

ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF
OIL COUNTRY TUBULAR GOODS FROM MEXICO
FINAL RESULTS OF SUNSET REVIEW OF ANTIDUMPING DUTY ORDER
FILE NO. USA-MEX-2001-1904-03

FIFTH DECISION OF THE PANEL

June 1, 2007

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The Panel also wishes to recognize the invaluable contribution of Panel Assistant Idalia Mestey Borges

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I. HISTORY

For the fifth time since 2001, and after having issued four Decisions, this Panel has been asked to review the final results of the five-year review (“sunset review”) by the Department of Commerce (“Commerce,” “the Department,” or “the Investigating Authority”) of the antidumping duty order on Oil Country Tubular Goods (“OCTG”) from Mexico. The Investigating Authority determined that “... the revocation of the antidumping order on OCTG from Mexico would be likely to lead to continuation or recurrence of dumping” at the margin of 21.70 percent *ad valorem*. The sunset review, published on March 9, 2000,¹ was the result of an antidumping investigation that was initiated on July 20, 1994.²

The Department initiated its investigation on July 20, 1994, and published its final determination of sales at less than fair value on June 28, 1995.³ Commerce found a weighted-average margin of 23.79 percent *ad valorem*. The 23.79 percent margin was calculated with the use of the “best information available” (“BIA”) based upon the Department’s use of financial statements which TAMSA felt did not accurately reflect its costs. TAMSA challenged Commerce’s use of these figures before a different NAFTA Binational Panel, which sustained the Department’s determination.⁴ However, as a result of the Panel’s remand to the Department on other issues, the dumping margin was reduced from 23.79 percent to 21.70 percent *ad valorem*.

During the first year following the finding of sales at less than fair value, TAMSA did not ship OCTG to the United States. However, thereafter TAMSA did ship OCTG and requested an administrative review for the second period (Aug. 1, 1996 – Jul. 31,

¹ *Oil Country Tubular Goods from Mexico: Final Results of Sunset Review of Antidumping Order*, 66 Fed. Reg. 14131 (Mar. 9, 2001).

² *Initiation of Antidumping Duty Investigations: Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, 59 Fed. Reg. 37962 (Jul. 20, 1994).

³ *Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Mexico*, 60 Fed. Reg. 33567 (Jun. 28, 1995).

⁴ *In the Matter of Oil Country Tubular Goods from Mexico*, USA-95-1904-04 (Jul. 31, 1996).

1997), which resulted in a zero percent dumping margin.⁵ Administrative reviews for the two subsequent years led to the same result for TAMSA: *i.e.*, a zero percent margin.⁶

A. FIVE-YEAR SUNSET REVIEW

The Investigating Authority commenced its five-year automatic sunset review, the determination at issue in this Panel Review, on June 16, 2000.⁷ Following Preliminary Results of the Review on October 30, 2000, it published its Notice of Final Results on March 9, 2001.⁸ Commerce found that the revocation of the antidumping order would be likely to lead to the continuation or recurrence of dumping at the rate of 21.70 percent. The Notice incorporated by reference a Decision Memorandum dated February 26, 2001 from Jeffrey A. May, Director, Office of Policy, Import Administration, to Bernard Carreu, fulfilling the duties of Assistant Secretary for Import Administration, Department of Commerce, which contains the Department's rationale for the Final Results.⁹ This Panel was constituted later that same year.

B. TAMSA'S INITIAL CHALLENGE

In its initial challenge to the Determination, TAMSA asserted that Commerce had relied solely upon the presumption arising from the decrease in export volume observed after the order. It was TAMSA's position that the Department had improperly refused to consider the "other factors" that TAMSA had brought to the Department's attention, which factors outweighed the effect of the presumption. These "other factors," TAMSA asserted, formed the factual basis for the original dumping finding, but were no longer likely events. Specifically, the factors were the simultaneous (1) massive Mexican peso

⁵ *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Administrative Review*, 64 Fed. Reg. 13962 (Mar. 23, 1999).

⁶ *Oil Country Tubular Goods from Mexico: Final Results of Antidumping Administrative Review*, 65 Fed. Reg. 1593 (Jan. 11, 2000) and 66 Fed. Reg. 15832 (Mar. 21, 2001).

⁷ *Notice of Initiation of Five-Year ("Sunset") Reviews*, 65 Fed. Reg. 41053 (Jul. 3, 2000).

⁸ *Oil Country Tubular Goods from Mexico: Final Results of Sunset Review of Antidumping Order*, 66 Fed. Reg. 14131 (Mar. 9, 2001).

⁹ *Issues and Decision Memorandum for the Full Sunset Review of The Antidumping Duty Order on Oil Country Tubular Goods from Mexico: Final Results*, 66 Fed. Reg. 14131 (Mar. 9, 2001).

devaluation and (2) TAMSA's considerable hard-currency (US dollar denominated) debt. According to TAMSA, the due consideration of these factors in the sunset review would overcome the presumption in favor of likelihood of dumping that the Department determined to have resulted from the decrease in TAMSA's post-order exports.

