ARTICLE 1904

BINATIONAL PANEL REVIEW UNDER

THE NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:

Oil Country Tubular Goods from

Mexico; Final Determination of Sales

At Less Than Fair Value

USA-95-1904-04

DECISION OF THE PANEL

REVIEWING THE FINAL DETERMINATION OF THE

INTERNATIONAL TRADE ADMINISTRATION,

U.S. DEPARTMENT OF COMMERCE

July 31, 1996

Before: Harry B. Endsley (Chairman)
Héctor Cuadra y Moreno
Raymundo-Emilio Enríquez-Sánchez
Frank G. Evans
Daniel G. Partan

Appearances:

Charles Owen Verrill, Jr. and John R. Shane, *Wiley, Rein & Fielding,* on behalf of the Petitioner, North Star Steel Ohio. With them on brief were Alan H. Price and Peter S. Jordan.

Linda S. Chang, Attorney-Advisor, Office of the Chief Counsel for Import Administration, and Elizabeth C. Seastrum, Senior Counsel for Countervailing Duty Litigation, Office of the Chief Counsel for Import Administration, on behalf of the Investigating Authority, the *International Trade Administration, U.S. Department of Commerce*. With them on brief was Stephen J. Powell.

Christopher F. Corr and Richard King, *White & Case,* on behalf of the Respondent, Tubos de Acero de México, S.A. With them on brief were David P. Houlihan, Richard J. Burke and Kristina Zissis.

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OPINION AND ORDER OF THE PANEL

I. INTRODUCTION

This Binational Panel ("Panel") was constituted under Article 1904(2) of the North American Free Trade Agreement ("NAFTA"[1]) and Title IV of the North American Free Trade Agreement Implementation Act[2] in response to a request for panel review of the Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Mexico ("Final Determination") made by the International Trade Administration of the U.S. Department of Commerce ("the Department") on June 28, 1995.[3]

In the Final Determination, the Department determined that oil country tubular goods ("OCGT")[4] from Mexico are being, or are likely to be, sold in the United States at less than fair value,

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[1]/North American Free Trade Agreement ("NAFTA"), *signed at* Washington, Mexico City, and Ottawa, December 17, 1992; supplemental agreements signed September 14, 1993; *reprinted in* H. Doc. 103-159, Vol. I *and in* 32 I.L.M. 605 (1993) (*entered into force* January 1, 1994).

[2]/Pub. Law. No. 103-182, approved December 8, 1993, 107 Stat. 2057; codified at various sections of title 19 and several other titles.

[3]/The Final Determination ("Fin. Det.") was published in the Federal Register at 60 Fed. Reg. 33567 (June 28, 1995) and is also contained in the administrative record in this case at Pub. Doc. 256, Fiche 46, Frame 79. Citations to public documents on the administrative record are designated herein as "Pub. Doc. __, Fiche __, Frame __." Citations to documents containing proprietary (confidential) information are designated as "Prop. Doc.__, Fiche __, Frame __."

[4]/In its scope analysis, the Department determined that oil country tubular goods ("OCTG") are hollow steel products of circular cross-section, including oil well casing, tubing, and drill pipe, of iron (other than cast iron) or steel (both carbon and alloy), whether seamless or welded, whether or not conforming to American Petroleum Institute ("API") or non-API specifications, whether finished or unfinished (including green tubes and limited service OCTG products). The scope of these products does not cover casing, tubing, or drill pipe containing 10.5 percent or more of chromium. These products fall into numerous

as provided in Section 735 of the Tariff Act of 1930, as amended (the "Act"). The period of investigation ("POI") was specified as the six-month period commencing January 1, 1994 and ending June 30, 1994.[5]

The Request for Panel Review was filed by Tubos de Acero de México, S.A. ("TAMSA"), the sole Mexican respondent in the underlying investigation, on July 25, 1995.[6] Complaint's[7] contesting certain aspects of the Final Determination were then filed on August 25, 1995 by both TAMSA[8] and North Star Steel Ohio, a division of North Star Steel Company ("North Star")[9] who was the Petitioner in the underlying investigation. For purposes of Rule 7 of the Rules of

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subheadings of the Harmonized Tariff Schedule of the United States, which were listed in full in the Final Determination. Id., at 33568.

[5]/Id.

[6]/On file at the Secretariat, U.S. Section. See Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Review ("Panel Rules").

[7]/On file at the Secretariat, U.S. Section. See Panel Rule 39.

[8]/ The Complaint filed by Tubos de Acero de México, S.A. ("TAMSA") alleges four different errors of fact or law with respect to the Final Determination, pertaining to (i) the Department's selection of an appropriate financial or interest expense, (ii) the Department's method of calculating general and administrative expenses, (iii) the Department's chosen allocation methodology for nonstandard costs, and (iv) a statement made by the Department in an underlying document with respect to a claimed offset for non-operating income, an issue expressly found to be moot in the Final Determination.See TAMSA Complaint, pp. 2-3.

[9]/ The Complaint filed by North Star Steel Ohio, a division of North Star Steel Company ("North Star") alleges a single error of law in the Final Determination, pertaining to the Department's choice of partial best information available ("BIA") in the calculation of TAMSA's financial expense. See North Star Complaint, p. 5.

Procedure for Article 1904 Binational Panel Review ("Panel Rules"), the Panel finds that the allegations of errors of fact and law set forth in the Complaints are adequate to permit panel review of such allegations.[10]

In the Final Determination, the Department calculated the estimated final dumping margin for TAMSA and "all others" to be 23.79 percent (weighted average).[11] Accordingly, this was the rate that the Department directed the U.S. Customs Service to apply against TAMSA and "all others" in the Department's Antidumping Duty Order, published on August 11, 1995.[12]

II. STATEMENT OF FACTS

A. General Background

At the administrative level, this case began on June 30, 1994 when North Star filed with the Department its Petition for the Imposition of Antidumping Duties Pursuant to Sections 731 and 732(b) of the Act.[13] On July 20, 1994, the Department concluded that the Petition met the

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[10]/ Panel Rule 7(a) states that "[a] panel review shall be limited to [ ] the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review..."

[11]/ Fin. Det., 60 Fed. Reg. at 33575.

[12]/ Antidumping Duty Order, 60 Fed. Reg. at 41056-57.

[13]/ Pub. Doc. 1, Fiche 2, Frame 1. As required by statute (Section 732(b) of the Act, 19 U.S.C. § 1673b), the Petition was also filed with the U.S. International Trade Commission ("ITC"). Volume I of the Petition concerned issues of relevance to the Department while Volume II concerned issues of relevance to the ITC, in particular, material injury and threat of material injury by reason of less-than-fair-value imports of OCTG from Mexico.

requirements of Section 732(b) of the Act and of 19 CFR § 353.12 and formally initiated its investigation of OCTG from Mexico.[14]

Discovery

Discovery by the Department commenced on August 26, 1994 when the Department issued an antidumping questionnaire to TAMSA.[15] This antidumping questionnaire consisted of a 4-page cover letter, a separate page identifying, *inter alia*, the official in charge and the POI, and all four sections of the standard questionnaire, Sections A, B, C and D.[16] The cover letter requested that TAMSA respond "in full" to the antidumping questionnaire, indicating that the response to Section A "must be received no later than September 9, 1994" and that the responses to the remaining sections "must be received no later than September 23, 1994."[17] Elsewhere in the cover letter, the Department cited statutory time constraints as compelling TAMSA's response "by the due dates noted above" and emphasized at another point that the requested information should be provided "within the required time period."[18] In addition, the Department expressly noted that "if the response is not submitted in a

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[14]/See Decision Memo, Pub. Doc. 6, Fiche 4, Frame 74. This determination was published in the Federal Register on July 26, 1994.See 59 Fed. Reg. 37962 (July 26, 1994), Pub. Doc. 9, Fiche 5, Frame 7.

[15]/ Pub. Doc. 42, Fiche 11 , Frame 1.

[16]/Section A of the Department's standard antidumping questionnaire concerns general corporate information; Section B deals with home market or third country sales, price and expense information; Section C pertains to sales, price and expense information with respect to sales to the United States; and Section D concerns cost-of-production ("COP") and constructed value ("CV"). In a subsequent telephone call, dated August 29, 1994, the Department informed TAMSA that it was not necessary to prepare a response to Section D at that time. Pub. Doc. 43, Fiche 11, Frame 87.

[17]/ Standard antidumping questionnaire cover letter, Pub. Doc. 42, Fiche 11, Frame 1, at 1.

[18]/ Id., at 2, 4.

timely fashion, we may have to make our determination on the basis of the best information available."[19]

Having asked for and received an extension of time.[20] TAMSA presented its response to Section A of the Department's questionnaire on September 23, 1994.[21] Similarly[22] TAMSA's Section C response was submitted to the Department on October 11, 1994,[23] and its Section B response was submitted on November 18, 1994.[24]

Based on TAMSA's Section A response, the Department decided to issue its standard Section E questionnaire (costs associated with further processing operations in the United States), which occurred on September 27, 1994.[25] The cover letter to this request required that TAMSA

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[19]/ Id., at 2. The Department's BIA rule appears in 19 CFR § 353.37, which is based on Section 776(b) (19 U.S.C. § 1677e) of the Act. The Department's cover letters typically state that complete and accurate information must be received by the date and time indicated, absent which the Department may be required to resort to BIA. Such statements were included in the various cover letters sent to TAMSA in this case.

[20]/ The Department granted TAMSA an extension of time for this filing on September 7, 1994. Pub. Doc. 52, Fiche 12, Frame 46. See 19 CFR § 353.31(b)(3).

[21]/ Pub. Doc. 72, Fiche 14, Frame 1.

[22]/ TAMSA appears to have timely requested, and received, extensions of time for all filings or submissions not submitted by the original deadline set forth in the questionnaire. The Department has not, in this panel review, suggested otherwise.

[23]/ Pub. Doc. 92, Fiche 17, Frame 1.

[24]/ Pub. Doc. 124, Fiche 24, Frame 15.

[25]/ Pub. Doc. 78, Fiche 14, Frame 25.

respond in full "no later than 5:00 p.m. on October 27, 1994." Based upon an approved extension of time, TAMSA filed its Section E response on November 10, 1994.[26]

On October 3, 1994, the Department issued the first of three requests concerning particular issues: home market viability, extending the period of investigation, and third country sales[27] TAMSA filed its responses to these requests on October 4, 1994, October 7, 1994, October 17, 1994, October 31, 1994, and January 4, 1995.[28]

Subsequently on October 20, 1994, the Department issued a deficiency questionnaire[29] posing various questions concerning TAMSA's Section A response and requiring that the response to this deficiency questionnaire "must be received no later than 5:00 p.m., November 3, 1994."[30] TAMSA filed its Section A deficiency response on this date.[31]

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[26]/ Pub. Doc. 116, Fiche 23, Frame 1.

[27]/ Pub. Doc. 116, Fiche 23, Frame 1.

[28]/See Pub. Doc. 84, Fiche 16, Frame 1; Prop. Doc. 16, Fiche 63, Frame 53; Prop. Doc. 19, Fiche 65, Frame 1; Prop. Doc. 23, Fiche 67, Frame 1; and Prop. Doc. 50, Fiche 83, Frame 1.

[29]/ Pub. Doc. 100, Fiche 18, Frame 23.

[30]/ Id., Section A deficiency questionnaire cover letter.

[31]/ Pub. Doc. 110, Fiche 21, Frame 1.

On December 7, 1994, having found various deficiencies in TAMSA's Sections B and C responses, the Department issued another deficiency questionnaire [32]which was required to be submitted "no later than 5:00 p.m. on December 21, 1994."[33] Having received an approved extension of time, TAMSA filed its Sections B and C deficiency responses on December 30, 1994.[34]

On December 28, 1994, the Department informed TAMSA that, based on Petitioner's November 29, 1994 sales below cost of production allegation[35] it was initiating a cost-of-production ("COP") investigation.[36] The Department enclosed Section D of the questionnaire[37] and required that it be responded to "no later than 5:00 p.m. on Wednesday, January 25, 1995."[38] The Section D

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[32]/ Pub. Doc. 133, Fiche 25, Frame 76.

[33]/ Id., Sections B and C deficiency questionnaire cover letter.

[34]/ Pub. Doc. 147, Fiche 27, Frame 1.

[35]/ Pub. Doc. 130, Fiche 25, Frame 25.

[36]/ Pursuant to Section 773(b) of the Act (19 U.S.C. § 1677b(b)) and 19 C.F.R. § 353.51, if the Department has reasonable grounds to believe or suspect that the sales on which it could base the calculation of foreign market value (either home market or third country sales) are at prices below the COP, the Department may, under specified circumstances, disregard those sales. See *infra* notes 48 and 65. If the remaining above-cost sales are inadequate to calculate foreign market value, the Department will then calculate foreign market value on the basis of CV. COP, as calculated by the Department, will include the cost-of-manufacturing ("COM") (including materials, labor and variable overhead) the subject products sold in the home market or third country, applicable average selling expenses incurred in selling the covered merchandise, and the general and administrative ("G&A") expenses, including financial or interest expense and other non-operating items related to production, that were incurred in the most recently completed fiscal year. This same data would be utilized, if appropriate, to calculate CV, but the latter would also include an addition for profit.

[37]/ Pub. Doc. 146, Fiche 26, Frame 35.

[38]/ Id., Section D questionnaire cover letter.

questionnaire requested combined COP and constructed value ("CV") data. Having received an approved extension of time, TAMSA submitted its Section D response on February 1, 1995.[39]

On February 3, 1995, the Department issued a deficiency questionnaire with respect to TAMSA's Section E response, as well as its Sections B and C responses[40] and required this deficiency response to be submitted "no later than 5:00 p.m. on Friday, February 17, 1995."[41]

Finally, on February 10, 1995, the Department issued another deficiency questionnaire with respect to TAMSA's Section D response[42] requiring a supplemental response to be submitted "no later than 5:00 p.m. on March 3, 1995."[43] TAMSA filed its responses to the Sections B, C, D and E deficiency questionnaires on this latter date.[44]

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[39]/ Pub. Doc. 176, Fiche 31, Frame 1.

[40]/ Pub. Doc. 181, Fiche 32, Frame 7.

[41]/ Id., Sections B, C and E deficiency questionnaire cover letter.

[42]/ Pub. Doc. 190, Fiche 32, Frame 62.

[43]/ Id., Section D deficiency questionnaire cover letter.

[44]/ Pub. Doc. 197, Fiche 33, Frame 1.

Preliminary Findings and Determination

On September 27, 1994, the Department determined TAMSA to be the sole mandatory respondent in this case, on the basis of the fact that TAMSA accounted for at least 60 percent of the exports of OCTG from Mexico during the POI.[45]

On November 3, 1994, based upon information contained in TAMSA's Section A response, the Department determined that TAMSA's home market was not viable within the meaning of section 773(a)(1)(B) of the Act (19 U.S.C. § 1677b(a)(1)(B)) and 19 CFR § 353.48[46] and that Saudi Arabia was the appropriate third country market for this investigation.[47] At this stage in the

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[45]/ Preliminary Determination ("Prel. Det."), 60 Fed. Reg. 6510 (February 2, 1995). Initially, in addition to the full antidumping questionnaire sent to TAMSA, the Department also issued antidumping surveys to three other potential respondents: *Tubacero, S.A. de C.V., Hylsa, S.A. de C.V.,* and *Villacero Tuberia Nacional, S.A. de C.V.* None of these companies were made respondents in this investigation.

[46]/ Under 19 C.F.R. § 353.48(a), if, during the period of investigation ("POI"), the quantity of "such or similar merchandise" sold for consumption in the home market country is so small in relation to the quantity sold for exportation to third countries (normally, less than five percent of the amount sold to third countries) that it is an inadequate basis for determining the foreign market value of the merchandise, the Department will calculate the foreign market value ("FMV") of the merchandise based on either third-country sales or CV.

[47]/Prel. Det., 60 Fed. Reg. 6510. Pursuant to 19 C.F.R. § 353.49(b), the selection of a third country is based on the following criteria:

(1) Such or similar merchandise exported to the country is more similar to the merchandise exported to the United States than is such or similar merchandise exported to other countries, and the Secretary decides that the volume of sales to the country is adequate;

(2) The volume of sales to the country is the largest to any country other than the home market country or the United States; and

(3) The market in the country, in terms of organization and development, is most like the United States market.

investigation, therefore, the Department's focus was on the data for TAMSA's sales to Saudi Arabia, which would be used whenever data on sales in the home market would otherwise be used.

On November 29, 1994, however, North Star alleged that TAMSA's sales to Saudi Arabia included sales below COP.[48] After examining the sufficiency of this allegation, the Department initiated a COP investigation on December 22, 1994,[49] in connection with which it issued a Section D (COP/CV data) questionnaire to TAMSA on December 28, 1994.[50] Because of the home market nonviability finding, the COP data requested from TAMSA involved the cost-of-production of merchandise sold to Saudi Arabia, while the CV data involved the costs associated with merchandise sold to the United States.

The Department issued its preliminary determination on February 2, 1995.[51] Because the Section D questionnaire response was not due until February 1, 1995,[52] the Department was unable

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[48]/ Under the applicable provisions, the Department must eliminate from the pool of home market or third country sales available for price-to-price matching to sales to the United States any sales which are made below cost over an extended period of time, in substantial quantities, and at prices that do not permit recovery of all costs within a reasonable period of time in the normal course of trade. If the remaining above-cost sales are insufficient for price-to-price matching purposes, the Department must match each U.S. sale to its CV, *i.e.*, to the COP for that model as calculated pursuant to Section 773(e) of the Act (19 U.S.C. § 1677b(e). See *supra* note 36 and accompanying text.

[49]/ Pub. Doc. 145, Fiche 26, Frame 32.

[50]/ See *supra* note 37.

[51]/ Prel. Det., 60 Fed. Reg. 6510.

[52]/ See *supra* text accompanying note 38.

to use any of the results of the COP investigation in its preliminary determination. Instead, the dumping margin was calculated solely on the basis of a comparison of the *prices* for TAMSA's U.S. sales to the *prices* for TAMSA's sales to Saudi Arabia.[53] None of the *cost* data (relating to financial expense, general and administrative expense, or the allocation of nonstandard costs) which are of central importance in this case were used. The preliminary dumping margin was zero.[54]

Verifications

From March 13-18, 1995, the Department conducted a *cost* verification at TAMSA's plant in Veracruz, Mexico.[55] The Department also verified TAMSA's *sales* data, which are not directly at issue in this case, from March 20-23, 1995 in Veracruz.[56]

From April 10-12, 1995, the Department conducted a further manufacturing *price* verification at the facilities of Texas Pipe Threaders ("TPT"), TAMSA's subsidiary in Houston,

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[53]/ Prel. Det., 60 Fed. Reg. 6510.

[54]/ Id.

[55]/Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1. The Department's Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, states that the Veracruz cost verification ended on March 17, 1995 and that the Veracruz sales verification was extended to March 24, 1995.

