UNITED STATES-CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW
USA-92-1904-03

	)	
	)	**Before:** **John D. Richard**
IN THE MATTER OF	)	**(Chairperson)**
PURE AND ALLOY	)	**Bruce Aitken**
MAGNESIUM FROM CANADA	)	**Jean-Gabriel Castel**
(CVD)	)	**Robert E. Ruggeri**
	)	**J. Christopher Thomas**

DECISION OF THE PANEL
(August 16, 1993)

Appearances:

Patrick F.J. Macrory, Spencer S. Griffith, James E. Mendelhall on behalf of the Government of Quebec.

Amy L. Rothstein on behalf of the Government of Canada.

Michael H. Stein on behalf of Norsk Hydro Canada Inc.

Robert J. Heilferty, Bernice A. Brown on behalf of the Investigating Authority, the United States Department of Commerce.

Lee R. Brown, Howard I. Kaplan, Kenneth R. Button on behalf of Magnesium Corporation of America.

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I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Article 1904.2 of the Canada-United States Free Trade Agreement ("FTA") to review the final affirmative countervailing duty determination ("Final Determination") of the United States Department of Commerce, International Trade Administration ("Commerce" or "the Department"), respecting Pure and Alloy Magnesium from Canada.[1] In that decision, Commerce decided that countervailable benefits had been provided by two programs: the Quebec Industrial Development Corporation ("SDI") and the exemption from payment of water bills. This final determination by Commerce was challenged by the Government of Canada ("Canada"), the Government of Quebec ("Quebec") and Norsk Hydro Canada Inc. ("Norsk" or "NHCI").

Quebec, in its written submissions, which were adopted by Canada and Norsk, challenged Commerce's decision on the following grounds:

1. The Magnesium Corporation of America ("Magcorp") lacked standing to bring this case before Commerce;
2. Commerce's findings with respect to the SDI assistance received by Norsk contained numerous errors;
3. Commerce incorrectly calculated the subsidy given to Norsk from unpaid water bills by examining projected water consumption rather than actual water consumption.

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[1] Final Affirmative Countervailing Duty Determination: Pure and Alloy Magnesium from Canada, 57 Fed. Reg. 30946 (July 13, 1992).

For the reasons more fully set forth in its Opinion, on the basis of the administrative record, the applicable law, the written submissions of the parties, and the public hearing held in Washington, D.C. on May 20, 1993, the Panel: *Affirms* in part and *Remands* in part.

II. BACKGROUND

On October 1, 1991, following a petition filed by Magcorp on behalf of the U.S. magnesium industry, Commerce initiated a countervailing duty investigation with respect to the imports of pure and alloy magnesium from Canada.[2] On December 6, 1991, Commerce published a preliminary determination that countervailable subsidies were being provided under the following programs:

1. The Canada-Quebec Subsidiary Agreement on Industrial Development;
2. Government Funding of the Institute of Magnesium Technology (IMT) under the Canada-Quebec Subsidiary Agreement on Scientific and Technological Development;
3. Preferential electric rates under the Risk and Profit Sharing Program;
4. Exemption of payment of water bills; and,
5. Article 7 grants from SDI.

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[2] Initiation of Countervailing Duty Investigation: Pure and Alloy Magnesium from Canada, 56 Fed. Reg. 49747.

On July 13, 1992, Commerce published its final determination which concluded that countervailable benefits had been provided by the two programs challenged by the Complainants: SDI and the exemption from payment of water payments.[3] A final countervailing duty rate of 21.61 percent was calculated.[4] Following this determination, a Panel Review was requested by the Complainants on August 10, 1992 pursuant to Article 1904.4 of the FTA.

During the course of this Panel Review, two motions were brought pursuant to the Rules of Procedure for Article 1904 Binational Panel Reviews ("Rules") . The motions, brought by Quebec and Norsk dated December 22, 1992 were disposed of without personal appearance by the participants. Both motions were based, inter alia, on Dow Chemical's failure to have:

1. Filed its Notice of Appearance within the time limitations of Rule 40(1);
2. Indicated which position the appearance would be supporting pursuant to Rule 40(1)(c); and,
3. Stated the requisite basis for its claim to entitlement to file a Notice of Appearance pursuant to Rule 40(1)(d).

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[3] Final Affirmative Countervailing Duty Determination: Pure and Alloy Magnesium from Canada, 57 Fed. Reg. 30946.

[4] Commerce subsequently reduced this rate to 7.61 percent after granting the Complainant's request for a changed circumstance review to examine the amendment made to the power contract made between Norsk and the power company Hydro-Quebec: Final Results of Changed Circumstances Administrative Review: Pure Magnesium and Alloy Magnesium from Canada, 57 Fed. Reg. 54047 (Nov. 16, 1992).

The Panel found that Dow Chemical did not file its Notice of Appearance within the time limit prescribed by the Rules. Accordingly, an Order was granted striking Dow Chemical's Notice of Appearance.

III. STANDARD OF REVIEW

Under Article 1904.2 of the FTA, the Panel is to determine whether a countervailing duty determination is:

> [I]n accordance with the...countervailing duty law of the importing Party. For this purpose, the...countervailing 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 administrative authority.

In the instant proceeding, the United States is the "importing Party."

Panel review of a countervailing duty determination is to be conducted "upon the administrative record." Article 1904.2.[5] 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).[6]

Article 1904.3 requires that Panels, in reviewing the administrative record, apply "the standard of review described in Article 1911 and the general legal principles that a court of the

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[5] 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.

[6] See, also, Extraordinary Challenge Committee, Live Swine from Canada (ECC-93-1904) at 11 (April 8, 1993).

importing Party would apply...."[7] Article 1911, in turn, defines the standard of review to be applied in a Panel review of a Commerce final countervailing duty determination as "the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended." Section 516A(b)(1)(B) defines that standard of review as:

> The court shall hold unlawful any determination, finding, or 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).[8]

Accordingly, the standard of review for the instant proceeding includes the "substantial evidence" test. The Panel must affirm the determination of the Commerce Department "unless we conclude that the ITA [Commerce] 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 Court of Appeals for the Federal Circuit has defined "substantial evidence" as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984), also Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562

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

[8] Prior Article 19 Panels have also found the standard of review to be the "substantial evidence test" as applied by the U.S. Court of Appeal for the Federal Circuit or the U.S. Court of International Trade. E.g., Fresh, Chilled or Frozen Pork from Canada, USA 89-1904-02 (Jan. 4, 1990)(Memorandum opinion and Order on Scope of Determination); New Steel Rails from Canada, USA 89-1904-09 and 89-1904-10 at 8-9 (Aug. 13, 1990).

