

**ARTICLE 1904
BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT**

IN THE MATTER OF:

**PORCELAIN-ON-STEEL COOKWARE
FROM MEXICO, Final Results of the Ninth
Antidumping Duty Administrative Review
(December 1, 1994 – November 30, 1995)**

**Secretariat File No.
USA-97-1904-07**

**DECISION OF THE PANEL
April 30, 1999**

PANEL:

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**For Cinsa, S.A. de C.V. (“Cinsa”) and Esmaltaciones de Norte America, S.A. de
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I. INTRODUCTION

This Binational Panel (“the Panel”) was constituted pursuant to Article 1904 of the North American Free Trade Agreement (“the Agreement”) to review the final results in the ninth administrative review of the antidumping duty order on porcelain-on-steel cookware from Mexico (“POS cookware”), covering the period December 1, 1994 through November 30, 1995. That determination was published in the Federal Register as Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 42496 (August 7, 1997).

In conformity with Article 1904.8 of the Agreement, and Part VII of the Rules of Procedure for Article 1904 Binational Panel Reviews (“the Rules”), this panel hereby renders its written decision.

II. BACKGROUND

The parties to this proceeding are Columbian Home Products, LLC (“CHP” or “petitioner”), successor in interest to petitioner General Housewares Corporation (“GHC”)¹, respondents Cinsa, S.A. de C.V. (“Cinsa”) and Esmaltaciones de Norte America, S.A. de C.V. (“ENASA”), and the U.S. Department of Commerce’s Import Administration (“Commerce” or “the Department”), the investigating authority.

As noted above, this Panel is reviewing the ninth administrative review of the antidumping duty order on POS cookware from Mexico. Commerce initiated that review on February 1, 1996, pursuant to requests made by Cinsa, ENASA and petitioner. The final results

¹ CHP filed a consent motion for substitution of party in this proceeding on April 13, 1998, based on its March 31, 1998 acquisition of GHC’s POS cookware business. In an order issued January 13, 1999, the Panel granted that motion.

were published on August 7, 1997.² Timely requests for panel review were filed by Cinsa, ENASA and GHC. The factual background relevant to each issue is set forth separately herein.

III. STANDARD OF REVIEW

The standard of review to be applied by binational panels under the North American Free Trade Agreement in their review of Commerce's determinations is specified in Articles 1904(2)-(3) and Annex 1911 of the Agreement. These provisions, in turn, require that the applicable standard of review is that set forth in Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a(b)(1)(B)). It is well established that this standard is not one of de novo review. Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 966 (CIT 1986), aff'd per curiam, 810 F.2d 1137 (Fed. Cir. 1987). Instead, the standard of review requires that a panel "hold unlawful any determination, finding, or conclusion not supported by substantial evidence on the record, or otherwise not in accordance with the law." 19 U.S.C. § 1516a(b)(1)(B). Article 1904(3) of the Agreement also specifically provides that decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit are binding on a panel.

"Substantial evidence" has been defined by the Court of Appeals for the Federal Circuit as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). The panel may not substitute its own judgement for that of the agency when there are two legitimate alternative views. Arkansas v. Oklahoma, 503 U.S. 91, 113 (1992). In considering whether or not a decision is "in accordance with law" the

² Certain Porcelain-on-Steel Cookware From Mexico: Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 42496 (August 7, 1997).

panel must defer “to reasonable interpretations by an agency of a statute that it administers. . .”
National R.R. Passenger Corp. v. Boston & Marine Corp., 503 U.S. 407, 417 (1992).³

IV. DISCUSSION

The Panel has examined every issue filed for its review and has considered each of the arguments presented concerning the issues.

A. Alleged Reimbursement By Cinsa and ENASA

The first issue to be considered by the Panel is whether the Department’s determination that Cinsa and ENASA were not reimbursing their affiliated importer for antidumping duties within the meaning of 19 C.F.R. § 353.26(a) was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department’s determination.

1. Factual Background

In the Final Results, the Department determined that Cinsa and ENASA were not reimbursing a U.S. affiliate:

In a public submission to the record of the 10th review, which petitioner has added to the record to this 9th review, respondents Cinsa and ENASA specifically stated that a second capital contribution made in April 1997, by CIC’s affiliate GISSA Holding USA, was provided to ensure that CIC would have enough funds to cover anticipated dumping duties and assessment liability subsequent to the liquidation of 5th and 7th POR entries during the 10th POR. These facts are not tantamount to the “producer or reseller” reimbursing the affiliated importer for antidumping duties. *See* 19 CFR 353.26(a). Although CIC, Cinsa, ENASA and GISSA share a common ultimate parent, GIS, there is no evidence that the source of this capital contribution was either a producer or reseller of POS cookware. All that is shown by these facts is that the importer’s parent made a cash infusion to cover

³ See, e.g., PPG Industries, Inc. v. United States, 712 F. Supp. 195, 198 (CIT 1989), aff’d, 978 F.2d 1232 (Fed. Cir. 1992) (“Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations.”).

antidumping liabilities, which is not in itself inconsistent with the reimbursement regulation. Because the record in this review does not support a finding that either producer (*i.e.*, Cinsa or ENASA) was in fact the ultimate source of these funds, we do not find reimbursement within the meaning of 19 CFR 353.26(a) in this review. However, we will examine the possibility further in the context of future reviews of POS cookware from Mexico. . . .

Final Results, 62 Fed. Reg. at 42505.

CHP argues that the Department erred in determining that Cinsa and ENASA were not reimbursing their affiliated U.S. importer for antidumping duties. CHP Brief, at 18. According to CHP, Commerce’s determination that the transfer of funds by an affiliated holding company, Grupo Industrial Saltillo, S.A. (“GIS”) to Cinsa’s affiliated importer, Cinsa International Corp. (“CIC”), expressly for the purpose of paying antidumping duties was not reimbursement of antidumping duties within the meaning of 19 C.F.R. § 353.26(a) is unsupported by substantial evidence in the agency record and is otherwise not in accordance with law. Id. at 19. CHP argues further that Commerce’s determination that the reimbursement regulation does not apply in this review is patently unreasonable and inconsistent with prior practice. Id. at 21. Furthermore, CHP reasons, the Dutch Steel⁴ determination indicates that Commerce has reconsidered its reimbursement policy and therefore the review should be remanded for a reconsideration of the evidence. Id. at 23.

According to Commerce, the determination that Cinsa and ENASA did not reimburse their affiliated importer CIC for antidumping duties was reasonable, supported by substantial evidence on the record, and otherwise in accordance with law. Commerce Response Brief, at 12. First, the Department explains, a “producer” or “reseller” within the meaning of the reimbursement regulation did not reimburse CIC. Id. at 15-17. Second, it is not Commerce’s

⁴ Certain Cold-Rolled Carbon Steel Flat Products From the Netherlands: Final Results of Antidumping Duty Administrative Review, 63 Fed. Reg. 13204 (March 18, 1998).

general practice to treat the different members of a corporate family as if each were a single entity. Id. at 19. Third, Commerce claims its determination in the Dutch Steel cases does not support the application of the reimbursement regulation here. Id. Finally, Commerce asserts that CHP's arguments as to the "fungibility of money" and the "holding company rule" are barred in this case because of exhaustion of administrative remedies. Id. at 24.

In its Response Brief, at 9, Cinsa and ENASA argue that Commerce was correct in determining that they did not reimburse the affiliated U.S. importer for antidumping duties. Cinsa claims that Commerce's conclusion is based on the facts of this case and is wholly consistent with its past practice. Id. at 13-14. Cinsa and ENASA note that Commerce has never treated affiliated exporters and importers as "one entity" for purposes of analyzing reimbursement and its approach in this case is consistent with that practice. Id.

