

ARTICLE 1904 BINATIONAL PANEL REVIEW
UNDER THE
NORTH AMERICAN FREE TRADE AGREEMENT
IN THE MATTER OF
OIL COUNTRY TUBULAR GOODS FROM MEXICO:
FINAL RESULTS OF ANTIDUMPING DUTY
ADMINISTRATIVE REVIEW AND DETERMINATION NOT TO REVOKE
REDETERMINATION ON REMAND

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

DECISION OF THE PANEL

January 16, 2007

Howard N. Fenton, Chair

Hector Cuadra y Moreno

Peter L. Fitzgerald

Jaime Horacio Galicia Briseno

Arturo J. Lan Arredondo

Appearances:

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

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

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

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

I. INTRODUCTION

This is the final stage of an administrative proceeding commenced initially in 1994, and the third decision of this Panel in this matter. Respondent Hylsa, S.A. De C.V. (Hylsa) was subjected to an antidumping order in 1995.¹ In 1999 it sought to have the order revoked by asserting it engaged in three years of sales in commercial quantities without dumping. The Commerce Department has decided, after two remands by this Panel, that Hylsa is not eligible for revocation of the order because of its failure to ship in commercial quantities during at least one of those three years. The Panel now determines that under its most recent analysis, the Department is acting within its discretion, and that its decision to deny the request for revocation is supported by substantial evidence on the record taken as a whole.

On August 11, 2006, this Panel issued its second decision in this matter, remanding the case with respect to the Department's revocation analysis regarding Hylsa. The Panel determined that the Department's basis for finding the absence of shipments in commercial quantities was "neither logical nor consistent with articulated reason."² In particular, the Panel had difficulty with the Department's selection of comparative review periods and its standard for assessing the risk of Hylsa "resuming" dumping. The panel also decided that it was inappropriate to consider the outcome of the ninth administrative review in the Department's decision to reject Hylsa's request to revoke the antidumping order at the end of the fourth administrative review.

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

² *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke; Redetermination on Remand USA-MEX-01-1904-05* at 12 (August 11, 2006).

On October 5, 2006 the Department issued its Redetermination on Remand in which it again determined that Hylsa did not sell the merchandise in the United States in commercial quantities in each of the three years cited by Hylsa to support its request for revocation, and again refused Hylsa's request to revoke the antidumping order against it. The Department also filed the remand record with the Panel on October 5, 2006.

On October 30, 2006 respondent Hylsa filed its comments and challenge to the Commerce Department's decision not to revoke the antidumping order against it. In its comments Hylsa objected to the amount of time the Department gave Hylsa to respond to its draft determination, while reiterating its objection to the Department's determination that it had not shipped in commercial quantities during the administrative review periods.

On November 20, 2006 the Department filed its response to Hylsa's challenge, and United States Steel Corporation filed comments in support of the Department.

For purposes of this decision, the jurisdiction of the Panel and the standard of review are the same as employed by the Panel in its initial decision³, which the Panel incorporates by reference.

This Panel concludes that the Department's calculation of commercial quantities in its remand determination was not an abuse of discretion.

II. DISCUSSION

A. Commerce Department Remand Proceeding

Hylsa argued that it had been denied the opportunity to meaningfully participate in the remand determination because of the limited time provided for comment on the

³ *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke*, USA-MEX-01-1904-05 at 7-10 (January 27, 2006).

Department's draft redetermination.⁴ While the circumstances of the delivery of the notice and draft are somewhat unclear, the Panel does not believe that there was a fundamental deprivation of fair process by the Department in its dealing with Hylsa. The issues addressed in the draft redetermination are issues that all parties were familiar with at this late stage of the proceeding. All parties were notified at the same time with the same time to respond. Furthermore, Hylsa has had ample opportunity to present its material objections to the Department's decision to this Panel, which it has done. We therefore reject any suggestion by Hylsa that the Department's positions should be viewed "with great suspicion"⁵ as a result of unfair dealing with Hylsa.

