

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

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In the Matter of:)	
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BINATIONAL PANEL REVIEW OF CARBON AND CERTAIN ALLOY STEEL WIRE ROD FROM CANADA)	Secretariat File No.
)	USA-CDA-2008-1904-02
)	
)	

DECISION AND ORDER OF THE PANEL

PANEL MEMBERS:

Lisa Koteen Gerchick, Chair
Cynthia C. Lichtenstein
John R. Magnus
David J. Mullan
Robert K. Paterson

**On Behalf of Ivaco Rolling Mills 2004, L.P. and Sivaco Ontario, a division of Sivaco
Wire Group 2004, L.P.:**

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On behalf of the Investigating Authority

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I. INTRODUCTION

This Binational Panel (“Panel”) has been established pursuant to Article 1904.2 of the North American Free Trade Agreement (“NAFTA”). The Panel was constituted to review *Carbon and Certain Alloy Steel Wire Rod from Canada: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 26,958 (May 12, 2008) (“Final Determination”).

On June 6, 2008, Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P. (collectively, “Ivaco” or “Complainant”), filed a First Request for Panel Review with the United States Section of the NAFTA Secretariat. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review*, 73 Fed. Reg. 35,370 (June 23, 2008). On July 7, 2008, Complainant, which consists of the respondent Canadian producers, exporters and U.S. importers of the subject merchandise, filed a complaint challenging the Final Determination of the fourth administrative review conducted by the Department of Commerce, International Trade Administration (“Commerce” or “the Investigating Authority”). The Investigating Authority filed a Notice of Appearance and Motion to File Out of Time in opposition to Ivaco’s complaint on August 1, 2008. The Panel granted the Investigating Authority’s motion on July 20, 2011. The Panel convened a hearing in Washington, DC on October 13, 2011, where counsel for Ivaco and the Investigating Authority appeared and participated in oral argument.

In accordance with Article 1904.8 of NAFTA, for reasons more fully set out below, and on the basis of evidence in the administrative record, the applicable law, the

written submissions of the participants, and oral argument at the Panel’s hearing, the Panel affirms the investigating authority’s final determination with regard to the issue of level of trade and remands with regard to the issue of “zeroing” in this matter, with instructions to the Investigating Authority to provide an explanation consistent with the remand orders in *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) (“*Dongbu*”) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011) (“*JTEKT*”).

II. BACKGROUND

On October 29, 2002, Commerce issued an antidumping duty order on carbon and certain alloy steel wire rod from Canada. *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 Fed. Reg. 65,944 (Oct. 29, 2002). Commerce conducted three administrative reviews prior to the review before this Panel. *See Final Results of Antidumping Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada*, 72 Fed. Reg. 26591 (May 10, 2007) (final results of third administrative review).

On October 2, 2006, Commerce issued a notice of opportunity to request an administrative review of the antidumping duty order for the period from October 1, 2005 through September 30, 2006. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 71 Fed. Reg. 57,920 (October 2, 2006). Mittal Steel USA Inc., Gerdau USA Inc., Nucor Steel Connecticut Inc., Keystone Consolidated Industries, Inc., and Rocky Mountain Steel Mills petitioned Commerce on October 31, 2006 for a review of Ivaco’s sales during the

period of review. Consequently, Commerce initiated an antidumping duty administrative review. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 71 Fed. Reg. 68,535 (November 27, 2006). Commerce preliminarily found “that sales of subject merchandise by Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario...have been made below normal value (NV)...” *Carbon and Certain Alloy Steel Wire Rod*, 72 Fed. Reg. 62,816 (Nov. 7, 2007) (“Preliminary Determination”). Upon Ivaco’s request, on November 29, 2007, Commerce issued supplemental questionnaires to Ivaco pertaining to the level of trade issue prior to scheduling the briefings and hearing. Ivaco responded to the supplemental questionnaires on December 13, 2007. Petitioners provided comments on Ivaco's response on December 21, 2007, to which Ivaco responded on December 31, 2007. Subsequently, Ivaco and Petitioners submitted their case briefs on January 23, 2008, and rebuttal briefs were submitted on January 30, 2008. The hearing was held on February 27, 2008 and, on May 12, 2008, Commerce published its final determination affirming its preliminary determination that Carbon and Certain Alloy Steel Wire Rod from Canada were being sold at less than fair value during the period of review. *See Final Determination, supra.*

III. STATEMENT OF ISSUES

Complainant Ivaco asserts the following errors on appeal:

1. Commerce’s decision to set the dumping margins for sales with negative dumping margins to zero is not in accordance with law. Commerce applied an erroneous interpretation of 19 U.S.C. §1677(35), an interpretation that is not consistent with the findings adopted by the World Trade Organization Dispute Settlement Body. Nor is the Department’s decision in accordance with recent decisions of the United States Court of Appeals for the Federal Circuit.

2. Commerce's decision that there was only one pertinent level of trade during the period of review is unsupported by the substantial evidence in the record and is otherwise not in accordance with law.

IV. STANDARD OF REVIEW

This Panel's authority to review antidumping administrative reviews conducted by Commerce under Section 751 of the Tariff Act of 1930 ("the Act") (19 U.S.C. §1675) derives from Chapter 19 of the NAFTA. Pursuant to NAFTA Article 1904.3, "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 would otherwise apply to a review of a determination of the competent investigating authority." When reviewing the determination of the investigating authority, the Panel must apply the standard of review and general legal principles established by the courts of that country. Annex 1911 of NAFTA. In a NAFTA panel review such as this one, in which the investigating authority is the U.S. Department of Commerce, the panel adjudicates in lieu of the United States Court of International Trade (the "CIT"). The panel is bound by the same precedent, substantive law, and standard of review as that court. As a result, this Panel must apply the standard of review set out in §516A(b)(1)(B) of the Act, which establishes that U.S. Courts "shall hold unlawful any determination, finding, or conclusion found...[1] to be unsupported by substantial evidence on the record, or [2] otherwise not in accordance with law." 19 U.S.C. §1516a(b)(1)(B)(i); *see also* NAFTA Annex 1911.

a. An administrative agency's determination must be supported by substantial evidence on the record.

When reviewing whether an administrative agency's determination was based on the substantial evidence in the record, such review must be confined to "the [administrative] record...." 19 U.S.C. §1516a (b)(2)(A). More specifically, this Panel's

review must be limited to the “information presented to or obtained by [the Department]...during the course of the administrative proceeding,...a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.” *Id.* Therefore, such determinations can only be judged on the grounds and findings actually stated in the pertinent determination, not on the basis of any *post hoc* arguments or facts presented by counsel for the investigative agency. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212-13 (1988) (consideration of “what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate”); *Florida Manufactured Housing Assn v. Cisneros*, 53 F.3d 1565, 1574 (11th Cir. 1995) (no consideration when the new interpretation is a mere litigation position); *USX Corp v. Director, Office of Workers’ Compensation Programs*, 978 F.2d 656, 658 (11th Cir. 1992) (no deference to agency’s litigating position absent prior interpretation).

The agency’s decision must have a reasoned basis in the record. The substantial evidence standard requires “more than a scintilla...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); *see also 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). Thus, the Panel must consider Commerce’s reasons for its conclusions and determine whether there is a rational connection between the facts found on the record and the determination made by Commerce. *Bando Chem. Indus. v. United States*, 16 CIT 133, 136-37, 787 F. Supp. 224, 227 (CIT 1992) (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)). Therefore, courts and

binational panels must consider “the record in its entirety, including the body of evidence opposed to the [agency’s] view.” *Universal Camera*, 370 U.S. at 477.

However, this does not enable courts or binational panels to “reweigh” the evidence or substitute their judgment for that of the original finder of fact. *Id.* at 488. As stated by the Federal Circuit:

A party challenging [an agency’s] determination under the substantial evidence standard has chosen a course with a high barrier to reversal. *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). We have explained that “even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent [the] determination from being supported by substantial evidence.” *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001).

Accordingly, the question for the Court of International Trade was, and for this court is “not whether we agree with the...decision, nor whether we would have reached the same result...had the matter come before us for decision in the first instance.”...[*United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed.Cir.1996)] Rather, “we must affirm [an agency’s] determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the...conclusion. *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) (internal quotation marks omitted). In short, we do not make the determination; we merely vet the determination.”

Nippon Steel Corp. v. United States, 458 F. 3d 1345, 1352 (Fed. Cir. 2006). Therefore, if the Department’s determination is supported by the substantial evidence in the record, this Panel may not, “even as to matters not requiring expertise... displace the [agency’s] choice between two fairly conflicting views, even though the court would justifiably have

made a different choice had the matter been before it *de novo*.” *Universal Camera*, 340 U.S. at 488.¹

b. An administrative agency’s determination must be in accordance with the law.

NAFTA Chapter 19 Panels must also follow the same standards of review and general legal principles followed by the U.S. courts when reviewing whether an administrative agency’s determination was in accordance with law. 19 U.S.C. §1516a(b)(1)(B)(i); *see also* NAFTA Annex 1911. As established by the U.S. Supreme Court, in the absence of a clear intent of Congress, federal courts must defer to the reasonable interpretation made by the agency charged with administration of a statute. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Thus, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s determination is based on a permissible construction of the statute. *Id.* The Court stated:

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 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 of 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

¹ *See also* *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (the panel may not substitute its own judgment for that of the agency when there are two legitimate alternative views); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966) (“the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”)

agency's answer is based on a permissible construction of the statute.

