

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

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

**DECISION OF THE PANEL ON REMAND**

February 3, 2006

Mr. Daniel A. Pinkus, Chair

Mr. Hernán García Corral

Mr. Jorge Miranda

Prof. Daniel G. Partan

Prof. Ruperto Patiño Manffer

**Appearances:**

Gregory J. Spak & Frank J. Schweitzer, White & Case, LLP, on behalf of Tubos de Acero de México, S.A.

Ada E. Bosque, on behalf of the United States Department of Commerce.

Roger B. Shagrin, Shagrin Associates, on behalf of Grant Prideco, Inc., IPSCO Tubulars, Inc., Lone Star Steel Company, Maverick Tube Corporation, and Koppel Steel Corporation and Newport Steel, both divisions of NS Group.

Robert E. Lighthizer, John J. Mangan, Jeffrey D. Gerrish on behalf of United States Steel Corporation.

## I. INTRODUCTION

In our February 11, 2005 Decision, the Panel issued two basic instructions to the Department. These were:

1. The Department is directed to determine whether the “other factors” raised by TAMSA in its “substantive response” to the initiation of the sunset review are “relevant” to the Department’s “likelihood” determination. If the Department considers that TAMSA’s “other factors” are not relevant, the Department is directed to explain the reasons leading to that decision.
2. As needed to consider its “likelihood” determination, the Department is directed to reopen the record for the limited purpose of investigating and fact-finding concerning the relevance and bearing of TAMSA’s “other factors” on the Department’s determination of whether revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping.

TAMSA challenged the Department’s May 13, 2005, Redetermination on Remand in certain respects as elaborated below.

## II. THE PANEL'S STANDARD OF REVIEW

As set out in the Panel’s February 11, 2005, Decision, the authority of the Panel flows from NAFTA Chapter 19. Article 1904.1 provides that “each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.” Article 1904.2 requires that a panel apply the “statutes, legislative history, regulations, administrative practice and judicial precedents” upon which a court of the importing country (in this case, the United States) would rely in reviewing a final determination of the investigating authority. The standard of review to be applied by such a court (in this case, the U.S. Court of International Trade (“CIT”)) is set forth in §516a(b)(1)(B)(i) of the *Tariff Act of 1930*,<sup>1</sup> as amended, codified at 19 U.S. Code §1516a(b)(1)(B)(i). That provision requires that the reviewing court “shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law”. Under this standard, the court (in this case, the Panel) does not engage in *de novo* review, and restricts its review to the administrative record.

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

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<sup>1</sup> Hereinafter references to provisions of the *Tariff Act of 1930*, as amended, are cited to the codification of the statutory provisions in Title 19 of the United States Code.

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

An agency's statutory interpretation is to be upheld if it is "sufficiently reasonable" even if it is not "the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986).

The U. S. Court of Appeals for the Federal Circuit has held that Commerce's statutory interpretations enunciated in an administrative determination are "entitled to deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). And the Department's regulations, adopted pursuant to notice and comment rulemaking are also entitled to a high level of deference. *See Koyo Seiko Co. v. United States*, 258 F. 3d 1340, 1347 (Fed. Cir. 2001).

Nonetheless, a panel must "assure that the agency has given reasoned consideration to all the material facts and issues" and that Commerce has explained how its legal conclusions follow from the facts in the record." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971). The agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made". *Avesta AB v. United States*, 724 F.Supp. 974, 978 (CIT 1989) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)), *aff'd*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 403 U.S. 1308 (1991).

In addition, when an agency does need to fill in gaps in a statute, it must act consistently with the underlying purpose of the law it is charged with administering. A reviewing panel must "reject administrative constructions, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy Congress sought to implement." *Hoescht Aktiengesellschaft v. Quigg*, 917 F.2d 522 (Fed. Cir. 1990) (quoting *Ethicon Inc. v. Quigg*, 849 U.S. 1422, 1425 (Fed. Cir. 1988), and *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).

