

**ARTICLE 1904 BINATIONAL PANEL REVIEW  
PURSUANT TO THE  
NORTH AMERICAN FREE TRADE AGREEMENT**

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<b>IN THE MATTER OF:</b>	:	
<b>CARBON AND CERTAIN ALLOY STEEL :</b>	:	
<b>WIRE ROD FROM CANADA</b>	:	<b>SECRETARIAT FILE NO:</b>
	:	<b>USA-CDA-2006-1904-04</b>
<b>2<sup>ND</sup> ADMINISTRATIVE REVIEW</b>	:	

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**DECISION OF THE PANEL  
November 28, 2007**

**PANEL MEMBERS:<sup>1</sup>**

Joseph I. Liebman, Chair  
Brian J. Barr  
Ron W. Erdmann  
Charles L. Levin  
Donald W. Morgan

**APPEARANCES:**

**On behalf of the Investigating Authority**

Carrie Owens, Esq., Office of the Chief Counsel for Import Administration, U.S.  
Department of Commerce

**On behalf of Mittal Canada Inc. (formerly Ispat Sidbec Inc.)**

Dennis James, Esq., Cameron & Hornbostel, LLP

**On behalf of Gerdau Ameristeel U.S., Inc., and Keystone Consolidated Industries, Inc.**

Mary Staley, Esq., Kelley Drye Collier Shannon

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<sup>1</sup> The Panelists wish to express their appreciation for the support received from Panel Assistant Yasir A. Naqvi.

## **PANEL DETERMINATION**

### **NAFTA CHAPTER 19 CARBON AND CERTAIN ALLOY STEEL WIRE ROD FROM CANADA USA-CDA-2006-1904-04**

#### **I. PROCEDURAL HISTORY**

This Panel was constituted under Article 1904(2) of the North American Free Trade Agreement (“NAFTA”)<sup>2</sup> and Section 516(A) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(a)(g) (“Tariff Act”)) following a Request for Panel Review issued by Mittal Canada Inc. (“Mittal”) in respect of a Final Administrative Review pertaining to Carbon and Certain Alloy Steel Wire Rod from Canada issued by the Administrating Authority, the United States Department of Commerce (“Commerce”) on January 24, 2006.

The Administrative Review was initiated by Commerce on November 19, 2004, 69 Fed. Reg. 67701 (Nov. 19, 2004), pursuant to a request filed by Mittal on October 29, 2004. The request asked for a review of the 12 month period between October 1, 2003, and September 30, 2004.

The Original Antidumping Order relating to Carbon and Certain Alloy Steel Wire Rod from Canada had been issued by Commerce on October 29, 2002, 67 Fed. Reg. 65944 (Oct. 29, 2002). The order had assigned a specific antidumping duty rate to Mittal, the complainant in this case.

Claiming that its raw material costs had increased suddenly and substantially after December 2003, Mittal in its initial questionnaire response to Commerce sought to bifurcate the

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<sup>2</sup> North American Free Trade Agreement, Dec. 17, 1992, United States-Canada-Mexico, Chapter 19, 32 I.L.M. 289 (entered into force Jan. 1, 1994).

period of review around December 31, 2003. Accordingly, Mittal divided its response into two periods: namely, October 1, 2003, to December 31, 2003, and January 1, 2004, to September 30, 2004.

Commerce issued a supplementary questionnaire to Mittal on May 10, 2005, seeking data for the period of review as a whole. Mittal supplied the data as requested but continued to assert the propriety of its claim to bifurcate the period of review.

Commerce published the Preliminary Results of the Review on July 20, 2005.

Mittal and Petitioners submitted case briefs to Commerce on August 29, 2005. Mittal's brief alleged that Commerce had made several errors in the Preliminary Review Results. In particular, Mittal complained that Commerce had inappropriately: (i) zeroed the margins of dump for various export sales, (ii) refused to bifurcate the period of review, (iii) determined the Constructed Export Price (a) inclusive of certain shipping costs and (b) inclusive of profits on EP sales and (c) exclusive of profits on domestic related party sales, and (iv) used negative net U.S. prices in the calculation of the applicable margins of dumping. These are the same errors complained of by Mittal in the current proceedings.

All parties filed rebuttal briefs on September 9, 2005.<sup>3</sup>

Commerce issued its Final Results on January 24, 2006, 71 Fed Reg. 3822 (Jan. 24, 2006), reaffirming its original position in all matters to which Mittal had objected.

Mittal filed a Request for Panel Review on January 30, 2006. Its Complaint was duly filed on February 24, 2006.

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<sup>3</sup> Two Petitioner companies, Gerdau Ameristeel USA, Inc., and Keystone Consolidated Industries, Inc, participated throughout these proceedings.

Commerce served and filed copies of the administrative record on April 28, 2006. The parties exchanged public and proprietary briefs, although by consent (and subsequently ratified by Panel Orders issued March 16, 2007) this process was not finally completed until November 3, 2006.

This Panel was constituted on January 17, 2007. Public Hearings were held in Washington, D.C., on May 24, 2007. Following our initial deliberations, the Panel invited the participants to comment on several additional questions. These were distributed to the participants on July 18, 2007, and directed that all participants' initial responses were to be filed on or before July 31, 2007, with reply comments on or before August 7, 2007. On consent motion both deadlines were extended by 14 days to August 14, 2007, and August 21, 2007, respectively.

By order dated August 20, 2007, the Panel extended the time to issue its decision in this matter until October 22, 2007. By order dated October 19, 2007, the Panel further extended the time to issue its decision in this matter until November 30, 2007.

## **II. PANEL JURISDICTION AND THE STANDARD OF REVIEW**

This Panel's authority derives from Chapter 19 of NAFTA. In undertaking our review of the decision under consideration here, we are informed by Article 1904.1 of the NAFTA that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Here we are reviewing the final results of an antidumping review conducted by Commerce under section 751 of the Tariff Act,

19 U.S.C. § 1675. Such a review is included with the definition of “final determination[s]” set forth in Annex 1911 of the NAFTA (“Annex 1911”).

In conducting our review, we apply:

the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

NAFTA, Art. 1904.2. Additionally, we are to apply the “general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.” *Id.* at Art. 1904.3. “General legal principles” as used there are stated in Annex 1911 to include “principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies.” The parties have brought to our attention and discussed at great length the doctrine of *stare decisis*, which is patently a general legal principle.

Article 1904.3 of the NAFTA requires this Panel to apply the “standard of review and general legal principles” that a U.S. court would apply in its review of Commerce’s determinations. The applicable standard is set out in Section 516A(b)(1)(B) of the Tariff Act, 19 U.S.C. § 1516a(b)(1), and requires a reviewing authority to “hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.”

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (“*Universal Camera*”); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). The reviewing authority

must take into account evidence that supports as well as fairly detracts from the weight of the evidence relied on by the agency in reaching its conclusions. *Universal Camera*, 370 U.S. at 487-88; *Atlantic Sugar, Ltd. v. United States* 744 F.2d 1556 (Fed. Cir.1984). *Accord, American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom.*, *Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

But it is well settled that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence” *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966). The reviewing authority therefore may not “displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo.” *Universal Camera*, 340 U.S. at 488. In reviewing an agency interpretation of a statute, the reviewing authority must employ the traditional tools of statutory construction to determine first whether Congress has directly spoken to the precise question at issue. If Congress’ intent is clear, that is the end of the matter. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (“*Chevron*”); *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (*citing Chevron*, 467 U.S. at 843 n. 9).

However, if the reviewing authority determines that the statute is silent or ambiguous with respect to the specific issue before it, a second question arises as to whether the agency’s construction of the statute is reasonable given the express terms of the relevant statutory provision and the objectives of the scheme as a whole. *Chevron*, 467 U.S. at 843; *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 813 (Ct. Int'l Trade1998); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir.1996). Deference applies to the agency’s statutory construction and a reviewing authority must defer to a reasonable interpretation of the

statute even if it would have preferred another. *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir.1992); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994); *Mitsubishi Heavy Indus., Ltd. v. United States*, *supra*.

Noting the complexity of the subject matter, and the foreign policy implications of anti-dumping determinations the courts have accorded particular deference to Commerce's interpretations and applications of the antidumping statute. *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1367 (Fed. Cir. 1999) ("*Thai Pineapple*"); *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996); *Micron Technology v. United States*, 117 F.3d 1386, 1394 (Fed. Cir.1997) ("*Micron Tech.*"); *Federal Mogul Corp v. United States*, 63 F.3d 1572 (Fed. Cir. 1995).

Deference to an agency's interpretation of the statute it is charged with implementing is not unlimited. The United States Supreme Court has held that "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System of Ohio v. June M. Betts*, 492 U.S. 158, 171 (1989). The agency's statutory interpretation must, when appropriate, take into account the international obligations of the United States. *Alexander Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581-82 (Fed. Cir.1995).

The reviewing authority may not defer to an agency determination premised on inadequate analysis or improper reasoning. *American Lamb Co.*, 785 F.2d 994, 1004 (Fed. Cir. 1986); *Chr. Bjelland Seafoods A/C v. United States*, 14 ITRD 2257, 2260, 1992 Ct. Int'l Trade LEXIS 213 (Ct. Int'l Trade 1992); *USX Corp. v. United States*, 655 F. Supp. 487, 492 (Ct. Int'l

Trade 1987); *Ceramica Regiomontana v. United States*, 636 F. Supp. 961, 965 (Ct. Int'l. Trade 1986) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421, 1424 (Ct. Int'l Trade 1986).

Furthermore, the reasons articulated by the agency must present a rational connection between the facts found on the record and the conclusions made by the agency. *Bando Chem. Indus. v. United States*, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992); *Avesta AB v. United States*, 724 F. Supp. 974, 978 (Ct. Int'l Trade 1989), *aff'd*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 499 U.S. 920 (1991); *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987). While absolute clarity is not required, the record must contain an adequate explanation of the bases for the agency's decision in order for the reviewing authority to meaningfully assess whether it is supported by substantial evidence on the record. *Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 621 (Ct. Int'l Trade 1993); *USX Corp. v. United States*, 655 F. Supp. 487, 490 (Ct. Int'l Trade 1987); *SCM Corp. v. United States*, 487 F. Supp. 96, 108 (Cust. Ct. 1980); *Maine Potato Council v. United States*, 613 F. Supp 1237, 1244-45 (Ct. Int'l Trade 1985).

Finally, in the interests of due process and procedural fairness, the agency must justify any departures it makes from settled practice with reasonable explanations that are themselves supported by substantial evidence on the record. *See, Western Conference of Teamsters v. Brock*, 709 F. Supp. 1159, 1169 (Ct. Int'l Trade 1989); *see also, National Knitwear and Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 1369 (Ct. Int'l Trade 1991).

### **III. DISCUSSION OF THE ISSUES**

In the Complaint filed in this case, Mittal denominated seven (7) claims, which it expounded upon in its “Brief of the Complainant, May 31, 2006” (hereinafter also referred to as “Brief for Mittal”) in four (4) separate issues. Also, Mittal expressly abandoned two claims, one relating to interest expense and the other relating to changing certain sales from one type to another, by stating that it “does not address those claims in this brief and will not pursue them.” Brief for Mittal, p.10.

The Panel will rule on each of the issues, as was framed in the Brief for Mittal.

#### **A. Did Commerce Err When it Zeroed Negative Margins?**<sup>4</sup>

The Tariff Act provides for the imposition of an antidumping duty against a foreign exporter of goods sold to a United States customer when there is injurious dumping into the United States. Dumping means “the sale or likely sale of goods at less than fair value,” and “dumping margin” means “the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” 19 U.S.C. §§1677(34) and (35)(A).

During an annual review of the United States sales of the Canadian exporter in this case, Mittal Canada, Commerce, charged with the administration of this statute, calculated a weighted-average margin of dumping. Commerce set at zero all amounts of dumping where the sales prices of the goods into the United States (the “Export Price”) exceeded the Canadian Normal Value and where the dumping amount would have otherwise have been negative. Accordingly, the average margin of dumping so calculated by Commerce across all sales was greater than it would have been if, in aggregating the amounts of dumping of all sales by Mittal of the same goods, Commerce had included those negative amounts where the Export Price to the United

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<sup>4</sup> Panelists Barr and Liebman dissent on this issue. See dissenting opinions following the Panel’s remand order, below p. 69.

States exceeded the Normal Value of Mittal's sales in Canada. Mittal argued that such zeroing compels producers or importers of foreign products to make every U.S. sale at or above the average Normal Value, which will be known only after it is computed by Commerce years after the sales, in order to avoid dumping.

### **1. The Arguments of the Parties**

Mittal argued that this Panel is the equivalent of the United States Court of Appeals for the Federal Circuit and is not bound by the Circuit's decisions. Reply Brief of Complainant, November 3, 2006 ("Reply Brief for Mittal"), pp. 4-5; Transcript of May 24, 2007, hearing ("Tr.") 9, 11, 12.

Commerce and U.S. Industry contended that a NAFTA binational panel is bound by decisions of the Federal Circuit, and that this binational panel cannot independently consider Mittal's challenge to zeroing on the merits.

On the merits, Mittal argued that under the canon of statutory construction set forth in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) ("An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .") ("*Charming Betsy*"), zeroing is no longer a reasonable interpretation of the Tariff Act (19 U.S.C. § 1677(35)(A)). That is so, Mittal continued, because (a) zeroing has been found to be inconsistent with the international obligations of the United States under Article 2.4 and/or Article 9.3 of The GATT Antidumping Agreement (the "ADA") (The Agreement on Implementation of Article VI of GATT (Apr. 15, 1994), reprinted in H. Doc. No. 103-316, vol. 1, at 1445 (1994)) by several recent World Trade Organization ("WTO") Appellate Body ("AB") decisions, and (b) there exists an evident possible interpretation of Section 1677(35)(A)

consistent with those obligations of the United States under international conventions, namely that zeroing is impermissible. Brief for Mittal, pp. 11, 21-26, 34.

Commerce and U.S. Industry replied that zeroing is a long-established practice whose application has been consistently upheld for many years by the Court of International Trade (“the CIT”) and the United States Court of Appeals of the Federal Circuit. Rule 57(2) Brief of the United States Department of Commerce, October 10, 2006 (“Commerce Brief”), p. 4; Opposition to Complainants’ Brief by Gerdau Ameristeel U.S. and Keystone Consolidated Industries, Inc. (“Industry Brief”), pp. 9-13. They cited among other authorities *Timken Company v. United States*, 354 F.3d 1334 (Fed Cir. 2004) (“*Timken*”); *Corus Staal B.V. v. United States* 395 F.3d 1343 (Fed Cir. 2005), *reh’g en banc denied*, May 18, 2005, *cert. denied*, 546 U.S. 289 (2006) (“*Corus I*”); and *Corus Staal v. United States*, 502 F. 3d 1370 (Fed. Cir. 2007) (“*Corus 2*”). They argued further that *Charming Betsy* does not require reconsideration of those decisions.

Commerce also contended that whether zeroing is consistent with the ADA is irrelevant because Congress has expressly excluded AB decisions and WTO agreements from having any effect on U.S. law unless and until completion of certain consultative mandates set out in the Uruguay Round Agreements Act, P.L. 103-465, 108 Stat. 4809 (December 8, 1994) (“URAA”). Commerce Brief, pp. 16-19.

Mittal countered that resort to the provisions of 19 U.S.C. §§3533 and 3538(b)(1) for Congressional consultation and decisions to implement WTO decisions is not a prerequisite to determining that zeroing-based dumping margins violate international obligations of the United States. Brief for Mittal, pp. 32-33.

Mittal also argued that failure to include excess-of-Normal Value transactions in the aggregate calculation resulted in the determination of an inaccurate dumping margin for the period under review in contravention of the basic purpose of the statute, which Mittal contended is to determine margins as accurately as possible. Brief for Mittal, pp. 41-46. Commerce asserted that the margins were accurate because zeroing is permissible.

With Commerce's recent decision no longer to apply zeroing in some other circumstances (see Notices of Determination under Section 129 URAA; 70 Fed. Reg. 22636 (May 2, 2005); 72 Fed. Reg. 25261 (May 4, 2007)), Mittal also submitted that the application of zeroing in the present case is arbitrary and capricious in contravention of the Administrative Procedures Act ("APA"). Brief for Mittal, pp. 47-51. Commerce answered that the APA argument is not properly before the Panel. Mittal later agreed that it is not entitled to press that argument. This Panel accordingly will not consider the APA argument further.

Mittal concluded that this Panel should remand the case to Commerce with instructions to re-calculate Mittal's margins of dumping without zeroing.

The principal substantive issue that the Parties presented, the validity of Commerce's application of zeroing in this case, may turn on a preliminary question, whether a NAFTA binational panel is bound by decisions of the Federal Circuit.<sup>5</sup> We now consider that question before we further address the issue of zeroing.

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<sup>5</sup> We consider below whether the Federal Circuit decisions on which Commerce relies are distinguishable and for that reason not controlling here.

## 2. The Status and Role of this Panel

NAFTA Article 1904.2 charges a binational panel with the task of determining whether a final determination of Commerce is in accordance with the antidumping law of the United States. As part of that task, the panel is charged with determining what constitutes the antidumping law of the United States. Article 1904.2 states that the antidumping law consists, not only of the relevant “statutes,” but also the “legislative history, regulations, administrative practice and judicial precedents *to the extent that a court of the importing Party [here, the United States] would rely on such materials in reviewing*” the final determination of Commerce (Italics added).