Finally, CHP asks that the Panel take note of the Department's preliminary determination in the eleventh annual review of POS Cookware from Mexico⁵ where the Department preliminarily determined that Cinsa and ENASA were reimbursing a U.S. affiliate.

2. Analysis

Under section 353.26 of the Department's regulations, 19 C.F.R. § 353.26, in calculating the United States price:

the Secretary will deduct the amount of any antidumping duty which the producer or reseller:

- (i) Paid directly on behalf of the importer; or
- (ii) Reimbursed to the importer. . . .

⁵ Porcelain-on-Steel Cookware From Mexico: Preliminary Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 1592 (January 11, 1999).

As there is no allegation that Cinsa or ENASA paid antidumping duties directly on behalf of CIC, the question to be answered is whether either company reimbursed CIC for antidumping duties within the meaning of 19 C.F.R. § 353.26(a)(ii).

According to the Department, in order for section 353.26(a)(ii) to be triggered, the producer or reseller itself must make the payment to the importer because:

the Department has reasonably limited its inquiry to the producer and reseller exporters, the parties whose books and records are normally reviewed in the antidumping proceedings, stating repeatedly in the regulation that it applied to reimbursement of an importer only by a producer or reseller.

See Department's Brief at 17 (emphasis added). The Panel cannot say that the Department's interpretation of its regulation is unreasonable. As the Department notes, the plain language of the regulation states that the reimbursement must be made by the "producer or reseller," not by the producer's or reseller's affiliates. Therefore, given that the evidence on the record shows that GISSA, and not Cinsa or ENASA, made the payment to CIC, and given that there is no evidence on the record showing that Cinsa or ENASA made payments to GIS or GISSA for the purpose of reimbursing CIC, the Panel affirms the Department's determination that GISSA's payment to CIC did not constitute reimbursement within the meaning of 19 C.F.R. § 353.26(a)(ii).

In reaching this conclusion, the Panel rejects CHP's assertion that the Department's position is inconsistent with its prior practice. According to CHP, the Statement of Administrative Action ("SAA")⁶ to the Uruguay Round Agreements Act ("URAA") states that the Department has "full authority . . . to increase the duty when an exporter . . . reimburses the importer, whether independent or affiliated, for the importer's payment of duties." CHP Brief at 22, citing SAA at 886 (emphasis added). Although CHP's citation of the SAA is accurate, it

⁶ H.R. Doc. No. 103-316, 103rd Cong., 2nd Sess. (1994).

does not mandate a conclusion that the Department's position is unlawful. The Department's determination that section 353.26(a)(ii) is triggered only when the producer or reseller makes the payment to the importer is fully consistent with the language in the SAA.

Furthermore, the Department's decision in Dutch Steel does not compel a different result. See Certain Cold-Rolled Carbon Steel Flat Products From The Netherlands, 63 Fed. Reg. 13204 (Mar. 18, 1998). The portion of the determination that CHP cites in its brief, see CHP Brief at 22-23, states only that a capital infusion can constitute reimbursement of antidumping duties under certain circumstances, not that it always will. Presumably, if it had been Cinsa or ENASA that had made the capital infusion, rather than GISSA, then the Department's statement in Dutch Steel would have compelled a finding of reimbursement. However, the evidence on the record does not compel such a conclusion.

In any event, the petitioners and respondents in Dutch Steel both addressed the Department's decision in the case at bar, with the petitioners arguing that the Department's interpretation of its regulation was incorrect, and the respondents arguing that, given the Department's interpretation, there was no basis for applying the reimbursement regulation in Dutch Steel. See id., 63 Fed. Reg. at 13215. If the Department had intended Dutch Steel to constitute a change in practice, it presumably would have said so. It did not.

In addition, the Panel is not convinced by CHP's citation of Departmental practice with respect to the fungibility of money and the allocation of holding company expenses. See CHP Brief at 24-28. None of the cases which CHP cites relate to these concepts as applied in the context of the reimbursement regulation. While CHP claims that the Department's determination is based on the "false premise" that GISSA's expenses are "neither tied to revenues generated by Cinsa and ENASA nor provide administrative support to Cinsa's and

ENASA's businesses," see CHP Brief at 27, it fails to recognize that ISLO, not GISSA, is the holding company which supports Cinsa and ENASA. Given this fact, it is not clear to the Panel why GISSA's expenses would be tied to Cinsa or ENASA or provide support to those companies' businesses.

Finally, the Panel feels compelled to address the Department's preliminary determination in the 11th administrative review. See Porcelain-on-Steel Cookware from Mexico: Preliminary Results of Antidumping Duty Administrative Review, 64 Fed. Reg. 1592 (January 11, 1999). As CHP notes in its brief to this Panel, "an agency's interpretation of its own regulation that departs from its established administrative practice must be struck down if the agency fails to provide a reasonable explanation for the new interpretation." CHP Brief at 21, citing Atchinson, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973). The Department has asserted forcefully – both in the ninth administrative review and before this Panel – that section 353.26(a)(ii) is triggered only when the payment to the importer is made by the exporter or reseller itself, not when the payment is made by another party acting on behalf of, or for the benefit of, the exporter or reseller. Reviewing the preliminary determination, it does not appear to the Panel that the Department has explained why its interpretation in the ninth review should no longer apply. That, however, is a question that a future Panel may be called upon to address. It is not germane to the current proceeding.

B. Classification of Sales as Export Price Sales

The second issue that the Panel must address is whether the Department's decision to classify Cinsa's FOB Laredo sales as export price ("EP") sales, rather than constructed export price ("CEP") sales, was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department's determination.

1. Factual Background

In its Final Results the Department determined that:

Cinsa and ENASA both state that sales to the U.S. are made on both an EP and a CEP basis. With respect to Cinsa, the facts on the record of this review do not contradict the reported classifications. . . . In its March 11, 1996, Section A questionnaire response Cinsa states that affiliated parties Global Imports Inc. (Global) and CIC purchase LG and HG cookware from Cinsa . . . and resell it in the United States. Although the date of sale reported by Cinsa . . . for all such sales is the date of the Global or CIC invoice, not the Cinsa . . . invoice, the record in this review indicates that both invoices are issued within a short time of each other. Cinsa notes in its response that the price for EP sales is agreed upon at the time the U.S. customer places a purchase order with the Cinsa export sales department in Mexico. Cinsa's response states that the precise quantity of product is not determined until the packing list is prepared for the shipment from Mexico, and CIC or Global issues the invoice to the U.S. customer. Thus, Cinsa and ENASA consider the date of sale to be the date of the Global or CIC invoice. Cinsa indicates that the sales categorized as EP sales are not warehoused by Global or CIC after they cross the border, and the sales data corresponding to these sales show that these sales are made on FOB Laredo terms. According to Cinsa, the duties performed by CIC and Global with respect to the FOB Laredo sales relate primarily to sales processing: issuing payment invoices, accepting payment and forwarding it to Mexico, posting antidumping duty deposits, and clearing products through customs for sales to unrelated customers in the United States. Therefore, for the purposes of this review we will continue to consider sales made through Global and Cinsa as EP sales when the products do not enter the inventory of Global or CIC.

Final Results, 62 Fed. Reg. at 42500.

