

1904 BINATIONAL PANEL REVIEW
Pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

	)	
In the Matter of:	)	
	)	
CARBON AND CERTAIN ALLOY STEEL	)	
WIRE ROD FROM CANADA	)	Secretariat File No.:
	)	USA-CDA-2009-1904-01
Final Results of the 2006-2007 Antidumping	)	
Duty Administrative Review	)	
	)	
	)	

ORDER

I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904(2) of the North American Free Trade Agreement. The Panel was appointed to review the final results of the 2006-2007 administrative review of the antidumping order issued by the U.S. International Trade Administration [*hereinafter* the "ITA"] in Carbon and Certain Alloy Steel Wire Rod from Canada.¹

On January 16, 2009 Complainants Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P., [*hereinafter* and collectively "Ivaco"], a Canadian producer and exporter of the subject merchandise, filed a Request for Panel Review of those results.

In its Complaint, filed on February 1, 2009, Ivaco alleged that the ITA had

¹ *Carbon and Certain Alloy Steel Wire Rod from Canada*, 73 Fed. Reg. 77,005 (Dec. 18, 2008)(final results).

committed two errors: (1) The ITA's decision that Ivaco had made sales to the United States and the home market at a single level of trade was unsupported by substantial evidence and otherwise not in accordance with law and (2) the ITA's decision to calculate Ivaco's overall weighted average dumping margin by setting negative individual dumping margins to zero is unsupported by substantial evidence and otherwise not in accordance with law.

For the reasons more fully set forth below, and on the basis of the administrative record, the applicable law, the written submissions of the ITA and Ivaco, and the Panel hearing held in Washington, D.C. on September 6, 2012, the Panel upholds the Final Results of the administrative review.

II. BACKGROUND

On October 29, 2002, the ITA published its Antidumping Order on Carbon and Certain Alloy Steel from Canada.² On July 10, 2008, the ITA published the preliminary results of its fifth administrative review of Ivaco's entries, covering the subject merchandise during the period October 2006-September 2007.³ In those preliminary results, the ITA found that Ivaco had made sales at a single level of trade in both the United States and home markets. *Id.* at 39,649-50. The ITA also calculated Ivaco's overall dumping margin by engaging in "zeroing", *i.e.*, assigning a zero margin to sales where the export price exceeded normal value. Ivaco filed a written brief with the ITA

² *Carbon and Certain Alloy Steel from Canada*, 67 Fed. Reg. 65,944 (Oct. 29, 2002).

³ *Carbon and Certain Alloy Steel from Canada; Preliminary Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 39,646 (July 10, 2008).

challenging the ITA's decision that Ivaco had made sales only at a single level of trade and the ITA's use of "zeroing". No administrative hearing was requested by the parties.

On December 18, 2008 the ITA published the final results of its administrative review.⁴ The ITA made no changes to the calculations in its preliminary results and determined that the weighted-average dumping margin on the subject merchandise from Canada for the period of review from October 1, 2006 through September 30, 2007 was 2.33% for Ivaco. In its *Issues and Decision Memorandum*⁵, the ITA affirmed its preliminary determination that Ivaco's sales in both markets were at the same level of trade. With regard to the "zeroing" issue, it also continued to deny offsets to dumping based on export transactions that exceeded normal value.

Following Ivaco's filing of its *Request for Panel Review* and its Complaint, the participants filed their respective briefs pursuant to the NAFTA Article 1904 Rules of Procedure. The participants appeared before this Panel at a hearing in Washington on December 18, 2012 and presented their respective arguments.

On March 14, 2013 the Panel granted Ivaco's *Motion to Stay Proceedings* pending the decision of the U.S. Court of Appeals for the Federal Circuit in *Union Steel v. United States*, Ct. No. 2012-1248. In *Union Steel* the Federal Circuit reviewed the U.S. Court of International Trade's decision that the use of zeroing in anti-dumping reviews, although no longer used in anti-dumping investigations, was in accordance with law. On

⁴ *Carbon and Certain Alloy Steel from Canada; Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 77,005 (Dec. 18, 2008).

⁵ *Issues and Decisions Memorandum for the 2006-2007 Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada; Final results of Antidumping Duty Administrative Review*, (Dec. 11, 2008).

April 6, 2013 the Federal Circuit issued its decision in *Union Steel* and affirmed that the ITA's use of "zeroing" under those circumstances was indeed in accordance with law.⁶ On July 31, 2013 the Panel directed the participants to brief the question of whether the *Union Steel* decision is controlling in, or distinguishable from, the instant case. Following the simultaneous submission of those written comments by both participants, the Panel on November 15, 2013 directed the Commerce Department to file a reply to Ivaco's comments that *Union Steel* was distinguishable from the instant case.

III. STANDARD OF REVIEW

The applicable standard of review is specified by NAFTA Articles 1904(2)–(3) and Annex 1911 of the NAFTA. Chapter 19 review panels are directed by Article 1904(3) to apply:

the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

These provisions therefore require that a Chapter 19 panel apply the standard of review and "general legal principles" which a federal court in the United States would otherwise apply in reviewing an ITC injury determination.⁷

Annex 1911 defines the standard of review to be applied in a Panel review as "the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930 as amended." Section 516A(b)(1)(B), in turn, defines that standard of review as:

The court shall hold unlawful any determination, finding, or

⁶ *Union Steel v. United States*, 713 F.3d 1101 (Fed. Cir. 2013).

⁷ Annex 1911 defines such "general legal principles" as, for example, "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

conclusion found...to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C.A. §1516a(b)(1)(B).

Accordingly, the standard of review for the instant proceeding includes the "substantial evidence" test as set out in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. §1516a(b)(1)(B)).

The Panel must, therefore, affirm the ITA's Final Results "unless we conclude that the ITA determination is not supported by substantial evidence or is otherwise not in accordance with law." *PPG Industries, Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992).

The U.S. Supreme Court has interpreted "substantial evidence" as follows:

Substantial evidence is more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"...and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from is one of fact for the jury.⁸

The Court of Appeals for the Federal Circuit has applied the same interpretation of "substantial evidence" in reviewing international trade determinations.⁹

⁸ *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). See, also, *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); and *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

⁹ E.g., *Matsushita Electric Industrial Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) and *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

The U.S. Court of International Trade employs this definition as well. E.g., *Koyo Seiko Co., Ltd. v. United States*, 810 F. Supp. 1287, 1289 (CIT 1993); *Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1013 (CIT 1992); *Tehnoimportexport, UCF America Inc. v. United States*, 783 F. Supp. 1401, 1404 (CIT 1992); *Minebea Co., Ltd. v. United States*, 782 F. Supp. 117, 119 (CIT 1992) *aff'd*, 984 F.2d 1178 (Fed. Cir. 1993); and *Armco, Inc. v. United States*, 733 F. Supp. 1514, 1518 (CIT 1990).

Furthermore, substantial evidence constitutes "something less than the weight of the evidence." *Consolo v. Federal Maritime Commission*, 383 U.S. at 619-20 (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." *Matsushita Electric Industrial Co., Ltd. v. United States*, 750 F.2d at 933 (Fed. Cir. 1984)(quoting *Consolo v. Federal Maritime Commission*, 383 U.S. at 619-20); and *PPG Industries, Inc. v. United States*, 978 F.2d at 1237 (Fed. Cir. 1992).¹⁰

It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." *Koyo Seiko Co. Ltd. v. United States*, 810 F. Supp. 1287, 1289 (CIT 1993) quoting *Timken Co. v. United States*, 699 F.Supp. 300, 306 (1988) *aff'd*, 894 F.2d 385 (Fed. Cir. 1990); and *Can-Am Corp. v. United States*, 664 F. Supp. 1444, 1450 (CIT 1987).

Panel review of a final injury determination is to be conducted "upon the administrative record." Article 1904(2).¹¹ Therefore, the Panel is not to review the agency determination *de novo*. *Cabot Corp. v. United States*, 694 F. Supp. 949, 952-53 (CIT 1988); *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (CIT 1986) *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *Luciano Pisoni Fabbrica Accessori v. United States*, 640 F. Supp. 255, 256 (CIT 1986).