(Fed. Cir. 1984).[9] The United States Supreme Court has also defined it as "enough [evidence] to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact...." NLRB v. Columbian Enameling and Stamping Co., 306 U.S. 292, 300 (1939). Substantial evidence constitutes "something less than the weight of the evidence." Consolo v. Federal Maritime Commission, 383 U.S. 607, 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 (1966)); 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

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[9] See, also, the United States Supreme Court's decisions in Consolo v. Federal Maritime Commission, 383 U.S. 607, 619-20 (1966); Universal Camera Corp. NLRB, 340 U.S. 474 (1951); and Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). The 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).

[10] Zenith Electronics Corp. v. United States, 812 F. Supp. 228, 231 (CIT 1993); Minebea Co., Ltd. v. United States, 782 F. Supp. 117, 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 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).

F.Supp. 1444, 1450 (CIT 1987).

The Court of Appeals for the Federal Circuit or the Court of International Trade ("CIT") "may not 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." Tehnoiimportexport, UCF America Inc. v. United States, 783 F. Sup. 1401, 1404 (CIT 1992) quoting Universal Camera Corp. 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. See, e.g., Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA 89-1904-02 (Jan. 4, 1990).

The deference to the agency has its limits. As the CIT has held:

> In the countervailing duty...the 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). See, also, the Panel's decision in Fresh, Chilled, or Frozen Pork from Canada, USA 89-1904-11 (Aug. 24, 1990).

The second prong of the applicable standard of review is whether the administrative determination is "in accordance with law." Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C.A. §1516a(b)(1)(B). In determining whether Commerce's interpretation of the statute is "in accordance with 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)[11]. 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).[12] This deference extends to the administering authority interpretations of its own regulations as well.[13]

In accordance with this principle of administrative law, Commerce has accorded great discretion in administering the countervailing duty laws. "Given these circumstances, appellant's burden on appeal is a difficult one, for it must convince us that the interpretation of 'bounty or grant' adopted by the ITA [Commerce] is effectively precluded by the statute." PPG Industries,

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[11] 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).

[12] 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).

[13] "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).

Inc. v. United States, 928 F.2d at 1571-73, rehearing denied, and rehearing en banc declined (Fed. Cir. 1991)[14]. 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).

[14] Prior to the passage of the Trade Agreements Act of 1979, the Treasury Department, which administered the countervailing duty 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).

IV. OPINION

A. Did Magcorp Lack Standing to Bring this Case before Commerce?

Quebec has submitted that Magcorp lacked standing and that Commerce should have, at the very least, investigated whether Magcorp's petition was filed "on behalf of" the domestic industry. Quebec's arguments were as follows:

1. That Magcorp accounted for only twenty-two percent of total domestic production of primary and alloy magnesium. (Complainant's Brief at 16);
2. That the petition itself disclosed that Magcorp was acting without the support of the other two members of the industry which together accounted for almost 80% of domestic industry. (Id. at 16);
3. That Magcorp's small percentage of the industry and its lack of support represents an obvious deficiency in the petition, and, by accepting a petition that lacked the support of more than three quarters of the domestic industry, Commerce thus violated the standing requirements of the underlying statute. (Id. at 17);
4. That Commerce's refusal to investigate the standing question was inconsistent with GATT panel rulings. (Id. at 21).

In response, Commerce presented the following arguments:

1. That Commerce's consistent practice has been to conclude that the petition is brought "on behalf of" the domestic industry absent a clear indication of opposition;

2. That the Federal Circuit in the Suramerica case, a decision which is binding precedent for this Panel, has rejected the argument that a petition must have affirmative support of the domestic industry. (Commerce Brief at 11-12);

3. That Commerce provided other domestic producers with an easy procedure for voicing objections to the petition and that no member of the domestic industry raised objection to the petition. (Id. at 13-14);

4. That Commerce has been given broad discretion in deciding when to pursue or terminate an investigation. (Id. at 12);

5. That the issue as to whether Magcorp's petition was brought "on behalf of" the domestic industry was within its discretion to decide. (Id. at 14);

6. That whether Commerce's action is consistent with the GATT is not an appropriate issue for this panel. (Id. at 19).

Under 19 U.S.C. § 1671a(b)(1), a "countervailing duty proceeding shall be commenced whenever an interested party. . . files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of" a countervailing duty. The U.S.C. definition of an "industry" is the "domestic producers as a whole of a like product", or "those producers whose collective output of the like product constitute a major proportion of the total domestic production of that product." 19 U.S.C. § 1677(9). Quebec argued, at page 17 of its brief, that Magcorp, because it was the only domestic producer supporting the petition, needed to constitute a "major proportion" of the total domestic production for its petition to be filed "on behalf of" the industry.

The central issue is whether a petitioner must have sufficient affirmative expressed support

or, as Commerce argues, a mere lack of expressed opposition to the petition will confer standing. As Commerce has noted, declining to express support for the petition can be another way of declining to express opposition. (Commerce Brief at 18.)

On the issue of whether there must be an affirmative showing of support for a petition, past Commerce practice, case law, and the relevant statutory language suggests that the panel must reject this proposition. It has been a consistent practice of Commerce to conclude that the petition is brought 'on behalf of' the domestic industry absent a clear indication of opposition. As discussed below, despite Commerce's provisions providing a procedure for indicating their opposition, the other domestic producers never expressed any indication of opposition to Magcorp's petition during the magnesium investigation.