Id. See also *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997) (the CIT and Federal Circuit must enforce the clear Congressional intent or, where the applicable statute is ambiguous or otherwise undefined, "accord substantial deference to Commerce's construction of pertinent statutes"). As a result, where an administrative agency's interpretation of the pertinent statute is found to be reasonable, that administrative agency's interpretation must prevail. *Id.*

Likewise, where an administrative agency's own regulations or methodologies are challenged, courts and binational panels must afford due deference to the regulations or methodologies applied by the agency charged by Congress with administration of the statute. *Id.* See also *National R.R. Passenger Corp. v. Boston & Marine Corp.*, 503 U.S. 407, 417 (1992) (when considering whether or not a decision is "in accordance with law," the panel must defer "to reasonable interpretations by an agency of a statute that it administers..."); *Torrington Co. v. United States*, 68 F. 3d 1347, 1351 (Fed. Cir. 1995) (the Federal Circuit will "accord substantial deference to Commerce's statutory interpretation, as the International Trade Administration is the 'master' of the antidumping laws"). Indeed, courts will afford Commerce broad discretion with regard to the conduct of investigations and acknowledge that it has "the discretionary authority to determine the extent of investigation and information it needs." *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992). Such agency's "statutory interpretations articulated in the course of antidumping proceedings [shall] draw *Chevron* deference." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376 (Fed. Cir. 2001). Thus, "as long as the agency's methodology and procedures are reasonable means of effectuating the

statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.” *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

On the other hand, the reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning. The extent of deference to be accorded to an agency’s determination is dependent on “the thoroughness evident in [its] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements....” *Id.* citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). Accordingly in this matter, the Panel must uphold the determination of the Investigating Authority if it is supported by substantial evidence on the record and is not contrary to law, even if the Panel would have made a different determination had it been the initial trier of fact or interpreter of the statute.

V. ZEROING

Ivaco challenges as “contrary to law” Commerce’s inclusion of the so-called “zeroing”² instruction in the margin calculation program utilized in the administrative review at bar. We address below (a) the justiciability of that claim, including the admissibility of one particular argument consideration of which Commerce has sought to preclude; (b) the merits of Ivaco’s primary, original arguments on the lawfulness of

² Zeroing is the practice of treating any price comparison in which the export price is lower than normal value, *i.e.*, there is no dumping, as if it were a margin of zero, as opposed to treating it as a negative dumping margin, in calculating a weighted-average dumping margin. In other words, when zeroing is applied, there are no negative dumping margins to offset the dumping margins in the calculation of a weighted-average margin.

zeroing; and (c) the implications of Ivaco’s latest argument, set out in supplemental briefing, on the lawfulness of zeroing in administrative reviews in light of *Dongbu*, *supra*, and *JTEKT*, *supra*.

Ivaco’s “contrary to law” claim rests on several underlying theories and arguments. Among these is the assertion that zeroing does not rest on a permissible construction of the relevant portion of the antidumping statute. Another is what is known as the “*Charming Betsy*” canon, which, according to Ivaco, requires a reviewing body to interpret the U.S. statute in the context of World Trade Organization (“WTO”) jurisprudence on zeroing. As to these arguments – and thus as to the overall claim on zeroing – justiciability is not in doubt. Nevertheless, there is a threshold procedural issue concerning zeroing that must be addressed.

a. Exhaustion of Administrative Remedies and Waiver of Argument

Commerce contends that the doctrine of failure to exhaust administrative remedies and the waiver concept each bar Ivaco from arguing that the agency cannot interpret 18 U.S.C. §1677(35) to permit application of the zeroing methodology in certain types of antidumping administrative proceedings, since it has ceased using the same methodology in other types of proceedings. In the supplemental brief filed on September 20, 2011, and at oral argument, Ivaco argued that the decisions in *Dongbu* and *JTEKT* require this Panel to remand the final determination to the Investigating Authority for a satisfactory explanation of the inconsistent treatment between proceedings involving average-to-average comparisons in original investigations, where Commerce had, at the time of the administrative review, discontinued its zeroing practice and those involving average-to-transaction comparisons (administrative reviews), where it continued to apply

that practice. (For the sake of simplicity, we will refer to Commerce’s practice at the time of the final determination under review as zeroing in the context of administrative reviews yet no longer zeroing in investigations.) Commerce contends that the Panel should dismiss Ivaco’s so-called “disparate treatment” argument because Complainant never raised this specific argument either during the administrative proceeding or in its briefs filed pursuant to rules 57(1) and (3). We find that neither the doctrine of exhaustion of administrative remedies nor the principle of waiver precludes this Panel from considering the issue.

1. Background

As recounted above, the administrative review under consideration covers the period October 2005 through September 2006. Commerce initiated the review in November 2006 and issued the final results of its review in May 2008. *See* Final Determination, *supra*. Meanwhile, on December 27, 2006, Commerce had published *Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation; Final Modification*, 71 Fed. Reg. 77,722 (December 27, 2006) (“*Section 123 Determination*”), in which Commerce announced that it would stop zeroing in most antidumping investigations. The *Section 123 Determination* was the outcome of statutorily mandated procedures and consultations required by Section 123 of the Uruguay Round Agreement Act (“URAA”) in response to an adverse determination by a WTO dispute settlement panel.³ Pub. L. No. 103-465. 108 Stat. 4809 (1994) (19 U.S.C. §§3501 *et seq.*) The *Section 123 Determination* explicitly announced that the offsetting methodology it would begin to apply to new investigations

³ We discuss Section 123 of the URAA more fully in Section V.b.2.A, *infra*.

would not extend to other types of antidumping proceedings, including administrative reviews. *Id.* During the course of the administrative review at bar, respondents contested Commerce's application of zeroing but did not make any argument regarding the discrepancy between the way in which Commerce was determining dumping margins in the review and the methodology Commerce had announced it would be applying in new – and unrelated – investigations.

Shortly after publishing the *Section 123 Determination*, Commerce published the final results of an administrative review of another antidumping duty order that was later appealed as *Dongbu Steel Co. v. United States*, 677 F. Supp.2d 1353 (CIT 2010). In contrast to the arguments respondents made in the administrative review before us, respondents in the proceeding before the *Dongbu* court had sent a letter challenging Commerce's practice of interpreting the statute one way in investigations and another way in administrative reviews. Commerce rejected the submission as untimely and the respondents appealed. *Id.* at 1358. The CIT agreed with Commerce but the Court of Appeals for the Federal Circuit reversed. *See Dongbu*, 635 F.3d 1363, *supra*. In that case, respondents did raise the specific issue of inconsistent statutory interpretation in the administrative proceeding below.

In this Panel review, respondent Ivaco filed its first brief, pursuant to Panel Rule 57(1) on October 6, 2008 and, on February 24, 2009, its Rule 57(3) brief replying to the Investigating Authority's brief of February 6, 2009. Pursuant to Rule 68 of the NAFTA Article 1904 Panel Rules, on May 26, 2011, Ivaco submitted two Notices of Subsequent Authority, one of which was the appellate court's decision in *Dongbu*, and the other, the CIT opinion in *JTEKT Corp. v. United States*, Slip Op. 11-52, Consol. Ct. No. 07-00377

(subsequently affirmed by the Court of Appeals for the Federal Circuit). *See Dongbu, supra; see also JTEKT, supra.* The Investigating Authority objected to the inclusion of these two decisions, filing its opposition on June 25, 2011. This Panel, in an order ruling on pending motions and issued on July 20, 2011, admitted the two subsequent authorities. The same day, “[g]iven the extensive lapse of time” since the filing of the participants’ briefs, the Panel issued an additional order, inviting the participants to submit concise supplemental briefs “limited to discussion regarding... ‘zeroing’” and developments in the law since the participants had filed their briefs. Consequently, Commerce and Complainant submitted supplemental briefs to the Panel on July 19 and 20, 2011, respectively.

It is against this chronological background that we discuss the applicability of the doctrine of exhaustion of administrative remedies and the principle of waiver of an argument.

2. Exhaustion of Administrative Remedies.

The doctrine of exhaustion of administrative remedies, which derived from the notion that a party could not evade an agency proceeding by taking a grievance directly to a trial-level court⁴, now incorporates the more pertinent concept that a party is required to present issues to the designated administrative agency before raising those issues in court. The objective is two-fold: to permit the agency to exercise its authority and to secure judicial economy. *See Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998), citing *McCarthy v. Madigan*, 503 U.S. 140, 145, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992). As the Supreme Court has explained:

⁴ *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

[I]t is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.

McKart v. United States, 395 U.S. 185, 193-94, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969).