CHP argues that Commerce erred in classifying Cinsa's FOB Laredo sales as export price (EP) sales. CHP Brief, at 28. CHP claims that Commerce's determination that Global's and CIC's activities with respect to sale of merchandise that did not enter Global's or CIC's inventory in the United States were merely clerical in nature and therefore insufficient to classify

these sales as CEP sales was not supported by substantial evidence in the administrative record. Id. at 29. Moreover, CHP argues that there is no evidence to support Cinsa's claim that sales reported as EP sales were made by Cinsa's export department in Mexico and not by CIC in the United States. Id. at 35.

In its Reply Brief, at 11-12, CHP argues that Commerce failed to apply properly the test to classify Cinsa's U.S. sales as EP sales, and as a result its determination to classify certain sales to CIC as EP sales is not supported by substantial evidence on the record. CHP replies that it would be inappropriate for the Panel to address the "customary sales channel" factor because Commerce failed to address this factor in its final results. Id. at 12. Additionally, CHP argues that Commerce's determination that CIC was merely a sales facilitator with respect to sales classified as export price sales is not supported by substantial evidence on the record. Id. at 13. CHP argues that Commerce's final results erroneously permitted Cinsa to allocate expenses in a manner consistent with CEP sales, yet obtain the benefits of EP sales classification, a determination which is not supported by substantial evidence and should be remanded to Commerce with instructions to classify Cinsa's reported EP sales as CEP sales and recalculate the margin. Id. at 19.

Commerce asserts that its classification of Cinsa's FOB Laredo sales as EP sales was reasonable, supported by substantial evidence on the record and otherwise in accordance with law. Commerce Response Brief, at 29. The FOB Laredo sales were shipped directly to the unaffiliated U.S. customer and the indirect PP/EP sales were part of Cinsa's customary commercial channel. Id. at 32-33. Additionally, for the FOB Laredo sales, the U.S. affiliate merely processed sales documentation and linked communications with the exporter. Id. at 35. Cinsa performed selling functions in Mexico on these sales and Cinsa set the price for the FOB

Laredo sales therefore making them EP transactions, despite the presence of shrink-wrapping by CIC. Id. at 38-42.

Cinsa argues that Commerce properly classified its FOB Laredo sales in the United States as export price transactions. Cinsa Response Brief, at 15. Cinsa reasons that the evidence on the record and Commerce's past practice indicate that Cinsa has met Commerce's three-prong test for classifying U.S. sales made before the date of importation as EP sales. Id. at 16-17. Cinsa argues that CHP may not ask the Panel to substitute its own judgment for that of Commerce in remanding the determination. Id. at 17. Commerce's determination that some sales were properly classified as EP transaction is supported by substantial evidence. Id. at 21.

2. Analysis

Under section 772 of the Act, 19 U.S.C. § 1677a, an export price ("EP") sale is a sale of subject merchandise where the first sale to an unaffiliated purchaser in the United States, or for export to the United States, is made prior to importation. 19 U.S.C. § 1677a(a). A constructed export price ("CEP") sale is a sale where the first sale to an unaffiliated purchaser is made in the United States, either before or after importation. 19 U.S.C. § 1677a(b). In addition, under certain circumstances, the Department will treat certain sales that might otherwise resemble CEP sales as "indirect" export price ("IEP") sales. In order to be classified as an IEP sale, the sale must meet the following three criteria: (1) the merchandise must not be introduced into the affiliated importer's inventory; (2) the sales channel must be customary between the involved parties; and (3) the affiliated importer must act only as a processor of documents and as a communications link with the exporter. See, e.g., Borusan Holding A.S. v. United States, 16 CIT 278, 281 (1992).

In the administrative review, the Department concluded that Cinsa's FOB Laredo sales met all of the relevant criteria for classification as IEP sales. Although CHP objects to the Department's conclusion, it does not dispute that the sales meet the first prong of the three part test. See CHP Brief at 30. According to CHP, however, the sales did not satisfy the second or third prongs. Id. Thus, the Panel must determine whether the Department's conclusion that the second and third prongs were met is supported by substantial evidence and otherwise in accordance with law.

As noted above, the second criterion under the Department's IEP test is that the sales channel must be customary between the involved parties. According to CHP, the Final Results failed even to consider whether Cinsa's FOB Laredo sales met this test. In CHP's view, the fact that a certain percentage of Cinsa's sales during the period of review were classified as CEP sales should prevent the Department from concluding that EP is the "customary" channel of trade for Cinsa. CHP Brief at 30-31.

In response, the Department argues that it has been well established over the life of the antidumping order on POS cookware from Mexico that Cinsa has a history of making EP sales through Laredo. See Department Brief at 33. In some review periods, Cinsa has made only EP (or "purchase price") sales, and in others, it has made both EP and CEP sales. See, e.g., Porcelain on Steel Cooking Ware From Mexico, 51 Fed. Reg. 18470, 18471 (May 20, 1986) (demonstrating that Cinsa made only purchase price sales in the original investigation); Porcelain-on-Steel Cookware From Mexico, 61 Fed. Reg. 54616, 54617 (Oct. 21, 1996). Therefore, the Department argues, it is evident from the history of the antidumping order that EP sales are a customary channel of trade for Cinsa.

Furthermore, the Department argues that the CIT has recognized that if a majority of a company's sales are not warehoused by its U.S. affiliate, this indicates that direct shipments are a customary channel of trade. Defendant's Brief at 33, citing E.I. DuPont de Nemours & Co., Inc. v. United States, 841 F. Supp. 1237, 1250 (CIT 1993).

Having reviewed the arguments of the parties, as well as the evidence on the record and the history of this proceeding, the Panel concludes that the Department has adequately demonstrated that Cinsa's FOB Laredo sales met the second prong of the IEP test. CHP's argument that the existence of CEP sales should prevent the Department from finding that Cinsa's FOB Laredo sales meet the second prong of the test appears to be premised on the idea that there can be only one customary channel of trade, either EP or CEP. CHP has failed, however, to cite any authority for this argument, and the Panel is aware of none. Accordingly, the Panel does not view the fact that Cinsa had CEP sales as fatal to its IEP claim.

A closer issue, however, is the Department's failure to clearly address the customary channel of trade issue in its discussion in the Federal Register. As CHP notes, it is not permissible for an agency to rely on *post hoc* rationalizations of agency counsel in support of its determinations. See CHP Reply Brief at 12-13. Moreover, the Panel is not convinced by the Department's argument that it is "clear" from the fact that it summarized petitioners' arguments and classified the sales as IEP sales that it adequately addressed the second prong of the IEP test. See Department Brief at 34. In particular, the Panel is not convinced by the Department's citation of the decision in Ceramica Regiomontana, S.A. v. United States, 810 F.2d 1137, 1139 (Fed. Cir. 1987). See Department Brief at 34. In the Panel's view, the Department attempts far too often to rely on Ceramica as a way of avoiding the consequences of inadequate explanations.

Nevertheless, as noted above, the Panel concludes that the Department has adequately demonstrated that Cinsa's FOB Laredo sales met the second prong of the IEP test. In the Panel's opinion, given the history of this proceeding, there would be little point in ordering a pro forma remand which would only acknowledge what is already abundantly clear from past proceedings: Cinsa has a well established history of making purchase price (now EP) sales to its United States customers, and it is reasonable to conclude that those sales constitute a customary channel of trade.

