UNITED STATES-CANADA BINATIONAL PANEL REVIEW

REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA	)	**USA-89-1904-03**

Before: **Alberger**
Brown
Flavell
Graham
Kassinger

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Following a Request for Panel Review filed by Allatt Paving Equipment Division of Ingersoll-Rand Canada, Inc. ("Allatt"), this review proceeded upon a complaint filed by Blaw Knox Construction Equipment Corporation ("Blaw Knox"), pursuant to Article 1904 of the United States-Canada Free Trade Agreement ("FTA") and Title IV of the United States-Canada Free Trade Agreement Implementation Act for 1988, 19 U.S.C. { 1516a(g)(2) (1989 Supp.) to contest the final antidumping duty determination by the U.S. Department of Commerce ("Commerce" or "the Department") in the administrative review investigation, Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, 54 Fed. Reg. 12,467 (1989).

Based principally on the United States Court of International Trade ("CIT") decision in Zenith Electronics Corp. v. United States, 633 F. Supp. 1382 (Ct. Int'l Trade 1986), dismissed, 875 F.2d 293 (Fed. Cir. 1989) ("Zenith"), Blaw Knox contests both Commerce's decision to make a full adjustment for certain Canadian taxes not paid because the subject merchandise was exported and its decision to perform a circumstance-of-sale ("COS") adjustment to eliminate the so-called "multiplier effect". Separately, Blaw Knox maintains that the administrative record also lacks substantial evidence to support Commerce's COS adjustment for Allatt's inland freight expenses. Finally, Blaw Knox argues that there is no evidence on the record of the proceeding to support the determination that Allatt actually paid the Canadian taxes.

II. BACKGROUND

The parties involved in this Panel review are the same parties to Panel Review USA 89-1904-02 (the "`02 Review"). The background to these reviews can be found in the Panel's Memorandum Opinion and Order regarding the `02 Review. 55 Fed. Reg. 5489 (1989).

III. ISSUES

The specific issues presented are:

1. Whether 19 U.S.C. { 1677a(d)(1)(C) (1982 & 1989 Supp.) requires Commerce in each case to determine the extent to which a manufacturer passes through to end users the cost of any

taxes assessed in the home market in its price before Commerce adjusts the purchase price for the amount of such taxes rebated or not collected because of exportation of the merchandise.

2. (a) Whether Blaw Knox exhausted its administrative remedies as to the propriety of Commerce's COS adjustment to account for the "multiplier effect," (that is, the comparative increase in a dumping margin that would result solely from the application of the same tax rate to a higher foreign market value compared to a lower U.S. price?

(b) If so, whether Commerce may make such a COS adjustment.

3. Whether Commerce's adjustment for Allatt's inland freight expenses is supported by substantial evidence on the record.

4. (a) Whether Blaw Knox exhausted its administrative remedies with respect to the question whether Allatt actually paid the Canadian Federal sales tax.

(b) If so, whether Commerce's determination that Allatt paid the sales tax supported by substantial evidence.

IV. STANDARD OF REVIEW

The Panel adopts and incorporates by reference that part of its opinion regarding the applicable standard of

review that was set forth in the Panel's Memorandum Opinion and Order in the `02

Review, with one additional observation on the precedential effect of opinions of the Court of International Trade on binational panel reviews. Although a binational panel proceeding provides a mechanism for review that is legally distinct from the judicial process that commences with CIT litigation, Article 1904(2) of the FTA states that a panel should rely on "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." Among the pertinent precedents are two decisions by two judges of the CIT; there are no appellate decisions directly on point. The key CIT decisions are Zenith and Atcor, Inc. v. United States, 658 F. Supp. 295 (Ct. Int'l Trade 1987) ("Atcor"). Atcor arguably reaches a different result than Zenith. Therefore, this Panel must first determine whether it is bound by stare decisis to follow one or the other of the conflicting CIT opinions.

This question is akin to that confronting a Member of the CIT when it is faced with an issue that has been decided previously by a separate Member, but never by the Court of Appeals for the Federal Circuit. In Rhone Poulenc v. United States, 583 F. Supp. 607 (Ct. Int'l Trade 1984), Judge Restani stated that "[a]lthough a nonfinal decision of the Court of International Trade is not a Supreme Court decision . . ., or even a Court of Appeals decision . . ., it is nonetheless valuable, though non-binding, precedent unless and until it is reversed." Id. at 612 (citations omitted) (emphasis added); see also Beker Industries Corp. v. United States, 7 Ct. Int'l Trade 313 (1984). In addition, the Chief Judge of the CIT, Judge Re, has stated in an article entitled Stare Decisis that "[t]he doctrine of stare decisis thus does not require unbending adherence to past decisions. It permits a court to benefit from the wisdom of the past, and yet reject the unreasonable and erroneous." 79. F.R.D. 509, 514 (1975). [1] With regard to the very issue raised in the Zenith case, there appears to be a lack of unanimity on the CIT. Although in Zenith, Judge Watson required that Commerce measure "tax incidence," in Atcor, a case dealing with a similar adjustment, Judge Carman did not require Commerce to measure tax incidence. The Atcor court remanded the case to Commerce, directing the Department to obtain evidence