Our task, at this juncture, is to decide whether “to the extent a court of the importing Party [United States] would rely on such materials” means, as urged by Commerce, “to the extent that the [CIT] would rely on and /or be bound by such materials,” or, rather, “to the extent [a hybrid or virtual court of the United States, exercising both the powers of the CIT and those of the Federal Circuit], would rely on such materials.”

Commerce contended that for the United States, “a court” identifies a particular court, the CIT. Commerce and U.S. Industry argued that “a court of the importing Party” necessarily means the CIT or the Federal Circuit because binational panels “substitute” for the CIT, and because the CIT had provided, before a binational panel could have been sought, and will continue to provide, after a binational panel could be, but is not sought,<sup>6</sup> a forum for judicial review.

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<sup>6</sup> Judicial review of a final Commerce determination continues to be available as a means-of-review alternative to a binational panel, but only with the consent of all parties. See NAFTA Articles 1904.10 and 1904.12.

Commerce additionally argued that this binational Panel “must apply the substantive and procedural laws of the United States to the same extent, and in the same fashion, that the CIT would apply these laws to the present case,” and must abide by all decisions of the Federal Circuit because “[i]f the present case were not before this Panel, it would be before the” CIT, and this Panel stands in the shoes of the CIT. Commerce also cited 5 Am Jur 2d Appellate Review § 591.<sup>7</sup>

In support of its position that this Panel stands in the shoes of the CIT, Commerce’s Brief also cited 28 U.S.C. §1581(c) vesting exclusive jurisdiction in the CIT to hear court appeals in cases such as this one. That section is a general provision governing the CIT’s jurisdiction but says nothing specific about the status or role of a NAFTA panel. It thus does not amplify, clarify or delimit the direction in Article 1903.3 quoted above to apply general legal principles that “a court,” not any specific court such as CIT, would apply.

At oral argument Commerce cited additional authorities to support its position, beginning with Paragraph 8 of Annex 1904.15 of NAFTA. That paragraph states that if a binational panel is requested, judicial review shall not be commenced in the CIT. Paragraph 8 says nothing, however, about the role or status of a panel. It simply provides that a party cannot pursue both avenues of relief. It is worth noting that the drafters of NAFTA knew how to specify a particular court, here the CIT, when that was their intent.

Moreover, the CIT is only the starting point for judicial review in domestic courts if a party elects that option, not the terminus. A party has a right of appeal from the CIT to the Federal Circuit and may seek discretionary review of that Court’s decisions in the United States

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<sup>7</sup> A cursory reading of Section 591 readily reveals that it is inapposite. It states only that appellate courts may affirm, reverse, or otherwise modify prior judgments.

Supreme Court. By contrast, if a NAFTA panel be selected as the route of judicial review, the panel is both the starting and ending point of the review process (except in the event of resort by a government party to NAFTA to an Extraordinary Challenge Committee (“ECC”) in the narrow circumstances of allegations of panelists bias or gross misconduct, or that the panel manifestly exceeded its powers, authority or jurisdiction in such a way as to materially affect the panel’s decision and threatens the integrity of the binational review process).<sup>8</sup>

Commerce contended further that this Panel obtains its exclusive jurisdiction from the CIT’s jurisdiction, citing again 28 U.S.C. §1581 (c). There is, however, no support whatsoever for that conclusion in the text of Section 1581(c). It says nothing about the status or role of a panel or its “jurisdiction.”

Commerce next cited 19 U.S.C. §1516a(g). That simply insulates panel decisions from judicial review. If it says anything about the role or status of a panel, it reinforces its independence from the court system and the finality of its rulings.

Commerce continued with a citation to 28 U.S.C. §1295(a)(5). That vests in the Federal Circuit exclusive jurisdiction to review the CIT’s decisions. It too is silent on the status and role of binational NAFTA panels. If being subject to judicial review in a higher court is relevant here, it is worth noting that Federal Circuit decisions are subject to review by the United States Supreme Court.

Finally Commerce asserted at oral argument that Article 1904.3 of NAFTA states “This panel applies the same standard of review and general legal principles as the U.S. court applies to review this determination.” From that Commerce argued, “ So, this panel would apply the

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<sup>8</sup> NAFTA Article 1904.11 prevents an appeal of a panel decision to domestic courts, while NAFTA Article 1904.13 lays out the grounds for an extraordinary challenge.

same standard of review as the CIT would apply. The CIT would be bound by Federal Circuit precedents.” Tr. 56. The quotation is not accurate.<sup>9</sup> Significantly, 1904.3 states “a court,” not “the court.” Neither does Commerce’s assertion respecting the CIT and the Federal Circuit follow from the text of Article 1904.3: if the applicability of a particular standard of review were to determine the status of this panel, it is worth noting that the Federal Circuit applies the same standard that the CIT does. *E.g., Timken*, 354 F.3d at 1340 (“[W]e apply ‘anew’ the statutorily-mandated standard of review. Accordingly, we will ‘uphold Commerce’s determination ‘‘unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with law’’”). Presumably the Supreme Court also would apply the same standard, or insist that lower courts do so. *Cf. Camp v. Pitts*, 411 U.S. 138,143 (1973) (applying similar standards found in the APA).

We note that clearly authoritative sources, *i.e.*, NAFTA and the North American Free Trade Agreement Implementation Act (“the NAFTAIA”), as well as the United States-Canada Free Trade Agreement (“the CFTA”) and the CFTA Statement of Administrative Action, H.R. Doc. 100-216, 100<sup>th</sup> Cong. 2d Sess. (1988), do not support the argument that “a court” means the CIT. If that had been intended, one would think that it would have, somewhere, been clearly expressed – and acceptable to Canada and Mexico. It is also significant that the Senate Report on the NAFTAIA, Report 103-189, 103d Cong., 1<sup>st</sup> Session (1993) (“Senate Report”), pp. 41-44,<sup>10</sup> severely criticized some panel decisions under the CFTA, the model for NAFTA, but did

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<sup>9</sup> Article 1904.3 reads “The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.”

<sup>10</sup> “At the outset, the Committee emphasizes that the NAFTA, just as the CFTA, *requires* binational panels to apply the same standard of review and general legal principles that domestic courts would apply. . . . [I]t is the function of the courts, and thus panels, to determine whether  
(continued...)

not criticize any panel for failing to agree with or be bound by any court decision. Rather, the criticism was that some panels had not afforded proper *Chevron* deference to Commerce and the International Trade Commission.

### **The Anderson Testimony**

In responses to supplemental questions issued by this Panel on July 18, 2007, concerning specific cited portions of legislative history, statements in an EEC opinion<sup>11</sup> and a handbook<sup>12</sup> bearing on the status of panels that the Panel brought to the Parties' attention, Commerce candidly observed that the cited materials are not particularly persuasive, and Mittal dismissed them as not persuasive at all.

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(...continued)

the agency has correctly applied the law, not to make the ultimate decision that Congress has reserved to the agency." *Id.* At 41-42.

<sup>11</sup> The ECC opinion affirmed a binational panel decision relied upon and called to this Panel's attention by Mittal [Mittal did not bring the ECC decision to our attention.], and hence the observations of the EEC opinion, brought to the attention of the participants by this Panel on July 18, 2007, were *obiturn dictum*. Neither the applicable provisions of the statutes nor of NAFTA were referred to by the EEC. Nor were competing arguments of the participants discussed or analyzed.

The ECC opinion referenced the Anderson testimony, discussed later, above, but did not quote any of her testimony, so it is unclear what in the Anderson testimony was relied upon by the ECC.

No authority was cited by the ECC.

There is, of course, no court decision construing NAFTA Chapter 19, or defining the authority of a NAFTA binational panel, and hence there is no judicial opinion or rule of law in that regard.

<sup>12</sup> The handbook: Folsom, Gordon, Spanogle, HANDBOOK OF NAFTA DISPUTE SETTLEMENT Vol. 1 §K, at 2-70 (2000), cited no authority for its view that panels are the equivalent of the CIT.

We agree. One of the specific cited portions of legislative history was the testimony of Jean Anderson in hearings before committees of the House and Senate respecting CFTA, to the effect that panels are bound by court decisions and panels are the equivalent of the CIT.<sup>13</sup>

Anderson was described at the hearings as chief counsel for Commerce's International Trade Administration, in other words, a Commerce lawyer. She also was the United States' chief negotiator of the binational panel provisions of the CFTA (*See Senate Hearings at 97*), the precursor of the corresponding provisions in NAFTA Chapter 19.

We have in mind that in delivering her statement and testimony to the House and Senate, Anderson was wearing more than one hat. She had recently been the chief United States negotiator for CFTA. She was now seeking to present this new concept in a way that hopefully would appeal to members of Congress who might be interested in this aspect of NAFTA.<sup>14</sup> And

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<sup>13</sup> *See* Hearing before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, on United States-Canada Free Trade Agreement, April 28, 1988, Serial No. 60, 100<sup>th</sup> Cong., 2d Sess.; Hearing before the Committee on the Judiciary, United States Senate, May 20, 1988, Serial No. J-100-62, S. Hrg. 199-1081. ("Senate Hearings").

<sup>14</sup> Another portion of legislative history that the Panel called to the Parties' attention was the Senate Report. There a Senate committee expressed its expectations that "binational panels will properly apply U.S. law and the appropriate standard of review." The Senate Report adds that a "central tenant of Chapter 19 is that a panel must operate precisely as would the court it replaces." We all agree that a binational panel must properly apply United States antidumping law. It is unclear, however, what the committee had in mind in saying that a panel "must *operate* precisely" (*italics added*) as the court it replaces. Despite Anderson's testimony, the report did not say that a panel is bound by court decisions, or that "a court" means the CIT.

For what it is worth, Anderson's views respecting CIT seem contradicted by the following exchange, Senate Hearing at 91: "Senator Heflin. Mr. McGinnis, does the Department of Justice accept that the panel is standing in as a court? . . . Mr. McGinnis. It is true that these panels will be standing, at least in the scheme of the FTA, rather like a court, but in our view they would not be acting under domestic law, but rather under international law and incorporating domestic law by reference."

she was also laying ground for Commerce's position in future litigation with exporters from Canada. So-called legislative history is often written with an eye to future litigation. Often it is not safe or reliable because it represents but one point of view or interpretation, that of persons who sought, or were invited, to appear before a committee, or had access to the staff of a committee, advocating for a special interest. Commerce had a special interest to advance.

We have seen no suggestion that Anderson's statement and testimony coincided with the views of her Canadian counterparts. The relevant language was part of a bilateral treaty, the CFTA, that, when emulated in NAFTA, became part of a multilateral treaty. The views of a representative of one Party concerning the meaning of the language used in the treaty are informative but not controlling. Absent further evidence in that regard, indicating that the representatives of the other Parties, Canada, later Mexico, shared those views, we find it safer to rely on the text of NAFTA Chapter 19.<sup>15</sup>

Annex 1911 defines some words and phrases in Chapter 19. For example, "antidumping statute means" in the case of the United States "the relevant provision of Title VII of the Tariff Act of 1930, as amended, and any successor statutes." And "competent investigating authority means" in the case of the United States "the International Trade Administration of the United States Department of Commerce, or its successor, or the United States International Trade Commission, or its successors."

The phrase "a court of the importing Party" is not so defined in Annex 1911. This omission is for us pregnant with meaning.

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<sup>15</sup> A different question would be presented if the antidumping law of the United States were to be amended by an Act of Congress to name the CIT as the "a court" in the case of the United States. *See* NAFTA Article 1902.

It appears that when the CFTA was being negotiated, Canada expressed concern respecting judicial review by “national courts,” “a perception in Canada when [which] we dispute but nonetheless important as a perception.” Senate Hearing, 64. Among the compromises that were made in negotiating the CFTA “to provide reassurance that both countries’ AD/CVD laws are properly administered, the two governments also agreed” that “final decisions under the AD/CVD laws of both countries would be reviewed not by national courts but by *independent* binational panels” (italics added), thus largely “*eliminating* review of the United States-Canada AD/CVD decisions by national courts.” *Ibid.* (italics added.) In the view of the Department of Justice, “[T]his binational panel decision is the lynchpin of this agreement . . . .” Senate Hearing at 91.

However Anderson’s testimony may sugar coat Canada’s concerns with judicial review, *e.g.*, “court decisions were not ever seen as the problem,”<sup>16</sup> Article 1904.1 nevertheless requires

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<sup>16</sup> The text of these portions of Ms. Anderson’s Senate testimony (pp. 63, 64) reads as follows:

In the free trade negotiations with Canada, a key Canadian objective was to devise new approaches to dumping and subsidies that could replace these AD/CVD laws in the free trade area. With the advice of the private sector and many members of Congress, U.S. negotiators were unwilling to exempt Canada from our CVD law without ensuring stronger enforceable discipline over Canadian subsidies. Despite very intense negotiations, it proved impossible to agree on subsidies discipline and new approaches to unfair trade practices in the short time frame of the FTA negotiations.

The two governments agreed instead to retain the existing national AD/CVD laws and procedures. But there was a perception in Canada when we dispute but nonetheless important as a perception that administrative AD/CVD determinations were open to being influenced politically. So to provide reassurance that both countries’ AD/CVD laws are properly administered, the two governments also agreed that during the early years of the FTA, while a bilateral working group continues to seek subsidies discipline and better ways of dealing with unfair pricing and subsidies, final decisions under the AD/CVD laws of both countries would be reviewed not by national courts but by independent binational panels.

(continued...)

each Party, Canada and the United States, to “replace judicial review” with “binational panel review.” Binational panel review appears to have been a concession to Canada because of its “perception,” which the United States probably did dispute. At the end, the United States agreed to remedy this perception by establishing binational panel review because of the importance of that perception.

It is now fairly clear that the omission to identify the CIT/Federal Circuit in Annex 1911 was not an oversight in this fastidiously drafted 33 page NAFTA article 19, but rather an intentional omission because Canada would not agree or was perceived by the United States as unwilling to agree, to so name the CIT or the Federal Circuit as the “a court of the importing Party” in the case of the United States.<sup>17</sup>

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(...continued)

Now, it is very important to understand that eliminating review of the United States-Canada AD/CVD cases by national courts was not the goal of either government.

Court decisions were not ever seen as the problem. Rather, the two governments created the panel procedure, combining independent review and judicial standards with an FTA-created forum and a tight schedule as an interim mechanism that preserves private rights to relief from unfair trade practices, but allows quick resolution of bilateral AD/CVD issues while we work on improved FTA approach to dumping and subsidies.”

<sup>17</sup> There are thus now at least three alternative means of challenging Commerce determinations, by filing an action in the CIT, or seeking the establishment of a NAFTA binational panel, or filing an appeal with the World Trade Organization. When protagonists of competing interests are unable to agree, creating a new forum for dispute resolution can be a means of moving on, and is not without precedent.

A taxpayer who receives a 90-day letter proposing a deficiency in tax from the Internal Revenue Service, can file a petition with the Tax Court of the United States with appeal therefrom to the Federal Circuit. Alternatively, he can pay the deficiency and claim and sue for a refund in the United States Court of Claims with appeal therefrom also to the Federal Circuit, or sue for a refund in an United States District Court with trial by jury with appeal therefrom to the United States Court of Appeals for that district court.

We conclude that NAFTA Article 1904.2's specification of "a court" of the importing Party, the United States here, means neither the CIT nor the Federal Circuit. Perforce it means a generic or virtual United States court reviewing final Commerce determinations, as described in NAFTA Chapter 19. This generic or virtual court is not situated within the regime of, or bound by, decisions of the CIT or the Federal Circuit.<sup>18</sup>

We further conclude that such a generic, virtual court (and this binational Panel) in determining whether the final determination before us is supported by substantial evidence and in accordance with law, would and must first determine, applying judicial standards, the extent to which such virtual United States court would rely on relevant decisions and other materials. In particular, in deciding questions of law of first impression in its jurisdiction, the virtual court should and would give full, thoughtful and respectful consideration to the decisions of the CIT and Federal Circuit. Such a virtual court should nonetheless look on those precedents like another United States Court of Appeals or a state supreme court would look upon them or another state supreme court decision. A decision whether to adopt a CIT or Federal Circuit decision should be primarily based on how relevant, well thought through and persuasive the decision appears to be in the context of the factual record presented. *See* 20 AmJur 2d, Courts, section 166, p. 448.

We acknowledge that whether binational panels must follow Federal Circuit decisions may not be free from doubt. Our view is, however, consistent with the statement in Article 1904.1, that Canada and the United States each "shall *replace* judicial review of final

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<sup>18</sup> Commerce argued that the doctrine of *stare decisis* requires acceptance of the *Timken* line of cases. That doctrine requires a court ordinarily to adhere to its own precedents and applies also to courts, generally lower courts, that are bound to follow its decisions. The doctrine has no application to a court or tribunal that is not bound to follow the court's decisions.

antidumping and countervailing duty determinations with binational panel review” (Italics added).

