NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW
USA-97-1904-3

In the matter of:	Before: Howard N. Fenton, III (chairperson)
CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM CANADA	William E. Code, Q.C. Lisa B. Koteen Shawna Vogel Gilbert R. Winham

DECISION OF THE PANEL ON
THE DETERMINATION ON REMAND

Appearances:

For Stelco, Inc.: Willkie Farr & Gallagher (Christopher Dunn and Daniel L. Porter).

For the U.S. Department of Commerce: Office of Chief Counsel for Import Administration (Myles S. Getlan).

For Certain United States Steel Producers: Skadden, Arps, Slate, Meagher & Flom LLP (Ellen J. Schneider).

TABLE OF CONTENTS

I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Article 1904 of the North American Free Trade Agreement to review a decision of the United States Department of Commerce, International Trade Administration ("Commerce" or "Department") regarding Commerce's valuation of Stelco's input prices in accordance with Commerce's second administrative review of the antidumping duty order on corrosion-resistant carbon steel flat products manufactured by Stelco.[1] In an order dated June 4, 1998, this Panel remanded that decision to the Department for certain adjustments and reconsideration. On September 3, 1998, the Department issued its Final Remand Determination, a portion of which Stelco challenged.

Stelco based its challenge on the failure of the Department to adjust its figures for Stelco's cost of production. Baycoat, an affiliated concern that provided painting services, returned proceeds to Stelco that were in excess of the cost of that painting. Stelco contends that the Department should have adjusted its cost figures to take the remittance into account.

This Panel has determined that the decision of the Department on remand with regard to this issue is not in accordance with law. The Panel has reached this conclusion notwithstanding the considerable discretion the Department enjoys in making determinations in antidumping matters, discretion which we acknowledged in our initial decision. We reach this conclusion after reviewing the Department's decision on remand and the submissions of the parties because we find that the Department has failed to follow the requirements of the statute that it calculate costs based on the records of the producer and all available evidence.

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[1]62 Fed. Reg. 18448 (April 15, 1997).

The Department has deemed irrelevant the kind of evidence, the return of revenues to Stelco from Baycoat based on Baycoat's painting of the steel in question, that it ordinarily considers in other contexts. The Department does not have the discretion to disregard the evidence in this particular matter because of the unique circumstances before it, circumstances that it has not previously encountered. In our initial decision we gave the Department the opportunity to develop its reasoning and justification for dismissing this evidence in the belief that its exercise of discretion could encompass a reasoned basis for not using the data before it. The Department's failure to justify its decision in this regard, coupled with our further scrutiny of the circumstances of this matter, has lead us to conclude that the Department is compelled to consider the return of revenues to Stelco in calculating costs in this unusual circumstance, and that its failure to do so is inconsistent with the requirements of the statute.

II. BACKGROUND

On August 19, 1993, Commerce issued an antidumping duty order to Stelco, a Canadian manufacturer and exporter of corrosion-resistant carbon steel products.[2] On September 9, 1995, Commerce initiated its second administrative review of the antidumping duty order. The period of review was August 1, 1994, through July 31, 1995.[3] As part of that review, Commerce issued a comprehensive antidumping questionnaire to Stelco to assist Commerce in determining Stelco's sales and cost data regarding the subject products. On February 5, 1996, Commerce issued a supplemental questionnaire to Stelco in order to clarify information submitted by Stelco concerning Stelco's costs

[2]Antidumping Duty Orders: Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada, 58 Fed. Reg. 4162 (August 19, 1993).

[3]62 Fed. Reg. 18448 (April 15, 1997).

of production. From April 15, 1996, to April 26, 1996, Commerce conducted a comprehensive verification of Stelco's submitted questionnaire responses regarding its costs of production. A central element of this review was to compare transfer prices between Stelco and Baycoat (a firm which is 50% owned by Stelco) with Baycoat's actual costs of painting.

Based on Commerce's review, Commerce determined that Stelco reported Baycoat's actual costs rather than the transfer price between Baycoat and Stelco as evidenced by two individual painting order invoices.[4] In Commerce's preliminary determination, it rejected Stelco's submitted costs of production and replaced it with a recalculated value for Baycoat's services. In response, Stelco argued that there was no legal or factual justification for Commerce to reject Baycoat's submitted actual costs of painting and that Commerce's methodology was inconsistent with Commerce's determinations in the original investigation and the first administrative review. Stelco also argued that Commerce used an improper methodology for comparing Baycoat's transfer prices to Baycoat's actual costs because Commerce refused to account for the fact that Baycoat remits half of its profits back to Stelco at the end of the year.