[1] See also S. Powell and L. Concannon, "Stare Decisis in the Court of International Trade: One Court or Many," in the U.S. Trade Law and Policy, 408 Practising Law Institute 351 (1987); D. Cameron and J. Russon, "Recent Trends in the Application of Stare Decisis by the Court of International Trade," in the Commerce Department Speaks 1987, 571 Practising Law Institute 547 (1987).

on whether the manufacturers included the tax in their home market price. Id. at 304-05.

Like the issue confronting Judge Restani in Rhone-Poulenc, we have before us a question that has not been addressed by any appellate court. Instead, we consider a matter that has been decided only by courts sitting, as we do, at the first full level of review of an agency determination. Given the complexity of the issues presented to the Panel, these precedents offer valuable assistance in evaluating the merits of the parties' arguments. As we chart a new course in this panel review, we thus accord Zenith and Atcor great respect, but treat neither as binding.

V. PASS THROUGH

A. Statutory Scheme

Under the Tariff Act of 1930, dumping margins for sales of imported merchandise are calculated by comparing foreign market

value ("FMV") and United States price ("USP"). 19 U.S.C. { 1673 (1982 & 1989 Supp.) [2] Where merchandise identical or similar to the imported merchandise is sold in the home market of the exporting country, FMV is determined from the home market price of that merchandise, pursuant to 19 U.S.C. { 1677b(a)(1)(A) (1982 & 1989 Supp.). In the absence of such sales, FMV may be determined by using sales prices to third countries other than the United States (see 19 U.S.C. { 1677b(a)(1)(B)), or by using a cost-based methodology known as constructed value. See 19 U.S.C. { { 1677b(a)(2) and (e) (1982 & 1989 Supp.). Determinations of USP ordinarily are based upon the import "purchase price." 19 U.S.C. { 1677a(b) (1982 & 1989 Supp.). If the importer and exporter are related parties, Commerce bases USP on first sales to unrelated American purchasers. This method is called the "exporter's sales price." 19 U.S.C. { 1677a(c) (1982).

Having chosen to utilize either these price or constructed value determinations, Commerce then makes various upward and downward adjustments pursuant to statutory provisions and implementing regulations to arrive at determinations of FMV and USP. The "absolute dumping margin" for a sale is the amount, if any, by which FMV

[2] See generally Coursey and Binder, "Hypothetical Calculations Under the United States Antidumping Duty Law: Foreign Market Value, United States Price, and Weighted-Average Dumping Margins," 4 Am. U.S. Int'l L. and Pol'y 537 (1989).

exceeds USP. Absolute margins are calculated for the assessment of antidumping duties. The "ad valorem (percentage) margin" for a sale is the ratio of the absolute margin over the USP. The "ad valorem weighted average margin" for sales during the period under investigation or review is the total amount of absolute margins on individual sales divided by the total USP for all entries. See 19 U.S.C. { 1677b(f) (1982 & 1989 Supp.) (authorizing use of averaging or sampling for determinations of FMV). Commerce calculates weighted average ad valorem margins for purposes of issuing and revoking orders and setting cash deposit rates. See Television Receiving Sets from Japan, 50 Fed. Reg. 24,278, 24,279 (1985).

The unadjusted price determinations by the ITA are "after-foreign-tax prices," in that such prices are measured after the producing country has assessed indirect taxes on the manufacture or sale of the subject merchandise. One such tax is the Canadian Federal Sales Tax ("FST"). Like most countries that impose excise or consumption taxes on goods, Canada assesses the FST on sales for domestic consumption, but does not collect the tax on export sales.

To prevent dumping margins from arising merely because the country of exportation assesses such excise taxes on home market sales but not on export sales, section 772(d)(1)(C) of the Tariff Act of 1930 provides for an offsetting adjustment in the calculation of USP. That section states:

> Adjustments to purchase price and exporter's sales price.
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> The purchase price and the exporter's sales price shall be adjusted by being --
> (1) increased by --
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to
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> the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. . . .

19 U.S.C. { 1677a(d)(1)(C) (emphasis added.)

By its terms, this adjustment has two components. First, Commerce must increase USP -- whether determined by purchase price or exporter sales price -- by the amount of foreign taxes imposed directly upon the exported merchandise or its components, which the exporting country forgives (rebated or not collected) because the

merchandise was exported to the United States.[3] Second, Commerce must limit the adjustment to the amount that such taxes are added to or included in the price of comparative merchandise sold in the home market.