See also *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97

L.Ed. 54 (1952). The exhaustion doctrine permits the agency to rectify administrative mistakes and compile a record adequate for judicial review. *Carpenter Tech. Corp. v.*

United States, 30 CIT 1373, 1374-75, 452 F. Supp.2d 1344, 1346 (2006). Agency fact-

finding and statutory interpretation not only aid judicial review, they also conserve

judicial resources. *Luoyang Bearing Factory v. United States*, 240 F. Supp. 2d 1268,

1297, 26 CIT 1156, (CIT 2002). See also *Pakfood Public Co. Ltd. v. U.S.*, 724 F.

Supp.2d 1327 (CIT 2010)⁵

Exhaustion of administrative remedies is discretionary in most cases; unless there is a statutory requirement for a litigant to exhaust administrative remedies, it is up to the court whether or not to apply the doctrine. *Corus Staal BV v. United States.*, 502 F.3d 1370, 1381 (Fed. Cir. 2007).⁶ With regard to the antidumping law, the statute requires litigants to exhaust administrative remedies “where appropriate.” 28 U.S.C. §2637(d). Although there would appear to be considerable judicial latitude in defining the phrase “where appropriate,” the CIT “generally takes a ‘strict view’ of the requirement that

⁵ Other justifications, such as avoidance of surprise, *Hormel v. Helvering*, 312 U.S. 552, 556 61 S. Ct. 719, 721 (1941), are not germane to this panel review.

⁶ Indeed, one scholar criticizes courts’ tendencies to manipulate the exhaustion doctrine to suit their approaches to the merits. K. Davis, 4 Administrative Law Treatise §26:1 (1983) at 414.

parties exhaust their administrative remedies before the Department of Commerce in trade cases.” *Fuwei Films (Shandong) v. United States*, 791 F. Supp.2d 1381, 1384 (CIT 2011).

Ivaco’s contention that a participant need not make a specific argument at the administrative level as long as the participant has argued the general issue below (*e.g.*, one that addresses zeroing generally but not the inconsistent statutory interpretation between investigations and reviews) is unsupported by judicial precedent. To do otherwise “usurps the agency’s function.” *Gerber Food Co., Ltd. v. United States*, 601 F. Supp.2d 1370, 1379 (CIT 2009), quoting *Unemployment Comp. Comm’n of Alaska v. Aragon*, 329 U.S. 143, 155, 67 S.Ct. 245, 91 L. Ed. 136 (1946). If an argument is relevant, the party must include it in its case brief before Commerce, in accordance with 19 C.F.R. §351.309(c)(2). *See also Fuwei Films, supra* at 1385.

A premise underlying the exhaustion doctrine is that parties should not be able to evade the administrative decision-maker by withholding an argument. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990) (frowning upon a Complainant’s failure to raise an argument “for tactical reasons.”). *See also Independent Radionic Workers of America v. United States*, 862 F. Supp. 422 (CIT 1994); *The Budd Co. v. United States*, 773 F. Supp. 1549 (CIT 1991). There is no evidence in this case, however, that the complainants intentionally refrained from making the disparate treatment argument during the administrative proceeding. Rather, they were apparently unaware of the argument. No judicial precedent existed to recommend the argument to Ivaco. Although the respondents in the administrative proceeding that ultimately resulted in *Dongbu* were more inventive, recognizing a basis for challenge as soon as Commerce

issued the *Section 123 Declaration*, we question whether the complainant can reasonably be expected to have made an original, unproven argument at the administrative level. Nevertheless, and notwithstanding the Panel’s view that the exhaustion doctrine might not apply in circumstances where a participant did not perceive a relatively novel argument, the fact remains that Complainant did not exhaust its administrative remedies with regard to the disparate treatment issue.

The exhaustion doctrine, however, is “subject to numerous exceptions,” *McKart, supra* at 193. The three primary exceptions are: (1) the “futility” exception; (2) the “pure question of law” exception; and (3) the “intervening judicial decision” exception; plus a fourth exception found in at least one analysis, which is lack of access to the administrative record. *Gerber Food, supra* at 1380.⁷ Complainant asserts that its case “doesn’t depend upon futility, it doesn’t depend upon whether it’s a fair [sic] question of law.” *Transcript of Hearing Before NAFTA Ch. 1904 Panel In re: Matter of Steel Wire Rod From Canada, 4th Administrative Review*, October 13, 2011, Panel Doc. No. 49, (“*Hearing Transcript*”) at 14. Rather, Complainant relies solely upon the intervening judicial decision exception. *Id.*

The intervening judicial decision exception derives from the seminal decision in *Hormel v. Helvering*, 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037 (1941). *Hormel* finds that, in the interest of justice, a court may excuse failure to exhaust administrative remedies when “there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered

⁷ See also *Consolidated Bearings Co. v. United States*, 166 F. Supp.2d 580 (CIT 2001) and *Budd, supra*, for lists of exceptions to the exhaustion doctrine. The fourth exception mentioned in *Gerber Foods, supra*, and the others are not relevant to this panel review.

the result.” *Id.* at 558-59. We examine below the elements *Hormel* identifies: (a) the timing of the decision; (b) its relevance to the case under Panel review; and (c) whether the application of the decision would materially alter the result of the administrative determination.

Dongbu and *JTEKT* are appellate court decisions concerning the zeroing issue, specifically, whether Commerce could interpret 19 U.S.C. §1677(35) to permit the Department to apply the zeroing methodology in administrative reviews while simultaneously permitting the Department not to zero in investigations. *Dongbu, supra* at 1358; *JTEKT, supra* at 1384-85. The Federal Circuit rendered the decisions after the final determination under review and pending appeal, that is, after the briefing in this Panel review had been completed yet before the oral hearing. As previously described, the Panel permitted additional briefing on the issue of zeroing. Thus, *Dongbu* and *JTEKT* satisfy the first of the three elements of the exception.

Commerce argues nonetheless that they are not binding precedent, in part because they are not “final,” as the concluding order was a remand necessitating further action on the part of the lower court and the Department, and in part because the opinions make no new interpretation of the law but instead merely order the Department to provide a satisfactory explanation of its own statutory interpretation.⁸

We do not agree with the allegation that the two decisions are not final. Many appellate decisions, calling upon the lower court to remand to the administrative agency, are final decisions. Neither *Dongbu* nor *JTEKT* orders the CIT, having decided each case

⁸ *Dongbu* holds that the apparent contradictions in Commerce’s interpretation of 19 U.S.C. §1677(35)(A) in the context of investigations and reviews demands an explanation, while *JTEKT* rejects Commerce’s explanation as unsatisfactory. *Dongbu, supra* at 1371-73; *JTEKT, supra* 642 F.3d at 1384-85.

on remand, to report back to the Court of Appeals for the Federal Circuit. That court has issued a final mandate in each case. Commerce's argument presumes that, after it responds to the CIT's remand decisions in *Dongbu* and *JTEKT*, and after the CIT rules in those cases, the CIT decisions will ultimately be appealed, giving the Federal Circuit the final say. The scenario envisioned by Commerce's argument may be likely but it is speculative. The CIT has remanded a case based upon an intervening judicial decision even when the new decision was rendered by the CIT—therefore not binding precedent—and the intervening judicial decision itself had ordered a remand and was therefore not final. *Rhone Poulenc, supra* at 608-610; *Alhambra Foundry Co., Ltd. v. United States*, 685 F. Supp. 1252, 1257 (CIT 1988); *cf. Gerber Food, supra* at 1381-82 (factual distinctions prevented related CIT decisions from constituting intervening judicial decisions). In contrast to *Rhone Poulenc* and *Alhambra Foundry*, here we have appellate court decisions that are final.

Furthermore, except for a few cases in which a CIT judge has avoided addressing the disparate treatment argument by dismissing the claim,⁹ the CIT has found itself bound by the *Dongbu* and *JTEKT* appellate court precedents and has remanded case after case to the Department for a satisfactory explanation of its interpretation of the statutory provision used to justify zeroing. *See, e.g., Grobest & I-Mei Industrial (Vietnam) Co., Ltd. v. United States*, Slip Op. 12-09 (CIT Jan. 18, 2012); *SKF USA Inc. v. United States*, Slip Op. 11-121 (CIT Oct. 4, 2011); *Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States*, Slip Op. 11-58 (CIT May 26, 2011). Of particular note is the lower court's

⁹ *See, e.g., Fuwei Films, supra*, and *Tianjin Magnesium International Co. Ltd. v. United States*, Slip Op. 11-118 (Ct. Int'l Trade Sept. 23, 2011).

decision in *JTEKT*, in which the CIT found that the Federal Circuit’s issuance of the *Dongbu* decision excused a complainant that had not raised the zeroing issue below. *JTEKT Corp. v. United States*, 768 F. Supp.2d 1333, 1363 (CIT 2011).¹⁰ Regardless of whether the example set by these CIT decisions ordering “*Dongbu* remands” is one we ought to follow here – a question addressed below at Section V -- we consider that these reactions to *Dongbu* and *JTEKT* are relevant to our assessment of Ivaco’s claim that zeroing is contrary to law.