B. Commercial Quantities Determination

Hylsa was eligible to request revocation of the antidumping order against it after three administrative reviews during which it did not sell the subject merchandise at less than fair value for the requisite period. The regulations require that the Department ascertain whether Hylsa sold the subject goods in commercial quantities during the three years⁶ and that Hylsa certify to that effect.⁷ The panel agreed with the Department that this is a threshold requirement for revocation in its initial decision with regard to TAMSA's request for revocation⁸ and that defining what constitutes "commercial quantity" is part of the Department's duty in administering the statute. The issue before

⁴ *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke*, USA-MEX-01-1904-05, Comments of Complainant Hylsa, S.A. de C.V., on Commerce's October 5 Remand Determination at 3-5 (October 30, 2006).

⁵ *Id.* At 5.

⁶ 19 C.F.R. §351.222(d)(1).

⁷ 19 C.F.R. §351.222(e).

⁸ *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke*, USA-MEX-01-1904-05 at 11, 14 (January 27, 2006).

this Panel at this time is whether the Department's chosen approach to determining whether Hylsa has sold subject goods in commercial quantities is consistent with that duty or an abuse of its discretion.

The Department determined that Hylsa had not shipped in commercial quantities during the three years in question because its volume of sales was significantly lower than its sales during the initial period of investigation by the Department into TAMSA's sales, the review that established the basis for the antidumping order. This Panel previously stated that "in the absence of dumping by Hylsa up to this point," the Department faced a heavier burden when undertaking its commercial quantities analysis because it had no period of sales resulting from unfair trade practices by Hylsa.⁹ The Panel noted that "the pattern of sales by Hylsa presents a challenge to the Department in determining what constitutes sales in commercial quantity by the company if the agency is basing its decision solely on comparisons."¹⁰

The Department addressed the Panel's concern about its failure to use the comparison period suggested by Hylsa by observing that sales during the suggested period did not themselves represent meaningful commercial participation in the U.S. market because they are too low in absolute terms. It further argued that the period suggested by Hylsa was not reflective of its normal commercial practices due to substantial sales for periods in close proximity to the suggested comparison period's minimal sales.¹¹

⁹ *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke; Redetermination on Remand*, USA-MEX-01-1904-05 at 8-11 (August 11, 2006).

¹⁰ *Id.* at 11.

¹¹ *Redetermination on Remand, In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Review and Determination Not to Revoke* at 12-14 (October 5, 2006).

The Department then addressed the Panel’s primary concern about identifying comparison periods used for companies not found to have engaged in dumping. It re-examined the record before it and concluded that it need not rely on the comparative standard used in its First Determination, but instead applied an “absolute standard” for determining commercial quantities for the three review periods.¹² This separate basis for the Department’s determination is consistent with the Department’s practices.¹³ In this case, sales by Hylsa in the three years in question are characterized by both a negligible number and a negligible volume of sales to the U.S. market, particularly sales in the 96-97 Administrative Review. The Department stated in its First Redetermination that Hylsa’s sales and export volume during the first period of review under consideration for revocation were extremely small.¹⁴ It concluded in this Second Redetermination that regardless of the comparison period used, whether Hylsa’s proposed benchmark period or the periods used by the Department, Hylsa’s sales and export volumes during the review period were so small in absolute terms that they cannot represent meaningful commercial participation in the U.S. market. The sales and export percentages, as a total of either

¹² See *Id.* at 10, 16, 25, 27; Response Brief of Investigating Authority at 4, 10 (November 20, 2006).

¹³ See, e.g., Issues and Decision Memorandum in Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea, 66 Fed. Reg. 3540 (Dep’t Commerce Jan. 16, 2001) (final results) (“Korea CORE Decision Memo”) at Comment 9; Brass Sheet and Strip from Netherlands, 65 Fed. Reg. 742, 750 (Dep’t Commerce Jan. 6, 2000) (final results) (“Brass Sheet and Strip”); Issues and Decision Memorandum in Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, and Singapore, 68 Fed. Reg. 35623 (Dep’t Commerce June 16, 2003) (final results) at Comment 27; Certain Pasta from Turkey, 67 Fed. Reg. 51194, 51198 (Dep’t Commerce Aug. 7, 2002) (prelim. Results) (unchanged in final results), Certain Pasta from Turkey, 68 Fed. Reg. 6880, 6881 (Dep’t Commerce Feb. 11, 2003) (final results)); Issues and Decision Memorandum in Silicon Metal from Brazil, 67 Fed. Reg. 6488 (Dep’t Commerce Feb. 12, 2002) (final results) at Comment 28; Issues and Decision and Memorandum in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China, 66 Fed. Reg. 1953 (Dep’t Commerce Jan. 10, 2001) (final results) at Comment 21; Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada, 65 Fed. Reg. 9243, 9244 (Dep’t Commerce Feb. 24, 2000) (final results); Pure Magnesium from Canada, 64 Fed. Reg. 12977, 12978 (Dep’t Commerce Mar. 16, 1999) (final results); Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada, 64 Fed. Reg. 2173, 2175 (Dep’t Commerce Jan. 13, 1999) (final results).

