to another.

5. Pricing Differences Attributable to Product Color

Cinsa asserts that Commerce incorrectly calculated the margin by not accounting for differences in the color and, therefore, the price of certain products. According to Cinsa, Commerce used the five digit product code, rather than the seven digit product code, and thereby failed to account for differences in product color. The five digit code identifies the product. The additional two digits identify the product color. Cinsa further contends that the administrative record contains information from which Commerce could have identified product color differences.

In its initial questionnaire response, and consistent with its position in the fourth administrative review, Cinsa informed Commerce that it should rely upon the

five digit product code instead of the seven digit product code. Cinsa explained then that color differences did not significantly alter product cost. Thus, Cinsa reported to Commerce that "[o]nce the number of enamel coatings is taken into account, fair value comparisons may be made without regard to color."

Later, on December 31, 1992, Cinsa wrote to Commerce seeking to change this position. Cinsa asked Commerce to compare "type, size, number of enamel coatings **and the color of the article** in its model matching criteria," explaining that "upon further review of the cost and pricing information contained in the questionnaire response, Cinsa has determined that the price and cost differences between articles of the same size and number of enamel coatings, but of different colors, are greater than de minimus." (Emphasis in original.) Cinsa requested that Commerce account for color differences, or, "to the extent that contemporaneous identical matches of same-colored merchandise cannot be made," that Commerce "make similar merchandise comparisons using an article of the same type, size and number of enamel coatings but of a different color, with an adjustment made to account for the cost differences as reported in the COP tape."

The comparisons Commerce used in its preliminary results did not account or adjust for product color

differences. Cinsa filed a lengthy administrative case brief in response to the preliminary results, raising many issues, and presented lengthy oral argument to Commerce. Nowhere did Cinsa raise with Commerce the alleged error in failing to account for product color differences. Cinsa did not raise the issue until its appeal to this panel.

At oral argument, Cinsa's counsel explained that Cinsa did not realize that Commerce had not accounted for color differences. Cinsa argued that Commerce stated in its preliminary decision that Commerce had compared identical products, and therefore Cinsa assumed that this meant that Commerce had accounted for product color differences:

"And the question of whether or not the DOC made identical model matches, we didn't focus on because, according to their memorandum, they did do that. We had no reason not to believe they did what they told us in the disclosure of what they were doing. That's the practical answer to what happened between why it wasn't raised at the preliminary stage."

Cinsa also admits that information in the record reflects that the five digit code was used, rather than the seven digit code. But, according to Cinsa, "it took us time to go through" the information and to simulate the computer program to discover the discrepancy.

The crux of the problem apparently was that Cinsa was not focused on the issue at the time. Instead, Cinsa concentrated on determining the reasons for the disparity

between the anti-dumping margins arising from earlier administrative reviews and the anti-dumping margin arising here. It appears that Cinsa simply did not notice the problem until the current appeal.

Cinsa asserts that, given this record, Commerce should be faulted for using the five digit code, rather than the seven digit code, in its final results. The Panel disagrees. Cinsa was timely in informing Commerce that product color differences should be taken into account. But when Cinsa failed to raise the Department's failure to do so in response to the preliminary results, Cinsa waived its right to assert that such failure was error. Commerce cannot be held in error for using the five digit code in its final results when Cinsa did not raise the issue in response to the preliminary results. See, e.g., Koyo Seiko Co. v. United States, 768 F. Supp. 832 (Ct. Int'l Trade 1991), aff'd, 972 F.2d 1355 (Fed. Cir. 1992) (party failed to exhaust its administrative remedies when it raised issue by letter early in proceedings but failed to raise issue again in administrative proceedings); Timken Co. v. United States, 795 F. Supp. 438, 443 (Ct. Int'l Trade 1992) (party is required "to specifically contest at the administrative level those choices with which it did not agree").