In Suramerica del Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660 (Fed. Cir. 1992) (hereinafter "Suramerica"), the Court of Appeals for the Federal Circuit defined Commerce's discretion in regard to the "on behalf of" issue: "[o]ne thing Congress did make clear -- Commerce has broad discretion in deciding when to pursue an investigation, and when to terminate one." 966 F.2d at 667 (Fed. Cir. 1992). Even Quebec concedes that "the Department has a great deal of discretion in determining whenever a petition has been filed 'on behalf of' domestic industry." (Complainant's Brief at 20.)

Counsel for Quebec argued that Commerce's acceptance of the petition without investigating the standing issue, given the "on behalf of" requirement, constituted a violation of the standing requirements laid down by the statute. (Complainant's Brief at 16-17.) Quebec argued further that the positive obligation to investigate the depth of industry support for the petition arose from the petition itself in which Magcorp stated:

> Unfortunately, Magcorp has been forced to take the lead in filing this Petition for relief due to the large and varied interests of its fellow U.S. producers. Dow Magnesium and North West Alloys are part of very large international corporations with complex business relationships and conflicts which overshadow their magnesium interests. (Petition at 3).

The Panel was not persuaded that this isolated reference constituted evidence of a lack of support for the petition, much less opposition to it. Presumably, by this statement, Magcorp meant only that it believed that the other U.S. producers had greater interests beyond the magnesium in this case, which lead them not to participate. All parties agreed that no member of the domestic industry explicitly expressed opposition to the petition during the magnesium investigation.

Both Dow and Northwest Alloys apparently were aware of the investigation. First there was the procedural notification in the Federal Register, 56 Fed. Reg. 49747 (Oct. 1, 1991). Counsel for Quebec stated that it did not "contend that the Federal Register was not adequate notice that an investigation was being contemplated." (May 20, 1993 Hearing Transcript at 18.) Moreover, counsel stated: "we certainly don't contend that Dow and Northwest didn't know about the investigation. They certainly did know about it because, indeed, at the International Trade Commission state, they received questionnaires." (Id.) As counsel for Quebec admitted, there was, shortly after the filing of the petition, direct contact of all members of the domestic industry by the International Trade Commission. See Final Determination: Magnesium from Canada, USITC Pub. 2550 at I-89: "The Commission received lost sales and lost revenue allegations from all three U.S. producers."

Quebec's "standing" argument focused on the "on behalf of" issue. (Complainant's Brief,

Feb. 1, at 15-21.) According to §1671a(b) of the Tariff Act of 1930 (the "Act"):

> Countervailing duty proceeding shall be commenced whenever an interested party . . . files a petition with the administering authority on behalf of an industry, which alleges the elements necessary for the imposition of [a countervailing duty], and which is accompanied by information reasonably available to the petitioner supporting those allegations. (Commerce Brief at 14.) [emphasis added]

There is no question that Magcorp is an "interested party" and both Commerce and Quebec agreed with the assertion. As to the "on behalf of" requirement, this panel, given that Federal Circuit decisions are binding precedent, must rely heavily on the Suramerica decision. In Suramerica the Federal Circuit held that Commerce's interpretation, among others, of "on behalf of" was sufficiently reasonable. "Commerce assumes that, as long as a petition is filed by an interested party, the filing is 'on behalf of' the domestic industry unless and until Commerce determines otherwise." 966 F.2d at 667. Neither party in the present case disputes the fact that Magcorp is an "interested party."

The phrase "on behalf of" is not among the terms defined in 19 U.S.C. §1677, and is ambiguous. However, Suramerica provides us with a standard to be applied in reviewing Commerce's interpretation of an undefined statutory provision:

> When such an interpretational gap exists regarding a statutory provision, we are to examine whether, in its own interpretation of its responsibilities under the Act, the agency charged with the everyday administration of the provision applies a permissible construction. [emphasis added] Suramerica, 966 F.2d at 665, citing Chevron U.S.A. Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 866, 104 S.Ct. 2778, 2793, 81 L.Ed. 2d 694 (1984).

In basing its holding on the fact that Commerce has been given a broad discretionary power by Congress in its decisions on initiation or termination of an investigation, the Federal Circuit in

Suramerica held that the CIT "erred in preferring its reasonable interpretation over that of Commerce's." 966 F.2d at 667 (Fed. Cir. 1992).

Moreover, in Suramerica, a major domestic producer sent a letter to Commerce explicitly stating that it opposed the petition. Suramerica, 966 F.2d at 662. Nevertheless, the Suramerica Court still held that the Southwire's petition was filed "on behalf of" the domestic industry stating that "Commerce has broad discretion in deciding when to pursue an investigation, and when to terminate one." (Id. at 667) The Court upheld Commerce's policy of assuming, in the absence of any expressed opposition to the petition by a majority of the U.S. industry, that the petitioner has standing. In the present case, as pointed out earlier, there was no explicit opposition to Magcorp's petition by the other domestic producers.[15]

Counsel for Quebec, in footnote 13 of its February 1 brief, relied on a past Commerce ruling which stated:

> Where domestic industry members opposing a petition provide a clear indication that there are grounds to doubt a petitioner's standing, the Department will evaluate the opposition to determine whether the opposing parties do, in fact, represent a major proportion of the domestic industry. [emphasis added] Preliminary Determinations of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Sweden, 53 Fed. Reg. 45319 (Nov. 9, 1988).

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[15] Quebec tries to distinguish Suramerica since, in that case, three other producers, comprising with the petitioner a majority of the U.S. industry, were reported to have said that they did not oppose the petition. However, in that case one major domestic producer, Alcoa, (accounting for 22% of the U.S. market) did expressly oppose the petition. 966 F.2d at 662. In the instant case there is no expressed opposition from any U.S. producer. Regardless, without relying on the degree of industry support, in Suramerica the Federal Circuit upheld the Commerce Department's interpretation of the statute. As long as a majority of the U.S. industry does not expressly oppose the petition, the petitioner is presumed to have standing.

Since there was no clear indication of opposition from other domestic producers, Quebec's reliance on the above Commerce decision is misplaced.

