

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 ANTIDUMPING DUTY  
ADMINISTRATIVE REVIEW AND DETERMINATION NOT TO REVOKE  
REDETERMINATION ON REMAND

FILE NO. USA-MEX-01-1904-05

**DECISION OF THE PANEL**

August 11, 2006

Howard N. Fenton, Chair

Hector Cuadra y Moreno

Peter L. Fitzgerald

Jaime Horacio Galicia Briseno

Arturo J. Lan Arredondo

**Appearances:**

Douglas S. Ierley, Office of the Chief Counsel for Import Administration, on behalf of the United States Department of Commerce

Jeffrey M. Winton, Preston Gates Ellis & Rouvelas Meeds LLP, on behalf of Hylsa, S.A. de C.V.

John J. Mangan, Skadden, Arps, Slate, Meagher & Flom LLP, on behalf of U.S. Steel

Robert B. Schagrin, Schagrin Associates, on behalf of IPSCO Tubulars

## I. INTRODUCTION

At this stage of an administrative proceeding commenced initially in 1994, respondent Hylsa, S.A. De C.V. (Hylsa) appears trapped in a classic “Catch -22”. The saga began when the company was subjected to an antidumping order in 1995 although it was never found to have engaged in dumping.<sup>1</sup> In 1999 it sought to have the order revoked but has now (in 2006!) been told no. The reasons given were the absence of sales of commercial quantities and the challenged occurrence of dumping in 2003-2004. The company has a record of relatively small sales to the U.S. except for a 15 month period coinciding with the original 1994-95 antidumping investigation of another company that led to the order. The Commerce Department has determined that since Hylsa’s later sales are much lower than this period (as they were before the period) they are not in commercial quantity. And, the Department says since the Department found dumping during the ninth administrative review for 2004-05, it cannot grant a request made for the fourth review (notwithstanding Hylsa’s pending challenge to that decision, and the fact that if the request had been granted after the fourth review, there would not have been a ninth review for Hylsa).

The issue before this Panel is whether the lawful discretion of the Commerce Department allows it to maintain an antidumping order against a company for reasons that have the appearance, at least, of bootstrapping by the Department, i.e. using a forced interpretation of both the facts and the rules in a way that leads to maintaining an antidumping order when it appears facially unfair.

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<sup>1</sup> Hylsa was one of several Mexican exporters included in the “all other” category and subjected to the cash deposit rate after the Commerce Department’s determination of dumping by Tubos de Acero de Mexico, S.A. (TAMSA), *See Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Mexico*. 60 Fed. Reg. 33657 (June 28, 1995).

On January 18, 2006 this Panel issued its initial decision in this matter, sustaining the Department's decision with regard to respondent TAMSAs to deny its request for revocation of the dumping order against it, and remanding the case to the Department to recalculate the final antidumping margins for Hylsa, as well as to consider Hylsa's request to revoke the antidumping order against it in the event the recalculation resulted in a zero dumping margin. On April 27, 2006 the Department issued its Redetermination on Remand in which it: (1) requested the Panel to reconsider its decision regarding the calculation of dumping margins, (2) recalculated the margins pursuant to the Panel's instructions and found a dumping margin of zero, and (3) refused Hylsa's request to revoke the antidumping order against it. The Department filed the remand record with the Panel on May 2, 2006.

On May 22, 2006 respondent Hylsa filed its comments and challenge to the Commerce Department's decision not to revoke the antidumping order against it. In its comments Hylsa objected to the Department's challenge to the Panel's decision, while raising its own objection to the Panel's decision rejecting its zeroing argument. In its challenge to the outcome of the Department's decision, Hylsa contested the determination by the Department that it had not shipped in commercial quantities during the administrative review periods, and argued that the reliance of the Department on its finding of dumping in the 9<sup>th</sup> Administrative Review of this order was improper.

On June 9, 2006 the Department filed its response to Hylsa's challenge, and complainants IPSCO Tubulars Inc., Lone Star Steel Company, and Maverick Tube Corporation filed comments in support of the Department. On June 12, 2006

complainant United States Steel Corporation filed its comments in support of the Department as well.

For purposes of this decision, the jurisdiction of the Panel and the standard of review are the same as employed by the Panel in its initial decision<sup>2</sup>, which the Panel incorporates by reference.

This Panel concludes that the Department's calculation of commercial quantities in its remand determination was an abuse of discretion and that the contested dumping determination in the 9<sup>th</sup> review is outside the scope of this proceeding and may not be taken into account.