Cinsa's contentions that this alleged error is a "purely legal" one, or alternatively that it could not have

sooner identified the alleged error, are both unconvincing. While Commerce is statutorily directed to compare identical products, how it does so in any particular case is a factual matter. The use of the five digit product code instead of the seven digit product code is not a matter of interpreting a statute or deciding upon a legal standard. It is, rather, purely factual. Cinsa had all of the information it needed to raise this alleged error when it presented its problems with the Department's preliminary results.

Cinsa had an obligation to raise with Commerce all substantive issues known at the time which Cinsa asserts contributed to an allegedly unfair price comparison. This is especially true when, as here, Cinsa's position on the particular assertion is directly contrary to the position submitted to Commerce in prior reviews and in Cinsa's initial questionnaire response. Because Cinsa waived this issue during the course of the administrative proceeding, this Panel will not consider whether Commerce should have used the seven digit product code instead of the five digit product code in establishing its model matching criteria.^{2/}

^{2/} On March 26, 1996, Cinsa informed the Panel that the Department had recently reached preliminary determinations in the sixth and eighth administrative reviews of the antidumping duty order on Porcelain-on-Steel Cooking Ware from Mexico. Copies of those results were submitted to the Panel with a request that we take notice of the fact that the Department considered product color in making model matches in both reviews. Decisions in these
(continued...)

6. Error Associated with Product Number 10158

In its administrative case brief in response to the preliminary results, Cinsa pointed out to Commerce that Cinsa had reported standard costs for certain items in a way that inappropriately skewed the figures for that item. Cinsa requested that Commerce account for its error when issuing the final results. Commerce declined. The Panel finds that Commerce erred in not accounting for the error, and direct Commerce on remand to recalculate in accordance with this opinion.

Commerce had required Cinsa to report costs on a per-unit basis. In general, Cinsa reported its costs on a per-box basis. But in those instances where Cinsa sold its products in boxes containing multiple units, as opposed to single units, Cinsa's standard cost accounting reported each box as a single unit. According to Cinsa, "in order to conform to the DOC's request to report only single unit costs,

^{2/}(...continued)

subsequent reviews do not, however, negate Cinsa's waiver of this issue with respect to the present review under consideration.

in cases where more than one item was packed in a box, Cinsa divided the total cost of the items sold in multiple packaged units by the number of items in the package." Prior to the preliminary determination, Cinsa discovered that it had not made that division for certain items and informed Commerce by letter of its error. Commerce corrected its data in accordance with the method that Cinsa suggested.

In reviewing the preliminary results, Cinsa discovered another such error and raised it in its administrative case brief. Commerce, however, declined to alter its findings to account for this error. Commerce and General Housewares assert that there was not enough evidence in the administrative record from which Commerce could recalculate the claim and that Cinsa's request therefore came too late. Commerce and General Housewares do not contend that Cinsa's position is flawed, but rather that Cinsa presented it too late.

The administrative record contained information indicating that Item # 10158 (1 quart sauce pan package with multiple units) differed from Item # 10166 (1 quart sauce pan package with single unit) because the reported weight was different by .092 kilograms (.348 kg vs. .440 kgs). Commerce contends that it cannot know the cost differential associated with the different items without knowing the packaging costs associated with the single unit item versus the multiple unit

item. Thus, according to Commerce, the error had to be corrected within the time for submission of new factual information.

Cinsa, on the other hand, contends that no new factual information was required to fix the error. According to Cinsa, Commerce could correct the COP/CV data error by dividing the reported costs for these items by two -- just as it did with the other errors brought to its attention before the preliminary results. Thus, Cinsa asserts that its failure to discover its mistake before the deadline for submission of factual information has no impact on Commerce's ability to correct for the error.

The Court of Appeals for the Federal Circuit recently addressed a similar situation in NTN Bearing Corp. v. United States 74 F.3d 1204 (Fed. Cir. 1995). In that case, the Federal Circuit made clear that Commerce may account for untimely factual information about inadvertent clerical errors, when to do so does not require starting anew or delaying the final determination. 74 F.3d at 1208. The case also raises the possibility that Commerce abuses its discretion when it fails to allow a respondent to present untimely, new factual information that would correct an error, even when such an error is not obvious from the record that existed before the preliminary determination.