The requirement that a review be "on the record" means that a Panel's review must be limited to only "information presented to or obtained by [the ITC]...during the course of an administrative proceeding...." 19 U.S.C. §1516a(b)(2)(A)(i). Consideration of

¹⁰ Also, *Zenith Electronics Corp. v. United States*, 812 F. Supp. 228, 231 (CIT 1993); *Minebea Co. Ltd. v. United States*, 782 F. Supp. at 119 (CIT 1992); *Torrington Co. v. United States*, 745 F. Supp. 718, 723 (CIT 1990) *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991); and *American Spring Wire Co. v. United States*, 590 F Supp. 1273, 1276 (CIT 1984) *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

¹¹ Section 516A(b)(1)(B) of the Tariff Act of 1930 *as amended*, 19 U.S.C. §1516a(b)(1)(B), similarly limits the Panel's review to information placed on the record during the administrative proceeding.

information which was not presented to, or obtained by, the ITA during the course of an administrative review would be beyond the jurisdiction of this Panel.

Neither the Court of Appeals for the Federal Circuit nor the Court of International Trade ("CIT") "may ... substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *Tehnoimportexport, UCF America Inc. v. United States*, 783 F. Sup. 1401, 1404 (CIT 1992) quoting *Universal Camera Co. v. NLRB*, 340 U.S. 474, 488 (1951) and *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (CIT 1984) *aff'd sub nom., Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985). Accordingly, this Panel is similarly constrained.

This deference to the agency is not without limits. As the CIT has held:

[T]he substantial evidence standard requires courts generally to defer to the methods and findings of an agency's investigation [T]he Court must not permit an agency in the exercise of that discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering....Were the scope of the discretion accorded to the agency unlimited, there would be no point in the (statutorily mandated) judicial review here undertaken.

Armco, Inc. v. United States, 733 F. Supp. 1514, 1519 (CIT 1990)(citations omitted); *Cabot Corp. v. United States*, 694 F. Supp. 949, 953 (CIT 1988)(and cases cited therein).

The other element of the standard of review (whether the determination is "in accordance with law")¹² applies to questions of statutory interpretation by the agency. Section 516A(b)(1)(CB) of the Tariff Act of 1930, *as amended*, 19 U.S.C.A. §1516a(b)(1)(B).

In determining whether the ITA's interpretation of the statute is "in accordance with

¹² NAFTA Article 1904(2) states that the "law" to be considered shall consist of "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials." Decisions of the United States Supreme Court and the United States Court of Appeals for the Federal Circuit are binding on this panel.

law", the Panel is to afford deference to the agency's reasonable interpretation of the statute which it administers. "The Supreme Court has instructed that the courts must defer to an agency's interpretation of the statute an agency has been charged with administering provided its interpretation is a reasonable one." *PPG Industries, Inc. v. United States*, 928 F.2d 1568, 1571, *rehearing denied and rehearing en banc declined* (Fed. Cir. 1991).¹³ Also, *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450-51 (1978); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986); *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986); *Consumer Product Division, SCM Corp. v. Silver Reed America, Inc.*, 753 F.2d 1033, 1039 (Fed. Cir. 1985); and *Smith Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed. Cir. 1983) *cert. denied* 465 U.S. 1022 (1984).¹⁴ This deference extends to the administering authority's interpretation of its own regulations as well.¹⁵

In accordance with this principle of administrative law, the ITA has been granted great discretion in administering the anti-dumping duty laws. "Given these circumstances, appellant's burden on appeal is a difficult one, for it must convince us that the interpretation ... [of the agency] is effectively precluded by the statute." *PPG Industries, Inc. v. United States*, 928 F.2d at 1571, *rehearing denied, and rehearing en banc declined* (Fed. Cir. 1991)¹⁶

¹³ Citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984); *Udall v. Tallman*, 380 U.S. 1, 16, *rehearing denied*, 380 U.S. 989 (1965); *K Mart v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).

¹⁴ The Court of International Trade has often applied this principle. See, e.g., *Tianjin Machinery Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1013 (CIT 1992); *PPG Industries, Inc. v. United States*, 712 F. Supp. 195, 197-98 (CIT 1989) *aff'd* 978 F.2d 1232 (Fed. Cir. 1992); and *Cabot Corp. v. United States*, 694 F. Supp. 949, 953 (CIT 1988).

¹⁵ "Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations." *PPG Industries, Inc. v. United States*, 712 F. Supp. at 198 (CIT 1989) *aff'd* 978 F.2d 1232 (Fed. Cir. 1992).

¹⁶ Prior to the passage of the Trade Agreements Act of 1979, the Treasury Department, which administered the antidumping law, also enjoyed such discretion. *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1216 (C.C.P.A. 1977) *aff'd* 437 U.S. 443 (1978).

Nonetheless, this discretion and deference is not unfettered. "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *Saudi Iron and Steel Co. (Hadeed) v. United States*, 675 F. Supp. 1362, 1365 (CIT 1987).

IV. OPINION

a. Is Commerce's Application of Zeroing in Administrative Reviews of Antidumping Orders Supported by Substantial Evidence and Otherwise in Accordance with Law?

In calculating dumping margins, Commerce is instructed by the statute to subtract the export price of the imported merchandise from the normal value (usually the home market price or cost of production) of such merchandise and then to aggregate these dumping margins into a weighted average dumping margin for collection upon import of subject merchandise to offset the dumping. 19 U.S.C. § 1677(35)(A)-(B).

Commerce interprets this mandate to mean that a dumping margin is to be included in the average only when the result of the subtraction is a positive number, that is, only when there is a finding of dumping, as opposed to instances of "negative dumping" or sale of the product for export at a price higher than its normal value. "Zeroing" out these negative margins in the calculation leads to a higher weighted average dumping margin than if instances of negative dumping were allowed to offset instances of positive dumping.

In its Rule 57(1) Brief to this Panel, Ivaco argues that Commerce's application of zeroing in administrative reviews is unlawful. First, it asserts that the applicable statute, section 771(35)(A) of the Tariff Act of 1930, *as amended*, 19 U.S.C. 1677(35)(A), does

not require the ITA to set negative dumping margins to zero. *Id.* at 35.

As a second claim, Complainant contends that application of the *Charming Betsy* canon of construction precludes deference to Commerce's interpretation of an admittedly ambiguous statute when that interpretation places the United States in violation of its international obligations. The use of zeroing by the Commerce Department has been repeatedly found by the WTO's Appellate Body to be inconsistent with WTO rules. *Id.* at 36 *et seq.*

At the Panel hearing and in its *Motion to Stay Proceedings*, Ivaco raised for the first time before this Panel the issue before the Federal Circuit in *Union Steel*, viz: is Commerce's application of zeroing in administrative reviews, but not in investigations, arbitrary and capricious and thus not in accordance with law?¹⁷

1. IS COMMERCE'S APPLICATION OF ZEROING IN ADMINISTRATIVE REVIEWS, BUT NOT IN INVESTIGATIONS, ARBITRARY AND CAPRICIOUS AND THUS NOT IN ACCORDANCE WITH LAW?

In the interim between the filing of the Complaint and the Panel hearing in this review, the Federal Circuit considered this same issue in *JTEKT Corp. and Koyo Corp. v. United States*, 642 F.3d 1378 (2011) and *Dongbu Steel Co., Ltd. v. United States*, 635 F.3d 1363 (2011).¹⁸

On March 31, 2011, the Federal Circuit in *Dongbu* held that Commerce had not supplied a reasonable interpretation why U.S. antidumping law supports the inconsistent

¹⁷ Commerce argued that Ivaco had failed to exhaust its administrative remedies by not raising this point earlier, but in an earlier Order the Panel allowed the issue nonetheless based, in part, on the intervening legal decision exception. *Carbon and Certain Alloy Steel Wire Rod from Canada*, Secretariat File No. USA-CDA-2008-1904-02 at 10-16 (March 14, 2013).