## **II. DISCUSSION**

### **A. Requests to Reconsider Panel's Decision**

Both the Department and Hylsa questioned elements of this Panel's decision and reasoning in its initial decision. The Panel regards these questions as challenges to its determination and notes that Rule 76 of the Rules of Procedure for Article 1904 Binational Panel Reviews provides the method for requesting a Panel to re-examine its decision. However, under this rule such a request must be filed within 10 days of the issuance of the decision,<sup>3</sup> and the challenging party may not "set out any argument already made in the Panel review."<sup>4</sup> The Panel notes that neither party complied with Rule 76 in the timing of the requests, the criteria for re-examination<sup>5</sup>, or the need for new

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<sup>2</sup> *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke*, USA-MEX-01-1904-05 at 7-10 (January 27, 2006).

<sup>3</sup> Rule 76(1).

<sup>4</sup> Rule 76(3).

<sup>5</sup> Rule 76(2).

arguments<sup>6</sup>. Therefore the Panel will not address the arguments made by the parties in their filings with regard to matters not subject to that part of the Department's Determination being challenged by Hylsa, the denial of the request for revocation.

## **B. Commercial Quantities Determination**

After recalculating the dumping margin for Hylsa following the directions of the Panel, the Department found that the margin was zero<sup>7</sup>. This gave Hylsa three administrative reviews during which it had not sold subject merchandise at less than fair value, and thus made it eligible to request revocation of the order against it.<sup>8</sup> The regulations require that the Department ascertain whether Hylsa has sold subject goods in commercial quantities during the three years<sup>9</sup> and that Hylsa certify to that effect.<sup>10</sup> The Panel concurred in the Department's view that this is a threshold requirement for revocation in its initial decision with regard to TAMSA's request for revocation.<sup>11</sup> The issue before the Panel at this time is how the Department chooses to define "commercial quantities" for purposes of Hylsa's request for revocation and whether its chosen approach is within its administrative discretion.

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<sup>6</sup> The Panel does recognize that Hylsa pointed out the decision of the WTO Appellate Body which reversed the WTO Panel Decision on zeroing in administrative reviews that the Panel had made reference to in its decision. *See* Comments of Complainant Hylsa, S.A. DE C.V., on Commerce's April 27 Remand Redetermination at 14-15 (Non-Proprietary Version, May 22, 2006). The Panel notes this decision, but insofar as it did not base its conclusion on the WTO Panel decision, this new information is not a material change.

<sup>7</sup> *Redetermination on Remand, In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Review and Determination Not to Revoke* at 1, 7, 19, 23, 29 (April 27, 2006); Response Brief of the Investigating Authority at 2, 4-5 (Public Version, June 9, 2006)..

<sup>8</sup> 19 C.F.R. §351.222(b)(2)(i)(A).

<sup>9</sup> 19 C.F.R. §351.222(d)(1).

<sup>10</sup> 19 C.F.R. §351.222(e).

<sup>11</sup> *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke*, USA-MEX-01-1904-05 at 11, 14 (January 27, 2006).

The Panel previously recognized that the Department determines commercial quantities on a case by case basis, taking into account the circumstances of each individual exporter.<sup>12</sup> The Department determined in this case that Hylsa had not shipped in commercial quantities during the three years in questions because its volume of sales was significantly lower than its sales during the initial period of investigation by the Department into TAMSA's sales, the review that established the basis for the antidumping order. In its consideration of Hylsa's revocation request the Department offered four different possible analyses of the commercial quantities question, although all four lead to Commerce's conclusion that the sales during the three review years were not in commercial quantity. Three of the tests were based on Hylsa's sales during either the six month POI<sup>13</sup>, or the calendar year,<sup>14</sup> while the fourth was based on TAMSA's sales.<sup>15</sup> Hylsa argues in its submission that if the Department had based its comparison on the period of investigation mandated by the Department's current rules<sup>16</sup> the sales during the three years would be very similar to those during the alternative POI.<sup>17</sup> Ordinarily the Panel would feel obliged to defer to the Department's discretion in making such determinations, as it did in its original decision regarding the failure of TAMSA to ship in commercial quantities.<sup>18</sup> However, there is a fundamental difference in this case.

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<sup>12</sup> *Id.* at 19, 21-23.

<sup>13</sup> Remand Redetermination at 24-29, 47-55; Investigating Authority's Response Brief at 8-14, 16.