The Panel believes that the NTN Bearing case is controlling here and that it sets the minimum standards for the untimely submission of factual information necessary to correct a clerical error. On remand, Commerce should consider whether Cinsa's suggestion of simply dividing by two the costs of producing Item # 10158 is sufficient (as it apparently was with the other multiple unit products brought to Commerce's attention) or whether Commerce needs Cinsa to present data relating to packaging costs. In either event, Commerce should account for the cost differential associated with the difference between a single-unit and a multi-unit package for 1 quart sauce pans.

The Panel remands this issue to the Department for further proceedings consistent with this opinion.

IV. CONCLUSION

The Panel affirms the Commerce Department's determinations with respect to all issues with the following two exceptions: (1) the Panel remands the issue concerning the error associated with product number 10158 for further proceedings not inconsistent with this opinion, and (2) the Panel remands the issue of the appropriate adjustment for rebated or uncollected value-added taxes with instructions for the Department to apply the tax neutral methodology approved

by the Court of Appeals for the Federal Circuit in Federal Mogul v. United States, 63 F.3d 1572 (Fed. Cir. 1995). The Department shall provide the Panel with the results of this remand within 45 days of the date of this decision.

ISSUED ON APRIL 30, 1996

SIGNED IN THE ORIGINAL BY:

O. Thomas Johnson, Chairman
O. Thomas Johnson, Chairman

Victor Carlos Garcia-Moreno
Victor Carlos Garcia-Moreno

Lewis H. Goldfarb
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Concurring Opinion
On The Issue Of The Inclusion of Profit-Sharing
In The Calculation Of COP & CV^{1/}

Joining in this Concurring Opinion on the issue of the inclusion of profit-sharing in the calculation of cost of production (COP) and constructed value (CV) are Panellists Alejandro Castañeda-Sabido & Victor Carlos García-Moreno (hereinafter "The Concurring Panel Members"). The Concurring Panel Members submit the following opinion and Appendix to express their finding that it would be reasonable from a profit maximization perspective not to include profit-sharing expenses in COP. Nevertheless, because the parties did not raise arguments using the profit maximization perspective, the standard of review afforded to the Panel does not allow for remand.

Analysis

The Concurring Panel Members find reasonable CINSA's position that profit-sharing payments should not be included in costs of production (COP), utilizing the perspective of a profit maximizing firm. The Concurring Panel Members' finding is analyzed below and in the Appendix. This analysis, however, was not raised by the Parties, and, thus, is not part of the administrative record upon which Commerce made its determination. In accordance with the North American Free Trade Agreement

¹The following opinion is applicable to Commerce's calculation of both costs of production (COP) and constructed value (CV). According to the analysis, profit-sharing would be included in CV as an element of profit and not as an element of production costs.

(NAFTA), Annex 1903.2(1), "the Panel shall base its decisions solely on the arguments and submissions of the two Parties." Thus, the standard of review does not allow for remand.

The Concurring Panel Members do not join in the decision of the Majority because they do not agree with the Majority's economic analysis of profit-sharing payments. As discussed further below and in the Appendix, the Concurring Panel Members find that economic analysis from a profit maximization perspective supports the conclusion that the full amount of profit-sharing expenses would not be included in marginal cost, and, thus, in the pricing decision of the firm. Moreover, since one of the purposes of the home market cost/price test is to determine whether the price set by the firm recovered the costs of production,^{2/} the Concurring Panel Members find that it would be reasonable for Commerce's determination to reflect the firm's decision-making process.

²See 19 U.S.C. § 1977b(b), which provides:

" . . . If the administering authority determines that sales made at less than cost of production --

(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

such sales shall be disregarded in the determination of foreign market value. . . ." [emphasis added]

See also, 19 C.F.R. § 353.51(a). In addition, the regulation provides, "The Secretary will calculate the cost of production based on the cost of materials, fabrication, and general expenses, but excluding profit, incurred in production such or similar merchandise." Id., subsection (c).