C. 2004 HEARING AND PANEL'S FIRST DECISION

In its First Decision, issued on February 11, 2005, following a 2004 hearing, the Panel rejected the Department's contention that TAMSA had failed to properly bring these factors to the attention of the Department. Not only had TAMSA made reference to the "other factors," but it had indicated why it considered them relevant to the likelihood determination. Furthermore, the Department already had pertinent evidence in the record. The Panel therefore ordered the Department to consider the relevance and effect of the "other factors" to the Department's likelihood determination. It specifically asked the Department to explain its reasoning in the event it determined the "other factors" to be irrelevant.

D. FIRST DEPARTMENT REDETERMINATION

However, in its First Redetermination issued on May 13, 2005, even though the Department appeared to have accepted that TAMSA had shown "good cause" for consideration of the "other factors," it failed to provide a reasoned analysis in support of its interpretation of the role played by the pre- and post-order levels of TAMSA's hard currency debt. It also reconstructed its affirmative likelihood determination by supporting it with another Mexican importer's, Hylsa, S.A. de C.V. ("Hylsa"), dumped sales during the review period.

E. SECOND PANEL DECISION

Therefore, in its Second Decision issued on February 8, 2006, the Panel directed the Department to determine whether the decrease in the magnitude of TAMSA's foreign

currency denominated debt in the sunset review period outweighed the “likelihood” presumption that the Department asserted resulted from the decrease in TAMSA’s post-order export volumes. The Panel specifically asked the Department to explain its reasoning in the event it determined that the lower level of foreign currency denominated debt did not outweigh the “likelihood” presumption. The Panel also rejected the Department’s reconstruction of its Determination. Hylsa is not a party to these proceedings, and the record of the issues raised with respect to dumping by Hylsa is not included in the administrative record for the present case.

F. SECOND DEPARTMENT REDETERMINATION

Commerce responded by issuing a Second Redetermination on March 16, 2006, in which it avoided considering the decrease in TAMSA’s foreign currency denominated debt during the sunset review period by creating and considering a hypothetical financial expense ratio instead of considering the uncontested actual financial expense ratio established in the record.¹⁰

G. THIRD PANEL DECISION

In its third Decision issued on July 28, 2006, the Panel found that use of a hypothetical financial expense ratio constituted an unreasonable methodology. Accordingly, the Panel again directed the Department to reconsider its likelihood determination and explain why TAMSA’s high financial expense ratio is likely to recur in the future, considering the decrease in TAMSA’s foreign currency debt during the sunset review period as evidenced by the actual financial expense ratio established in the record of this proceeding.

¹⁰ The term “financial expense ratio” in the context of this case is an expression of the financial burden resulting from the combination of the peso devaluations and the resultant dollar denominated debt service losses.

H. THIRD DEPARTMENT REDETERMINATION

In its Third Redetermination issued on August 17, 2006, Commerce again evaded conducting a proper analysis and instead unreasonably changed its methodology so as to better suit its conclusion. Commerce failed to measure the effect of the decline in TAMSA's financial expense ratio on its likelihood determination by creating yet another hypothetical financial expense ratio and then asserting that the financial expense ratio was irrelevant to its likelihood determination. The Department supported its Third Redetermination with arguments it did not make in support of its original Determination, and gave no weight to the zero margins which it calculated during the review period, margins which may have predictive value.

I. FOURTH PANEL DECISION

In its fourth Decision issued on January 17, 2007, the Panel denied TAMSA's repeated request that it order the Department to enter a negative likelihood determination, but warned the Department that it would not affirm a Fourth Redetermination that was not supported by the record and continued to rely on evidence previously held to be insufficient by the Panel.

The Panel directed the Department to reconsider its likelihood determination and either issue a determination of no likelihood, or to give a reasoned analysis to support the conclusion that TAMSA's dumping is likely to continue or recur upon revocation of the antidumping duty order. The Department was also directed to explain in detail why the elimination of TAMSA's foreign debt does not outweigh the likelihood presumption derived from the post-order reduction of TAMSA's exports in the event that the Department reissued a likelihood determination. In so doing, the Department was to utilize the actual financial expense ratio established in the record of this proceeding.

Finally, the Panel directed the Department to provide an explanation supported by sunset review law indicating why TAMSA's zero margin calculations have no predictive value.

J. FOURTH DEPARTMENT REDETERMINATION

In its Fourth Redetermination issued on February 6, 2007, the Department once again found that revocation of the Order would likely lead to a continuation or recurrence of dumping. The Department's Fourth Redetermination is discussed in Section III of this fifth Panel Decision.

II. THE RELEVANT LAW

A. THE PANEL'S JURISDICTION AND STANDARD OF REVIEW¹¹

The authority of this Panel flows from NAFTA Chapter 19. Chapter 19 Article 1904.1 provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Article 1904.2 requires that a panel apply the "statutes, legislative history, regulations, administrative practice and judicial precedents" upon which a court of the importing country (in this case, the United States) would rely in reviewing a final determination of the investigating authority. Article 1907 (1) calls for the panel to review expeditiously the final determination to determine whether it conforms with the antidumping or countervailing duty law of the country that made the determination. *See also* 66 Fed. Reg. 22215-02, 2001 WL 458836 (F.R.). The standard of review to be applied by such a court (in this case, the U.S. Court of International Trade ("CIT")) is set forth in §516a(b)(1)(B)(i) of the *Tariff Act of 1930*,¹² as amended, codified at 19 U.S. Code §1516a(b)(1)(B)(i), which requires that the reviewing court "shall hold unlawful any determination, finding, or conclusion, found ... to be unsupported by substantial evidence on the record, or

¹¹ This subsection is largely drawn from all four prior Panel Decisions.