The legislative history explaining this provision is quite limited. As explained below, Judge Watson appears to have based his decision in the Zenith case primarily on one statement in the legislative history.

B. The Zenith Decision

1. Issues Presented

The Zenith case involved the appeal of a Commerce decision in the antidumping review of Television Receiving Sets from Japan, 50 Fed. Reg. 24,278 (1985). In that case, Commerce made

an adjustment for the entire amount of the Japanese commodity tax in question that was forgiven on televisions exported to the United States. The Department made the adjustment to FMV rather than USP in order to eliminate the multiplier effect. [4]

Zenith, the petitioner, appealed to the CIT. In his opinion, Judge Watson remanded Commerce's determination on two grounds: (1) that the adjustment to FMV was contrary to Section 772(d)(1)(C) of the Tariff Act; and (2) that Commerce failed, to determine the extent to which the commodity taxes were passed on to customers in the Japanese market, if at all.

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[3] Where the sales tax rate in the foreign market is 15%, the effect may be illustrated as follows:

Home Market		United States
$100 (price of domestic sale)		$90 (export sales price)
+$ 15 (15% tax)	0 (tax exempt)	
$115 FMV		$90 USP

Absolute margin: $115 - $90 = $25

Here the tax-net margin ($10) is increased by $15, solely as a result of the forgiveness of the sale's tax on exports.

[4] See definition of "multiplier effect," p.3.

2. Adjustment to Foreign Market Value

Based on the plain language of the statute, Judge Watson rejected Commerce's argument that it had to make the adjustment to FMV in order to maintain tax neutrality. In its opinion, the

CIT described the evolution of the pass through provision from the version that originated in the Antidumping Act of 1921.

In the 1921 Antidumping Act, codified before repeal at 19 U.S.C. {{ 160-173, Congress specifically "defined FMV, consistent with ordinary dutiable value, to include taxes imposed on merchandise sold in the foreign home market." Zenith, 633 F. Supp. at 1390. To prevent dumping margins from arising due to the forgiveness of such taxes on exports, the 1921 Act provided for an upward adjustment to USP in "`the amount of any taxes imposed in the country of exportation upon the manufacturer, producer, or seller, . . . which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States.'" Id. (quoting from S. Rep. No. 16, 67th Cong., 1st Sess. 2 (1921)). Thus, the court remanded that portion of the case to Commerce with instructions to adjust USP upward rather than FMV downward to account for the rebated tax. [5]

3. The Pass-Through Provision

The court then focused on the statutory language in the pass-through clause, which states that the amount of the adjustment may not exceed "the extent to which such taxes are

added to or included in the price of such or similar merchandise when sold in the country of exportation." Zenith, 633 F. Supp. at 1394. Judge Watson framed the issue as "first, whether the pass-through clause was intended to require the measurement of tax absorption, and if so, whether [Commerce] acted within its discretion by simply assuming a full pass-through." Id.

In the 1974 Trade Act, 19 U.S.C. {{ 2101-2487 (1982), Congress added the pass-through provision to the

[5] In this case, Commerce correctly adjusted the USP upward, thus whether Commerce correctly adjusted USP is not a question before the Panel.

1921 Antidumping Act. Apparently the essential holding in Zenith is based on the following statement in the 1973 House Report describing that change:

> Further, an adjustment for such tax rebates would be permitted only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation. This is to insure that the rebate of such taxes confers no special benefit upon the exporter of the merchandise that he does not enjoy in sales in his home market. To the extent that the exporter absorbs
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> indirect taxes in his home market sales, no adjustment to purchase price will be made and the likelihood or size of dumping margins will be increased.

Id. at 1396 (quoting from Report of the Committee on Ways and Means on H.R. 10710, House Report No. 571, 93rd Cong., 1st Sess. at 69 (Oct. 10, 1973)) (emphasis added).

From this statement -- with special emphasis on the term "absorbs" -- the Zenith court rejected Commerce's interpretation of the statute. Judge Watson determined that Congress added the pass-through clause because of an unstated belief that foreign manufacturers frequently did not fully shift forward such indirect taxes through to purchasers: "Congress did not want the adjustment for such a tax to increase [USP] calculations by an amount greater than the price increase which the tax generated in comparable home market sales." Id.

In Zenith, as here, Commerce argued that it has reasonably interpreted the tax pass-through clause to allow for a full adjustment, based on evidence of tax payment, without further measuring absorption; and further, that its interpretation is consistent with the United States Court of Appeals for the Federal Circuit (CAFC) holding in Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983); cert. denied 465 U.S. 1022 (1984). In Smith-Corona, the CAFC held that with respect to COS adjustments based on costs, Commerce may reasonably conclude that cost and value are directly related, absent evidence that costs do not reflect value. Smith-Corona, 713 F.2d at 1577 n.26. Thus, concerning tax pass-through, Commerce similarly argued in Zenith that "[a]bsent evidence that clearly demonstrates a manufacturer's commodity tax cost is not reflected in home market sales prices, the Department may reasonably conclude that cost and price are directly related." Zenith, 633 F. Supp. at 1399.