Part A. Characteristics of Profit-Sharing

As explained in the Majority decision, profit-sharing payments are "hybrid transfers of value." The Concurring Panel Members understand the profit-sharing expense as a contingent payment made by companies to employees based on the annual assessed profits of the firm. This contingent payment is similar to direct employee wages in that the payment is made to individuals involved in the production of the product.

Unlike other employee wages and benefits, however, the profit-sharing payment will only be made if the company achieves a profit. In this respect, the profit-sharing expense also differs from the production costs of materials, fabrication, general expenses and packaging because these costs are incurred independently of whether the company works at an overall loss.^{3/} This aspect makes profit-sharing analogous to income tax and dividend payments because they are all contingent on the firm's realization of a profit.

Profit-sharing is further likened to dividends because profit-sharing extends to the workers the economic risks that the company faces while operating in an uncertain environment. As stated by Commerce in its Opposition Brief, the risk-sharing aspect of dividends is a reason why dividends are not considered a cost of production. See Commerce Opposition Brief at 49.

³Even though working at an overall loss, the firm will still make these payments as long as it can recover its variable costs.

Profit-sharing differs from dividend payments, as pointed out in the Majority decision, in that profit-sharing is a legal obligation and does not convey any ownership rights.

The Majority decision also discusses CINSA's argument that profit-sharing should be treated like income tax payments. The Majority agrees with CINSA that both profit-sharing and income taxes "constitute mandatory payments that are tied to a firm's fiscal results." The Majority, however, distinguishes profit-sharing on the basis that it benefits workers and that it allows a firm to reduce fixed employee wages. This assertion was also presented in, Oil Country Tubular Goods From Austria, where Commerce asserted that, from an economic perspective, profit-sharing was directly related to wages and salaries.^{4/} Id. 60 Fed. Reg. at 33,557. To support the conclusion, Commerce claimed that because of profit-sharing, "[t]he company's fixed wages are reduced allowing it to remain cost efficient in tough economic conditions." Id.

The Concurring Panel Members, however, find the claim that a firm can reduce wages because of profit-sharing, speculative and not supported by evidence on the record in the case at hand.

⁴The Concurring Panel Members agree with CINSA that Oil Country Tubular Goods can be distinguished from the case at hand because in that case, the expense denominated "profit-sharing" was not exactly what is meant in the present case. Id. 60 Fed. Reg. at 33,557. In that case, the firm had to pay the profit-sharing allowance even if it did not make a profit. In contrast, CINSA only paid profit-sharing if the firm achieved a profit.

Regarding the give and take between wages and profit-sharing, they do not agree that the two payments are perfect substitutes from the worker's perspective. Moreover, even though an institutional arrangement such as profit-sharing may reduce overall expenses, that does not mean that a profit-maximizing firm will allocate the expenses due to this arrangement as part of the marginal cost that affects their price-setting decision. The elements that are included in the firm's marginal cost and price-setting decision will be discussed at length below and in the Appendix.

These different aspects of profit-sharing have made the expense a vague and somewhat problematic element for Commerce in the calculation of cost of production. Complicating matters further, Congress has not provided fixed standards or principles to instruct Commerce in its determinations or to guide the courts in their reviews.

Part B. Economic Argument.

The Majority decision asserts that, although both income taxes and profit-sharing payments affect marginal cost in a similar way, only profit-sharing is rightfully included in COP.^{5/}

⁵The Majority states, "Income taxes and mandatory profit-sharing payments are also alike in that both reduce a firm's return on equity, thus increasing the firm's costs of capital and, in time, the firm's marginal cost." The Concurring Panel Members point out, however, that even though profit-sharing and corporate taxes have this indirect impact on marginal cost and prices, it does not mean that they should be included as part of COP.