¹⁴ See *Redetermination on Remand, In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Review and Determination Not to Revoke* at 28, 52-53 (April 27, 2006).

OCTG consumption in the United States, sales of OCTG to Mexico prior to the imposition of the order, or all imports of OCTG into the United States, are extremely small.

In our prior decision, this panel rejected a comparison by the Department between Hylsa's sales and broader sales by other shippers utilizing the analysis of Rebar from Turkey.¹⁵ However we did so because Hylsa was not new to market, the central premise of that case. This is not the same as rejecting an assessment of Hylsa's sales in the context of the total U.S. consumption of OCTG and U.S. imports of OCTG. Thus, this comparison¹⁶ is proper, and as the Department stated, "regardless of the comparison period used, it is not possible to find that Hylsa exported OCTG to the United States in commercial quantities during the 96-97 Administrative Review."¹⁷

Additionally, the record evidence supports the Department's conclusion. In the second administrative review, Hylsa made only one sale of 66 metric tons ("MT") of OCTG to the United States.¹⁸ Moreover, in the third administrative review, Hylsa's shipments only increased slightly to 143 MT.¹⁹ Thus the Department is free to conclude that in absolute terms the shipments during the three review periods in question cannot be considered commercial quantities. This is particularly true in light of significant

¹⁵ *In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke; Redetermination on Remand*, USA-MEX-01-1904-05 at 10 (August 11, 2006).

¹⁶ It is perhaps misleading to speak of an "absolute" standard because any analysis of economic activity takes place in some market context. Rather, the absolute standard is applied outside the specific context of defined periods of economic activity.

¹⁷ See *Redetermination on Remand, In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Review and Determination Not to Revoke* at 16 (October 5, 2006); Response Brief of Investigating Authority at 4, 10 (November 20, 2006).

¹⁸ See, Hylsa's Aug. 16, 2000 Submission at Attachment 2 (Public Version) (as resubmitted to the Department on Aug. 18, 2000) (ranged number); *Redetermination on Remand, In the Matter of: Oil Country Tubular Goods from Mexico; Final Results of Antidumping Duty Review and Determination Not to Revoke* at 24 (April 27, 2006).

¹⁹ Hylsa's Aug. 16, 2000 Submission at Attachment 2 (Public Version) (as resubmitted to the Department on Aug. 18, 2000) (ranged number).

shipments of subject matter goods by Hylsa immediately prior to the imposition of the original anti-dumping order, and after the establishment of the zero cash deposit rate following completion of the 96-97 Administrative Review.

Therefore, the fact that Hylsa made some small sales during the three administrative review periods without dumping does not have the same probative value it would otherwise have. The Panel does not ignore that the changing approaches utilized by the Department might be misleading and, also, that the use of an absolute standard has the potential to penalize companies with minor exports to the United States. However, in light of the analyzed facts, the Panel finds that the Department was within its discretion in determining that Hylsa did not meaningfully participate in the marketplace and thus, because it has not sold the subject merchandise for three years in commercial quantities within the meaning of 19 C.F.R. § 351.222(e), does not qualify for revocation.

III. DECISION AND ORDER

It is our conclusion that the Department acted within its discretion and has satisfied their burden in using an “absolute” standard in this particular case for assessing whether shipments occurred in commercial quantities. The Department has adequately justified their determination that Hylsa did not ship the subject matter goods in commercial quantities during the periods of review in question and thus does not qualify for revocation of the antidumping order.

For the foregoing reasons the Panel affirms the Department's determines that Hylsa did not ship in commercial quantities and that its determination not to revoke the antidumping order is upheld.

SIGNED IN THE ORIGINAL BY:

Howard N. Fenton

Howard N. Fenton, Chair

Dr. Hector Cuadra

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