Commerce issued its final determination for the second administrative review on April 15, 1997.[5] In it, Commerce upheld its preliminary determination on all points. On May 12, 1997, Stelco submitted its request for this Panel to review Commerce's final determination. This Panel submitted its Decision on June 4, 1998. In the Decision, the Panel remanded this matter to the Department instructing the Department, among other things, to reconsider and explain the calculation of the transfer price for the Baycoat inputs, and consider Stelco's argument that the transfer price of the

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[4]Commerce Department's Cost Verification Report, Non-Pub. R. Doc. 78, at 15.

[5]62 Fed. Reg. 18449 (April 15, 1997).

Baycoat inputs should be recalculated to take account of Stelco's actual costs with regards to these inputs.

The Department issued its Final Remand Determination on September 4, 1998, in response to the Panel Decision. In it, the Department summarily concluded that an adjustment to transfer price would be inappropriate. Stelco filed comments objecting to this Determination on September 28, 1998, and requesting the Panel to review the Department's Final Remand Determination.

III. THE STANDARD OF REVIEW

In reviewing the Commerce Department's Final Remand Determination, this Panel is to apply the same standard of review that the Panel applied to Commerce's Final Determination. The NAFTA requires that this Panel apply the standard of review that a U.S. court would apply, referring to the standard of review set forth in 19 U.S.C. § 1516A(b)(1)(B); Article 1904(3), Annex 1911. Under 19 U.S.C. § 1516A(b)(1)(B), the Panel must "hold unlawful any determination, finding, or conclusion found...to be unsupported by substantial evidence on the record or otherwise not in accordance with law." In the Statement of Administrative Action, which is the official explanation of the NAFTA provisions to the U.S. Congress, the executive branch admonished, "Strict adherence by binational panels to the requirement in Article 1904(3) that panels apply the judicial standard of review of the importing country is the cornerstone of the binational panel process." Therefore, the standard of review warrants close analysis.

The first part of the standard of review is "substantial evidence on the record." The United States Supreme Court has consistently stated, "Substantial evidence is more that a mere scintilla. It

means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[6] Further, substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[7] "A court reviewing an agency's adjudicative action should accept the *agency's* factual findings if those findings are supported by substantial evidence on the record as a whole.... The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence."[8] Nevertheless, "[a] reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view."[9] Thus, this Panel must find that the agency's findings of fact are based on more than a "mere scintilla" but "less than the weight" of the evidence on the record and it cannot pick and choose among alternative findings; yet, if the evidence supporting the agency's findings is not substantial, taking into account the entire record, the Panel may set aside the agency's decision.

The overarching question of the second part of the standard, "otherwise not in accordance with law," is the degree of deference this Panel must pay Commerce. The landmark decision discussing an agency's interpretation of the law is *Chevron U.S.A., Inc. v. Natural Resources Defense*

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[6]*Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951), citing *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938).

[7]*Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 619-20 (1966).

[8] *Arkansas v. Oklahoma,* 503 U.S. 91, 113 (1992). *See also, Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984

[9]*Universal Camera Corp. v. NLRB, supra* at 488 (1951).

Council, Inc.[10] The Supreme Court in *Chevron* enunciated a two-pronged test. If Congress addressed a question directly in a statute, and the intent of Congress is clear,

> [T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[11]

More recently, the Supreme Court has ruled, "Judicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law."[12] The Court in *K Mart Corp. v. Cartier, Inc.*[13] declared, "If the agency interpretation is not in conflict with the plain language of the statute, deference is due."[14] The Court of Appeals for the Federal Circuit adds, "Our duty is not to weigh the wisdom of , or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute."[15]

In reviewing antidumping determinations of the Department of Commerce, courts have shown

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[10]467 U.S. 837 (1984).

[11]*Id.* at 842-43.

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

[13]486 U.S. 281, 292 (1988).

[14]*Id.* at 417-18.