The Majority distinguishes profit-sharing stating that a rational firm will try to save on this expense, and, thus, on increased capital costs, by reducing the fixed wages paid to the workers with the promise of sharing profits with them. The Majority states:

"It is reasonable to assume that, rather than seeing its cost of capital and, ultimately, its marginal costs rise, a rational firm will attempt to keep its employee compensation levels at the market-clearing level, and will attempt to pass the cost of profit-sharing on to those workers who benefit from it - - rather than to the shareholders."

What the Majority refers to here as "employee compensation" includes the fixed wage and the so-called expected profit-sharing allocation.

The Concurring Panel Members respectfully disagree with the Majority's assertion. The Concurring Panel Members' criticisms of the Majority's analysis on the effect of profit-sharing come from the supply side of the labor market and from the way profit-sharing enters into the firm's decision-making process.

From the perspective of labor supply, the Concurring Panel Members do not agree that the contingent profit-sharing payments will perfectly substitute for fixed wages. It is not clear whether the workers will perfectly substitute a secure salary (fixed wage) for a contingent or expected payment (profit-

sharing). Unless workers are risk neutral, no perfect substitution will be present. Furthermore, the supply schedule of workers that would receive a fixed wage plus the contingent payment will be different than the supply schedule that would receive a pure fixed wage. If the labor supply schedule has some degree of elasticity and the demand for labor remains unaltered, a firm's attempt to substitute contingent payments for fixed wages will imply a reduction in fixed wages, but also will imply a reduction in the market clearing employment and an increase in the so-called market clearing wage.

Assuming that the labor market faced by a firm is perfectly competitive, then the firm faces a perfectly elastic supply curve (i.e., the firm faces a competitive market in which it cannot have any impact), and there is no way in which the firm can reduce the fixed wages with the promise of sharing profits. The Concurring Panel Members do not agree that the supply schedule will remain constant after the workers have changed from a situation in which pure fixed wages were given to them to a situation in which part of their income is made contingent on uncertain events.

More fundamentally, the Concurring Panel Members disagree with the Majority's characterization of the impact of the profit-sharing expense on the firm's decision making process. The Majority concludes that the full amount of the expected profit-sharing payment is correctly included in COP. The Concurring

Panel Members, however, find that this conclusion does not reflect the marginal decisions with respect to hiring labor for a profit maximizing firm that has to share profits. To illustrate this point, the Concurring Panel Members offer their own analysis of the decision-making process of a profit maximizing firm that shares profits.

A firm that does not share profits will hire an additional worker if the revenue that the firm expects to obtain from hiring the additional worker is larger than the extra costs that it will incur. Now, suppose that a firm has to share profits and faces the same decision with regard to hiring a worker. That firm has to share a certain percentage -say 10%- of its additional revenue that emerges because of the hiring of the additional worker. However, since the share is on profits, and since profits are calculated by subtracting costs from revenues, the effective cost of hiring the worker will also be reduced in the percentage in which the firm shares profits. Thus, there is no reason why a firm should have to consider expected profit-sharing as part of its marginal cost upon which production and pricing decisions are based. Any amount of profit-sharing will reduce revenues and costs in the same percentage. This analysis implies that a firm which shares profits and a firm which does not share profits will choose the same output and price.

The results of the analysis in the preceding paragraph assume that it is reasonable to study the price fixing decision

from a short run perspective. As analyzed in the Appendix, if the long run perspective were to apply, it would imply that a firm could change all factor of productions at will, including capital. The Concurring Panel Members, however, find that the respondent did not have the ability to change its level of capital assets during the whole period of review, and, thus, it is reasonable to assume a fixed stock of capital. If the capital stock is fixed, the only way a profit maximizing firm can alter the level of production is by changing its level of labor employment.

Assuming that a firm may convince its workers to accept a lower fixed wage with the promise of sharing profits so that capital costs do not increase, there is no reason why a firm that maximizes profits needs to consider the expected profit-sharing payments as part of its marginal costs. Even in the long run, a firm that shares profits will lose on revenues, but will save in costs, and, thus, its impact is neutral in the pricing decision as long as capital is not mismeasured.