Commerce’s reading does not “replace judicial review,” but rather, at least for the issue of zeroing and other issues, superimposes judicial precedents of the Federal Circuit reached in earlier reviews of antidumping decisions as controlling, reducing to a magisterial level the function of binational panels that are established to “*replace* judicial review.”

### **3. Whether Zeroing Distorts Dumping Margins**

Mittal complained generally that zeroing has distorted its dumping margins in this case. Zeroing undoubtedly does increase dumping margins. Whether the increases distort margins depends, however, on whether zeroing is permissible in administrative reviews. Mittal principally argued that application of the *Charming Betsy* canon of statutory construction is appropriate here and precludes zeroing. Commerce, with U.S. industry generally in support, advanced several arguments to preclude application of the canon. We now turn to those arguments.

### **4. Whether Court Decisions Upholding Zeroing Control the Decision in this Case**

Commerce argued that prior court decisions upholding zeroing preclude this Panel from applying the *Charming Betsy* canon of statutory construction so as to construe

19 U.S.C. § 1677(35)(A) (“The term ‘dumping margin’ means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.”) to disallow zeroing. The leading case on zeroing is the Federal Circuit decision in *Timken* (2004).<sup>19</sup>

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<sup>19</sup> A later similar decision of the Federal Circuit, *Corus I*, 395 F.3<sup>rd</sup> at 1347, 1349, upholding zeroing in investigations, explicitly reasoned that “Timken governs” the propriety of zeroing, and also rejected the applicability of the WTO Appellate Body ruling in *EC-Bed Linen*, WT/DS141/AB/R (March 1, 2001), “for the same reasons cited in” *Timken*. *Corus I* then rejected *Softwood Lumber*, WT/DS264/AB/RP66 (August 11, 2004), because Congress had not  
(continued...)

The court there held that Commerce’s application there of its zeroing methodology was based on a reasonable interpretation of the statute. The court did not, however, read “the normal value exceeds” language as expressing a Congressional intent requiring zeroing: “the statute does not plainly require consideration of only those dumping margins with a positive value.” *Id.* at 1741. Explaining its conclusion that zeroing was a reasonable interpretation, the court said that “while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce’s construction.” *Id.* at 1742.

The court elaborated that if “Commerce could not zero negative transactions,” “Commerce could potentially owe” payment to a customer who paid more than normal value, “a result clearly not contemplated by the statutory scheme,” (*Id.* at 1342-43) an imaginary straw man that has not and will not come to life.

The court then advanced a policy rationale for zeroing, advertent to the decisions of the CIT in *Serampore Industries Pvt. Ltd. v. U.S. Dep. of Commerce*, 675 F. Supp. 1354, 1360-1361 (1987), and *Bowe Passat Reinigungs-UND Waschereitechnik GmbH v. United States and U.S. Department of Commerce*, 926 F. Supp. 1138, 1150 (1996) (“*Bowe*”), which it said it had found instructive for the purpose of its analysis, where zeroing was found to be a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to ‘mask’ sales at less than fair value.” In *Serampore*, the court said that Commerce’s interpretation prevents a “foreign producer from masking its dumping with more profitable sales.” 675 F.Supp. at 1361 In *Bowe*, 92 percent of the exporter’s U.S. sales

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(...continued)

adopted it. More recently two CIT decisions have followed *Timken* on zeroing. *SKF USA Inc. v. United States*, Slip Op. 07-86 (May 29, 2007); *Corus Staal BV v. United States*, Slip Op. 07-90 (June 5, 2007), *aff’d*, *Corus 2*.

were made at or above fair market value. The court said that it was “aware of the statistical bias inherent in Commerce’s methodology,” but nevertheless was

not prepared, however, to invalidate that methodology because the practice combats masked dumping, an apparently legitimate goal consistent with the antidumping statute. Unless and until it becomes clear that such a practice is impermissible or unreasonable (because, e.g., Commerce *erroneously* placed too much significance on the phenomenon of masked dumping, the Court must defer to Commerce’s chosen methodology.

926 F. Supp. at 1150 (Emphasis in original).

In this case, Commerce reset negative margins to zero for approximately 5,000 sales transactions out of approximately 12,800 Mittal’s United States sales in the year under review. Although Commerce and U.S. Industry both discussed zeroing at length in their briefs and during oral argument,<sup>20</sup> neither Commerce nor U.S. Industry have suggested or sought to show that Mittal’s sales involved masked or targeted dumping or, as also dubbed in *Passat*, “spot dumping or rifle shooting,” or that Commerce could not practically, in its administration of the statute, ferret out masked dumping by Mittal unless it could zero every transaction where the sales price exceeded normal value.<sup>21</sup>

In *Chevron*, the United States Supreme Court said:

When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the

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<sup>20</sup> While Gerdau Ameristeel U.S., Inc., and Keystone Consolidated Industries, Inc., the Domestic Industry, generally support Commerce’s arguments here, they differ in that they argue that the statute *requires* zeroing. Commerce has recently accepted contrary court rulings that appear persuasive, *see, e.g.*, Tr. 127-128; *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722, 77723 (Dec. 27, 2006) (rejecting argument that the statute requires zeroing).

<sup>21</sup> As *U.S. Zeroing-Japan* (WT/DS322/AB/R--January 9, 2007)(“*Measures*”) notes, zeroing is not necessary, or permissible under WTO decisions, to combat targeted dumping: Commerce can define an area of targeted dumping and limit its comparisons of Normal Value and Export Prices to transactions within that area. *Measures* at Paragraph 135.

intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction 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 the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43.

In an adjoining footnote, the Court said, "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."

In *Chevron*, the Court set forth a framework for deference to agency determinations where the statute is silent or ambiguous, or leaves a gap for agency elaboration, and the Court considered at length the reasonableness of an Environmental Protection Agency regulation, revised during the early years of the Reagan administration, issued under the authority of the Clean Air Act Amendment of 1977, permitting some states to treat all the pollution-emitting devices within the same industrial groupings as though they were encased within a single "bubble," and concluded that the revised regulation was a reasonable construction of the statutory term "stationary source."

The *Chevron* Court said that the EPA had "set forth several reasons for concluding that the plant wide definition was more appropriate." 467 U.S. at 858. The Court reviewed those reasons, and found that the EPA had advanced reasonable explanations for its conclusion that the regulations served both the economic and environmental objectives of the legislation, and

provided an allowable effective reconciliation of those twofold goals.<sup>22</sup> What comes through is

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<sup>22</sup> The Court said:

In 1981 a new administration took office and initiated a ‘Government-wide reexamination of regulatory burdens and complexities.’ 46 Fed. Reg. 16281. In the context of that review, the EPA reevaluated the various arguments that had been advanced in connection with the proper definition of the term "source" and concluded that the term should be given the same definition in both nonattainment areas and PSD areas.

In explaining its conclusion, the EPA first noted that the definitional issue was not squarely addressed in either the statute or its legislative history and therefore that the issue involved an agency ‘judgment as how to best carry out the Act.’ It then set forth several reasons for concluding that the plantwide definition was more appropriate. It pointed out that the dual definition ‘can act as a disincentive to new investment and modernization by discouraging modifications to existing facilities’ and ‘can actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones.’ Moreover, the new definition ‘would simplify EPA's rules by using the same definition of “source” for PSD, nonattainment new source review and the construction moratorium. This reduces confusion and inconsistency.’ *Ibid.* Finally, the agency explained that additional requirements that remained in place would accomplish the fundamental purposes of achieving attainment with NAAQ's as expeditiously as possible. These conclusions were expressed in a proposed rulemaking in August 1981 that was formally promulgated in October. . . .

More importantly, that history plainly identifies the policy concerns that motivated the enactment; the plantwide definition is fully consistent with one of those concerns -- the allowance of reasonable economic growth -- and, whether or not we believe it most effectively implements the other, we must recognize that the EPA has advanced a reasonable explanation for its conclusion that the regulations serve the environmental objectives as well. Indeed, its reasoning is supported by the public record developed in the rulemaking process, as well as by certain private studies. . . .

We hold that the EPA's definition of the term ‘source’ is a permissible construction of the statute which seeks to accommodate progress in reducing air pollution with economic growth. ‘The Regulations which the Administrator has adopted provide what the agency could allowably view as . . . [an] effective reconciliation of these twofold ends . . . .

*Chevron*, 467 U.S. at 857-859, 863, 866.

that at least in *Chevron* itself, the Court reviewed the agency's explanations for the regulations and found that they reasonably could be viewed as serving to reconcile the multiple goals of the legislation.

In this case, the meaning of "dumping margin," and whether the term includes negative numbers as well as positive numbers, become clearer when the definition of "dumping margin" is read in conjunction with the next term defined in the statute: "The term 'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margin determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. §1677 (35)(B).

The word "aggregate" means all, not some or less than all. Congress clearly intended that all 12,800 Mittal sales transactions would be aggregated, combined, in determining the weighted average dumping margin. The only rationale for including approximately 5,000 of the approximately 12,800 sales at zero, rather than at their correct negative values, is to guard against masked dumping, of which there is no evidence on this record. Industry Petitioners have participated throughout these proceedings. If masked dumping were involved, they would surely have been aware of it, and could have pointed Commerce in the right direction.

The holding in *Timken* was premised on its determination that the statute did not "directly speak to the issue of negative-value dumping margins, [and therefore the *Timken* Court] evaluate[d] whether Commerce's interpretation is based on a permissible statutory construction." 354 F.3d at 1342.

The Court in *Timken* acknowledges that the "word 'exceeds' does not unambiguously require that dumping margins be positive numbers," or "preclude the calculation of a negative

dumping margin.”<sup>23</sup>

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<sup>23</sup> The Court said:

Recognizing this as a close question, we are reluctant to find these dictionary definitions so clear as to compel a finding that Congress expressly intended to require zeroing. Even using the above ‘greater than’ definitions, the statute does not plainly require consideration of only those dumping margins with a positive value. At least in a mathematical context, ‘exceeds’ does not unambiguously preclude the calculation of a negative dumping margin. We thus disagree with the government’s position that Congress deliberately used the word “exceeds” to avoid the calculation of negative dumping margins, instead of using the more open-ended phrase ‘difference between.’ Rather, the word ‘exceeds’ could arguably allow for negative dumping margins because it guides the manner in which to set up the mathematical equation— $x$  ‘exceeds’  $y = x - y$ . Similarly, the words ‘difference between’ could arguably be construed as calling for the absolute value of the difference, a positive number—the ‘difference between’  $x$  and  $y = |x - y|$ . Finally, reviewing the legislative history as a whole, we disagree with Timken’s argument that the relevant statements, or lack thereof, conclusively demonstrate Congress’s adoption of definitions specifically requiring zeroing. Accordingly, we conclude that Congress’s use of the word ‘exceeds’ does not unambiguously require that dumping margins be positive numbers.

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In contrast with the careful scrutiny by the Supreme Court in *Chevron* of the EPA's explanations for revising the regulation there before the Court, the Court in *Timken* accepted Commerce's justification of its zeroing methodology at face value although Commerce and U.S. Industry did not claim or show, as they similarly have failed to do here, that there was masked dumping. Nor did the Court in *Timken* recognize that a goal of the antidumping law is accuracy in calculating dumping margins. The *Timken* Court did not consider whether blanket zeroing of all negative margins without regard to whether there is evidence of masked dumping reasonably serves the accuracy goal of the legislation in light of the deterrence of dumping goal, and whether blanket zeroing constitutes a reasonable reconciliation of those dual goals.

Further, in contrast with the EPA in *Chevron*, Commerce has not set forth its zeroing methodology in a published writing explaining how blanket zeroing serves or reconciles the policy goals of the antidumping law, nor has it proposed a rule or regulation for comment and response and commentary.

Commerce has adhered to this blanket zeroing methodology for over 20 years. This methodology can not be sustained here on the basis of assertions by Commerce without evidentiary support that blanket zeroing is reasonably necessary to combat masked dumping.<sup>24</sup>

There is no evidence, certainly no substantial evidence that Commerce was justified in zeroing the approximately 5,000 transactions with negative margins in determining the weighted average dumping margin to guard against masked dumping by Mittal.

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(...continued)  
354 F.3d at 1341-42.

<sup>24</sup> Surely, Mittal was not burdened with the obligation to prove a negative, that all 5,000 sales were not masked dumped, absent any suggestion or evidence proffered by U.S. industry or Commerce that there was any masked dumping.

We thus conclude that Commerce's final determination is not supported by substantial evidence and is not in accordance with law (section 516(A)(b)(1)(B)).

### **5. Whether the Absence of Congressional Consultations Precludes Application of the Charming Betsy Canon of Statutory Construction**

*Timken* did not rule on whether the Congressional consultation and review provisions of 19 U.S.C. §3533 preclude reconciling the URAA and WTO zeroing rulings with Commerce's calculations of dumping margins. 354 F.3d. at 1345. *Corus 2* makes clear, however, that this line of cases is based on the view that Commerce need not abandon zeroing in the absence of compliance with those provisions: (“[W]e therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme” 502 F.3d \_\_\_, LEXIS 10-11 (Quoting *Corus 1*)).

Significantly, the *Timken* line of cases did not even consider whether Commerce's zeroing methodology for reviews is a “practice” within the ambit of that statutory scheme. We now turn to the need for Congressional consultations.

Citing 19 U.S.C. §§3533 and 3538, Commerce argues against application of the *Charming Betsy* canon to implement an AB ruling unless and until statutory review procedures for such implementation have run their course. The *Softwood Lumber* panel decision so ruled at one point, noting that the very determination by Commerce that it had before it was also the subject of an adverse AB ruling. That is not so for this case. Commerce's determination under review here can not become the subject of the statutory procedures in question. (Canada can no longer take this case to the WTO.) There is therefore no requirement or comity consideration to await the outcome of such procedures. Sections 3533 and 3538 are simply inapplicable.

Nor would decision here to apply the *Charming Betsy* canon implement in either form or substance any single WTO ruling.<sup>25</sup> Rather, it would recognize, for this case only, that the totality of AB rulings and other precedents respecting zeroing now definitively regard zeroing as a violation of the Anti Dumping Agreement (“ADA”)<sup>26</sup>. *Charming Betsy* thus would call for construing U.S. law itself as disallowing zeroing if doing so is a “possible construction.” *Charming Betsy*, 6 U.S.at 118. There would then be no inconsistent U.S. statute to consider, *e.g.*, 19 U.S.C. §3533, in statutorily mandated deliberations about a particular WTO decision. It is also the case that application of the canon here would resolve only the zeroing issue in the administrative review before us. NAFTA Article 1904.9 provides that a panel ruling affects only the case that is before it. Sections 3533 and 3538 do not deprive this panel of authority and the obligation to decide the case in accordance with the directives of Articles 1904.2 and 1904.3 of NAFTA.<sup>27</sup>

In any event, Section 3533 (g)(1) of 19 U.S.C. requires consultation with Congress before Commerce changes only a “regulation or practice” that a WTO panel has found to be inconsistent with the ADA. Zeroing, however, is based on neither a regulation nor a practice; the

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<sup>25</sup> Commerce argued at the hearing that since a WTO decision against zeroing might not result in the prevailing party actually being relieved of the consequences of zeroing, this Panel cannot mandate such relief. Tr.130. Panel decision making differs, however, from WTO decision-making. NAFTA’s provisions for panels authorize, indeed require, panels to grant relief if they conclude that a party’s rights have been infringed. USTR and Congress have no stated obligatory role under the URAA or NAFTA in choosing whether to comply. The analogy to WTO decision-making is inapt.

<sup>26</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

<sup>27</sup> In the absence of still pending implementation of an AB ruling, the *Softwood Lumber* panel applied the *Charming Betsy* canon. That situation is analogous to this case.

Statement of Administrative Action authoritatively<sup>28</sup> describes “practice” as “a written policy guidance of general applicability.” SAA at 352. Section 3533 thus does not require Congressional involvement for changes in anything of less definitive authority.<sup>29</sup>

Considering that to our knowledge no court has ruled on the significance of the SAA’s definition of “practice,” this Panel asked the parties in supplemental questions that it issued on July 18, 2007, whether they were aware of any relevant court ruling. No party responded with any such ruling. This Panel also asked the parties for their views on the SAA’s definition of “practice”; on whether Commerce has such policy guidance of general applicability for zeroing; on the significance of the presence or absence of such a written policy as it pertains to this case; and specifically on whether the Congressional consultation process is required for a change in Commerce’s zeroing methodology if Commerce has no written policy guidance of general applicability for zeroing. Commerce’s August 14, 2007, Responses to those questions indicated that Commerce has no written policy guidance regarding its zeroing methodology in administrative reviews. Those Responses did not explicitly address the significance for this case of the absence of such a policy, given the SAA’s definition of “practice.”

Commerce proceeds with its zeroing methodology for reviews on a case-by-case basis. Commerce is entitled to do so. It follows, however, from the SAA’s definition of “practice” and the absence of a written policy of general applicability for zeroing in reviews, that Congressional review is not required in order to change the zeroing methodology for reviews. Since the *Timken*

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<sup>28</sup> *E.g.*, Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H. Doc. No. 103-316, Vol. 1 (1994) (“SAA”) at 656; Commerce’s Brief at 7-8.