Finally, we turn to the third prong of the IEP test: whether the affiliated importer acted only as a processor of documents and as a communications link with the exporter. According to CHP, there is no evidence on the record that Cinsa performed selling functions in Mexico with respect to the Laredo sales. See CHP Brief at 33. CHP then posits that if Cinsa performed no selling functions, then Global's and CIC's role in the sales process must have been more than ancillary or incidental. Id. In CHP's view, the magnitude of the selling expenses reported by CIC and allocated to EP demonstrates that its role in the sales process was not incidental. CHP also claims that it was CIC and Global, not Cinsa, that sets the selling price for U.S. sales. Finally, CHP argues that CIC shrink wrapped products for certain EP customers, and that this activity should disqualify Cinsa's IEP claim.

After reviewing the evidence on the record, the Panel concludes that the Department's determination that the FOB Laredo sales met the third prong of the IEP test is supported by substantial evidence on the record. First, none of the arguments forwarded by the parties lead the Panel to question the Department's finding that CIC's and Global's activities relevant to the Laredo sales were merely ancillary. The evidence on the record indicates that the activities performed by CIC and Global "relate[d] primarily to sales processing: issuing payment invoices,

accepting payment and forwarding it to Mexico, posting antidumping duty deposits, and clearing products through Customs for sales to unrelated customers in the United States.” 62 Fed. Reg. at 42500. While CHP speculates that CIC’s and Global’s activities “must have been” more than incidental or ancillary, it provides no evidence to support its assertion. The Panel agrees with the Department, for example, that shrink wrapping is nothing more than an ancillary activity.⁷

Second, the Panel disagrees with CHP’s argument that Cinsa performed no selling activities on the Laredo sales. Contrary to CHP’s assertions, Cinsa stated on the record that it did perform selling activities on the Laredo sales. See Department Brief at 38-39, citing Cinsa supplemental response. Moreover, Cinsa reported indirect selling expenses incurred in Mexico on its EP sales, and nothing on the record leads the Panel to believe that Cinsa’s statement was untrue. The Panel agrees with the Department that CHP has taken out of context the excerpt from Cinsa’s and ENASA’s case brief which it cites as evidence that Cinsa did not incur such expenses. The Panel also agrees with the Department that, based on the record evidence, it was Cinsa, and not CIC, which set the prices for the Laredo sales. See 62 Fed. Reg. at 42500. As discussed above in relation to the second prong of the IEP test, it has been well established over the history of the POS Cookware antidumping order that Cinsa makes EP sales to its U.S. customers.

In sum, the Department’s conclusion that Cinsa’s FOB Laredo sales met the test for classification as IEP sales is supported by substantial evidence and is otherwise in accordance with law. For this reason, the Panel affirms the Department’s determination.

⁷ It is unclear from the record whether it was Cinsa or CIC that shrink wrapped the products in question. Cf. Department Brief at 42-43; Cinsa Reply Brief at 20-21. Regardless, the Panel agrees with the Department that shrink wrapping does not merit a change in classification from IEP to CEP.

C. Decision Not To Deduct Certain Indirect Selling Expenses from CEP

The third issue that the Panel must address is whether the Department's decision not to deduct from CEP the indirect selling expenses that Cinsa incurred in Mexico on sales it made to CIC was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department's determination.

1. Factual Background

CHP argues that Commerce erred when it failed to deduct from CEP sales made by Cinsa and ENASA certain indirect selling expenses and inventory carrying costs incurred in Mexico on U.S. sales. CHP Brief, at 51. CHP claims that Commerce's failure to deduct from CEP indirect selling expenses incurred in Mexico in support of sales of subject merchandise to the United States is directly contrary to both the plain language of the statute and the Congressional intent as set forth in the legislative history. Id. at 51-52. Both indicate that all indirect selling expenses "that may be reasonably attributed to" U.S. sales must be deducted from the CEP without limitation. Id. at 56.

In its Reply Brief, at 19, CHP argues further that Commerce's determination not to deduct indirect selling expenses incurred in Mexico from CEP is contrary to the plain language of the antidumping statute. CHP canvasses the law to support its contention that the statutory term "any" modifying the CEP-deductible selling expenses should be broadly interpreted as "all" or "every," thus permitting indirect selling expenses to be deducted from CEP and requiring the dumping margin to be recalculated. Id. at 20-32.

Commerce argues that it properly calculated the CEP when it did not deduct indirect selling expenses that Cinsa incurred in Mexico on sales to its U.S. affiliate CIC. Commerce Response Brief, at 43. The Post-URAA statute does not contemplate deduction of indirect

selling expenses incurred in connection with the exporter's sale to an affiliated customer in the United States, and Commerce's regulations codify the Department's interpretation of the statute. Id. at 45, 52.

Cinsa argues that Commerce correctly calculated CEP when it did not deduct indirect selling expenses and inventory carrying costs incurred in Mexico from CEP. Cinsa Response Brief, at 30. Cinsa reasons that Commerce's final results are consistent with precedent, determinations and the preamble to Commerce's final regulations. Id. at 31. CHP has not come forward with any evidence to support its allegations that Commerce's interpretation of its obligations under the CEP statute is an unreasonable interpretation of the law. Id. at 32.

2. Analysis

Section 772(d) of the Act, 19 U.S.C. § 1677a(d), addresses adjustments to the constructed export price. According to section 772(d):

[T]he price used to establish constructed export price shall . . . be reduced by –

- (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise . . .
 - (A) commissions for selling the subject merchandise in the United States;
 - (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
 - (C) any selling expenses that the seller pays on behalf of the purchaser; and
 - (D) any selling expenses not deducted under subparagraph (A), (B), or (C)

At issue is whether Section 772(d)(1)(D) requires the Department to deduct not only those indirect selling expenses which the affiliated reseller incurs in selling the merchandise to the first unaffiliated party in the United States, but also any indirect selling expenses which the producer/exporter incurs in selling to the affiliated reseller. CHP claims that the statute requires the Department to make such deductions, and the Department rejects CHP's interpretation. The task for the Panel is to determine whether the Department's position is based on a permissible reading of the statute.

At the outset, the Panel rejects CHP's contention that the plain language of Section 772(d) requires the Department to deduct the expenses. While it is true that the statute instructs the Department to deduct "any" of the enumerated expenses which are incurred "in selling the subject merchandise," the statute does not explicitly state, one way or the other, whether the sale being referred to is the sale from the producer/exporter to the affiliated reseller, the sale from the affiliated reseller to the unaffiliated purchaser in the United States, or both. Thus, because the statutory language is not clear, the Department's interpretation is entitled to deference if it is based on a permissible reading of the statute.

As the Department notes, according to the SAA:

under new section 772(d), constructed export price will be calculated by reducing the price of the first sale to an unaffiliated customer in the United States by the amount of the following expenses (and profit) associated with economic activities in the United States: . . . (4) any 'indirect selling expenses' (defined as selling expenses not deducted under any of the first three categories of deductions) . . .

SAA at 823 (emphasis added). In the view of the Department, the underscored language refers to the expenses incurred in the sale to the unaffiliated purchaser, not the sale to the affiliated reseller. In the opinion of the Panel, the Department's interpretation is a reasonable one.

The Department's interpretation is consistent with the purpose of the CEP provision. As the SAA explains in discussing the CEP profit deduction, the constructed export price "is now calculated to be, as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." SAA at 823. In the EP context, if a producer incurs indirect selling expenses in selling to an unaffiliated importer in the United States, the expenses are not deducted from the export price. See 19 U.S.C. § 1677a(c)(2). Therefore, in the opinion of the Panel, CHP's argument that the Department should deduct such expenses from CEP would result in a CEP which would not "correspond[] to an export price between non-affiliated parties." Moreover, as the Department notes in its brief, adopting CHP's interpretation would upset the statutory balance between EP and NV by deducting expenses from CEP that are not deducted from the normal value. See Department Brief at 51.