### III. ISSUES IN THE PRESENT PROCEEDING

Several aspects of the matter are clearly established. First, the Department's dumping determination in the initial investigation is not subject to panel review in this proceeding. However, it is clear from the record in the present proceeding that in the initial investigation, the Department's finding of TAMSA's dumping resulted from the combination of two factors: Mexico's peso devaluation and TAMSA's considerable hard-currency (US-dollar denominated) debt. The peso devaluation significantly increased TAMSA's interest liabilities on its hard-currency debt, which in turn raised TAMSA's Cost of Production (COP) to levels above home market prices. This led to the determination of TAMSA's "normal value" on the basis of a "constructed value", the result of which was a dumping finding in the initial investigation. Dumping is a legal concept determined by an assessment of price differentials in which neither motivation nor intent are considered. Thus it is clear that the Panel must proceed on the basis that TAMSA's dumping has been established by the determination made in the initial investigation.

It is also clear in the "sunset" provisions of the anti-dumping law that TAMSA's post-order record of decreased exports establishes a presumption in favor of a "likelihood of continuation or recurrence" determination. Nevertheless, we remanded the "likelihood" determination to the Department because the Department had failed to consider the effect of "other factors" cited by TAMSA – principally the combination of Mexico's peso devaluation and TAMSA's high US-dollar denominated debt. TAMSA argues that the combination of these factors, which led to the Department's dumping determination in the initial investigation, were no longer significant in the sunset review period. In TAMSA's view, the record shows that TAMSA no longer had large hard currency debt in the sunset review period, and that there is no basis to expect additional massive peso devaluation. In its Redetermination issued May 13, 2005, however, the Department concluded: "[E]ven if the Department finds that [TAMSA's 'other factors'] are relevant to the Department's analysis, TAMSA has not demonstrated that these 'other factors' should change the Department's likelihood determination."<sup>2</sup>

In its Redetermination, the Department also appears to accept that TAMSA has shown "good cause" to consider what role TAMSA's "other factors" may have played in TAMSA's export practices during the sunset review period. But, as discussed below, we find that the Department's Redetermination fails to provide an adequate reasoned analysis in support of its interpretation of the role played by TAMSA's hard currency debt. This finding leads us to the following conclusion: Under the governing law, the Department must determine whether the decrease in the magnitude of TAMSA's foreign currency denominated debt in the sunset review period rebuts the "likelihood" presumption that results from the decrease in TAMSA's post-order exports.

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<sup>2</sup> Final Results of Sunset Review of Antidumping Duty Order on Oil Country Tubular Goods ("OCTG") from Mexico, Redetermination on Remand at 47 (May 13, 2005).

The Panel's findings and conclusions on these matters, and on other issues raised by parties to this proceeding, are discussed in the sections that follow.

#### **IV. DISCUSSION**

##### **A. TAMSA's "OTHER FACTORS"**

The Department's Redetermination provides textual analysis and two appendices from which we conclude that the exchange rate of the peso continued to decline during the sunset review period. However, the Department provides no comparable data with respect to the decline in TAMSA's US dollar-denominated debt. Hence it appears that the Department has failed to consider whether the substantial decrease in TAMSA's financial expense ratios offsets the "likelihood" presumption that results from the decrease in TAMSA's post-order exports. As TAMSA has pointed out, its financial expense ratio<sup>3</sup> was close to 40% at the time of the initial dumping determination, whereas it fell to less than 2% during the sunset review period. We conclude that the Department's failure to consider a change of this magnitude in TAMSA's financial expense ratio, owing to the substantially lower dollar-denominated debt, renders the Department's likelihood determination unreasonable and unsupported by the evidence.

Our reasoning is as follows. TAMSA's high level of foreign currency debt in 1994 resulted in the finding of dumping in the initial investigation. The combination of Mexico's peso devaluation and TAMSA's foreign currency debt service raised its financial expense ratio to 39.5%. Since financial expenses are factored into cost of production (COP), in the initial investigation TAMSA's COP was determined to be higher than domestic prices. In such situations, home market sales at prices below COP are disregarded for purposes of calculating normal value since they are not in the ordinary course of trade.<sup>4</sup> The exclusion of such sales may result in a determination that there are insufficient home market sales in the ordinary course of trade to use as the basis for calculating normal value, making it necessary to calculate normal value according to constructed value, which is built up taking the COP as the starting point. That is what happened here. The high financial expense ratio experienced by TAMSA as a result of the peso devaluation led to the determination of dumping. The substantial subsequent decrease in TAMSA's foreign currency debt may show that such a scenario is unlikely to recur.