In addition to Suramerica, the CIT set the standard that "though [Commerce] certainly may revoke an antidumping order where there is little industry support for it, Commerce is plainly not required to do so." NTN Bearing v. United States, 757 F.Supp. 1425, 1429 (CIT 1991). Further it states:

> When [domestic industry] opponents of the petition surface . . . the ITA [Commerce] must investigate the depth of industry support for the petition. The investigation will not be rescinded unless the opponents of the petition constitute the majority of U.S. production in that industry. However, . . ., even if opponents outweigh supporters of the petition, the ITA still has the discretion to continue or dismiss the case, provided that discretion is exercised reasonably and the decision is supported by substantial evidence. Neither the statute nor the case law compels Commerce to dismiss a case which lacks affirmative majority support. NTN Bearing, 757 F. Supp. at 1429, (CIT 1991)). [emphasis added]

In the present case, Commerce did not disregard industry opposition because, as discussed earlier, none was ever asserted, much less established. Thus, Quebec's reference to several CIT cases can be distinguished since, in this case, no opposition to the petition was ever received.

Given that the industry must be "not merely indifferent but positively opposed" to warrant investigation, NTN Bearing, 757 F. Supp. at 1429, and given Commerce's discretion and notification procedure which it undertook, this Panel is of the opinion that Commerce's approach in the present case was a reasonable exercise of its broad discretion. See Id.; Accord Comeau Seafoods v. United States, 724 F. Supp. 1407, 1411 (CIT 1989); Citrosuco Paulista, S.A. v. United States, 704 F.Supp. 1075, 1085 (CIT 1988).

The second major element of Quebec's argument is that this Panel should rule on whether Commerce's actions were consistent with certain panel opinions pursuant to the GATT.

(Complainant's Brief at 21-22.) However, as Commerce asserts, under U.S. law any conflict between the application of domestic law and an international agreement is resolved in favor of domestic law. (Commerce Brief at 19; and see H. Rep. No. 317, 96th Cong. 1st Sess. at 41: "No provision of any trade agreement approved under Section 2(a) nor the application of any such provision to any person or circumstances which is in conflict with any U.S. statute shall be given effect under U.S. law.")

Furthermore, as counsel for Quebec conceded, the GATT panel decisions have not been formally adopted by the GATT. (May 20, 1993 Hearing Transcript at 37.) Although counsel stated that they might be "useful aids" (Id.), the fact is that the GATT panel decisions are nonbinding precedents for the GATT, let alone this Panel. In Suramerica, the Federal Circuit rejected an identical argument:

> [T]he GATT panel itself acknowledged and declared that its examination and decision were listed in scope to the case before it. The panel also acknowledged that it was not faced with the issue of whether, even in the case before it, Commerce had acted in conformity with U.S. domestic legislation. 966 F.2d at 667 (Fed. Cir. 1992).

For these reasons alone, this Panel finds that the GATT panel decisions are not binding upon it. Moreover, as the GATT panel itself noted, their decisions do not address the very point with which this Panel is charged: whether the Commerce Department acted in accordance with U.S. law. See Article 1904.2 (FTA binational panels are to determine whether the agency determinations are in accordance "with the law of the Importing Party.") If the Commerce Department's actions are not consistent with the GATT or any of its panel decisions, that is more a matter for the GATT dispute resolution regime than this Panel to address. And as the

Suramerica Court pointed out, even if the statutory provisions were inconsistent with the GATT, that is an issue for Congress, and not this Panel, to address. Suramerica, 966 F.2d at 668 (Fed. Cir. 1992).

In summary, the Panel affirms Commerce's decision that Magcorp had standing to bring this petition.

B. SDI Subsidy

1. De Facto Specificity

History of the Specificity Test

A central issue in this case is whether Commerce properly based its affirmative finding on the basis of disproportionality and, in so doing, whether it properly considered other factors set forth in its Proposed Regulations. Quebec has argued that Commerce's determination that the SDI program provided benefits to a "specific" enterprise or industry, or group of enterprises or industries, was improper. In view of this, and the recent decision on the issue of specificity by the Softwood Lumber Panel, this Panel feels that it is appropriate to examine closely the history and development of the "specificity" tests.

Specificity analysis is required because it has long been recognized that the reach of the countervailing duty law should not extend to benefits and services, like highways, law enforcement and education, that governments routinely provide to their population at large. The statutory basis

for drawing the distinction between such widely used and specific domestic subsidies is found in the definition of "subsidy" in Section 771(5) of the Tariff Act of 1930, as amended (the "Act"). "Subsidy" includes domestic subsidies only if "provided to a specific enterprise or industry, or group of enterprises or industries." 19 U.S.C. § 1677(5)(B). Legislative history of this law provides two rationales for this specificity test. First, Congress recognized that every export benefits from some general government assistance (e.g., public roads, utilities, education), and therefore, every import would arguably be subject to countervailing duties without such a test. See 125 Cong. Rec. 20160, 20168, 20185 (1979); Carlisle Tire and Rubber Co. v. United States, 564 F. Supp. 834, 838 (C.I.T. 1983). Second, government programs which do not confer benefits selectively do not upset the free market forces that countervailing duties are meant to offset. See, e.g., 125 Cong. Rec. 20160, 20168, 20185 (1979).

Commerce implemented the specificity requirement in 1980 by adopting a "general availability test." See Carlisle Tire, 564 F. Supp. at 836-37; Cabot Corp. v. United States, 620 F. Supp. 722, 730-31 (CIT 1985), dismissed, 788 F.2d 1539 (Fed. Cir. 1986). Originally, Commerce implemented the statute by determining whether the foreign law or regulation under consideration made benefits available generally or to a specific enterprise, industry or group thereof. Using this methodology, Commerce refused to find a particular domestic program "specific" where the program's implementing statute and regulations indicated that the program was generally available. (Id.)

The Courts rejected this "generally available" test. Cabot Corp. v. United States, 620 F. Supp. 722 (CIT 1985), appeal dismissed, 788 F.2d 1539 (Fed. Cir. 1986) ("Cabot I"); (Cabot Corp. v. United States, 694 F. Supp. 949 (CIT 1988) ("Cabot II"); Roses, Inc. v. United States, 743 F. Supp. 870, 879 (CIT 1990). For example, the Roses Court stated: "[t]hus, the general availability rule

under which [Commerce] conducted the investigation was flawed." Id. at 879. In all of the above cases, the CIT held that Commerce's "generally available" test was not in accordance with U.S. law.