We turn now to the second prong of Commerce’s argument, concerning the effect of *Dongbu*—and, to a lesser extent, *JTEKT*—on the results of the review. While those opinions do not articulate whether and in what circumstances Commerce may zero, they do raise questions about (and might eventually yield limits on) Commerce’s discretion in the interpretation of the statute. While Commerce has the discretion to interpret the statutory provision as either allowing or not allowing offsets for negative dumping margins, *Dongbu* admonishes, the agency cannot variously interpret the statute depending upon the phase of the proceeding (investigation or review) unless there is a reasonable explanation for its disparate application of zeroing. It is true that the ultimate result might be that Commerce can explain its methodological inconsistency to the satisfaction of the courts, such that nothing will change, but the courts could just as well find Commerce’s explanation unpersuasive and hold that administrative review determinations which zero are therefore “contrary to law.”¹¹ The intervening judicial

¹⁰ Affirmed in the Federal Circuit decision in *JTEKT*. *Supra*, 642 F.3d at 1378

¹¹ We note that the explanation provided by Commerce within the proceeding underlying *Dongbu* has been reviewed and declared satisfactory at the CIT level, in *Union Steel v. United States*. *Union Steel and Dongbu Steel Co., Ltd. v. United States*, Slip Op. 12-24

interpretation exception does not mandate that the intervening judicial decision materially alter the result, only that it “*might* materially alter the result.” *Hormel, supra* at 559 (emphasis added). Thus, while Ivaco failed to exhaust its administrative remedies, the Panel accepts that an exception prevails, such that the issue is properly before the Panel.

3. Waiver

Commerce argues in its supplemental brief that Ivaco has waived the argument regarding disparate treatment because the argument did not appear in the complaint nor in the briefs filed under sub-rules 57(1) and (3) of the NAFTA Article 1904 Panel Rules. Waiver applies when a party either raises an issue for the first time on appeal or raises the issue after briefing. *Novosteel SA v. United States*, 284 F.3d 1261, 1273-74 (Fed. Cir.2002); *Forshey v. Prinicipi*. 284 F.3d 1335, 1353-54 (Fed. Cir. 2002). Like the exhaustion doctrine, waiver is premised in part upon the notion that courts do not like surprises, either to themselves or to other litigants. *See Singleton v. Wulff*, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), quoting *Hormel, supra*. Courts liberally employ their discretion where waiver is concerned. As long as a general issue is before the court, the court will entertain specific arguments or sub-issues that the litigant did not raise below: “When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.” *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99, 111 S.Ct. 1711, 114 L. Ed.2d 152 (1991). *See also Navajo*

(CIT February 27, 2012). We return to this CIT decision in addressing the merits of Ivaco’s zeroing claim in Section V below.

Nation v. United States, 501 F.3d 1327, 1337-38 (Fed. Cir. 2007) and cases cited therein.¹²

Upon review, we find that the complaint is sufficiently broad in its description of the zeroing issue to incorporate the disparate treatment argument. Moreover, the Federal Circuit in *Novosteel SA* clarifies that “a party does not waive an argument based on what appears in its pleading; a party waives arguments based on what appears in its brief.” *Novosteel SA*, *supra* at 1273-74. Thus, the complaint is adequate.

As for Ivaco’s failure to raise the argument until its supplemental brief, we must take into account the temporal circumstances of this case. Here we have a situation in which judicial decisions were issued approximately two years after briefing was complete. The complainant had furnished copies of the decisions to the Panel, which the Panel had agreed to accept, over Commerce’s objections. Furthermore, the Panel, observing the delay since commencement of the Panel review, provided the opportunity for further briefing. Although one could argue that the parties could have declined the opportunity or discussed the latest developments in the law without introducing a new line of argument, it would be unreasonable to expect such reticence. Certainly, we could find that Ivaco had waived the argument but this is one of those “particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.” *Hormel*, *supra* at 557. The Panel, having opened the door

¹² In *JTEKT (CIT)*, the court rejected one plaintiff’s attempt to raise the disparate treatment argument in its reply brief on the grounds of waiver, in contrast to its excusal of another of plaintiff’s failure to exhaust administrative remedies, thanks to the intervening judicial decision exception. *JTEKT*, at 1341, 1363.

to argument, should not then slam it shut. Therefore, we decline to find that Complainant has waived the argument.

b. Zeroing and *Charming Betsy*: the Relationship of WTO Decisions to U.S. Law.

We have considered, and we find unpersuasive, Ivaco’s original arguments in support of its zeroing claim. Those arguments maintain that (1) zeroing rests on a clearly-impermissible construction of the antidumping statute, and that (2) in any event the *Charming Betsy* canon requires us to construe that statute in “harmony” with decisions, adopted by the WTO Dispute Settlement Body (DSB), which have found zeroing to be inconsistent with the WTO Antidumping Agreement. On the former contention, we note that the Court of Appeals for the Federal Circuit has ruled repeatedly and explicitly that zeroing in administrative reviews rests on a permissible construction of the U.S. antidumping law. *Timken Co. v. United States*, 354 F.3d 1334, 1341-42 (Fed. Cir. 2004)(“*Timken*”), cert. denied, 543 U.S. 976 (2004); *NSK LTD. v. United States*, 510 F.3d 1375, 1380 (Fed. Cir. 2007), *reh’ing en banc denied*, 2008 U.S. App. LEXIS 8540 (Fed. Cir. 2008); *SKF USA v. United States*, 527 F.3d 1373, 1381 (Fed. Cir. 2008). Even if we were inclined to doubt the soundness of those authoritative rulings, we would not be at liberty to rule differently. On the latter contention, involving the *Charming Betsy* canon and the relevance of DSB-adopted decisions in U.S. antidumping proceedings (and appeals thereof), our assessment follows below.

1. The Participants’ Arguments Regarding Zeroing

Ivaco argues that the zeroing methodology used by Commerce is inconsistent with WTO rules as interpreted by the WTO Appellate Body, whose rulings, the

complainant contends, are applicable under U.S. law. Ivaco relies on a statement, sometimes described as a canon of statutory interpretation set out in *Charming Betsy*:

It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). Ivaco argues that since an interpretation of 19 U.S.C. §1677(35)(A) that is consistent with decisions of the WTO Appellate Body is at least possible, the implementation of zeroing is impermissible under U.S. law.

The Investigating Authority counters that, in the URAA, Congress established detailed rules regarding the relationship between WTO agreements and domestic (U.S.) law, as well as an elaborate scheme to deal with the consistency of domestic law with the WTO agreements. Commerce further argues that the domestic effect of a WTO panel or Appellate Body ruling is for the executive and congressional branches of the U.S. government to determine. The Investigating Authority says that even if *Charming Betsy* were to be applied by this Panel, it cannot lead to a finding that zeroing is impermissible since, even under WTO rules, there is no binding obligation that WTO members implement WTO panel and Appellate Body reports.

In its reply brief, Ivaco argues that decisions of the Federal Circuit are in a state of conflict regarding the interaction of *Charming Betsy* and the principle in *Chevron, supra*, of judicial deference to government agencies' interpretations of the statutes they administer. Ivaco claims that this Panel should attempt to harmonize *Charming Betsy* and *Chevron* by construing an administrative interpretation of ambiguous statutory

language as unreasonable or impermissible if it conflicts with what it calls the “international obligations” of the United States.

Ivaco also argues that, as to Section 129 regarding implementation of WTO decisions adverse to the U.S. in antidumping cases, it is not seeking implementation of a WTO ruling (on zeroing) under that section, but is merely seeking a finding that, since zeroing has been found under the WTO dispute settlement process to violate the WTO Antidumping Agreement,¹³ applying the principle set out in *Charming Betsy*, U.S. law should be construed as disallowing zeroing. The Investigating Authority responds that in a line of cases the Federal Circuit has upheld Commerce’s use of zeroing and has expressly rejected the view that such a practice is unreasonable or impermissible.

2. Discussion

A. *The Uruguay Round Agreements Act and WTO Decisions and Agreements*

B.

The URAA contains detailed provisions concerning the relationship between WTO agreements and U.S. law. It is clear from these provisions that the Uruguay Round Agreements, like all U.S. trade agreements, are not self-executing and that their legal effect in U.S. law depends on implementing legislation.¹⁴ Section 3512 (a)(1) of the URAA provides: “No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with

¹³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, reprinted in H. Doc. 103-316, Vol. 1, 103d Cong., 2d. Sess. (1994) (“Anti-Dumping Agreement”).

¹⁴ See John H. Jackson, “Editorial Comment: The WTO Dispute Settlement Understanding – Misunderstandings On The Nature of Legal Obligation”, 91 *A.J.I.L.* 60 (1997).

any law of the United States shall have any effect.” This provision clearly suggests that Congress intended that no WTO agreement or its interpretation (such as by a WTO Panel or the Appellate Body) can override U.S. law. It is evidence of an intent to insulate U.S. law from the effect of WTO rulings.

Patrick C. Reed, in “Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality,” has commented on the above provision as follows:

[A]lthough URAA section 102(a) is captioned “relationship of agreements to United States law”, it does not define what the relationship is. Rather, it defines what the relationship is not: WTO agreements are not self-executing, have no direct effect, have no domestic effect at all if they are inconsistent with U.S. law, and do not create any private cause of action. The statute precludes possible alternative relationships in which WTO agreements would have different legal effects, but it does not explain fully what the relationship between the WTO agreements and U.S. law is.