Nevertheless, the Zenith court found that specific language existed in the pass-through clause and in the legislative history which required a price-based determination. "To permit Commerce to assume, without any evidentiary basis, that home market price always reflects the full amount of such taxes would effectively render the pass-through clause a nullity and would defeat the express will of Congress." Id. Judge Watson concluded:

> Whereas the Smith-Corona decision sustained Commerce's discretion to assume as a practical matter in limited situations that differences in manufacturer's costs reflect differences in price or value, Commerce now brazenly leaps to a purely cost-based view of the antidumping law, wherein the effect of cost on price is not relevant even in principle. While this may be
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> the antidumping law Commerce officials would like to see, it is not the antidumping law presently in place.

Id. at 1401.

C. Impact of Zenith Determination

Prior to the Zenith case, Commerce had simply asked in its questionnaire whether the foreign producer had paid the tax and whether the tax had been added to the customer's sales receipt in the home market. If so, Commerce assumed that the entire amount had been passed through in the price to the customer. Based on the holding in Zenith, Commerce was forced to give an economic interpretation to the words "added to or included in the price," found in the pass-through clause. Therefore, on remand from Zenith, Commerce attempted to measure the incidence (or ultimate distribution of the burden) of the tax in the foreign market and to limit the amount of the addition to USP to that proportion of the tax found to be "passed-through" to home market customers. [6]

To measure tax incidence, Commerce chose to conduct an econometric study, which uses the techniques of statistical analysis to derive economic functions, such as supply and demand, from empirical data about costs, prices, sales volume, and the like. Despite Commerce's conviction that econometrics is a highly theoretical discipline fraught with uncertainty and requiring a staggering volume of data, the econometric model was, according to Commerce, the only alternative which provided an adequate measurement of tax incidence.

To conduct the study, a questionnaire was sent to the Japanese television producers, requiring them to submit

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[6] For example, assume that a 15% tax is nominally added to the price of a $100 television, so that the invoice reads "$100 + $15 = $115." Commerce would regard this as a conclusive showing that the tax had been added to the price. Pursuant to the Zenith decision, however, the inquiry may not end there. The Zenith decision also requires Commerce to attempt to determine whether the price would have been higher than $100 if there had been no tax. If Commerce concludes that the price would have been $105 if there had been no tax, this would signify that the manufacturer had succeeded in "passing-through" to customers only two-thirds ($10) of the tax, and had itself "absorbed" the remaining third ($5) himself. This remaining third would create a dumping margin of $5, or increase the margin by that amount.

virtually all sales data for a ten year period. This questionnaire increased the total volume of required data from respondents in the administrative review by approximately fifty percent. Id. In addition, only three of the five major producers under review could provide all of the requested information. The data ultimately obtained were analyzed by means of a very sophisticated economic model that was designed to act as a surrogate for the Japanese television market.

According to Commerce, despite the sophistication of the model, it could only produce a reasonable estimate of tax absorption because of the number of variables. On balance, however, the results of the econometric model used on remand in Zenith were entirely consistent with Commerce's original assumption that the entire amount of the tax had been passed through. Id. at 21. [7]

This econometric approach apparently has been followed in only one other instance. In Daewoo Electronics Co., Ltd. v. United States, 712 F. Supp. 931 (Ct. Int'l Trade 1989), Judge Watson reaffirmed his decision in the Zenith case, but did not add any additional legal reasoning to the Zenith decision. Commerce is still conducting an econometric analysis in the Daewoo case.

D. The Commerce Department's Pass-Through Methodology is Reasonable

The issue confronting the Panel is not whether Commerce's analysis or the Zenith analysis of the pass-through issue is the correct one. Rather, the issue presented to the Panel is whether

the methodology used by Commerce in this case was based on a reasonable interpretation of the statute. See Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 n. 11 (1984). We believe that it was.

1. The Commerce Department's Methodology is Consistent With the Statute and the Legislative History

Under Zenith and Daewoo, Commerce would have to measure the amount of tax "passed-through" to

[7] When Commerce appealed the Zenith decision to the CAFC, the court held that there was no longer a case or controversy because Commerce had suffered no injury on its dumping determination. Zenith Electronics Corp. v. United States, 875 F.2d 293 (Fed. Cir. 1989). The court explained that because the econometric analysis did not effect Commerce's final antidumping finding, the Department had not suffered any injury. Thus, the court concluded that no case or controversy existed as required by Article III of the Constitution. Id. at 293. Thus, the Panel is without benefit of the CAFC's opinion of the Zenith holding.