<sup>14</sup> *Id.*

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

<sup>16</sup> See Hylsa's Comments on Remand Redetermination at 16-17, 20-26 (Non-Proprietary Version); See also 19 U.S.C. § 1677(17); 19 U.S.C. § 1677(14); 19 U.S.C. § 1677(b)(1)(B); 19 C.F.R. § 351.204(b); 19 C.F.R. § 353.42(b)(1995 Version); 19 C.F.R. § 371.701.

<sup>17</sup> *Id.*

<sup>18</sup> Panel Decision at 23 (January 27, 2006).

Unlike TAMSA, Hylsa was not found by the Department to have engaged in sales at less than fair value. When the Department published its final rule in 1997 adopting the new regulations with the commercial quantity requirement, it stated:

The underlying assumption behind a revocation based on the absence of dumping ... is that a respondent, by engaging in fair trade for a specified period of time, has demonstrated that it *will not resume* its unfair trade practice following the revocation of an order (emphasis added).<sup>19</sup>

Hylsa, of course, had not engaged in an unfair trade practice, and had nothing to prove with its sales during the three years of administrative reviews. Thus, when the department confines its analysis of commercial quantities to a brute comparison of Hylsa's sales during a 15 month period in 1994 and 1995, ignoring sales volumes before and after that period, solely because that period coincides with its investigation of TAMSA, a company guilty of an unfair trade practice, the Department has a heavy burden in demonstrating the validity of its choice. It is made heavier in this case because the Department declined to include Hylsa in its initial investigation because its sales were too low.<sup>20</sup> Now the Department is arguing that because its sales are low during the subsequent administrative review periods the company does not qualify to have the antidumping order revoked.

It is a well established principle of Administrative Law that the decision of an agency must be evaluated on the basis of the explanation offered by that agency.<sup>21</sup> In justifying its commercial quantity standard, the Department repeatedly relies upon the expressed need to determine if the company can participate in the market without the

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<sup>19</sup> 62 Fed. Reg. 27296, 27326 (May 19, 1997).

<sup>20</sup> See Hylsa's Comments on Remand Redetermination at 22 (Non-Proprietary Version).

<sup>21</sup> See *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575 (1947). See also Aman & Mayton, Administrative Law, Ch. 13 §13.10.1 (2d ed. 2001).

discipline of the antidumping order.<sup>22</sup> Where a company has previously engaged in dumping, and its sales under the antidumping order continue at a tiny percentage of its sales made while engaging in dumping, it is a perfectly rational standard for determining that the sales were not in commercial quantity. The Panel acknowledged this in its initial decision.<sup>23</sup> It is not clear to the Panel however that this rationale is legitimate when the company seeking the revocation has not engaged in dumping and it can establish a legitimate pattern of commercial sales outside the time frame Commerce has chosen to use as its basis. Under such circumstances the Department needs to establish a rationale for its standard that is unrelated to suspicions about a firm that has engaged in an unfair trade practice in rejecting legitimate alternatives.<sup>24</sup> Part 351.222(b) creates a rebuttable presumption in favor of revocation when there has been no dumping over the course of three years of export sales in commercial quantities. Once the presumption in favor of revocation is properly triggered, the burden shifts in such a manner that the Department can only retain the order if there is “positive evidence” on the record supporting this decision and justifying that it is necessary to offset dumping.<sup>25</sup> Given the Department’s articulated practice of determining commercial quantity on a case by case basis, and the absence of any dumping by Hylsa up to this point, the need for Commerce to establish a legitimate alternative explanation or outcome for its commercial quantity determination is all the more compelling.

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<sup>22</sup> See Remand Redetermination at 29, 52-56; Investigating Authority’s Response Brief at 6-7, 15-16.

<sup>23</sup> See Panel decision at 20-21 (January 27, 2006).

<sup>24</sup> The Panel cannot accept the reasoning of Commerce that its commercial quantities standard is needed to establish a rational relation between the level of sales and the likelihood of the *recurrence* of dumping, given that Hylsa has not previously been found dumping. We find it difficult to conclude rationally that an exporter will *resume* an unfair trade practice, when such exporter has not been found committing unfair trade practices. Even grammatically, to “resume” implicates the continuation of something that has already started in the past. In other words, in the absence of a history of unfair trade practices, there may not be any relation between the level of sales of an exporter and the likelihood of *recurrence* of dumping .

<sup>25</sup> See Part 351.222(b)(1)(i)(B) and (b)(2)(i)(C).