38 *Georgetown J. of Int’l. L.* 209, at 216 (2006) (“*Reed*”).

Of course, this comment speaks only to the Uruguay Round Agreements and not to any subsequent interpretation of them by WTO panels or the Appellate Body. Congress in the enactment of the URAA has also spoken directly to this latter issue of the effect on U.S. law of WTO panel or Appellate Body decisions adverse to the United States.

Both parties have made reference to Sections 123 and 129 of the URAA, which set out procedures for the incorporation into U.S. law and Department of Commerce

antidumping determinations of decisions made under the WTO dispute settlement process in cases in which the U.S. is found to be in violation of its WTO obligations.¹⁵

Section 123(g) of the URAA provides, in cases where a WTO dispute settlement panel or the Appellate Body finds that a regulation or practice of a U.S. department or agency is inconsistent with any of the Uruguay Round agreements, including the Antidumping Agreement, that the regulation or practice may not be modified until after the Administration consults with and reports to relevant congressional committees, considers advice from private sector advisory committees and waits for the passage of a 60-day consultation period. 19 U.S.C. § 3533.

Section 129 contains the procedures for changing an administrative determination which has been challenged under the WTO dispute resolution procedures and resulted in a panel or Appellate Body decision adverse to the United States. Section 129 only applies to particular determinations that the exporting country has taken to WTO dispute settlement in Geneva and so is narrower than Section 123 but, like Section 123, it requires consultation between the U.S. Trade Representative and relevant stakeholders before the U.S. Trade Representative makes the decision to require the Department of Commerce to bring the particular determination into conformity with a WTO report.

The fourth administrative review results now before this Panel were never challenged in Geneva. Moreover, while Commerce issued on December 28, 2010, under Section 123, a proposed revision of its procedures with respect to antidumping administrative reviews in which it will give offsets for negative margins of dumping when using the average to average method of calculation (as it presently does with initial

¹⁵ URAA, §123 (19 U.S.C. §3533) and §129 (19 U.S.C. §3538).

investigations) and, on February 14, 2012, Commerce promulgated the corresponding final rule, that Section 123 Determination is applicable only to administrative reviews pending before Commerce for which a preliminary determination is issued after April 16, 2012. *Final Modification for Reviews*, 77 Fed. Reg. 8101 (February 14, 2012).¹⁶ Thus in the case before the Panel, Commerce applied a longstanding and judicially approved methodology of calculation of antidumping duties (a methodology which “zeroes”) which has been since the enactment of the URAA its interpretation of the basic antidumping statutory section. *See* 19 U.S.C. § 1677.

C. *Chevron* and Zeroing

Appellate review of Commerce’s use of zeroing in this case is governed by the two-part test established by the Supreme Court in *Chevron*, as described in Section IV.b, *supra*.¹⁷ The *Chevron* test first examines whether the precise question at issue is addressed by Congress in the applicable statute. If the answer is positive, that is the end of the matter. If it is not, the next question is whether the agency’s interpretation is a “permissible construction” or a “reasonable interpretation” of the statute in question. *Id.*

In this case, both sides agree – and so do we -- that the language of the statute is ambiguous. Therefore, the first prong of *Chevron* is not dispositive and we move to the second prong. An issue in this case is thus how can the second test in *Chevron* be applied in relation to the principle in *Charming Betsy*? The resolution of this issue, among

¹⁶ *Final Modification for Reviews* is to be codified at 19 C.F.R. Part. 351.

¹⁷ *Supra*, n.3 at 842 to 843. ¹⁸ This deference to the zeroing practice of Commerce received strong support by the Federal Circuit in *SKF USA v. United States*, 537 F 3d 1373 (Fed. Cir. 2008), which relied, *inter alia*, on *Timken, supra* at 1382.

others, will determine whether Commerce's use of zeroing will be upheld or form the basis for a remand.

On several occasions both sides to this panel review have loosely referred to the international rules that Commerce might or might not be obliged to implement as "obligations". In this case, however, the international "rules" that are being argued about are in no sense legally binding on the United States. They do not represent the language of any sort of international agreement but are the non-binding outcomes of WTO dispute settlement processes. Ivaco has not been able to point to any U.S. court decision supporting the idea that a finding by Commerce is "unreasonable" or "impermissible" because it conflicts with a WTO panel or Appellate Body ruling. The decisions of the Federal Circuit that bind this Panel will now be examined to assess whether it is unreasonable for Commerce not to defer to WTO decisions in deciding whether or not to use the zeroing methodology.

D. The Federal Circuit and Zeroing

i. Timken

Timken, supra, dealt with an appeal against a CIT decision upholding zeroing in calculating dumping margins on imports from Japan. The plaintiff in *Timken* argued that Commerce's use of zeroing was "unreasonable" in light of the WTO Appellate Body's interpretation of the Antidumping Agreement. The Federal Circuit concluded that the statute did not mandate zeroing – in effect finding that the statute was ambiguous. The Federal Circuit then applied the second step of the *Chevron* test, noting that it has "accorded particular deference to Commerce in antidumping determinations." *Id.* at 1342.

It then went on to conclude that Commerce’s interpretation of the statute was “reasonable” even in the light of opposing Appellate Body decisions:

As Koyo acknowledges, the [Appellate Body] decision is not binding on the United States, much less this court. While Koyo relies on *EC-Bed Linen* for its persuasive value in an effort to convince us of the unreasonableness of Commerce’s zeroing practice, we do not find it sufficiently persuasive to find Commerce’s practice unreasonable. In light of the fact that Commerce’s “longstanding and consistent administrative interpretation is entitled to considerable weight” ...we refuse to overturn the zeroing practice based on *EC-Bed Linen*.

Id at 1344.¹⁸ *Timken* does not explain what weight should be given to WTO decisions but it supports zeroing as being a reasonable practice even if it conflicts with WTO decisions.

ii. Corus Staal

Corus Staal represents an affirmation of the approach of the Federal Circuit in *Timken*. *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005), *reh’ing and reh’ing en banc denied, cert. denied*. 126 S. Ct. 1023 (Mem) (S. Ct. 2006). The case was another instance of a challenge of Commerce’s zeroing practice in antidumping cases. *Id.* The court reiterated the principle of deference to Commerce’s expertise in antidumping investigations pursuant to *Chevron*. *Id.* The court also restates the principle in *Charming Betsy* without making any distinction between international legal “obligations” on the one hand and non-binding sources of international law (such as WTO panel and Appellate Body decisions) on the other. *Id.* However, the court went on

¹⁸ This deference to the zeroing practice of Commerce received strong support by the Federal Circuit in *SKF USA v. United States*, 537 F 3d 1373 (Fed. Cir. 2008), which relied, *inter alia*, on *Timken*, *supra* at 1382.

to decide, presumably under the constitutional doctrine of separation of powers, and the provisions of the URAA, why it would not reject Commerce's zeroing methodology:

We will not attempt to perform duties that fall within the exclusive province of the political branches, and we 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.

Id. The *Corus Staal* court also said:

Neither the GATT nor any enabling international agreement outlining compliance therewith (e.g. the ADA) trumps domestic legislation; if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress.

Id. at 1348.¹⁹

It would seem that the Federal Circuit regards the statutory provisions concerning implementation in the URAA as ousting any scope for application of the *Charming Betsy* canon. Indeed, the text in *Corus Staal* specifically says that, in cases where a WTO decisionmaker has ruled adversely to the U.S., the agency may only interpret the text of the statute in accordance with the directions of the political branches:

Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so implemented, the extent of implementation. See 19 U.S.C. §§ 3533(f), 3538 (2000); see also 19 U.S.C. § 3533(g) (2000) (defining a statutory scheme that Commerce must

¹⁹ The GATT is the General Agreement on Tariffs and Trade, the original multilateral trade agreement. The Uruguay Round of trade negotiations established the WTO. The ADA is the Antidumping Agreement, a product of the Uruguay Round.

observe in order to change its policy to conform to a WTO ruling).

* * *Finally, we reject *Softwood Lumber* as nonbinding because the finding therein was not adopted as per Congress's statutory scheme. "[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government..." *United States v. Pink*, 315 U.S. 203, 222-23, 62 S. Ct. 552, 86 L.Ed. 796 (1942). In this case, section 1677(35) presented Commerce with a choice as to how it calculates weighted-average dumping margins. We give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination. See *Fed.-Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir.1995).

Id. at 1349

Finally and definitively for any argument based on *Charming Betsy*, the *Corus Staal* court in addressing Corus' argument that "...Commerce's zeroing methodology violates the United States' obligation to interpret Section 1677(35) to conform to WTO decisions prohibiting zeroing" replied "...and because Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law, Corus' arguments fail."

Id. at 1349

It should also be noted that the *Corus Staal* Court of Appeals decision was denied rehearing, then denied rehearing en banc and finally was denied certiorari by a memorandum decision of the Supreme Court. Thus, whatever force the statement found in *Charming Betsy* has does not apply to WTO panel and Appellate Body decisions.

The Federal Circuit in *Corus Staal* did not directly address whether, while upholding *Chevron* deference, there is any scope for according WTO rulings persuasive weight in interpreting provisions of U.S. law involving WTO agreements. Instead, it

invoked the doctrine of separation of powers to reject all relevance of WTO rulings for Commerce's antidumping and countervailing duty determinations.