Canadian customers before it could make an adjustment for the rebated or uncollected tax. The statutory language, however, does not mention tax "burden" or "shifting" and does not otherwise refer to tax incidence. The specific clause in question speaks of the tax "added to or included in" the price of such or similar merchandise in the home market. The most reasonable, "plain meaning" interpretation of this language is that a seller in fact charges its customers for the tax on its sales: it "adds" or "includes" the tax in its invoice price. In its investigation, Commerce can verify that such charges are made. Given the normal procedures of an investigation and the short time limits imposed by statute upon their completion, it is reasonable to assume that Congress did not contemplate the extraordinary effort required to complete an econometric verification of tax absorbtion. Further, absent evidence to the contrary, it is reasonable to assume that when a manufacturer is selling merchandise at a profit, it is recovering all of its costs, including the taxes, and, therefore, all costs are "included" in the customer's price.

Blaw Knox argues that Commerce's interpretation reads the tax clause out of the statute because Commerce assumes in every instance that the tax is passed on to customers. We read the statute as requiring substantial evidence that the taxes are paid on sales within the home market. Commerce indeed insists that it requires respondents to provide evidence that the manufacturer has actually paid the tax and that the sales receipts reflect that the manufacturer "added [the tax] to or included [it] in" the price paid by home market purchasers. Where Commerce fails to conduct such an inquiry, its determination is subject to remand. See Atcor, 658 F. Supp. at 296 (case remanded to Commerce to "verify" full extent of taxes incurred). Here, Commerce's decision in an administrative review is before the Panel. In Atcor, it was an initial dumping determination. The distinction is only relevant in that here, Commerce relies upon prior inquiries and verification in other administrative reviews on this product and under this antidumping order for the judgment that the tax was paid and was added to the price charged to customers.

Commerce's construction of the statutory language is also consistent with the legislative history, which does not contain a detailed description of the pass-through clause. We agree that the 1973 House Report's use of the single term "absorbs" does not compel Commerce to measure tax incidence in an economic sense. If Congress had contemplated such a burdensome requirement -- one that could not readily be performed with confidence or within the statutory framework for investigations -- the Senate as well as the House surely would have been more explicit about

their intent. We doubt that this methodology was ever considered, much less agreed upon, by the drafters of the legislation.

2. The CIT's Methodology is Inconsistent with the GATT

The antidumping provisions of the Tariff Act should, where possible, be construed in a manner consistent with the General

Agreement on Tariff and Trade ("GATT"). Matsushita Elec. Indus. Co. v. United States, 569 F. Supp. 853, 859 (Ct. Int'l Trade 1983); rev'd on other grounds, 823 F.2d 505 (Fed. Cir. 1987). It is true that in the event of a conflict between the GATT and U.S. law, U.S. law prevails. 19 U.S.C. { 2504(a) (1982). The Trade Agreements Act of 1979, [8] however, amended the Tariff Act in order to implement the GATT Antidumping Code. Therefore, whenever possible, the Tariff Act should be construed in a manner consistent with the GATT. This is particularly true when a Binational Panel is reviewing antidumping determinations under the law. In its preamble, the FTA states that one of the significant reasons why the governments of Canada and the United States reached the agreement was "to build on their mutual rights and obligations under the [GATT] . . . ." In addition, Article 1902 of the FTA provides that each party reserves the right to amend its antidumping law, provided that "such amendment . . . is not inconsistent with . . . the [GATT or] . . . , the Agreement on Implementation of Article VI of the [GATT] (the Antidumping Code). . . ." FTA Article 1902(2)(d)(i). We believe that these provisions in the FTA compel Binational Panels to be as consistent with the GATT as possible when construing either U.S. or Canadian antidumping law.

When viewed in this light, the Commerce interpretation of the tax pass-through clause in this case finds additional support. Article VI(4) of the GATT provides that imported products of a contracting party shall not be subject to an antidumping duty "by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes." General Agreement on Tariffs and Trade, art. VI(4) (emphasis added). Commerce asserts that if it increased

[8] Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of title 19 of the U.S. Code and amended in part by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948).

dumping margins on paver parts from Canada by any proportion of indirect taxes forgiven on exports which it determined were not passed through to home market customers, that increase would be inconsistent with Article VI(4) of the GATT.

Blaw Knox maintains that all it seeks is measurement of the true extent to which such taxes are indeed passed-through on home market sales. However, the GATT does not limit the tax adjustment to the percentage amount passed-through to the customer in the home market. It provides an adjustment for the tax borne, meaning tax paid.