[56]/ Sales Verification Report, Prop. Doc. 79, Fiche 95, Frame 1.

Texas.[57] From April 18-20, 1995, the Department conducted a further manufacturing *cost* verification at TPT in Houston.[58]

Three verification reports were issued: one on April 28, 1995 (respecting TAMSA's sales and covering both the Veracruz and Houston sales verifications), a second on May 1, 1995 (respecting TAMSA's COP/CV submissions), and a third, also on May 1, 1995 (respecting TPT's further manufacturing).[59]

Hearing

The Department held a public hearing on May 19, 1995, in which both TAMSA and North Star participated.[60] In anticipation of the public hearing, on May 9 and 16, 1995, the interested parties submitted case and rebuttal briefs.[61]

In its Case Brief, North Star attached a copy of TAMSA's 1994 unaudited financial statement which TAMSA had filed with the Mexican Stock Exchange (*Bolsa Mexicana de Valores*)

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[57]/ Id.

[58]/ Further Manufacturing Cost Verification Report, Prop. Doc. 81, Fiche 97, Frame 24. The Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 1, states that the further manufacturing cost verification at TPT took place on April 17-19, 1995.

[59]/ See *supra* notes 55, 56, and 58.

[60]/ Public Hearing Transcript, Pub. Doc. 231, Fiche 44, Frame 1.

[61]/ See TAMSA's Case Brief, Pub. Doc. 223, Fiche 39, Frame 36, and Rebuttal Brief, Pub. Doc. 227, Fiche 42, Frame 7. See also North Star's Case Brief, Pub. Doc. 224, Fiche 40, Frame 1, and Rebuttal Brief, Pub. Doc. 228, Fiche 42, Frame 61.

on March 23, 1995.[62] This document has become of central importance to this proceeding. It is a matter of record that TAMSA did not submit this Mexican stock exchange filing to the Department at the Houston cost or sales verification or otherwise.[63]

B. The Final Determination

The Department's Final Determination was published June 28, 1995.[64] In making this determination, the Department used the results of the COP investigation for the first time. Based on

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[62]/ See Pub. Doc. 224, Fiche 40, Frame 1, at Exhibit 1. In the form attached to North Star's Case Brief, this document is entitled "BOLSA MEXICANA DE VALORES, INFORMACION FINANCIERA TRIMESTRAL, CORRESPONDIENTE AL 4to TRIMESTRE DE 1994-1994." TAMSA's Panel Rule 57(1) Brief, at 16, refers to this document as "the unaudited 1994 financial results that TAMSA filed with the Mexican securities oversight authority (*Comisión Nacional de Valores*)."In its Panel Rule 57(2) Brief, at 36, the Department states that TAMSA filed this document with two Mexican agencies in March of 1995, treating the Commission and the Mexican Stock Exchange as separate entities. As background for this issue, the Panel will take the opportunity to set out the following excerpt from "Symposium -- The New Latin American Debt Regime -- Restructuring Strategies for Mexican Eurobond Debt," Duncan M. Darrow, *et al*., 16 J. Int'l L. Bus. 117 (Fall, 1995): "The *Comisión Nacional Bancaria y de Valores* (CNBV), the principal securities regulator in Mexico, and the *Bolsa Mexicana de Valores*, the Mexican stock exchange (the Bolsa), require most Mexican public companies to file annual audited financial statements (within 120 days after the end of the calendar year), quarterly unaudited financial statements (within twenty business days after the end of the first, second and third quarters and within forty-five business days after the end of the fourth quarter), and announcements regarding material corporate events and other material events which may affect the market value of the publicly traded securities they shall have issued [citing in footnote 34 the Ley del Mercado de Valores, *Diario Oficial de la Federación* (January 2, 1975), arts. 14(VI) and 16; Circulares 11-11, 11-11 Bis 2, 11-11 Bis 3, 11-23, 11-24 and 11-25 issued by the CNBV].... These filings are publicly available through the Bolsa." This article notes that "Mexican companies are often late in providing the required information to the Bolsa." Id.

[63]/ Fin. Det., 60 Fed. Reg. at 33572.

[64]/ Id., at 33567.

those results.[65] the Department determined that there were no remaining above-cost sales to Saudi Arabia. Pursuant to the regulations,[66] the Department therefore compared the *prices of U.S. sales* for the POI to the *constructed value* of the products sold to the United States.[67] Based on this comparison, the final dumping margin for TAMSA was calculated to be 23.79%.[68]

In making its Final Determination, the Department accepted the COP/CV data as submitted by TAMSA in its Section D response, with three important exceptions:

(1) The Department revised TAMSA's financial or interest expense ("financial expense") rate to reflect TAMSA's consolidated results for the first two quarters of 1994, rather than TAMSA's 1993 audited consolidated financial statement;

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[65]/ As reported in the Final Determination, it is the Department's standard practice, when it finds that less than 10 percent of a company's sales are at prices below the COP, not to disregard any below-cost sales because they were not made in substantial quantities. When it finds between 10 and 90 percent of the company's sales are at prices below the COP, and the below-cost sales are made over an extended period of time, it disregards only the below-cost sales. When it finds that more than 90 percent of the company's sales are at prices below the COP, and the sales were made over an extended period of time, it disregards all sales for that product and calculates FMV based on CV. Id., citing Section 773(b) of the Act. In this instance, the Department found that there were no sales to Saudi Arabia above COP; thus, it became necessary to compare United States Price ("USP") to CV to determine the dumping margin. Fin. Det., 60 Fed. Reg. at 33568-69.

[66]/ 19 CFR §§ 353.51(b) and 353.50.

[67]/ Fin. Det., 60 Fed. Reg. at 33569. See *supra* note 48. CV includes the COM, G&A expense (including financial expense), profit, and packing expenses. See also 19 CFR § 353.50 and Section D questionnaire, Pub. Doc. 146, Fiche 26, Frame 35, at 2-3.

[68]/ Fin. Det., 60 Fed. Reg. at 33575.

(2) The Department rejected TAMSA's methodology for allocating fixed costs and variances ("nonstandard costs") in arriving at TAMSA's cost-of-manufacturing ("COM"), which had been based on *finishing line machine time*, and substituted another methodology, which was based on *standard costs*; and

(3) The Department also revised TAMSA's general and administrative ("G&A") expense rate to reflect TAMSA's half-year 1994 unconsolidated results, rather than TAMSA's 1993 audited unconsolidated financial statement.[69]

These three changes form the basis of TAMSA's and North Star's principal challenges to the Final Determination.[70]

In its Final Determination, the Department explained its positions with respect to the modifications it had made to the COP/CV data submitted by TAMSA. As to the issue of financial expense, the Department stated that it had rejected TAMSA's calculation based on 1993 data because that was not the most current information available and was not indicative of expenses during the POI.[71] In addition, citing TAMSA's failure to produce the Mexican Stock Exchange filing[72] as

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[69]/ Id., at 33568-69.

[70]/ TAMSA also challenges a statement made by the Department in a preliminary document regarding a claimed offset for non-operating income, an issue expressly found to be moot in the Final Determination. See *supra* note 8.

[71]/ In response to Comment 6, the Department noted that "[t]he January—June 1994 financing expense is substantially higher than the 1993 amount, in part due to the fact that the Mexican peso lost approximately nine percent of its value during the POI." Fin. Det., 60 Fed. Reg. at 33572. The suggested other causes underlying the higher 1994 financial expense rate were not identified by the Department.

[72]/ See *supra* text accompanying notes 62-63.

independent justification for its application of partial best information available ("BIA"),[73] the Department concluded that using the 1993 data would, in effect, reward TAMSA for "withholding" the Mexican Stock Exchange filing at the time of verification, a result incompatible with BIA principles.[74] At the same time, however, the Department stated that it was rejecting North Star's choice for partial BIA, which was TAMSA's *full-year* 1994 financial expense costs, noting that the sudden and severe peso devaluation in December of 1994, well after the POI, made full-year 1994 results unrepresentative of financial expense for the POI.[75]

As to the issue regarding allocation of nonstandard costs[76] the Department explained that it was rejecting TAMSA's finishing time allocation methodology because it shifted such nonstandard costs to products that undergo more finishing, thus distorting actual production costs; and because that methodology neither reflected machine time for other processes performed nor took into account the real cost drivers for price or efficiency variances and other fixed costs.[77] Having rejected

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[73]/The Department applied, as partial BIA, a financial expense rate that reflected the consolidated results for the first two quarters of 1994. Fin. Det., 60 Fed. Reg. at 33572.

[74]/ In response to Comment 6, the Department stated that use of the 1993 financial data "would reward the respondent for not fully cooperating in the investigation." Id.

[75]/ Id.

[76]/ In response to Comment 7, the Department noted that TAMSA's normal accounting system did not allocate variances, depreciation and other fixed costs (which TAMSA termed "nonstandard" costs) to individual products. Thus, for purposes of responding to the Department's questionnaire, TAMSA was compelled to develop a methodology to allocate such nonstandard costs to its calculation of *per unit* COP and CV. TAMSA did so, utilizing as a base the machine time for its *finishing line* process only (not *all* machine time). Id., at 33572-73.

[77]/Id., at 33573. The Department further stated that machine time was not an appropriate allocation basis for costs other than depreciation.

TAMSA's allocation methodology, the Department used total standard cost as the allocation basis for the nonstandard costs, calculating nonstandard costs as a percentage of total standard costs.[78]

With respect to G&A expense, which TAMSA had calculated and submitted based on its unconsolidated 1993 data, North Star once again argued that partial BIA was appropriate, because TAMSA had "systematically withheld its 1994 consolidated financial statements from the Department."[79] The Department noted, however, that TAMSA had provided the 1994 *unconsolidated* G&A data that the Department had requested and that, therefore, there was no basis to apply BIA.[80] Nevertheless, the Department once again decided to reject TAMSA's G&A calculation based on the 1993 data because it considered that the 1994 unconsolidated data was more representative of the actual POI expenses.

Finally, because the Department elected to use the 1994 data, rather than the 1993 data, for its G&A expense rate calculation, it explicitly declined to reach, in the Final Determination, any other issues concerning the use of 1993 G&A data.[81]

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[78]/ The Department stated that total standard cost appropriately factors in machine time, labor hours, direct and indirect material cost and usage, labor cost and usage, energy cost and usage, other variable costs, maintenance, and other services. Id.

[79]/ Id.

[80]/ In response to Comment 8, the Department indicated that "it is the Department's standard practice to calculate G&A based on the financial statements of the producing company that most closely relates to the POI...." Id.

[81]/ Id.

C. Facts Pertinent to the Challenges to the Final Determination

In this portion of the Opinion, the Panel will further develop the facts contained in the administrative record that are pertinent to each of the above issues.

1. Calculation of Financial Expense

In its brief to the Panel[82] the Department noted by way of background that financial expenses are incurred to finance the operation of the integrated enterprise. Therefore, it is the Department's usual practice to base the financial expense allocated to each product on the *consolidated* financial statement of *all* of the related firms.[83] To eliminate the effect of seasonality, to reflect year-end adjustments, and to utilize the most trustworthy data, it is also the Department's practice to base its calculation on the financial expense reported in the *annual, audited* financial statements which correspond most closely to the POI.[84] When calculating financial expenses, therefore, the

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[82]/ Department Panel Rule 57(2) Brief, at 8.

[83]/The Department noted that "TAMSA's 1991-93 consolidated statement consolidates the financial operations of TAMSA and ten subsidiaries. Pub. Doc. 176, [Fiche 31, Frame 1,] Attachment D8 at 6. In May of 1993, the Argentine OCTG producer Siderca acquired a substantial interest in TAMSA. Id., Attachment D8 at 14. It is common for a parent company to obtain credit which will also be used by its related entities. Money obtained in this way is often reflected on the books of a subsidiary firm as debt to the parent, rather than to a lending institution, and interest is not necessarily paid to the parent firm. Thus, in determining financial expense with respect to a firm which is part of a consolidated group, the Department generally bases this figure on a ratio of the annual financial expenses of the consolidated entity to the annual cost of goods sold of the consolidated entity. This ratio is then applied to the COM of the firm under investigation for the POI, usually six-months." Id., at 8 note 4.

[84]/ See Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 13, citing New Minivans from Japan, 57 Fed. Reg. 21937 (May 26, 1992) and Small Business Telephones from Korea, 54 Fed. Reg. 53141 (December 27, 1989).

Department's clear preference is to utilize the *annual, audited, consolidated financial statement* which corresponds most closely to the POI, absent evidence in the record which would require a contrary result.

August 26, 1994 Standard Questionnaire

The Department first sought financial data from TAMSA in its August 26, 1994 questionnaire, wherein at A-5 the Department requested:

> *b. If internal financial statements are prepared and maintained for the subject merchandise, provide copies for your two most recent fiscal years.*
>
> *c. Provide English translations of your audited, consolidated financial statements for your two most recent fiscal years.*
>
> *d. Provide copies of any financial statement or other financial report filed with the local or national government of the country in which your company was located for the two most recent fiscal years.*

TAMSA responded to these requests on the date ultimately due-September 23, 1994- by furnishing the Department with TAMSA's *1992 and 1993 audited, consolidated financial statements.*[85]

[85]/Pub. Doc. 72, Fiche 14, Frame 1, Attachment A11 ("TAMSA Consolidated and Unconsolidated Financial Statements for 1992 and 1993").

September 27, 1994 Section E Questionnaire

The Department submitted its Section E questionnaire on September 27, 1994[86] in which it instructed TAMSA to calculate financial expense "from the annual consolidated financial statements as a percentage of consolidated cost of sales."[87]

TAMSA submitted its Section E Response on the date ultimately due: November 10, 1994, including as Attachment E9 the "TAMSA Consolidated Financial Statement 1993." TAMSA's financial expense calculation was, therefore, based on TAMSA's 1993 annual consolidated audited financial statement.[88]

October 20, 1994 Section A Deficiency Questionnaire

In its October 20, 1994 Section A deficiency questionnaire, the Department requested that TAMSA, on or by November 3, 1994:

> *13. ... provide copies and translated versions of Siderca S.A.I.C.'s financial statements for the two most recent fiscal years.... Provide any semi-annual profit and loss statements for January - June 1994 for TAMSA, TIC, TAMTRADE, Siderca Corp., and Siderca S.A.I.C.*[89]

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[86]/Pub. Doc. 78, Fiche 14, Frame 25. The Section E questionnaire concerns further manufacturing in the United States.

[87]/ Id., Section E2 - Cost of Further Manufacturing Performed in the United States, at 12.

[88]/ TAMSA Panel Rule 57(1) Brief, at 12.

[89]/ Pub. Doc. 100, Fiche 18, Frame 23, at 2.

TAMSA responded to this request on the due date, providing the Department with, inter alia, TAMSA's consolidated profit and loss financial statements for the first and second quarters of 1994.[90]

December 28, 1994 Section D Questionnaire

In its Section D questionnaire of December 28, 1994, the Department requested that TAMSA base its interest expense calculation on its "audited annual consolidated financial statements"[91] and that it provide the following:

> *C . Financial Accounting Systems and Policies*
>
> *Even if you have already done so in your response to Section A of the Department's questionnaire, please provide a completely translated copy of the company's audited financial statements, including footnotes and auditor's opinion for all fiscal years covered by the POI.*[92]

In its Section D response of February 1, 1995 (the due date), TAMSA based the financial expense portion of its response on its audited, consolidated financial statement for 1993,

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[90]/Pub. Doc. 110, Fiche 21, Frame 1, Attachment A30 ("TAMSA and Siderca SAIC Profit and Loss Statements - First Two Quarters of 1994"). These statements, consisting of the balance sheet and income statement for only the first two quarters of 1994, were, of course, unaudited.

[91]/ Pub. Doc. 146, Fiche 26, Frame 35, at 15. The Section D questionnaire concerns both COP and CV.

[92]/ Id., at 7.

stating that this was "the most recently completed fiscal year".[93] In the same submission, TAMSA provided consolidated and unconsolidated financial statements for 1992 and 1993.[94]

February 3, 1995 Sections B, C and E Deficiency Questionnaire

On February 3, 1995, in a deficiency questionnaire covering Sections B, C, and E, the Department made the following Section E deficiency request:

> *18. Please provide a copies* (sic) *of any 1994 financial statements.*[95]

This request came due on March 3, 1995, at which time TAMSA responded by providing TAMSA's consolidated profit and loss financial statements for the first three quarters of 1994,[96] stating that these were the only quarters for which such statements were available.[97]

February 22, 1995 Cost Verification Outline

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[93]/ Pub. Doc. 176, Fiche 31, Frame 1, at 21 ("TAMSA has reported its interest expense on a consolidated basis for fiscal year 1993, the most recently completed fiscal year.").

[94]/ Id., at Attachment D8 ("TAMSA Consolidated and Unconsolidated Financial Statements for 1992 and 1993").

[95]/ Pub. Doc. 181, Fiche 32, Frame 12.

[96]/ Pub. Doc. 197, Fiche 33, Frame 1, Attachment E37 ("TAMSA Financial Statements - First Three Quarters 1994"); this attachment consisted of the balance sheets and income statements for the first three quarters of 1994. The record does not reflect at what point TAMSA's unconsolidated "data for the fourth quarter of 1994" became available. See TAMSA Panel Rule 57(1) Brief, at 13 (stating that it is undisputed that such data was not available on March 3, 1995).

[97]/ TAMSA Panel Rule 57(1) Brief, at 13.

As a leadup to the Veracruz cost verification, the Department on February 22, 1995 submitted to TAMSA its agenda for the Section D verification ("Cost Verification Outline"),[98] noting that the cost verification was to take place between March 13-17, 1995 at TAMSA's factory in Veracruz.[99] Although the Department made no specific request in the Cost Verification Outline for financial statements, it did note that "[o]ne of the most important verification steps ... is to reconcile the costs traced to the general ledger ... to the financial statements of the company (preferably audited financial statements").[100]

March 6, 1995 Sales Verification Outline

On March 6, 1995, the Department submitted to TAMSA its agenda for the Sections A, B and C verifications ("Sales Verification Outline"),[101] noting that the Veracruz verification was scheduled to take place from Monday, March 20, 1995 to Friday, March 24, 1995, and that the Houston verification was scheduled to take place from Monday, April 10, 1995 to Wednesday, April 12, 1995.[102] On page 1 of the Sales Verification Outline, the Department indicated that "Financial

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[98]/ Prop. Doc. 100 [not reproduced on microfiche].

[99]/ Id., Cost Verification Outline cover letter, at 1.

[100]/ Id., Cost Verification Outline, at 1.

[101]/ Sales Verification Outline, Pub. Doc. 198, Fiche 36, Frame 1.