[15]*Suramerica de Aleaciones Laminadas. C.A. v. United* States, 966 F.2d 660, 665 (Fed. Cir. 1992).

considerable deference, referring to Commerce as "the 'master' of antidumping law,"[16] and observing that "it is a cardinal principle that the Secretary's interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable."[17]

This avowal of deference does not mean, however, that the reviewing body relinquishes all judgment to the administrative agency. The Supreme Court has held, "'...If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.' *United States v. Shimer*, 367 U.S.374, 382 (1961)."[18] The Court has also noted that "a reviewing court need not accept an interpretation which is unreasonable."[19]

The situation this Panel addresses is one of those where the statute, while not silent, nonetheless does not unambiguously address the precise issue in review, thus shifting the analysis toward the second prong of *Chevron.* The Panel must afford Commerce's Determination considerable deference unless Commerce's Determination is unreasonable or is one which Congress would not have sanctioned. While the Panel cannot reject Commerce's determination and remand again unless it has "compelling reasons so to do,"[20] our reading of the statute coupled with its legislative history provides such reasons.

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[16]*Daewoo Electronics v. Int'l Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993).

[17]*Consumer Prod. Div., SCM Corp. v. Silver Reed America*, 753 F.2d 1033 (1985).

[18]*Chevron, supra,* at 845.

[19]*National R.R. Passenger Corp. v. Boston & Maine Corp., supra* at 418.

[20]*PPG Industries, Inc. v. United States*, 712 F. Supp. 195, 197 (Ct. Int'l Trade 1989).

IV. DISCUSSION

A. THE PANEL'S INITIAL DECISION

This Panel was called upon to review a decision by the Department treating a factual situation that was outside the normal pattern of its experience. The record here indicates that the invoice prices for painting were artificially high. The invoice prices between Baycoat and Stelco (the "transfer price") that the Department used to establish cost of production (COP) are higher than actual production costs for Stelco. This is because Baycoat is a joint venture 50% owned by Stelco and Stelco receives 50% of Baycoat's "profits", those being proceeds in excess of the costs of painting. The Department justified its use of the invoice price based on its administrative precedent[21] and its proposed regulations that called for it to use (or "normally" to use, under the regulations)[22] the higher of transfer price, the affiliated supplier's production cost, and market price. The rationale for this, found in the statute, is to allow the Department to calculate costs that "reasonably reflect the costs associated with the production . . . of the merchandise" in determining the existence of dumping and the calculation of dumping margins.[23] As most commonly applied, this "highest" standard justifies using production costs when stated transfer prices are artificially low, usually between affiliated parties. This application would be consistent with the statute's intent, being to find as nearly as possible the actual costs, and with the reasons for sections (f)(2) and (f)(3) of the act.

When the transfer price is artificially high between affiliated parties, as in this case, application of the "highest" standard yields a result at odds with the "actual cost" object of the statute. This

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[21] Final Remand Determination at 4.

[22] 19 C.F.R. § 351.407 (1997).

[23] 19 U.S.C.S. § 1677b(f)(1)(A).

Panel invited the Department to revisit this application of its rule, in particular by taking into account the return to Stelco of a portion of its payments to Baycoat for the painting services. The Department declined to do this for reasons, discussed below, that are at odds with its own practices as well as judicially-directed practices. Thus the Department's inability or unwillingness to go beyond its simplistic "highest" test on this unusual factual scenario has resulted in a decision that this Panel finds is not in accordance with the appropriate rules of law.

In our initial decision, the Panel told the Department that it had the discretion to use transfer price rather than Baycoat's costs of providing the painting service.[24] We did not, however, address the question of the Department's discretion not to consider the return of a portion of Baycoat's proceeds for this painting to Stelco because the Department requested that we remand the matter to it for consideration of this issue.

We indicated to the Department that we would not endorse the methodology it asked us to endorse for considering this issue, a methodology that automatically resulted in the highest costs and ignored any return to Stelco of the proceeds of the painting from Baycoat. The Department had applied 19 U.S.C. §1677b(f)(2) and (f)(3) to this situation, and asked the Panel to endorse that methodology that required the Department to use the highest of the transfer price, the market price and the cost of production. We rejected reliance by the Department on 19 U.S.C. § 1677b(f)(2) and (3) as the facts before it did not fall within the fact scenario addressed by these sections.[25] We

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[24] "The first issue presented to the Panel is whether the Department of Commerce has the discretion to use, as Complainant Stelco Inc.'s cost of production for painting steel coils, an average of sample invoice prices ("transfer price")between Stelco and its affiliated painting supplier, Baycoat, **rather than using Baycoat's costs.** The Panel finds that the Department does have that discretion." (emphasis added) Panel Decision at 5-6.