In response to CIT decisions rejecting the "generally available" test, Congress amended the law in 1988. According to 19 U.S.C. §1677(5)(A), in order to determine that a domestic subsidy is countervailable, Commerce first must find that the subsidy is ". . . provided . . . to a specific enterprise or industry, or group of enterprises or industry..." Congress added a "special rule" in 19 U.S.C. §1677(5)(B):

> In applying subparagraph (a), the administering authority, in each investigation, shall determine whether the bounty, grant or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises of industries. Nominal general availability, under the terms of the law, regulation, program or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof. 19 U.S.C. § 1677(5)(B).

Congress intended that this provision codify the CIT's holding in Cabot, 620 F. Supp. 722. The Cabot court held that Commerce could not base a finding of non-specificity simply on a program's nominal general availability -- where a subsidy was de jure generally available, Commerce was obliged to further determine whether it de facto was being provided to a specific enterprise or industry or group thereof. See Omnibus Trade Act of 1987, Report of the Committee on Finance, United States Senate on S.490, Report No. 100-71, at 122 (1987).

By amending the law, Congress also intended to prevent nations from avoiding countervailing duties by simply declaring that benefits are generally available when, in fact, benefits only "accrued to specific individuals or classes." Live Swine from Canada, USA-91-1904-04 at 13-14 (August 26, 1992) (citing Cabot, 620 F. Supp. at 731).

Following the enactment of the special rule, Commerce issued Proposed Regulations that, among other things, described how it planned to perform the specificity analysis. Countervailing Duties, 54 Fed. Reg. 23366 (May 31, 1989) (Notice of Proposed Rulemaking) (to be codified at 19 C.F.R. § 355.43).

In PPG Industries, Inc. v. United States, 928 F.2d 1568, 1576 (Fed. Cir. 1991) ("PPG I"), the Federal Circuit described Commerce's specificity practice resulting from the introduction of the Special Rule as follows:

> The ITA's specificity test is two-fold. If the domestic subsidy is provided by its terms to a particular enterprise or industry or group of enterprises or industries, it is countervailable without further inquiry. If the benefit appears by its terms to be nominally generally available to all industries, the benefit may nevertheless be countervailable if, in its application, the program results in a subsidy to a specific enterprise or industry or specific group of enterprises or industries.

The Court went on to quote with approval Commerce's summary of its practice regarding the second de facto branch of the specificity test:

> Based on our six years of experience in administering the law, we have found thus far that the specificity test cannot be reduced to a precise mathematical formula. Instead, we must exercise judgment and balance various factors in analyzing the facts of a particular case in order to determine whether an 'unfair' practice is taking place.
>
> Among the factors we consider are: (1) the extent to which a foreign government acts to limit the availability of a program; (2) the number of enterprises, industries, or groups thereof which actually use a program, which may include the examination of disproportionate or dominant users; and (3) the extent to which the government exercises discretion in making the program available. The Department must consider all of these factors in light of the evidence on the record in determining the specificity in a given case. (Id. at 1576-77.)

This current "four-prong" test, based on Cabot, was ruled to be a "proper legal test and . . . in

accordance with law" in another PPG case, PPG Industries, Inc. v. United States, 978 F.2d 1232, 1244 (Fed.Cir. 1992) ("PPG II"). After repeating that the specificity test is a two-part test, the Court of Appeals summarized the de facto second branch as follows:

> At least three factors must be considered on a case-by-case basis to determine whether a program is specific in its application. First, the ITA must consider the extent to which the foreign government acted to limit the availability of the program. Second, the ITA must consider the number of enterprises or industries which actually use the program. Third, the ITA must consider the extent to which the foreign government exercises discretion in making the program available. Id. at 1239-40 [emphasis added].

In addition to PPG II's express validation of the "four prong" test which is detailed in the Proposed Regulations, the CIT has consistently upheld the application of the test. See, e.g., Roses, Inc. v. United States, 743 F. Supp. 870 (CIT 1990); Armco Inc. v. United States, 733 F. Supp. 1514 (CIT 1990); Comeau Seafoods Ltd. v. United States, 724 F. Supp. 1407 (CIT 1989).

Proposed Regulations: "Four-Prong" Specificity Test

Following the enactment of the special rule, Commerce issued Proposed Regulations that, among other things, described how it planned to perform the specificity analysis. Countervailing Duties, 54 Fed. Reg. 23366 (May 31, 1989). First, Commerce will determine whether the bounty or grant is de jure specific, i.e., limited by law or regulation to a specific enterprise or industry or group thereof. Id. at 23379.

If de jure specificity is not found, Commerce will then consider other relevant factors to determine whether, nonetheless, the bounty or grant is in fact limited to a specific enterprise, industry

of group thereof. Commerce's Proposed Regulations identify three factors that it "will" consider:

1. The number of enterprises, industries or groups thereof that actually use a program;
2. Whether there are dominant users of a program or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and,
3. The extent to which a government exercises discretion in conferring benefits under a program. Id. at 23379 [emphasis added].

The Issue

Both the Complainants and Commerce agreed that the standards to be applied in analyzing specificity are set forth in Commerce's Proposed Regulations. See Complainant's Brief, Feb. 1, 1993 at 27-28; Commerce Brief at 22.

The Complainant's Arguments

The Complainants argued that the sole basis for the specificity determination was a finding of disproportionate use of the SDI program and that Commerce failed to consider and weigh the other factors contained in the Proposed Regulations. They argued that the Court of Appeals for the Federal Circuit and other binational panels have held that Commerce must consider and weigh all four of the factors set out in the Proposed Regulation.