[102]/Id., Sales Verification Outline cover letter, at 1. The cover letter also noted that the enclosed agenda was not necessarily all inclusive and that the Department reserved "the right to request any additional information or materials necessary for a full verification." Id. In addition, the Department noted that "if information requested for verification is not supplied, or is unverified..., we may be obligated to use the

Statements (with English translations)" would be needed for verification.[103] Subsequently in the Sales Verification Outline, the Department stated:

> *To verify total quantity and value of sales reported during the POI, the verifiers will examine the following source documentation. Please be prepared to present any of these items at verification if they have not already been submitted for the record:*
>
> *1. Last financial statement, or equivalent;*
>
> *2. Latest internal financial statements;*[104]

March 13-18, 1995 Veracruz Cost Verification

At the Veracruz cost verification, TAMSA, in response to an oral request by the verifiers, provided the Department with its 1994 year-end trial balance,[105] which contained a summary

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best information available, which may include information supplied by the petitioners, for our final determination." Id., at 2.

[103]/ Sales Verification Outline, Pub. Doc. 198, Fiche 36, Frame 3, at 1.

[104]/ Id., at 4.

[105]/North Star informs the Panel that "a 'trial balance' typically is an internal company accounting record which forms the basis of the audited financial statements. It incorporates all of the key financial information from the company's subsidiary ledgers, including its record of sales, costs, assets, and liabilities. A trial balance usually contains all balance sheet data and income statement information shown in an audited financial statement, but in much greater detail." North Star Panel Rule 57(2) Brief, at 34 note 84.

of all of TAMSA's unconsolidated accounts for the full-year 1994. This trial balance was included as Attachment A17 to the Cost Verification Report.[106]

The Cost Verification Report, issued on May 1, 1995, describes what, in the Department's view, took place at the Veracruz cost verification and at the subsequent Houston cost verification with respect to the issue of TAMSA's financial statements. This statement, and the facts described therein, are a matter of some controversy in this case:

> *According to company officials, TAMSA's 1994 audited financial statements were not yet available. Company officials indicated that the 12/31/94 quarterly filing with the Mexican and U.S. securities oversight agencies (which is publicly available) was to be filed by March 21, 1995. Company officials indicated that the 12/31/94 audited financial statements would be available for release on April 14, 1995.*
>
> *As a part of this investigation, the Department performed a cost verification of the further manufacturing data on April 18-19, 1995. Company officials stated that we would be able to obtain the 12/31/94 audited financial statements at that verification. TAMSA indicated that the only adjustments made to the trial balance amounts would be balance sheet reclassification and a correction for the abrupt devaluation of the peso that occurred in December 1994. At the further manufacturing verification, Department personnel were told that the audited financial statements were not available and that no financial statement was filed with the securities oversight agencies. Therefore, we were not able to obtain the audited 1994*

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[106]/ Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 9. The 1994 trial balance was given in apparent response to the following Department request: "The Department next requested the complete 1994 financial statements at the verification of TAMSA's cost information, March 13-18, 1994 (sic) in Veracruz, Mexico." See Team Concurrence Memorandum, Pub. Doc. 251, Fiche 26, Frame 51, at 11.

financial statements from TAMSA and could not confirm the adjustment for the devaluation. TAMSA did provide a copy of the press release showing unaudited results. The press release is exhibit 20 of the further manufacturing cost verification.[107]

As indicated by this document, it was the Department's view, therefore, that it had been informed by TAMSA officials at the Veracruz cost verification that the fourth quarter (in effect, full-year) consolidated statement was not yet available, but that the (unaudited) 12/31/94 quarterly filing with the Mexican and U.S. securities oversight agencies (which is publicly available) was due to be filed March 21, 1995. In addition, it was the Department's understanding that the "12/31/94 audited financial statements would be available for release on April 14, 1995," and that TAMSA had offered to provide the Department with the audited financial statement during the April 18-20, 1995 further manufacturing cost verification in Houston.[108]

The Department and TAMSA, in their briefs to the Panel, both speak to these "understandings," describing them in somewhat different terms.[109] TAMSA, acting in a timely fashion,

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[107]/ Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 9-10.

[108]/ Id., at 10; see also TAMSA Panel Rule 57(1) Brief, at 15.

[109]/ TAMSA's brief to the Panel states that "TAMSA volunteered that *unaudited* financial results for 1994 would be published and filed with the Mexican and U.S. securities oversight agencies shortly after verification. TAMSA emphasized that both filings would be available on the public record, but also offered to submit them to the Department after they were made." TAMSA Panel Rule 57(1) Brief, at 14-15 (emphasis added).The Department Panel rule 57(2) Brief, at 11, states: "Instead, [the Department] indicated that TAMSA could provide them with the unaudited consolidated filings (and the audited TAMSA-specific statement) during the further manufacturing verification in Houston."

disputed in its pre-hearing Case Brief filed on May 9, 1995, and at the public hearing itself, certain of the characterizations made by the Department in the Cost Verification Report.[110]

April 18-20, 1995 Houston Cost Verification

The Department states in its brief to the Panel (citing the Team Concurrence Memorandum) that at the Houston further manufacturing cost verification conducted April 18-20, 1995,[111] the Department orally requested the audited 1994 statements and the fourth quarter (in effect, full-year) 1994 unaudited consolidated statements filed with the Mexican and U.S. securities oversight agencies.[112] The Team Concurrence Memorandum itself, however, does not in *direct* terms indicate what the Department requested of TAMSA. The scope of the Department's requests can only be inferred *indirectly* from the statements contained in the Team Concurrence Memorandum that TAMSA officials told the verifiers that (i) the audited financial statements were not available, and that

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[110]/ Quoting TAMSA in full: "With reference to page 10 of the cost verification report TAMSA wishes to clarify that, at verification, TAMSA officials stated that TAMSA's non-final, unaudited 1994 results, which must be released in accordance with the requirements of the U.S. and Mexican securities authorities, would be available during the Department's further manufacturing cost verification in April 1995. As indicated in the cost verification report, these results were provided to the Department during the further manufacturing verification, in the form released. Company officials did not state that the 1994 audited financial statements would be available at that time." TAMSA Case Brief, Pub. Doc. 223, Fiche 39, Frame 36, at 21.TAMSA also asserted at the public hearing that at the time it provided the Department with the unaudited 1994 trial balance, it (i) clarified to the Department that the 1994 audited financial statement was not yet completed; (ii) volunteered that after verification it would be filing, with the securities authorities in both countries, *unaudited* 1994 results; and (iii) did not (and could not) promise that the *audited* financial statement was going to be available by the time of the U.S. verification. Public Hearing Transcript, Pub. Doc. 231, Fiche 44, Frame 1, at 33.

[111]/ The agenda for the April 18-20, 1995 Houston further manufacturing (cost) verification was set out in a letter from the Department to TAMSA dated April 13, 1995. See Pub. Doc. 270 [not reproduced on microfiche].As drafted, this document was similar in style and content to the February 22, 1995 Cost Verification Outline. See *supra* note 98.

[112]/Department Panel Rule 57(2) Brief, at 11, citing Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 11.

(ii) no financial statement had been filed with the "securities oversight agencies."[113] In lieu of the financial statements that TAMSA indicated were still unavailable, TAMSA provided the Department with a copy of a press release showing its 1994 financial results, which included three pages of financial tables (a summarized income statement and a summarized balance sheet for TAMSA's consolidated 1994 results)[114] TAMSA strongly disputes to the Panel the assertion that the Department requested the Mexican Stock Exchange filing at the Houston cost verification.

May 9, 1995 North Star Case Brief

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[113]/ See Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 11 ("At the Department's verification of further manufacturing cost conducted April 18-20, 1995 in Houston, Texas, we were told that the audited financial statements were not available and that no financial statement was filed with the securities oversight agencies. Therefore, the Department was not able to obtain the audited or unaudited 1994 financial statements from TAMSA and could not review the company's accounting for the devaluation of the Mexican peso which occurred in 1994.") Id. This quotation highlights a difference between the Department's Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 10, which indicates that the Department was unable to obtain the "audited" 1994 financial statements from TAMSA at the Houston cost verification, and the Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 11, which indicates that the Department was unable to obtain the "audited or unaudited" 1994 financial statements at that verification.

[114]/ See Further Manufacturing Cost Exhibit 20.

[115]/TAMSA asserts that, at the Houston cost verification, the Department "explicitly requested: (1) the 1994 audited financial statement; and (2) the financial statement filed with the SEC." TAMSA states that it accurately informed the Department that tht 1994 audited financial statement was not completed, and that it provided the Department with the 1994 financial results that soon would be filed with the SEC. The Department, TAMSA asserts, never requested the Mexican Stock Exchange filing. TAMSA Panel Rule 57(1) Brief, at 27,28.

On May 9, 1995, North Star provided the Department with a copy of a 38-page unaudited 1994 consolidated financial statement which TAMSA had filed with the Mexican Stock Exchange on March 23, 1995.[116]

Final Determination

In the Final Determination, the Department determined that TAMSA's "failure" to provide the March 23, 1995 Mexican Stock Exchange filing justified its application of partial BIA.[117] The pool of potential BIA rates, and the Department's basis for selecting among them, was set out in the Team Concurrence Memorandum.[118]

1. Calculate interest expense based upon the 1993 financial statements, as submitted 2.9%

2. Calculate interest expense based on the annual amounts reported in the 1994 financial statements filed with the Mexico Stock Exchange. However, completely remove the "special item in loss in exchange rates" reflected in those statements 22.5%

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[116]/ North Star Case Brief, Pub. Doc. 224, Fiche 40, Frame 1, Exhibit 1.See *supra* note 62 and accompanying text.

[117]/ In the Team Concurrence Memorandum, the Department elaborated on its reasoning: "TAMSA's failure to provide the financial statements when they became available effectively prevented the Department from reviewing this data during the verification process. If this information had been presented at such time, the Department would have been able to test and possibly quantify the effects of any unusual results, stemming from either the peso devaluation or any other factors. We also would have been able to raise issues or concerns noted with the data contained in those statements. In that way, the Department would have allowed parties to provide substantive comments on the issues and could have fully addressed those substantive issues in our determination." Pub. Doc. 251, Fiche 46, Frame 51, at 13.

[118]/ Id., at 13-15

3. Calculate interest expense based on the amounts reported in the quarterly reports filed with the Mexican securities oversight agency for the first two quarters of 1994 (i.e., the POI) 37.0%

4. Calculate interest expense based on the amounts reported in the 1994 statements filed with the Mexico Stock Exchange, however isolate the "special item in loss in exchange rates" and amortize this amount over the life of the debt (5 years). Do not reduce the interest expense by interest income and monetary gain as there is no information on the record to support such an

adjustment.....39.5%

5. Calculate interest expense based on the entire amount of financial expenses reported in the 1994 financial statements filed with the Mexico Stock Exchange, including the "special item in loss in exchange rates". 95%

The Department gave reasons for rejecting four of the five options, especially option #1 (favored by TAMSA)[119] and option #5 (favored by North Star),[120] and for ultimately selecting option #3.[121]

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[119]/Id., at 13-14 ("The Department normally relies on the most recent audited financial statement to calculate the financial expense. This is because, absent evidence to the contrary, we believe the prior year to be reasonably representative of the company's normal experience. TAMSA's quarterly filings with the Mexican Stock Exchange show its financial expense totalled 27 percent of cost of goods sold for the quarter ended March 31, 1994, 37 percent for the quarter ended June 30, 1994 and 58 percent for the quarter ended September 1994. These are significantly higher rates than the rate based on the 1993 audited financial statement. Therefore, the 1993 financial expense rate is not representative of the costs incurred during the POI.")

In the Final Determination, as suggested, the Department declined to use the annual data for either 1993 (2.9%) or 1994 (95%) and instead used, without further adjustment, the 37% rate applicable to the POI.[122]

2. Calculation of General and Administrative Expense

In its brief to the Panel, the Department noted that G&A expenses are those expenses which relate to the activities of a company as a whole, rather than to simply its production processes.[123] Because the Department's general practice is to base G&A expenses on the experience of the company actually *producing* the subject merchandise (plus an appropriate allocation of the G&A expenses of the parent company), and because some significant expenses, such as auditing expenses, are paid only once

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[120]/ Id., at 15 ("Although this option would be the most punitive, like option 4, it also carries the problem of holding the company responsible for pricing decisions it made which did not take into account an event of enormous magnitude, occurring after the POI which could not have reasonably been foreseen.") (emphasis in original).

[121]/Id., at 14 ("This option reflects TAMSA's financial costs as reported in the quarterly statements filed with the Mexican Stock Exchange. The option reflects costs incurred by TAMSA specifically during the POI. We reviewed the exchange rate between the Mexican peso and the U.S. dollar during the POI and noted that during the POI the Mexican peso lost approximately 9 percent of its value. This option, therefore, is punitive in that it captures the change in the value of the Mexican currency during the POI. We note that it does not include the largest effect of the currency devaluation, which was the severe and sudden devaluation of December 1994. Although the quarterly filings do not reflect audited results, company officials have filed them with the government's securities oversight agencies, and certified their accuracy under threat of penalties if they are misstated.").

[122]/ Fin. Det., 60 Fed. Reg. at 33572.

[123]/ Department Panel Rule 57(2) Brief, at 12.

a year but must be allocated over the entire fiscal year, G&A expenses are normally calculated based on *unconsolidated full-year data.*[124]

The Department's December 28, 1994 Section D (COP/CV) questionnaire[125] required that TAMSA submit G&A expense data in the following form:

G&A expenses are those expenses which relate to the activities of the company as a whole rather than to the production process.... G&A expenses should be calculated on an annual basis as a percentage of cost of sales. Provide a worksheet reconciling the submitted G&A expenses to the amount recorded on the company's audited financial statements for the year that most closely relates to the POI.[126]

In its Section D response of February 1, 1995, TAMSA based the G&A expense portion of its response, as requested, on unconsolidated full-year data for 1993.[127]

At the Veracruz cost verification conducted on March 13-18, 1995, the Department reports that it orally requested from TAMSA any audited or unaudited 1994 unconsolidated full-year

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[124]/ Id.

[125]/ Pub. Doc. 146, Fiche 26, Frame 35.

[126]/ Id., at 15 (emphasis added).

[127]/ Pub. Doc 176, Fiche 31, Frame 1, Attachment D14.

data.[128] In response, TAMSA furnished the Department with its unconsolidated trial balance of December 31, 1994.[129]

The Department verified both the G&A aspects of the 1993 data submitted in response to questionnaires and the G&A aspects of the 1994 unconsolidated data obtained at verification.[130] However, TAMSA did not submit a breakout of indirect selling expenses contained in the G&A data underlying the 1994 trial balance,[131] thereby precluding the Department from making that adjustment. On this latter point, TAMSA asserts that "the elimination of selling expenses already separately accounted for in the dumping calculation is routinely done to avoid double counting" and that simple methods were available to the Department to accomplish such an adjustment.[132]

In the Final Determination, the Department stated that it was inappropriate to use TAMSA's 1993 G&A expenses for the same reasons it was inappropriate to use TAMSA's 1993

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[128]/ Department Panel Rule 57(2) Brief, at 13. See also Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 11.

[129]/ Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 5, 20; see Attachment A17. TAMSA's Panel Rule 57(1) Brief, at 41, states that the Department specifically "requested and received the 1994 unconsolidated trial balance, which set forth TAMSA's unconsolidated, unaudited 1994 financial data, including G&A expenses." For a description of a "trial balance," see *supra* note 105.

[130]/ TAMSA asserts that the Department "did not seek to analyze or verify the unaudited 1994 G&A expenses." TAMSA Panel Rule 57(1) Brief, at 41. In its brief to the Panel, the Department asserted that the 1994 data *was* verified. Department Panel Rule 57(2) Brief, at 68-72.

[131]/ Department Rule 57(2) Brief, at 72.

[132]/ TAMSA Panel Rule 57(1) Brief, at 46-47.

financial expense data.[133] Specifically, use of the 1993 data was not appropriate because it "is not the most current information available [and] is not indicative of the expenses incurred during the POI."[134]

However, the Department also rejected North Star's contention that, because TAMSA was uncooperative in withholding its 1994 *consolidated* financial statement, the Department should base G&A expense for TAMSA on the consolidated statement prepared for the Mexican Stock Exchange. Instead, the Department followed its usual practice of basing its G&A expense calculation on TAMSA's *unconsolidated* data, noting that use of BIA was not called for, since TAMSA's lack of cooperation had not extended to the unconsolidated data.[135]

3. Allocation Methodology for Nonstandard Costs

The Department's Section D (COP/CV) questionnaire called for TAMSA to submit product-specific COM data based on production *during the POI.*[136] In its Section D response of

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[133]/ Fin. Det., 60 Fed. Reg. at 33573 (response to Comment 8, cross-referencing Comment 6).

[134]/Fin. Det., 60 Fed. Reg. at 33572 (response to Comment 6). It will be recalled that the Department also noted in its response to Comment 6 that using 1993 data for financial expense would be inappropriate because it "would reward the respondent for not fully cooperating in the investigation."Id.However, because TAMSA cooperated by providing the full year 1994 unconsolidated G&A trial balance, thus allowing the Department to verify this data, the Department's decision not to use 1993 data for G&A expenses did not involve BIA.

[135]/Id., at 33573. In a memorandum dated June 19, 1995 (the same date as the Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51), a Department official stated that BIA was applied to the recalculation of TAMSA's G&A expense rate. Pub. Doc. 249, Fiche 46, Frame 1, at 2. However, the Final Determination itself states otherwise and the Department's brief to the Panel confirms that this reference was simply a mistake. See Department Panel Rule 57(2) Brief, at 65 note 38.

[136]/ Pub. Doc. 146, Fiche 26, Frame 35, at 1, 2.

February 1, 1995, TAMSA accordingly based the COM portion of its response on unconsolidated year-to-date data for the first two quarters of 1994.[137]

The Department's COM methodology requires that *all* manufacturing costs be allocated on a *per-product* basis.[138] Thus, TAMSA was required to report per-product data not only for those costs for which TAMSA normally derives a product-specific cost in its accounting system (TAMSA calls these "standard" costs), but also for those costs which TAMSA normally accounts for in the aggregate and does not assign to specific products in the regular course of business (TAMSA calls these "nonstandard" costs).[139] TAMSA's standard costs, which constitute the bulk of manufacturing costs and which, as indicated above, are normally allocated to specific products, include *direct material costs* and *direct labor costs.*[140] TAMSA's nonstandard costs, a smaller basket of costs which are accounted for in the aggregate and are normally not assigned to specific products, include *input, price* and *efficiency variances* as well as *depreciation* and *other fixed overhead costs.*[141]

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[137]/ Pub. Doc. 176, Fiche 31, Frame 1, at 2.

[138]/ Pub. Doc. 146, Fiche 26, Frame 35, at 1 ("for each product sold in the home/third country market") and 2 ("for each product sold in the U.S. market").

[139]/ See id., at 1, and Fin. Det., 60 Fed. Reg. at 33573. See also TAMSA's Panel Rule 57(1) Brief, at 49.

[140]/ Fin. Det., 60 Fed. Reg. at 33573.