[25]Page 9 of the Panel Decision.

declined to accept the mechanical application of the highest of the transfer price, market price and cost of production in all cases. Rather, the Panel preferred the current Commerce regulations (19 C.F.R. §351.407(b)) which require the Department to normally follow the hierarchy. This regulation requires the Department to use its discretion and assess the applicability of the methodology rather than blindly apply it. The Panel believes that this approach is essential to considering factual circumstances not previously encountered.

The Panel pointed out that section 19 U.S.C. §1677b(f)(1)(A), which provides that "costs shall normally be calculated based on the records of the exporter or producer of the merchandise...[that] reasonably reflect the costs associated with the production and sale of the merchandise" is aimed at determining the actual costs as accurately as possible.[26] The Department requested that we remand the matter to it so that the Department could offer a reasoned explanation of its decision to use the transfer price of the painting service from Baycoat to Stelco[27] and consider Stelco's claims about the calculation of transfer price for the inputs Stelco purchased from Baycoat. The Panel indicated that in fairness the Department could exercise is discretion to consider adjustments to the transfer price for return of revenues to Stelco and "to address the requirement of §1677b(f)(1)(A)."[28] This last statement by the Panel may have been misinterpreted by the Department as meaning that the Panel believed the Department had the discretion to ignore the statutory

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[26]Page 9 and footnote 15 of the Panel Decision

[27] "For the foregoing reasons, we respectfully request a remand to consider Stelco's claims about the calculation of transfer prices for the inputs Stelco purchased from Baycoat. We request that the remand instructions permit Commerce to apply its affiliated party input methodology as described in the text above." Response Brief of the Investigating Authority at 38, January 20, 1998.

[28] Panel Decision at 10.

requirements to consider all of the evidence of the producer's costs. Of course, neither the Panel nor the Department has the authority to ignore the requirements of the statute in this or any other case.

Thus the Department was instructed to "reconsider and explain the calculation of transfer price for the Baycoat inputs, and consider Stelco's argument that the transfer price of the Baycoat inputs should be recalculated to take account of Stelco's actual costs with regard to these inputs."[29] Given the decision of the Panel, this task was in the context of:

1. The Panel's rejection of the Department's application of 19 U.S.C. § 1677b(f)(2) and (f)(3);
2. The Panel's reference to the purpose of 19 U.S.C. § 1677b(f)(1)(A); and
3. The Panel's refusal to endorse the Department's methodology in choosing in all cases the highest of transfer price, market value and cost of production.

The Department's failure to respond substantively to these instructions has resulted in the Panels's decision that the remand determination is not in accordance with law.

B. THE DEPARTMENT'S DETERMINATION ON REMAND

As mentioned above, the Department itself requested remand for purposes of considering adjustments to the transfer price based on the specific circumstances of the Stelco-Baycoat relationship. However, in its Final Remand Determination, the Department summarily dealt with Stelco's argument that remission of profits from Baycoat be considered to adjust the transfer price downward. In one short paragraph, the Department seized upon our observation that the profits were not directly related to particular transactions and concluded that "no adjustment to transfer price

[29] Panel Decision at 14.

is appropriate."[30] This summary treatment of such a critical point looms very large in our review of this decision. Commerce's assertion that consideration of profits as an adjustment to the transfer price is not appropriate because the profits are not directly linked to a particular transaction is delivered without authority or support.

For the more general question of the Department's use of the invoice price (transfer price) alone, the Department offers a lengthier explanation. However, this explanation relies on the assertion that no adjustment was necessary, without further explanation. Our remand instructed the Department to reconsider and explain the calculation of transfer price for Baycoat's inputs. The Department's decision reflects no reconsideration, and virtually no explanation.

From its initial Determination in this matter through this Remand Determination, the Department has used the invoice price from Baycoat to Stelco as its "transfer price". In support for this position on Remand, the Department characterizes the legal relationship between Stelco and Baycoat as separate legal entities, rather than Baycoat being an operating division. The Department states that its transfer price calculations were based on Stelco's own cost records (*i.e.*, it found evidence that Stelco recorded the invoice costs at some point in its accounting process) and concludes that there is no evidence that such costs are distorted.[31] While acknowledging that "there is conflicting evidence on the record as to the cost basis chosen by Stelco for its financial statements,"[32] the Department declines to consider it. It categorically concludes that "the actual cost of the painting services to Stelco is in fact the price paid by Stelco, and that there is no reason, based upon the

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[30] Final Remand Determination at 3.