<sup>29</sup> Significantly, Section 3533(g)(1) requires prior opportunity for public comment on any change in a regulation or practice and publication “of the final rule or modification” in the Federal Register, thus underscoring the focus of Congressional review on written directives of general applicability

line of cases did not address the significance of the SAA definition of “practice,” an issue that apparently no party raised, those cases are distinguishable and lack persuasiveness on the need for Congressional consultation here. Thus, even if panels were bound by Federal Circuit decisions, this Panel would not contravene any court decision by remanding in this case for computation of dumping margins without zeroing.

#### **6. Whether It Would Violate the Law of Nations To Interpret the URAA in a Manner Inconsistent With the Aggregate of the WTO Rulings Against Zeroing**

Commerce’s Brief at 16 argued that it would not “violate the law of nations” to interpret the URAA in a manner inconsistent with a WTO dispute settlement report. That may be so, for any one report. That argument does not, however, reach the present circumstances, in which numerous AB rulings have definitely clarified and established that zeroing as applied and “as such” violates the ADA. That agreement is undoubtedly part of the law of nations.

#### **7. Whether 19 U.S.C. §3512(a) Sustains Zeroing**

Commerce argued that Congress has specified that WTO reports are not to change domestic law unless and until a specified statutory scheme has been followed, citing among other authorities 19 U.S.C. §3512(a) (“[N]o provision of any of the Uruguay Round Agreements, nor the application of any such provision or circumstance, that is inconsistent with any law of the United States shall have effect.”). A threshold question is whether “law” includes zeroing.<sup>30</sup>

In *CPC International, Inc. v. United States*, 956 F.Supp. 1014 (1997), Commerce argued that in 19 U.S.C. §3312, a NAFTA-related provision parallel to 19 U.S.C. §3512(a) relating to the Uruguay Round Agreements, “law” meant only statutory law. *Id.* at 1020. CIT called that

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<sup>30</sup> In response to a question from the Panel about court decisions interpreting “law” in the statute, Commerce argues that the panel is required to apply U.S. law including judicial precedents. That is so, but does not shed light on the meaning of “law” in Section 3512(a).

“disingenuous.” The Federal Circuit reversed, holding that Section 3312 “simply ensures that NAFTA will not be construed as having implicitly amended or repealed any federal statute.” *Bestfoods v. United States*, 165 F.3d 1371, 1376 (Fed. Cir. 1999); accord, *Xerox Corp. v. United States*, 423 F.3d 1356, 1364 (Fed. Cir. 2005).<sup>31</sup>

In the apparent absence of a court decision construing Section 3512(a) otherwise, we think it reasonable to conclude that the term “law” has the same meaning in both that section and Section 3312 – statutory law.

No statute mandates the zeroing methodology. It results instead from administrative interpretations and applications of the URAA by Commerce on a case-by-case basis. Indeed, Commerce is at liberty to change that interpretation, provided that its new interpretation is reasonable.<sup>32</sup> Such a reinterpretation would not change the words of the statute itself. Neither would application here of the *Charming Betsy* canon of statutory construction change the words of the statute.

In view of the foregoing, we conclude that neither Section 3512(a) nor the other statutory provisions argued by Commerce and discussed above establishes the propriety of zeroing in this case. We now turn to other aspects of the zeroing issue.

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<sup>31</sup> The *Softwood Lumber* panel decision also concluded that “The challenge here . . . does not involve the application of any ‘law of the United States.’ Section 3512(a) deals with statutes, and as such is not directly relevant . . .” Parties’ Joint Appendix of Authorities, Item 45, at 29.

<sup>32</sup> E.g., *Chevron*, 476 U.S. at 843; *Bankers Trust New York Corp v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000); *Softwood Lumber* panel decision, *supra* at 38 (“Commerce has the power to adopt a WTO-consistent interpretation. *United States – Section 129(c) (1) of the Uruguay Round Agreements Act* (WT/DS221/R) at 3.77-3.79”).

## **8. The Role of the Appellate Body in Clarifying the Anti-Dumping Agreement and Resolving Disputes, and Congress's Recognition of that Role**

Of general relevance here is that an agreed function of the WTO dispute settlement system is to clarify the meaning of the WTO agreements:

The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

*Understanding on rules and procedures governing the settlement of disputes*, Annex 2 of the WTO Agreement, Article 3.2.

The United States placed a high priority on establishment of the Dispute Resolution Body to resolve promptly and authoritatively differences that might arise under the ADA and other WTO Agreements, and the Congress that enacted the URAA surely realized that. The SAA stated at pages 339-341:

The Understanding of Rules and Procedures Governing the Settlement of Disputes . . . responds to long-held U.S. concerns regarding international trade disputes . . . the United States has a strong interest in having an effective process to enforce U.S. rights . . . Congress made the negotiation of a more effective GATT dispute settlement system a principal U.S. negotiating objective in the Uruguay Round. Among the most important changes effected by the DSU are . . . creation of an Appellate Body to review panel determinations of Uruguay Round agreements and legal issues . . . the dispute settlement system is meant to clarify the various Uruguay Round Agreements . . . U.S. negotiators insisted on the inclusion of a fair and effective WTO dispute settlement system.

Congress intended the URAA “to bring U.S. law fully into compliance with U.S. obligations under the [WTO] agreements.” *Id.* at 669.

## 9. Whether It Is Appropriate To Apply the *Charming Betsy* Canon of Statutory Construction

The number and rationales of the AB rulings against zeroing, particularly *Measures* on January 9, 2007, have definitively clarified the ADA respecting the impropriety of zeroing in any circumstance. *E.g.*, *Bed Linen from India* (WT/DS144/AB/R-Mar. 12, 2001)); *Hot Rolled Steel from Japan* (WT/DS184/AB/R-Aug. 23, 2001); *Corrosion Resistant Carbon Flat Steel from Japan* (WT/DS244/AB/R Dec. 15, 2003); *Softwood Lumber from Canada* (WT/DS264/AB/R-August 11, 2004); *U.S. Zeroing-Europe* (WT/DS294/AB/R-Apr. 18, 2006); *Softwood Lumber from Canada* (WT/DS264/AB/RW-Aug. 15, 2006); *Measures*. The AB's opposition to zeroing appears in perhaps its most striking form in *Measures'* discussion of the argument that zeroing is mathematically required to combat targeted dumping in investigations. In dismissing that argument, *Measures* stated that:

In order to unmask targeted dumping, an investigation authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern [of unusual prices found to warrant a targeted dumping analysis].

*Id.* at Paragraph 135.

According to USTR, the suggestion that the targeted dumping methodology may be applied to a subset of export transactions is novel, “No Member has ever done this, nor has any Member even suggested that it was permissible to do this.” *United States – Measures Relating to Zeroing and Sunset Reviews* (WT/DS322), February 20, 2007, *Communication [to the WTO Dispute Settlement Body] by the United States*, Paragraph 12.

Nonetheless, USTR appears, understandably so, to have implicitly resigned itself to the finality of the AB and other WTO rulings against zeroing.<sup>33</sup> USTR's February 20, 2007,

<sup>33</sup> In response to a question at the hearing whether it seemed possible that the United States

(continued...)

*Communication* to the Dispute Settlement Body severely critiques *Measures* but concludes at Paragraph 25 with the comment that *Measures*' approach "has very troubling implications for . . . the relationship between the Members' exclusive authority to issue interpretations and the limited role assigned to the dispute settlement system of helping resolve specific disputes." Whether the United States could pursuant to Article IX-2 of the WTO Agreement persuade the WTO Ministerial Conference or General Council to promulgate an interpretation allowing zeroing is uncertain. On June 4, 2007, the United States submitted a proposal to the WTO Negotiating Group on Rules "to correct the Appellate Body's rulings regarding" zeroing. The U.S. urges WTO Members to adopt clear, precise rules permitting the use of zeroing in both investigations and administrative reviews.<sup>34</sup> The proposal was submitted as part of the ongoing Rules negotiations in the Doha Development Agenda. The outcome and timing of the negotiations are both uncertain. The Doha negotiations have been stymied for years. NAFTA requires this panel to decide this case now. For the time being, we regard WTO law as settled with respect to zeroing – it is impermissible.

We recognize that the United States had strong arguments to uphold Commerce's zeroing methodology, including that the WTO Agreements were not intended to disallow zeroing and that zeroing had been a long-standing practice by the time of those agreements. Disallowing zeroing will lower or eliminate dumping margins in the United States. The AB has, however, rejected time and time again the United States' arguments having considered them at length and preferring instead its own deductions from the text of the ADA.

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(...continued)

could obtain reversals from the AB, no counsel expressed the view that reversal was possible.

<sup>34</sup> USTR Press Release, "U.S. Proposes to Address 'Zeroing' in World Trade Organization Negotiations," 06/04/2007.

Given the apparently settled AB view that zeroing violates the ADA, future zeroing by Commerce may result in frequent resort to the WTO dispute settlement procedures, since challenges there are virtually certain of success. It is true that the United States could instead of complying be prepared to provide compensation or face sanctions, although Congress understands that compliance is the preferred course. SAA at 341. Whether United States authorities would persist with zeroing over an extended period of time despite knowledge that zeroing has been found to violate the ADA and the virtual certainty of losing more WTO cases respecting zeroing is a matter for them to decide. Zeroing seems inconsistent, however, with both the underlying principle of the *Charming Betsy* canon, to respect the law of nations wherever possible, and the United States' Uruguay Round negotiation goal of obtaining an effective dispute-resolution system.

The canons of statutory interpretation set forth in *Chevron* and *Charming Betsy* are both important. The former is an important constituent of domestic administrative law. The latter is an important constituent of Supreme Court jurisprudence in the international relations field. Mandatory provisions of the ADA constitute international-law or "law of nations" obligations of the United States.<sup>35</sup> It would be unseemly in the present circumstances to prefer discretion of an administrative agency over compliance with the law of nations, particularly the WTO Agreements into which the United States quite willingly entered a little over a decade ago. Nor is there any reason to believe that the Supreme Court intended *Chevron* to overrule *Charming Betsy*. The Supreme Court has, so far as this Panel and the Parties are aware, uniformly applied

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<sup>35</sup> E.g., *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995); *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002); *Timken*, 354 F.3d at 1341-42.

the *Charming Betsy* doctrine when a possible reading of a statute would avoid a conflict with the law of nations.<sup>36</sup> NAFTA Article 1904 obliges us to follow those precedents today.

An example of such precedents is *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963). There United Fruit Company, incorporated in New Jersey, established a Honduran subsidiary that owned legal title to a number of vessels flying the Honduran flag and regularly engaging in transport of bananas to U.S. ports. The National Labor Relations Board asserted jurisdiction over labor relations of the crews and the equitable (United Fruit) and legal owners of the ships. Ordinarily under international law it is the law of the flag state that governs labor relations. While holding that Congress could vest the asserted jurisdiction in the Board, the Court observed that the *Charming Betsy* doctrine meant that in that delicate field of international relations there must be an affirmative intention of the Congress, clearly expressed, to sustain such jurisdiction, and held against the Board's jurisdiction. *Id.* at 21-22. Commerce agrees that an affirmative intention is required, but argues that the URAA provisions for determining whether and how the United States will implement a WTO ruling express such an intention. Those provisions, however, apply only to regulations and "practices" and thus are inapplicable to use of zeroing methodology in reviews. The URAA has expressed no approval of zeroing, certainly not affirmatively and clearly, and no interest in Congress' reviewing case-by-case determinations such as those applying zeroing in reviews. It thus is appropriate to apply the *Charming Betsy* canon.

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<sup>36</sup> The Supreme Court's denials of issuance of a writ of certiorari in *Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 592 (Number 318 of 334 petitions for certiorari denied on November 1, 2004), and in *Corus I* are not exceptions. Considering the huge volume of such petitions and other factors, denial of certiorari has no substantive significance. *E.g.*, *State v. Baltimore Radio Show*, 338 U.S. 912, 917-19 (1950).

The provisions of 19 U.S.C. §§ 1677(34) and (35)(A) quoted at the beginning of this part focus on the pricing behavior of a foreign producer or exporter in relation to the subject merchandise. The sections do not refer to the price of only a part of the subject merchandise, such as the price of that part that is sold at less than Normal Value. We construe the definitions in those sections as requiring inclusion of *all* prices of the Subject Merchandise in any calculation of dumping margins in this administrative review. Such a construction is well within the mandate of *Charming Betsy*, to adopt any “possible construction” that would not violate the law of nations. We accordingly conclude that this Panel’s obligation to respect and apply the *Charming Betsy* canon of statutory construction precludes approval of the use of zeroing in calculating Mittal’s margins.<sup>37</sup>

As shown above, we also have concluded that this Panel is not bound by any particular court decision and we do not find the *Timken* line of cases persuasive.

#### **10. Conclusion of the Panel on Zeroing**

In sum, on the issue of the permissibility of zeroing, the Panel remands the matter back to Commerce to re-calculate Mittal’s dumping margins without zeroing.

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<sup>37</sup> It thus is not necessary to rule on Mittal’s “fair comparison” argument that zeroing violates the ADA.

## **B. Did Commerce Err by Denying Mittal's Request for a Split of Cost of Production?**

This administrative review covered a twelve month period from October 1, 2003, to September 30, 2004. In its questionnaires, Commerce requested data from all exporters for this period of review ("POR"). Mittal provided the data requested in two separate segments – one covering the last three months of 2003 and the other covering the first nine months of 2004. Mittal kept its financial records on a calendar year basis and it submitted that it was reporting two separate costs of production ("COP") because of the sharp increase in the costs of its raw materials that occurred in 2004.

In both its Preliminary and Final Results, Commerce rejected the two separate COPs that Mittal reported and concluded that Commerce should not deviate from its normal practice of calculating a single COP for the review period. Commerce determined that the increases in COP failed to meet the three-part test that it applies to decide whether to split the POR into more than one period -- were the cost changes significant; were they consistent; and were the increases in costs directly passed through to customers.

Mittal argued that Commerce's refusal to use its discretion to split its cost of production into two periods is unsupported by substantial evidence on the record, arbitrary and otherwise not in accordance with the law. It argued that the increases in costs between the two periods were significant, consistent and have produced an inaccurate margin of dumping calculation. Further, it argued that an indication of the seriousness of the cost increases was that it had attempted to recover the higher costs through a series of raw materials surcharges on its 2004 sales to its customers.

## 1. Commerce's Normal Practice

It is agreed by all parties that Commerce's normal practice is to calculate a single COP for the entire twelve month period of an administrative review. In its Final Decision Memorandum, Commerce noted that it uses "annual average costs in order to even out swings in production costs experienced by respondents over short periods of time." Issues and Decision Memorandum, January 17, 2006, p. 17. Commerce went on to describe a three-part test that it used in reaching its decision: it "analyzed the significance of the change in COM ["Cost of Manufacture"], whether the change in cost occurred consistently and significantly throughout the POR, and whether the direct material inputs causing the cost fluctuations can be directly tied to the related sales transactions" *Id.*, p. 17.

Commerce submitted that "COP is defined by the statute as 'the cost of materials and of fabrication or other processing of any kind employed in producing the foreign like product, during a period which would ordinarily permit the production of that foreign like product in the ordinary course of business,' plus additional overhead and expenses. 19 U.S.C. § 1677b(b)(3)." Commerce Brief, October 10, 2006, p. 25. Its Brief further noted at p. 25 that:

the Federal Circuit has held that the statutory language does not specify the period to be used nor does it dictate the methodology for calculating COP. Thai Pineapple Canning Indus. Corp., v. United States, 273 F. 3d 1077, 1084 (Fed Cir. 2001). Commerce's standard methodology is to use a single weighted-average cost for the entire POR to account for swings in the production cost experienced by the respondent over short periods of time. Commerce's methodology smooths out the effect, among other things, of fluctuating raw material costs, erratic production levels, major repairs and maintenance, inefficient production runs, and seasonality.

Commerce noted that its standard methodology "is reflected in its questionnaires which routinely request that cost be reported on an annual average basis over the entire POR." *Id.*, pp. 25-26.

Commerce acknowledged that:

in certain rare circumstances, where costs and price averages calculated over the entire period do not permit an appropriate comparison, Commerce will apply another methodology. Commerce has determined that it will deviate from its normal practice, however, only when it can be demonstrated that costs changed significantly (either declining or rising) throughout the POR, causing a significant impact to the total cost of manufacturing and that the increased (or decreased) costs of the direct material inputs can be directly tied to the specific sales transactions.

*Id.*, p. 26. At the hearing, Commerce confirmed that it has a three-part test and it explained that the tests were:

- a. Is there a significant change in the cost of manufacturing?
- b. Is it a consistent change?
- c. Do they have the ability to tie their costs to their sales?

According to Commerce, Mittal failed to meet any of these tests. *Tr.*, p.64.

Finally, Commerce's Brief argued at p. 27 that the burden is on the respondent to demonstrate that Commerce's standard methodology will distort the COP calculation.

Mittal acknowledged that Commerce's normal practice is to calculate a single weighted-average cost for the entire POR. *Brief for Mittal*, p. 54. However, it submitted that Commerce "will weigh costs over other time periods in cases where inputs representing a substantial portion of a product's total costs rise significantly and consistently during the POR, and where the use of a single weighted-average cost would result in inappropriate conclusions" *Id.*, pp. 54-55. Mittal argued that "Commerce will thus deviate from its normal practice where it is appropriate to do so, and Commerce has not adequately explained why it did not do so here" *Id.*, p. 56.