Blaw Knox further contends that Allatt does not pass the entire tax through to its customers because it grants discounts ranging from five to twenty-five percent on sales to distributors in the Canadian market. Discounts, however, bear no relationship to tax incidence. As Commerce states in its brief, "[This] argument ignores the obvious fact that the original invoice price may be deliberately inflated so that "discounts" can routinely be granted." Brief of Investigating Authority at 45. If the foreign producer is making a substantial profit in the home market, it stands to reason that the producer is passing through all costs including taxes in its sales price to the customer. If Blaw Knox were correct, a company that granted discounts or rebates greater than the tax amount in the home market could not receive an adjustment under the tax clause. We believe this would be inconsistent with the GATT.

Where the U.S. law is capable of a construction consistent with the GATT, that approach should be preferred. Here, the Panel finds no conflict between U.S. law and the GATT provisions. We have no difficulty in construing U.S. law in a manner entirely consistent with express provisions of GATT.

3. The Smith Corona Decision

Finally, we believe that Commerce's methodology is supported by Smith-Corona Group v. United States, 713 F.2d 1568 (Fed. Cir. 1983). As discussed above, with regard to COS

adjustments based on costs such as advertising, that "absent evidence that costs do not reflect value, [Commerce] may reasonably conclude that cost and value are directly related." Id. at 1577 n.26. "The ready availability of cost data that can be employed without extensive complex econometric analysis supports the reasonableness of the Secretary's decision to rely on cost. Cost may be the only practical way to administer the statute." Id. at 1577 n.27.

In sum, we conclude that Commerce's methodology as used in this case is based on a reasonable interpretation of the tax pass-through clause. This interpretation does not read the "pass-through" language out of the statute, and it is consistent with the GATT. Because we find Commerce's construction of the tax clause provisions in the statute to be more reasonable than the CIT's, we affirm that portion of the agency's determination.

VI. THE "MULTIPLIER EFFECT" COS ADJUSTMENT

In addition to alleging that Commerce erred by assuming a full tax pass-through, Blaw Knox contends that Commerce also

erred by making a COS adjustment to compensate for the "multiplier effect" [9] created in determining the amount of tax not collected by virtue of exportation to the United States. Blaw Knox did not directly raise this issue until its complaint and briefs filed in this Panel review. Because Blaw Knox failed to raise this issue in the administrative proceeding below, despite ample opportunity to do so, Commerce and Allatt argue that Blaw Knox is barred from raising it now by the doctrine of exhaustion of administrative remedies.

Blaw Knox maintains that it raised the issue below through its numerous references to Zenith, which, as described above, dealt in some detail with the tax pass-through adjustment. Blaw Knox argues that by virtue of its citing Zenith with regard to the tax pass-through issue it provided Commerce with sufficient notice that it was also challenging Commerce's authority to make the COS adjustment for the multiplier effect. Reply Brief of Complainant Blaw Knox at 33. Because we are unable to find either that Blaw Knox raised the issue below or that some exception to the doctrine of exhaustion of administrative remedies applies,[10] the Panel is compelled to agree with Commerce and Allatt that Blaw

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[9] The multiplier effect can be illustrated by use of an example. If product A sells in Canada for a pre-tax price of $100 and in the United States for $90, and the tax imposed in Canada on sales to end users is 10%, then the total price in Canada is $110 [$100 + ($100 x 10%)] whereas the total price in the United States is $99 [$90 + ($90 x 10%)]. As a result, a pre-tax difference of $10 is now an after-tax difference of $11. This extra $1 is called the multiplier effect.

[10] The Supreme Court has enumerated several exceptions to the exhaustion doctrine. The doctrine does not apply if the agency has insufficient power to grant the remedy; if the federal plaintiff will be irreparably harmed by the delay; if resorting to agency action would be futile; or if the plaintiff is attacking the constitutionality of the entire statutory scheme. See McKart v. United States, 395 U.S. 185 (1969); Alahambra Foundry v. United States, 685 F. Supp. 1252 (Ct. Int'l Trade 1988). None of these exceptions arguably apply in this case, and Blaw Knox has not argued any of these exceptions.

Knox is barred from raising the propriety of the COS adjustment at this juncture.

As the CAFC explained in Sharp Corp. v. United States, 837 F.2d 1058, 1062 (Fed. Cir. 1988) (citations omitted): "Judicial review of administrative action is inappropriate unless and until the person seeking to challenge that action has utilized the prescribed administrative procedures for raising the point." See also Kokusai Elec. Co. v. United States, 632 F. Supp. 23, 28 (Ct. Int'l Trade 1986) ("a reviewing court would usurp the function of the agency if it were to set aside an administrative determination upon a ground not previously presented, thereby depriving the agency of a chance to consider the matter" (citation omitted)). Section 3 of Article 1904 of the FTA provides that "[t]he panel shall apply . . . 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." Article 1911 of the FTA explains that the requirement of exhaustion of administrative remedies is among these general principles.