[31] Remand Determination at 5.

[32] *Id.*

affiliated supplier' costs **or any other measure of value** (emphasis added), to conclude that the actual cost is distorted or should be replaced."[33]

C. THE DECISION IS NOT IN ACCORDANCE WITH LAW

The Panel is not second-guessing the Department on its view of the evidence and it is not seeking to substitute its own interpretation for that of the Department. The Panel concludes, however, that the Department's uncritical embracing of the methodology expressly rejected by the Panel and its failure to go beyond the recitation of its earlier position has resulted in a determination that is not in accordance with law.

Further, the Panel concludes that the failure of the Department to consider profits to Stelco from Baycoat's activities is not a discretionary interpretation of the statute and that failure to consider profits is contrary to the statutory requirement.[34] This decision is grounded on two elements:

1. The objective of the statute is to arrive at a cost figure that is an accurate reflection of the producer's costs, using the records of the producer, in accordance with §1677b(f)(1)(A). The Department declined to do that in this case.
2. The Department's explanation and justification for its decision not to consider profits in determining costs is contrary to its own practices with no rational explanation.

Intent of the Statute to use Accurate Costs is Clear

In our initial Decision, this Panel pointed out that the legislative history of the antidumping statute reflected the intent of Congress that the Department ascertain "as closely as possible the costs

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[33] *Id.* at 5-6.

[34] The Department's dismissal of an adjustment for these proceeds "because these remissions were not in the nature of a price adjustment" Remand Determination at 12, is not sufficient an explanation given the Department's treatment of other adjustments discussed *infra*.

that most accurately reflect the resources actually used in the production of the merchandise in question."[35] Indeed, as we indicated in that Decision, Congress had noted that the Department should not base its valuation on constructed value "solely for the purpose of using this provision to increase dumping margins."[36] Our reading of this language reinforces our view that the statute requires the Department to fully consider all elements affecting the cost of production, which in this unusual case includes the return of proceeds or profits by Baycoat to Stelco.[37]

While the Department states that the transfer price is Stelco's cost for painting services, the record reflects that fact that the only thing Baycoat does is paint steel for Stelco and Dofasco, its joint owners, and return all revenues over its costs to those two entities. Stelco pays money to Baycoat for the painting services and receives money back from Baycoat that exceeds Baycoat's cost of providing that service. The return necessarily relates to the service, although it is not a per-transaction remittance.[38] Failure to take this remittance into account in some fashion in determining

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[35] Panel Decision at 9, footnote 15, quoting from the Senate Committee report on the 1994 Uruguay Round Agreements Act.

[36] Panel Decision at 10, quoting from the conference report on the 1988 legislation amending the antidumping statute.

[37] The statutory provisions that follow 19 U.S.C. § 1677b(f)(1)(A), §§ (f)(2) and (f)(3) give direction to the Department on adjustments to cost in transactions between affiliated parties. As we have indicated, neither of these provisions apply to this case, although Stelco and Baycoat are affiliated. Whatever the distortions that affiliation may cause in Congress' view as reflected in these provisions, this situation is not among them. Thus, the Department must fall back on the instructions of section (f)(1)(A).

[38] While Stelco and Dofasco, the two owners of Baycoat, share the remittances over Baycoat's cost of painting equally, in any given period the amount of work performed for the two owners may not be equal. Given that the Department has access to both sets of figures, *i.e.* the amount of the remittances and the volume of steel painted for each firm, it would appear that the Department could make a functional determination of the amount of the remittances that should be attributed to Baycoat's painting of Stelco's product and adjust Stelco's costs accordingly.

costs ignores a significant element of the cost equation and provides an inflated picture of Stelco's costs of production. Unless the Department can rationally explain why it declines to use all of the information available to it, its determination must fail for being contrary to the objective of the statute.