The conclusions reached by the Department on the likelihood of future peso devaluation combined with a high level of foreign currency debt are therefore not supported by the evidence. The Department's findings do not take into account the magnitude of the decrease in TAMSA's dollar-denominated debt and the resulting dramatically lowered financial expense ratio. TAMSA's financial expense ratio was calculated at 39.5% during the initial investigation. But it fell to 1.96, 1.96, and 0% in

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<sup>3</sup>The terms "interest expense ratio" and "financial expense ratio" are used by both TAMSA and the Department without distinction.

<sup>4</sup> Normal value is calculated from profitable home market sales, if any.

the subsequent three annual reviews. Even though the cost of servicing each dollar of TAMSA's external debt may have been more expensive during the sunset review period, such foreign currency costs did not continue to be a major factor in calculating TAMSA's COP. Thus the lowered financial expense ratio in the annual reviews enabled the Department to determine normal value based upon profitable home market sales, with the result that TAMSA was found not to have dumped during the sunset review period.

Viewing the record as a whole, the "likelihood" presumption based on TAMSA's post-order record of decreased exports is the only basis for sustaining the Department's Redetermination on Remand. The evidence concerning the sharp difference in the interest expense ratios in the original investigation and in the sunset review period shows that what happened during the original investigation was not repeated during the sunset review period.<sup>5</sup> We therefore conclude that TAMSA has made a substantial showing that the high financial expense ratio found in the initial investigation is unlikely to recur.

Considering that the Department failed to provide a reasoned analysis to support a conclusion that TAMSA's high financial expense ratio is likely to recur, we believe that TAMSA's evidence overcomes the likelihood presumption based upon the post-order decrease in TAMSA's exports. In other words, we conclude that the Department's Redetermination has not reasonably established that revocation of the antidumping duty order would be likely to lead to continuation or recurrence of dumping.

## **B. ADDITIONAL ISSUES**

### **1. Dumping by Hylsa**

In addition to the issue as to whether dumping is likely to resume if the order is withdrawn, the Department based its Redetermination upon the conclusion that there was dumping during the Period of Review by Hylsa S.A. de C.V. ("Hylsa"), another Mexican producer. Hylsa is not a party to the present proceedings.

With respect to dumping by Hylsa during the sunset review period, the Statement of Administrative Action (SAA) requires the Department to make its likelihood determination on an order-wide basis. Hence dumping by Hylsa has properly been included in the Department's sunset review. As the Department pointed out, "[t]he period of the fourth administrative review on OCTG from Mexico fell within the sunset review period." The Department also observed that "[at] the preliminary determination,

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<sup>5</sup> TAMSA's proprietary "Second Comments on Draft Remand Determination" (Doc. # 1423) shows a consistent decrease in TAMSA's total liabilities throughout the review period. The record also contains accounting notes showing that TAMSA's long-term debt is payable in U.S. dollars and continuously diminished during the review period. The Department has not referred to any evidence showing that TAMSA is likely to incur additional foreign-denominated debt if the antidumping order is withdrawn.

the Department preliminarily found that Hylsa was dumping sales during the period of review.”<sup>6</sup>

Hylsa was included in the initial 1995 anti-dumping order. Although it appears that Hylsa was not investigated at that time, it was included in the “all others” category. In 1995, the Department assigned a 23.79% margin to TAMSAs, the only respondent investigated. The Department assigned a margin of 21.79% to “all others.” The 23.79% margin assigned to TAMSAs was later reduced to 21.70% pursuant to a decision by a NAFTA Panel.<sup>7</sup>

Hylsa requested first, second, and fourth administrative reviews and fully participated in them. The fourth review resulted in a determination of dumping (0.79%) that Hylsa is currently litigating before another NAFTA Panel (USA-MEX-2001-1904-06). Hylsa’s margins are included in the record in this proceeding in that they are part of the sunset review documents included by the Department.

Hylsa submitted comments in response to the Department’s notice of initiation of the present sunset review. However Hylsa apparently did not seek revocation of the final sunset review determination either separately or together with TAMSAs. Hence, Hylsa is not a party in the present case.