In reaching this conclusion, the Panel rejects CHP's contention that the legislative history supports the opposite result. As noted above, the SAA supports the Department's construction of the statute. Under 19 U.S.C. § 3512(d), the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of . . . this Act in any judicial proceeding in which a question arises concerning such interpretation or application." Moreover, the Senate Report language cited by CHP, viewed in context, states only that, "[a]s under current law, Commerce will make additional adjustments for constructed export price." S. Rep. 412, 103d Cong., 2d Sess. 64 (1994). It does not address the issue at hand. In addition, CHP ignores additional language in the Senate Report which instructs Commerce to deduct expenses and profit "associated with selling the merchandise in the United States" S. Rep. 412, 103d Cong., 2d Sess. 64 (1994) (emphasis added). To the extent that the House Report

suggests an alternative interpretation (which is debatable), the House Report must cede to the SAA.

Finally, the Panel rejects CHP's reliance on Mitsubishi. See CHP Reply Brief at 28, citing Mitsubishi Heavy Indus., Ltd. v. United States, 32 Cust. B. & Dec., No. 31, at 58 (1998).⁸ The Department agrees in its brief that the country in which the expenses are incurred is not determinative of whether they may be deducted from CEP. The issue, rather, is whether they are "associated with economic activities in the United States." See Department Brief at 51 n.35. The excerpt from Mitsubishi which CHP cites is fully consistent with the Department's position.

For all of the foregoing reasons, the Panel concludes that the Department's decision not to deduct from CEP the indirect selling expenses that Cinsa incurred in Mexico was supported by substantial evidence and is otherwise in accordance with law.

D. Decision Not To Include Certain Indirect Selling Expenses in Total U.S. Expenses for CEP Profit Calculation

The fourth issue that the Panel must address is whether the Department's decision not to include certain indirect selling expenses in the pool of U.S. expenses for the CEP profit calculation was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department's determination.

1. Factual Background

CHP asserts that Commerce erroneously failed to deduct foreign indirect selling expenses and foreign inventory carrying costs incurred in Mexico on sales to the United States in calculating CEP for Cinsa and ENASA. CHP Brief, at 57. CHP claims that Commerce also erred when it failed to include those expenses in "total United States expenses" when calculating

⁸ 15 F.Supp.2d 807, 818.

CEP profit. Id. CHP alleges that Commerce’s failure to include indirect selling expenses and inventory carrying costs incurred in Mexico on U.S. sales in “total U.S. selling expenses” for purposes of calculating CEP profit was not in accordance with law. CHP Reply Brief, at 32. CHP requests that the Panel remand the issue to Commerce to recalculate the dumping margins for Cinsa and ENASA after including indirect selling expenses and inventory carrying costs incurred in Mexico in “total U.S. expenses.” Id. at 33.

Commerce contends that in calculating CEP profit, it properly did not include the Mexican indirect selling expenses that Cinsa incurred on sales to its affiliate in “total United States expenses.” Commerce Response Brief, at 54. Commerce properly focused on the amount of profit associated with the CEP sales made by CIC to its unaffiliated U.S. customers. Id. CEP adjustments are designed to construct the arm’s length equivalent of a sale from the exporter to the U.S. affiliate by backing out expenses and profit associated with the downstream sale by the affiliate to the first unaffiliated customer. Id. Thus, there is no reason to include in this calculation expenses associated with the upstream sale by Cinsa. Id.

Cinsa argues in its Response Brief that in calculating CEP profit, Commerce correctly excluded indirect selling expenses and inventory carrying costs incurred in Mexico on sales to the United States. Cinsa Response Brief, at 33. Furthermore, Cinsa asserts that such calculation is in accordance with Commerce’s practice. Id.

2. Analysis

Section 772(d)(3) of the Act, 19 U.S.C. § 1677a(d)(3), requires the Department to reduce the CEP “starting price” by an amount for “the profit allocated to the expenses described in paragraphs (1) and (2)” of subsection (d). The SAA further instructs the Department, “in determining the constructed export price, to identify and deduct from the starting price in the

U.S. market an amount for profit allocable to selling, distribution and further manufacturing activities in the United States. The profit to be deducted from the starting price . . . is that proportion of the total profit equal to the proportion which the U.S. manufacturing and selling expenses constitute of the total manufacturing and selling expenses.” SAA at 824.

CHP argues that the Department erred by refusing to include the indirect selling expenses that Cinsa incurred in Mexico on its sales to CIC in the pool of “total United States expenses” used for the CEP profit calculation. See CHP Brief at 57-58. As is evident from both CHP’s and the Department’s briefs, the resolution of this issue turns on whether 19 U.S.C. § 1677a(d)(1) required the Department to deduct the expenses from CEP. In the preceding section of this opinion, the Panel affirmed the Department’s refusal to make these deductions. Therefore, the Panel also affirms the Department’s decision not to include the expenses in calculating the CEP profit deduction.

E. Use of Global Ratio in Calculating Yamaka Expenses

The fifth issue that the Panel must address is whether to grant the Department’s request for a remand to utilize the indirect selling expense ratio submitted by Yamaka China (“Yamaka”) in determining Yamaka’s indirect selling expenses. For the reasons that follow, the Panel remands the issue to the Department to determine whether its action was in fact a ministerial error and, if so, to correct the error.

1. Factual Background

CHP argues that Commerce failed to deduct the correct amount of indirect expenses in its calculation of CEP for ENASA and used the incorrect ratio to calculate U.S. indirect selling expenses for ENASA’s CEP sales because it used the indirect selling expense ratio submitted for

Global, instead of Yamaka. CHP Brief, at 58. Accordingly, Commerce’s calculation of indirect selling expenses for CEP sales is unsupported by substantial evidence in the agency record and is otherwise not in accordance with law. Id.

Cinsa argues that Commerce correctly calculated indirect selling expenses deducted from CEP. Cinsa Response Brief, at 34. Cinsa indicates that CHP’s alleged ministerial errors were beyond the scope of the statute provision for correction for “clerical errors in that Commerce’s calculation methodology was consistent with its intended results.” Id. The calculation proposed by CHP, Cinsa claims, results in a gross over-statement of indirect selling expenses and should not be used by Commerce. Id. at 35.

Commerce concedes that it inadvertently utilized an indirect selling expense ratio corresponding to another U.S. affiliate, Global Imports, Inc., in calculating Yamaka’s indirect selling expense ratio. Commerce Response Brief, at 56. Commerce requests a remand to correct the inadvertent substitution of data in the calculation of Yamaka’s indirect selling expenses. Id. In light of its concession, CHP supports Commerce’s request for a remand to correct the inadvertent substitution of Global’s data in the calculation of Yamaka’s indirect selling expenses. CHP Reply Brief, at 33.

2. Analysis

Section 353.28 of the Department’s regulations, 19 C.F.R. § 353.28, addresses the correction of ministerial errors. Pursuant to section 353.28(c), if the Department receives a timely ministerial error allegation, it “will analyze any comments received and, if appropriate, correct any ministerial errors by amending the final antidumping determination or final results of administrative review. . .”.

During the administrative review, GHC filed a timely request for correction of ministerial errors. See CHP Brief at 59 n.7; Cinsa Response Brief at 34. Cinsa then filed a letter responding to GHC's request which argued that GHC's allegation was without merit. See Cinsa Response Brief at 34, citing Prop. Doc. #39. The Department never responded to GHC's letter. CHP Brief at 59 n.7. Moreover, it never responded to Cinsa's letter.