The Department's Use of Profits and Losses in Adjusting Costs is Common Practice

The Department has indicated in its arguments that it will not take into account the profits from Baycoat that are returned to Stelco in calculating costs of production. The Department has sought to justify this position based on the profits being non-specific to particular transactions. However, its explanation is contradicted by its treatment of profits and losses in coal and iron expenses in this very matter[39] and by its similar treatment of general losses or profits in other matters.[40] Indeed, the authority the Department cites in its brief in support of its determination, while not directly on point (it involves post-sale price adjustments for exporter sales price offsets),

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[39] The Department used profit and loss figures from Stelco, figures that Stelco recorded on its financial statements as changes to equity income, to adjust costs downward for iron and upward for coal. *See* "Complainant's Comments Challenging Part of the Commerce Department's Final Remand Determination" at 15 -16, including authority cited therein. While the record indicates that there were no transactional figures for iron and coal purchases for the Department to work with, that is not the distinction the Department is drawing. Rather the Department would have us believe that revenues recorded as profits or return on equity cannot be used to adjust costs in antidumping determinations. This is obviously not true.

[40] *See* Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From the Federal Republic of Germany, 54 Fed. Reg. 18992 (May 3, 1989) at 19078. "DOC Position. The Department agrees with FAG-Italy in part. Transfer prices were used for the COP/CV calculations because FAG-Italy could not obtain the actual costs to produce the spherical roller bearings from its joint venture. **However, we have increased the transfer price between the joint venture and FAG-Italy to reflect the loss incurred during the POI because the transfer prices in aggregate were below the cost to produce the bearings and the loss of the joint venture must be absorbed by the participants of the joint venture."** (emphasis added.)

reinforces the Panel's point that rigid formality is inconsistent with the law and practice in this area.[41]

V. CONCLUSION

The Panel has great difficulty in reconciling the Department's Determination on Remand with its obligation under the statute. During this Panel's initial review, the Department requested that we remand the matter so that the Department could consider Stelco's claims about the calculation of transfer price for the inputs Stelco purchased from Baycoat and provide a reasoned explanation of its decision to use the transfer price of the painting service from Baycoat to Stelco. We granted that request, but refused to endorse the methodology the Department proposed for reaching its conclusion, reliance on the regulations and reasoning in *Roller Bearings* that compelled it to use the higher of transfer price, market price, or production costs.

On remand, the Department has failed to offer any rational explanation for its decision to use the transfer price of the painting services and not consider an adjustment for profits. The Department has substantial discretion in its application and interpretation of the antidumping statute and

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[41] *Torrington Company v. United States*, 82 F.3d 1039 (Fed. Cir. 1996) 1039, 1051, at Response of the Investigating Authority to Stelco Inc.'s Comments Challenging Part of the Commerce Department's Final Remand Determination (Oct. 19, 1998), p.7. The Federal Circuit found that the Department's decision was not in accordance with law because is had failed to correctly treat post sale price adjustments ("PSPA's") as direct selling expenses. Commerce had treated these PSPA's as indirect expenses (and thus deductible from foreign market value under ESP offset regulations) based in part on the way the company maintained and reported the figures. The court observed that "The allocation of expenses in a manner different from the calculation of expenses, however, does not alter the relationship between the expenses and the sales under consideration." The court refused to be bound by the producer's record keeping and the way the figures were reported to Commerce. In this case the costs were recorded in a non-transaction specific way (linked to customers rather than individual sales), but could be traced to specific transactions, albeit only with extraordinary difficulty. Commerce was faulted for its failure to ignore the form of the recorded adjustments and deal with their substance.

regulations, but that discretion reaches its limits when the Department's actions are those that Congress would not have sanctioned or are otherwise unreasonable.[42] In this case, the Department cannot assert a position that, on its face, ignores the purpose of the statute, does not take in to account all of the evidence on the record, and is supported only by the most simplistic reading of the Department's own regulatory interpretation of the statute.

Commerce's position in its Remand Determination is inconsistent with its own treatment of other issues in this same matter, inconsistent with its reasoning in other cases it relies upon and inconsistent with the clear objective of the statute. Therefore, this Panel finds that the Department's decision to base its calculations on the unadjusted transfer price of the painting services is "otherwise not in accordance with law" under the antidumping statute and the matter must be remanded for the Department to reconsider these costs in a manner not inconsistent with this opinion.

[42] *See* Section III STANDARD OF REVIEW *supra*.

VI. DISPOSITION AND PANEL ORDER

The Panel remands this matter to the Department of Commerce with the following instructions:

1. That the Department reconsider the costs associated with Baycoat's painting services to Stelco in a manner not inconsistent with this opinion.
2. That the Department will return a determination on remand within 60 days of the issuance of this Order.

Date of Issuance: January 20, 1999

Signed in the original by:

Howard N. Fenton, III, Chairperson
Howard N. Fenton, III, Chairperson

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