In summary, there is agreement that Commerce's standard methodology is to calculate a single weighted-average cost of production for the POR. There is also agreement that Commerce has the discretion to split the period when it is appropriate to do so. The

disagreement centers on whether that discretion should have been exercised in this case and who bears the onus to demonstrate that a different set of periods should be used.

As discussed above in Section II, “Panel Jurisdiction and Standard of Review,” on a matter of administrative discretion such as this (the appropriate length of cost periods), the standard of review calls for deference to Commerce's determinations if they reflect reasonable interpretations of an ambiguous or silent statute, and are supported by substantial evidence in the record and an adequate explanation of the bases for the determinations. The Panel will now turn to an examination of the elements of Commerce’s cost period determination.

## **2. Significance of Mittal’s Cost Increases**

Mittal argued that its costs of raw materials went up significantly and consistently from 2003 to 2004 and that this resulted in a significant increase in its overall COP. It buttressed its arguments with charts and data on the costs of Direct Reduced Iron, Scrap, Ore, and Alloys that are the material inputs to Mittal’s production of steel rod. Brief for Mittal, p. 57. Mittal submitted that it was forced “to implement Raw Materials Surcharges for all customers in order to be able to manage these sharp cost increases.” *Id.*, p. 58.

Mittal asserted that Commerce’s conclusion that Mittal’s cost increases were not significant was arbitrary and without any explanation or rationale. *Id.*, p. 61. Mittal argued that Commerce’s conclusion was capricious and absurd because it suggested that a difference in COP of 7-12 percent was not “significant.” *Id.*, p. 62.

Mittal further submit that the analysis underlying Commerce’s decision was flawed. It pointed to three problems with the analysis: a mistake in the choice of product Control Numbers (“CONNUM”) for the products being compared; the comparison between 2003 and POR costs

should have been between 2003 and 2004 costs; and there is a significant difference between Cost of Manufacture (“COM”) and Direct Materials (“DIR”) costs. *Id.*, p. 63.

Mittal provided several graphs containing trend lines to demonstrate why it believed that the cost increases were clearly significant. Mittal argued that the graphs indicate a clear break in costs and cost trends after December 2003. Reply Brief for Mittal, November 3, 2006, p. 31. It submitted that “in a discipline where the *ad valorem* percentage of dumping margin is carried out to two decimal places, increases in cost of manufacture in the range of 7 to 12 percent . . . must *per force* be considered significant” *Id.*, p. 32.

Finally, Mittal contended that much of Commerce’s and the Domestic Industry’s discussion of “what magnitude of cost change is significant is in the context of declining costs rather than increasing costs.” It argued that “perhaps a decline of 12 percent is not significant, but an increase of 12 percent definitely is . . . because declining costs simply do not pose the same difficulty to a company subject to a dumping order that increasing costs do . . . . Where costs are rising, the respondent cannot go back in time and increase prices for sales already made” *Id.*, p. 33.

Commerce asserted that its determination of what percentage changes in COM rise to the level of significant is not arbitrary, but is instead “consistent with findings in other administrative proceedings and has been affirmed by the CIT.” Commerce submitted that it conducted the analysis correctly, but that even accepting Mittal’s proposed analytical methodology, “the changes in the COM would still be insignificant.” Commerce Brief, p. 30.

Commerce acknowledged that it had not established a specific standard for what would be a significant cost change in this type of case, preferring to analyze the issue on a case-by-case basis. It has, however, in several cases found changes in raw materials prices that resulted in a

twelve percent or less difference in COM to be insignificant. *Certain Steel Concrete Reinforcing Bars from Turkey, Final Results*, 65 Fed. Reg. 67,665 (November 8, 2005); *Certain Pasta from Italy: Notice of Final Results of Antidumping Duty Administrative Review*, 65 Fed. Reg. 77,852 (December 13, 2000) (“*Pasta from Italy*”). It noted that in the *Pasta from Italy* case, the CIT upheld Commerce’s determination about what change was not significant. The court recognized that “there is no bright line standard for determining a significant decline” in prices. Commerce argued that there is likewise no bright line standard for a significant increase. *Id.*, p. 30. In response to a question at the hearing about how exactly Commerce determined that a particular change in costs was significant or not, counsel for Commerce replied that “it relied on our specialists at the Department to tell us.” Counsel went on to confirm that “(W)e have accountants there and we rely on them to tell us, in their expertise in this matter.” Counsel concluded that “When they reviewed this, they determined that this was not significant.” Tr., p. 68.

**a) CONNUMs compared**

Mittal contended that Commerce compared costs for the top-five CONNUMs between 2003 and the POR, but that, in one instance of the five, it erroneously compared two different CONNUMs. After correcting for this error, Mittal asserted that the weighted average increase in COM between 2003 and the POR would have been about 1 percentage point higher than the increase calculated by Commerce. Brief for Mittal, p. 63.

Commerce agreed that it did not use the same CONNUMS in both the 2003 and 2004 portions of the POR, but it argued that that does not mean that its analysis is inappropriate. It contended that its intent was to examine the five highest production value CONNUMS, but that one of the high volume CONNUMS in 2004 was not produced at all in 2003. So it substituted

the next highest overall production volume for 2003. Commerce further asserted that even if Commerce should have used the CONNUMs suggested by Mittal, the difference in the total COM is still not significant. Commerce Brief, p. 33.

The Domestic Industry agreed that Commerce erred in its comparison of one of the CONNUMs, but asserted that this error is insignificant because correction of the error results in an increase to the change of costs calculated by Commerce of less than one percentage point. Industry Brief, p. 27.

On the matter of which CONNUMs were compared, it appears to this Panel that Commerce should have compared the same CONNUMs in both periods, without substitution. However, even after this error is corrected, the overall weighted-average change in COM still falls below the threshold for significance that Commerce was applying to this case.

#### **b) Basis of Comparison**

Mittal contended that Commerce actually compared average costs in 2003 to average costs for the entire POR, when what they said they did and what they should have done was compare costs in 2003 to 2004. Mittal concluded that Commerce's analysis was mis-specified. After correcting for this alleged error, Mittal asserted that the weighted average increase in COM would have been nearly 1.5 percentage points higher than the increase calculated by Commerce. Brief for Mittal, p. 64.

Commerce took the view that its analysis was correctly specified because it was attempting to determine whether using the standard methodology (with a single COP for the entire period) would distort the costs of sales produced in the 2003 portion of the POR. Commerce Brief, p. 32. Again, Commerce noted that even using Mittal's proposed

methodology, the average increase in COM from 2003 to 2004 was still not greater than 12 percent and therefore not significant. *Id.*, p. 47.

This Panel is of the view that Commerce's comparison methodology was reasonable in the circumstances for what it was trying to compare.

#### **c) CONNUM Analysis Results**

When Mittal looked at the average cost premium in 2004 over 2003 for COM on a product-by-product basis, it obtained results that it contended are significant (even though they remain below the range that Commerce has, in previous cases, considered not significant). Brief for Mittal, p. 65.

Commerce noted that even when Mittal assessed the cost increases on a CONNUM-by-CONNUM basis, the results for COM still fell within the seven to twelve percent range that Commerce initially rejected as insignificant. Commerce Brief, p. 32.

The Industry Brief also noted, at p. 27, that even after Commerce's analysis is corrected, the weighted average increase in COM for the 5 largest CONNUMs continues to fall within the range that was calculated by Commerce and found not to be significant.

This Panel is of the view that, even after making the corrections that are appropriate, the average increase in the Cost of Manufacture continues to fall below the threshold that Commerce has determined in this case to be insignificant.

#### **d) Views of the Panel on the Significance of the Cost Increases**

Although Mittal has alleged that Commerce made a number of errors in methodology, its own analysis acknowledged that, even after correcting for these errors, the overall weighted-average change in COM still falls below the threshold for significance that Commerce was applying to this case. Therefore, this Panel is of the view that a remand of any of these issues,

by themselves, to Commerce for correction would serve no useful purpose. By the admission of all parties, it would not result in any change to Commerce's original conclusion that the change in the weighted average COM was below 12 percent.

In the view of the Panel, the crux of the issue is whether Commerce's determination of insignificance in this case (*i.e.*, change in costs of less than 12 percent) is supported by substantial evidence. Although Commerce does not have a clear written policy and there is no "bright line standard" of significance, Commerce has found in several previous cases that similar levels of cost change are not significant. The CIT has upheld Commerce's significance determination in *Pasta from Italy*. While the CIT decision is not binding on this Panel, it is instructive.

Although Mittal has argued that cost increases are more significant than cost decreases of a similar percentage in the context of a company subject to a dumping order, this Panel is not persuaded. It is true that a company usually cannot raise prices retroactively to deal with cost increases that occur after a sale has taken place. But it is also true that a company experiencing declining costs may not be able to keep its prices up high enough in the later stages of a POR, especially in a competitive market environment, to stay above its average POR costs and thereby avoid dumping.

As for Mittal's graphical argument that there was a clear break in the levels and trends of costs between 2003 and 2004, this Panel takes the view that there is a difference between statistical significance and economic significance. While the differences between the average levels and trends of costs in 2003 and 2004 may have been statistically significant, that merely means that they were different from zero at some specified level of confidence. But Commerce properly focussed its analysis, in this Panel's view, on whether the difference in cost was

important enough to warrant splitting the cost of manufacture into two or more periods instead of applying Commerce's normal practice of a single COM for the entire POR.

This Panel has more difficulty with Commerce's justification that increases in costs of less than 7 percent or even less than 12 percent are not significant. In its determination, Commerce has merely stated its conclusion about the significance of the results in this case compared to previous like cases but unsupported by any reasoned analysis of relevant factors specific to this case. It has not shown that it has given reasoned consideration to all material facts and issues and it has not articulated a rational connection between the facts found and the decision made. Consequently, this Panel is unable to assess in any meaningful way whether Commerce's decision that the cost increases in this case were not significant was reasonable.

This Panel, therefore, remands the question of the significance of the cost increase back to Commerce for a reasoned explanation of its decision, based on the record and corrected for any errors in calculation of costs that may have been made in the original decision. At a minimum, the revised determination should include a description of the criteria that Commerce applied and an explanation of how Commerce decided on the significance or lack thereof of the cost increases in this case.

### **3. Consistency of Cost Increases**

The Domestic Industry argues that Commerce, in order to meet all of its tests for deciding whether to split the cost period, must also examine whether the changes in cost over time were consistent – that is changing sharply in one direction or another. Using a table of monthly raw material unit costs, the Domestic Industry argues that there was actually considerable fluctuation in the direction of change of costs for three of the four of Mittal's principal raw materials from month to month during the POR. It argues that these costs did not

exhibit a consistent pattern of increasing costs. It concludes that Commerce's "decision not to allow Mittal's request to split the POR into two cost periods was proper and was consistent with the Department's policy." Industry Brief, pp. 29-30.

Although the Domestic Industry emphasized the need for consistency of cost changes during the POR and argued that they were not consistent in this case, Commerce itself made no such argument in its brief. At the hearing, Commerce did confirm that consistency is one of the tests that it applies in deciding whether to split the POR into more than one period for determining COP, and it asserted that Mittal did not meet that test or any of the others, but it did not provide a detailed rationale. Tr., p.64.

In the opinion of this Panel, there is more than one way to interpret consistency. The Domestic Industry suggests that consistent change means that there was a change in costs in the same direction in every month of the POR. If this is the test, Mittal clearly failed to meet it. An alternative approach, however, would be to compare average cost levels in one period with the average cost levels in another, across all products in the range of subject goods. Under this latter definition of consistency, the COM for Mittal appears to have met the test for consistent change. Commerce has not, however, clearly spelled out what its test of consistency is to allow this Panel to understand whether it is reasonable and whether Mittal has met it.

This Panel is of the view that the application of a consistency test as one of several tests to determine whether it is appropriate to sub-divide a standard 12 month period of review is a reasonable interpretation of Commerce's mandate. However, it is not entirely clear from either its Final Decision Memorandum or Commerce's arguments to this Panel what Commerce's consistency test is. Moreover, this Panel is not persuaded that a test that requires changes in costs in the same direction in each and every month of a two-segment period of review is a

reasonable application of the statute. Accordingly, this Panel remands this matter back to Commerce to clarify what is its test for consistent cost increases in this case, to explain why that test is reasonable, and to determine whether Mittal's costs met that test.

#### **4. Pass Through of Cost Increases**

Mittal contends that the fact that it issued surcharges commencing in January 2004 to its customers to offset the higher costs for materials in 2004 responds to Commerce's concern that "sales transactions in this case cannot be tied directly to costs in a particular portion of the POR." Brief for Mittal, p. 67. It acknowledged that the formula and the choice of index for the surcharge are decided during negotiations with each customer. *Id.*, p. 68. Mittal asserts that the existence of the surcharges demonstrates that the test applied in *Brass Sheet and Strip from the Netherlands, Final Results*, 65 Fed. Reg. 742 (January 6, 2000) ("*Brass Sheet and Strip*") is met in this case. *Id.*, p. 69.

Responding to opposing arguments, Mittal asserted that surcharges are "identical to price increases," because they obviously raise the price paid by the customer. It also contended that "if 'absolute lockstep' is the test that Commerce has established, it is one that is virtually impossible to meet." Reply Brief for Mittal, p. 29.

Mittal also argued that whether the costs were "passed on" should not be relevant at all to the issue of the number of cost periods. It asserts that the crux of the issue is whether the cost increases were significant enough to warrant splitting the POR into different periods. *Id.*, p. 30.

Commerce argued that it departed from its standard methodology in *Brass Sheet and Strip* because "the price of the raw-material inputs was a direct pass-through item" (the respondent purchased the input metals on the customers' behalf and billed them for the inputs) "and it could be tied directly to each related sales transaction." In that case, Commerce

contended, “the respondent was able to demonstrate that its monthly cost and price fluctuations were in absolute lockstep with one another.” Unless “the increased costs are actually related to particular sales prices, simply splitting the cost averaging period and comparing the average costs in that shorter period to the prices on sales in that same shortened period, may result in comparisons that are less accurate than using single weighted average POR costs.” Commerce Brief, pp. 34-35.

The Domestic Industry argued that a direct pass through of input material costs (or prices) to the final customer is a key distinction between this case and *Brass Sheet and Strip*. It noted that a direct pass through of the price of metal is common in the brass industry and the prices for brass sheet and strip generally consist of separate metal price and a separate price for fabrication. It made the further point that in *Brass Sheet and Strip*, Commerce continued to use the POR weighted-average costs for the remainder of the non-metal components of the COM. Industry Brief, p. 19.

The Domestic Industry also argued that the indexes and formulas used to calculate the amounts of surcharges were not based on Mittal’s actual costs and differed across customers. It concluded that Mittal failed to tie changes in its cost of materials to individual sales transactions. *Id.*, pp. 36-39.

Commerce described its linkage test as one in which the increased costs of the direct material inputs can be tied directly to the specific sales transactions. Although it does not describe precisely how this linkage test is defined or how it would be applied, it referred favorably to the direct lockstep between costs and prices demonstrated in *Brass Sheet and Strip*. This Panel is not persuaded that the test of “absolute lockstep” between costs and prices is a reasonable application of the statute given the different methods of price setting in different

industries. We note that there is no requirement for, or presumption of, lockstep matching of costs and prices in Commerce's standard 12 month POR. Without further explanation from Commerce, it appears to the Panel that it was unreasonable for Commerce to reject a price increase merely because it is imposed as a surcharge or even because it is negotiated on a case by case basis.

Accordingly, this Panel remands this matter back to Commerce to provide a reasoned description and explanation of its linkage test and to provide a reasoned explanation of whether Mittal has actually met the test in its proposed two shorter cost periods.

##### **5. Conclusion of the Panel on Split of Cost of Production**

In sum, on the issue of the significance of the actual cost increases, however, the Panel remands this matter back to Commerce for a reasoned explanation of its decision based on the record and corrected for the errors in calculation of costs that were made in the original decision. At a minimum, the revised determination should include a description of the criteria that Commerce applied and an explanation of how Commerce decided on the significance, or lack thereof, of the cost increases in this case.

On the issue of the consistency of the cost increases between the two cost periods proposed by Mittal, this Panel remands this matter back to Commerce to clarify what is its test for consistent cost increases in this case, to explain why that test is reasonable and to provide a reasoned explanation of whether Mittal's costs met that test in this case.

Finally, on the issue of the linkage between changes in costs and prices, this Panel also remands this matter back to Commerce to provide a reasoned description and explanation of its linkage test, to apply that test to the costs and prices in this case, and to provide a reasoned

explanation of whether Mittal has actually met this linkage test in its proposed cost periods in this case.

In respect of all other matters not remanded above but raised by Mittal under the heading of “Split Cost of Production,” the decision of Commerce is affirmed.