Before this Panel, counsel for the Department has asserted that the Department did in fact make a ministerial error and has requested a remand to implement the change urged by CHP. Department Brief at 56. As noted above, however, the Department itself failed to address the issue during the proceeding. Therefore, the Panel remands the issue to the Department to (1) determine, after addressing both GHC's ministerial error letter and Cinsa's submission opposing GHC's letter, whether it did in fact make a ministerial error; (2) if it did, to correct the error; and (3) in making any correction, to consider comments from the parties on the proper calculation⁹, specifically address those comments in its remand determination, and explain the basis for the correction in detail.

F. Use of Weight-Based Freight Expense Allocation Methodology

The sixth issue that the Panel must address is whether the Department's decision to accept Cinsa and ENASA's allocation methodology for freight expenses was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department's determination.

⁹ See, e.g., Cinsa/ENASA September 17, 1998 Response Brief at footnote 11; CHP October 2, 1998 Reply Brief at pp. 33-35.

1. Factual Background

CHP asserts that Commerce erred in granting Cinsa/ENASA's claim for a freight expense adjustment to normal value. CHP Brief, at 36. CHP argues that Commerce erroneously allowed both companies to make deductions from normal value for freight expenses incurred on home market sales of subject merchandise. Id. The record demonstrates that Cinsa and ENASA failed to establish that their methodology for allocating freight expenses was not distortive of the actual, transaction-specific freight expense for sales of the subject merchandise. Id. at 37. Additionally, the companies failed to demonstrate that their weight-based freight expense allocation methodology accounted for the distance shipped. Id. at 38. Finally, Cinsa/ENASA failed to demonstrate that the inclusion of out-of-scope merchandise in the home market inland freight calculation is non-distortive. Id. at 39. CHP argues that Commerce should have denied Cinsa/ENASA's claim for a home market inland freight adjustment. Id. at 40. CHP concludes, therefore, that Commerce's determination to accept Cinsa's and ENASA's home market freight expenses is unsupported by substantial evidence in the agency record and is otherwise not in accordance with law. CHP Brief, at 40; CHP Reply Brief, at 36.

Commerce contends that its determination to accept Cinsa and ENASA's weight-based allocation of home market freight expense was reasonable, supported by substantial evidence on the record, and is otherwise in accordance with law. Commerce Response Brief, at 56. Commerce explains that the allocation of freight costs on home market sales between Cinsa and ENASA merchandise was reasonable and non-distortive. Id. at 58. Furthermore, Commerce argues that Cinsa's allocation of freight costs on home market sales between subject and non-subject merchandise was reasonable and non-distortive. Id. at 60. Finally, Commerce contends

that the submitted freight cost allocations reasonably reflected the actual shipping distances. Id. at 65.

Cinsa argues that Commerce properly deducted reported freight costs in the calculation of normal value. Cinsa Response Brief, at 21. Commerce has expressly acknowledged that claimed adjustments to normal value including adjustments for movement expenses may be based on reasonable allocation methodologies if the submission of transaction-specific data is not feasible. Id. Commerce's established practice accepts freight expenses calculated based on average freight costs. Id. at 22. Moreover, the inclusion of non-subject merchandise in the freight allocation methodology was not distortive because the freight rate applied to all products was constant. Id. at 24. Commerce therefore claims that its determination was not contrary to law.

2. Analysis

The essence of CHP's challenge on this issue is that Cinsa and ENASA failed to demonstrate that their freight expense allocation methodology was non-distortive. Cinsa used a weight-based allocation methodology to apportion the freight cost. This type of allocation has been long accepted by the United States courts. Brother Industries, Ltd. v. United States, 540 F.Supp. 1341, 1363 (CIT 1982); Daido v. United States, 893 F.Supp. 43, 47 (CIT 1995). Where a company pays freight or packing charges quarterly or monthly, such charges must be allocated to individual sales. See id. Where a charge is spread across sales of more than one unit, it must be allocated to individual sales or a per-unit price that will not reflect the charges. Id.

When a transaction-specific calculation is not possible, a reasonable allocation is permitted. Such an allocation may be "representative" of the costs incurred. See Certain Circular Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping

Duty Administrative Review, 61 Fed. Reg. 1328, 1333 (January 19, 1996); Antifriction Bearing: Final Results of Antidumping Duty Administrative Reviews, 63 Fed. Reg. 33320, 33340 (June 18, 1998). The allocation does not have to correlate to specific merchandise, as CHP suggests, just as long as the allocation represents the costs incurred. Moreover, the preamble to the new regulations states that “the Department will normally accept an allocation method that calculates expenses or price adjustments on the same basis as expenses were incurred or the price adjustments were granted”. 62 Fed Reg. at 27347 (May 19, 1997). Further, Commerce’s regulations expressly provide that Commerce shall not reject an allocation methodology solely because it includes expenses incurred with respect to merchandise not subject to an antidumping duty order. See Section 351.401(g)(4).

Here, the trucking firm charged the same rate for delivery to various destinations of all items on the truck because it operated in a specific area, and differences in freight rates within the “Monterrey Region” are limited because the differences in the distance shipped were minor. See Department Brief at 67. Thus, even if Cinsa’s melamine customers within the Monterrey region are indeed located further from the warehouse than its cookware customers, the cost of freight would remain necessarily the same. Accordingly, the weight-based allocation was not distortive since distance was not measured in determining the cost of the shipping.

In Daido v. United States, 893 F.Supp. 43, 47 n.3 (CIT 1995), the Court affirmed Commerce’s decision to divide the total inland freight expenses incurred during the fiscal year by total weight shipped. Since such weight-based allocations have been well recognized by Commerce and by the U.S. courts, as a means of determining the cost of shipping when no specific transactions can be measured, the weight-based allocation is acceptable and may be

used. Thus, the Panel affirms Commerce's decision to apply the weight-based allocation method in determining the freight cost.

G. Treatment of Freight Expense on Returned Items

The seventh issue that the Panel must address is whether the Department's treatment of freight expenses on returned items was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department's determination.

1. Factual Background

CHP asserts that Commerce erred in its calculation of U.S. inland freight for CEP sales made by ENASA by failing to include both "outbound" freight expenses and "return" freight expenses in the U.S. inland freight adjustment for ENASA. CHP Brief, at 60. The "return" freight expense, CHP asserts, should have been allocated across the total sales made under the contract. Id. at 62. However, CHP argues that in the margin calculation for ENASA, Commerce failed to deduct the full amount of return freight expenses from ENASA's CEP in its final results. Id. As a result, CHP reasons that Commerce's final results understate the amount of "outbound" freight expense incurred with respect to ENASA's U.S. sales. Id. at 60. Finally, CHP indicates the proper methodology to properly calculate all U.S. inland freight expenses associated with the sale and the sale and return of subject merchandise. Id. at 63. CHP maintains that because Commerce's calculation was arithmetically faulty and improperly included the weight of returned merchandise in the allocation base, the calculation understated the per-unit freight expense to be allocated to the sale for which margins were calculated. CHP Reply Brief, at 44-45. Therefore, Commerce's calculation of U.S. freight expenses for Yamaka is not in accordance with law. Id. at 42.

Commerce takes the position that its treatment of freight expenses on returned items was reasonable, supported by substantial evidence on the record, and otherwise in accordance with law. Commerce Response Brief, at 68. Commerce specifically alleges that it reasonably considered sales of ultimately repurchased items as bona fide sales for which it calculated antidumping margins. Id. at 70. In addition, Commerce argues that it properly allocated “outbound” freight costs over all sales made pursuant to the promotion contract. Id. at 73. Finally, Commerce asserts that it properly allocated “return” freight costs over all sales made pursuant to the promotion contract. Id. at 75.