¹⁸ As we noted in our Order granting Ivaco's *Motion to Stay Proceedings*, "the Federal Circuit's decisions in *JTEKT* and *Dongbu* were published on June 29, 2011, and March 31, 2011 respectively – nearly three years after Ivaco's Case Brief of August 11, 2008 and the ITA's final determination dated December 18, 2008."

application of zeroing to administrative reviews, but not to investigations. *Id.* at 1371. The Court noted that the provision of the statute being applied was identical for both investigations and reviews, and that Commerce had even argued in an earlier case, *Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) (“*Corus I*”), that there is no statutory basis for interpreting the provision (19 U.S.C. § 1677(35)) differently in investigations than in administrative reviews. Three months later, on June 29, 2011, the Federal Circuit issued the same result in *JTEKT*. The Federal Circuit in *JTEKT* explicitly noted that its prior holdings on the legality of zeroing under U.S. law do not apply in light of Commerce’s abandonment of the practice in investigations but not in reviews. 635 F.3d at 1370-71.

To calculate the dumping margin, there are three methods of comparing normal market and export price: “average to transaction” (weighted average of normal value compared to individual export prices); “average to average” (weighed average of normal value to the weighted average of the export prices); or “transaction to transaction” (normal value of an individual transaction to export price of an individual transaction).¹⁹

The ITA’s use of zeroing in original investigations and reviews has evolved over the years. Commerce originally used average to average transaction comparisons to calculate dumping margins in both investigations and reviews. It then switched to using average-to-average or transaction-to-transaction comparisons in original investigations. However, it generally continued to use average-to-transaction comparisons in administrative reviews.

Since 2004, however, the United States had been under continuing challenge in

¹⁹ *Statement of Administrative Action* accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316, vol.1 at 842-43, reprinted in 1994 U.S.C.C.A.N. 3773, cited in *Union Steel*, *supra*, at 1103-04.

the Dispute Settlement Body of the World Trade Organization [“WTO”] for its use of zeroing. Several WTO appellate decisions found that the U.S. practice of zeroing, whether during an investigation, an annual administrative review, or a five-year (sunset) review, is inconsistent with the WTO’s Anti-Dumping Agreement, to which the United States is a party.²⁰ In reaction to the WTO proceedings, on December 27, 2006, Commerce announced that it would abandon zeroing in its original investigations, on a prospective basis, beginning in February 2007.²¹ On February 14, 2012, Commerce published its final rule abandoning the practice of zeroing in administrative and five-year (sunset) reviews in which the preliminary results are issued after April 16, 2012.²² It would now use average-to-average comparisons as the default method for calculating weighted average dumping margins.

In *Union Steel* the Federal Circuit accepted Commerce’s rationale for using zeroing in reviews, but not in investigations, based, in part, on the different methods of comparing prices. It found that the ITA was reasonable to use its average-to-transaction methodology in reviews because “greater specificity” was needed there as opposed to original investigations (which only require average-to-average comparisons). *Id.* at 1108.

²⁰ E.g., Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)*, WT/DS294/AB/R (Apr. 18, 2006); Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007); Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) - Recourse to Article 21.5 of the DSU*, WT/DS294/AB/RW (May 14, 2009); Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews - Recourse to Article 21.5 of the DSU*, WT/DS322/AB/RW (Aug. 18, 2009); *United States—Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”)—Recourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator*, WT/DS294/39 (Dec. 8, 2010); *United States—Measures Relating to Zeroing and Sunset Reviews—Recourse to Article 22.6 of the DSU by the United States: Communication from the Arbitrator*, WT/DS322/38 (Dec. 15, 2010). Also, Sungjoon Cho, *No More Zeroing?: The United States Changes its Antidumping Policy to Comply with the WTO*, 16 AMERICAN SOCIETY OF INTERNATIONAL LAW, Insights, (March 9, 2012).

²¹ *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77,722 (Dec. 27, 2006).

²² *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8,102, 8,113-14 (Feb. 14, 2012)[hereinafter “*Final Modification*”].

The court also accepted the ITA's explanation that using average-to-transaction comparisons in reviews can reveal individual dumping otherwise masked by the average-to-average method. *Id.* at 1109.

The *Union Steel* court also considered Commerce's explanation that it had changed its investigation methodology in response to the adverse WTO decisions on zeroing.²³ The court held that Commerce has the "discretion to adopt reasonable practices to meet international obligations." *Id.* It also noted that the adverse WTO decision at issue dealt with average-to-average comparisons in investigations, not in reviews. Commerce, accordingly, did not feel required to go beyond investigations to achieve compliance. *Id.* at 1110.

IS UNION STEEL DISTINGUISHABLE FROM THE INSTANT REVIEW?

In its successful *Motion for a Stay* pending the *Union Steel* case, Ivaco argued that, "Issuing a stay in this case is appropriate because the Federal Circuit's precedential decision in *Union Steel* will impact this Panel's analysis in the disposition of [this Review]".²⁴ Having received the *Union Steel* decision, however, Ivaco now asserts that the case is distinguishable and, even if not, is not even binding on this Panel.²⁵

Ivaco argues that Commerce's rationale for zeroing, which was accepted by the *Union Steel* court, has been disavowed and rendered inoperative by the agency in its

²³ Congress enacted the Uruguay Round Agreements Act (URAA) to implement the various treaties that were negotiated as part of the creation of the WTO. The URAA sets out a complex, explicit, and exclusive procedure for U.S. agencies to implement WTO dispute panel decisions. Sections 123 and 129 of the URAA require close consultation with Congress, involvement of the trade policy arm of the President, the U.S. Trade Representative, and reports by the administering agencies, Commerce, or the U.S. International Trade Commission. Only at the conclusion of this consultative procedure, which sometimes requires legislative amendment to the U.S. statute and whose coordination can occupy two or more years, may Commerce take action on a WTO decision, and then only to the extent that USTR dictates. 19 U.S.C. §§3538(b)(3) and (d).

²⁴ *Motion to Stay Proceedings* at 2.

²⁵ *Comments of Ivaco Regarding Effect of Union Steel Decision* at 1.

*Final Modification for Reviews.*²⁶ Commerce had changed its zeroing practice on February 14, 2012 to use average-to-average comparisons in reviews. Ivaco's point is that the ITA's rationale before the Federal Circuit, *i.e.*, that average-to-transaction comparisons are needed in reviews to capture masked dumping, was flatly contradicted by the *Final Modification*.²⁷

In its comments to Ivaco's argument, which were solicited by the Panel, Commerce replies that the identical issue before this Panel was before *Union Steel* as well and therefore the decision is not distinguishable. That issue is whether use of average-to-transaction comparisons in reviews is reasonable when they are not used in investigations. Also, since the *Final Modification's* change to average-to-average comparisons in reviews was applied prospectively, the Federal Circuit acknowledged it, but did not apply it to that case. This Panel has not applied the *Final Modification*, either. Moreover, we consider it important that the *Final Modification* was not issued until November 2012 - years after the administrative decisions at issue in both *Union Steel* and the instant Panel review.

We agree with Commerce. There is no question but that the *Final Modification* was in front of the Federal Circuit (although it was not applied by the court). The Federal Circuit was not unaware of the *Final Modification* and even stated that "it bears noting" that Commerce had again revised its methodology. *Union Steel* at 1106 n.5. We, similarly, believe that it bears noting that the Federal Circuit emphasized that "This change *only* applies prospectively." (Emphasis added). Ivaco may feel that the Federal

²⁶ *Final Modification*, 77 Fed. Reg. at 113-14.

²⁷ Ivaco points to the ITA's statement in the *Final Modification* that it will capture 100% of dumping using the average-to-average comparison. *Ivaco Comments* at 4-5.

Circuit failed to “address whether this change in Commerce’s methodology...undermines its justification allowing Commerce to interpret 19 U.S.C. 1677(35)”²⁸ as it does, but that is, as counsel for Commerce has said, “a substantive disagreement with the Federal Circuit’s decision, not legal argument”.²⁹ We see no reason to avoid following the authority of *Union Steel* based on Ivaco’s disagreement with the scope or quality of its analysis. As we discuss, *infra*, we consider *Union Steel* and other decisions of the Federal Circuit to be binding authority on this Panel.

Ivaco also argues that the *Chevron* deference paid by the *Union Steel* court³⁰ is misplaced and cites *Estate of Cowart v. Nicklos Drilling Co.* for support. However, in that case, the agency changed its position *pendent lite*, formally became a respondent, and actually sided with its adversary, claiming that it now agreed with the plain meaning of the statute.³¹ In *Union Steel*, by contrast, the ITA did not switch sides and become an Appellant; did not change its legal position that the statute is ambiguous; and did not begin to argue that zeroing in reviews was unreasonable. Ivaco also relies on *Christopher v. SmithKline Beecham Corp.*, but in that case, too, the federal agency had switched its statutory interpretation during the litigation (and even after *certiorari* had

²⁸ *Ivaco Comments* at 3.