[141]/ TAMSA informs the Panel that depreciation is the decrease in value over time of plant and equipment. Manufacturing overhead comprises all manufacturing costs other than direct materials and direct labor. It is divided into variable and fixed overhead. Fixed overhead costs are those that are not affected by the volume of activity, and include certain supervisory salaries, depreciation, real estate taxes, insurance, and basic maintenance. Variances account for the difference between budgeted costs and actual costs incurred in production (for example, standard and actual input prices). See TAMSA Panel Rule 57(1) Brief, at 49.

In its initial cost questionnaire response of February 1, 1995,[142] and its supplemental questionnaire response of March 3, 1995.[143] TAMSA allocated its nonstandard costs to individual products on the basis of the machine time for a single process: *the finishing line.*[144] In its brief to the Panel, the Department spelled out the exact calculation that TAMSA performed.[145] In submissions commenting on TAMSA's responses, North Star questioned the appropriateness of TAMSA's allocation methodology and requested that the Department investigate it.[146]

At the Veracruz cost verification, TAMSA officials informed the Department that OCTG production, and therefore cost, is dependent on the slowest process, which is the finishing line. The finishing line at TAMSA's factory, therefore, acted as a "bottleneck" or production limit on the other (prior) production process.[147]

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[142]/ Prop. Doc. 61, Fiche 87, Frame 1.

[143]/ Prop. Doc. 68, Fiche 90, Frame 1.

[144]/ Fin. Det., 60 Fed. Reg. at 33572-73. TAMSA notes in its Panel Rule 57(1) Brief, at 50 note 112, that there are three basic processes at TAMSA's plant: (1) production of steel bar (steel shop); (2) rolling of pipe (rolling mill); and (3) straightening, cutting, finishing and testing pipe (finishing line). See Cost Verification Exhibit A11 (plant layout) and Cost Verification Exhibit A9 (layout of the finishing line).

[145]/ TAMSA divided total nonstandard costs for the six month POI by total hours of finishing line machine time for the same period, yielding a nonstandard cost allocation per hour of finishing time. This cost per finishing hour was then multiplied by the actual product-specific finishing line machine time of each of the OCTG products sold during the POI, yielding a product-specific nonstandard cost for each OCTG product sold during the POI. See Department Panel Rule 57(2) Brief, at 78.

[146]/ Prop. Doc. 65, Fiche 89, Frame 17; Prop. Doc. 70, Fiche 93, Frame 14.

[147]/ Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 15.

For the submitted costs, TAMSA allocated all variances and fixed costs based on finishing line machine time. TAMSA officials stated that production, and therefore costs, are dependent on the slowest machine in the process. TAMSA officials refer to the slowest machine as the bottleneck. TAMSA maintains that the finishing line is the slowest process. TAMSA claims that beveling and finishing line pipe is far more time consuming and expensive than threading and finishing OCTG. TAMSA allocated N$[ ] of nonstandard costs using this methodology. TAMSA's methodology resulted in allocating [ ]% of the nonstandard costs to subject merchandise and [ ]% of the nonstandard costs to non-subject merchandise.

The use by TAMSA of this finishing line allocation methodology was, in its view, a practical necessity.[148] Both the claim that the finishing line acted as a bottleneck for the entire production line and the claim concerning beveling and finishing were listed, in the Cost Verification Report, as issues for further consideration by the Department.[149]

In order to reconcile standard costs to actual POI costs, Department officials at the Veracruz cost verification requested and obtained a listing of standard costs for all OCTG

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[148]/ At the public hearing, TAMSA noted that while it does "have the records at the various processes, the task of assigning depreciation for each of the many machines in each process and calculating an expense on a per process basis would have been exceedingly complex and perhaps realistically impossible within the time frame of a dumping investigation." Pub. Doc. 231, Fiche 44, Frame 1, at 46-47. TAMSA then stated that there was no point in doing this when there was "another method at hand that was just as good or better for their own operation[]." Id., at 47. TAMSA further noted that this methodology was already in use by the company for certain other purposes *(e.g.*, to evaluate timing in production and prices). The Panel notes that North Star disputes TAMSA's characterization. See North Star Panel Rule 57(2) Brief, at 55-56 note 140 ("TAMSA could have taken total non-standard manufacturing costs and allocated it to each product based on total machine time. The record clearly demonstrates that both figures were readily available to TAMSA.") (emphasis in original).

[149]/ Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 2. In this issue summary, the Department reiterated that TAMSA's allocation methodology would result in a specified allocation of nonstandard costs between subject and non-subject merchandise.

production during the POI. However, the Department did not request similar information for products that were sold within the POI but produced outside the POI.[150]

In view of the controversy concerning its allocation methodology, TAMSA, in its pre-hearing Rebuttal Brief,[151] submitted opinions of its Mexican auditors, Price Waterhouse, that its finishing line allocation methodology was consistent with Mexican Generally Accepted Accounting Principles ("GAAP"), and was "most suitable" for TAMSA's particular manufacturing process; and a further opinion of its U.S. auditors, also Price Waterhouse, that TAMSA's allocation methodology was reasonable under GAAP and was utilized by other companies.[152]

In its Final Determination, the Department made three different findings critical of TAMSA's finishing line allocation methodology:

1. TAMSA's allocation methodology "distorts actual production costs because it shifts overhead expenses to products which undergo more finishing";

2. TAMSA's allocation methodology "did not reflect the machine time for other processes performed"; and

3. While machine time is an accepted allocation basis for *depreciation* costs, it "is not the appropriate allocation basis for costs other than depreciation"; therefore, TAMSA should not

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[150]/ Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 19.

[151]/ Pub. Doc. 227, Fiche 42, Frame 7.

[152]/ Id., at Attachment 1.

have used (finishing line) machine time to allocate *material and energy price variances*, *efficiency variance*, or *other fixed costs*, because these other items have different "cost drivers".[153]

As a result, the Department decided to reject TAMSA's allocation methodology and to re-allocate nonstandard costs, using standard costs as the basis for that re-allocation.[154]

In its Panel Rule 57(2) Brief, at 93, the Department has acknowledged that its original calculation using this standard cost methodology, with respect to a certain subset of sales (*i.e.*, sales of OCTG produced before the POI but sold by TAMSA within the POI), leads to inappropriately adverse results to TAMSA, and has requested a remand to amend its calculation.

4. Offset for Non-Operating Income

As indicated above, TAMSA's original G&A expense calculation was based on the data contained in its audited, unconsolidated 1993 financial statement.[155] As part of this calculation, TAMSA made an offset against the G&A expenses in the amount of the income from the sale of its ownership interest in two companies, both of which it considered to be production-related.[156] Evidence

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[153]/ Fin. Det., 60 Fed. Reg. at 33573.

[154]/Id. ("We have used total standard cost as the appropriate allocation basis for the nonstandard costs. Total standard cost factors in machine time, labor hours, direct and indirect material cost and usage, labor cost and usage, energy cost and usage, other variable costs, maintenance, and other services. Therefore, we revised the COP and CV to include nonstandard costs as a percent of total standard costs.").

[155]/ See TAMSA's September 23, 1994 Section A Response, Prop. Doc. 9, Fiche 56, Frame 1, at 3, 10-11, Attachment A11.

[156]/ See TAMSA's March 3, 1995 Sections B, C, D and E Supplemental Response, Prop. Doc. 68, Fiche 90, Frame 1, at 12-13, Attachment E32.

in support of this position was provided by TAMSA to the Department at the Veracruz cost verification.[157]

However, the subsequent Cost Verification Report described the non-operating income that TAMSA had included as an offset to the G&A expenses as a "gain ... from the sale of an investment in common stock in two companies the *parent* had made," and noted further that "the gain TAMSA included in G&A was recorded as a non-operating income on its *parents'* books."[158] This summary of the facts contained an inaccuracy: TAMSA has no parent company.[159]

The later Team Concurrence Memorandum continued the error concerning TAMSA's corporate structure; nevertheless, that document for the first time highlighted the Department's essential reasoning:

First, a gain from the sale of an ownership interest is a gain on an investment, and not a gain from a production asset.... Second, the ownership interests were not held by TAMSA directly.... While TAMSA may have derived some benefit from its parent's ownership interest in the related companies, the investment was not an asset used in production by TAMSA.[160]

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[157]/ See TAMSA Panel Rule 57(1) Brief, at 68-69.

[158]/ Prop. Doc. 80, Fiche 97, Frame 1, at 19, 20 (emphasis added).

[159]/ See TAMSA Panel Rule 57(1) Brief, at 70. See also Panel Hearing Transcript, at 154.

[160]/ Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 21.

After first noting that the Participants' arguments on this point would be "completely moot" if information from the 1994 financial statements were used, the Department was nevertheless clearly stating in this document that if it had used the 1993 G&A expense rate, it would have *excluded* the gains from TAMSA's sale of its ownership interest in the two companies since the income at issue resulted from an "investment," not from the sale of "fixed" productive assets.[161]

In the Final Determination, because of the Department's decision *not* to use the 1993 financial statement as the basis for calculating the 1994 G&A expense,[162] which decision was reached subsequent to the issuance of the Team Concurrence Memorandum, the Department found that this issue was moot and expressly did not address it.[163]

Since it is within the competence of the Panel to determine that the 1993 data should be used for the calculation of the G&A expense (as opposed to the 1994 data), and since the Department has already "articulated its view" that this offset for non-operating income would be improper, TAMSA argues that "[i]n the interest of judicial economy, the issue is ripe for consideration and properly before this Panel."[164]

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[161]/ Id.

[162]/ Because the decision whether to base G&A expenses on 1993 data or 1994 data had not been made at the time the Team Concurrence Memorandum was prepared, this document discussed both options. See Department Panel Rule 57(2) Brief, at 98.

[163]/Fin. Det., 60 Fed. Reg., at 33573, response to Comment 8 ("All other comments concerning G&A are moot, as they concerned the calculation of G&A using the 1993 financial statements.").

[164]/ TAMSA Panel Rule 57(1) Brief, at 70-71.

III. STANDARD OF REVIEW

Article 1904(3) of the NAFTA requires that this Panel apply the "standard of review" and "general legal principles"[165] that a U.S. court would apply in its review of a Department determination.[166] The standard of review that must be applied by the Panel is dictated by § 516A(b)(1)(B) of the Act,[167] which requires the Panel to "hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[168]

The question on review is whether the administrative record adequately supports the Department's determination,[169] which must be adjudged only on the grounds and findings actually stated in its determination[170] not on the basis of *post hoc* argumentation of counsel.[171] In carrying out

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[165]/ These principles include "standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies." NAFTA Art. 1911.

[166]/ Under the NAFTA, an Article 1904 Binational Panel Review of a less-than-fair value determination in a U.S. antidumping duty action must be conducted in accordance with U.S. law. NAFTA Art. 1902(1).

[167]/ 19 U.S.C. § 1516a(b)(1)(B); see NAFTA Annex 1911.

[168]/For purposes of Panel review, the "law" consists of "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials...." NAFTA Art. 1904(2). The "substantial evidence" standard mandated by the NAFTA is statutorily linked to that evidence which is "on the record," and Article 1904(2) of the NAFTA expressly limits the Panel's review to the "administrative record" filed by the Department.

[169]/ Daewoo Electronics Company v. International Union, 6 F.3d 1511, 1520 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994).

[170]/Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 427 (Ct. Int'l Trade 1993), citing SEC v. Chenery, 318 U.S. 80, 87 (1943).

its review of an agency determination, a reviewing court or binational panel must stay strictly within the confines of the administrative record already in existence.[172] Panels may not engage in *de novo* review[173] and, as a consequence, may not make new factual findings that would amend the agency record. Indeed, the statutory requirement that review be "on the [administrative] record" means that the reviewing court or binational panel is limited to "information presented to or obtained by [the Department] ... during the course of the administrative proceeding..."[174]

A. Substantial Evidence

The contours of the substantial evidence standard are well established in United States case law. Substantial evidence has been defined by the Supreme Court[175] as "more than a mere

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[171]/ Maine Potato Council v. United States, 613 F. Supp. 1237, 1245 (Ct. Int'l Trade 1985) ("Counsel's *post hoc* rationalization cannot substitute for a clear statement by the [agency] as to how it treated [a significant competitive factor].").

[172]/ See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.... The task of the reviewing court is to apply the appropriate [ ] standard of review [ ] to the agency decision based on the record the agency presents to the reviewing court.") (citations omitted).

[173]/ Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (Ct. Int'l Trade 1986), aff'd per curiam, 810 F.2d 1137 (Fed. Cir. 1987).

[174]/ 19 U.S.C. § 1516a(b)(2)(A)(i).

[175]/ The Panel recognizes that decisions of the Supreme Court and the U.S. court of Appeals for the Federal Circuit are binding on Article 1904 binational panels. NAFTA Article 1904(2)-(3). In contrast, decisions of the U.S. Court of International Trade do not constitute binding precedent. See Rhone Poulenc v. United States, 583 F. Supp. 607, 612 (Ct. Int'l Trade 1984) (A decision of the Court of International Trade is "valuable, though non-binding, precedent unless and until it is reversed."). Likewise, a decision of one Article 1904 binational panel is not binding on future panels. See Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93-1904-03, at 78 note 254 (October 31, 1994).

scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[176] In a later case the Supreme Court elaborated on this standard, stating that substantial evidence can be "something less than the weight of the evidence."[177]

In assessing the substantiality of the evidence, the Panel must consider "the record in its entirety," including "the body of evidence opposed to the [agency's] view."[178] As noted by the binational panel in New Steel Rails from Canada, the Panel's role is "not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that."[179] Rather, the Panel must also take into account evidence that detracts from the weight of the evidence relied on by the agency in reaching its conclusions.[180]

The Panel is, however, conscious of its obligation under the substantial evidence standard not to reweigh the evidence, or substitute its judgment for that of the Department.[181] It is well

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

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

[178]/ Universal Camera, 340 U.S. at 488.

[179]/ New Steel Rails from Canada, USA-89-1904-09, at 9 (Aug. 13, 1990).

[180]/ See Universal Camera, 340 U.S. at 477, 488; Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984); see also Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348, 353 (Ct. Int'l Trade 1993) ("In other words, it is not enough that the evidence supporting the agency decision is 'substantial' when considered by itself.").

[181]/Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 8 (Aug. 24, 1990); see also Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989).

settled that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[182] The reviewing authority therefore may not "displace the [agency's] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo."[183] As the Supreme Court has noted, the substantial evidence standard effectively "frees the reviewing [authority] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute."[184]

B. Deference

The substantial evidence standard generally is seen to require the reviewing authority to accord *deference* to an agency's factual findings, its statutory interpretations, and the methodologies selected and applied by the agency. With respect to fact-finding, prior binational panels have noted that "deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority."[185] Judicial decisions are clearly in accord with this view.[186]

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[182]/ Consolo, 383 U.S. at 620.

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

[184]/Consolo, 383 U.S. at 620.

[185]/Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 6 (citing Red Raspberries from Canada, USA-89-1904-01, at 18-19 (Dec. 15, 1989).

[186]/ See also N.A.R., S.p.A. v. United States, 741 F. Supp. 936, 939 (Ct. Int'l Trade 1990) ("[D]eference is given to the expertise of the administration agency regarding factual findings.").

On issues of statutory interpretation, "deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law."[187] The Supreme Court has stated that "when a court is reviewing an agency decision based on a statutory interpretation, 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statue."[188] A reviewing authority need not conclude that "[t]he agency's interpretation [is] the only reasonable construction or the one the [reviewing authority] would adopt had the question initially arisen in a judicial proceeding."[189] Moreover, the U.S. Court of Appeals for the Federal Circuit has emphasized that "[d]eference to an agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws."[190]

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[187]/National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992).

[188]/Id., quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843 (1984). Despite the ostensible clarity of the Supreme Court's pronouncement in Chevron, the case has engendered a great deal of academic and judicial doubt and debate. See, *e.g.*, Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L. J. 969, 978 (1992), and Federal Mogul Corp. v. United States, 63 F.3d 1572, 1579 (Fed. Cir. 1995).

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

[190]/ Koyo Seiko v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994), citing Daewoo Electronics, 6 F.3d at 1516.

It is also clear that deference must be given to the methodologies selected and applied by the agency to carry out its statutory mandate,[191] which a court or panel may only review for reasonableless.[192]

Deference to the Department's interpretation and implementation of the antidumping laws can be seen to be grounded in express congressional intent. The United States Congress has stressed that in the antidumping field, it has "entrusted the decision making authority in a specialized, complex economic situation to administrative agencies."[193] As a result, reviewing courts have acknowledged that "the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor. The Secretary of Commerce . . . has broad discretion in executing the law."[194]

C. Limitations On Deference

Although review under the substantial evidence standard is, by Congressional intent and by law, limited, application of that standard clearly does not result in an abdication of the Panel's authority to conduct a meaningful review of the Department's determination.[195] Indeed, a contrary

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

[192]/ Koyo Seiko Co. v. United States, 66 F.3d 1204, 1210-11 (Fed. Cir. 1995) ("[O]ur inquiry is limited to determining whether Commerce's model-match methodology ... is reasonable.")

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

[194]/ Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), cert. denied, 465 U.S. 1022 (1984); see also Consumer Prod. Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

[195]/ See Al Tech Specialty Steel Corp. v. United States, 651 F. Supp. 1421, 1424 (Ct. Int'l Trade 1986) ("This deference, however, should in no way be construed as a rubber stamp for the government's interpretation of

conclusion would eviscerate the function of the reviewing authority, rendering the appeal process superfluous. The deference to be accorded an agency's findings and conclusions therefore is not unbounded.[196]

It is well established, for example, that an agency's determination must have a reasoned basis.[197] The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning.[198] The extent of deference to be accorded depends on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements...."[199]

Furthermore, a rational connection must be present between the facts found and the choice made by the agency.[200] Although room exists to uphold an agency's decision of less than ideal

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statutory provisions."). See also Smith-Corona Group, 713 F.2d at 1571 ("The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence.").

[196]/ See Softwood Lumber from Canada (Injury), USA-92-1904-02, at 15 (July 26, 1993).

[197]/ American Lamb Co., 785 F.2d at 1004 (citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 638); see also Fresh, Chilled and Frozen Pork, USA 89-1904-11, at 13 (Aug. 24, 1990).

[198]/ Chr. Bjelland Seafoods A/C v. United States, 14 ITRD 2257, 2260, 1992 Ct. Int'l Trade LEXIS 213 (Ct. Int'l Trade 1992); USX Corp. v. United States, 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987).

[199]/ Ceramica Regiomontana, S.A., 636 F. Supp. at 965 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), aff'd, 810 F.2d 1137 (Fed. Cir. 1987).