Cinsa argues that Commerce’s calculation of the freight expenses associated with Yamaka sales is supported by substantial evidence. Cinsa Response Brief, at 35. Specifically, Cinsa argues that Commerce’s final determination that the expenses associated with products returned to Yamaka should be treated as selling expenses and allocated to the cost of the return freight across total sales to Yamaka pursuant to the sales contract was a reasonable determination and should be upheld by the Panel. Id. at 37.

2. Analysis

CHP’s first challenge is to the methodology that the Department used in allocating the “outbound” freight expenses that Yamaka incurred in shipping the subject merchandise to its customers. According to CHP, the Department should have reallocated the expenses over the weight of the merchandise that was “actually sold” or, in other words, the merchandise that was not returned. See CHP Brief at 60. The Panel agrees with the Department that CHP’s approach would lead to an overstatement of the outbound freight expenses and that the Department’s methodology was reasonable.

As the Department notes in its brief, see Department Brief at 70-71, the statute instructs Commerce to establish an antidumping margin for “each entry” of merchandise subject to an administrative review. 19 U.S.C. § 1675(a)(2)(A). In the case at bar, the Department determined that all of the sales under the Yamaka promotional contract – whether ultimately returned or not – were properly included within the administrative review. As a result, it calculated antidumping margins for all such sales. CHP did not object to the Department’s action during the administrative review.

Yamaka incurred outbound shipment expenses for all of the sales, and the Department therefore allocated the total shipment expenses over all of the sales. Nothing in CHP’s arguments convinces the Panel that the Department’s approach was unreasonable or not in accordance with law. In particular, CHP’s argument that Commerce should have deducted the repurchased merchandise from its dumping analysis comes too late. See CHP Reply Brief at 43-44.

Similarly, the Panel affirms the Department’s methodology for allocating Yamaka’s “return” freight costs. As the Department notes, 19 U.S.C. § 1677a(c)(2)(A) applies, by its plain terms, to expenses incurred in bringing the subject merchandise “from the original place of shipment . . . to the place of delivery in the United States.” It does not apply to “return” freight costs. Therefore, the Department treated the expenses as direct selling expenses (because they were incurred as a direct consequence of the promotional contract), and deducted them from U.S. price under 19 U.S.C. § 1677a(d)(1)(B). Moreover, because Yamaka’s agreement to repurchase unsold merchandise was a condition of sale for all of the items sold under the contract, the Department allocated the return freight expenses over all sales.

CHP's argument that the Department is "denying" that the merchandise was returned and that expenses incurred in the returns should be deducted from the U.S. price is flatly contradicted by the fact that the Department did, in fact, deduct the expenses from U.S. price. See CHP Reply Brief at 43; 62 Fed. Reg. at 42501-02. For the Department to allocate the expenses only over merchandise that was not repurchased, see CHP Reply Brief at 44-45, would simply overstate the antidumping margin. The Department's methodology was reasonable and otherwise in accordance with law.

H. Treatment of Enamel Frit Cost

The eighth issue that the Panel must address is whether the Department's calculation of the cost of enamel frit used in the manufacture of subject merchandise was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department's determination.

1. Factual Background

CHP contends that Commerce erred in its calculation of Cinsa's cost of enamel frit used in the manufacture of the subject merchandise. CHP Brief, at 41. Cinsa obtained 100 percent of its enamel frit from an affiliated supplier, ESVIMEX, S.A. de C.V. Id. Cinsa claims that the reported transfer prices paid for the enamel frit were a valid basis for determining its cost and Commerce should have adjusted Cinsa's costs upward to account for the difference between the alleged cost savings and the average market prices paid by ESVIMEX's unaffiliated customers. Id. According to CHP, Commerce erred in accepting non-price evidence of the arm's-length nature of ESVIMEX's sales of enamel frit and failed to base Cinsa's cost of frit on frit's market

value. Id. at 44. In the alternative, CHP argues that Commerce failed to adjust Cinsa's cost to reflect the entire difference between Cinsa's transfer prices and market value. Id. at 48.

CHP argues that Commerce's final results increased the relevant costs by only a fraction of the entire difference between the reported costs and market value, thereby failing to adjust the costs in the manner originally intended by Commerce. CHP Reply Brief, at 49. Commerce's determination to adjust and not reject Cinsa's and ENASA's reported frit costs was contrary to the statute and inconsistent with its long-standing practice. Id. at 45. Commerce's decision to adjust Cinsa's reported cost of frit rather than base such costs on the record, as evidence of market prices for identical frit, was contrary to law. Id. In the alternative, if Commerce's determination to adjust Cinsa's reported costs was in accordance with law, CHP argues that a remand is necessary to recalculate the adjustment to Cinsa's reported cost of materials. CHP Reply Brief, at 51.

Cinsa argues that Commerce's adjustment to Cinsa's and ENASA's reported enamel frit costs was not supported by substantial evidence in the administrative record. Cinsa Brief, at 5. Specifically, Cinsa argues that Commerce's analysis of whether ESVIMEX's prices to Cinsa and ENASA were at arm's-length improperly focused on the apparent price differential between sales to affiliated and unaffiliated customers. Id. at 10. Cinsa claims that Commerce failed to take into account prompt payment and volume discounts in determining whether ESVIMEX's prices to Cinsa and ENASA were made at arm's-length. Id. at 14. Cinsa notes, however, that Commerce was correct in its determination to accept any evidence that ESVIMEX's transfer prices reflected market value. Cinsa Response Brief, at 27.

Cinsa and ENASA submit that it was appropriate for Commerce to conform its decision in the ninth administrative review to the finding of the court in the fourth administrative review

and that Commerce's final results are fully consistent with the statute. Id. at 28. Additionally, Cinsa argues that Commerce's methodology is correct and that CHP's proposed methodology would be incorrect. Id. at 29. Finally, Cinsa argues that the Panel is not entitled to reject an agency determination merely because it would have arrived at a different determination had it been reviewing the record for the first time, and as a result, Commerce's determination should stand. Id. at 29-30.

In its Reply Brief, at 3, Cinsa argues that Commerce's adjustment of Cinsa's and ENASA's reported raw material costs for purposes of calculating cost of production and constructed value was not supported by substantial evidence because it failed to take into account various provisions of the joint venture contract which established that affiliated pricing was made at arm's length. Id. Commerce's failure to take the prompt payment discount into account in its pricing analysis was not supported by substantial evidence in the agency record, Cinsa claims. Id. In the alternative, Cinsa argues that if the Panel affirms the methodology of Commerce's arm's-length analysis, the administrative record supports Cinsa's and ENASA's assertion that any price differential not directly attributable to verified cost savings is attributable to a volume discount. Id. at 12. Therefore, Commerce should not be permitted to correct alleged ministerial errors not raised by parties. Id. at 14.

Commerce asserts that its determination to take into account quantified and verified market-based savings, but not a claimed volume discount on enamel frit obtained from an affiliated supplier was reasonable, supported by substantial evidence on the record and otherwise in accordance with law. Commerce Response Brief, at 77. According to Commerce, it reasonably adjusted the frit portion of total materials costs to reflect quantified and verified market-based savings on frit purchased from ESVIMEX. Id. at 80. Commerce asserts that it

reasonably considered evidence other than ESVIMEX's prices to unaffiliated customers in determining to what extent ESVIMEX's transfer prices to affiliated customers reflected the market value. Id. Commerce claims its determination to adjust frit costs to reflect verified market-based savings was supported by substantial evidence on the administrative record. Id. at 84.