### **C. Was CEP Profit Overstated?**

Mittal claimed that Commerce erred by overstating the amount Commerce calculated as profit in determining the Constructed Export Price (“CEP”). CEP sales are generally sales made in the United States by companies affiliated with the foreign exporter (producer) or where the sale is made after importation into the United States. Export Price (“EP”) is determined by looking at sales to unaffiliated importers. Here, Mittal reported some sales made by its affiliated companies. The applicable statute, 19 U.S.C. § 1677a(c) and (d), provides for certain adjustments to be made to CEP.<sup>38</sup> One of those adjustments is that a certain amount for profit

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<sup>38</sup> These provisions, in pertinent part, state:

- (c) Adjustments for export price and constructed export price. The price used to establish export price and constructed export price shall be-- . . .
  - (2) reduced by--
    - (A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States, and
    - B) the amount, if included in such price, of any export tax, duty, or other charge imposed by the exporting country on the exportation of the subject merchandise to the United States, other than an export tax, duty, or other charge described in section 1677(6)(C) of this title.
- (d) Additional adjustments to constructed export price. For purposes of this section, the price used to establish constructed export price shall also be reduced by - - . . .
  - (3) the profit allocated to the expenses described in paragraphs (1) and (2).

will be deducted from CEP. *See, e.g.*, 19 U.S.C. § 1677a(d)(3). Where there are CEP sales, Commerce’s regulations require a calculation of imputed “CEP profit.” *See*, 19 C.F.R. §351.402(d).<sup>39</sup> Commerce calculated the profit ratio as a proportion of sales revenues in this matter to be 27 percent.

Mittal advanced several arguments as to why Commerce erred. First, Mittal claimed that a 27 percent profit is unreasonable. Second, it claimed that Commerce’s calculation of CEP Profit is overstated and does not meet the standard of review applicable in this matter basically for three reasons: 1) because EP sales were used to calculate the ratio, 2) because home market sales to affiliates were not included in the CEP calculation, and 3) because Commerce changed a portion of the Canada to United States freight to further manufacturing costs.

Both Commerce and the domestic respondents have urged the Panel to conclude that Commerce’s calculation of the CEP profit ratio was consistent with the statute and with Commerce’s practice and was not unreasonable. We have considered the arguments presented in the respective briefs of all the participants, as well as the arguments made by counsel for the

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<sup>39</sup> This regulation, in pertinent part, states:

**§351.402 Calculation of export price and constructed export price; reimbursement of antidumping and countervailing duties.**

. . . .

(d) *Special rule for determining profit.* This paragraph sets forth rules for calculating profit in establishing constructed export price under section 772(f) of the Act.

(1) *Basis for total expenses and total actual profit.* In calculating total expenses and total actual profit, the Secretary normally will use the aggregate of expenses and profit for all subject merchandise sold in the United States and all foreign like products sold in the exporting country, including sales that have been disregarded as being below the cost of production. (*See* section 773(b) of the Act (sales at less than cost of production).

. . . .

participants at the hearing held in this matter in order to determine whether Commerce erred in its calculation of CEP profit. Our analysis follows.

### **1. Is The Profit Rate Reasonable?**

The essence of Mittal's assertion that Commerce's calculation of a profit of 27 percent was unreasonable flows from its reliance upon newspaper reports provided to Commerce that it maintains show that the normal profit in the "industry" is only 10 percent. As well, in response to questions at the hearing, Mittal noted that its overall corporate profitability in 2002 and 2003 ranged between only 3 and 6 percent. Tr., p. 110. Candidly, however, Mittal acknowledged that there is nothing in the United States antidumping law that sets a maximum ceiling for the level of profit that Commerce may deduct from CEP sales prices. Brief for Mittal, pp. 71-72.

Nevertheless, Mittal attempted to anchor its argument with an "analogy" to the limitation set forth in another provision of the antidumping laws, 19 U.S.C. §1677b(e), which deals with constructed value.

Mittal's comparison contradicted a well-established rule of statutory construction. "It is well-established that when Congress has included specific language in one section of a statute but has omitted it from another related section of the same act, it's generally presumed that Congress intended the omission." *Torrington v. United States*, 881 F. Supp. 622, 638 (Ct. Int'l Trade 1995) (citing *Rusello v. United States*, 464 U.S. 16, 23 (1983)). Moreover, the statute applicable here makes clear that whenever possible the CEP profit should be calculated on the basis of the

respondent's data. *See* 19 U.S.C. §1677a(f)(2)(C).<sup>40</sup> This is precisely what Commerce relied upon here.

As Commerce observed in its Brief, at p. 38:

Ispat's [Mittal's] reference to irrelevant "facts" does not help its argument. Specifically, Ispat cites two articles for the proposition that a profit of 27 percent is not what is "normally realized" in the industry. Br., at 72 and Exh. 5a. As noted above, nothing in the statute or the regulations on CEP profit directs Commerce to base its analysis upon what is "normally realized in the industry." See generally, 19 U.S.C. § 1677a(f); and 19 C.F.R. §351.402(d). Moreover, these articles are contradicted by Ispat's own experience in the market. Ispat's brief lists the profit for EP sales, which is *higher* than the 27 CEP profit ratio. Because Congress' intent is that the constructed export price is now calculated to be, as closely as possible a price corresponding to an export price," the fact that Ispat's EP sales have a higher profit demonstrates that a CEP profit of 27 percent is not unreasonable.

We regard Commerce's argument as persuasive.

Accordingly, on the basis of the record here, in our view, Mittal has failed to demonstrate that Commerce's calculation was either not supported by substantial evidence or that

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<sup>40</sup> 19 U.S.C. § 1677a(f)(2)(C) provides that:

(C) Total expenses

The term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:

- (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
- (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.
- (iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

Commerce's calculation of profit was not in accordance with the applicable statutory requirements. Mittal has not shown that profit margins in the range of 27 % are unreasonable.

## **2. What United States Sales Should be Included in the Calculation of CEP Profit?**

Mittal claimed that the CEP profit rate is overstated because Commerce included Mittal's EP sales in the profit rate calculations. Mittal acknowledged that this issue has been addressed by the CIT, the United States court having jurisdiction to review decisions involving the antidumping statutes. Mittal argues that this Panel, since it stands in the "shoes" of both the CIT and Federal Circuit, is not bound by the prior decisions of the CIT (citing *NTN Bearing Corporation v. United States*, 186 F. Supp. 2d 1257 (Ct. Int'l Trade 2002) ("*NTN Bearing*")) and should reject Commerce's decision to include EP sales. Mittal maintains that to do so has the "unintended effect of actually comparing U.S. prices to other U.S. prices." Brief for Mittal, p.74.

This Panel is of the view that Commerce correctly complied with the applicable statutory requirements. Under 19 U.S.C. § 1677a(f)(2)(C)(i), the term "total expenses" means "expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country." Here, the merchandise includes both EP and CEP sales. The reasoning of the CIT in the *NTN Bearing* decision is persuasive. Additionally, Commerce's inclusion of EP sales bears further support from the SAA, where it is explained at p. 824 that:

total expenses are all expenses incurred by or on behalf of the foreign producer and exporter and the affiliated seller in the United States with respect to the production and sale of the first of the following alternatives which applies: 1) subject merchandise sold in the United States and the foreign like product sold in the exporting country . . . .

Inasmuch as "total expenses" encompass both EP and CEP sales, where a respondent such as Mittal makes both EP and CEP sales, "sales of the subject merchandise," encompasses both types of transactions.

Consequently, we conclude that Commerce acted reasonably and in accordance with the statutory requirements by providing that the CEP profit calculation made in this matter included expenses resulting from Mittal's EP sales as well as from its CEP and home market sales.

### **3. Were Home Market Sales that Fail the Arm's Length Test Properly Excluded from the CEP Profit Calculation?**

Mittal took issue with Commerce's decision in the context of "CEP profit calculation," not "in making price-to-price comparisons," to disregard Mittal's sales to affiliated customers in the home market. Commerce determined that these sales were not at arm's length. Brief for Mittal, p. 74. Mittal complained that it was wrong to disregard such sales when calculating CEP profit because, "by disregarding the sales to affiliates the profit of" those sales is not included in the CEP profit calculation and the expenses relating to the sales are excluded from the denominator of the calculation." *Id.*, p. 75. It went on to state that "[t]his affects both the amount of profit used as well as the ratio used to calculate CEP profit and distorts – by increasing– the actual profit allocable to the CEP sales. To correctly calculate CEP profit, all profits and all expenses in the home market must be included in the calculation." *Ibid.*

Mittal encapsulated its contention that Commerce erred by arguing that Commerce did not follow its own regulations and its reasoning is contrary to a decision of the CIT. *Ibid.* However, the regulation that Mittal relies upon, 19 C.F.R. §351.402(d)(1)<sup>41</sup> must be

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<sup>41</sup> 19 C.F.R. §351.402(d)(1), in pertinent part, provides:

In calculating total expenses and total actual profit, the Secretary normally will use the aggregate of expenses and profit for all subject merchandise sold in the United States and all foreign like products sold in the exporting country, including

(continued...)

read in its proper context. Examination of 19 U.S.C. § 1677a(f)(2)(C) discloses that (emphasis added):

The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country *if such expenses were requested by the administering authority for the purpose of establishing normal value* and constructed export price.

Although Commerce may have requested Mittal to file such expenses in its questionnaires, they were not used by Commerce in establishing normal value and therefore they do not fall within the scope of relevant expenses in the regulation.

Additionally, as is made clear from the text of the regulation, there is no requirement that Commerce “always” use the aggregate of expenses and profit sold in the exporting country. The regulation states that Commerce will “normally” do so, however, in situations where the sales are not at arm’s-length, there is room for Commerce to disregard such sales. Commerce acted reasonably in doing so here. Commerce followed past practice to exclude sales that failed the arm’s length test as evidenced by at least three prior antidumping proceedings referenced in the decision of Commerce under review here.<sup>42</sup>

Also, examination of the CIT decision relied upon by Mittal, *Torrington v. United States*, 973 F. Supp. 164 (Ct. Int’l Trade 1997), *aff’d*, 127 F.3d 1077 (Fed. Cir. 1997) (“*Torrington*”), suggests instead, contrary to Mittal’s claim that the court’s reasoning supports its position, that here Commerce properly determined that sales outside of the ordinary course of trade were not an appropriate measure of actual profit (or loss). In *Torrington*, the CIT remanded the case to Commerce to determine a proper methodology for calculating constructed value profit in the

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(...continued)

sales that have been disregarded as being below the cost of production.

<sup>42</sup> See Issues and Decision Memorandum, p. 20; 71 Fed. Reg. 3822 (Jan. 24, 2006).

absence of cost of production data where related party sales were not made at arm's length. Thus, we agree with Commerce that Mittal's reliance upon *Torrington* is unfounded.

Consequently, we conclude that Commerce acted reasonably and in accordance with the statutory requirements when it excluded from the CEP profit calculation home market sales to affiliates that were not made at arms-length.

#### **4. Did Commerce Err in Classifying Freight Expenses from the United States – Canadian Border to the United States Further Processor as Further Manufacturing Expenses?**

Mittal challenged Commerce's decision to treat the U.S. portion of freight costs of the goods involved here that were shipped to U.S. further processors, and borne by Mittal, as a cost of further manufacturing. While Commerce treated the expense incurred from the warehouse to the border as a movement expense, it considered the expense from the border to the further processor as a "cost of further manufacturing." Mittal contended that this improperly increased the CEP profit component of the sales because further manufacturing costs are a part of the numerator of the CEP profit calculation. Mittal opined that if the processor had incurred the expense, rather than Mittal, then Commerce would have been correct in considering the expense to be part of the manufacturing expense. Brief for Mittal, pp. 77-78. Further, Mittal postulated that because Commerce has not been consistent in its past administrative treatment of freight from the Canadian border to a United States processor the reasoning to do so in this case fails to meet the applicable standard of review and must be erroneous. Mittal based this claim on the fact that in a decision issued in 2004 Commerce stated:<sup>43</sup>

[I]t is not the Department's current practice to treat freight expense from the port to the U.S. further processor as further processing expenses. Irrespective of the decisions . . . {cited by petitioners}, in the more recent HR from the Netherlands,

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<sup>43</sup> Certain Corrosion-Resistant Carbon Steel Flat Products from Canada, 69 Fed. Reg. 2566 (Jan. 16, 2004); Issues and Decision Memorandum at 23.

as cited by {[respondent]}, the Department has determined that freight to warehouse charges are considered movement expenses by the Department. It is not the Department's normal practice to include such movement expenses within the calculation of selling expenses used to calculate CEP profit.

Brief for Mittal, p. 78.

In the decision under review here, Commerce acknowledged the above departure from its previous practice, but stated that: "looking at the totality of precedent on this topic, we believe the Department's determination in *Stainless Steel Sheet from France* [70 Fed. Reg. 7240 (Feb. 11, 2005)], which was published in 2005, best reflects our current practice." Commerce Brief, p. 45.

During the hearing in this matter on May 24, 2007, counsel for Commerce, without refutation from Mittal, advised the panel that the practice of treating freight expenses from the border to the United States processor as a manufacturing expense, had been consistently applied prior to 2004, at least as far back as 1995, citing to *Grey Portland Cement and Clinker from Japan*, 60 Fed. Reg. 43761 (Aug. 23, 1995) ("*Grey Portland Cement*"). Tr., pp. 77-78.

In *Grey Portland Cement* it was stated that:

[I]t is the Department's established practice to attribute all costs incurred after a product has arrived in the United States to U.S. production costs when the product is further-manufactured in the United States. . . . Additionally, Onoda correctly cites the COP/CV section of the questionnaire in explaining that in the home market, the expense of transporting the material to the factory is defined as part of the cost of materials which is then incorporated into the cost of manufacturing. This is done so that the cost of materials and therefore, the cost of manufacturing reflects all the expenses incurred during the production process. Similarly, in further-manufacturing situations, the cost of transporting the cement from the U.S. port to the U.S. factory is included under 'process of production' expenses used to determine U.S. value added in order to accurately reflect all expenses incurred during the further-manufacturing process.

Consistent with our established practice, we included freight expense from the U.S. port to the U.S. plant in the U.S. further manufacturing costs in establishing the relationship between U.S. further manufacturing costs and total costs of the merchandise.

60 Fed. Reg. at 43768.

Here, Mittal was well informed through the questionnaire it received of Commerce's treatment of such freight expenses as a cost of manufacturing. See Department of Commerce Questionnaire at E-8 and E-9. Commerce explained in its decision in this matter that counting the freight to a further processor as part of the cost of manufacturing on United States sales was symmetrical with the way Commerce treats such costs in the home market. Issues and Decision Memorandum, p. 5.

Stripped to its core, Mittal's claim of error here rests upon a narrow reed, based upon its claim that Commerce's decision regarding how to treat freight within the United States to a United States processor is not supported by an unbroken chain of consistent administrative practice. For the reasons that follow, that reed cannot sustain the load of Mittal's arguments.

Mittal relied upon court decisions which essentially hold that if Commerce "intends to depart from a prior position . . . it must give its reasons for doing so, thereby allowing the [reviewing] Court [panel] to 'understand the basis of the agency's action and . . . judge the consistency of that action with the agency's mandate.'" Brief for Mittal, p. 79, quoting *Hoogoven Stall BV v. United States*, 4 F. Supp. 2d 1213, 1217 (Ct. Intl' Trade 1988), quoting *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

Although "[a]n agency interpretation which conflicts with the agency's earlier interpretation 'is entitled to considerably less deference' than a consistently held agency view" (*I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting from *Watt v. Alaska*, 451 U.S.259, 273 (1981)), in this case we have what appears to be a short-lived, unexplained failure by Commerce in 2004, in an administrative matter that is not being reviewed here, to follow an

articulated and consistent practice that goes as far back as at least 1995.<sup>44</sup> Therefore, unless we conclude that Commerce failed to meet the appropriate standards of review with respect to its decision to treat the freight expense in the United States as a cost of manufacture, we should affirm that decision.

When as here, Commerce has “special expertise” and is considered the “master of antidumping law,” *see Micron Tech.*, 117 F.3d at 1394, and “reviewing courts [panels] must accord deference to the agency in its selection and development of proper methodologies,” *Thai Pineapple*, 187 F.3d at 1365, this Panel, absent a finding of error by the agency in statutory construction or conclusion that the agency has acted unreasonably with respect to this issue, should not substitute its reasoning for that of the agency. Moreover, we should not substitute our reasoning, even if we conclude that there is more than one reasonable way to treat the freight expense.

Based upon consideration of all the arguments made by the parties, we conclude that Commerce’s decision to treat freight from the United States border to the United States processors as a manufacturing expense was neither contrary to statutory authority nor unreasonable.

## **5. Conclusion of the Panel on CEP Profit**

In sum, after considering the arguments presented in the respective briefs of all the participants, as well as the arguments made by counsel for the participants at the hearing held in

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<sup>44</sup> In other words, a panel reviewing the decision involved in the 2004 matter might justifiably maintain that in the absence of an articulated and well justified explanation for the departure by the agency from its long standing prior practice, a remand there would be necessary before the panel could pass upon the propriety of that decision. Here we have the benefit of the agency’s rationale in the decision at hand and in the earlier consistent decisions.

this matter, the Panel concludes that Commerce did not err in its calculation of CEP profit and we affirm its determination.

**D. Did Commerce Err in its Use of Negative Net Prices On CEP Sales in the Margin Calculations?**

Mittal contended that Commerce erred in including in the margin calculation 51 CEP sales by Mittal's U.S. affiliate(s) that included deductions for further manufacturing costs that resulted in negative net prices. The prices became negative in Commerce's dumping calculations as a result of deduction of actual and imputed expenses, such as CEP profit.