[200]/ Bando Chem. Indus. v. United States, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974), and Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); Avesta AB v. United States, 724 F. Supp. 974, 978 (Ct. Int'l Trade 1989), aff'd, 914 F.2d 233 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 1308 (1991).

clarity if its path of reasoning may reasonably be discerned,[201] there must nevertheless be an adequate explanation of the bases for the agency's decision in order for the reviewing authority to meaningfully assess whether it is supported by substantial evidence on the record. The Department, therefore, must articulate and explain the reasons for its conclusions.[202]

Deference to an agency's interpretation of the statute it is charged with implementing also is not unlimited. A reviewing authority may not, for instance, permit an agency "under the guise of lawful discretion or interpretation to contravene or ignore the intent of Congress." [203] The Supreme Court itself has held that "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." [204] Moreover, the Department's efforts at statutory interpretation must, when appropriate, take into account the international obligations of the United States.[205]

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[201]/ Ceramica Regiomontana, S.A., 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing Bowman Transportation, 419 U.S. at 286).

[202]/ See, *e.g.*, Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 621 (Ct. Int'l Trade 1993); USX Corp., 655 F. Supp. at 490; SCM Corp. v. United States, 487 F. Supp. 96, 108 (Cust. Ct. 1980); Maine Potato Council, 613 F. Supp. at 1244-45; Bando Chem. Indus. 787 F. Supp. at 227.

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

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

[205]/ See Alexander Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Federal-Mogul Corp., 63 F.3d at 1581-82; Section 114, Restatement (Third) of the Foreign Relations Law of the United States.

Even the methodology selected and applied by the agency to carry out its statutory mandate "still must be lawful, which is for the courts finally to determine."[206]

Finally, although there is a presumption of good faith and conscientious exercise of the Department's responsibilities in an investigation.[207] the Department has a legal obligation to observe the basic principles of due process and fundamental procedural fairness[208] and to justify any departures it makes from settled practice with reasonable explanations that are themselves supported by substantial evidence on the record.[209]

The standard of review and established principles articulated above and elaborated on throughout have been thoroughly considered and applied by the Panel in rendering its opinion.[210]

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[206]/ Brother Industries, 771 F. Supp. at 381. See also Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577, 582 (Ct. Int'l Trade 1985) ("If the use of [a submarket] analysis was improper, then the Commission's findings would not be supported by substantial evidence.").

[207]/ Saha Thai Steel Pipe Co. v. United States, 661 F. Supp. 1198, 1202 (Ct. Int'l Trade 1987); Librach v. United States, 147 Ct. Cl. 605, 612 (1959). See also Takashima U.S.A., Inc. v. United States, 886 F. Supp. 858, 861 (1995) ("A presumption of regularity attaches to the actions and conduct of government officials in the performance of their lawfully executed duties.") (citing Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 795 (Fed. Cir. 1993).

[208]/ See Sigma Corp. v. United States, 841 F. Supp. 1255, 1267-68 (Ct. Int'l Trade 1993); Usinor Sacilor v. United States, 893 F. Supp. 1112, 1141 (Ct. Int'l Trade 1995); and Creswell Trading Co. v. United States, 15 F.3d 1054, 1062 (Fed. Cir. 1994).

[209]/ See Western Conference of Teamsters v. Brock, 709 F. Supp. 1159, 1169 (Ct. Int'l Trade 1989); see also National Knitwear and Sportswear Ass'n v. United States, 779 F. Supp. 1364, 1369 (Ct. Int'l Trade 1991).

[210]/ Extraordinary Challenge Committees ("ECC") formed pursuant to NAFTA Art. 1904(13) have also addressed the issue of standard of review. The second ECC emphasized that binational panels must not only accurately *articulate* the standard of review, but must conscientiously *apply* the appropriate standard of review so as not to

IV. SUMMARY OF PANEL DECISION

A. Calculation of Financial Expense

The Panel upholds the Department's calculation of TAMSA's financial expense on the basis of BIA and on the alternative basis that the 1993 financial data was not representative of the financial expenses incurred during the POI.

B. Calculation of General and Administrative Expense

The Panel remands the Final Determination to the Department for a detailed explanation as to the reasons for its rejection of the 1993 financial data as non-representative of the G&A expenses incurred during the POI.

C. Allocation Methodology for Nonstandard Cost

The Panel upholds the Department's rejection of TAMSA's nonstandard cost allocation method and its substitution of an allocation method based on standard costs. The Panel also grants the Department's request for a remand to re-calculate the nonstandard cost allocation for a particular subset of TAMSA's sales.

D. Offset for Non-Operating Income

The Panel determines that the challenge by TAMSA to the Final Determination, based on a statement made by the Department in the Team Concurrence Memorandum, is not ripe for consideration.

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exceed its jurisdiction. Live Swine from Canada, ECC-93-1904-01USA, at 11 (April 8, 1993) (citing Fresh, Chilled, and Frozen Pork from Canada, ECC 91-1904-01USA, at 21 (June 14, 1991).

V. DISCUSSION

A. Calculation of Financial Expense

1. Arguments of the Participants

TAMSA

TAMSA sets out a number of challenges to the Department's decision to reject TAMSA's financial expense calculation based upon its 1993 full-year audited data and to utilize, as partial BIA, TAMSA's 1994 half-year unaudited data. Specifically, TAMSA argues that the Department:

- Disregarded its established standards of practice for using only financial expense data based on: (a) annual (b) audited financial statements, (c) which it verified;

- Rejected TAMSA's 1993 expense data even though it was the only available data that was verified, from annual, audited financial statements;

- Disregarded its established standards for imposing BIA and opted to punish TAMSA for "withholding" a document the Department never actually requested even though TAMSA had cooperated with all of the Department's requests, and had provided the data in question in other submissions;

- Used as punitive BIA 1994 data that was: (a) distortive, (b) unaudited, (c) for only a half year, and (d) which the Department chose not to verify.[211]

[211] / TAMSA Panel Rule 57(1) Brief, at 10.

As noted previously, the Department made this particular decision for two independent reasons: first, the withholding of the Mexican Stock Exchange filing warranted the application of the 1994 half-year data as partial BIA; and second, the half-year 1994 data was more current and thus more "representative" of POI expenses.[212]

TAMSA's argument to the Panel on the financial expense issue focuses on three major points: (1) the Department's "established practice and policy" requires the Department to base its financial expense calculation on TAMSA's *audited* 1993 financial statement; (2) TAMSA "fully cooperated" with the Department and thus there was no justification for the latter to impose BIA; and (3) the Department's "assertion" that the 1994 half-year data was more appropriate than the audited, full-year 1993 data was unjustified.

TAMSA highlights the first argument by noting that "it is the Department's well established practice to develop the financial expense information based on the full-year *audited* financial statement that most closely corresponds to the [POI]."[213] Moreover, TAMSA states that it is "[t]he Department's general policy ... to utilize audited financial statements that are completed no later than the time of verification."[214] Finally, TAMSA states that it is "the Department's longstanding policy ... to use a one-year period for calculating administrative and financial expenses."[215]

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[212]/ See *supra* note 71 and accompanying text.

[213]/ TAMSA Panel Rule 57(1) Brief, at 18 (emphasis in original), citing Shop Towels from Bangladesh, 60 Fed. Reg. 48966, 48967 (September 21, 1995), and Furfuryl Alcohol from Thailand, 60 Fed. Reg. 22557, 22561 (May 8, 1995).

[214]/ TAMSA Panel Rule 57(1) Brief, at 19. Arguing that there must be some "cut-off" point for the use of new data, TAMSA states that "the Department normally employs verification as that point because it is the last meaningful time the Department and the responding companies can analyze and verify the data, as well as potentially important adjustments thereto." Id.

TAMSA supports its recapitulation of the Department's practice primarily on the basis of two decisions rendered at about the same time as the instant case: Furfuryl Alcohol from Thailand.[216] ("Furfuryl Alcohol") and Canned Pineapple Fruit from Thailand.[217] ("Canned Pineapple"). As perceived by TAMSA, the Furfuryl Alcohol case involved a decision by the Department to base financial expense on the Thai respondent's audited 1993 financial statement, even though at verification it obtained and verified the unaudited 1994 full-year and half-year data. Similarly, the Canned Pineapple case involved a decision wherein the Thai respondents had requested that the department use the unaudited, but complete and verified, 1994 financial statements submitted by the time of the verification. In addition, respondents' audited 1994 financial statements were submitted after verification but before the hearing. In the final determination, however, the Department elected to use the audited 1993 data.

TAMSA states that the Furfuryl Alcohol and Canned Pineapple cases "exemplify the Departments [sic] standard practice of strict adherence to its policy of using only data from audited financial statements,"[218] and notes that the instant case, when compared to those cases, evinces "a troubling and irrational inconsistency...."[219]

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[215]/ Id., at 20.

[216]/ 60 Fed. Reg. 22557 (May 8, 1995).

[217]/ 60 Fed. Reg. 29553 (June 5, 1995).

[218]/ TAMSA Panel Rule 57(1) Brief, at 24.

[219]/ Id., at 25.

TAMSA's second argument is primarily a factual one, asserting that the Department's finding that TAMSA was uncooperative was "premised on three key errors...."[220] The first of these was the Department's characterization in the Team Concurrence Memorandum that the 1994 financial results TAMSA provided to the Department at the Houston cost verification was merely a "press release,"[221] which diminished the fact that this material "constituted the official results that TAMSA would soon file with the SEC as required by U.S. law."[222] Second was the Department's statement that TAMSA "withheld" the Mexican Stock Exchange filing.[223] Third was the Department's assertion that the withholding of that filing prevented the Department from effectively verifying and analyzing the 1994 financial expense.[224] Based on these three "key errors," TAMSA asserts that the Department erroneously concluded that TAMSA was not cooperating in the investigation.

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[220]/ Id., at 26.

[221]/ See Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 11.

[222]/ TAMSA Panel Rule 57(1) Brief, at 27. TAMSA argues that this material, which admittedly contained a press release, "included TAMSA's key financial results, the 1994 balance sheet and the income statement," similar to TAMSA's later 6K SEC filing for 1994. Id.

[223]/ TAMSA asserts that it had offered at the Veracruz cost verification to provide the Department with the unaudited financial results once they were filed with the U.S. and Mexican securities authorities, but that the Department declined this offer, stating that it would seek to collect the 1994 results at the U.S. verification. At the further manufacturing cost verification, however, TAMSA asserts that the Department requested only the 1994 audited financial statement and the financial statement filed with the SEC. TAMSA states that the Department never requested the Mexican Stock Exchange filing. See *supra* note 115.

[224]/ TAMSA asserts that "it would have been impossible for the Department to verify the 1994 financial expense at TAMSA's minimal subsidiary, TIC." Id., at 30. The only practical time the Department could have done so was at the Mexican verification, which took place before the filing of the document in question. Id.

TAMSA's third argument against the use of the 1994 half-year data was that such data was itself distortive ("the devaluation effects in the first six months of 1994, while not as enormous as those at the end of the year, nevertheless were substantial, aberrational and distortive").[225] Relatedly, TAMSA expresses concern that "[t]he Department never indicated it would base the financial and G&A expenses on data for the first six months of 1994 until the final determination, when it was too late for TAMSA to address the point."[226]

The Department

The Department responds to TAMSA's challenges by noting that an agency is not rigidly bound by its prior practice and that "an agency has the authority to depart from prior practice, either as a matter of ongoing policy or to accommodate the unusual circumstances of a particular case, as long as the agency provides a reasonable explanation for its departure from past practice."[227] Specifically, the Department states that "[t]he use of data from the most recent year for which audited statements are available is predicated on the assumption that such data are representative of data for the POI."[228] In this instance, the Department reasonably determined that TAMSA's 1993 financial

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[225]/ Id., at 35. TAMSA noted that the significant devaluation of the peso during the POI caused, at least in part, a one thousand percent increase in financial expenses during the POI versus the same period of the previous year. Id.

[226]/ Id., at 36-37.

[227]/ Department Panel Rule 57(2) Brief, at 23-24, citing National Knitwear, 779 F. Supp. at 1369, 1374; Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1088 (Ct. Int'l Trade 1988); and Krupp Stahl A.G. v. United States, 822 F. Supp. 789, 795 (Ct. Int'l Trade 1993).

[228]/ Department Panel Rule 57(2) Brief, at 25. ("Commerce's purpose is not to obtain data that are valid only for the fiscal year covered by a given audited statement, but trustworthy data that are representative of costs during the POI. Data, however trustworthy, are useless if they are not representative of POI costs.") Id., at 26.

expense data were *not* representative of POI expenses[229] which called for a departure from the Department's usual practice as represented by the outcomes of Furfuryl Alcohol and Canned Pineapple.[230] Given the "extreme differences," the Department "made an explicit decision to depart from its general practice of using audited annual statements as the basis for financial expense calculations in order to utilize more representative data."[231] In doing so, the Department recognized the tension between the desirability of using audited statements and "requirement" of using data that is not representative of the POI.[232]

Aside from the question of whether the data was representative, the Department also states that TAMSA's "lack of cooperation" was an independent factor in the use of the 1994 data and the related decision to deny adjustments to that data. The Department summarizes the point by stating that "TAMSA, despite early cooperation in providing necessary data, improperly withheld the fourth quarter 1994 consolidated financial statement it filed with Mexican securities authorities and the

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[229]/ The Department notes that the interest expense calculated based on the audited 1993 financial statements was "a mere 2.9%." In contrast, interest expense for the POI was 37%, "nearly thirteen times the 1993 annualized rate." Id., at 28.

[230]/ For a statement of the general rule, the Department also cites Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands, 58 Fed. Reg. 37199, 37204 (July 9, 1993) (Comment 11) ("We calculate G&A expenses based on the audited annual financial statements which most closely correspond to the POI.... If such statements are not available, the Department has relied on financial statements from the fiscal year prior to the POI, when such statements provide a reasonable approximation of the company's current financial position."). Department Panel Rule 57(2) Brief, at 26-27 (emphasis omitted). The Department in fact reads Furfuryl Alcohol and Canned Pineapple as supporting this general principle. Id., at 32.

[231]/Department Panel Rule 57(2) Brief, at 28. See also id., at 34 ("TAMSA's 1993 audited data was not a reasonable surrogate for data from 1994, when TAMSA's financial expenses soared as a result of the ever-weakening peso.")

[232]/ Id., at 35 ("When firms do prepare audited statements, but they are not available for the period most closely related to the POI, the Department must weigh the importance of using audited data against the requirement that the data be representative of the POI.")

Mexican Stock Exchange, thereby assuring that the Department would not be able to verify that statement."[233]

In its Panel Rule 57(2) Brief, the Department reviewed the facts related to what it characterized as its numerous "ongoing" and "standing" requests for year-end 1994 financial statements, and states that TAMSA's claims that it had complied with all of the Department's specific requests and that the Department failed to ask for the Mexican Stock Exchange filing lack credibility.[234] The Department argues that during the Houston verifications (April 10-12, 1995 for sales; April 18-20, 1995 for cost), it "again requested the long-awaited audited consolidated financial statement as well as the unaudited version of that statement that was to have been filed with U.S. and Mexican securities authorities in March,"[235] for which it received the answers that "audited financial statements were not available" and that "no financial statement was filed with the securities oversight agencies."[236] The Department then discusses and dismisses as meritless the three "key errors" put forward by TAMSA.

Having discussed the factual basis for its determination that TAMSA was, in law, "uncooperative," the Department then sets out at length its argument that the BIA statute requires the Department to use BIA for the financial expense data, and that the Department has great discretion in selecting BIA. The Department is not, for example, limited to verified data in its choice of BIA and it

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[233]/ Id., at 36.

[234]/ Id., at 36-37.

[235]/ Id., at 38.

[236]/ See Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 9-10; see also *supra* notes 112, 113, and 115.

need not select, as BIA, the most adverse data on the record, although the BIA selected must be "reasonably adverse." In this instance, the Department argues that it was reasonable for it to reject full-year 1994 financial expense data, since the full-year data (including the December 1994 devaluation) greatly overstated financial expense during the POI, and to select the 1994 half-year data as "reasonably adverse."[237] The Department also explained its specific choice among the pool of five BIA options available.[238]

North Star

North Star was also a complainant with respect to the Final Determination, and its Panel Rule 57(1) Brief focused on the Department's failure to apply the most adverse BIA possible for calculation of the BIA. North Star argues that the Department applies a two-tier methodology for both "total BIA" and for "partial BIA," and that even though the present situation involved partial BIA, TAMSA's withholding of the Mexican Stock Exchange filing was of sufficient seriousness that it should have resulted in the Department's applying the most adverse margin possible.[239]

North Star's Panel Rule 57(2) Brief generally supports the positions taken by the Department in its own response brief. However, North Star emphasizes that "the Panel must reject any arguments based on factual allegations that are outside the administrative record of the underlying proceeding."...[240] Noting that TAMSA had argued that: (i) the Department never actually requested

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[237]/ Department Panel Rule 57(2) Brief, at 46 *et seq.*

[238]/ Id., at 60-62.

[239]/North Star Panel Rule 57(1) Brief, at 11-19.

[240]/ North Star Panel Rule 57(2) Brief, at 7.

the 1994 financial statement filed in Mexico; (ii) the relevant 1994 data was already on the record in the form of the press release submitted at the Houston cost verification; and (iii) the Department was incapable of verifying the information contained in the Mexican filing at TAMSA's U.S. facility, North Star urges that these "facts" are nowhere to be found in the record and are instead mere argument of counsel.[241] Indeed, North Star emphasizes that the Department's Cost Verification Report constitutes "the official record of the Mexican and U.S. verification proceedings,"[242] which report clearly evidences both the request for the 1994 financial data and TAMSA's denial that such data had been filed with the "securities oversight agencies.[243]

In response to TAMSA's remaining points, North Star argues that the Houston press release cannot be considered a surrogate for the Mexican Stock Exchange filing since it was "not an authoritative and detailed financial statement upon which the Department could rely for the purpose of financial expense."[244] Finally, North Star argues that U.S. law does not permit a respondent to "pick

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[241]/ Id., at 16.

[242]/ Id., at 18.

[243]/ North Star states that "[t]he Department's verification report, team concurrence memorandum, and final determination all provide overwhelming support for the Department's findings that TAMSA was requested to furnish 1994 financials, but did not; and that TAMSA told the Department's verifiers that the 1994 financials were not filed with the securities oversight agencies, when in fact they had been." Id., at 19.

[244]/ Id., at 23.

and choose" what data to provide to the Department[245] and that it was not TAMSA's prerogative to withhold the Mexican Stock Exchange filing because it believed that verification was impractical.[246]

2. Discussion and Decision of the Panel

The Panel has carefully considered the factual record before us on the financial expense issue, the arguments advanced by the Participants concerning that record, and the standard of review applicable to its deliberations, and determines that the Department's decision to calculate financial expense on the basis of the 1994 half-year financial data selected by the Department as BIA must be sustained. The Panel reaches this result because it finds substantial record evidence that the Department asked TAMSA for the 1994 full-year, audited *and unaudited* financial data on at least two occasions during or covering periods of time in which at least the unaudited data had become available and, indeed, had been publicly filed by TAMSA with the Mexican Stock Exchange.