¹² Hereinafter references to provisions of the *Tariff Act of 1930*, as amended, are cited to the codification of the statutory provisions in Title 19 of the United States Code.

otherwise not in accordance with law.” Substantial evidence is relevant evidence that “a reasonable mind might accept as adequate to support a conclusion.” *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Under this standard, the reviewing court (in this case, the Panel) does not engage in *de novo* review, and restricts its review to the administrative record.

In reviewing the interpretation of statutes, the Panel follows the two-stage approach set forth by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). When reviewing an agency’s construction of a statute that the agency administers, the Panel is confronted with two questions:

[First,] ... whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the [Panel], as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the [Panel] determines that Congress has not directly addressed the precise question at issue, the [Panel] does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to a specific issue, the question for the [Panel] is whether the agency’s interpretation is based upon a permissible construction of the statute. [*Chevron, U.S.A., Inc.* at 842-43.]

An agency’s statutory interpretation is to be upheld if it is “sufficiently reasonable” even if it is not “the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding.” *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). The U.S. Court of Appeals for the Federal Circuit has held that Commerce’s statutory interpretations enunciated in an administrative determination are “entitled to deference under *Chevron*.” *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). And the Department’s regulations, adopted pursuant to notice and comment rulemaking are also entitled to a high level of deference. *See Koyo Seiko Co. v. United States*, 258 F.3d 1340,

1347 (Fed. Cir. 2001). Nonetheless, a panel must “assure that the agency has given reasoned consideration to all the material facts and issues” and that the agency has explained how its legal conclusions follow from the facts in the record. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The agency must “examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made.” *Avesta AB v. United States*, 724 F.Supp. 974, 978 (CIT 1989) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)), *aff’d*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 403 U.S. 1308 (1991). In addition, when an agency does need to fill in gaps in a statute, it must act consistently with the underlying purpose of the law it is charged with administering. A reviewing panel must “reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement.” *Hoescht Aktiengesellschaft v. Quigg*, 917 F.2d 522 (Fed. Cir. 1990) (quoting *Ethicon Inc. v. Quigg*, 849 U.S. 1422, 1425 (Fed. Cir. 1988) and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)). Finally, the reviewing court has the power to define the parameters as to what an administrative agency is to consider in a particular remand. See *Chung Ling Co., Ltd. v. United States*, 829 F. Supp. 1353, 1358 (Ct. Int’l. Trade 1993). The agency has “no power or authority” to deviate from a court’s remand order. See *in re Wella A.G.*, 858 F.2d 725, 728 (Fed. Cir. 1988) citing *Briggs v. Pennsylvania R.R.*, 334 U.S. 304, 306 (1948); *Federal Power Comm’n v. Pacific Co.*, 307 U.S. 156, 160 (1939)).

The Federal Circuit and the CIT have begun to delineate the limits of the authority granted by 19 U.S.C. § 1516a(b)(1)(B) to reviewing courts to order the Investigating Authority to issue negative determinations. After declaring that “[u]nder [19 U.S.C. § 1516a(b)(1)(B)], the Court of International Trade must reverse any determination, finding or conclusion found to be ‘unsupported by substantial evidence on the record,’” the Federal Circuit stated that “[i]t may well be that the trade court may be faced with a ... determination that is unsupported by substantial evidence, and for which a remand would be ‘futile.’” *Zenith Elec. Corp. v. United States*, 99 F.3d 1576, 1580

(Fed.Cir. 1996), quoting *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1349 (Aug. 10, 2006).

In *Nippon Steel Corp.*, the Federal Circuit decided that the agency's record contained substantial evidence to support the International Trade Commission's injury determination even though the CIT had previously ordered a negative material injury determination. *Id.* The Federal Circuit stated that "[s]o long as there is adequate basis in support of the Commission's choice of evidentiary weight, the Court of International Trade, and this court, reviewing under the substantial evidence standard, must defer to the Commission." *Id.* But at the same time the Court made clear that in cases where there is not substantial evidence in the record to support an agency determination, remanding would be a futile attempt to get the agency to issue a negative determination. *Id.*

The CIT has further found that in cases where the result would generally be the same whether the Court orders Commerce to produce a determination consistent with the opinion or directs Commerce to issue a negative determination, "granting a request to remand the case and order Commerce to take action consistent with the Court's opinion would [be] 'an idle and useless formality.'" *NTN Bearing Corp. of Am. v. United States*, 132 F.Supp.2d 1102, 1105 (CIT 2001), citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 89 (1969). In *NTN Bearing Corp. of Am.*, Commerce undertook a duty-absorption inquiry for which it had no statutory authority. *NTN Bearing Corp. of Am.* at 1105. Upon remand the CIT ruled:

[T]he only action that Commerce could [have taken] in order to remain within the bounds of the Court's interpretation of the law would [have been] to annul the findings and conclusions made pursuant to Commerce's erroneous interpretation of the law... [T]he result would have generally been the same whether the Court ordered Commerce to annul its findings or, more generally, ordered Commerce to produce a determination consistent with the opinion. Since the Court had already declared Commerce's interpretation of the law as improper, and there was no additional fact-finding to be done nor any discretionary action to be taken by

Commerce, granting a request to remand the case and order Commerce to take action consistent with the Court's opinion [would be] 'an idle and useless formality' by the Court. [*Id.*, citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 89 (1969).]