It is clear that period of time selected by the Department as the basis for sales in commercial quantity by Hylsa is not compelled by statute or regulation<sup>26</sup>. It is based on the Department's regulations in place at the time of the initial action against TAMSA defining the period of investigation of the antidumping complaint (the prior six months including the month in which the complaint was filed).<sup>27</sup> As Hylsa points out, the Department has changed its regulations so that the period of investigation for a complaint now encompasses the four fiscal quarters prior to the filing of the complaint.<sup>28</sup> Thus the Department is not constrained by law in establishing the time period for evaluating a complaint, and cannot argue that it is frozen into the six month period it has embraced. Indeed, the Department showed a willingness to consider other timeframes in setting forth the basis for is commercial quantity assessment, as it has done in other cases.<sup>29</sup> It took the six months figures and annualized them,<sup>30</sup> and then took the entire calendar year of 1994 and considered that.<sup>31</sup> Both of these approaches captured the higher sales by Hylsa during the May 1994 to June 1995 period, assuring figures significantly higher than those during the three year review period that Hylsa based its revocation request on. It is noteworthy that Commerce chose not to use the standard period that it now currently uses for its investigations and its basis for commercial quantity sales, which would have

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<sup>26</sup> In fact, there is a strong argument that to the extent there is a compulsory standard, it is the current four fiscal quarters rule because that was the rule in place when Commerce made its initial revocation ruling in this matter, after this Panel issued its decision in January 2006.

<sup>27</sup> See Hylsa's Comments on Remand Redetermination at 16-17, 20-26 (Non-Proprietary Version); See also 19 U.S.C. § 1677(17); 19 U.S.C. § 1677(14); 19 U.S.C. § 1677(b)(1)(B); 19 C.F.R. § 351.204(b); 19 C.F.R. § 353.42(b)(1995 Version); 19 C.F.R. § 371.701.

<sup>28</sup> See *Id.* Using the current standard the basis for Hylsa's sales would be starkly different than under the standard adopted by the Department.

<sup>29</sup> See Remand Redetermination at 24-28; Investigating Authority's Response Brief at 8-15.

<sup>30</sup> See *Id.*

<sup>31</sup> See *Id.*

yielded numbers similar to Hylsa's sales during the three years.<sup>32</sup> The reasoning offered by the Department for considering its alternatives and not the current standard suggested by Hylsa is a recitation of the need to establish a sales record without the discipline of the antidumping order,<sup>33</sup> reasoning grounded in the suspicions against a violator of trade laws which we reject.

The Department also suggested a fourth method of analysis which does not use actual sales figures by Hylsa. It referred to its decision in Rebar from Turkey,<sup>34</sup> which involved the request of a new to the market company to have the antidumping order revoked against it based on three years of sales at not less than fair value. The Department compared the sales to the companies that had been the subject of the investigation and concluded that the new firm's sales were too low to reflect what a typical firm in that business would sell. This would appear to be analogous since the new to market firm could not have engaged in previous dumping. However, because it was new to the U.S. market, there were no prior sales of any kind that would provide a basis for comparison. Here Hylsa has a history of participation in the U.S. market, albeit an uneven history that provides actual sales figures for comparison.<sup>35</sup> Thus the Panel does not believe that Rebar From Turkey presents a valid basis for determining commercial quantity.<sup>36</sup>

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<sup>32</sup> See Hylsa's Comments on Remand Redetermination at 21-26(Non-Proprietary Version).

<sup>33</sup> See Remand Redetermination at 34, 48-49; Investigating Authority's Response Brief at 10-11.

<sup>34</sup> See Remand Redetermination at 25-28, 50-51, 55; Investigating Authority's Response Brief at 11-15; See also *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part*, 68 Fed. Reg. 53217 (September 9, 2003) Issues and Decision Memorandum.

<sup>35</sup> Hylsa argues that comparing its sales to TAMSA's in the manner done in Rebar from Turkey is inappropriate because of the dissimilarities in the products and marketing of Hylsa and TAMSA. See Hylsa's Comments on Remand Redetermination at 27-28 (Non-Proprietary Version). While we find that this argument raises some legitimate issues, we do not address it here because of our decision that treating Hylsa as new to market is inappropriate.

<sup>36</sup> *Certain Steel Concrete Reinforcing Bars From Turkey: Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination Not To Revoke in Part*, 68 Fed. Reg. 53217 (September 9, 2003) Issues and Decision Memorandum.

The alternative suggested by Hylsa, using the current period of investigation standard of the four quarters prior to the complaint being filed, was rejected by Commerce on the basis of it being a later adopted process.<sup>37</sup> Yet the effect of this standard illustrates the arbitrary character of Commerce's choice. Hylsa sales utilizing this previous four quarters standard would be similar to its sales during the administrative review periods. Would the Department refuse to characterize these as being in commercial quantity because sales immediately thereafter were greater? We need not speculate about that, but the differences in baseline sales for comparison purposes of the two standards points to an inherent arbitrariness in the use of mechanical formulae that the Department must address.