The Department's Requests Did Cover the Mexican Stock Exchange Filing

There is clear evidence of such a request in a document that has not been cited by either the Department or North Star for this purpose.[247] In the Panel's previous factual discussion of the financial expense issue, it has made reference to the March 6, 1995 Sales Verification Outline

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[245]/ Id., at 24, citing Persico Pizzamiglio, S.A. v. United States, 16 ITRD 1465, 1468 (Ct. Int'l Trade 1994); N.A.R., S.p.A., 741 F. Supp. at 941-42; and Brother Industries, 771 F. Supp. at 383.

[246]/ North Star Panel Rule 57(2) Brief, at 24.

[247]/The Panel cannot account for the Department's and North Star's failure to cite and argue upon this document. While it concerns the sales (not cost) verifications, it nevertheless is directly on point and indeed supplies the very thing that TAMSA has consistently argued was missing: a direct request for any financial statements filed in Mexico, made at the time of, or with respect to, the date on which such financial statements had in fact been filed.

pursuant to which the Department submitted to TAMSA its agenda for the Sections A, B and C verifications. This document covered the Veracruz verification scheduled to take place between *March 20-24, 1995* and the Houston verification scheduled to take place between *April 10-12, 1995*. Each of these periods covers or is subsequent to the date on which the 1994 unaudited financial data was filed by TAMSA with the Mexican Stock Exchange: *March 23, 1995*.

The Panel has quoted the key language from the Sales Verification Outline indicating that, at verification, TAMSA should present (1) its "[l]ast financial statement, or equivalent;" and (2) its "[l]atest internal financial statements." In the Panel's view, a straight-forward reading of this instruction is that TAMSA must present to the Department, by March 24th in Veracruz and/or by April 12th in Houston, the *latest* financial statement prepared by TAMSA for use in Mexico or the United States, irrespective of whether that statement has been published and filed or whether it merely exists as an "internal" company document. The Panel finds no ambiguity in this instruction[249] and is not persuaded that its appearance on a *sales* verification document, as opposed to a *cost* verification document, has any bearing on its validity or scope, on its usefulness to the Department for *all* verification purposes, or on its probativeness with respect to the issue before the Panel.

Even if this document were not deemed fully probative, however, the record contains sufficient *other* evidence of the Department's request for the 1994 financial data. As noted above, the Department asserts in its brief that both the audited and unaudited 1994 financial statements were requested at the Houston verification.[250] TAMSA, however, asserts that the Department requested (merely) the 1994 audited financial statement and the financial statement filed with the SEC.[251]

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[248] / See *supra* text accompanying note 104.

[249]/It is very comprehensive in scope and, since it applies to *internal* as well as external documents, unusually broad as well.

[250]/ See *supra* text accompanying note 112.

While neither the Cost Verification Report nor the Team Concurrence Memorandum is a model of clear writing and expression (*e.g.*, neither document explicates what specific requests were made of TAMSA at the Houston cost verification), they are nevertheless official documents[252] that do evidence TAMSA's statements that (i) the audited financial statements were not available, and (ii) "no financial statement was filed with the securities oversight agencies." While the first statement was undoubtedly correct (*audited* financial statements had not been filed), the second statement was not (the 1994 *unaudited* financial statement had on March 23, 1995 been filed with the Mexican Stock Exchange), and the statements together inferentially support the view that the Mexican Stock Exchange filing had indeed been requested by the Department. Although the Panel does note some discrepancy between a key passage of the Team Concurrence Memorandum (referring to unaudited as well as audited statements) and the Cost Verification Report (referring solely to audited statements)[253] the Panel accepts, in the context of the Department's numerous past requests to TAMSA for comprehensive financial data, that the Team Concurrence Memorandum is the most accurate reflection of the actual facts.

The Panel appreciates that TAMSA has vigorously disputed, both to the Department and to the Panel, certain of the statements made by the Department in the Cost Verification Report and

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[251]/ See *supra* note 115.

[252]/ North Star has observed that the Cost Verification Report is the official record of the verification procedures. See *supra* text accompanying note 242.

[253]/ Cf. Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 1, at 11 and Cost Verification Report, Pub. Doc. 220, Fiche 39, Frame 1, at 9-10.

the Team Concurrence Memorandum.[254] The Panel also accepts that TAMSA's assertion that the Department never specifically requested the Mexican Stock Exchange filing is being made in good faith. Nevertheless, the Department is equally confident of its own interpretation of events, and the Panel accepts that the Department's interpretation of these critical documents is, in the context of this proceeding, more faithful to their actual language and intended spirit than is the interpretation of those documents made by TAMSA. For this purpose, the Panel cites the useful and binding rule that a reviewing authority must take the administrative record as it finds it and disregard *post hoc* argumentation of counsel that is not consistent with that record.[255]

Therefore, the Panel also finds that there is substantial evidence in the Cost Verification Report and the Team Concurrence Memorandum that support the Department's assertion and finding that the 1994 financial data (unaudited as well as audited) *were* requested at the Houston cost verification and that the unaudited data, although available, was not supplied.

The Department Properly Applied BIA

This failure of TAMSA to supply requested data of course *requires* the Department to utilize BIA. The governing statute provides that:

In making [its] determinations under this subtitle, [the Department] shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and

[254]/ The Panel also appreciates, as TAMSA has stated in this matter, that a complex verification, conducted in a foreign country and in two languages, is a ripe setting for misunderstanding and miscommunication.

[255]/ See *supra* text accompanying note 171.

in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.[256]

Judicial decisions make it clear that the Department "cannot be left merely to the largesse of the parties at their discretion to supply [it] with information."[257] The BIA rule is in fact used to prevent a respondent from controlling the results of an administrative proceeding by providing incomplete information or by delaying or hindering the proceeding.[258] In a recent case, the Court of International Trade held that the Department could resort to BIA if it found that a respondent inaccurately represented that it was unable to provide the sales data requested by the Department.[259]

Having concluded that the Department was entitled to *invoke* BIA, due to TAMSA's withholding of the requested 1994 financial data, the Panel next directs its attention to the question of the Department's *selection* of a BIA rate.

The Department correctly notes that neither the statute nor the relevant legislative history defines the term "best information available",[260] or dictates a particular BIA methodology for

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[256]/ 19 U.S.C. § 1677e(b) (emphasis added). See also 19 C.F.R. § 353.37(b) ("If an interested party refuses to provide factual information requested by the [Department] or otherwise impedes the proceeding, the [Department] may take that into account in determining what is the best information available.").

[257]/ Olympic Adhesives v. United States, 899 F.2d 1565, 1571 (Fed. Cir. 1990).

[258]/ Rhone Poulenc v. United States, 899 F.2d 1185, 1191 (Fed. Cir. 1990), reh'g denied, 1990 U.S. App. LEXIS 6258 (Fed. Cir. 1990).

[259]/ Usinor Sacilor v. United States, 872 F. Supp. 1000, 1007 (Ct. Int'l Trade 1994).

[260]/ See 19 U.S.C. § 1677e(c) (1991); H. Rep. No. 317, 96th Cong., 1st Sess. 77 (1979); S. Rep. No. 249, 96th Cong., 1st Sess. 98 (1979).

the Department to follow. Because Congress has "explicitly left a gap for the agency to fill," the Department's construction of the statute must be accorded considerable deference.[261]

The Department's methodologies have been informed by several Federal Circuit decisions and by numerous Court of International Trade decisions. These decisions suggest that, outside of unusual factual situations[262] the Department enjoys substantial discretion on BIA issues, particularly as to the issue of the selection of a BIA rate.[263] So long as the agency has acted reasonably in selecting between cooperative and non-cooperative total BIA rates,[264] has acted reasonably in choosing between total and partial BIA[265] has selected a rate that does not "reward" the respondent for

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[261]/ Allied-Signal Aerospace v. United States, 996 F.2d 1185, 1991 (Fed. Cir. 1993), quoting Chevron, 467 U.S. at 843-44.

[262]/ Cf. U.H.F.C. Co. v. United States, 916 F.2d 689, 701 (Fed. Cir. 1990) (ITA may not resort to BIA where a party has failed to provide information that does not exist); Olympic Adhesives, 899 F.2d at 1571-72 (ITA may not resort to BIA where complete answer to question is given but answer does not resolve issue being considered); Floral Trade Council v. United States, 775 F. Supp. 1492, 1498 (Ct. Int'l Trade 1991) (ITA may not resort to BIA in absence of an information request); and Daewoo Electronics v. United States, 712 F. Supp. 931, 944-45 (Ct. Int'l Trade 1989) (ITA may not resort to BIA where ITA has requested information without using its normal questionnaire procedure and without providing respondent with appropriate instructions needed to compile the information).

[263]/ See Timken v. United States, 865 F. Supp. 850, 854 (Ct. Int'l Trade 1994), citing Allied Signal, 996 F.2d at 1191-92. See also list of authorities provided in Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA-90-1904-01 (May 24, 1991), at 44 note 33, and Krupp Stahl, 822 F. Supp. at 792 (courts have granted the Department "broad discretion in determining what constitutes the BIA in a given situation.").

[264]/Allied Signal, 996 F.2d at 1192 (concluding that ITA improperly applied non-cooperative total BIA rate to respondent which had demonstrably attempted to cooperate but was nevertheless unable to satisfy information request).

[265]/ Persico Pizzamiglio, 16 ITRD at 1471 (if requested data is not provided, ITA has authority to reject response in total even if it is "substantially complete"); Paving Equipment, USA-90-1904-01 (May 15, 1992), at 76 (ITA has "discretion to use BIA in place of all or part of the information furnished to it"); Brother Industries, 771 F. Supp. at

its conduct[266] and has selected a rate from among the universe of possible BIA rates that are actually contained on the administrative record,[267] the courts have been substantially disinclined to overturn the agency's decision. As stated succinctly by another binational panel, "[t]he U.S. courts have consistently affirmed the discretion of the administering agencies to choose what is the 'best information available."[268]

Despite the mandate of the statute and the breadth of discretion, that the courts have sanctioned, it is common for respondents to argue, as TAMSA has argued, that the Department's use and selection of BIA leads to inaccurate results and is "punitive."[269] However, arguments that a particular BIA rate was punitive (or arbitrary, inaccurate, not the "best," etc.) have fared poorly in the courts.[270] Undoubtedly, there is a natural tension between the goal of calculating accurate dumping

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383 (upholding use of BIA: "The law does not permit a party to pick and choose information it wishes to present to the agency, and a deficient submission may lead to an undesired result.") (see *supra* text accompanying note 245).

[266]/See Rhone Poulenc, 899 F.2d at 1190-91; and Krupp Stahl, 822 F. Supp. at 793 (respondent "should not find itself in a better position as a result of its noncompliance....").

[267]/19 U.S.C. § 1516a(b)(1)(B). The law also requires the agency to consider the most recent information on the record. See Rhone Poulenc, 899 F.2d at 1190 ("What is required is that the ITA obtain and consider the most recent information in its determination of what is best information.") (emphasis in original).

[268]/New Steel Rail, Except Light Rail, From Canada, USA-89-1904-08, at 31 (August 30, 1990).

[269]/ TAMSA Panel Rule 57(1) Brief, at 26 *et seq.*

[270]/ The courts have not required ITA to prove that its selected BIA is the "best" in any absolute sense, and instead have applied the substantial evidence test. See Seattle Marine Fishing Supply Co. v. United States, 679 F. Supp. 1119, 1128 (Ct. Int'l Trade 1988); accord U.H.F.C. Co. v. United States, 706 F. Supp. 914, 922 (Ct. Int'l Trade 1989) (concurring with view that "the issue is not which, of all the information ITA has to choose from, is the best information available, but rather, whether the information chosen by ITA is supported by substantial evidence on the record"), modified on other grounds, 916 F.2d 689 (Fed. Cir. 1990); see also Chinsung Indus. Co. v. United States, 705 F. Supp. 598, 601 (Ct. Int'l Trade 1989) (rejecting view that ITA must use information that can

margins[271] and the use of the BIA rule as "an investigative tool, which [ITA] may wield as an informal club over recalcitrant parties" to induce noncomplying respondents to provide the agency with data needed to calculate accurate dumping margins.[272] The way to have accurate dumping margins, however, is for respondents to comply with the Department's requests and to provide information which is both accurate and complete. Absent a respondent's having done so, the Department has no choice but to rely on what is, by direct implication, less than accurate information.[273]

Taking the above authorities into account, the Panel finds that the Department was not bound to a rigid BIA formula, as urged upon us by North Star[274] and was reasonable in selecting

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"reasonably be considered best"). The courts have also been disinclined to determine that a BIA rate was "punitive," particularly when the respondent to whom it was applied was given an opportunity to rebut the inference created by the selection of the BIA rate by producing the information requested. Rhone Poulenc, 899 F.2d at 1190-91.

[271]/See Smith-Corona Group, 713 F.2d at 1578 ("One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis—comparing apples with apples."). See also Federal-Mogul Corp., 63 F.3d at 1580 ("Antidumping jurisprudence seeks to be fair, rather than to build bias into the calculation of dumping margins.").

[272]/ Atlantic Sugar v. United States, 744 F. 2d 1556, 1560 (Fed. Cir. 1984).

[273]/ See e.g., Asociacion Colombiana de Exportadores v. United States, 704 F. Supp. 1114, 1126 (Ct. Int'l Trade 1989) (BIA is "not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information"), reversed in part upon remand, 717 F. Supp. 834 (Ct. Int'l Trade 1989), aff'd on other grounds, 901 F. 2d 1089 (Fed. Cir. 1990), cert. denied, 111 S. Ct. 136 (1990); and Uddeholm v. United States, 676 F. Supp. 1234, 1236 (Ct. Int'l Trade 1987).

[274]/ North Star has argued that Allied-Signal requires the Department to use the most adverse data on record as BIA. In response, the Department has argued that (i) Allied-Signal was permissive not mandatory ("Allied-Signal is about what Commerce may do, not what it must do"); and (ii) Allied-Signal permitted the Department to apply a "two tier" methodology in a *total* BIA case, but did not address *partial* BIA as has been invoked by the Department in this case. Department Panel Rule 57(2) Brief, at 51-54. The Department also notes that the Court of International Trade has "explicitly held that the Department is not required to always apply the highest possible rate to a non-cooperative respondent." Id., at 54, citing Saha Thai Steel Pipe Co. v. United States, 828 F. Supp. 57 (Ct. Int'l Trade 1993) (involving complete failure by respondent to reply to a questionnaire). The Panel concurs with the Department's analysis on this issue.

among the five BIA rates available. The Panel also finds that the Department was reasonable in deciding not to further adjust the specific BIA rate chosen.[275]

While the Department's determination can be sustained on this ground alone, the Panel also finds that it is able to sustain the Department's determination on the basis that the 1993, [276]financial expense data was not "representative" of the POI's financial expenses; thus, the Department properly rejected that data and substituted therefor the half-year 1994 data. The Panel's conclusion in this regard is guided by the substantial evidence on the record that shows a dramatic increase in TAMSA's financial expenses during the first half of 1994, as compared to the first half of 1993.[277] In addition, while the Department made no direct explanation of this issue in the Final Determination, the Panel can readily understand the contribution made by the peso devaluation to that dramatic increase in financial expenses. As the Panel explains below, however, this lack of explanation by the Department is more troubling when the issue involves the apparent increase in TAMSA's G&A expenses over the same period.

Before turning to the next issue, the Panel desires to state that it does not agree with certain language used by the Department in its brief to the Panel, which language was, in short-hand terms, intended to describe the process by which the Department requests information from respondents and respondents supply, or fail to supply, that information. In its Panel Rule 57(2) Brief,

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[275]/See Department Panel Rule 57(2) Brief, at 60-61 ("Due to TAMSA's failure to cooperate in full, Commerce also definitively foreclosed a [ ] financial interest rate option removing the effects of the Mexican currency devaluation from data for the first six months of 1994...") (emphasis in original).

[276]/ See *supra* note 229.

[277]/ See *supra* note 229.

the Department referred to "standing requests" and "ongoing requests" for information, which language carries the implication that once respondent receives such a "standing request" it has an obligation *beyond* the due date of the request to continually update the information that is responsive to that request.[278] North Star made a similar suggestion in the hearing before the Panel.[279]

The Panel finds no basis in the Department's regulations for "standing requests" or "ongoing requests." Instead, the Panel understands that the Department must make *specific requests* for information which, under potential pain of BIA, the respondent must furnish by a *specific date*. If the requested information is supplied and is accurate, there is full compliance with the Department's request. If the information is not supplied, or is incomplete or inaccurate, then the Department must evaluate whether to make a new request for the same information or to apply BIA. Of course, BIA would be inappropriate if the information specifically requested was not (yet) in existence.[280] The Panel believes, however, that BIA would also be inappropriate-and its application not only grossly unfair to respondents but contrary to statute and regulation-in situations where the Department decided, at any time of its choosing and with respect to any or all prior requests made by it during the investigation phase, that such information was part of a "standing request" which had not been properly updated.

In fairness, the Panel would note that the above language may have simply been an unfortunate choice of words, since it appears that in fact both the Department and TAMSA fully

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[278]/ See Department Panel Rule 57(2) Brief, at 37 and 41.

[279]/ See colloquy at p. 84, Panel Hearing Transcript: "PANELIST PARTAN: So you would share or accept the view that there's no continuing obligation to supply these financial reports, owing to the earlier February request. MR. VERRILL: There's some debate about that as to whether, if you file an answer that includes only information available as of that day, whether you have fully complied with the Department's requirement and whether, if subsequently any of the information changes, there's an obligation to update the information."

[280]/ See U.H.F.C. Co., 916 F.2d at 701.

complied with the regulations in this case. TAMSA appropriately requested extensions of time to supply information requested by the Department, and the Department appropriately granted such extensions where feasible. The Department did regularly reiterate and repeat its requests for updated financial data, recognizing that TAMSA could not produce what did not yet exist.

As an additional aside, the Panel would also reject language put forward by North Star implying that TAMSA engaged in a pattern of evasive conduct.[281] The Panel finds no evidence of that behavior, although it is obvious that the Panel does agree that the Department ultimately asked the right question at the right time, to which TAMSA regrettably gave the wrong response. As suggested above, our concern is not about the actual practice of the Participants in this case, merely with the language of the briefs that attempts to summarize that practice, which the Panel finds potentially misleading.

B. Calculation of General and Administrative (G&A) Expense

1. Arguments of the Participants

TAMSA

TAMSA challenges the Department's decision to reject TAMSA's calculation of G&A expenses based on its audited, verified, full-year 1993 data, and to substitute therefor the unaudited and unverified half-year 1994 data, because such rejection was "in direct conflict with established Department precedent and was unjustified."[282] TAMSA again cites the Furfuryl Alcohol and Canned Pineapple cases as a reaffirmation of the Department's policy of reliance on *audited* data (in these instances, the Department rejected the 1994 data because it was unaudited).

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[281]/ North Star Panel Rule 57(1) Brief, at 15-16.
[282]/ TAMSA Panel Rule 57(1) Brief, at 42.