Although not a direct precedent for the present proceeding, a NAFTA Chapter 19 Extraordinary Challenge Committee has upheld the NAFTA Binational Panel decision named *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, No. USA-CDA-2002-1904-07 (Aug. 31, 2004) (hereinafter "*Softwood Lumber Injury*"), which directed the International Trade Commission ("ITC") to issue a negative threat of injury determination. See *In the Matter of Certain Softwood Lumber Products from Canada: Opinion and Order of the Extraordinary Challenge Committee*, ECC-2004-1904-01 USA (Aug. 10, 2005).¹³

In *Softwood Lumber Injury*, the NAFTA Panel realized it would be futile to remand the ITC's affirmative threat of injury determination to the ITC for a third time because (1) the record could not support an affirmative threat determination, and (2) the ITC had demonstrated an unwillingness to respect the panel's Chapter 19 review authority by issuing affirmative remand determinations that continued to rely on evidence that the panel had already held to be insufficient. *Softwood Lumber Injury* at 3-4. The Panel found that remanding the case once more would have been an "idle and useless formality." *Id.* at 4, citing *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 89 (1969). The Extraordinary Challenge Committee, ECC-2004-1904-01 USA, ¶¶ 122-23 (2005), explained its decision as follows:

[A NAFTA] panel's power is similar to that of the CIT, which like other courts performing judicial review functions is normally limited to remanding an administrative agency's decision for reconsideration in a manner not inconsistent

¹³ See also the Binational Panel Decision: *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination* ("*Softwood Lumber Injury*"), No. USA-CDA-2002-1904-07 (Aug. 31, 2004).

with the court’s decision, and does not authorize the court to, in effect, reverse the agency’s decision. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

However, it is also clear that a court need not remand when to do so “would be an idle and useless formality,” and that “*Chenery* does not require that we convert judicial review of an agency action into a ping-pong game.” *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 n. 6 (1969), *per* Brennan J. Hence, it is common ground that, “in rare circumstances,” a court may direct the agency under review to enter a particular decision. *Florida Power and Light Co. v. United States Regulatory Comm’n*, 470 U.S. 729, 744 (1985). None of the cases cited to us excludes from the category of “rare circumstances” situations in which the reviewing court has remanded for lack of substantial evidence.

B. TITLE 19, U.S. CODE, STATEMENT OF ADMINISTRATIVE ACTION, AND DEPARTMENT OF COMMERCE’S SUNSET POLICY BULLETIN¹⁴

1. TITLE 19, U.S. CODE

The Department’s sunset review was undertaken pursuant to Title 19 U.S. Code §1675(c), entitled “Five-year review.” The statute provides, in relevant part, that five years after the publication of an antidumping order,

(1) In general

... the administering authority [Commerce] ... shall conduct a review to determine, in accordance with [§1675a of this title], whether revocation of the ... antidumping duty order ... would be likely to lead to continuation or a recurrence of dumping....

¹⁴ This subsection is drawn from all four prior Panel Decisions.

Further, Title 19 U.S. Code §1675(d)(2) provides in pertinent part:

In the case of a review conducted under subsection (c) of this section, the administering authority [Commerce] shall revoke ... an antidumping duty order or finding ... unless --

(A) the administering authority makes a determination that dumping ... would be likely to continue or recur

Title 19 U.S. Code §1675a(c), entitled “Determination of likelihood of continuation or recurrence of dumping,” provides in relevant part:

(1) In general

In a review conducted under section 1675(c) of this title, the administering authority [Commerce] shall determine whether revocation of an antidumping order ... would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider --

(A) the weighted average dumping margins determined in the investigation and subsequent reviews, and

(B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping order...

(2) Consideration of other factors

If good cause is shown, the administering authority [Commerce] shall also consider such other price, cost, market, or economic factors as it deems relevant.

(4) Special rule

(A) Treatment of zero or de minimis margins

A dumping margin described in paragraph (1)(A) that is zero or de minimis shall not by itself require the administering authority to determine that revocation of an antidumping duty order ... would not be likely to lead to continuance or recurrence of sales at less than fair value.