Mittal argued that for these 51 sales, in which the U.S. net price became less than zero, *i.e.*, negative, Commerce should either have applied the so-called "special rule" for further manufactured items because the value added in the United States was "significant," exceeding a presumptive threshold of 65% of the total value of the property, or zeroed those sales.

Mittal asserted that the use of negative U.S. prices penalized Mittal twice since the negative prices increased the numerator of the margin calculation, and, at the same time, reduced the denominator, in effect, so Mittal asserted, double-counting the negative values.

Mittal acknowledged that in *RHP Bearings, Ltd. v. United States*, 288 F.2d 1334, 1345-1346 (Fed Cir 2002), the Federal Circuit held that the application of the special rule is discretionary with Commerce as long as it acts reasonably in the exercise of that discretion. Mittal asserted, however, that Commerce's refusal to apply the special rule was unreasonable, as manifested by evidence that in every one of the 51 sales where U.S. prices were below zero, the cost of further manufacturing or assembling in the United States was far in excess of 65% of the sales price. Brief for Mittal, p. 82.

Commerce responded that the statute provides that the dumping margin is the "amount by which the Normal Value exceeds the export price [EP] or constructed export price [CEP] of the

subject merchandise.” 19 U.S.C. § 1677(35)(A). The margin is calculated by taking the sum of the difference between the Normal Value and the U.S. price (U.S. price includes both EP and CEP sales). The sum is then divided by the U.S. price.

Commerce explained that negative CEP sales lower U.S. prices in both the numerator and the denominator. It stated that although negative price is counted in both the numerator and denominator, it does not follow that there is double-counting. What occurred in this case is the result of following the commands of the statute, and results from Commerce following the commands of the statute.

Commerce stated that Congress added the special rule that allows alternative means of determining CEP when the value added in the United States is “likely to exceed substantially the value of the subject merchandise.” 19 U.S.C. § 1677(a)(e). Commerce continued that the special rule was designed to alleviate “the enormous burden on Commerce if it were required to ‘back out’ from the price of the [further manufactured goods] all of the value added in the United States to work back to the constructive export price of the [subject merchandise],” citing SAA, p. 825. Congress, Commerce asserted, reiterated that its purpose for the special rule is to save “Commerce the considerable effort of measuring precisely the U.S. value added.” *Id.*

Commerce argued that the special rule is normally invoked at the outset of proceeding when Commerce is deciding whether it would be burdensome to collect the data on the value added and then back it out of the price to work back to CEP. In this case, however, Mittal reported all the applicable value added expenses at the beginning of this proceeding, and Commerce determined that it would not be burdensome to calculate CEP. Accordingly, there was no need to resort to other “surrogates for the CEP, as provided under the special rule.” Commerce Brief, p. 50.

In all events, Commerce pointed out that in the “preambulatory language” of the regulations, it is stated that because the purpose of the special rule is to reduce the administrative burden on the Department, “the Department retains the authority to refrain from applying the special rule in those situations where the value added, while large, is simple to calculate.”<sup>45</sup>

The preamble also states that the Department “does not intend that its bright-line standard [of 65%] operate as an irrebuttable presumption for all cases,” and it retained the authority to “use a different threshold where it is satisfied, based on the facts, that a different threshold is more appropriate in a particular case. *Id.* at 27353.

We agree with Commerce that it did not abuse its discretion in determining that it would not be burdensome to calculate the value added for these sales and in declining to apply the special rule in this case.

Mittal provided all the necessary value-added information enabling Commerce to remove the costs for further manufacturing and calculate the CEP.

In sum, after considering the arguments presented in the respective briefs of all the participants, as well as the arguments made by counsel for the participants at the hearing held in this matter, the Panel concludes that Commerce did not err in its use of negative net prices on CEP sales in the margin calculations and we affirm its determination.

#### **IV. Remand Order**

On the issue of the permissibility of zeroing, the Panel remands this matter back to Commerce to re-calculate Mittal’s dumping margins without zeroing.

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<sup>45</sup> Antidumping Duties: Countervailing Duties: Final Rule, 62 Fed. Reg. 27296, 27352 (Department of Commerce, May 19, 1997 (Preamble)).

On the issue of the significance of the actual cost increases, the Panel remands the question of the significance of the cost increase back to Commerce for a reasoned explanation of its decision, based on the record and corrected for any errors in calculation of costs that may have been made in the original decision. At a minimum, the revised determination should include a description of the criteria that Commerce applied and an explanation of how Commerce decided on the significance or lack thereof of the cost increases in this case.

On the issue of the consistency of the cost increases between the two cost periods proposed by Mittal, this Panel remands this matter back to Commerce to clarify what is its test for consistent cost increases in this case, to explain why that test is reasonable and to provide a reasoned explanation of whether Mittal's costs met that test in this case.

On the issue of the linkage between changes in costs and prices, this Panel also remands this matter back to Commerce to provide a reasoned description and explanation of its linkage test, to apply that test to the costs and prices in this case, and to provide a reasoned explanation of whether Mittal has actually met this linkage test in its proposed cost periods in this case.

Commerce is further directed to issue its Final Re-determination on Remand within forty-five days from the date of this Panel Decision.

**V. Dissenting View of Panelists Barr and Liebman Concerning the Majority Opinion to Remand to Commerce Its Decision to Apply Zeroing**

We would affirm Commerce's use of zeroing in this case for reasons which are set out below.

Mittal argues that under the *Charming Betsy* (*Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch.) 64 (1804)) canon of statutory construction, zeroing is no longer a reasonable interpretation of the section 1677(35)(A) of the Tariff Act of 1930, as amended, 19 U.S.C. §

1677(35)(A) (“Tariff Act”), because zeroing has been found to be inconsistent with the international obligations of the United States under Article 2.4 and/or Article 9.3 of The GATT Antidumping Agreement (The Agreement on Implementation of Article VI of GATT (Apr. 15, 1994) reprinted in H.. Doc. No. 103-316, vol. 1, at 1445 (1994)) (“ADA”) by several recent World Trade Organization Appellate Body (“WTO AB”) decisions: Bed Linen from India (WT/DS144/AB/R-Mar. 12, 2001)); Hot Rolled Steel from Japan (WT/DS184/AB/R-Aug. 23, 2001); Corrosion Resistant Carbon Flat Steel from Japan (WT/DS244/AB/R Dec. 15, 2003); Softwood Lumber from Canada (WT/DS264/AB/R-August 11, 2004); U.S. zeroing Europe (WT/DS294/AB/R-Apr. 18, 2006); Softwood Lumber from Canada (WT/DS264/AB/RW-Aug. 15, 2006); U.S. Continued Zeroing Europe (WT/DS/322/12-Oct. 11, 2006 and U.S. zeroing-Japan (WT/DS322/AB/R--January 9, 2007).

Second, Mittal says that zeroing produces inaccurate margins of dumping in contravention of the basic purpose of the antidumping statute which it says is to determine margins as accurately as possible.

Third, with Commerce’s recent decision to no longer apply zeroing in some circumstances (See Notices of Determination under Section 129 URAA; 70 Fed. Reg. 22636 (May 2, 2005); 72 Fed. Reg. 25261 (May 4, 2007)), the application of zeroing in the present case is arbitrary and capricious in contravention of the Administrative Procedures Act (“APA”).

Mittal therefore urges the Panel to remand the case to Commerce with instructions to re-determine Mittal’s margins of dumping without zeroing.

Commerce and U.S. Industry counter that zeroing is a long established practice whose application has been consistently upheld for many years by the United States Court of International Trade (“CIT”) and the United States Court of Appeals of the Federal Circuit

(“CAFC”). Specifically, they say the recent decisions of the CAFC in *Timken Company v. United States*, 354 F.3d 1334 (Fed Cir. 2004) (“*Timken*”) and *Corus Staal B.V. v. United States* 395 F.3d 1343 (Fed Cir. 2005), *reh’g en banc denied*, May 18, 2005, *cert. denied*, \_\_\_U.S.\_\_\_, 126 S. Ct. 123, 163 L. Ed 2d 853 2006) (“*Corus*”) are controlling of the present case. In their view whether zeroing is consistent with the ADA agreement or not is irrelevant because Congress has expressly excluded AB decisions and WTO agreements from having any effect on U.S. law “unless and until” adopted under certain consultative mandates set out in the Uruguay Round Agreements Act, P.L. 103-465, 108 Stat. 4809 (December 8, 1994) (“URAA”) . Finally they aver that the APA issue is not properly before the Panel.

#### **A. Zeroing, Charming Betsy and the WTO**

In order to succeed in this case, Mittal must overcome the fact that the CAFC in *Timken* and *Corus* reaffirmed the reasonableness of Commerce’s use of zeroing in the face of many of the same AB decisions which Mittal puts forward in support of the proposition that zeroing as practiced by Commerce is a violation of the ADA. Mittal puts forward a narrow distinction of *Timken* and *Corus* but says that in any event *stare decisis* does not compel us to follow them.

First in this regard it argues that we have concurrent jurisdiction with the CAFC and are therefore not bound by its rulings. Alternatively it argues that *stare decisis* does not preclude inferior courts from overturning or refusing to follow “unworkable or badly reasoned decisions” (“Reply Brief of Complainant, November 3, 2006, p. 2 (“Mittal Reply”)), by which it presumably means *Corus* and *Timken*.

Given that the almost 20 year history of the Chapter 19 process, we find it surprising that the role and status of binational panels (“Panels”) relative to domestic courts is still an issue. A review of several early panel decisions under the Canadian United States Trade Agreement

(“CUSTA”) and the North American Free Trade Agreement (“NAFTA”) [*Bituminous Pavers* USA-89-1904-03; *Color Picture Tubes* USA-95-1904-03, p. 2; *Corrosion Resistant Carbon Steel* USA-97-1904-03, p.5; *Brass Sheet and Strip* USA-CDA-98-1904-03, p.11 n. 14; *Pure Magnesium* USA-CDA-2000-1904-06, p. 8; *Alloy Magnesium* USA-CDA-2003-1904-02, p. 19; *Durum Wheat* USA-CDA-2003-1904-05, p. 17] indicates that previous panels have regarded themselves bound by CAFC precedent. Unfortunately to the extent that any of these earlier panels addressed reasons to the point, they were content to merely cite NAFTA articles 1904.2 or 1904.3 without elaboration. It is therefore open to this Panel to reconsider that position in light of a more fulsome consideration of the issues particularly as it touches upon our very mandate.

We do not think the majority’s description of Panels as “virtual” courts is helpful and regard their views regarding the motivations behind the Anderson testimony about the role of Panels as speculative. See hearing before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary on the United States-Canada Free Trade Agreement, April 28, 1988, Serial No. 60, 100<sup>th</sup> Congress, 2<sup>nd</sup> Sess.; Hearings before the Senate Committee on the Judiciary, United States Senate, May 20, 1988, Serial No. J-100-62, S. Hrg. 199-1081. We do agree with our colleagues in the majority that Panels are meant to *replace* the domestic judicial review process in its entirety. That being so, we also agree with them that there is no reason in the language of the Treaty or the NAFTA Implementation Act to conclude that the Panel’s role is limited, *per se*, to that of one part of that domestic review process, namely the CIT.<sup>46</sup>

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<sup>46</sup> In a separate dissenting opinion, Panelist Liebman sets forth his additional views that when the CAFC has ruled on an issue, the decision of the CAFC should be followed because the Panel is required to apply the general legal principle of *stare decisis*, which is applicable under NAFTA, Art. 1904.2. See Panel Determination, above, p. 4.

However, we disagree with the majority in the capacity of Panels to depart from established CAFC precedent. In our view such precedents ought to be followed unless there are exceptional circumstances to the contrary. It would be so even if we stood in the shoes of the CAFC itself. See *Randall v. Sorrell*, \_\_\_US \_\_\_, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006). It is particularly so given the political history that attended the establishment of the Panels (ably described by the majority subject to our comments about motivation above) and the caution expressed by the Extraordinary Challenge Committee in the Live Swine case. *In the Matter of Live Swine from Canada*, ECC-93-1904-01USA, April 8, 1993.

It is unnecessary for us to define the circumstances under which a Panel may depart from CAFC precedent, because, in any event, we are persuaded by the reasoning of the Timken line of cases as they pertain to the continued appropriateness of zeroing under the Tariff Act in light of the various WTO AB rulings against zeroing in its various manifestations.

Accordingly we would uphold Commerce's continued use of zeroing unless and until modified pursuant to the URAA for similar reasons to those expressed in the Timken line of cases as well as the additional reasons set out below.

In *Timken* the CAFC affirmed a CIT decision upholding zeroing in an administrative review. The Court rejected a *Charming Betsy* inspired attack on zeroing based on the WTO AB decision in EC-Bed Linen review case (WT/DS141/AB/R (March 1, 2001)). Under the *Charming Betsy* canon of statutory construction, U.S. statutes are to be interpreted in a manner consistent with the international obligations of the United States, unless there is clear legislative command to the contrary. See *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75, 108 S. Ct. 1392, 1397-98; 99 L. Ed. 2d 645, 654-55.

Relying on the *Softwood* Panel decision (USA-CDA-2002-1904-02, Panel Decision following Remand on June 9, 2005 (“Softwood”)) at p. 41, Mittal argues that the *Timken* court left open the possibility that a different result would have occurred in the face of an adverse WTO AB decision pertaining specifically to U.S. zeroing practice. In our view the *Corus* case closed whatever precedential gap there may have been in the absence of a WTO AB ruling specifically against U.S. zeroing (a view shared by the CIT; see *Dorbest Ltd.v. United States*, 462 F. Supp. 2d 1262 (2006)). *Corus* was a *Charming Betsy* attack on U.S. zeroing practice in original investigations and was issued 12 months after *Timken*. The fact that the *Corus* importer had an adverse WTO AB ruling involving a U.S. zeroing practice (*i.e.* Softwood Lumber WT/DS264/AB/R--August 11, 2004-pertaining to Original Investigations) was held to be of no consequence. The CAFC refused to apply *Charming Betsy* and affirmed Commerce’s use of zeroing despite the WTO AB Softwood decision.

In *Corus* the CAFC took up the argument that it did not reach in *Timken*, namely that sections 3512, 3533 and 3538 of URAA insulated domestic legislation from the ADA and any adverse WTO AB rulings based upon it. In the view of the *Corus* court, no WTO AB rulings against U.S. zeroing practices could have any effect “unless and until” they were adopted pursuant to the statutory scheme under the URAA (*Corus*, p. 9).

Mittal attempted to counter this position with a restrictive interpretation of section 3512(a) of URAA. Relying on the panel decision in *Softwood*, Mittal argued that the word “law” in section 3512(a) is limited to statutes and, as zeroing is merely a “discretionary agency action” [per *Softwood*, p.39] which is neither mandated nor required by the Tariff Act, zeroing does not have the status of “law” under § 3512(a). Thus Mittal argues that any changes

to U.S. zeroing practice to bring it into conformity with the WTO AB decisions cannot be said to be inconsistent with U.S. law.

Neither Mittal nor *Softwood* cited any authority for their restrictive interpretation of “law” in this regard. Although it is not clear from the *Corus* decision whether the particular section 3512 “law” argument here advanced by Mittal was made in that case, the *Corus* court clearly was not persuaded by the Panel’s decision in *Softwood*, which expressly relied on the same argument.

Here this Panel’s research uncovered a case where the CAFC considered the effect of an almost identical provision to 19 U.S.C. § 3512(a) which purported to protect the primacy of U.S. “law” in cases of apparent inconsistencies with the NAFTA Implementation Act:

Neither provision of the [NAFTA], nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

19 U.S.C. § 3312(a).

In *Bestfoods v. United States*, 165 F.3d 1371 (Fed. Cir. 1999) (“*Bestfoods*”), the importer argued that even though it was importing goods from a NAFTA country, it should be able to rely on the pre-NAFTA marking rules to claim exemption from marking them as “articles of foreign origin” because the regulatory change made to adopt the NAFTA marking provisions amounted to an implicit modification of the pre-NAFTA marking statute contrary to 19 U.S.C. § 3312(a). The *Bestfoods* court found no inconsistency between the NAFTA marking regulations and the marking statute because the marking statute was silent on the methodology to be used to determine origin [like the Tariff Act with respect to zeroing]. The court concluded that 19 U.S.C. § 3312(a) “simply ensure[d] that NAFTA will not be construed as having implicitly amended or repealed any federal **statute**” (*Bestfoods* at 1376 (emphasis added)).

The above comment in *Bestfoods* notwithstanding, we do not find Mittal's "law" means "statute" argument persuasive for several reasons. First, limiting section 3512(a) to agency actions expressly authorized by statute as suggested by Mittal, would in our view, render § 3512(a) redundant as any agency action that is mandated by clear statutory language would not need its protection in any event even if manifestly inconsistent with GATT or any other international obligations. In our view, section 3512(a) is therefore directed precisely at those situations where, as here, "discretionary agency action" (or whatever else it may be called) is required to fill in the gaps created by statutory silence or ambiguity.