Despite the way in which the language in *Charming Betsy* (which some commentators consider to be *dicta*)²⁰ has been used to argue that WTO decisions should be used by Commerce to resolve ambiguities in the U.S. antidumping law, a fair reading of *Timken* and *Corus Staal* indicates the contrary: They imply that WTO decisions should not have effect on Commerce's reading of its statute. Moreover, several additional factors suggest why it is inappropriate to use WTO decisions in interpreting U.S. statutes. These include: the fact that WTO rulings lack precedential value in subsequent WTO disputes, that they constitute the interpretation of WTO agreements after those agreements were enacted into U.S. law, and that the legislative history of the URAA suggests that Congress was apprehensive about future WTO rulings influencing the interpretation of U.S. trade statutes. *Reed* at 226.²¹

E. Conclusion

²⁰ See, e.g., Jonathan Turley, "Dualistic Values in an Age of International Legisprudence," 44 *Hastings L. J.* 185, 213 (1993).

²¹ In *Cummins Inc. v. United States*, 454 F.3rd 1361 (Fed. Cir. 2006), the court dealt with the CIT's consideration of an opinion of the World Customs Organization about the classification of goods. The Federal Circuit said that "such an opinion is not given deference by United States courts" but "can be consulted for its persuasive value." *Id.* at 1366. Citing *Timken* and *Corus Staal*, the court found that the World Customs Organization opinion was entitled, at most, to "respectful consideration." This decision has been described as supporting the theory that the interpretations of international agreements by international tribunals are not governed by *Charming Betsy* but that they are governed by a "respectful consideration" standard that does not make disregarding them "unreasonable" or "impermissible" and therefore a ground for judicial review. *Reed* at 239.

In light of these most recent decisions of the Federal Circuit that are binding on this Panel, *Charming Betsy* does not form a basis to remand Commerce's continuation of the application of zeroing in this administrative review. For us to decide otherwise would seemingly undermine the perceived role of Congress and the Administration in implementing adverse rulings in WTO disputes.

c. Ivaco's Remaining Argument Based on Dongbu and JTEKT

Ivaco's remaining argument, raised in the supplemental briefing, maintains that zeroing in the administrative review at bar was contrary to law because of Commerce's abandonment of zeroing in the context of original investigations. Specifically, invoking the *Dongbu* and *JTEKT* decisions of the Court of Appeals for the Federal Circuit, Ivaco contends that implementing the statute in a way that grants offsets for non-dumped sales at one stage of a proceeding while denying those offsets at a later stage is simply a bridge too far – placing Commerce's interpretation outside even a generous zone of *Chevron* deference.

This argument has, for various reasons both procedural and substantive, presented the Panel with its greatest challenge. *Dongbu* and *JTEKT* have not yet produced, and may not ever produce, a substantive change to U.S. law which (as noted above) presently regards zeroing in administrative reviews as lawful. Regardless of what the agency might *choose* to do, or what it might be *instructed* to do in the URAA Section 123 context, there are obviously doubts as to whether Commerce will (or should) be *judicially* precluded from treating non-dumped sales differently in administrative reviews and investigations. We have taken notice, in this regard, of the detailed explanation produced by Commerce in the wake of *Dongbu*, as well as CIT Judge Restani's decision in upholding that

explanation. *See Union Steel and Dongbu Steel Co., Ltd. v. United States*, Slip Op. 12-24 (CIT Feb. 2012) at 22, in which the court wrote, “[T]he statute does not dictate a particular manner of calculating a weighted-average dumping margin percentage...Commerce did not abuse its discretion in changing its investigation methodology, but not its review methodology, in the Final Modification in response to WTO decisions. Commerce acted reasonably in applying the antidumping statute to conform to the different purposes of investigations and reviews. Commerce's practices are not arbitrary in this regard.”

Nevertheless, a majority of the Panel favors following the CIT’s example and remanding to Commerce in order to secure a *Dongbu*-type explanation within the record of this appeal. In this, we acknowledge the shared view of both litigants here that the explanation Commerce has issued in another case should not be incorporated by reference in the record of this panel appeal. *See U.S. Department of Commerce’s Response to the Panel’s March 12, 2012 Order*, March 26, 2012, Admin. Rec. 57, at 2-3; *Complainant’s Response to the Panel’s March 12, 2012 Order*, Apr. 2, 2012, Admin. Rec. 58, at 1-2.

We remand to Commerce for further administrative proceedings and an explanation along the lines of the remand instructions issued in *Dongbu* and *JTEKT*, specific to the antidumping administrative review before us.

VI. LEVEL OF TRADE

There is some ambiguity as to whether Complainant’s appeal on the Level of Trade (“LOT”) issue is pleaded purely under the “substantial evidence” standard, or also seeks to invoke the “otherwise contrary to law” standard.

a. Unsupported by Substantial Evidence

Insofar as the appeal is framed as a “substantial evidence” appeal, our analysis must begin by identifying the factual determination being challenged. That determination, the parties agree, held that two sets of sales occurring during the period of review and detailed in the questionnaire responses were made at substantially the same level of trade. *See Level of Trade Memorandum, Final Results*, U.S. Department of Commerce (May 5, 2008) (“*LOT Memorandum*”), Admin. Rec. Doc. 73, at 8. Denial of an LOT adjustment – an adjustment sought by Complainant because it would have reduced the dumping margin – followed automatically from this factual finding.

The Investigating Authority identifies, and asserts that Commerce relied upon the following evidence in support of this factual determination: questionnaire responses and underlying documentation on selling functions, inventory maintenance, delivery services, delivery size, and truck fleet ownership. The Investigating Authority notes that Commerce analyzed this evidence in the 40-page *LOT Memorandum*. *Id.*

Our job here is straightforward. We must decide, first, whether the evidence relied upon by Commerce qualifies as substantial. *Bando, supra*. At this stage, the focus is exclusively on evidence cited in support of Commerce’s determination. We find that evidence – which includes considerable detail on the two sellers’ business models, selling functions, inventory maintenance, and delivery services – to be substantial, indeed far more than a mere scintilla. *Universal Camera, supra*.

As for record evidence tending to show a *difference* in the levels of trade, that touches on our second responsibility, which is to judge whether Commerce failed to grapple sufficiently with record evidence that fairly detracts from the factual

determination it made. *See American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986). Complainant identifies, in this category, the following: evidence that IRM's sales to Sivaco Ontario caused the merchandise to change hands twice; evidence that sales functions were carried out by separate sales forces in different offices; evidence that IRM's sale from inventory was aberrational rather than typical; and evidence that not all processed rod sold by IRM was processed exclusively by Sivaco.

We do not agree that Commerce ignored this evidence. Rather, Commerce addressed each element cited by the Complainant, and did so in considerable detail. Summarizing the *LOT Memorandum* analysis for public consumption, Commerce stated in the Final Determination:

. . . there are many activities for which IRM selling functions were as significant, or in some instances more significant, than Sivaco Ontario: maintenance in inventory of merchandise desired by customers; delivery services; handling services; technical services; credit extension; personnel training; advertising; arrangements for packing; provision of rebate and cash discount programs; and warranty services.

LOT Memorandum, supra, at 8. Commerce therefore met its obligation to consider (and explain its consideration of) evidence pointing in the other direction.

Whether, as a substantive matter, Commerce correctly *weighed* the evidence on each side of the matter is not for us to second-guess. *Nippon Steel Corp., supra*; *Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989) (explaining that courts may not reweigh the evidence or substitute its judgment for that of the agency)

We note that there is nothing unusual about a finding, based on the information in an administrative record, which leads to the denial of a LOT adjustment. Requests for LOT adjustments are carefully scrutinized in U.S. antidumping practice. For example::

Commerce will grant [LOT] adjustments only where: (1) there is a difference in the level of trade (i.e., there is a difference between the actual functions performed by the sellers at the different levels of trade in the two markets); and (2) the difference affects price comparability. ... []}f a respondent claims an adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment. ... Because level of trade adjustments may be susceptible to manipulation, Commerce will closely scrutinize claims for such adjustments.

URAA, *Statement of Administrative Action*, H. Doc. No. 103-316 (1994) at 159-160.

Complainant notes that the factual records in prior segments of *this* antidumping proceeding had been found by Commerce to show different levels of trade, and thus to justify an LOT adjustment. There is no reason for us to consider those factual records in deciding whether a factual determination made in the fourth administrative review was supported by substantial evidence. It is possible that the evidence in those records would have supported a finding either way. Regardless, only one record, and one finding based on that record, is before us now. The distinct facts and findings of other segments were not controlling at the agency level during the fourth administrative review, and they have no relevance to the “substantial evidence” claim in this appeal. Commerce is entitled – indeed, obligated – to make findings in each segment based on that segment’s unique evidentiary record. Complainant has cited no authority for the proposition that a change in a factual determination from one segment to another is somehow suspect or in need of special explanation under U.S. law.

b. Otherwise Contrary to Law

1. Complainant's Allegations and Commerce's Position

Belatedly and with some hesitation, Complainant at the hearing did seek to articulate an “otherwise contrary to law” claim. *See Hearing Transcript*, at 27-28, 79-80. In the interest of completeness, we address this claim despite harboring doubts as to whether it has been adequately pleaded. (According to its counsel, the Defendant in this appeal did not believe that it was responding to an “otherwise contrary to law” claim, but merely an “unsupported by substantial evidence” claim. *Id.* at 76.)