2. STATEMENT OF ADMINISTRATIVE ACTION

In addition to the provisions of Title 19, the Statement of Administrative Action (“SAA”) gives Commerce specific guidance on how it should interpret the factors which, under the statute, it must consider in conducting a sunset review. According to the Uruguay Round Agreements Act (“URAA”), which adopted amendments to the then existing U.S. trade legislation and specifically “approved” the SAA, the provisions of the SAA are authoritative interpretations of the statute. URAA §102(d), 19 U.S. Code §3512(d), provides that the SAA “shall be regarded as an authoritative expression by the United States concerning the interpretation and application of [both] the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.” Accordingly, the Department must interpret and apply the relevant provisions of the statute in light of the authoritative interpretations expressed in the SAA. Relevant to sunset reviews, SAA, H.R. Doc. No. 103-316, vol. 1, at 879 (1994), states that sunset review determinations will be made by the Department of Commerce on an order-wide, rather than a company-specific, basis.

The SAA, H.R. Doc. No. 103-316, vol. 1, at 899 (1994), adds:

[D]eclining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong

indication that, absent an order, dumping would be likely to continue, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes.

Further, the SAA continues:

The Administration believes that the existence of dumping margins after the order or the cessation of imports after the order, is highly probative of the likelihood of continuation or recurrence of dumping. If companies continue to dump with the discipline of an order in place, it is reasonable to assume that dumping would continue if the discipline were removed. If imports cease after the order is issued, it is reasonable to assume that the exporters could not sell in the US without dumping and that, to reenter the U.S. market, they would have to resume dumping.

New section 752(c)(2) [19 U.S. Code § 1675a(c)(2)] provides that, for good cause shown, Commerce also will consider other information regarding price, cost, market or economic factors it deems relevant. Such factors might include the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates ...; [and] any history of sales below cost of production [*inter alia*]. In practice this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping. The list of factors is illustrative, and the Administration intends that Commerce will analyze such information on a case-by-case basis.

Under new section 752(c)(4) [19 U.S. Code § 1675a(c)(4)], the existence of zero or *de minimis* dumping margins at any time while the dumping order was in effect shall not in itself require Commerce to determine that there is no likelihood of continuation or recurrence of dumping. Exporters may have ceased dumping because of the existence of an order ... Therefore, the present absence of dumping

is not necessarily indicative of how exporters would behave in the absence of the order ... [SAA, H.R. Doc. No. 103-316, vol. 1, at 890 (1994).]

As applied to sunset reviews, the Supreme Court's *Chevron* decision dictates that to the extent that the combination of the statute and the SAA provide the "unambiguously expressed intent of Congress," "that is the end of the matter."¹⁵ Both the Department and the Panel must give effect to the intent of Congress.¹⁶ Where there is ambiguity, the Panel must ensure that the Department's actions are consistent with the underlying purposes of the law.¹⁷

3. THE DEPARTMENT'S SUNSET POLICY BULLETIN

In 1998 Commerce issued a "Policy Bulletin," in which Commerce proposed "Policies Regarding the Conduct of Five-year ('Sunset') Reviews" of antidumping and countervailing duty orders.¹⁸ The Department's Sunset Policy Bulletin quotes the statutory standards from 19 U.S. Code § 1675a(c) and the provisions of the SAA quoted above. The Bulletin adds, in pertinent part:

[T]he Department normally will determine that revocation of an antidumping order ... is likely to lead to continuation or recurrence of dumping where –

- (a) dumping continued at any level above de minimis after the issuance of the order...;
- (b) imports of the subject merchandise ceased after issuance of the order...; or

¹⁵ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ DOC International Trade Administration, "Policies Regarding the Conduct of Five-year ('Sunset') Reviews of Antidumping and Countervailing Duty Orders," 63 Fed. Reg. 18871-77 (Apr. 16, 1998). (hereinafter "Sunset Policy Bulletin")

(c) dumping was eliminated after the issuance of the order..., and import volumes for the subject merchandise declined significantly.¹⁹

With respect to relevant “other factors” that the Department must also consider “if the Department determines that good cause is shown,” the Sunset Policy Bulletin states:

[T]he Department will consider other factors in AD sunset reviews if the Department determines that good cause to consider such other factors exists. The burden is on an interested party to provide information or evidence that would warrant consideration of the other factors in question.²⁰

The Sunset Policy Bulletin published in 1998 in the Federal Register “for comment” remains in effect today.²¹ According to the Department, “[t]he proposed policies are intended to complement the applicable statutory and regulatory provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.” Thus, the policies stated in the Bulletin are applied by the Department in its decision-making process, but the Bulletin does not have the formal status of a Department regulation.

III. THE PANEL’S ANALYSIS OF TAMSA’S CHALLENGE TO THE DEPARTMENT’S FOURTH REDETERMINATION

In reconsidering its likelihood determination for the fourth time, the Department’s conclusion was:

“[T]he Department continues to find that revocation of the Order would likely lead to a continuation or recurrence of dumping. In so doing, and in

¹⁹ *Id.* at 18872.

²⁰ *Id.* at 18874.