The Panel must reject Blaw Knox's position that its argument against the COS adjustment for the multiplier effect can be "implied" from its frequent citation to Zenith. Although it is true that Blaw Knox relied on Zenith at the administrative level, it did so solely with regard to the tax pass-through issue discussed above. Blaw Knox never challenged, at the administrative level, Commerce's authority to make the COS adjustment. Obviously, Commerce was aware that Blaw Knox was relying on Zenith in disputing Commerce's method for measuring the Canadian tax payments. However, mere citation to Zenith was not sufficient in and of itself to raise the question of Commerce's authority to make a COS adjustment to reduce the dumping margin to its pre-tax level. The authority to make a COS adjustment stems from a distinct statutory provision, and that provision was explicitly invoked in Commerce's preliminary determination. See 19 U.S.C. { 1677b(a)(4)(B) (1982 & 1989 Supp.). Blaw Knox should have made its position known in equally explicit terms, since a decision on the tax pass-through issue would not necessarily have mooted the question of Commerce's authority to make a COS adjustment. Moreover, a party could consistently challenge Commerce's application of the tax pass-through statute without challenging the legality of a COS adjustment for the multiplier effect.

It would be ridiculous to infer that a party automatically raises all the legal issues discussed in any case merely by citing the case. Parties must articulate particular issues of concern so that an agency can render a considered decision and a proper record is created for review. Cf. Kokusai, 632 F. Supp. at 28. A case may address a number of issues, of which only one or two are relevant to the circumstances of an ongoing proceeding. It is for a party to decide

and affirmatively set out which issues it believes are dispositive with respect to the proceeding at hand. Here, citation to Zenith, without explicitly explaining what that case tells about the proceeding before the agency, is not adequate.

Any such inference in this particular proceeding would be difficult to justify because the Zenith court was not actually reviewing the propriety of a COS adjustment. In Zenith, the issue was whether the tax adjustment was made to FMV or, as the statute provides, to USP. An adjustment to FMV eliminates the need to perform a COS adjustment for the multiplier effect. The relevant discussion in Zenith addresses only a hypothetical COS adjustment for the multiplier effect. Thus, the Zenith court was presumably not aided by a full briefing on the issue. Blaw Knox's challenge is barred by the doctrine of exhaustion of administrative remedies.

VII. FREIGHT COST COS ADJUSTMENT

In calculating margins of dumping, Commerce also made a COS adjustment for inland freight costs incurred by Allatt on sales

of replacement parts in the Canadian domestic market. [11] Blaw Knox challenged the adjustment on the grounds that Commerce's finding was unsupported by substantial evidence on the record and was not in accordance with U.S. law. The Panel disagrees.

Allatt reported its inland freight costs incurred on Canadian sales of replacement parts for bituminous paving equipment in Schedules D and D-2 of its questionnaire response in the administrative review. Allatt reported this data as it did other expenses, including salesmen's salaries, commissions and warranty expenses. See Section B of Allatt's Questionnaire response. Blaw Knox did not question the validity of these other reported expenses; however, it challenges Allatt's reporting method of its freight costs in the questionnaire's schedules as inconsistent because Allatt responded "N/A" to inquiry 16 of the questionnaire. See id. Blaw Knox maintains that Allatt's response of "N/A" meant that all its sales were made ex factory F.O.B. Downsview, Ontario and thus Allatt did not incur any freight costs. Allatt explained that it "occasionally" paid freight on domestic shipments of replacements parts. See Allatt's Rebuttal Comments to Commerce's Preliminary Determination, filed November 11, 1988 at 2. Furthermore, Commerce stated

[11] See 19 U.S.C. { 1677b(a)(4)(B) (1982 & 1989 Supp.).

that it verified Allatt's claimed inland freight expenses in prior reviews. See Section B of Allatt's Questionnaire response.

The Panel believes that Allatt's reporting of a figure for freight costs in Schedules D and D-2 of its questionnaire response constituted substantial evidence on the record sufficient to support Commerce's COS adjustment for freight costs. [12] Commerce informed the Panel that it previously verified this type of expense pursuant to U.S. law, and that a sale made "F.O.B. (factory)" does not necessarily mean that the manufacturer did not incur any freight costs. Blaw Knox failed to establish that Commerce could not reasonably conclude that Allatt reported its freight costs in Schedules D and D-2. Thus, the Panel concludes that Commerce acted reasonably in adjusting FMV for Allatt's inland freight costs as reported in Schedules D and D-2.

Blaw Knox has also questioned Commerce's methodology in allocating freight expenses over all sales of replacement parts in the Canadian market. Blaw Knox asserted that Commerce should only allocate freight expenses to the particular sale to which they are related. The Panel concludes that Commerce's allocation of freight expenses over all sales of replacement parts in the Canadian market does not constitute error. The Panel finds that Commerce's methodology was a reasonable application of the principles relating to COS adjustments as described in Smith Corona [13] and Zenith. [14] In the Panel's view, it was not unreasonable for Commerce to take a position that a direct relationship to sales under consideration would be met as long as all of the expenses related to the goods under consideration (i.e., replacement parts for bituminous paving equipment).