TAMSA also asserts that the Department did not verify the 1994 G&A expense data during the Veracruz verification and thus it did not review potentially important adjustments to that data.[283] In TAMSA's view, it was procedurally unfair for the Department to "ignore" the 1994 data at verification and then later to decide to use this ("unaudited, unverified, unadjusted, and thus inaccurate") data. TAMSA considers that the Department should have put TAMSA on notice that it might decide to use the 1994 data, which would have allowed TAMSA to submit for review various adjustments to that data.

As to the issue of adjustments, TAMSA asserts that the Department "refused to make any adjustments,"[284] making particular reference to the fact that indirect selling expenses were already separately accounted for in the dumping calculation and, therefore, such expenses should have been eliminated from the 1994 data to avoid double counting.

The Department

In its brief to the Panel, the Department responds to the arguments made by TAMSA:

- It was reasonable for the Department to reject the 1993 data and to use 1994 data which was more representative of the POI.[285]

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[283]/ Id., at 45.

[284]/ Id., at 46.

[285]/ In its detailed discussion, the Department noted "the extreme decline in the value of the peso across 1994 (even without taking into consideration the precipitous drop in December of that year) made costs in 1993 unrepresentative of those in the 1994 POI." Department Panel Rule 57(2) Brief, at 66.The Department, however, pointed to no evidence in the record concerning the increase in the G&A costs, nor did it explain how the decline in the value of the peso would have affected, specifically, G&A costs.

- Despite TAMSA's allegation, the 1994 data *was* verified.[286]

- It would have been inappropriate for the verification team to signal to TAMSA that the 1994 data would ultimately be used, and TAMSA had no procedural right to such a statement.[287]

- BIA played no role in the selection of the 1994 data for G&A expenses[288] and

- The Department made no adjustment to the 1994 data for indirect selling expenses because TAMSA declined to submit data in support of that adjustment.

On the last issue noted above, the Department concedes that "the elimination of indirect expenses from G&A data is routinely done."[289] However, the Department considers it settled

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[286]/ Consistent with the rule that verification is a "spot check" and not an exhaustive examination of the respondent's business (Monsanto Co. v. United States, 698 F. Supp. 275, 281 (Ct. Int'l Trade 1988)), the Department states that it "reviewed several areas of [the 1994 unconsolidated trial balance submitted by TAMSA to the Department at the Veracruz cost verification] extensively against both TAMSA's internal accounting books and its submission," pointing out in this connection various notations made by the verifiers on the relevant documents. Department Panel Rule 57(2) Brief, at 69, 71.The Department also observed that TAMSA "opted not to provide" a revised G&A submission to accompany the 1994 trial balance at the time it was turned over to the Department. Id., at 70.

[287]/ The Department argues that there is no basis in law for TAMSA's allegation that the Department should have "announce[d]", prior to the final determination, that the 1994 data would be used. "[B]ecause the decision maker in antidumping cases does not reach a final decision until all of the evidence is before her (*i.e.*, after the hearing), no right exists to have a particular element of that decision communicated to a party before the final determination."). Id., at 67.

[288]/ See *supra* note 135.

[289]/ Department Panel Rule 57(2) Brief, at 74, citing TAMSA Panel Rule 57(1) Brief, at 46.

law that "because respondents seeking adjustments are the parties with access to the data pertaining to adjustments, it is their burden to provide the information necessary to establish the claim for such adjustments."[290]

The Department notes, in this instance, that TAMSA had previously submitted an indirect selling expense factor in support of an adjustment to its G&A submission based on the 1993 data.[291] However, TAMSA "chose not to submit for verification a comparable breakout of full year 1994 indirect selling expenses when it presented its 1994 annual unconsolidated trial balance at the Veracruz verification."[292] The Department then makes the point that as is generally the case for adjustments which benefit respondents and which are not specified by statute, a failure to submit the information simply means that the Department will not make the adjustment. There is no resort to BIA as there would be in the case of information required by the statue.[293] In the Department's view, TAMSA's failure to provide the optional indirect selling expense breakout was a "head-in-the-sand" avoidance strategy.[294]

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[290]/ Department Panel Rule 57(2) Brief, at 73, citing Industrial Fasteners Group v. United States, 710 F.2d 1576, 1582 note 10 (Fed. Cir. 1983) (in context of a tax rebate adjustment to FMV, where respondent possessed necessary facts, it had the burden of furnishing that information and establishing a prima facie case); Timken Co. v. United States, 673 F. Supp. 495, 513 (Ct. Int'l Trade 1987) (burden of establishing adjustment to FMV is on respondent seeking adjustment because respondent has access to the necessary information and might otherwise have an incentive to fail to produce information that might be contrary to its interests); and Silver Reed America v. United States, 711 F. Supp. 627, 630-31 (Ct. Int'l Trade 1989) (respondents must provide evidence to justify a proposed methodology for quantifying a requested adjustment).

[291]/Department Panel Rule 57(2) Brief, at 74, citing Prop. Doc. 34, TAMSA's November 18, 1994 Section B Response, at Exhibit B-8.

[292]/ Department Panel Rule 57(2) Brief, at 75.

[293]/ Id., at 75-76.

[294]/ Id., at 76. The Department cites Mitsuboshi Belting Ltd. v. United States, No. 93-09-00640, slip op. 94-23, at 10 (Ct. Int'l Trade February 10, 1994) (when plaintiff had opportunity to submit information during administrative proceeding but did not do so, it cannot require the Department to consider that information).

North Star

North Star's brief to the Panel supports the Department's positions with respect to the rejection of the unrepresentative 1993 data as the basis for calculating POI G&A expense, the selection of the 1994 data for that purpose, and the refusal of the Department to make the indirect selling expense adjustment for lack of information on the record. In addition, however, North Star points to specific information on the record concerning the increase in G&A expense from 1993 to 1994.[295] This information was not contained in either the Final Determination or the Department's brief.

The Final Determination in fact contains very little information as to the facts underlying the Department's decision with respect to G&A expense or its reasoning with respect to those facts. In response to Comment 8 of the Final Determination, the Department merely states:

We agree, in part, with the petitioner that it is inappropriate to use the 1993 G&A expenses. (See DOC position regarding Comment 6). We disagree with the petitioner, however, that BIA is appropriate because TAMSA provided us with the 1994 G&A information that the Department requested. As indicated in the questionnaire, it is the Department's standard practice to calculate G&A based on the financial statements of the producing company that most closely relates to the POI, which, in this investigation, is January 1, 1994 through June 30, 1994. Therefore, the appropriate financial statement for TAMSA's G&A calculation is TAMSA's unconsolidated 1994 financial statement. We used the 1994 G&A expenses from the unconsolidated producing entity.[296]

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[295]/ North Star Panel Rule 57(2) Brief, at 36 note 89 and 38 note 97.

[296]/ Fin. Det., 60 Fed. Reg. at 33573 (response to Comment 8); see also Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 20.

2. Discussion and Decision of the Panel

The Panel has reflected upon the Participants' arguments and has noted the record evidence cited by North Star in its Panel Rule 57(2) Brief. Nevertheless, the Final Determination itself relies mostly on assumption and intuition for the relevant facts and reasoning-the assumption being that whatever facts were cited for the financial expense issues must, *ipso facto*, be sufficient facts for the G&A expense issue; and the intuition being that the peso devaluation in the first half of 1994 (and other factors) will have had the same clear and direct impact on G&A expense as they appear to have had on financial expense.

The Panel considers that neither point has been established and notes particularly the failure of the Department to point out relevant record facts on the G&A issue that could form "substantial evidence" in support of the Final Determination, which is the requirement that the statute places before us.[297] The Panel also observes that if the extraordinary item referred to in North Star's footnotes were eliminated from the equation, the increase in G&A expense from 1993 to 1994 would be quite small.[298] Whether or not such an exclusion would be appropriate in this particular context, and the precise manner in which the peso devaluation affected G&A expenses (most of which presumably are in pesos), are matters of uncertainty to the Panel.

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[297]/ As to the financial expense issue, the Department noted in its brief to the Panel that "rampant inflation" as well as the peso crisis "played havoc with financial expense costs" (Department Panel Rule 57(2) Brief, at 31) but, once again, the Final Determination itself makes no reference to inflation, either with respect to the calculation of financial expenses or G&A expenses, and the Panel finds itself unable to simply "intuit" the relative impact of these factors on G&A expenses or to conclude that that impact is the "substantial evidence" that the statute requires in support of the Department's Final Determination.

[298]/ See *supra* note 294.

Accordingly, the Panel finds that it is not yet prepared to rule on the G&A expense issue and it orders the remand of this issue to the Department for a complete explanation of its reasoning and a full citation to the administrative record for facts on which it bases its determination on this issue.

C. Allocation Methodology for Nonstandard Costs

1. Arguments of the Participants

TAMSA

TAMSA sets out a number of challenges to the Department's decision to reject TAMSA's nonstandard cost allocation methodology. Specifically, TAMSA argues that the Department.[299]

- Disregarded its own established practice for accepting a company's cost allocation methods when it is: (i) from the company's normal records; (ii) based on accepted accounting norms, and (iii) not distortive;

- Rejected TAMSA's allocation method which was consistent with standard Department practice, consistent with the company's records and accounting norms, and non-distortive;

- Flatly ignored the opinions of two independent internationally recognized auditors that validated TAMSA's method;

- Failed to base the rejection on substantial evidence in the record, relying only on assertions and demonstrably erroneous assumptions;

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[299]/ See TAMSA Panel Rule 57(1) Brief, at 48.

- Imposed an unusual and patently distortive allocation method; and

- Punished TAMSA with highly adverse assumptions for more than one-fifth of TAMSA's individual products, even though TAMSA provided all information [the Department] asked of it.

As noted above, it became clear at verification that TAMSA had allocated the nonstandard costs to specific products based on machine time from its normal records, but not of *all* machine time, merely that of the *finishing line* in its factory, which was the last of the three principal production processes. In TAMSA's view, the finishing line was "the critical process that constrains capacity at TAMSA's plant. In essence, the finishing line is the 'gate' of TAMSA's factory, through which all production must pass, which determines the capacity and timing of all processes at TAMSA's plant".[300] TAMSA concedes that the use of the finishing line methodology to allocate nonstandard costs to particular products was a matter of convenience if not practical necessity, given the circumstances of TAMSA's accounting techniques and practices.[301]

TAMSA asserts that a full explanation was given to the Department at the Veracruz cost verification concerning this issue, particularly (i) how the flow of production must be synchronized with timing of the slowest process: the finishing line; (ii) how finishing line machine time was derived and used in TAMSA's normal accounting system; and (iii) how finishing line machine time was

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[300]/ See TAMSA Panel Rule 57(1) Brief, at 50.

[301]/ See *supra* note 148. See also TAMSA Panel Rule 57(1) Brief, at 57 ("[A]llocation over 'total machine time' was not a realistic option, given TAMSA's normal record-keeping. It was practically impossible for TAMSA to derive nonstandard costs based on machine time for the entire factory for each product, because TAMSA does not maintain its records in a way that would make this approach practicable.").

"representative" of relative machine time in other process.[302] TAMSA also expresses concern that the Department's decision to reject the finishing line allocation methodology may have been based on a misreading of an important verification exhibit,[303] and it asserts that the Department, at verification, had actually compared the allocation of the price variance under TAMSA's methodology with the allocation of the price variance based on actual consumption or usage, without setting out the result of that comparison in the verification report.

Finally, TAMSA asserts that the Department "simply disregarded" the opinion of its Mexican auditing firm that the finishing line allocation methodology was consistent with Mexican GAAP and was "most suitable" for TAMSA's particular manufacturing process, and of its U.S. auditing firm that the allocation methodology was reasonable under the GAAP and was used by U.S. companies.[304]

In its briefs to the Panel and in oral argument, TAMSA emphasized that its allocation methodology was consistent with the Department's "clearly established precedent,"[305] and that it is the

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[302]/ TAMSA Panel Rule 57(1) Brief, at 57.

[303]/ TAMSA states that "[t]he Department's verification report demonstrates a fundamental failure to grasp TAMSA's methodology. The report's summary stated that TAMSA's methodology 'equally divides nonstandard costs between subject and non-subject merchandise.' (footnote omitted). This was demonstrably incorrect and evidently was based on a misunderstanding regarding a hypothetical, simplified illustration in a verification exhibit, designed to demonstrate the distortive effects of allocating depreciation on a tonnage basis." See TAMSA Panel Rule 57(1) Brief, at 51. The illustration was contained in Cost Exhibit D-1 and explained in TAMSA's May 9, 1995 Case Brief, Prop. Doc. 82, Fiche 97, Frame 35, at 11-13, and Attachment 2.

[304]/ Id., at 52, 61.

[305]/ Id., at 53-54, citing Certain Welded Carbon Steel Small Diameter and Light-Walled Rectangular Pipes and Tubes from Singapore, 51 Fed. Reg. 33101, 33104 (response to Comment 6) (Sept. 18, 1986) ("[t]he absorption of overhead by different products is more accurately reflected using an allocation method which accounts for the

Department's practice to "use allocation methodologies based on the company's normal records, particularly where an independent auditor states that the method comports with GAAP, and the method is not shown to be distortive."[306] TAMSA also argues that the Department failed to point to any evidence on the record to support its "mere assertion" that TAMSA's finishing line allocation methodology was distortive and did not reflect the machine time for the entire factory. Indeed, TAMSA urges the point that the only evidence specifically cited by the Department - the hypothetical illustration provided by TAMSA at verification - was clearly misinterpreted by the Department and was therefore "demonstrably erroneous."[307]

The Department

In response, the Department argues that TAMSA's finishing line allocation method is *not* consistent with Department practice; is *not* reasonable and appropriate for all nonstandard costs; and is *not* effectively supported by the opinions of TAMSA's independent auditors.

While conceding that machine time is a common basis for allocating processing costs, the Department argues that "the 'machine time' to which this applies is machine time specific to the particular cost center(s) for which costs must be allocated."[308] Accordingly, finishing line machine time

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different amounts of machine time required to produce a ton of various products.") and Shop Towels from Bangladesh, 57 Fed. Reg. 3996, 3999 (response to Comment 5) (Feb. 3, 1992).

[306]/ TAMSA Panel Rule 57(1) Brief, at 54, citing Furfuryl Alcohol From South Africa, 60 Fed. Reg. 22550, 22556 (response to Comment 17) (May 8, 1995) ("The Department normally relies on the respondent's books and records prepared in accordance with the home country GAAP unless these accounting principles do not reasonably reflect the COP of the merchandise.").

[307]/ TAMSA Panel Rule 57(1) Brief, at 58.

[308]/ Department Panel Rule 57(2) Brief, at 79.

is an appropriate basis for allocating *finishing line* overhead, while total machine time is the appropriate basis for allocating costs involving the *entire production line*.[309] Indeed, the Department reads the cases cited by TAMSA as in fact not supporting TAMSA's position but supporting the "Department's practice of looking to total machine time when the costs being allocated involve more than one cost center."[310] In addition, the Department disputes the ostensible implication of TAMSA's argument that machine time, even if unrepresentative of total machine time, must be preferred to all other allocation approaches, citing other instances when the Department has used or considered a *per-ton* method of allocation, a *value-based* allocation, and a *labor-hour* allocation.[311]

In response to TAMSA's argument that its preferred allocation method should be accepted because it is based on company records, the Department counters that TAMSA does not normally allocate its nonstandard costs to individual products and, therefore, its choice of allocation methodology has "no precedential value."[312] This fact distinguishes Furfuryl Alcohol from South Africa,[313] cited by TAMSA. Relatedly, the Department argues that "[t]he fact that finishing line machine time is considered in connection with other decisions for which output data are required does not establish the suitability of such data for allocation of nonstandard costs."[314]

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[309]/ Id., at 79-80 (emphasis added), citing Steel Wire Rope from Korea, 58 Fed. Reg. 11029 (February 23, 1993).

[310]/ Department Panel Rule 57(2) Brief, at 80 (emphasis in original). For cases cited by TAMSA, see *supra* note 305.

[311]/ Department Panel Rule 57(2) Brief, at 80-81.

[312]/ Id., at 81-82.

[313]/ 60 Fed. Reg. at 22556 (Comment 17).

[314]/ Department Panel Rule 57(2) Brief, at 83.

Turning to the issue whether finishing line machine time was established by TAMSA to be a *representative* measure of per-product nonstandard costs incurred across the full production process, the Department argues in the negative:

It is undisputed that, had TAMSA accurately based its allocation methodology for nonstandard costs on total machine time, [the Department] would have accepted that as a reasonable allocation basis. Machine time for the finishing process alone, however, would only be acceptable as an allocation basis for cost associated with the entire production process if it could be shown that the finishing costs for individual products were a representative proxy for total machine time for those products, or in some other way consistently represented, across various products, costs incurred during the overall production process. TAMSA's finishing line machine time allocation does neither.[315]

The Department argues that TAMSA's bottleneck theory is a theoretical construct that is unlikely to work as advertised and is, in any event, inconsistent with TAMSA's actual operations. Specifically, it is insupportable in three different respects:

- While finishing time "may be representative of the level of effort provided in the finishing stage, it does not begin to quantify the processing costs which each product incurs at other stages of production."[316]

[315]/ Id., at 83-84 (emphasis in original).

[316]/ Id., at 86.

- The theory does not effectively "apply to products which may incur different machine times at cost centers prior to reaching the finishing stage",[317] and

- Not all of the products involved in the cost allocation are fully processed within the Veracruz plant to which the theoretical model applies (*e.g.*, a significant amount of OCTG is exported to the United States to be threaded).[318]

The Department also dismisses the import and significance of the purportedly "misread" verification exhibit, arguing that it merely sets out a hypothetical which was designed to prove an obvious point but which, at the same time, totally fails to prove the *essential* point that finishing machine time was discernibly "representative" of total machine time. Similarly, the Department dismisses TAMSA's "vague claim" that its allocation methodology bore a certain relationship to another methodology.[319]

Finally, the Department argues that it reasonably disregarded the affidavits from TAMSA's auditors on the grounds that they were not prepared in the ordinary course of business but for the purpose of supporting TAMSA's position in this antidumping investigation, and because their reliability was open to question.[320]

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[317]/ Id., at 84.

[318]/ Id., at 84, 86.

[319]/ See *supra* text accompanying note 302. The Department states that this claim has no basis in the record and is not credible: "There is no reason why Commerce would have verified an allocation methodology which was not used." Department Panel Rule 57(2) Brief, at 89 note 51.

[320]/ Department Panel Rule 57(2) Brief, at 90-91.