²¹ At the Panel Hearing in 2004, counsel for the Department affirmed that the Department had made no response to any comments received and had not altered the text of its Sunset Policy Bulletin. Hearing Transcript at 122.

accordance with the Panel's instructions, the Department has provided a reasoned analysis to support its conclusion. Specifically, the Department explains why the elimination of TAMSA's foreign debt does not outweigh the likelihood presumption derived from the post-order reduction of TAMSA's exports, has utilized the actual financial expense ratio in its analysis, and has provided an explanation supported by sunset review law indicating why TAMSA's zero margin calculations have no predictive value²².²³

TAMSA agrees with the description of the facts and evidence put forth by the Department, but states that such a record does not support a finding that dumping is likely to continue or recur. TAMSA asserts that there is no rational connection between the facts and evidence and the Department's Redetermination, and that the Department is viewing the presumption created by the decrease in volume as conclusive.

A. TAMSA'S ACTUAL FINANCIAL EXPENSE RATIO

With regard to TAMSA's financial expense ratio ("FER"), the Department decided to follow Panel instructions and used the actual FER on the record.

TAMSA expressed agreement with the Department's choice.

B. PROBATIVE VALUE OF ZERO MARGINS

The Department also undertook to provide a reasoned analysis flowing from a reasonable interpretation of the law which is supported by substantial evidence on the record to substantiate its determination to ascribe no or minimal probative value to the zero margins obtained by TAMSA throughout the review period. The Department's analysis rested on the low level of shipments made by TAMSA to the United States

²² Throughout the rest of its Fourth Redetermination on Remand, the Department states that TAMSA's zero margins have "only minimal probative value."

²³ Fourth Redetermination on Remand, *In the Matter of Oil Country Tubular Goods from Mexico: Final Results of Sunset Review of Antidumping Duty Order*, at 1 (Feb. 6, 2007). (hereinafter "Fourth Redetermination")

during the review period. The Department interpreted 19 U.S.C. § 1675a(c)(4)(A) as indicating that zero margins “should be examined before any probative value is assigned to [them] that would indicate dumping would not be likely to continue or recur.”²⁴ In this respect, the Panel finds that the Department’s interpretation is reasonable.

The Department then linked § 1675a(c)(4)(A) to 19 U.S.C. § 1675a(c)(1)(B), the SAA at 889-90, Section II.A.3.(c) of the Department’s Sunset Policy Bulletin, 19 C.F.R. § 351.222(d)(1) and 19 C.F.R. § 351.222(e)(1)(ii). In so doing, it asserted that “the [low] level of TAMSA’s exports constitutes cessation for purposes of the sunset determination.”²⁵ In this manner, the Department equated its characterization of TAMSA’s import volume decrease, *i.e.*, “virtual cessation,” with the SAA’s reference to “cessation” of imports which, according to the Department, fits the facts of the case squarely within the statute. The Department’s analysis also provided the Panel with the rationale behind the framework used for revocation investigations in which the Department measures the probative value of zero margins. This rationale is rooted in what the Department views as “commercial quantities,” or meaningful commercial participation in the U.S. market. In this respect, the Department’s methodology involves a comparison of pre- and post-order volumes. As explained by the Department, if there is a drop in export volumes and the magnitude of this drop is high, then the Department can reasonably conclude that the importer is engaging in strategic behavior. Ignoring strategic behavior would undermine the legitimacy of the presumption in favor of revocation.

The Department cited its past decisions²⁶ to indicate that it had previously determined that a drop in magnitude close to TAMSA’s 94 percent drop in post-order volumes does not constitute meaningful participation in the U.S. market. It wrapped up its analysis by asserting that TAMSA’s drop in post-order sales severely undermines the significance of the sales and thus robs the zero margins of any probative value. Once it determined that the zero margins were not obtained through meaningful participation in

²⁴ Fourth Redetermination at 6.

²⁵ Fourth Redetermination at 7.

²⁶ See Department Determinations cited in its Fourth Redetermination at 8-9.

the U.S. market, the Department decided that the zero margins possess no or minimal probative value.

TAMSA claims that the Department's decision to assign zero probative value to the zero dumping margins is contrary to law and unsupported by evidence on the record, and is a failed, inadequate response to the Panel's directions. TAMSA narrates how the zero margins were the result of thorough and contested administrative reviews. It states that administrative review results are relevant and must be treated as such. And it indicates that it sold above cost during the review period. It admits that the Department is being more careful in how it explains its findings in its Fourth Redetermination, but asserts that the Department is not changing the position previously rejected by the Panel.

Although the Panel remains skeptical of the Department's claim that its interpretation of the SAA's reference to "cessation" is sufficiently reasonable as applied to this case,²⁷ the Panel finds the balance of the Department's analysis and conclusions reasonable, thorough, and supported by law and by substantial evidence on the record. The Panel thus deems the Department's determination to assign no or minimal probative value to the zero dumping margins obtained by TAMSA during the review period both reasonable and supported by law and substantial evidence on the record.