The Panel acknowledges that the pattern of sales by Hylsa presents a challenge to the Department in determining what constitutes sales in commercial quantity by the company if the agency is basing its decision solely on comparisons. The company had not participated in the American market for some years, and then resumed with small quantity sales in March and April of 1994, and larger sales in May through the following June of 1995. Sales during the three administrative review years reflected the March and April sales rather than the higher volumes of the May 1994 through June 1995 period.<sup>38</sup> Commerce has chosen to utilize a time period that captures these higher sales figures to argue that later sales are not in commercial quantities.<sup>39</sup> The Panel cannot say that this

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<sup>37</sup> See Remand Redetermination at 34, 48-49; Investigating Authority's Response Brief at 10-11..

<sup>38</sup> Hylsa has noted that its sales during the review periods occurred in only one or two months of each period, consistent with its sales that would have been captured by Commerce's use of its current four quarters prior to the complaint standard for periods of investigation. See Letter from Shearman & Sterling to N. Mineta, August 16, 2000; See also Letter from Shearman & Sterling to N. Mineta, August 29, 2000.

<sup>39</sup> The company has noted that the drop off in its sales occurred with the imposition of the 21% antidumping cash deposit rate on its sales to the U.S. effective in July of 1995 after the final determination against TAMSA. See Letter from Shearman & Sterling to N. Mineta, August 16, 2000; See also Letter from Shearman & Sterling to N. Mineta, August 29, 2000. While the Department does not regard sales

choice is incorrect or cannot be justified, but observes that the offered explanation is neither logical nor consistent with the articulated reason. If a company is not dumping product (an assumption fundamental principles of due process compel us to make about Hylsa<sup>40</sup>), comparing its sales to a period before the imposition of an antidumping duty to a period after the duty is imposed tells the Department nothing about the ability of that company to sell without the discipline of the antidumping order. It does suggest that posting a cash deposit of 21% has discouraged it from selling those goods to that market. It may be that in circumstances where a company has not been found to have engaged in dumping but does have an historic pattern of sales there is no sound reason to use an artificial comparative standard based on the misconduct of another.

### **C. Consideration of Ninth Administrative Review Determination**

The Department stated in its decision that even if Hylsa had sold goods in commercial quantities, the Department could not revoke the antidumping order against it because the Department had found that Hylsa engaged in dumping in the 9<sup>th</sup> administrative review of the order in this matter for 2004-2004.<sup>41</sup> The Department argues that this satisfies the provision of the regulations that provides for the Department to decide if the “order is otherwise necessary to offset dumping.”<sup>42</sup> In support of its position that it may consider

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declines due to antidumping duties as a legitimate reason for reduced sales, when those duties are imposed against a company in the “all others” category that was not found to have engaged in dumping, using the decline to reject its revocation request raises justifiable questions of fairness.

<sup>40</sup> The Panel does not assume that the Department chose the particular time frame because it suspected Hylsa was engaged in dumping during this period of higher sales. Such an assumption by the Department would be clearly an abuse of discretion and an illegitimate basis for a legal assumption.

<sup>41</sup> See Remand Redetermination at 55-56; Response Brief at 17. We feel constrained to observe that Commerce has also made a preliminary determination of dumping by Hylsa in its tenth administrative review, 71 Fed. Reg. 27676 (May 12, 2006). Our reasoning in this opinion would equally apply to that decision.

<sup>42</sup> 19 C.F.R. §351.222(b)(2)(i)(C).

an event that occurs more than five year after the proceeding in question, it cites the decision of the Court of International Trade in Luoyang Bearing Corp. v. United States.<sup>43</sup> Hylsa challenges the use of the evidence of the ninth review as a basis for the Department's decision in this, the fourth review by questioning the reasoning of the CIT in Luoyang<sup>44</sup> and arguing that neither the decision nor the evidence of the ninth review is on the record before this Panel.<sup>45</sup>

The Panel is frankly very troubled by the notion that the Commerce Department can use a contested finding of its own<sup>46</sup> in an administrative review five years after the circumstances of the present proceeding as evidence of dumping in order to deny the request for revocation. It is, nonetheless mindful of its role under the NAFTA Chapter 19 process to respect the decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit.<sup>47</sup> It has therefore closely examined the opinion of the CIT to determine if it compels our decision. We find that the circumstances and reasoning employed by the Court in that case are not applicable to ours, and that the failure of the Court to address the fundamental question of the nature of the record gives us no guidance at all for the review on the record required by Chapter 19 Rules.