Specifically, Quebec made the following arguments:

1. Commerce should have considered all of the factors (Complainant's Brief, Feb. 1, 1993 at 28);
2. At least three factors must be considered on a case-by-case basis according to the PPG decision (Id. at 29; citing PPG Industries, Inc. v. United States, 928 F.2d 1568, 1576 (Fed. Cir. 1991));
3. The specificity test cannot be reduced to a precise mathematical formula and Commerce must exercise its judgment and carefully consider all relevant factors in order to determine whether an unfair practice is taking place (Complainant's Brief,

Feb. 1, 1993 at 29-30; citing Live Swine From Canada, USA-91-1904-03 at 16 (May 19, 1992);

Commerce's Arguments

Commerce's position is that rather than being obliged to consider and weigh all factors listed in the Proposed Regulations, it need only follow a sequential progression through the four specificity factors. It pointed out that where de jure specificity is found under factor (1) it need not proceed to examine the three de facto criteria. A program which is expressly limited on its face to a certain class of recipients is clearly countervailable. Further analysis of the de facto criteria would be superfluous.

If, however, de jure specificity is not found under factor (1), Commerce contends that it is proper for it to proceed to examine factor (2), the number of actual users of a program. If it determined that the number of actual recipients of a subsidy (as opposed to the number of those eligible for benefits) was limited, it could find specificity, resting its analysis on factor (2).

If it found that the number of users was not so limited as to render a subsidy program de facto specific on the basis of factor (2) alone, it would then examine factor (3), dominant use or disproportionately large benefits under a program, and then factor (4), the extent of government discretion in conferring benefits. Thus, Commerce submits that it is not required to weigh all four factors in every case. It maintained that it is entitled to make a specificity determination on the basis of one factor alone.

During the May 20, 1993 hearing in this case it became evident that the central issue that divided the parties was the meaning of the words "consider," "balance" and "weigh." Commerce

maintained that it had considered but discarded prongs (1), (2) and (4). However, it contended that there was sufficient evidence of prong (3) to justify a specificity finding. It argued that it is not necessary to weigh or balance prongs (2) and (4) against factors (3) to justify a specificity finding. It argued that it is not necessary to weigh or balance factors (2) and (4) which would support a finding of non-countervailability against factor (3) which supported a finding of countervailability. Commerce submitted that there was no U.S. judicial authority which has ever held that Commerce cannot make a specificity finding based on one factor alone. As stated in Commerce's Brief:

> It has never been Commerce practice to examine and weigh each factor listed in section 355.43(b)(92) in every determination regardless of the relevance of the particular factor. Rather, the firmly established practice has been precisely that which is described above; namely, after examination of the relevant factors, a single factor can lead to a finding of specificity. Although the language in the Proposed Regulations is arguably imprecise, Commerce's practice, and the importance of its practice when interpreting the regulations, is clear. (Commerce Brief at 27.)

It distinguished the PPG cases principally on the basis that they involved negative specificity determinations. Specifically, Commerce made the following arguments:

1. That it considered all of the factors listed. (Commerce Brief at 23);
2. That it based its finding of specificity on prong (3), i.e., it concluded that "NHCI received a disproportionately large share of assistance" under the SDI program. (Id.; citing 57 Fed. Reg. at 30949) [emphasis added];
3. That there is a logical progression to the listing of factors in Section 355.43(b)(2) which indicates that the satisfaction of a single factor can lead to a finding of specificity. (Id. at 25-26);
4. That the Proposed Regulations were intended to codify Department practice which

has been that, after examination of the relevant factors, a single factor can lead to a finding of specificity. (Id. at 27); and,

5. That Commerce performed a comprehensive analysis and did not rely solely on a "mathematical construct." (Id. at 28-29).

Discussion

In its final determination, Commerce concluded that "NHCI received a disproportionately large share of assistance" under the SDI program. 57 Fed. Reg. at 30949. With respect to prong (1), Commerce found no evidence that Quebec had acted on a de jure basis to limit availability of SDI. Commerce Brief at 23. Commerce, also considered prong (2) and concluded that the program was not de facto specific on this basis because a "wide variety of firms did receive assistance." Id. Commerce did find, though, "that NHCI received a disproportionate share of benefits when compared to other projects funded under Article 7." 57 Fed. Reg. at 30,952. With respect to prong (4), Commerce stated that it was not basing its finding on discretion. (Id.) More specifically, in its Final Determination Commerce explained its specificity decision with respect to SDI assistance as follows:

> To determine whether this program is countervailable, we reviewed the number of recipients which received benefits under Article 7 of SDI. We compared the amount of assistance provided to each of the recipients to the amount of assistance provided to NHCI. While a variety of firms did receive Article 7 assistance, we determine that NHCI received a disproportionately large share of assistance under the program. Therefore, we determine the program, with respect to the assistance provided to NHCI, to be countervailable. 57 Fed. Reg. at 30949 [emphasis added].

Commerce has broad discretion in administering antidumping and countervailing duty law. The Supreme Court has stated: "when faced with a problem of statutory interpretation, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965). See also Kester v. Horner, 778 F.2d 1565, 1569 (Fed. Cir. 1985), "to sustain an agency's construction of its authority, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings."

Long-standing case law has found that a reviewing court must accord substantial weight to an agency's interpretation of a statute it administers. For example, the PPG I court cited the U.S. Supreme Court decision in Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 838 at 844 (1984): "we have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." See also Zenith Radio Corp. v. United States, 437 U.S. 443, 450-51 (1978) and Udall v. Tallman, 380 U.S. 1,16 (1965).

Although a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is "sufficiently reasonable." Federal Election Commission v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 39 (1981) [emphasis added]. Thus, the Panel must satisfy a demanding standard before it may properly overturn an interpretation of the countervailing duty statute made by Commerce. Commerce has been entrusted by the Congress with broad discretion under this law. See PPG Industries v. United States, 928 F.2d 1568, 1571-72 (Fed. Cir. 1991). Its interpretations that do not contravene clearly discernible legislative intent may not properly be

reversed unless they are unreasonable. In PPG II, for example, the Court stated that "for this Court to reverse and remand for further investigation, PPG would have to show that the ITA abused its discretion in not conducting further investigations."