C. TAMSA'S FOREIGN DEBT AND THE LIKELIHOOD OF RECURRENCE OF DUMPING

In its Fourth Redetermination, the Department again:

“finds that the elimination of TAMSA's foreign debt does not outweigh the likelihood presumption derived from the post-order reduction of TAMSA's exports. When a company or industry alleges ‘other factors’ in a sunset review, a post-order analysis of shipments generally should indicate the absence of dumping at volumes similar to those that occurred

²⁷ See Fourth Redetermination at 7.

prior to the imposition of the order. Such shipments would support the contention that ‘other factors’ outweigh any presumption of the likelihood of the continuation or recurrence of dumping. Consequently, once TAMSA’s foreign currency debt was eliminated completely, and the cash deposit rate reduced, indeed eliminated, the Department would expect to see shipments of Mexican OCTG to the United States that are not dumped and are, at a minimum, in volumes representing commercially meaningful participation in the U.S. market. Nonetheless, TAMSA’s exports to the United States did not increase to a commercially meaningful level. Accordingly, the elimination of TAMSA’s foreign debt does not outweigh the likelihood presumption because the reduction in the debt along with zero cash deposit rates did not cause TAMSA to participate in the U.S. OCTG market.”²⁸

The Department then discounts TAMSA’s argument throughout this proceeding by asserting that, had the argument been true, TAMSA would have shipped at pre-order volume levels after the imposition of the order. Commerce adds that the intent of Congress, as evidenced by the statute and the SAA, is for Commerce to look take pre- and post-order volumes into consideration when looking at the dumping margins throughout the review period. Since the ‘other factors’ raised by TAMSA were no longer seen during the review period, those ‘other factors’ should not have affected TAMSA’s shipment levels. The Department again brings Hylsa into the picture to show that Hylsa’s post-order shipment volumes were commercially meaningful. The Department ends by stating that TAMSA’s shipments should have been commercially meaningful during the period when the dumping margins were reduced to zero in order for the Department to have considered revoking the order.

²⁸ Fourth Redetermination at 12. (emphasis in the original)

TAMSA characterizes the Department's argument as "circular" in nature, and argues that the Department's treatment of volume as determinative is contrary to law and unsupported by substantial evidence on the record.²⁹

TAMSA begins by quoting the Department's argument that:

[w]hen a company or industry alleges 'other factors' in a sunset review, a post-order analysis of shipments generally should indicate the absence of dumping at volumes similar to those that occurred prior to the imposition of the order...³⁰

TAMSA asserts that this argument "finds no support in U.S. law, and it is not even logical once the concession is made that the company does not dump under normal, non-aberrational conditions."³¹ TAMSA then goes on to list the arguments repeated by the Department in support of its likelihood determination although they had already been rejected by the Panel in prior remands. TAMSA reiterates why the "other factors" rebut the presumption in favor of likelihood. It explains that the order was put into existence by aberrational characteristics which did not recur during the review period and are not likely to recur in the future, namely, the high financial expense ratio which led to an artificial dumping margin. It concludes by stating that once it has been determined that the circumstances leading to the original dumping finding were aberrational, temporary in nature, and unlikely to recur, "there is no basis to decide that dumping is 'likely' to recur just because the volume decreased."³² Therefore, TAMSA argues that the Department must revoke the order.

²⁹ TAMSA's Rule 73(2) Challenge to the Department of Commerce's Fourth Remand Determination, *In the Matter of Oil Country Tubular Goods from Mexico: Final Results of Sunset Review of Antidumping Duty Order*, at 9 (Mar. 5, 2007) (hereinafter "TAMSA's Challenge").

³⁰ *Id.* at 10, *citing* Fourth Redetermination at 12.

³¹ TAMSA's Challenge at 16.

³² *Id.*

Careful review of the analysis presented by the Department for its determination that the “other factors” raised by TAMSA do not rebut the presumption in favor of a likelihood of recurrence or continuation of dumping, and thorough assessment of the legal bases provided by the Department for its analysis together with careful consideration of the factual evidence on record lead the Panel to conclude that the Department has, for the fifth time, rendered a determination unsupported by substantial evidence on the record and not in accordance with the applicable law.

The Department has not presented relevant evidence that a reasonable mind might accept as adequate to support its conclusion. Neither has it provided the Panel with reasoned consideration of all the material facts and issues or explained how its legal conclusions reasonably follow from the facts in the record. Congress has directly spoken to the precise question at issue. It has directed Commerce to consider the weighted average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping order. It has also directed Commerce to consider such other price, cost, market, or economic factors as it deems relevant if good cause is shown. It has already been settled that TAMSA has shown good cause for the consideration of the aberrational nature of its financial expense ratio. The statute does not suggest that the Investigating Authority is to ignore consideration of “other factors” because volumes are low. Congress intended for Commerce to consider both volumes and “other factors” when entering its likelihood determination. That is the end of the matter. Commerce must give effect to the unambiguously expressed intent of Congress.

Commerce may not neglect to consider the “other factors” raised by TAMSA because the volumes decreased. Commerce neither examined the relevant data nor articulated a satisfactory explanation for its determination. It did not establish a rational connection between the facts found and the choices made. This Panel must therefore reject Commerce’s administrative constructions because they are inconsistent with the statutory mandate and frustrate the policy Congress sought to implement.

D. THIS IS AN ABNORMAL CASE

The Department's disregard of the Congressional intent that it consider the "other factors" raised by TAMSA is further amplified by its unreasonable application of its Sunset Policy Bulletin to this case. As previously mentioned, the dumping margin calculated for TAMSA during the investigation was the result of an aberrational financial expense ratio which did not repeat itself throughout the review period. This case is not like the usual or normal case in which the Department considers whether an actual dumping margin calculation based on non-aberrational factors is likely to recur. Normal cases fit squarely within the statutory scheme; TAMSA's case does not. TAMSA's case is abnormal. Thus, the Department's application of its Sunset Policy Bulletin as an extension of the SAA is an unreasonable interpretation of the law.