²⁹ *U.S. Dept. of Commerce’s Brief in Response to the Complainant’s Comments* at 1.

³⁰ *Union Steel* at 1104, 1107, and 1110 citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

³¹ “Of course, a reviewing court should not defer to an agency position which is contrary to an intent of Congress expressed in unambiguous terms. *K mart Corp. v. Cartier, Inc.*, 486 U. S. 281, 291 (1988); *Chevron, supra*, at 842-843. In any event, we need not resolve any tension of that sort here, because *the Director of the OWCP and the Department of Labor have altered their position regarding the best interpretation of § 33(g). The Director appears as a respondent before us, arguing in favor of the Court of Appeals’ statutory interpretation, and contrary to his previous position.*” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992)(emphasis added).

been granted by the Supreme Court).³² By comparison, the ITA changed its *methodology* but did not change its interpretation of the statute or whether it was ambiguous; nor was that change even before the *Union Steel* court to review. In both cases cited by Ivaco, the federal agencies had truly changed their minds and “abandoned” their earlier litigation positions. In the ITA’s case, it clearly was motivated not by any change of heart, but rather by the impact of the adverse WTO appellate decisions and the URAA’s section 123 proceeding. *Union Steel* at 1109-10. Viewed that way, it is hard for the Panel to characterize the ITA’s *Final Modification* as a voluntary “abandonment” of its position.

Again, Ivaco faults the Federal Circuit for failing to “address the question of whether Commerce’s abandonment of the very policy under review in that proceeding...in fact undermines or disqualifies Commerce’s claim for Chevron deference for the abandoned policy that was applied to Ivaco.” *Ivaco Comments* at 7. But Ivaco’s disagreement with the court’s analysis and conclusions does not render *Union Steel* distinguishable.

THIS PANEL IS BOUND BY RULINGS OF THE FEDERAL CIRCUIT

Chapter 19 panels are required to review AD determinations

to determine whether such determinations are in accordance with the antidumping...law of the importing Party. For this purpose, the antidumping...duty law consists of the relevant statutes, legislative history, regulations, administrative practice and *judicial precedents* to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

NAFTA Article 1904.2 (emphasis added). Panels are also to “apply the standard of review set out in Annex 1911 and the general legal principles that a court of the

³² *Christopher v. SmithKline Beecham Corp.*, 132 S.Ct. 2156, 2166 n. 14 (2012).

importing Party otherwise would apply to a review of a determination of the competent investigating authority.” NAFTA Article 1904.3. This means that, in the case of panel reviews of United States AD determinations, Chapter 19 panels must rely on the same federal court decisions (“judicial precedents”) which a reviewing U.S. federal court would rely on.

Part of the rationale for requiring the Chapter 19 panels to apply the precedent and authorities of the importing country was a concern that they might otherwise develop a body of case law separate from that country’s trade law. In passing the North American Free Trade Agreement Implementation Act, Congress noted that:

Strict adherence by binational panels to the requirement in Article 1904(3) that panels apply the judicial standard of review of the importing country is the cornerstone of the binational panel process. Scholars have noted the potential for *disuniformity of panel decisions with each other and established U.S. law*. See A.F. Lowenfeld, “Binational Panel Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal” 81 (December 1990). *In order to ensure that such lack of uniformity does not develop through panel decisions under the NAFTA*, binational panels must take care to apply properly the importing country’s law and standard of judicial review.³³

Congress explained further:

The intent of this provision [Section 411(2) of H.R. 3450] is to make clear that a panel...decision is binding only with respect to the particular matter before that panel and does not constitute binding precedent on U.S. courts or other binational panels. A U.S. court’s consideration of panel decisions will be limited to the intrinsic persuasiveness of the statements in those decisions.

*The binational panel process is not to effect any change in the substantive law of the United States or to provide any benefit to importers of goods from NAFTA countries.*³⁴

³³ H.R. Rep. No. 361[I], 103 Cong., 1st Sess., 75 reprinted in [1993] U.S. CODE CONG. & AD. NEWS 2553, 2625 (emphasis added).

³⁴ *Id.* at 83, reprinted in [1993] U.S. CODE CONG. & AD. NEWS at 2633 (emphasis added).

This concern is particularly long-standing and had been expressed in the legislative history of NAFTA's predecessor, the United States-Canada Free Trade Agreement Implementation Act.³⁵

The NAFTA Statement of Administrative Action makes the same point:

Article 1904 contains a few significant procedural changes from the comparable CFTA provision. Notably, the panels will continue to be binational in composition. One important improvement is the NAFTA's preference for appointing judges and former judges as panelists. Annex 1901.2 of the NAFTA provides that the roster for binational panels 'shall include judges and former judges to the fullest extent practicable.'

There are several advantages to having judges and former judges serve as panelists. For example, the participation of panelists with judicial experience would help to ensure that, in accordance with the requirement of Article 1904, panels review determinations of the administering authorities precisely as would a court of the importing country by applying exclusively that country's AD and CVD law and its standard of review. *In addition, the involvement of judges in the process would diminish the possibility that panels and courts will develop distinct bodies of U.S. law.*³⁶

To ensure that they do not "*effect any change in the substantive law of the United States*", it is essential that panel decisions, in the case of U.S. imports, are, therefore, based upon U.S. legal precedent and authority (to the same extent that a U.S. reviewing court would be). The corollary is that panel decisions, in turn, must have no precedential effect on U.S. courts.³⁷

³⁵ Senate Report No. 100-509, 100 Cong. 2d Sess, reprinted in [1988] U.S. CODE CONG. & AD. NEWS 2395, 2429.

³⁶ *The North American Free Trade Agreement Act Statement of Administrative Action*, H.R. Doc. 103-159, Vol. 1, 103d Cong., 1st Sess. (1993)(emphasis added). Congress implemented NAFTA through the NAFTA Implementation Act, Pub. L. 103-182, 107 Stat. 2057, (1993) (codified at 19 U.S.C. § 3311 *et seq.*). By that Act, Congress approved NAFTA, as well as the "Statement of Administrative Action" that was submitted by the President on November 4, 1993 with the draft legislation. *Id.* at §101, 19 U.S.C. §3311(a).

³⁷ "Thus, panel decisions will not be binding on the CIT, even if the same or related issues are raised in court actions reviewing determinations of the administering authority or the ITC. Likewise, a panel decision involving a determination relating to merchandise from one NAFTA country will not be binding on other panels, including a

The clear implication of this legislative history is that U.S. Chapter 19 panels must be bound by relevant Federal Circuit precedent if they are to avoid “disuniformity” and inconsistency with U.S. law. If panels were free to disregard Federal Circuit precedent, little (except for the rare U.S. Supreme Court CVD or antidumping decision) would stand in the way of a panel developing its own parallel jurisprudence apart from U.S. trade law. Therefore, when Article 1904.2 requires panels to apply the importing country’s “judicial precedents”, it is primarily referring to Federal Circuit authority. It is clear that where binational panel review is requested, it takes the place of judicial review by both the CIT and the Federal Circuit.³⁸

However, Chapter 19 panels have a different relationship to the CIT. There are several reasons why we do not consider Chapter 19 panel reviews to be bound by the decisions of the CIT. First, the CIT, like a binational panel, is bound by Federal Circuit precedent. Second, NAFTA required that panel review, when requested, take the place of litigation in the CIT. “The United States shall amend section 516A of the Tariff Act of 1930, as amended, to provide that judicial review of antidumping or countervailing duty cases regarding Mexican, as well as Canadian, merchandise *shall not be commenced in the Court of International Trade if binational panel review is requested.*”³⁹

Also, as noted *supra*, NAFTA Article 1904.3 requires the panel to apply the importing country’s AD law, which includes “judicial precedents *to the extent that a*

panel reviewing the same or related issues.” H.R. Rep. No. 361[I], *supra* note 20, at 83, *reprinted in* [1993] U.S. CODE CONG. & AD. NEWS at 2633 (emphasis added).