Accordingly, the record of any issues raised with respect to dumping by Hylsa is not included in the administrative record for the present case, and we cannot evaluate whether there is substantial evidence to support a likelihood of future dumping by Hylsa. Furthermore, as mentioned above, the Department’s determination of dumping by Hylsa in the fourth administrative review has been appealed in a different proceeding before another Binational Panel.<sup>8</sup> Hence, notwithstanding the order-wide scope of sunset review proceedings, we have no basis for determining in the present case whether, in accordance with the order-wide basis of sunset review determinations, the Department’s “likelihood” determination in the present case properly reflects a final determination that Hylsa dumped during the sunset review period.

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<sup>6</sup> Redetermination on Remand at 22, n.5 (May 13, 2005).

<sup>7</sup> See USA-95-1904-04, Oil Country Tubular Goods from Mexico, Department of Commerce Final Determination of Sales at Less than Fair Value (TAMSAs) (Dec. 2, 1996).

<sup>8</sup> See USA-MEX-2001-1904-05, Oil Country Tubular Goods from Mexico, Department of Commerce Final Results of the 4th Antidumping Duty Administrative Review and Determination Not To Revoke (Hylsa) (active panel review).

## **2. TAMSA's "Business Decision"**

TAMSA argues that its decision not to export in substantial quantities during the sunset review period was a "business decision". Although post-order withdrawal from the export market is presumed to reflect inability to compete in the US market without dumping, it may not be unreasonable for a company to make a "business decision" to withdraw based on the added cost of anti-dumping duties triggered by US dumping orders – and related legal and other expenses. Nevertheless, the exporter must produce evidence to rebut the presumption of inability to compete; the exporter cannot simply rely on an assertion that its withdrawal from the market constituted a "business decision". In the present case, TAMSA's "other factors" must be considered to determine whether to set aside the presumption that follows from TAMSA's failure to export in substantial quantities during the sunset review period.

## **3. The Department's Draft Redetermination**

TAMSA argues that the Department's failure to explain the basis for changes made in its Draft Redetermination when it issued its Final Redetermination evidences a lack of serious consideration given to the "other factors" raised by TAMSA. Since we are reviewing the Department's Final Redetermination, not its working papers, the Panel has no authority to consider the reasons that may have led the Department to change its views.

## **4. The Panel's Legal Analysis**

Grant Prideco, Inc., IPSCO Tubulars, Inc., Lone Star Steel Company, Maverick Tube Corporation, Koppel Steel Corporation, and Newport Steel (collectively, "Domestic Interested Parties") argue that the Panel's elucidation of the SAA and Sunset Policy Bulletin's references to the production of information or evidence in the context of a showing of "other factors" represents "a serious violation of a NAFTA panel's mandate."<sup>9</sup> According to the Domestic Interested Parties, the Panel's legal analysis amounts to legally impermissible statutory interpretation. The Domestic Interested Parties support their argument by citing NAFTA Article 1904(8) and NAFTA Implementation Rule 73(6), neither of which speaks directly to their proposition.<sup>10</sup>

The Domestic Interested Parties state that:

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<sup>9</sup> Domestic Interested Parties Response to Rule 73 Challenge by TAMSA, at 1 (Jul. 1, 2005).

<sup>10</sup> The cited section of NAFTA Art. 1904 (8) provides: "The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision."

The cited section of NAFTA Implementation Rule 72 provides: "the panel shall issue a written decision pursuant to Rule 72, either affirming the Determination on Remand or remanding it to the investigating authority..."



[U]nlike the Court of International Trade, NAFTA Panels are not empowered to proclaim U.S. law and may not construe the interaction between the SAA and the Department's Policy Bulletin in the first instance. The NAFTA Panel may only ask the Department [to] provide an interpretation and then approve the interpretation or remand the matter. The Panel may not offer its own preferred statutory framework.<sup>11</sup>

The Domestic Interested Parties misread the Panel's Decision and its support in the caselaw, and seemingly neglect that the main issue in the present review is whether TAMSA had produced sufficient evidence to rebut the statutory presumption in favor of a likelihood of recurrence determination.<sup>12</sup> Given the nature of the misstatements, we address them individually.

The Domestic Interested Parties state that the "Panel's construction of the statute, which posits a 'burden of persuasion' for the 'opposing party' (apparently the domestic interested parties) is a fundamental misreading of the Sunset provisions and the Department's role in conducting Sunset Reviews."<sup>13</sup> They then seek to explain why such a construction would be incorrect.