The company in Louyang challenging the decision not to revoke, Zhejiang Machinery Import and Export Corp. (ZMC), had been found to have engaged in dumping and been subject to an antidumping order for over 12 years. The company had requested revocation based on three years of sales at not less than fair value, but Commerce found

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<sup>43</sup> 358 F. Supp. 2<sup>nd</sup> 1296 (2005).

<sup>44</sup>See Hylsa's Comments on Remand Redetermination at 30-32 (Non-Proprietary Version).

<sup>45</sup> *Id.*

<sup>46</sup> Hylsa has challenged the Department's decision in the 9<sup>th</sup> review in the Court of International Trade.

<sup>47</sup> North American Free Trade Agreement, Sep. 13, 1993, Part 7, Administrative and Institutional Provisions, Chapter 19, Review and Dispute Settlement in Antidumping and Countervailing Duty Matters, Article 1904(2).

dumping in the twelfth administrative review. ZMC challenged that finding and Commerce agreed, recalculating the margin to find zero dumping, and preliminarily revoking the order. However, because of the delays in the process due to Commerce's error, before Commerce issued its final determination the Department found in the fourteenth administrative review that ZMC was dumping<sup>48</sup>. Commerce then reversed its preliminary determination and refused to revoke the order. The Court of International Trade relied on the assertion of the Department that "the discipline of the order continues to be necessary to offset dumping by ZMC"<sup>49</sup> and upheld the decision. It supported its decision by arguing that because the purpose of the antidumping law was remedial and not punitive, Commerce could not ignore this later collected evidence in deciding whether or not to revoke the order.<sup>50</sup>

Once again we are asked to allow Commerce to justify a questionable practice because of guilt, or suspicion of guilt of a party violating the trade laws. And once again we feel constrained to point out that Hylsa, unlike ZMC, has not been found to have engaged in dumping, and that we regard the "discipline of the order" justification as unconvincing. The CIT's assertion that the purpose of the law is remedial may apply to a company with a record of dumping. But to a company never found to have engaged in dumping, it is difficult to see how the law does not operate in a punitive fashion. It certainly cannot justify such gross deviation from traditional principles of administrative

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<sup>48</sup> This case is further distinguished by the fact that ZMC was detected engaging in dumping in the administrative review only two years after the review it challenged. Here on the contrary, there is no relation or proximity between the fourth and the ninth review, conducted five years later. This further undermines Commerce's argument that this is somehow a "continuation" of a commercial practice of Hylsa.

<sup>49</sup> 358 F. Supp. 2d 1301.

<sup>50</sup> ZMC was also attempting to make a collateral attack on the 14<sup>th</sup> review in this case, which further distinguishes it from our matter. See *Zhejiang Machinery & Export Corp. v. United States*, 2005 Ct. Intl. Trade LEXIS 150, Slip Op. 2005-139 at 12 (CIT 2005).

law that it would allow the Commerce Department to construct its own record outside the scrutiny of this Panel to justify its actions.

With all due respect to the CIT, the Panel cannot see how it can perform its review on the record required by law when the deciding evidence cited by the Department is outside that record. The CIT in *Luoyang*<sup>51</sup> considered the argument of ZMC that it should review the decision of Commerce that lead to its conclusion of dumping, but said it was outside the scope of the matter before the court and “involve[s] a record that is not before the Court in the context of this action.”<sup>52</sup> The Panel finds that the proceedings and record of Commerce’s ninth review is similarly not before us, although its conclusion is. But we frankly do not see how we can uphold the Department on this basis.

Our analysis must begin with what constitutes the record in this case. The statute defines the administrative record as:

- (i) a copy of all information presented or obtained by the ... administering authority...during the course of the administrative proceeding...and
- (ii) a copy of the determination, all transcripts or records of conference or hearings, and all notices published in the Federal Register.<sup>53</sup>

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<sup>51</sup> 358 F. Spp.2d 1301 fn 3.