³⁸ This is self-evident since, once a binational panel is requested, there is no further recourse to either the CIT or the Federal Circuit. NAFTA Annex 1904.15(8). “[B]inational panel review of final U.S. AD or CVD determinations regarding Canadian merchandise...in general substitutes for judicial review in the national courts.” H.R. Rep. No. 361[I], *supra* note 19, at 71, *reprinted in* [1993] U.S. CODE CONG. & AD. NEWS at 2621.

³⁹ NAFTA Annex 1904.15(8)(emphasis added).

court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.” (Emphasis added). The CIT is the court which reviews, in the first instance, AD determinations. Therefore, binational panels are to apply the same legal authority which the CIT would, *i.e.*, Federal Circuit and U.S. Supreme Court decisions.⁴⁰ The CIT follows decisions of another CIT judge only to the extent that it chooses to under *stare decisis*. Accordingly, CIT decisions are no more than persuasive authority in binational panels.

With this regime in mind, we turn to Ivaco’s argument that this Panel is not necessarily bound by the *Union Steel* decision. Ivaco asserts that, with its issuance of the *Final Modification*, Commerce’s rationale for zeroing accepted by the court “and central to the CAFC’s holding” is no longer valid. Accordingly, it argues that the *Union Steel* decision itself is no longer controlling because its circumstances have changed so much. *Ivaco Comments* at 12-13.

The short answer is that the ITA’s existing rationale, pre-*Final Modification*, was indeed central to *Union Steel*. However, that rationale was operative for the ITA review results at issue in that case as in this Panel review. The *Final Modification*, which has only prospective application, cannot affect prior ITA results (such as the one before this Panel) or the agency’s rationale for past methodology. For that reason, we are not persuaded by the case law cited by Ivaco for the proposition that changed circumstances can affect the justification for otherwise binding precedent.

As for Ivaco’s argument that the Federal Circuit itself failed to follow Supreme

⁴⁰ *Dicta* in numerous NAFTA binational panels over the years have also noted that Federal Circuit decisions are binding on panels while CIT decisions are merely persuasive authority. While we agree, we also note that other NAFTA binational panel decisions are not binding on this Panel.

Court precedent concerning inconsistent interpretations of the same statutory provision, the Panel disagrees. We are unpersuaded that the Federal Circuit in *Union Steel* “misapplied” *Clark v. Suarez Martinez* or “misconstrued this fundamental rule of statutory construction”. *Id.* at 15, 19. We see nothing in the court’s distinguishing of *Clark* that would compel us to refuse to follow the binding precedent of *Union Steel*.

2. THE APPLICATION OF THE *CHARMING BETSY* DOCTRINE

Ivaco also argues that, since the *Union Steel* court failed to determine that the *Final Modification* precludes *Chevron* deference to Commerce’s interpretation, the Panel should apply *The Charming Betsy* doctrine and “harmonize” the ITA’s procedures with WTO requirements.⁴¹ *Ivaco Comments* at 8.

As noted *supra*, the Panel does not agree with Ivaco that the ITA is no longer entitled to *Chevron* deference. But neither are we inclined to agree with Commerce that, merely because the Federal Circuit has now held that the ITA’s use of zeroing in reviews is a reasonable interpretation of the statute, *Charming Betsy* somehow cannot also apply here.⁴² The *Charming Betsy* doctrine exists separately from the *Chevron* considerations relied upon by the Federal Circuit.

The Federal Circuit has already rejected the argument against zeroing based upon application of the *Charming Betsy* canon to a WTO decision. *E.g., Timken Co. v. United*

⁴¹ As for *The Charming Betsy* doctrine, the operative language of the decision is as follows: “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. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

⁴² *U.S. Dept. of Commerce’s Brief in Response to the Complainant’s Comments* at 5.

States, 354 F.3d 1334, 1343-44 (Fed. Cir. 2004).⁴³ Plaintiff there had relied upon the WTO decision in the EU case, but the United States had not yet completed the URRA process that ultimately resulted in Commerce’s abandoning zeroing in investigations.⁴⁴ As noted above, Congress has set down an intricate regime for bringing into effect the decisions of the WTO reached through its dispute settlement system. It has declared in the URAA that the regulation or practice found invalid by the WTO dispute settlement process “may not be amended, rescinded, or otherwise modified . . . unless and until” these intricate procedures are completed.

Here and in *Union Steel*, unlike in *Timken*, the ITA has actually completed that statutory process under the URRA and made the *Final Modification* which addresses the WTO process. However, that modification, by its very terms, is prospective and does not affect the agency determination under review here. Therefore we decline to hold that the ITA’s 2008 final results of its 2006-2007 review must somehow be made to “conform to its *current* interpretation of 19 U.S.C. 1677(35), which is that the statute allows calculation of dumping margins in administrative reviews without zeroing.” *Ivaco Comments* at 10 (emphasis in original). Rather, the Panel believes that the *Final Modification* ITSELF was not at issue in *Union Steel* and is not at issue here. The ITA’s review determinations preceded, and were not made pursuant to, the *Final Modification*.

In lieu of *Timken*, *Union Steel*, and *Corus Staal*, Ivaco urges us to follow the “precedent” of the Federal Circuit’s *Allegheny Ludlum* decision and its reliance on

⁴³ Ivaco also believes that *Timken* and *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343 (Fed. Cir. 2005) are now distinguishable also since they, too, did not consider Commerce having abandoned zeroing in reviews. We disagree since the *Final Modification* is neither at issue here nor in those cases (which preceded it by several years).

⁴⁴ Similarly, the URRA statutory process to deal with zeroing was still years from completion when Commerce submitted its 57(2) Response Brief in this Panel review and argued that the statutory implementation scheme had not taken place. *U.S. Dept. of Commerce’s Brief in Response to the Complainant’s Comments* at 19 *et seq.*

Charming Betsy. *Ivaco Comments* at 10. That case involved an ITA countervailing duty determination where the ITA changed its methodology, according to the court, in response to a WTO decision. However, the Federal Circuit ultimately determined that the CVD statute and case law, not the WTO or *Charming Betsy*, precluded the ITA's changed methodology. And the court properly noted that the limited role to be played by *Charming Betsy* and non-binding WTO decisions in judicial review is merely as a "guideline".

In so doing, this court recognizes that the Charming Betsy doctrine is only a guide; the WTO's appellate report does not bind this court in construing domestic countervailing duty law. Nonetheless, this guideline supports the trial court's judgment. Accordingly, where neither the statute nor the legislative history supports the same-person methodology under domestic countervailing duty law, this court finds additional support for construing 19 U.S.C. § 1677(5)(F) as consistent with the determination of the WTO appellate panel.

Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004)(emphasis added). Accordingly, we are not persuaded to apply *Charming Betsy*, whether as a guideline or not, to "require" Commerce to retroactively apply its Final Modification to past review results.

- b. **Was Commerce's Decision that IRM and Sivaco Ontario Make Sales at the Same Level Of Trade Unsupported by Substantial Evidence Or Otherwise Not In Accordance With Law?**

The antidumping law provides for the following adjustment to normal value for a difference in the "level of trade" if the difference in level of trade "involves the performance of different selling activities; and is demonstrated to affect price comparability":

(7) Additional adjustments.

(A) *Level of trade.* The price described in paragraph (1)(B) shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade

(i) involves the performance of different selling activities; and

(ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

Section 773(a)(7)(A) of the Tariff Act of 1930. Commerce's regulations implement this provision, in pertinent part, as follows:

(2) *Differences in levels of trade.* The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent). Substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing. Some overlap in selling activities will not preclude a determination that two sales are at different stages of marketing.

19 C.F.R. 351.412[c](2).

With that rule in mind, we turn to the facts. It is not disputed that Complainant Ivaco Rolling Mills 2004 L.P [*hereinafter* "IRM"] produces unprocessed steel wire rod for sale to affiliated customers in Canada, and both affiliated and unaffiliated customers in the

the United States.

Complainant Sivaco Ontario purchases unprocessed wire rod from its affiliate IRM. It sells both the unprocessed and processed rod to unaffiliated customers in Canada and the United States.