Second, adopting Mittal's position would be contrary to the intended effect of the § 3512 as outlined in the SAA [H.Doc. No. 103-316, Vol. 1 (1994)], and Senate Report on the NAFTAIA, Report 103-189, 103d Cong., 1<sup>st</sup> Session (1993), Senate Report, discussed in the Panel Determination, above, p. 15, which attended the adoption of the URAA. A reading of those documents as well as the URAA sections themselves leads us to the firm conclusion that Congress, in creating a process to bring U.S. law into conformity with the WTO on an ongoing basis, clearly intended that process to be inclusive of all U.S. agency actions and circumscribed within the four corners of the URAA. It is hard to imagine why Congress would have excluded discretionary agency actions such as zeroing from the WTO compliance measures of the URAA when such discretion has been repeatedly recognized as playing such a vital role in the U.S. antidumping scheme as a whole. [See *S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979)*; "Commerce is the master of antidumping law," *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999)] and indeed seems to be the subject of so many complaints to the WTO. It seems unlikely to us that Congress intended to leave such an important area outside the reach of the URAA.

Third, the NAFTA Implementation Act considered in *Bestfoods* does not contain the equivalent of sections 3533 and 3538. This, in our view, and the view of the CAFC and the CIT in the *Corus* cases, are meant to circumscribe the manner in which WTO developments are to be implemented into the domestic law of the United States. We see these sections as “legislative commands” against the implicit adoption of WTO AB rulings via *Charming Betsy*. See *De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, supra*.

While use of the terms “practice”, “regulation” and “action” at various points in sections 3512, 3533 and 3538 invites consideration of whether “law” was intended in contradistinction to those seemingly disparate terms, and whether zeroing is or is not a “practice,” such considerations must be balanced against the overall policy objectives stated in the legislation or otherwise illuminated by other applicable interpretative tools.

Thus while Mittal’s restrictive view of “law” and “practice” may be grammatically possible interpretations of the relevant sections of the URAA, they are not the only ones available and we see no reason in policy or on the face of the statute to compel the adoption of those restrictive meanings. Reading the statute as a whole, and together with the Trade Act itself, sections 3512, 3533 and 3538 of the URAA easily admit of a more generic meaning, which encompasses zeroing within their purview. In our view such a generic meaning is to be preferred because it would avoid the legal absurdities highlighted above and seems better at meeting the objectives outlined in the SAA and the Senate Report.

Rendering all WTO compliance measures subject to the consultative mandates of the URAA is at the end of the day still a method of making US law WTO compliant. Seen in this light, our interpretation is entirely consistent with *Charming Betsy* albeit one which steers a

different and more protracted course than the one preferred by Mittal and the majority.

Moreover, the URAA process does seem to be effective at creating change.

Commerce has recently adopted several measures in response to these adverse WTO rulings which limit the application of zeroing albeit only in certain cases. See 71 Fed. Reg. 77722 (December 27, 2006); *Implementation of the Findings of the WTO Panel in U.S. – Zeroing (EC)*; *Notice of Determination Under Section 129 of the Uruguay Round Agreement Act and Revocation and Partial Revocation of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25262 (May 4, 2007). That these measures did not eliminate zeroing entirely or immediately reflects a policy choice best left to the political branches and even if it is true that zeroing in any form is contrary to the WTO, it cannot be said that all zeroing will never be eliminated from US trade law under this statutory scheme. We do not see the *Charming Betsy* doctrine as requiring the relevant statutes to be interpreted to require immediate compliance with international obligations given that a working compliance mechanism is in place. Carving out exceptions to the URAA compliance process on the basis of whether “law” is limited to statutes or whether a particular US case has or has not been appealed to the WTO would introduce needless uncertainty.

Moreover were we to direct Commerce to eliminate zeroing on the basis of it being inconsistent with the various WTO rulings against US zeroing cases, we would be requiring Commerce to do indirectly through *Charming Betsy* what it cannot do directly, namely adopt an adverse WTO AB ruling outside of the sections 3533 and 3538 processes.

Finally, we find it instructive that the *Bestfoods* court interpreted the relevant NAFTA provisions in a manner which upheld the pre-NAFTA provisions while maintaining the effect and integrity of the new regime in respect of NAFTA goods. See also: *Xerox Corporation v. United States*, 423 F.3d 1356 (Fed. Cir. 2005). Similarly, we prefer our view of the URAA which would

has the effect of leaving the pre statutory scheme in place while maintaining the effect of the new statutory regime's modification procedures.

We are not persuaded by the most recent WTO AB rulings [See *United States - - Laws, Regulations and Methodology for Calculating Dumping Margins* (WT/DS294/AB/R (Apr. 18, 2006)) and *United States - - Measures Relating to Zeroing and Sunset Reviews* (WT/DS322/AB (Jan. 9, 2007))]. As previously stated, WTO AB rulings adverse to U.S. zeroing practices were not controlling in the 2005 *Corus* decision. Additional adverse rulings are no more relevant in the present case. We note that these most recent WTO rulings did not persuade the CAFC in the most recent attempt by Corus Staal to use WTO rulings to overturn U.S. zeroing practices. *Corus Staal v. United States*, 502 F. 3d 1370 (Fed. Cir. 2007), aff'g, Slip Op. 2006-112, LEXIS 113 (Ct. Int'l Trade, July 25, 2006). See also *SKF USA v. United States*, 491 F. Supp. 2d 1354 (Ct. Int'l Trade 2007).

#### **B. Zeroing produces inaccurate margins of dumping**

Mittal cites the 1990 decision in *Rhone-Poulenc v. United States*, 899 F.2d 1185 (Fed. Cir. 1990) ("*Rhone-Poulenc*") and the 2001 decision in *Shakeproof v. United States*, 268 F.3d 1376 (Fed. Cir. 2001) ("*Shakeproof*") for the proposition that the statute requires margins to be determined as accurately as possible. It then advances several arithmetic examples to demonstrate how zeroing distorts dumping margins. However, dramatic this exercise may be (and it has proven to be so to the WTO Appellate Body), there is nothing new here. U.S. courts have consistently upheld zeroing in the face of these undesirable effects. Indeed the *Timken* court spent some time reviewing similar arithmetic examples (see 354 F. 3d, pp. 1342-1343) and still upheld zeroing as reasonable

The cited cases are distinguishable and do not control. *Rhone-Poulenc* was a ‘best information available’ case where the exporter’s information was deemed incomplete and *Shakeproof* was a case where the importer attacked Commerce’s use of third country data as the best substitute for information on exports from a non-market economy. Neither deal with zeroing. If anything they support agency discretion to make choices to achieve the objectives of the statute. Zeroing has been confirmed on the same basis.

### **C. Zeroing is arbitrary and capricious contrary to the APA**

Mittal admitted (See Mittal Reply Br., p. 23) that the Respondents were correct in asserting that the APA issue raised by Mittal was not properly before this Panel. Mittal advanced no argument to distinguish or otherwise overcome that objection in its reply and simply reasserted its original position. Quite apart from ignoring the timing of the policy change relative to the issuance of this decision, the majority decision admits through the backdoor the APA argument that all parties admit we have no jurisdiction to consider. Accordingly, we do not believe that Commerce’s decision to abandon zeroing in certain cases is relevant to this case.

### **Conclusion on Zeroing**

For all the above reasons, we would affirm Commerce’s use of zeroing.

### **VI. Additional Dissenting View of Panelist Liebman Concerning the Majority Opinion to Remand to Commerce Its Decision to Apply Zeroing Based Upon a Determination to Not Follow Controlling Precedent of the United States Court of Appeals for the Federal Circuit Based Upon the General Legal Principle of *Stare Decisis***

In addition to the reasons already set forth in the dissent I have shared with Panelist Barr (“Joint Dissent”), section VI, above, I would affirm Commerce’s use of zeroing in this case for reason that when the CAFC has ruled on an issue, the decision of the CAFC should be followed because the Panel is required to apply the general legal principle of *stare decisis*, which is applicable under NAFTA, Art. 1904.2. See Panel Determination, above, p. 4.

In the Joint Dissent it has been established that several early panel decisions under the CUSTA and NAFTA have consistently regarded themselves bound by CAFC precedent. I incorporate the citations given their by reference.

It is instructive to reference the Extraordinary Challenge Committee (“ECC”) decisions in two cases. The first is *In the Matter of Live Swine from Canada*, ECC-93-1904-01USA, April 8, 1993 (“*Swine from Canada*”), and the second is, *In the Matter of Certain Softwood Lumber Products from Canada*, ECC-2004-1904-01USA, August 10, 2005 (“*Softwood Lumber from Canada*”).<sup>2</sup>

Panels must follow and apply the law, not create it. FTA Article 1904.2 and 1904.3; Anderson House Testimony at 76. Although Panels substitute for the Court of International Trade in reviewing Commerce’s determinations, they are not appellate courts. Anderson House Testimony at 76; Anderson Senate Testimony at 95. Because the Committee’s scope of review is so limited, most panel decisions will never be reviewed. United States-Canada Free-Trade Agreement, Statement of Administrative Action, printed in H.R. Doc. No. 216, 100<sup>th</sup> Cong., 2d Sess. 163, at 267 (1988). Panels must understand their limited role and simply apply established law. Panels must be mindful of changes in the law, but not create them. Panels may not articulate the prevailing law then depart from it in a clandestine attempt to change the law.

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Panels are not appellate courts and must show deference to an investigating authority’s determinations.

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<sup>2</sup> In Article 1904.13 Annex, the NAFTA provides for a limited review of Panel decisions when a party requests the establishment of an ECC. The “persuasive, if not binding interpretations, of ECC panels, with regard to other panels is well recognized. *See In the Matter of Gray Portland Cement from Mexico*, ECC-2000-1904-01USA, p. 5. EEC decisions are clearly binding upon the panel whose decision is being reviewed. Article 1904.13(3) Annex.

*Id.* at 15-16.<sup>3</sup> As the ECC makes clear, a Panel under the FTA stands in the shoes of the CIT, and not the appellate court that reviews that court's decisions.

Thus, Panels, just like the CIT, apply decisions of the CAFC and the United States Supreme Court, and they are bound to follow them. As was acknowledged by parties in the hearing in this matter, even another panel of the CAFC is bound to follow the earlier decisions of other CAFC panels until such time that an intervening higher authority, such as the United States Supreme Court, or the entire CAFC, sitting *en banc*, overrules a precedential decision of a prior panel. See *Teva Pharmaceuticals, Inc. USA Inc. v. Novartis Pharmaceuticals Corporation*, 482 F.3d 1330 (2007); *Nippon Steel Corporation v. United States*, 458 F.3d 1345 (2006). The ECC in the *Softwood Lumber from Canada* matter, which decision involved NAFTA, similarly, said that (at 21):

The standard of review to be applied by the Panel is the standard of review applied by the Court of International Trade (CIT) when it reviews decisions of the Commission. See NAFTA Article 1904.3 NAFTA Annex 1911-Country-Specific-Definitions"Standard of Review" (b).

Given the foregoing explicit 1988 testimony before Congress, which was relied upon the ECC in *Swine from Canada*, coupled with publicly available decisions of CUSFTA panels, articulating the proposition that Panels do **not** substitute for the CAFC, and are only surrogates for the CIT, Congress is presumed to have approved and ratified that practice at the same time

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<sup>3</sup> The testimony referenced by the ECC was of M. Jean Anderson, then Chief U.S. Negotiator of Binational Panel provisions, who appeared before the *United States-Canada Free Trade Agreement Hearing before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, House of Representatives*, H. Serial No. 60, 100<sup>th</sup> Cong., 2d Sess. 69, 75-76 (1988) and the *United States-Canada Free Trade Agreement Hearing before the Comm. on the Judiciary, United States Senate, on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, S. Serial No. J-100-62 (S. Hrg. 1081), 100th Cong., 2d Sess. 95 (1988).

that it enacted the implementing legislation for NAFTA. The United States implementing legislation states that:

In making a decision in any action brought under subsection (a) of this section, a court of the United States is not bound by, but may take into consideration, a final decision of a binational panel or extraordinary challenge committee convened pursuant to article 1904 of the NAFTA or of the Agreement.

19 U.S.C. § 1516a(b)(3). Congress was concerned with assuring that the CIT would not be required to follow a decision of a NAFTA panel or a reviewing extraordinary challenge committee, but it took no steps to elevate the status of binational panels to that of the CAFC under NAFTA. The language with respect to applying the law that a court of the deciding country would apply remained the same under NAFTA as it was under the Canadian-United States Free Trade Agreement. The doctrine of legislative ratification is applicable here.<sup>2</sup>

In a series of decisions, involving several different judges of the court, the CIT has recently held that it is bound by *Timken* and *Corus* and unless the Supreme Court or the Federal Circuit (*en banc*) decide to overrule *Timken* and *Corus*, the CIT has no power to re-examine the

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<sup>2</sup> While not dispositive, I also find persuasive the comments which appear in Senate Report 103-189, 103<sup>rd</sup> Congress, 1<sup>st</sup> Sess., November 18, 1993, Calendar No. 309, North American Free Trade Agreement, Implementation Act, pp. 41-48, and in particular the following statement (at 43-44, emphasis added):

It is the Committee's expectation that, in the future, binational panels will properly apply U.S. law and the appropriate standard of review, giving broad deference to the decisions of both the Department of Commerce and the ITC. If they do not, the Committee expects the Administration to avail itself of the extraordinary challenge procedures set forth in Annex 1904.13. Paragraph 13 of Article 1904 specifically provides that extraordinary challenge procedures may be invoked where a panel has manifestly exceeded its powers, authority or jurisdiction by failing, for example, to apply the appropriate standard of review, where such action has materially affected the panel's decision and threatens the integrity of the binational panel process. **Because the central tenet of Chapter 19 is that a panel must operate precisely as would the court it replaces**, the Committee believes that misapplication of U.S. law in important areas is a clear threat to the integrity of the Chapter 19 process.

issue of zeroing in administrative reviews. See *Paul Muller Industrie GMBH & Co., et al., v. United States*, 435 F. Supp. 2d 1241 (Ct. Int'l Trade 2006) p. 6 citing *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005) & *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1372 (Fed. Cir. 2000); see also *SKF USA et. al. v. United States*, 491 F. Supp. 2d 1354 (Ct. Int'l Trade 2007) and *Corus Staal B.V. v. United States*, 493 F. Supp. 2d 1276 (Ct. Int'l Trade June 5, 2007).

The majority views the role of this Panel as a “virtual court” and therefore the majority maintains that we are not bound to follow the precedent of the CAFC. The majorities’ rejection of the conclusion that we are not constrained to begin our analysis of the legal issues presented here in the same way that the CIT would, and, therefore, we are not obligated to follow precedent of the CAFC under the principle of *stare decisis*, is fraught with either an apparent inconsistency in logic or raises the specter that the majority also regards binational panel as having the right to reject the holdings of the United States Supreme Court in the same circumstances that the Supreme Court would decline to follow its own precedent. While it may not be necessary in this case, since the Supreme Court has not addressed the issue of zeroing, to consider whether we would be bound by the holding in such a hypothetical case, the majority’s logic suggests that we would not be bound. That possibility has serious implications. Indeed, if this Panel was not bound, then there is no compelling reason to consider, as the majority exhorts, the Court’s holding in *Alexander Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) to be controlling.

The United States Supreme Court in *Randall v. Sorrell*, \_\_\_US \_\_\_, 126 S. Ct. 2479, 165 L. Ed. 2d 482 (2006), has reaffirmed the importance that *stare decisis* has in the United States legal system and sharply limited the circumstances in which the controlling court may not follow and

apply the doctrine in future cases involving the same fundamental issues. The Court said (126 S. Ct. at 2496):

The Court has often recognized the "fundamental importance" of stare decisis, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. See *Harris v. United States*, 536 U.S. 545, 556-557, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002) (plurality opinion) (citing numerous cases). The Court has pointed out that stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 116 S. Ct. 1793, 135 L. Ed. 2d 124 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)). Stare decisis thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional, and requires "special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212, 104 S. Ct. 2305, 81 L. Ed. 2d 164 (1984). This is especially true where, as here, the principle has become settled through iteration and reiteration over a long period of time.

The approach of the majority in this case, rather than replacing judicial review with a substitute court in lieu of the CIT, adopts a regime that is based upon the inherent uncertainty and unpredictability that is often associated with arbitration. When arbitration was intended, the drafters of NAFTA clearly knew how to denominate and adopt such a regime, as they did in NAFTA Chapter 11: Investment. See Chapter 11, Article 1119, *et seq.*

In the absence of any definitive statutory provision or controlling judicial decisions, the best approach seems to be that this Panel stands in the shoes of the CIT because binational panel review replaces the judicial review which would otherwise be the exclusive jurisdiction of the CIT under §1581(c).

Accordingly, for all the reasons set forth in the Joint Dissent, and, additionally, because under the general legal principle of *stare decisis* we are bound by applicable CAFC precedent, which was discussed more fully in the Joint Dissent, above, the decision of Commerce to apply zeroing should be affirmed.

ISSUED ON NOVEMBER 28, 2007

SIGNED IN THE ORIGINAL BY:

Joseph I. Liebman  
Joseph I. Liebman, Chair

Brian J. Barr  
Brian J. Barr

Ron W. Erdmann  
Ron W. Erdmann

Charles L. Levin  
Charles L. Levin

Donald L. Morgan  
Donald L. Morgan