As a result of the foregoing, the Panel has determined that substantial evidence exists on the record to support Commerce's COS adjustment for Allatt's inland freight expenses and that Commerce's allocation of Allatt's freight expenses over all Canadian market sales of replacement parts was reasonable and in accordance with U.S. law.

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[12] The issue as to whether the apparent inconsistency of reporting Canadian market sales as "F.O.B. Downsview" vitiates the reporting of a dollar figure of expenses incurred on freight is, in the view of the Panel, a question that is properly addressed during the verification phase of the proceeding. The Panel considers the information of record here sufficient for Commerce to reach a reasonable conclusion that Blaw Knox failed to show good cause for reverification. Blaw Knox, however, did not raise the issue, and as such, the sufficiency of the record upon which Commerce would have made its "good cause" determination is not before this Panel. Blaw Knox failed to make a timely request for verification. 19 U.S.C. { 1677e(a)(3)(A) (1982 & 1989 Supp.).

[13] Smith Corona v. United States, 713 F.2d 1568 (Fed. Cir. 1983).

[14] Zenith v. United States, 783 F.2d 1184 (Fed. Cir. 1986).

VIII. PAYMENT OF THE CANADIAN TAX

At the eleventh hour, in an addendum to its reply brief,[15] Blaw Knox raised an entirely new argument that Allatt failed to submit evidence during the administrative review to show that it had, indeed, paid taxes on sales in the home market. Blaw Knox, therefore, argues that substantial evidence on the record does not exist to support Commerce's adjustment for the amount of the tax rebated or not collected by reason of exportation under 19 U.S.C. { 1677a(d)(1)(C) (1982 & 1989 Supp.).

Blaw Knox clearly did not raise this issue either during the administrative proceedings or in its complaint to the Panel. In its comments in response to Commerce's preliminary determination and in its complaint to the Panel, Blaw Knox merely argued that Commerce did not follow the Zenith determination when it failed to determine the amount of the tax passed-through to the end user.

Whether the tax was not paid, or was only paid on certain replacement parts, is a basic argument; yet, it was never raised until Blaw Knox's "addendum" to its reply brief to the Panel. Had the Panel ruled the issue totally out of order at the hearing, which perhaps in hindsight we should have done, we would never have uncovered murky responses at our hearing. Counsel for Commerce not only informed us that we had no right to inquire about the facts with respect to payment of the tax, which was correct, but further told us that there was no evidence of payment in this particular record, beyond Allatt's statement in the questionnaire, since verification now only occurs every 3 years (See 19 U.S.C. { 1677e(b)(3)(B)) and verification of tax payment occurred in a previous administrative review. Counsel also pointed out that Blaw Knox did not request verification in this review. Had Blaw Knox requested such verification, and shown good cause for such (in effect) reverification, Commerce may well have conducted one.

Nowhere, however, did Blaw Knox ever question Allatt's payment of the tax or request verification. Were there not a background in this antidumping investigation of verification of such tax payments by Allatt, this Panel would be especially concerned about Commerce's procedures, as was the CIT in Atcor. It is our view, and indeed the statute implicitly requires, that Commerce should develop specific evidence of such tax payments in every administrative review, such that it is clear that the steps that follow -- adjustments for pass-through and the multiplier effect -- are

[15] The Panel struck the addendum at the November 28, 1989 hearing, but Blaw Knox raised the issue, again, in its posthearing brief.

indeed warranted. This will not in any significant way add to Commerce's burden.

It is clearly incumbent upon Commerce to develop sufficient evidence to support an adjustment such as the tax pass-through, which can have a major impact on the dumping margin. The parties in this proceeding dispute whether Commerce did so. Blaw Knox never raised the issue until the eve of the Panel hearing. This was too late in the day, and we decline to remand for further investigation. Even more than with Blaw Knox's challenge of the COS adjustment for the multiplier effect, this last minute allegation is barred by the doctrine of exhaustion of administrative remedies. See supra Section VI for further discussion of those principles. Were the payment of tax issue properly before us, the panel is split as to whether we would have remanded.

Accordingly, for the reasons stated above, we **AFFIRM** the final determination of the Department in A-122-057, Replacement Parts for Self-Propelled Bituminous Paving Equipment From Canada.

_____	_____
Date	Bill Alberger
_____	_____
Date	Donald Brown
_____	_____
Date	C.J. Michael Flavell
_____	_____
Date	Thomas Graham
_____	_____
Date	Theodore W. Kassinger