In the long run perspective, assuming that capital services are not accurately measured, then the savings in costs may be larger or smaller than the true cost of the capital services. In this case, profit-sharing is not fully neutral. In the case at hand, however, there is no record evidence that the capital services were mismeasured during the period of investigation. In fact, the Panel's decision with regard to depreciation affirms

Commerce's determination which found that the revalued method of depreciation as used in the firm's financial statements, reasonably reflected the depreciation expenses. Even assuming that capital has been mismeasured, in the short-run perspective, the mismeasurement does not imply that profit-sharing will affect the output and pricing decision.

If the firm can alter the level of capital and labor -the long run perspective- and if the capital costs are accurately calculated, the firm still does not have to worry about recovering the full amount of profit-sharing because it will still save on costs in the same percentage in which it loses on revenues, and, thus, the impact is neutral. Marginal cost would be determined by the fixed wage and by the rate of return on capital. If a firm succeeds in reducing its fixed wages allocation with the promise of sharing profits and maintains its capital costs at a constant level, the firm will face a lower marginal cost.

If capital costs are mismeasured and the firm is in the long run perspective, then the firm will still save on costs. However, the percentage on savings will be smaller than the percentage that it has to pay on revenues. Even in this case, unless the level of mismeasurement is excessive, most of the profit-sharing allocations will be automatically recovered without the need to alter the price. For example, if capital services are mismeasured at the 10 percent level; profit-sharing

is ten percent; and if the firm increases its level of output in one unit -assuming for simplicity that price changes very little- then 10 percent of the additional revenues will be lost and the firm will also save 10 percent of the additional labor costs and approximately 9 percent of the additional capital costs.

Although a small part of the additional capital costs are not saved, and this small part slightly changes marginal cost and prices, the magnitude is never at the full amount of profit-sharing. In other words, the firm does not need to alter the price dramatically since most of the profit-sharing expenses are recovered and marginal cost would only be changed slightly. As shown in the Appendix, this change is fundamentally determined by the level of mismeasurement of capital and not by the amount of profit-sharing.

The Concurring Panel Members find that there is no evidence in the record that shows that capital services have been mismeasured, and, thus, find it reasonable that from a profit maximizing perspective, profit-sharing should not be included as part of COP. The Concurring Panel Members also find reasonable that labor and other inputs -such as materials- were the only inputs that CINSA could alter in the period of investigation. Under the latter circumstance, even if capital was mismeasured, profit-sharing will not have an impact on marginal cost and on the pricing decision. It is true, however, that if capital is being mismeasured and the firm is facing a long run situation,

then profit-sharing may affect marginal cost, but this impact is not rightly incorporated by adding the profit-sharing allocation as part of the labor costs. Thus, the Concurring Panel Members find that the analysis from the profit maximization perspective does not support the Majority analysis and Commerce's methodology.

The Concurring Panel Members conclude that if a profit maximizing firm shares profits, then it need not worry about including the full amount of profit-sharing in determining prices because the recovery of profit-sharing is automatic. The firm loses on revenues, but also saves on costs, even if not the full amount. From a profit maximizing perspective, the Concurring Panel Members find that the inclusion of profit-sharing would bias the cost/price test. Whatever the impact of profit-sharing on marginal cost, it is substantially reflected in fixed wages and the rate of return on capital.

In order to estimate what elements a firm would include in its price-setting decision, certain assumptions must be made as to how the firm behaves. One widely recognized assumption used by economists is that the aim of a rational firm is to maximize profits. This general assumption has been recognized by the administering authorities^{6/} and by the reviewing courts. In USX

⁶The International Trade Commission (ITC), in making its domestic injury tests, uses an economic model which assumes that firms optimize profits. The name of the model is Comparative Analysis of the Domestic Industry's Condition (CADIC). Several