<sup>52</sup> *Id.*

<sup>53</sup> 19 U.S.C. §1516a(b)(2)(A)(2006). The definition under NAFTA Chapter 19 Rules of Procedure 41 provides:

**administrative record** means, unless otherwise agreed by the Parties and the other persons appearing before a Panel:

(a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of *ex parte* meetings as may be required to be kept;

(b) a copy of the final determination of the competent investigating authority, including reasons for the determination;

The CIT has further clarified this by holding that “[a]ny information received by (the ITA) after the particular determination at issue is not part of the reviewable administrative record.”<sup>54</sup> In defining the “particular determination at issue” in that case the CIT said that “[t]he administrative record in this case consists of materials submitted to or obtained by the ITA between the initiation of this administrative review...and the publication of the Final Results in this review...”<sup>55</sup> Hylsa argues that the period of the administrative review in this matter during which Commerce can assemble the record can be “no more than 18 months after the end of the anniversary month in which the review is requested.”<sup>56</sup> This ignores the fact that the Department reopened the record pursuant to the remand by this Panel to address Hylsa’s revocation request, and that the Final Results of that determination were published on April 27, 2006.

This presents us with a difficult conceptual problem. In its remand consideration, Commerce was concerned with the activities of Hylsa during the period of the fourth administrative review from August 1, 1998 to July 31, 1999, and prior reviews in order to consider Hylsa’s request to revoke based on three consecutive reviews without dumping. Upon publication of the April 27, 2006 Redetermination, the Department also filed a supplemental record. While this record contained data from the review periods, it also included the submissions of the participants. One of those submissions, by complainant

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(c) all transcripts or records of conferences or hearings before the competent investigating authority; and

(d) all notices published in the official journal of the importing Party in connection with the administrative proceeding.

<sup>54</sup> *Intrepid v. United States*, 715 F. Supp. 1104, 1109 (CIT 1984) quoted in *Neuweg Fertigung GmbH v. United States*, 797 F. Supp. 1020, 1022 (CIT 1992).

<sup>55</sup> *Neuweg Fertigung GmbH* at 1023.

<sup>56</sup> See Hylsa’s Comments on Remand Redetermination at 32 (Non-Proprietary Version), citing 19 U.S.C. § 1675(a)(3)(A).



U.S. Steel, recited the fact that in the ninth administrative review the Department had determined that Hylsa was guilty of dumping the subject merchandise.<sup>57</sup> In its decision, the Department rejected Hylsa's request to strike that reference from the record<sup>58</sup> and proceeded to use the ninth review finding as a separate basis for denying the revocation request. Thus, it is arguable that the *outcome* of Commerce's ninth review is a part of the record<sup>59</sup> even though it transpired several years after the relevant period of activity by Hylsa. This is supported by the "otherwise necessary to offset dumping" language of the revocation criteria in §351.222(b)(2)(i)(C), which invites the Department to an expansive consideration of relevant factors.

However, having the outcome of the ninth review in the record offers little help to this Panel in determining if there is substantial evidence in the record to support the Department's decision not to revoke. This is true for several reasons. First, the decision of the Department is by no means a final decision, since Hylsa has filed a judicial challenge. While the parties may speculate on the outcome of this appeal or the merits of Hylsa's arguments, to allow the Department to base its decision in this case on its own decision in a later case that is still pending in the courts is irrational. If the Department were to be reversed in the ninth review, the effect of its now invalid decision would still control the outcome of this proceeding. The Panel believes this is inconsistent with fundamental concepts of administrative accountability.<sup>60</sup>

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<sup>57</sup> See U.S. Steel's Comments in Support on Commerce's April 27 Remand Redetermination ( June 12, 2006).

<sup>58</sup> See Remand Redetermination at 55; Investigating Authority's Response Brief at 17-18.

<sup>59</sup> The Panel notes that the Department could have taken notice of its own proceeding in any event, even if one of the parties had not brought it into the record by including the reference in its submission.

<sup>60</sup> This is such an anomalous situation that our research has revealed no decisions addressing such a circumstance. Its basic illogic suggests why no court has ever had to address it.

Second, the Panel is troubled by the circumstance that had the Department acted on this fourth review in a timely manner and revoked the order, the ninth review would never have taken place. By virtue of the delay, the Department is now able to argue that the later review provides the “otherwise necessary” circumstance to reject revocation. While the Department may not be responsible for the delay in the appointment of the Chapter 19 Panel, had it correctly calculated the dumping margin originally, it would have had to consider Hylsa’s revocation request at the time of the review instead of six years later. Regardless of fault, the Panel does not believe that placing the risk of the delay on Hylsa is appropriate. Allowing the Department to use the outcome of later administrative reviews to justify declining revocation in reviews conducted in a dilatory fashion encourages strategic bureaucratic delay and abuse of the administrative process.