During this administrative review, Ivaco reported to the ITA that IRM and Sivaco Ontario made sales in different channels of distribution and asserted that they sold at different levels of trade.⁴⁵ In particular, Ivaco claimed that Sivaco Ontario had sold at a more remote marketing stage and provided additional selling services than IRM had. Ivaco provided the ITA with various details and examples of the different marketing and service functions carried out by IRM and Sivaco Ontario. Accordingly, Ivaco requested a level of trade adjustment pursuant to section 773(a)(7)(A) of the Act.

The ITA rejected this request, finding that, since IRM had many selling functions that were as significant as Sivaco Ontario's, the record did not support the contention that sales by Ivaco Ontario were made at a more advanced LOT than sales by IRM.⁴⁶ The ITA did not cumulate IRM's selling activity with Sivaco Ontario's.⁴⁷

Ivaco complains to this Panel that:

the ITA's decision that IRM and Sivaco Ontario provide similar selling services is not supported by substantial evidence;

the ITA's decision that there was only one level of trade is inconsistent with its

⁴⁵ *Ivaco Section A Response* at 17-52.

⁴⁶ *Memorandum from Gary Taverman to David M. Spooner, Issues and Decision Memorandum for the 2006-2007 Administrative Review of Carbon and Certain Alloy Steel Wire Rod from Canada; Final Results of Antidumping Duty Administrative Order*, 2-3 (December 11, 2008)[hereinafter "Issues and Decision Memorandum"], and *Memorandum from Steve Bezirganian to Richard Weible, Level of Trade Issue Referenced in 2006/2007 Final Results Issues and Decision Memorandum for Ivaco Rolling Mills 2004 L.P. and Sivaco Ontario, a division of Sivaco Wire Group 2004 L.P.* 31 (December 11, 2008)[hereinafter "LOT Memo"]. The Panel cites herein only to the public version of both memoranda.

⁴⁷ LOT Memo at 13.

decisions in other similar cases; and

the ITA's decision that there is only one level of trade is an unexplained departure from Ivaco's prior reviews where two levels of trade had been found.

SUBSTANTIAL EVIDENCE

Ivaco summarizes the "principal differences" in the record between IRM and Sivaco Ontario's sales as:

IRM produces and sells only wire rod while Sivaco Ontario is a "service center" that sells wire as well as wire rod;

IRM and Sivaco Ontario operate on different schedules: IRM produces rod products at given intervals on a quarterly rolling schedule while Sivaco Ontario sells or processes rod or wire from inventory with a short period of time;

IRM's customers therefore order on a monthly basis while Sivaco Ontario's on a short "just-in-time" basis;

IRM produces to order and has no uncommitted inventory of finished products in Canada. Sivaco Ontario has a large uncommitted inventory of green rod; and

IRM sells large quantities of wire rod to large scale producers (generally a full truckload is a minimum order). Sivaco Ontario sells smaller quantities to end-product manufacturers with smaller runs of various products. Ivaco characterizes IRM as acting "like a wholesaler, whereas Sivaco Ontario acts as a retailer."⁴⁸

Ivaco complains that the ITA merely "paid lip service to the evidence on the record" and "brushed aside the substantial evidence supporting the fundamental differences in the selling operations of each company while scouring the record for isolated instances where the selling functions of each company overlap."⁴⁹

The ITA characterizes a different level of trade as "a difference between the actual functions performed by the sellers at the different levels of trade in the two

⁴⁸ *Ivaco's Rule 57(1) Brief* at 9-10.

⁴⁹ *Id.* at 14.

markets”.⁵⁰ Therefore the ITA conducted an analysis of IRM’s selling activities to its customers versus those sales functions provided by Sivaco Ontario to its own customers.⁵¹ The ITA reviewed the following aspects of the two sellers’ selling functions: inventory functions; communications and planning; delivery functions; handling services; administrative services; technical services; credit/financing services; rebates/cash discounts; bid assistance; warranty services; packing; and advertising. Turning to each briefly:⁵²

Inventory: The ITA acknowledges that Sivaco Ontario *does* maintain “green” wire rod inventory that is uncommitted for customers, and that this indeed is a significant difference from IRM which has no such “uncommitted” inventory.⁵³ Ivaco points to the benefits to its customers stemming from the inventory for just-in-time purposes, *etc.* However, the ITA found no factual basis that this inventory, or the shorter-term sales it allowed, actually affected the sales price as required by the statute.

The ITA also looked at the two sellers’ comparative inventories of wire rod ready for shipment and found that IRM held it longer than Sivaco Ontario had. On balance, the ITA examined the extent to which both performed inventory maintenance and concluded that Sivaco Ontario did not perform significantly more than IRM.

⁵⁰ *Id.* (quoting the *Statement of Administrative Action accompanying the Uruguay Round Agreements Act*, H. REP. NO. 103-316 at 829(1994)).

⁵¹ The ITA did not review IRM’s selling functions to Sivaco Ontario’s customers since it found that there was no evidence of record that there was any. *Id.* at 13.

⁵² Ivaco has not challenged the ITA’s findings with respect to five selling functions: administrative services; bid assistance; warranty services; packing; and advertising. *Commerce Rule 56(1) Brief* at 40; *Hearing Transcript* at 66. Therefore we leave them as they are in the *LOT Memorandum* and the Final Determination which incorporates it. Ivaco apparently has addressed the Communications function under the heading of “Sales Administrative Services”. *Ivaco Brief* at 28.

⁵³ *LOT Memorandum* at 16.

We cannot say, however, that the ITA's conclusions on inventory are unsupported by substantial evidence. The agency has pointed to much evidence of record supporting its findings on the two sellers' inventory functions.⁵⁴ It appears that Ivaco is actually more concerned about the *correctness* of the ITA's *conclusion*, which it feels is wrong. This Panel is not able, or inclined, to substitute its own decision for the ITA's, if based on substantial evidence, "even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Tehnoimportexport, UCF America Inc. v. United States*, 783 F. Sup. 1401, 1404 (CIT 1992) *quoting Universal Camera Co. v. NLRB*, 340 U.S. 474, 488 (1951).

Communication and Planning: Essentially, the ITA found that both sellers communicated with their customers, although it reviewed the record and found thousands of order changes executed by IRM and only hundreds for Sivaco Ontario. *LOT Memorandum* at 17. On this basis, the ITA concluded that Sivaco Ontario did not perform more of this selling activity than IRM. This satisfies the substantial evidence requirement. While Ivaco complains that Sivaco Ontario is a "small service center" providing "retail-type services" with greater variety "and intensity" of customer contact⁵⁵, it has provided little evidence to that effect and therefore has not met its burden of proof.⁵⁶

⁵⁴ *Id.* at 14-16.

⁵⁵ *Ivaco Brief* at 29.

⁵⁶ "The party seeking such a level-of-trade adjustment must demonstrate that one is warranted." *Fujitsu Gen. Ltd.*, 88 F.3d at 1045-46; *Corus Staal BV v. United States*, 27 CIT 388, 406, 259 F. Supp. 2d 1253, 1270 (2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005)(*quoted in PSC VSMPO – Avisma Corporation v. United States*, Slip Op. 09-120 at 8 (CIT 2009)).

Delivery and Handling Services: This is a closer question. The ITA finds delivery to be comparable for both sellers although Ivaco has shown that Sivaco Ontario ships in smaller quantities on a just-in-time basis. The ITA relies upon certain evidence that IRM shipped less than full truckloads and is there supported by sufficient evidence of record. *LOT Memorandum* at 20. The ITA rejects the argument on shorter lead times since they already stem from the inventory function and would result in double counting. Ivaco asserts that inventory maintenance and delivery are separate functions, but the record is not entirely convincing to the Panel on this point. Again we cannot find that Ivaco met its burden of proof on this issue.

The ITA similarly rejects Ivaco's handling function as greater than IRM's on the same grounds that inventory services have covered this issue. We consider this a close question as well but are more convinced by the ITA's evidence of record that at least on some transactions IRM had a contractual obligation to provide certain handling services if not racks like Sivaco Ontario did. While the record is less substantial than we would like on this point, it is more certain that Ivaco has failed to meet its burden of proof in raising the level of trade request.