Commerce's Proposed Regulations, when combined with the broad discretion afforded to Commerce, lead the Panel to conclude that Commerce's reliance on the "disproportionately" prong to find specificity was in accordance with U.S. law. In the Proposed Regulations, in discussing the treatment of programs limited to agricultural products, Commerce explained:

> [A]n agricultural program may be deemed specific if, for example, benefits under the program are limited to, or provided disproportionately to, producers of particular agricultural products. Proposed Regulations, 54 Fed. Reg. at 23368 [emphasis added].

These Proposed Regulations, as a whole, have been considered and approved by the Court of Appeals for the Federal Circuit. PPG Industries v. United States, 928 F.2d 1568 (Fed. Cir. 1991).

Furthermore, Commerce's interpretation is consistent with long-standing administrative practice. For example, in Certain Fresh Cut Flowers from the Netherlands, 52 Fed. Reg. 3301 (Feb. 3, 1987), (Final Affirmative Countervailing Duty Determination), Commerce determined that a preferential natural gas contact between a government agency and a single user was de facto specific. Similarly, in Lime from Mexico, 49 Fed. Reg. 35672, (Sept. 11, 1984) (Final Affirmative Countervailing Duty Determination), Commerce determined that the provision of free fuel to one producer of lime by a state-owned company conferred de facto specific benefits. In both cases, Commerce rested its determination exclusively on the limited coverage of the program in issue, disproportionality, dominant use, and discretion were not considered by the agency. See also Carbon

Black from Mexico, 51 Fed. Reg. 30385 (Aug. 26, 1986) (First Results of Countervailing Duty Administrative Review).

As in Certain Fresh Cut Flowers, the SDI Article 7 assistance contract was between a government agency ("The Industrial Development Corporation" or SDI) and a single user (Norsk). See 57 Fed. Reg. at 30949. In the present case, Commerce rested its determination on "disproportionality," stating: "we determine that NHCI received a disproportionately large share of assistance under the program." Id. In short, in both of Commerce determinations cited above, as here, Commerce relied on one prong.

Moreover, careful reading of Commerce's Final Determination indicates that Commerce did "consider" other prongs in addition to the "disproportionality" prong. Having found no de jure countervailability, it did "review the number of recipients which received benefits under Article 7 of SDI." 57 Fed. Reg. at 30949. It found that a wide variety of firms received benefits. In examining the number of recipients of the program, Commerce therefore did consider prong (1).

Additionally, there was evidence of government discretion and Commerce could have based its "specificity" finding on the "discretion" prong if it had not found that Norsk was receiving disproportionately large amount of benefit. See id. at 30949. Thus, it is not correct, as Quebec asserts, that Commerce did not consider all relevant factors in its finding of specificity. In the present case, Commerce "considered" these other factors, but found them unnecessary for its determination. The Panel believes that conclusion was within the discretion of Commerce.

Quebec also argued that Commerce's practice in this case is inconsistent with the Proposed Regulations in that it employs a mechanical approach in determining whether specificity exists. The

warning against using a mathematical formula comes from Commerce's comments on its Proposed Regulations: "[A]s the Department has explained in various determinations over the years, the specificity test cannot be reduced to a precise mathematical formula." (Proposed Regulations, supra. at 23368.) However, the facts belie this. First, Commerce has established the disproportionate amount of benefits going to Norsk. Second, there was evidence that Quebec had discretion in deciding which projects to allocate benefits to. See 57 Fed. Reg. at 30949. However, Commerce followed a sequential progression method, going through each prong of the four-prong test instead of jumping to the "discretion" prong. We find this to be a reasonable exercise of Commerce's administrative discretion.

Two weeks prior to the oral hearing in this case, the Binational Panel in Certain Softwood Lumber from Canada released its Report. (United States-Canada Free Trade Agreement Article 1904 Panel Review U.S.A.-92-1904-01, Decision of the Panel (May 6, 1993) ("Softwood Lumber"). The Softwood Lumber Panel was concerned with a Commerce determination that Canadian stumpage programs were de facto specific. Commerce had made its specificity determination on the basis of factor (2) alone, because of what Commerce considered to be the limited number of uses of the program at issue. The Panel reviewed both the Preliminary Determination and the Final Determination in that case and found that although there was evidence on the record regarding factors such as lack of dominant or disproportionate use and the exercise of government discretion, nowhere in either determination was there a reference to such evidence. Given that it is well established in U.S. law that an agency must base it decisions on all record evidence, including that which fairly detracts from the evidence in support of its decision, the Panel found that Commerce had failed to consider legally relevant evidence and remanded the determination back to Commerce to consider

all relevant record evidence. In the Softwood Lumber case, the Panel found there was a complete failure to consider evidence relevant to factors (3) and (4).

The Softwood Lumber panel decision, while thorough, is, as a matter of law, not necessarily binding on this or other Panels. See Article 1904.9 ("The decision of a panel under this Article shall be binding on the Parties with respect to the particular matter between the Parties that is before the panel.")[16] This Panel has considered the reasoning of the Softwood Lumber decision.

The Lumber Panel held that:

> Commerce is required as a matter of law to consider all relevant evidence in determining whether the actual recipients of a particular program form a "specific group of industries", and cannot base its decision solely on evidence of the number of industries represented by the program recipients.
>
> As a matter of general U.S. administrative law, it is well established that an agency must base its decision upon all record evidence, including that which fairly detracts from the evidence in support of its decision. Softwood Lumber at 36 citing Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

The Lumber panel further concluded:

> We find that it is simply not reasonable for Commerce to posit, as it has in this case, that it is not required to consider evidence relating to all four of the factors listed in the Proposed Regulations, as well as any other relevant record evidence, before coming to a conclusion in specificity. Id. at 39.

Under Quebec's analysis, if an agency must consider all evidence, it must also analyze all statutory factors and criteria since, otherwise, the evidence of record pertaining to those criteria would be left unreviewed. We are unpersuaded by this reasoning. The doctrine that agencies must consider all evidence before them does not mandate that they must therefore a fortiori consider all

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[16] The Parties agree that the Lumber decision is not binding on this Panel. Quebec Reply Brief at 5; Commerce Brief at 10.

criteria before them. Where an agency is given several alternatives in a statute or regulation, Quebec would have it analyze all of them to avoid the evil of missing some evidence.