As we understand it, this is not a claim that Commerce’s published regulation on LOT adjustments is itself unlawful; nor a claim that Commerce in this case violated that published regulation; nor a claim that application of the regulation was defective simply because it yielded different results from one segment to the next. Rather, Complainant seems to be asserting that Commerce changed (without the necessary justification) its *methodological approach* in analyzing LOT-relevant information. More specifically, Ivaco complains that Commerce did not cumulate IRM's selling functions with Sivaco Ontario's selling functions for the purposes of analyzing the selling functions relating to Sivaco Ontario's sales. In Ivaco’s words, Commerce in this respect was applying, *sub silentio*, a “new test.” According to Complainant, Commerce was obligated under general principles of U.S. administrative law either to cumulate or to explain (more persuasively than occurred here) why it did not cumulate.

This aspect of Commerce's determination in the fourth administrative review emerges most clearly from the October 31, 2007 case analysis in the Level of Trade Memorandum that preceded and was incorporated into the *Notice of Preliminary Results*,

72 Fed. Reg. 62,816, 62,819 (November 7, 2007), and, by necessary implication, into the *Final Determination* in this matter, *supra*, and *LOT Memorandum, supra*, at 17-18. The case analyst's memorandum stated:

The Department is not cumulating any of the IRM functions with those of Sivaco Ontario for purposes of determining the LOT of Sivaco Ontario sales because IRM's selling functions/services do not benefit Sivaco Ontario's customers. While IRM may incur expenses associated with its sales to Sivaco Ontario, the activities associated with such expenses should not be assumed to constitute services to the Sivaco Ontario customers.

, *Memorandum re: Level of Trade Analysis for Ivaco Rolling Mills 2004 L.P. et. al.*; *Carbon and Alloy Steel Wire Rod from Canada*, October 31, 2007, Admin Rec. 50, (*LOT Memorandum (Preliminary)*) at 5.

According to Ivaco, once again most directly in counsel's oral argument, this represented the adoption of a new or changed test. *See Hearing Transcript*, at 79-80. According to Ivaco's oral submission, Commerce had previously applied the following test:

[W]hen you analyze sales between affiliated parties, when the producer sells to the re-seller and the re-seller sells to an unaffiliated customer, the test is that you cumulate.

Id. at 79, lines 11-14. Counsel for Ivaco, relying principally on the CIT in *CINSA S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1238 (CIT 1997), submitted that the agency in making such a change was obliged to explain the reasons for its departure. *Hearing Transcript, supra*, at 80, lines 1-15. As Commerce had not done so here, its decision was "not otherwise in accordance with law," counsel averred. *Id.* at 80, lines 16-18.

With regard to the "otherwise contrary to law" claim, Commerce denies that there was any change in methodology. It maintains that it followed its standard methodology.

Therefore, Ivaco’s contention that Commerce did not satisfactorily explain a change in methodology is not at issue because Commerce is not required to adhere to prior decisions when the facts do not support such an outcome.

As explained below, we do not agree with Ivaco that Commerce made an insufficiently-explained methodological change in the administrative review at bar.

2. Legal Standard for Methodological Change

The general principle applicable to administrative reviews is that Commerce “is not obligated to follow prior decisions if new arguments or facts are presented that support a different conclusion.” *Citrosuco Paulista, S.A. v. United States*, 704 F. Supp. 1075, 1088 (CIT 1998). However, Commerce cannot “act arbitrarily”, and this imposes an obligation to act consistently in some situations or to “explain its reasons for the departure...” *Id.* The new position must, of course, also rest on a permissible interpretation of the relevant statute, and not be adopted without giving the parties an opportunity while the record is still open to submit proofs and arguments with respect to the proposed change. The obligation therefore has both substantive and procedural components.

In *Citrosuco Paulista, S.A., supra*, the duty to act consistently or explain a departure from prevailing practice was expressed in terms of Commerce's prior decisions and clearly involved situations where the factual matrix and the legal issues were the same as in a prior decision involving either the same parties or different parties. In *CINSA* the obligation to act consistently was held to attach to a previously applied “methodology.” *CINSA, supra*, at 1238. In other words, even where there were factual variations between one administrative review period and another, Commerce was obliged

to continue to apply a “relied upon methodology” or give reasons for “changing its practice.” *Id.* For these purposes, past practices include the application of “factual presumptions” and “policies.” *Solvay Solexis S.p.A. and Solvay Solexis Inc. v. United States*, 628 F. Supp. 2d 1375, 1381 (CIT 2009), citing *British Steel PLC v. United States*, 879 F. Supp. 1254, 1316-17 (CIT 1995), *aff'd in part and rev'd in part British Steel PLC v. United States*, 127 F. 3d 1471, 1475 (Fed. Cir. 1997).

To this day, the CIT still applies the principle that the obligation to be consistent or explain a departure extends beyond explicit interpretations of relevant statutory provisions. The obligation to be consistent or explain a departure also applies to methodologies and practices. *MTZ Polyfilms, Ltd. v. United States*, 717 F. Supp. 2d 1346, 1365 (CIT 2010). The Federal Circuit has also consistently supported application of that principle. See *Save Domestic Oil, Inc. v. United States*, 357 F. 3d 1278, 1283-84 (Fed. Cir. 1997), and *NMB Singapore Ltd., et al. v. United States*, 557 F. 3d 1316, 1328 (Fed. Cir. 2009) (equating “practice” with “a course of action”), and each in turn citing *Motor Vehicle Mfrs. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983) (a case involving a change in a rule).

It is therefore apparent that the obligation applies across a broad spectrum of Commerce's operational tools: precedents, methodologies, practices, policies, courses of action, presumptions, and interpretations. However, those asserting the existence of the obligation have to establish a sufficient degree of adherence to such a past practice, methodology, or policy. Thus, in *MTZ Polyfilms, Ltd., supra*, the CIT, applying *Save Domestic Oil Inc., supra*, found that there was no proof of a practice, let alone a “routine”

practice. In *Solvay Solexis*, the CIT spoke in terms of a “standard procedure or policy.”
Supra, at 1382

The substantive component of the obligation, as already identified, consists in providing adequate justification or explanation for the departure from standard or longstanding agency practice. That onus rests on Commerce. *See British Steel PLC*, 127 F.3d. 1471, *supra*. As the Federal Circuit has stated in *British Steel PLC*, “[o]nce an agency justifies its change with sufficient, reasoned analysis, however, the revised policy deserves the same deference as the original policy. ... We cannot overturn Commerce's new methodology unless it is unreasonable [citations omitted].” *Id.* at 1475.

Solvay Solexis, also speaks to the procedural component of Commerce's obligations, citing to extensive authority:

Commerce carries the burden of providing notice to the respondents if it decides to apply a new factual presumption that is contrary to, or a significant departure from, its previous or traditional methodology.

Solvay Solexis, *supra*, at 1381. In *British Steel*, the CIT had elaborated on the content of this due process obligation:

Commerce is not required to afford interested parties an unlimited opportunity to comment on each modification of the agency's practice or procedure. To provide otherwise would be to unnecessarily burden the agency with an unending cycle of notices, comments and responses. Fundamental fairness demands, however, that in certain circumstances, an interested party be given at least the opportunity to be heard on agency actions that may adversely impact upon the party's interests.

Indeed, adequate notice may also involve providing that interested party with the purported justification for the change or modification so that the party may more effectively address the relevant issues.

British Steel, supra, at 1317. The nature of the obligation in situations such as are before this panel is well-illustrated by the judgment of the CIT in *Sigma Corporation v. United States*, 841 F. Supp. 1255, 1257 (CIT 1993). There, the Court held that Commerce failed in its due process obligations when it said something in its preliminary results, and then, notwithstanding party reliance on that statement, changed its position in the final determination and said something completely different. Due process required that the affected party have notice of and an opportunity to contest any change in position on a significant matter that Commerce was contemplating as between its preliminary results and its final determination.

3. *Application to Current Matter*

In making the argument that Commerce's failure to cumulate the selling functions of IRM with those of Sivaco Ontario represented a change in methodology, Ivaco appeared to assume that there had been cumulation in the previous three administrative reviews. However, it did not make explicit reference to the findings of those prior administrative reviews but relied primarily on the decisions of Commerce in two other cases: *Structural Steel Beams from Spain*, 67 Fed. Reg. 35,482 (Dep't Comm. May 20, 2005) (final results) and accompanying *Issues and Decision Memorandum*, at 6, and *Steel Reinforcing Bars from Turkey*, 70 Fed. Reg. 67,554 (Nov. 8, 2005) (final results) and accompanying *Issues and Decision Memorandum*, at 61. In both instances, Commerce cumulated the selling functions of the producer and an affiliated reseller for the purposes of the level of trade analysis. In each case, the decision to cumulate was expressed in the following terms:

When a producer sells through an affiliated reseller in the comparison market, we consider the relevant functions to

be the selling functions of both the producer and the reseller (*i.e.*, the cumulative selling functions along the chain of distribution) for purposes of comparing the selling activities related to the affiliate's sale with those related to the producer's sale to its customers.