Technical Services: Ivaco essentially argues that Sivaco Ontario's less sophisticated customers require an extra layer of service not required by IRM's. While the record shows that both sellers did provide technical services⁵⁷, Sivaco Ontario says it must also "interface" with IRM (the supplier) to convey its customers' needs and

⁵⁷ *LOT Memorandum* at 24-27.

concerns. Ivaco complains that, while the ITA criticizes Ivaco's seven examples of service provided, the agency failed to challenge or ask for explanations during the review. We find it more persuasive that Ivaco failed to meet its burden of proof with the relatively thin evidence it presented on this point.

Credit Services: We are not persuaded that Sivaco Ontario incurs greater credit expense for its customers simply because they take longer to pay than IRM's customers do. There is no evidence of record that they have to provide a different level of service than IRM in this regard. The payment terms are the same for both. The ITA does note that IRM had to deal with the bankruptcy and bad debt expenses of one customer during the period of review. *LOT Memorandum* at 27. Ivaco has therefore not met the burden of proof.

Rebates and Cash Discounts: It is not contested that IRM offered cash discounts services in the U.S. market that Sivaco Ontario does not. IRM provided rebates in both markets; Sivaco Ontario did in neither market. We agree with the agency that these constitute "selling expenses" and are not persuaded by Ivaco's argument that Sivaco Ontario must be providing more valuable services to the customer since it needn't resort to discounts and rebates.

With regard to all the elements of the level of trade adjustments, as noted above, the ITA, over the course of its 31-page *LOT Memorandum* and the evidence of record that it references, certainly relied upon "more than a scintilla of ... 'such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion.”⁵⁸

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).

Moreover, the ITA met its obligation to address each factual issue cited by Ivaco, and did so in considerable detail. Summing up, the ITA addressed the issues as follows:

While Sivaco Ontario performed more significant inventory function than IRM with respect to the impact on shorter-term delivery lead times, there were many activities for which IRM selling functions were as significant, or in some instances more significant, than Sivaco Ontario. This includes the maintenance in inventory of merchandise desired by customers, delivery services, handling services, technical services, credit extension, advertising, arrangements for packing, provision of rebate and cash discount programs, and warranty services.

LOT Memorandum at 31. Commerce therefore met its obligation to consider and explain its consideration of the evidence on both sides.

Whether, as a substantive matter, Commerce correctly *weighed* the evidence on each side of the matter is not for us to second-guess. A federal court, like this Panel, is constrained not to "substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.'" *Tehnoimportexport, UCF America Inc. v. United States*, 783 F. Sup. 1401, 1404 (CIT 1992) *quoting* and *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (CIT 1984) *aff'd sub nom., Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985). *Nippon Steel Corp., supra*; *Granges*

⁵⁸ *Universal Camera Co. v. NLRB*, 340 U.S. 474, 488 (1951).

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 do not agree with Ivaco that the ITA “nit-picked” contradictory evidence to deny the request for a level of trade adjustment. Rather, Commerce addressed each element cited by the Complainant, and did so in considerable detail.

Not Otherwise in Accordance with Law

In addition, Ivaco argues that the ITA’s determination regarding the level of trade was also not otherwise in accordance with law. According to Ivaco, the ITA had introduced a new standard, with new criteria, in place of the one set out in the regulation at 19 C.F.R. 19 C.F.R. 351.412[c](2) and described in the preamble to the regulation at 62 Fed. Reg. 27,296, 27,371. We agree with Ivaco that the test for a level of trade adjustment is indeed a two-step process: sales must be made at different stages of marketing *and* there must be an additional layer of selling activities amounting to different selling functions.⁵⁹ Commerce has explained that:

In the Department’s view, while neither the statute nor SAA defines level of trade, section 773(a)(7)(A)(i) of the Act provides for LOT adjustments where there is a difference in levels of trade and the difference “involves” the performance of different selling activities. Thus, the statute uses the term “level of trade” as a concept distinct from selling activities.

Id. at 27,371.

Ivaco asserts that the “new” standard introduced by the ITA is that selling activity by a producer/seller (such as IRM) to an affiliated re-seller (such as Sivaco Ontario) cannot be considered if it was completed before the re-seller begins to sell to an

⁵⁹ *Transcript* at 26-27.

unaffiliated customer. The ITA was not persuaded that IRM had carried out any selling activity to an unaffiliated customer since IRM's activity was completed before Sivaco Ontario had sold to its own customer. We are similarly not persuaded.

Moreover, we do not believe that the ITA has introduced any new standard here. Rather it is applying and relying upon the one already in the statute and regulation and, in doing so, has determined that there was no evidence of record to show that the producer in this case had engaged in selling activities to the unaffiliated customer. Since Commerce has not introduced a new legal standard or methodology, there is no basis to conclude that its determination on level of trade was not in accordance with the applicable statute and regulation that it is charged with implementing and following.

We must defer to the ITA in its interpretation and implementation of the regulations. "Given these circumstances, appellant's burden on appeal is a difficult one, for it must convince us that the interpretation ... [of the agency] is effectively precluded by the statute." *PPG Industries, Inc. v. United States*, 928 F.2d at 1571, *rehearing denied, and rehearing en banc declined* (Fed. Cir. 1991). Commerce's treatment of IRM's selling activity is hardly precluded by the statute.

c. The ITA's decision that there was only one level of trade is inconsistent with its decisions in other similar cases.

Ivaco's position was that since Sivaco Ontario purchased its wire rod from IRM, its re-sales to its own customers were at a different marketing stage than IRM's. The ITA did not cumulate IRM's selling functions with Sivaco Ontario's because it considered IRM's sales to unaffiliated customers to be on the same level as its sales to Sivaco Ontario. IRM sold unprocessed rod to Sivaco Ontario, which the ITA considered as an input or a "raw material." Moreover, the ITA found that IRM's selling functions *vis a*

vis Sivaco Ontario were generally completed before Sivaco sold to its own customers. Therefore IRM had not performed any significant selling activities for Sivaco Ontario's customers. The IRM selling functions were more properly part of Sivaco Ontario's cost of production. *LOT Memorandum* at 13.

Ivaco responds that the sales from IRM to Sivaco Ontario are held for resale to unaffiliated customers and receive only "limited processing". *Ivaco Brief* at 22.

Ivaco argues that the ITA's refusal to cumulate here is inconsistent with the ITA's past cases. In *Steel Reinforcing Bars from Turkey*, the ITA cumulated the producer's and affiliated reseller's selling functions.

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.

70 Fed. Reg. 67,554 (Nov. 8, 2005) (final results) and accompanying *Issues and Decision Memorandum*, at 61.⁶⁰

The ITA went on to add, "In other words, we compare the cumulative selling functions performed by both the producer and reseller in selling to the reseller's customers with the selling functions performed by the producer in selling to its customers." *Id.* at 61 n. 25 (emphasis added). The ITA in our case has seized on this language to assert that, unless IRM carried out selling activities to *Sivaco Ontario's* customers, those activities cannot be cumulated. *ITA Brief* at 39. Ivaco argues that this is

⁶⁰ *Id.* (citing *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.)

an impermissible interpretation of the regulation since it would exclude the producer's selling activities unless they pertained to the re-sale to the unaffiliated customer. *Ivaco Reply Brief* at 11. However, the ITA in the cases cited by Ivaco states: "If the *reseller* performs selling functions *which add substantial selling activity to make the sale*, we may find that sales by the reseller are made at a different LOT than the LOT of the producer."⁶¹ This suggests that there are indeed instances where the producer's selling functions may be more responsible for the re-sale than the affiliate's.

Ivaco also cites two French steel cases for the proposition that the producer's expenses selling to the affiliate are to be cumulated with those of the affiliate selling to an unrelated purchaser.⁶² These cases provide a bit more context than the ITA decisions cited *supra* at nn. 59 and 60 which added very little to the existing regulations. While the agency did cumulate expenses in certain distribution channels, it based that decision on "significant distinctions in selling activities and associated expenses between" the two levels of trade. 64 Fed Reg. at 41,200. This tracks the regulation, which requires that "substantial differences in selling activities are a necessary, but not sufficient, condition for determining that there is a difference in the stage of marketing." 19 CFR 351.412[c](2). And, as in all cases, an effect on price comparability must be present as well.