The Panel made no such construction. In fact, the Panel expressly stated the contrary in our Decision of February 11, 2005. First, the Panel said that we understood the SAA reference to an opportunity "to provide information or evidence" as "*at most a burden analogous to a burden of production*, rather than to a burden of persuasion."<sup>14</sup> Then, after explaining the nature of a burden of production, the Panel stated that we "need go no further on the burdens issue".<sup>15</sup> The Panel acknowledged that no party has argued that the reference to "evidence" in the Sunset Policy Bulletin means that an interested party has the burden of persuasion.

The only time the Panel made reference to an "opposing party" was when we drew a theoretical distinction between a burden of production and a burden of persuasion, for the purpose of defining the nature of a burden of production. The theoretical nature of the sentence establishing this distinction is made clear by the subsequent sentence, which applies the distinction in the context of the sunset review process. The two sentences state as follows:

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<sup>11</sup> Domestic Interested Parties' Response to Rule 73 Challenge by TAMSA, at 2 (Jul. 1, 2005).

<sup>12</sup> The Department made no such misinterpretation. *See* Department's Redetermination on Remand at 5-8 (May 13, 2005).

<sup>13</sup> Domestic Interested Parties' Response to Rule 73 Challenge by TAMSA at 2 (Jul. 1, 2005).

<sup>14</sup> Panel Decision at 16 (Feb. 11, 2005) (emphasis supplied).

<sup>15</sup> *Id.*

Unlike a burden of persuasion, which would require a party to present evidence sufficient to establish a proposition, a burden of production would require a party to present evidence sufficient to make a *prima facie* showing of the proposition, thereby shifting the burden of persuasion to the opposing party. And, in the sunset review context, the SAA specifies only a burden to “provide information” of “other factors”.<sup>16</sup>

It is therefore clear that the Panel never *created* a burden of production. Instead, the Panel elucidated what is meant by an opportunity to provide information or evidence, words that have been explained in the same manner by the Court of International Trade and, most recently, by the Appellate Body of the WTO.<sup>17</sup>

Finally, the Domestic Interested Parties state that the Panel Decision both created a “burden of production” and shifted the “burden of persuasion” from the respondents to the Domestic Interested Parties.<sup>18</sup> That is incorrect. As stated above, the Domestic Interested Parties simply misread our Decision where we engaged in a theoretical discussion.

## V. THE PANEL’S ORDERS ON REMAND

The Department is directed to determine whether the decrease in the magnitude of TAMSA’s foreign currency denominated debt in the sunset review period outweighs the “likelihood” presumption that results from the decrease in TAMSA’s post-order exports.

If the Department determines that the lower level of TAMSA’s foreign currency denominated debt does not outweigh the “likelihood” presumption that results from the decrease in TAMSA’s post-order exports, the Department is directed to explain the reasons leading to its determination.

If the Department determines that the lower level of TAMSA’s foreign currency denominated debt in fact outweighs the “likelihood” presumption that results from the

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<sup>16</sup> Panel Decision at 16 (Feb. 11, 2005).

<sup>17</sup> The CIT has held that the “interested party” bears the burden to raise the issue “with sufficient clarity to put Commerce reasonably on notice” of the information that it needs to consider in a full sunset review. *AG der Dillinger Hüttenwerke v. United States*, 193 F.Supp. 2d 1339, 1348-50 (CIT 2002). The Appellate Body of the WTO recently held that “the factual scenarios of the SPB must not be mechanically applied. The responding parties do have a responsibility to submit information and evidence in their favour, particularly about their pricing behaviour, import volumes, and dumping margins”. United States–Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico, WT/DS282/AB/R at para. 201 (2 Nov. 2005).

<sup>18</sup> Domestic Interested Parties’ Response to Rule 73 Challenge by TAMSA at p. 3 (Doc. 57, July 1, 2005).

decrease in TAMSA's post-order exports, the Department is directed to enter a finding of no likelihood of continuation or recurrence of dumping.

The Department is further directed to issue its Final Redetermination on Remand within twenty days from the date of this Panel Decision.

ISSUED ON February 8, 2006

SIGNED IN THE ORIGINAL BY:

Daniel A. Pinkus  
Daniel A. Pinkus, Chair

Ruperto Patino Manffer  
Ruperto Patino Manffer

Daniel G. Partan  
Daniel G. Partan

Hernan Garcia Corral  
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Jorge Miranda  
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