The SAA states that a "cessation of imports after the order... is highly probative of the likelihood of continuation or recurrence of dumping." SAA, H.R. Doc. No. 316, 103rd Congress, 2d Session, Vol. 1 (1994) at 890. The Department's liberal interpretation of "cessation" is found in its SPB, a statement of Department practice which has yet to be finalized, but which the Department treats in this case as an authoritative interpretation of the statute and the SAA.

According to the Department, TAMSA's case fits squarely within the SPB's third scenario. Scenario (c) states that the Department will "normally" determine that revocation of an antidumping order is likely to lead to a continuation or recurrence of dumping where "dumping was eliminated after the issuance of the order... and import volumes for the subject merchandise declined significantly."³³

As already mentioned, the SPB has yet to be finalized. Nevertheless, even if the Panel accepts the SPB as the Department's interpretation of the statute, the standard of

³³ Sunset Policy Bulletin, 63 Fed. Reg. at 18872.

review to be observed by this Panel when reviewing the Department's interpretation is one of sufficient reasonableness.

Scenario (c) of the SPB is, in the Department's own words, applicable to "normal" cases. But this is not a "normal" case. The Department's Fourth Redetermination analysis is based on the presumption that "TAMSA's financial expense ratio during the investigation is aberrational, temporary in nature, and unlikely to recur."³⁴ In fact, it did not recur during the review period because the other factors present during the investigation that led to an aberrational financial expense ratio did not recur during the review period. Thus, in the present case, the absence of dumping observed after the imposition of the order does not have the same significance as the absence of dumping observed after the imposition of an order which results from normal circumstances, *i.e.*, circumstances in which the calculation of a dumping margin is due to non-aberrational, recurrent, or constant factors. In such a case, the accompanying decrease in import volumes can reasonably be interpreted to mean that the exporter cannot enter the U.S. market in commercial quantities without dumping. Since TAMSA's dumping margin was determined based on aberrational factors, TAMSA's case is not normal and the same cannot be reasonably said of TAMSA's accompanying decrease in import volumes. Therefore, the application of the SPB scenario to TAMSA's case is unreasonable and the Department's conclusion that TAMSA ceased to import is not supported by law.

IV. THE PANEL'S DECISION

In our Fourth Decision, this Panel denied TAMSA's request that the Panel order the Department to enter a negative likelihood determination. At that stage in this proceeding, the Panel was not prepared to find that a remand "would be an idle and useless formality." Thus, at that juncture, we were not willing to direct the Department to enter a negative likelihood determination. But we indicated to Commerce that we would

³⁴ Fourth Redetermination at 5.

not affirm the Department's Fourth Redetermination if the Department continued to be disrespectful of the Panel's review authority under Chapter 19 of the NAFTA by issuing affirmative remand determinations which cannot be supported by the record and that continued to rely on evidence that the Panel had already held to be insufficient.

Commerce has issued such a remand determination.

This Panel was constituted in 2001 to review expeditiously Commerce's sunset review determination to determine whether it conforms with the antidumping duty law of the United States. As is true of all NAFTA Binational Panel proceedings, the Treaty requires Panel review to be "expeditious." Almost six years have elapsed since the initiation of this sunset review. During this period, Commerce has issued five determinations, each of which was not supported by substantial evidence on the record and therefore was not in accordance with the antidumping law of the United States. Commerce has also been disrespectful of the Panel's review authority under Chapter 19 of the NAFTA by issuing a fourth affirmative remand determination which cannot be supported by the record and continues to rely on evidence that the Panel had previously held to be insufficient.

At this juncture, Commerce has proven to the Panel that remanding once again to reconsider would be a futile attempt to get the Department to issue a determination supported by the evidence on the record and in accordance with United States antidumping law. Its repeated attempts at evading an analysis substantiated by the facts of the case and United States law, together with the evidence on the record, lead the Panel to assume that Commerce cannot issue a reasonable affirmative likelihood of recurrence or continuation of dumping determination. Thus, granting a request to remand the case and order Commerce to take action consistent with the Panel's opinion would be an idle and useless formality which would further undermine the Panel's mandate to review Commerce's determination in an expeditious manner.

THEREFORE, IT IS HEREBY ORDERED THAT

This case be remanded to the Department for the Department to make a determination consistent with the decision of this Panel to the effect that the evidence on the record does not support a finding of likelihood of recurrence or continuation of dumping upon revocation of the antidumping duty order, and to make that determination within ten (10) days from the date of this Fifth Panel Decision.

ISSUED ON June 1, 2007

SIGNED IN THE ORIGINAL BY:

Daniel A. Pinkus, Chair

Daniel A. Pinkus, Chair

Hernán García Corral

Hernán García Corral

Jorge Miranda

Jorge Miranda

Daniel G. Partan

Daniel G. Partan

Ruperto Patiño Manffer

Ruperto Patiño Manffer