The Panel finds that the ITA is clearly bound here by the applicable statute and its regulations in determining if there were two levels of trade. We find little in the unrelated

⁶¹ *Id.* and *Circular Welded Carbon Steel Pipes and Tubes from Thailand*, 67 Fed. Reg. 18,749, 18,752 (April 7, 2008)(preliminary results)(emphasis added).

⁶² *Stainless Steel Sheet and Strip in Coils from France*, 64 Fed Reg. 30,820 (Dept Comm. June 8, 1999)(final determination) and *Certain Cut-to-Length Carbon-Quality Steel Plate Products from France*, 64 Fed. Reg. 41,198 (Dept. Comm. July 29, 1999)(prelim. determination).

ITA decisions cited by Ivaco that would provide any more binding authority. With regard to these past decisions in unrelated LOT cases, Commerce may be less restrained to change its methodology. Regardless, the Panel holds that the ITA's refusal to cumulate in this case was not necessarily a departure from any clear precedent. Nor did the agency fail to follow the terms of the statute or its regulation in this regard.

Commerce, of course, denies that, in refusing to cumulate here, it has changed its methodology at all from prior unrelated administrative decisions on level of trade. It cites to the various statutory and other factors in the regulation and asserts that this is a highly case-specific factual determination.

The Panel agrees with Commerce, since the prior, unrelated, determinations are not necessarily on point and do little more than recite the statutory rule – which the ITA is clearly required to follow regardless.

With that, we turn to the remaining issue of whether the ITA was required to follow its methodology from the prior reviews of this very same antidumping order.

- d. The ITA's decision that there is only one level of trade is an unexplained departure from Ivaco's prior reviews where two levels of trade had been found.

On this issue Ivaco is on more solid ground and raises a more compelling issue: having found in the original investigation and the first three reviews that there were two levels of trade, was the ITA obligated to do so here or at least explain why not?

The ITA found in the original investigation and in the reviews that two levels of trade exist in the home market: "an IRM level of trade (level one) and a Sivaco Ontario

level of trade (level two)”.⁶³

In the fourth review the ITA denied Ivaco’s level of trade request and determined that IRM and Sivaco Ontario’s sales were at the same level of trade.⁶⁴ In the fifth review, under review here, the ITA made the same denial and determination as in the fourth review.

Ivaco claims that the relevant facts are essentially the same in all the reviews and that its relevant commercial operations have not changed since the original investigation. In an attempt to identify a variable in the fourth and fifth reviews, Ivaco asserts that the only conceivable factual change in the case has been in the office and staff at the ITA which began to handle the last two reviews.⁶⁵ Ivaco has raised what appears, at first blush, to be a compelling argument that the agency has acted without any apparent rationale.

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 still cannot “act arbitrarily” and must 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

⁶³ *Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 Fed. Reg. 17,389, 17,395-96 (Dept. Comm. Apr. 10, 2002); *Carbon and Certain Alloy Steel Wire Rod from Canada*, 69 Fed. Reg. 43,389, 43,392-93 (Dept. Comm. July 20, 2004); *Carbon and Certain Alloy Steel Wire Rod from Canada*, 70 Fed. Reg. 41,681, 41,686 (Dept. Comm. July 20, 2005); and *Carbon and Certain Alloy Steel Wire Rod from Canada*, 71 Fed. Reg. 64,921, 64,925 (Dept. Comm. Nov. 6, 2006).

⁶⁴ *Carbon and Certain Alloy Steel Wire Rod from Canada*, 72 Fed. Reg. 62,816, 62,816 (Dept. Comm. Nov. 7, 2007)(preliminary results).

⁶⁵ The case has allegedly been transferred from “Office 1” to “Office 7” at the ITA. *Ivaco Brief* at 13.

still open to submit proofs and arguments with respect to the proposed change.

In *Citrosuco Paulista, S.A.*, the duty to act consistently or explain a departure from prevailing practice was expressed in terms of Commerce's prior decisions and the same facts and legal issues were presented. In *CINSA S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1238 (CIT 1997) the obligation to act consistently applied to a previously applied "methodology" (regardless of a change in the facts). Commerce was obliged to continue to apply a "relied upon methodology" or else give reasons for "changing its practice." "Past practices" of the agency include the application of "factual presumptions" and "policies."⁶⁶

The obligation to be consistent or explain a departure also applies to methodologies and practices as well as statutory interpretations. *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.⁶⁷

Here, the ITA insists that it has not changed methodology, policy, practice, or any interpretation. Rather it asserts that the evidence of record in the last two reviews demonstrated that the two sellers did not sell at different levels of trade. *ITA Brief* at 35-36.

However this Panel has before it solely the administrative record of the *fifth* review. We are limited by the statute to considering only that record. A review "on the

⁶⁶ *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* 127 F. 3d 1471, 1475 (Fed. Cir. 1997).

⁶⁷ E.g., *Save Domestic Oil, Inc. v. United States*, 357 F. 3d 1278, 1283-84 (Fed. Cir. 1997), and *NMB Singapore Ltd. 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).

record" means that a Panel's review must be limited to only "information presented to or obtained by [the ITC]...during the course of an administrative proceeding...." 19 U.S.C. §1516a(b)(2)(A)(i). This Panel therefore has neither the authority, the means, nor the inclination to reach beyond the record of the fifth review to try to determine the facts of earlier reviews.

Moreover, as the ITA notes, Ivaco asserts that the "change" first occurred in the *fourth* review, not the fifth. Therefore, Ivaco must argue that the departure in the fourth review should have triggered the necessary notice or explanation. Not only is the Panel being asked to determine facts outside this record, but to assess error in a prior review as well.

Ivaco claims that even if only the facts have changed in this review, the ITA still must explain itself and identify the changes or "if it is simply changing the test or policy." *Ivaco Brief* at 21. This, we believe, the agency has done: it has made it clear that it has not changed any test or practice. The Panel accepts that position.⁶⁸ The ITA has also identified those facts in the record which support its determination in this review and has pointed to some which differ from the fourth review.⁶⁹

Assuming, *arguendo*, that there are no new facts and merely an alleged change in methodology or practice, we consider the following. Ivaco claims that it has been subjected to "a higher benchmark" in the last two reviews than before.

The agency has the burden of providing adequate justification or explanation for

⁶⁸ At the hearing, counsel for the ITA acknowledged that it had expanded from "6 or 7" to 12 the criteria it looks at to determine selling functions. In response to a question from the Panel, she stated that the ITA "has been refining its level of trade practice and part of that is looking at more of the factors based on what respondents like Ivaco provide to the Department." *Transcript* at 71.

⁶⁹ *Transcript* at 66-67.

the departure from standard or longstanding practice. “Once 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.” *Id.* at 1471, 75 (citations omitted).

Not only does the agency have the burden of justification, it must also provide notice to respondents. “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*, 628 F. Supp. 2d. at 1381. The CIT has explained the notice 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.

Here Ivaco claims prejudice from having the ITA's policy change during the fourth review. *Ivaco Reply* at 8. At that point in the chronology of the case, Ivaco's entries were already being made for the fifth review. Ivaco claims that the late notice made it impossible for it to make changes in the marketplace and comply with the new change and its implications. The Panel has no reason to believe that is not true. However, we are compelled to agree with Commerce which notes that the United States

dumping law is designed to “look back” and take corrective action on past entries. Therefore it is not clear how a change by the ITA in a review would not catch the entries made in the next period of review.

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, after citing one position in its preliminary results, and then, notwithstanding the parties’ reliance on that statement, changed its position in the final determination. 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.

Ivaco has had full opportunity, and has taken it, to respond formally on the record before the final results in reaction to what it perceives to be the changed methodology of the ITA.

THEREFORE

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’s final results that calculate a dumping margin only when there is a finding of dumping, as opposed to instances of “negative dumping” or sale of the product for export at a price higher than its normal value, is affirmed.

Issue Date: April 29, 2014

Signed in the original by:

ROBERT E. RUGGERI, CHAIRMAN
ROBERT E. RUGGERI, CHAIRMAN

SERGE ANISSIMOFF, PANELIST
SERGE ANISSIMOFF, PANELIST

DAVID MULLAN, PANELIST
DAVID MULLAN, PANELIST

ROBERT PATERSON, PANELIST
ROBERT PATERSON, PANELIST

MARK R. SANDSTROM, PANELIST
MARK R. SANDSTROM, PANELIST