Corp. v. United States, the Court of International Trade (CIT) reviewed a decision by the International Trade Commission (ITC) which found negative material injury on domestic industry based upon a test, developed by one of the commissioners, which demonstrated that the foreign company had not engaged in predatory pricing. 12 C.I.T. 205, 682 F. Supp. 60 (Ct. Intl. Trade 1988). The Court remanded the decision, rejecting the Commissioner's position that before finding material injury, the ITC must first find predatory pricing. Id. 682 F. Supp. at 66-68. Nevertheless, the Court agreed ". . . that analysis from the point of view of rational profit-maximization is necessary in many situations . . ." Id. at 68. In another CIT decision, British Steel Corp. v. United States, the Court states, "The Department agrees that a profit-maximizing company should use the types of analyses suggested by the plaintiff in making its managerial decisions on these issues, . . ." 10 C.I.T. 224, 232, 632 F. Supp. 59, 66 (Ct. Intl. Trade 1986). The Court then goes on to question the reasonability of using such analyses on a per-

determinations from the International Trade Administration (ITA), also refer to profit-maximizing firms. See, e.g., Final Affirmative Countervailing Duty Determination: Cold Rolled Carbon Steel Flat-Rolled Products from Korea 49 FR 47,284 (December 3, 1984) (. . . "profit maximizing firms compete within that system, a marketplace exists and our benchmarks for identifying and valuing subsidies are prices in that market place"); Final Affirmative Countervailing Duty Determination: Certain Steel Products From Austria, 58 FR 37,217 (July 9, 1993) ("Privatized companies (and their assets) are now owned and controlled by private parties who are profit-maximizers.").

project basis, but it does not question the profit-maximizing assumption. Id.

The Concurring Panel Members find it reasonable that Commerce calculate COP in the case at hand using the economic principle of profit-maximizing behavior. Since the purpose of the determination of sales at less than fair value is to assess whether the firm has engaged in an unfair trade practice, it is reasonable that Commerce evaluate the firm using the market principles by which firms operate.^{7/} Moreover, since one of the purposes of the home market cost/price test is to determine whether the price set by the firm recovered the costs of production, it is reasonable for Commerce to make the recovery analysis as the firm would, based on market principles.

SIGNED IN THE ORIGINAL BY:

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Issued on April 30, 1996

⁷Congress has recognized the importance of the market principles by providing a special procedure for calculating FMV in non-market economies. U.S.C. § 1677b(c) (1982); See also, S. Rep. No. 93-1298, 93rd Cong., 2nd Sess. 174, reprinted in 1974 U.S.C.C.A.N, 7186, 7311.

Appendix to the Concurring Opinion

Economic Analysis

The Concurring Panel Members' reasoning can be better explained with the help of the following mathematical model. First, suppose that there are just two inputs, capital services and labor. If both are accurately measured, the profit function by including profit-sharing can be written in the following way:

$$\text{II} = (1-s)(pq-wl-rk)$$

Where p is the price at which the firm sells the quantity q . The term w is the fixed labor wage; k are the capital services; and r is the price per unit of the capital services. Both k and l , are cost-minimizing choices of capital and labor in the long run perspective.

If the firm wants to increase its level of output and sell one more unit, then it will have to buy more capital and labor services. The firm will increase production as long as marginal revenue exceeds marginal cost. In this example, the fact that firms share profits does not alter the decision to produce an additional unit. The firm will lose a certain percentage of the revenue, but that percentage will also be saved on costs.

Now suppose that capital is being mismeasured and only a certain percentage of capital is incorporated in the profit-sharing allocation. Call this percentage θ and assume that its

value lies below 1, then the profits of the firm will be written in the following way.

$$\Pi = (1-s)(pq-wl-(rk) - (1- ()rk$$

In this case profit-sharing is not neutral, a firm that decides to increase an amount of production and will adjust its choices of capital and labor will not save all the percentage of profit-sharing allocations in cost.

Using microeconomic analysis, the definition of "long run" is understood as a situation in which all inputs are subject to change. The Concurring Panel Members do not find that the long run perspective is the appropriate standard for the period of investigation in the case at hand, because there is no evidence on the record which shows that CINSA was able to adjust its capital stock at will during this period. Rather, the Concurring Panel Members find it reasonable to view the analysis by considering, as standard microeconomic analysis does, that the respondent had some level of inputs -such as the capital stock- which were inherited from past decisions, and, thus, that the short run profit function holds.