Id., citing *Structural Steel Beams from Spain, Issues and Decision Memorandum, supra*, 67 Fed. Reg. at 6.

As noted, Ivaco did not explicitly identify a persistent pattern of cumulation of the selling functions of IRM²² with those of Sivaco Ontario in the three previous administrative reviews. On the administrative record before us (including documents incorporated by reference), it is in fact difficult to determine whether cumulation did take place for the purposes of the level of trade analysis in each of those reviews, and, if so, its significance in the overall determination to grant a level of trade adjustment. However, there is certainly some evidence that there was cumulation. Thus, the final determination for the second review stated:

Moreover, Ivaco notes that the petitioners fail to acknowledge that Sivaco did not have any sales during the POR that were not first purchased from IRM. Therefore, for each Sivaco sale, both Sivaco's and IRM's selling functions apply, while for each IRM sale, only IRM's selling functions apply. Ivaco contends this factor makes it obvious that IRM and Sivaco operate at different marketing stages.

Issues and Decision Memorandum for the Final Results of the Second Administrative Review, 71 Fed. Reg. 3822, at 8, Comment 2 (January 24, 2006).

²² In its briefs, Ivaco references a letter dated November 9, 2007, in which counsel protested that Commerce had granted a level of trade adjustment in “all four prior segments of the proceeding” but had denied the adjustment in the fourth administrative review. *Letter from Law Firm Hunton & William to Secretary of Commerce*, November 9, 2009, Admin. Rec. Pub. Doc. 53.

The Investigating Authority's position appears to accept that it was appropriate for IRM to cumulate its selling functions and those of Sivaco in this way:

Ivaco did not report Sivaco's imputed inventory carrying cost on green rod as a selling expense. What Ivaco did report as selling expenses for the green rod sales in question are the indirect selling expenses related to running its sales and shipping departments, which were properly allocated over all sales including sales of green rod.

Id. at 10, Comment 2.

It might therefore be contended that, by refusing to cumulate in the fourth administrative review, Commerce not only failed to follow its own precedents established in other level of trade decisions but also reversed the position that it had apparently taken on cumulation in the previous administrative reviews in this very matter.

However, even assuming that Commerce did cumulate in prior administrative reviews, it does not necessarily lead to the further conclusion that Commerce either changed its methodology or failed in the legal duties attendant on such a change in methodology.

First, if one looks to the statements in both *Structural Steel Beams from Spain* and *Steel Reinforcing Bars from Turkey*, it is not at all apparent that they support the proposition that cumulation is appropriate or required on every occasion in which product changes hands between a producer and an affiliated company. When the entire product is destined for resale in its original form, cumulation may well be the appropriate methodology but that does not necessarily speak to situations such as prevail in this administrative review. Beyond the simple or straightforward case of straight resales, other considerations can obviously intrude, and the decision on whether to cumulate becomes a much more fact-based or fact-sensitive decision. The precedents of *Structural*

Steel Beams and Steel Reinforcing Bars do not necessarily speak to the outcome in such situations.

Secondly, even assuming the precedential pull of cumulation in the three previous administrative reviews in relation to this particular matter, it does not automatically mean that Commerce changed its methodology when it specifically declined to cumulate on the fourth administrative review. It may simply have been making a determination that the factual situation that confronted it on the fourth administrative review was different from that which was present on the three previous administrative reviews and that those factual differences took the situation outside of the reach of the precedents or past practices.

Thirdly, and most pertinent, even if the decision of Commerce in this case did represent a change from both the general body of precedents and its acceptance of cumulation in the three previous administrative reviews, there is still the issue of whether Commerce did meet the legal obligations that such a change in methodology would normally involve.

Viewing the matter from this third vantage point and the one most favorable to Complainant, this Panel concludes that Commerce met its legal obligations. While at no point did Commerce specifically state that it was changing its methodology or not following its precedents on the issue of cumulation, in the level of trade analysis supporting its Preliminary Determination, Commerce clearly put Ivaco on notice that cumulation was a live issue in this administrative review and that Commerce was at least of the tentative view that cumulation would not be permitted for the purposes of this level of trade analysis. *LOT Memorandum (Preliminary)*, *supra*. This provided Ivaco with the opportunity to contest Commerce's preliminary conclusion and to put forward any

arguments based on a change in methodology in the context of its response to the November 7, 2007 Preliminary Results.

In fact, the whole issue of cumulation received scant treatment in Ivaco's case brief, dated January 23, 2008 and filed in response to the Notice of Preliminary Results.

Ivaco simply asserts:

The Department stated in the preliminary results that it will not cumulate for LOT analysis purposes the selling functions of IRM with those of Sivaco Ontario. See LOT Analysis Memo, at 5-6. However, the fact that Sivaco Ontario must first purchase subject merchandise from IRM is legally germane to the LOT analysis because it shows that Sivaco Ontario's sales are at a more remote marketing stage than IRM's sales.

Case Brief of Ivaco in Response to Preliminary Determination, January 23, 2008, Admin. Rec. 63, at 6.

There is no suggestion in this response that Ivaco is challenging the preliminary determination not to cumulate as an inappropriate change in methodology. Indeed, it does not even amount to a challenge to the merits of the preliminary decision on cumulation. Rather, the fact of that preliminary decision is simply noted and deployed as a segue into a different argument or contention. Given that Ivaco did not directly challenge Commerce's preliminary determination with regard to cumulation, it is understandable why the issue was not again dealt with specifically in Commerce's final determination. In all those circumstances, it cannot be contended that Commerce failed to meet the procedural obligations attendant upon a change in methodology. IRM was put on notice and given the opportunity to contest that preliminary determination on its merits, or as an inappropriate change in methodology or failure to follow precedent or past practices

either as a general matter or in the particular circumstances of administrative reviews of Ivaco and its subsidiaries.

As for Commerce's substantive justification of its change of methodology or a failure to follow precedent or its past practices (if that is what it was), in all of the circumstances this is appropriately evaluated against the discussion of this issue in the preliminary determination. Even though not framed as a justification for departure from precedent or practice, or a change in methodology, the question is whether that portion of the preliminary determination provided a reasoned and reasonable explanation for the position that Commerce was proposing to take.

In the view of the Panel, it did so. Irrespective of whether Commerce had allowed cumulation in the past, the agency was obviously now of the tentative view that, in a situation such as was present here, it was not appropriate to cumulate. The last paragraph of this part of the *LOT Memorandum* annexed to the *Notice of Preliminary Results* captures it well:

The overwhelming majority of IRM sales to Sivaco Ontario are transfers of materials within the same entity (i.e. Ivaco) that undergo subsequent further processing and for these sales, as well as the relatively few Sivaco Ontario sales involving rod that Sivaco Ontario did not further process, the functions performed by IRM for Sivaco Ontario take place prior to the sales process between Sivaco Ontario and its customers, and do not benefit Sivaco Ontario's customers.

LOT Memorandum (Preliminary) at. 7-8. In making this assessment of the situation and whether it justified cumulation, the memorandum also notes the extent to which Ivaco itself downplayed the relevance of its selling functions in relation to product destined for Sivaco Ontario. *Id.*

While this might very well constitute a new or different assessment, or way of assessing the factual situation as it bears upon the issue of cumulation, it is explicit, detailed, and reasoned. In all of those circumstances, the Panel concludes that Commerce met the burden of reasoned explanation for any change in practice or methodology or failure to follow precedent. It was also sufficient to put Ivaco on notice as to the case it had to meet in order to persuade Commerce not to use that methodology in its final determination.

Complainant cannot therefore challenge the final determination for failing to meet the substantive and procedural obligations that attend a significant change in an agency's methodology, and the “new” approach is otherwise entitled to *Chevron* deference in that it can only be reviewed successfully if not supported by substantial evidence or as not in accordance with any reasonable interpretation of the law, as discussed *supra*.

VII. CONCLUSION

For the reasons discussed in the foregoing sections of this decision, the Panel affirms in part and remands in part, the Final Determination of the administrative review under review.

ORDER

Upon consideration of all papers and proceedings herein, it is hereby

ORDERED that the Investigating Authority's final results of the administrative review determining that Complainant's sales were made at the same level of trade are affirmed; it is further

ORDERED that the Investigating Authority shall provide on remand a thorough explanation, keyed to the “otherwise contrary to law” standard of review, of the statutory

interpretation underlying its approach of granting offsets for non-dumped sales in original investigations while denying such offsets in administrative reviews. The Investigating Authority shall provide such explanation within 45 days of the date of issue of this Panel Decision and Order.

IT IS SO ORDERED:

ISSUED ON MAY 11, 2012

SIGNED IN THE ORIGINAL BY

Lisa Koteen Gerchick
Lisa Koteen Gerchick, Chairperson

Cynthia Lichtenstein
Cynthia Lichtenstein

John Magnus
John Magnus

David Mullan
David Mullan

Robert Paterson
Robert Paterson