Having set out its reasons for rejecting TAMSA's allocation approach, the Department then argues that its methodology based on a *percentage of standard costs* reflected the total production process for OCTG products.[321] The Department's explanation for this choice was set out in the Team Concurrence Memorandum, as follows:

Because we do not have total machine time, total standard cost is the appropriate allocation basis for the nonstandard costs. Machine time and labor hours are factored into the build up of product-specific standard costs. Also, total standard costs are based on product specific direct and indirect material usage, labor usage, energy usage, other variable costs, maintenance and other services. In this case, total standard costs is a more appropriate measure of activity than machine time of one phase of production or a per-ton allocation.[322]

In its brief to the Panel, the Department also explained its request for a remand with respect to its application of its standard cost allocation method as applied to products sold by TAMSA within the POI but produced by TAMSA outside the POI. In carrying out this calculation, the Department had initially decided to use the highest of the pool of possible adjustment factors (so that TAMSA would not benefit from its use of the "distortive" finishing machine time allocation approach). On reconsideration, however, the Department has now concluded that since TAMSA had never been asked to submit standard costs for non-POI products, it should have applied a *neutral* adjustment factor to the COM. Accordingly, the Department now "requests remand to substitute a weighted

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[321]/ Id., at 93.

[322]/ Team Concurrence Memorandum, Pub. Doc. 251, Fiche 46, Frame 51, at 18-19.; see also Fin. Det., 60 Fed. Reg. at 33573.

average factor for the adverse factor currently used in its calculation of nonstandard costs for non-POI products."[323]

North Star

North Star's brief to the Panel supports the position taken by the Department, but emphasizes a number of points. First, North Star points out that TAMSA consistently responded to questionnaires in the discovery stage of the investigation with information "strongly indicat[ing] that TAMSA was basing its allocation on machine time for all production processes."[324] Indeed, it was not until the Veracruz cost verification that TAMSA disclosed for the first time that it was using finishing line machine time only, as opposed to process-specific machine time, as its allocation methodology for nonstandard costs.[325] North Star further argues that TAMSA did not provide the Department, at verification or otherwise, with any empirical analysis or other factual evidence to justify the bottleneck theory.[326]

North Star argues, as does the Department, that in TAMSA's normal accounting system, TAMSA does not allocate fixed overhead or variances to individual products, although it

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[323]/ Department Panel Rule 57(2) Brief, at 97.

[324]/ North Star Panel Rule 57(2) Brief, at 48 (emphasis in original).

[325]/ Id. North Star argues that TAMSA's failure to disclose this fact at an earlier stage "severely prejudiced the Department's investigation. Without advance knowledge, the Department had no opportunity to test TAMSA's key assumptions underlying this allocation method.... " Id., at 51.

[326]/ Id., at 49. Like the Department, North Star disputes the value of TAMSA's verification exhibit, Cost Verification Report, Exhibit D1, Prop. Doc. 80: "This example in no way demonstrates the reasonableness of the methodology."North Star Panel Rule 57(2) Brief, at 49 note 126. North Star argues that the entire bottleneck theory is based on statements made in TAMSA's Case Brief, Rebuttal Brief, and in the public hearing, without any record evidence in support thereof. Id., at 52 note 132.

claims to use the finishing line allocation methodology for other purposes such as scheduling production, evaluating orders, and setting prices.[327] However, the test is not whether the raw data is drawn from "normal accounting records," but whether the methodology itself is reasonable and non-distortive: all "raw data" necessarily comes from a respondent's normal accounting records.[328]

On this latter issue, North Star asserts that TAMSA's methodology was distortive in that "it *a priori* shifted costs from products which undergo less finishing to products which undergo more finishing."[329] Further, "TAMSA failed to demonstrate that the relative time spent at only one stage of production can serve as a proxy for the relative time spent at every stage of production."[330] North Star argues that, to the contrary, "the record evidence shows that TAMSA's methodology would inappropriately allocate more melt shop and rolling mill overhead costs to those products with more extensive end-finishing."[331]

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[327]/ North Star Panel Rule 57(2) Brief, at 54-55. North Star argues that this claim was never verified by the Department.

[328]/ See Department Panel Rule 57(2) Brief, at 82.

[329]/ Id., at 56-57.

[330]/Id., at 57 (emphasis in original). North Star asserts that under TAMSA's methodology, virtually all nonstandard costs are shifted to the OCTG product which requires more end finishing. Id., at 58.

[331]/ Id., at 58.

Dismissing the "*post hoc* rationalizations" of TAMSA's independent auditors,[332] North Star concludes its argument by supporting the Department's alternative allocation method (based on standard costs) as a reasonable alternative to TAMSA's distortive allocation methodology.[333]

2. Discussion and Decision of the Panel

The Panel considers that the question presented by TAMSA's use of its finishing line allocation methodology presents two separate issues. The first issue is whether there is substantial evidence on the record in support of the Department's decision to reject TAMSA's use of that methodology because it was not shown by TAMSA to be reasonable and non-distortive. The second issue is whether there is substantial evidence on the record in support of the Department's decision to select an alternative methodology based on standard costs. The Panel will address each of these issues below.

Rejection of TAMSA's Finishing Line Allocation Methodology

It has already been noted that, for purposes of this antidumping investigation, TAMSA was required to submit to the Department product-specific COM data based on production during the POI, and to do so in a manner such that *all* manufacturing costs were allocated on a per-product basis. The December 28, 1994 Section D questionnaire did not impose a particular methodology on TAMSA in this regard, requiring only that the methodology selected by TAMSA be reasonable and non-distortive:

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[332]/ Id., at 59. North Star notes that "the Department normally places great weight on the views of independent auditors, if they are prepared for purposes other than justifying a particular method used to prepare antidumping responses," but accords very little weight to "*ex post facto* rationalizations by outside accountants prepared solely for the purposes of dumping investigations." Id., at 60.

[333]/ Id., at 61.

All variances between standard and actual costs resulting from manufacturing operations must be allocated to the subject merchandise using a reasonable methodology that does not distort per-unit costs. If your company uses an actual cost accounting system you must use this system in reporting COP/CV data. If your company does not calculate product specific per-unit costs or has more than one costing system, please contact the Office of Accounting.[334]

TAMSA, therefore, bore the twin burdens of selecting a methodology that was inherently "reasonable" under the circumstances, and of proving to the satisfaction of the Department that this methodology was non-distortive under its usual conditions of application. As noted, TAMSA also bore the burden of discussing any unusual issues that might arise with the Department's Office of Accounting, so that a resolution of those issues could be achieved in advance.[335]

Aside from the obligations derived from the questionnaire, the Department appears in practice to have established three basic criteria for evaluating an allocation methodology reported by a respondent during a proceeding: (1) whether the respondent's methodology is part of its normal accounting records; (2) whether the methodology comports with home market GAAP; and (3) whether the methodology results in allocations that reasonably reflect the costs associated with production of the subject merchandise.[336] In concrete cases, several alternative methodologies may be

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[334]/ Pub. Doc. 146, Fiche 26, Frame 35, at 10 (emphasis added).

[335]/ The Panel considers that this represents an opportunity as much as it does a burden, since it allows a respondent to clear up ambiguities, resolve issues and select methodologies that will be acceptable to the Department at the *outset* of an investigation, not toward the *end* of the investigation when it has become too late for the respondent to change course.

[336]/ See Canned Pineapple, 60 Fed. Reg. at 29559 (response to Comment 6) ("[T]he Department's practice is to rely on a respondent's books and records prepared in accordance with its home country GAAP unless these accounting principles do not reasonably refelect costs asscociated with production of the subject merchandise.").

available to a respondent for selection and use-based on *machine time*, *tonnage produced*, *value*, *labor-hours*, *standard costs*, etc.; and it does not appear that the Department necessarily insists on any particular methodology, provided that the method ultimately selected by the respondent has the characteristics of being both reasonable and non-distortive.

However, it seems clear that *total machine time* is an allocation method often selected by respondents and readily agreed to by the Department at least for depreciation costs. As stated in the Final Determination itself:

The basic premise that machine time can be a reasonable and appropriate allocation basis for depreciation costs is well substantiated in both accounting [citation omitted] and Departmental practice (Final Determination of Sales at Less Than Fair Value; Steel Wire Rope from Korea 58 FR 11029, February 23, 1993.[337]

The Department in its brief to the Panel appears to have extended this point, stating that it was "undisputed that, had TAMSA accurately based its allocation methodology for nonstandard costs on total machine time, Commerce would have accepted that as a reasonable allocation basis."[338]

TAMSA's selection of an allocation methodology, not based on *total* machine time, but based upon *finishing line* machine time, was, by its own admission, a matter of convenience and

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[337]/ Fin. Det., 60 Fed. Reg. at 33573.See also Welded Carbon Steel From Singapore, 51 Fed. Reg. at 33104 (response to Comment 6) (allocating factory overhead based on total machine time rather than tonnage produced) and Shop Towels from Bangladesh, 57 Fed. Reg. at 3998-99 (response to Comment 5) (allocating fabrication and depreciation expenses based on total machine time rather than kilogram output).

[338]/ Department Panel Rule 57(2) Brief, at 83.

practical necessity.[339] Neither convenience nor practical necessity, however, can relieve TAMSA from its burdens of establishing the inherent reasonableness of its methodology and its non-distortive character when applied to the facts at hand.

The Panel finds that the Department was correct in having concluded that TAMSA has not in this case discharged those burdens. In general terms, the Panel would comment that an allocation methodology based on *total* machine time, since it reflects the overall machine time needed to produce a given product at every stage of production, is on its face inherently reasonable. The Department practice on this issue so reflects. However, an allocation methodology based on *partial* machine time -to be used as a *proxy* for such other stages of production- can be said to be inherently suspect, and the Panel believes that a respondent bears a heavy burden to establish that this proxy is in fact a reasonable representation of the costs incurred in those other production stages.

In this instance, even if it may be conceded that the theory of a "bottleneck" has some intuitive appeal, and even though TAMSA has argued vigorously to the Panel that the finishing line machine time is in fact "representative" of the earlier stages of OCTG production and thus of total machine time, the Panel ultimately must be guided by what, if anything, is contained on the administrative record that might prove or substantiate this claim. The Panel has thoroughly explored that record and does not find substantiating evidence of this kind. The cost verification exhibit noted previously does not appear to perform this function,[340] nor is there other evidence on the record that does so.

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[339]/ The Panel again notes that North Star disputes that selection of this alternative methodology was even a practical necessity. See North Star Panel Rule 57(2) Brief, at 55 note 140.

[340]/ See *supra* note 326.

The issue before the Panel, however, is not so much whether there is substantial evidence to support TAMSA's position, but whether, under the applicable standard of review, there is substantial evidence to support the position taken by the Department in the Final Determination. In its factual summary, the Panel has noted that the Department has made three different findings concerning TAMSA's finishing line allocation method. The first was that TAMSA's allocation method "distorts actual production costs because it shifts overhead expenses to products which undergo more finishing." Since the record clearly establishes that TAMSA produces a variety of products which do indeed vary by the amount of finishing time they undergo, the Panel finds that there is substantial evidence on the record to support this finding.

The Department's second finding was that TAMSA's allocation method "did not reflect the machine time for other processes performed." Under the circumstances, since TAMSA's allocation method was specifically designed to *eliminate* the need to reflect the actual costs incurred in those other processes, using finishing line time as a proxy for those other costs, this statement amounts to a truism. Therefore, the Panel is compelled to find that it too is supported by substantial evidence on the record.

Finally, the Department found that machine time "is not the appropriate allocation basis for costs other than depreciation," although TAMSA had used it as well for the allocation of *variances* and *other fixed costs*. While the Panel is also prepared to sustain this finding, the Panel is concerned about the degree to which this broad language casts doubt on the existing practice of the Department to accept total machine time as a typical allocation methodology for nonstandard costs, knowing that such nonstandard costs will inevitably include variances and other fixed costs.[341] It is not clear to the Panel whether the Department is attempting to describe a new rule of practice, or whether this statement should be limited to the context and confines of this particular case.

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[341]/ See *supra* text accompanying note 338.

In sum, therefore, the Panel finds that TAMSA did not meet its burdens of establishing that its finishing line allocation methodology was both reasonable and non-distortive and finds, as well, that the decision of the Department to reject that allocation methodology was reasonable and supported by substantial evidence on the record.

Selection of Alternative Methodology

The second issue presented to the Panel is whether the Department's selection of an alternative methodology based on standard costs- having rejected TAMSA's finishing line allocation methodology- was supported by substantial evidence on the record. In the Panel's view, this issue is directly affected by the standard of review, which requires the Panel to grant deference to the Department in its choice of methodologies to implement the antidumping statue.[342]

It is the judgment of the Panel that the Department has adequately explained in the Final Determination and in the Team Concurrence Memorandum the basis for its selection of an alternative methodology based on standard costs,[343] and that this methodology, since it is entirely based on facts of record, is reasonable and permissible for the purposes at hand. Therefore, the Panel upholds the Department's selection of an allocation methodology based on standard costs.

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[342]/ See *supra* notes 190, 191.

[343]/ Id.

Remand

Finally, without further discussion, the Panel grants the remand requested by the Department to adjust the calculations made under the standard costs allocation methodology for those sales made within the POI of products produced outside the POI.[344]

D. Offset for Non-Operating Income

1. Arguments of the Participants

TAMSA

TAMSA urges that the Panel consider the issue whether the Department's preliminary objection to its offset for non-operating income, set out in the Team Concurrence Memorandum, is correct.[345] TAMSA indicates that this "issue is ripe for consideration and properly before this Panel."[346] Accordingly, TAMSA, in its Panel Rule 57(1) Brief argues in some detail concerning the substantive correctness of the Department's views, although TAMSA fails in that brief to cite any authority on the procedural issue of ripeness itself.

The Department

For its part, the Department's Panel Rule 57(2) Brief fails to address the substantive issue and focuses only on the procedural issue. The Department notes,[347] that the statement contained

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[344]/See *supra* text accompanying note 323.

[345]/ See *supra* text accompanying note 160.

[346]/ TAMSA Panel Rule 57(1) Brief, at 71.

[347]/ See Department Panel Rule 57(2) Brief, at 97-102.

in the Team Concurrence Memorandum was merely an alternative or *conditional* recommendation made to the Department's senior import administration officer prior to the ultimate decision to base the G&A expenses on 1994 data; that this recommendation did not rise to the level of a "final determination" subject to review by this Panel; that once the decision was made to use the 1994 data, no "case or controversy" existed with respect to the 1993 data,[348] and that the Panel may not render an opinion on an issue that the agency has expressly declined to reach.[349]

North Star

North Star, in its Panel Rule 57(2) Brief, takes the same position as the Department on the procedural question, but also addresses at some length the substance of the challenge raised by TAMSA.[350]

2. Discussion and Decision of the Panel

This Panel derives its authority from Article 1904 of the NAFTA. Article 1904(2) permits a panel to "review, based on the administrative record, a final antidumping ... duty determination of a competent investigating authority of an importing Party...." While panels may take into account the general legal principles (such as mootness)[351] that a court of that importing Party

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[348]/Citing North Carolina v. Rice, 404 U.S. 244, 246 (1971) ("[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.").

[349]/ Citing Matsushita Electric Industrial Co. v. United States, 688 F. Supp. 617, 622 (Ct. Int'l Trade 1988) (issue not ripe for review because question could be considered upon a final determination), aff'd 861 F.2d 257 (Fed. Cir. 1988); and American Spring Wire Corp. v. United States, 569 F. Supp. 73, 75 (Ct. Int'l Trade 1983) (even an event that is likely to recur is no substitute for an actual controversy).Citing also SEC v. Chenery, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.").

[350]/ North Star Panel Rule 57(2) Brief, at 64-75.

[351]/ NAFTA Article 1911 explicitly states that "general legal principles" includes mootness (see *supra* note 165).

might consider in such a review of a final determination, panels are authorized specifically to review only the Department's final determination. They are not empowered to review challenges to specific findings or determinations contained in an underlying document in the record which are not addressed or contained in that final determination. In this instance the "finding" challenged by TAMSA was expressly *not* addressed or contained in the Final Determination, and therefore it is beyond the reach of this Panel.

The Supreme Court has had numerous opportunities to consider mootness and ripeness issues in administrative law cases, and in doing so has provided definitive support for the above conclusion. See, *e.g.*, Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.") In the present case, while it may be said that the Department, in its leadup to the issuance of the Final Determination, did *consider* the issue raised by TAMSA, and provided some *reasoning*, the missing element is that it failed to "make its ruling." At this juncture, there has been no ruling or final determination by the Department on the issue in question.

The Supreme Court has recognized the "constitutional dimension of the mootness doctrine."[352] As stated in American Spring Wire:

In order to satisfy the "case or controversy" clause of Article III [of the United States Constitution] there must exist "a present, live controversy ... to avoid advisory opinions on abstract

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[352]/See American Spring Wire, 569 F. Supp. at 74, citing Liner v. Jafco, 375 U.S. 301, 305 note 3.

propositions of law." Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1379 (D.C.Cir. 1979) ("no jurisdiction over suits challenging administrative orders which are moot").[353]

If courts or binational panels lack jurisdiction to review administrative orders "which are moot," they most certainly lack jurisdiction to review administrative orders which have never been made. In this instance, of course, the Department has not made a final decision on the issue in question, and it is beyond the province of a court or binational panel to speculate as to how the Department may in fact rule.[354] As stated in Matsushita Elec. Indus. Co., Ltd. v. United States, "[i]t may very well be that the results of the final agency action will obviate the need for judicial review."[355]

Based upon the foregoing, the Panel therefore expressly declines to consider the substantive challenge raised by TAMSA to the view expressed in the Team Concurrence Memorandum concerning TAMSA's claimed non-operating income offset.

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[353]/ American Spring Wire, 569 F. Supp. at 74. Accord North Carolina v. Rice, 404 U.S. at 246.

[354]/ On subsequent reconsideration, nothing would prevent the Department from reaching, if it chose to do so, a decision favoring TAMSA on the substantive issue.

[355]/ Matsushita Elec. Indus. v. United States, 688 F. Supp. at 622 ("At this time we do not know precisely what methodology Commerce will employ or what justification Commerce may have for any change in methodology it may make. Moreover, it is possible that Commerce may finally revoke the dumping order under whatever methodology it employs."), aff'd Matsushita Elec. Indus. v. United States, 861 F.2d 257, 260 (Fed. Cir. 1988).

ARTICLE 1904

BINATIONAL PANEL REVIEW UNDER

THE NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF: **Oil Country Tubular Goods from** **Mexico**; Final Determination of Sales At Less Than Fair Value	USA-95-1904-04

REMAND ORDER

The Panel ORDERS the U.S. Department of Commerce to make a determination on remand consistent with the instructions and findings set forth in the Panel's opinion. The Department shall allow an appropriate period of time for North Star and TAMSA to comment on the proposed remand results. The final determination on remand shall be issued within ninety (90) days of the date of this Order.

ISSUED ON JULY 31, 1996

SIGNED IN THE ORIGINAL BY:

Harry B. Endsley

Harry B. Endsley, Chairman

Héctor Cuadra y Moreno

Héctor Cuadra y Moreno

Raymundo-Emilio Enríquez-Sánchez

Raymundo-Emilio Enríquez-Sánchez

Frank G. Evans

Frank G. Evans

Daniel G. Partan

Daniel G. Partan