Under the short term conditions, the term k in the last equation is fixed. A firm which wants to produce more output has to hire more labor. By doing this, the firm increases its output and sales and loses a percentage of revenues because of profit-sharing, but the firm will also save on labor costs in the same

percentage. Thus, there is no reason to try to recover the profit-sharing allocation. The impact of profit-sharing is neutral, and the decision to price and produce is not affected by profit-sharing.

The conclusion of the Majority's corporate tax analysis is that in a competitive capital market, the term r - capital services - will change. Comparing this with profit-sharing, the Majority states that a rational firm will reduce the fixed wages and will consider a labor compensation level that incorporates the expected profit-sharing payments, and moreover, that the labor compensation will stay at the same level at which the market cleared when the firm offered only a fixed wage. Here is where the Concurring Panel Members disagree. First, as economic analysis and the above profit function indicate, any additional unit of labor to be hired to increase production will be neutral. The firm will have to lose on revenue but it will also save on costs in the same percentage. Thus, a rational profit-maximizing firm should not worry about recovering this allocation of profit-sharing, because the firm will recover it automatically. In other words, a firm that hires an additional unit of labor and loses a percentage of the additional revenues because of profit-sharing, will also save on marginal labor costs in the same percentage, and, thus, there is no reason to try to recover the profit-sharing allocation and the firm does not have to worry about maintaining its labor compensation at the

former market clearing level.

Suppose that we are in the long term perspective (k is variable) and capital services are being mismeasured (θ is less than 1), then the implicit price of capital has increased and the firm will choose relatively more labor. Marginal cost will depend among other things on the parameters θ , the fixed wage w and the rate of return on capital r . The firm will lose on revenues by sharing profits and a lower percentage will be saved on cost since the new implicit price on capital, $(1-\theta)r$, is larger than the price of capital when the capital services are accurately measured, $(1-s)r$.

If capital services are mismeasured at the 10 percent level and profit-sharing is ten percent, then $\theta = .9$. Then, as analyzed above, only a small part of profit-sharing will not be recovered. This reasoning implies that the price will be altered only slightly, if at all. The impact of profit-sharing will be reflected in marginal cost and in the pricing decision, but only in the amount in which $(1-\theta)$ differs from $(1-s)$. Even in this case the effect on prices may be ameliorated by nonlinear considerations, such is the case of a Cobb-Douglas technology.

When capital services are mismeasured, the effect of profit-sharing on the pricing decision will depend fundamentally in the factor θ . The inclusion of profit-sharing as part of the cost of production will not resemble this impact, and, thus, the impact of

profit-sharing on the pricing decision will not be accurately depicted by adding profit-sharing as part of the cost of production. The inclusion of profit-sharing as part of cost of production will distort the cost/price test if the firm maximizes profits.

As the above reasoning illustrates, when capital is being mismeasured, profit-sharing does affect marginal cost, but this does not mean that the way it affects marginal cost is by including it as part of an extra wage added to the fixed wage term w . Profit-sharing affects marginal cost through the $($ factor, and there is no reason to add profit-sharing to resemble the impact of this factor.

The Concurring Panel Members understand that Commerce, by adding profit-sharing to COP and applying the cost/price test, intends to show that the impact of profit-sharing has to be recovered in some way. However, as the model in this Appendix indicates, recovering the profit-sharing payments should not be a concern. If profit-sharing has any impact then that should be picked in the $($ factor, and the terms r and w .

The upshot of this economic analysis is that profit-sharing is not a significant issue in the pricing decision because a firm that shares profits and another that does not share will set almost the same price. Under Commerce's current methodology (adding profit-sharing to COP), the home market cost/price test will be biased.

Thus, based upon economic assumptions such as profit-maximization, the Concurring Panel Members do not agree with Commerce's methodology.

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