In addition, Commerce asserts that it properly declined to treat transfer prices from ESVIMEX as "market prices" when Cinsa and ENASA failed to support their claims that the full difference between the transfer prices and ESVIMEX's prices to unaffiliated parties was market-driven. Commerce Response Brief, at 85. Commerce also claims it properly determined that ESVIMEX's joint venture arrangements did not ensure that transfer prices were arm's length prices. Id. at 86. Commerce claims it reasonably did not presume the general use of prompt payment discounts and volume discounts in making its frit adjustments to material costs. Id. at 88-91. However, Commerce acknowledges that due to a clerical error, the full difference between the reported frit value and the equivalent of a market-based price to ESVIMEX's affiliates was not included in the frit expense adjustments to material costs. Id. at 93.

2. Analysis

The first issue that the Panel must address is CHP's contention that the Department's decision to accept non-price evidence of the arm's-length nature of the frit sales was erroneous. See CHP Brief at 44. Under Section 773(f)(2) of the Act, 19 U.S.C. § 1677b(f)(2):

A transaction directly or indirectly between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. If a transaction is disregarded under the preceding sentence, and no other transactions are available for consideration, the determination of the amount shall be based on the information available as to what

the amount would have been if the transaction had occurred between persons who are not affiliated.

As is clear from the foregoing citation, the statute does not instruct the Department on how to determine the market value of inputs purchased from affiliates. Moreover, the CIT has specifically addressed this issue in the context of an earlier POS Cookware administrative review and concluded that third-party sales information is not the only means of determining whether transfer prices are at arm's length. See Cinsa, S.A. de C.V. v. United States, 966 F. Supp. 1230, 1237 (Apr. 4, 1997). Therefore, the Panel rejects CHP's argument that it was unlawful for Commerce to rely upon non-price evidence in ascertaining the market value of the inputs in question.

Second, the Panel concludes that the Department's decision to adjust the frit costs to reflect the market-based savings associated with ESVIMEX's sales to its affiliates is supported by substantial evidence on the record. The Department explained in the Final Results that it examined respondent's claimed costs during verification and concluded that it would be appropriate to accept all of the cost savings that were supported by documentation. See Final Results, 62 Fed. Reg. at 42506. While CHP alleges that the Department should not have relied on non-price evidence, it has not contested the accuracy of the evidence itself. Given that Commerce verified the accuracy of the information, the Panel affirms the Department's decision to perform the adjustment.

Finally, the Panel rejects the Department's request for a remand to correct an alleged "ministerial error" in the Final Results. Although 19 U.S.C. § 1675(h) authorizes the Department to correct ministerial errors in its final determinations, no party – including the Department – noted this alleged error within the time limits provided in the Department's

regulations. See 19 C.F.R. § 353.28. Accordingly, the Department's determination is final and cannot be disturbed.

I. Treatment of Saltillo Pre-Sale Warehouse Expenses

The final issue that the Panel must address is whether the Department's refusal to deduct from normal value pre-sale warehouse expenses incurred at the Saltillo facility was reasonable and otherwise in accordance with law. For the reasons that follow, the Panel affirms the Department's determination.

1. Factual Background

Cinsa argues that, contrary to law, Commerce failed to deduct pre-sale warehouse expenses incurred at its Saltillo plant from normal value. Cinsa Brief, at 18. Specifically, Cinsa alleges that Commerce's decision to classify Cinsa's and ENASA's reported pre-sale warehouse expenses incurred at the warehouse located adjacent to Cinsa's production facility in Saltillo as direct selling expenses rather than movement expenses was contrary to law. Id. at 21. Cinsa argues that all warehousing expenses attributable to the Saltillo warehouse, whether incurred at a warehouse adjacent to the plant or at a warehouse remote from the place of production, must be included in the statutory deduction for movement expenses. Id. at 25. Therefore, Commerce's failure to deduct pre-sale warehousing expenses incurred at the Saltillo plant from normal value is contrary to law. Cinsa Reply Brief, at 16. Congress intended a contrary treatment to such expenses, and the Panel should not defer to Commerce's unreasonable, unjustifiable, and internally inconsistent interpretation. Id. at 16, 22.

Commerce contends that its determination to treat pre-sale warehouse expenses at the Saltillo facility as indirect selling expenses and not deduct such expenses from normal value was

reasonable, supported by substantial evidence on the administrative record, and otherwise in accordance with law. Commerce Response Brief, at 95. Commerce contends that these expenses were not associated with the movement process. Id. Furthermore, Commerce contends that the statute, its legislative history, and implementing regulations support Commerce's decision not to classify the Saltillo plant warehouse expenses as movement expenses. Id. at 97. Commerce contends that the distinction it created between factory and remote warehousing is not artificial. Id. at 99. Finally, Commerce argues that its practice of treating pre-sale factory warehousing as an indirect expense leads to a fair comparison between U.S. price and normal value. Id.

2. Analysis

According to 19 U.S.C. § 1677b(a)(6)(B)(ii), the Department is required to reduce the normal value by:

the amount, if any, included in the price . . . attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser

According to Cinsa, the statute requires the Department to deduct from normal value "any" movement expenses which Cinsa incurs on its home market sales. Cinsa Brief at 21. Cinsa further argues that it is clear from the SAA that warehousing expenses are properly categorized as movement expenses. Id. at 22. Therefore, according to Cinsa, the intent of Congress is clear, and a remand is necessary for the Department to deduct Cinsa's presale warehousing expenses from normal value. The Department disputes Cinsa's contentions at length.¹⁰

¹⁰ The Department quotes at length from its new regulations and the preamble which accompanies them. As the ninth administrative review was not subject to the new regulations, the Panel has not taken them into consideration in reviewing this issue.

Notwithstanding the length and amount of detail contained in the parties' arguments, the critical question in this issue is a simple one: Is the Department's interpretation of the phrase "original place of shipment" as referring to the plant gate a permissible one? The Panel concludes that it is. As the Department notes in its brief, the purpose of the adjustments to export price and normal value is to permit an ex-factory comparison. See SAA at 827 (explaining that deducting movement charges from export price and normal value "reflects Article 2.4 of the Antidumping Agreement, which requires that prices normally be compared at the ex-factory level"). For this reason, the Department deducts from the normal value, and the export price, all movement charges – including warehousing expenses – which a party incurs once the merchandise is shipped from the factory. In the view of the Panel, the purpose of the statute is achieved whether the Department treats the "original place of shipment" as the end of the production line, the plant gate, or some other intermediate point, provided that the deductions are symmetrical. Nothing in Cinsa's argument has convinced the Panel that Commerce's approach fails to accord with the statute.

Therefore, the Panel affirms the Department's decision to treat the Saltillo warehousing expenses as indirect selling expenses, rather than movement expenses, and not to deduct them from normal value.

V. CONCLUSION AND PANEL ORDER.

For the reason stated above, the Panel hereby takes the following actions:

1. Affirms the decision of the Department of Commerce in all respects, except that, it remands to the Department the use of the global ratio in calculating Yamaka's indirect selling expense to determine whether its calculation was in fact a clerical

- error and, if so, to correct the error and explain the basis for the correction in detail, specifically addressing comments on the proper calculation; and
2. That the Department will return a determination on remand no later than June 4, 1999.

Date of Issuance: April 30, 1999

Signed:

John M. Peterson (Chairman)

Víctor Blanco Fornieles

Eduardo Magallón

Jorge Alberto Silva

D. Michael Kaye