This issue also, once again, draws the Panel to the distinction between those exporters found to have engaged in dumping and those who have not. The revocation requirement for those previously found to have engaged in dumping includes an agreement that allows the Department to automatically reinstate the order if the Department finds dumping.<sup>61</sup> No such requirement exists for Hylsa, yet the effect of what the Department is arguing for here would subject Hylsa to that condition. By allowing the Department to use dumping determinations in later administrative reviews (that theoretically would not have occurred), the Department gets to automatically impose a dumping order on a company not previously found to have engaged in dumping. This strikes the Panel as inconsistent with the rationale as well as the requirements of the regulations.

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<sup>61</sup> 19 C.F.R. §351.222(b)(2)(i)(B).

Finally, and perhaps most importantly, the Panel does not see how it can perform meaningful “review on the record” when the determinative circumstances fall totally outside the purview of the Panel. The substantial evidence test involves reviewing the record taken as a whole, including evidence that supports and detracts from the conclusion reached by the Department.<sup>62</sup> The Department and complainants would have us accept the outcome of the ninth review as determinative evidence to support denial of revocation without any assessment of the elements of that decision. This Panel has previously found the Department’s dumping conclusion in the fourth review fundamentally flawed, and ultimately reconsidered with a result of a zero dumping margin. Yet we are now called upon to take at face value the Department’s finding in the ninth review, even as it is challenged by Hylsa in another forum.<sup>63</sup> This is where we are most troubled by the CIT’s decision in *Luoyang Bearing Corporation* because acceptance of the outcome alone as an element of the record would be dispositive and obviate any need or impact of record review. The Panel does not believe the requirement for Panel review (or judicial review for that matter) under the antidumping law and the North American Free Trade Agreement is achieved when the Department is allowed to short-circuit meaningful review by interposition of its unreviewed decision in a later proceeding.

We have looked at the Court of International Trade’s decision in *Floral Trade Council of Davis, California v. United States*<sup>64</sup> and find some additional guidance on this point. In that case the plaintiff was challenging a determination by the Department that

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<sup>62</sup> See e.g. *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997).

<sup>63</sup> In theory this Panel could have had both cases before it under the Chapter 19 Rules, which would have addressed this particular concern, although not the two arguments previously raised.

<sup>64</sup> 709 F. Supp. 229 (CIT 1989).

certain flowers did not fall within the scope of an antidumping order and sought to expand the record to include the full International Trade Administration and International Trade Commission investigations that lead to the orders it was seeking to clarify. In its decision the Department had stated “without qualification that it has examined ‘the original investigations by the ITC and the Department’” and used that as a partial basis for its decision.<sup>65</sup> The CIT said that when the Department makes such a statement, the court “must assume that all relevant information from those previous investigations is before the agency for the purpose of the current decision.”<sup>66</sup> There the CIT expanded the record to include investigative materials from the other proceedings. Here the relevant information that led to the Department’s decision is not before this Panel, but as the CIT in *Luoyang Bearing Corporation* pointed out, it is not appropriate for the ninth administrative review proceedings to be before this Panel. We think that the CIT decision in *Floral Trade Council* is compelling. If the Department is going to rely upon another proceeding, the relevant elements of that proceeding need to be before the reviewing tribunal. Since in this case the record of the ninth review is outside the scope of our consideration for the fourth review, the conclusion in that proceeding must also be outside the scope of our substantial evidence review.

Therefore, for purposes of our review of the decision of the Department to reject Hylsa’s request to revoke the antidumping order at the end of the fourth administrative review, the Panel will not consider the outcome of the ninth administrative review.

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<sup>65</sup> *Id.* at 230.

<sup>66</sup> *Id.*

### III. DECISION AND ORDER

It is our conclusion that the Department acted in an arbitrary and capricious fashion when it failed to adequately justify its determination that Hylsa did not ship the subject matter goods in commercial quantities during the periods of review in question. We therefore are remanding the matter to the Department for further consideration, in light of the issues raised by the Panel. This is necessary because of our decision that the results of the ninth administrative review cannot be taken into account by the Department in its decision in the fourth review, leaving the commercial quantities determination the sole basis for its refusal to revoke the antidumping order against Hylsa.

For the foregoing reasons the Panel orders that this matter be remanded to the Department of Commerce to reconsider its determination that Hylsa did not ship in commercial quantities consistent with the findings of this Panel.

The Department shall report the results of its remand decision within 45 days of the date of this order.

ISSUED: August 11, 2006

SIGNED IN THE ORIGINAL BY:

Howard N. Fenton

Howard N. Fenton, Chair

Dr. Hector Cuadra

Dr. Hector Cuadra

Dr. Arturo Lan

Dr. Arturo Lan

Peter L. Fitzgerald

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Jaime Galicia

Jaime Galicia