This approach takes the doctrine too far. Agencies are required to consider all relevant evidence of record. The relevance of the evidence is determined by the scope of the agency's analysis which, in turn, is determined by the relevant statute or regulation.

Once the statutory or regulatory criteria which the agency must consider are identified, then the agency must consider all pertinent evidence before it which relates to those criteria. We are unpersuaded that Commerce must analyze all of the specificity factors simply to avoid overlooking evidence, without being separately convinced that all of those factors must be analyzed. Put another way, if Commerce's interpretation of the statute were unreasonable and it were obliged to consider all of the specificity factors, we would ensure that it review all of the evidence under each of the factors. We are satisfied that Commerce, in the instant proceeding, reviewed all of the evidence applicable to those factors which it was obliged to consider.

We conclude that the PPG and Roses decisions can be distinguished since they involved appeals of negative specificity determinations and our case involved an affirmative decision. It would be a reversible error for Commerce to fail to consider the remaining factors if its analysis of one factor did not indicate specificity. However, the opposite is not true. Commerce need not continue to other factors once it determines that under one factor the subsidy is specific.[17]

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[17] The Lumber Panel rejected Commerce's attempt to distinguish as we do, PPG. The Lumber Panel reasoned that "[i]f the existence of a dominant user within a non-specific group may indicate specificity, so too may the lack of a dominant user indicate a lack of specificity." Lumber at 37 [emphasis in the original]. The former will be the end of Commerce's analysis since there is no need to proceed further once specificity is found. A finding of non-specificity under another factor would (continued...)

2. Disproportionality Analysis: Industry-by-Industry versus Enterprise-by-Enterprise Basis

Quebec has submitted that Commerce should have conducted its disproportionality analysis on an industry-by-industry rather than an enterprise-by-enterprise basis. The grounds for this argument were as follows:

1. That Commerce did not explain why it chose to proceed on an enterprise-by-enterprise as opposed to an industry-by-industry basis;
2. That Commerce's decision to proceed on an enterprise-by-enterprise basis was a departure from past Department practice which, at a minimum, required an explanation; and,
3. That it would have been more appropriate under the circumstances of this case for Commerce to employ an industry-by-industry analysis.

In response, Commerce presented the following arguments:

1. That U.S. law gives Commerce complete discretion to make its analysis on either an enterprise or industry basis;[18]

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[17](...continued)
not vitiate or affect a finding of specificity already found under the first factor. The converse is not true. A finding of a "lack of specificity" under one factor does not mean that specificity cannot be found under another factor. For that reason, a negative Commerce specificity determination could be reversed if Commerce failed to consider all factors. But an affirmative determination could not be overturned on the same grounds because, once specificity is found, further analysis under other factors will not affect it.

[18] The statute states, in part, that:

(continued...)

2. That Commerce's decision to proceed on an enterprise-by-enterprise basis was not a departure from past practice; and,

3. That an enterprise-by-enterprise approach was a more appropriate manner in which to conduct an analysis in this particular case.

On the first point, the Panel finds that although Commerce has a discretion under statute to conduct an enterprise rather than industry analysis, it nevertheless has a duty to justify its choice by giving cogent explanation for the exercise of its discretion. In Motor Vehicle Manufacturers Association of the United States, et al. v. State Farm Mutual Automobile Insurance Company, et al.[19], a decision of the United States Supreme Court, Justice White wrote, for the Court, that: "We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner."[20] He reiterated this point by citing the Court's decision in Burlington Truck Lines, Inc. v United States[21]:

> There are no findings and no analysis here to justify the choice made, no indication of the basis on which the [agency] exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such ... practice .... Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding,

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[18](...continued)

> The term subsidy ... includes, but is not limited to, the following:
> ...
> (ii) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries ... (19 U.S.C. § 1677(5)(A)).

[19] 463 US 29, 77 L Ed 2d 443, 103 S Ct 2856 (1983).

[20] 77 L Ed 2d, at 461.

[21] 371 US, at 167, 9 L Ed 2d 207, 83 S Ct 239.

> expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' New York v. United States, 342 US 882, 884 [96 L Ed 662, 72 S Ct 152] (dissenting opinion)

Counsel for Commerce stated that the analysis was done on an enterprise-by-enterprise basis because the information was received in this form and counsel for Quebec responded that this was how it was sought. The Panel does not find this explanation satisfactory because it does not answer the underlying question of why Commerce embarked on an enterprise-by-enterprise analysis in the first place.

Counsel for Commerce also stated that Commerce chose the enterprise over the industry method due to certain assumptions that would have to be made in its analysis. If this is the case, Commerce should have said so in its decision. The Panel is not prepared to speculate as to how Commerce reached its decision. Moreover, the Panel is mindful of the Motor Vehicles decision above, in which the Supreme Court held that a court reviewing whether an agency rule is arbitrary and capricious, may not supply a reasoned basis for the agency's action that the agency itself has not given.[22] The Court went further to state that the courts, when reviewing an agency's actions, may not accept an appellate counsel's "post hoc rationalization" for agency action. An agency's action must be upheld, if at all, on the basis articulated by the agency itself.[23]

On the second issue, the Panel is unprepared, and does not feel it is necessary, to determine if all prior decisions of Commerce addressing disproportionality were conducted on an industry basis, as argued by counsel for Quebec and disputed by Commerce. However, the Panel finds that an

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[22] 77 L Ed, at 458.

[23] Id, at 462.

industry approach was at least the norm. Commerce, at page 38 of its brief, admitted that an industry approach is "more commonly employed."

Following on our reasoning above, the Panel finds that Commerce had a duty to give reasons for departing from a method of analysis that was commonly employed. Indeed, the need for reasons would seem to be particularly important where a practice was not going to be followed. In The Atchison, Topeka & Santa Fe Railway Company, et al. v. The Wichita Board of Trade, et al.[24], a decision of the United States Supreme Court, Justice Marshall wrote that:

> Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.[25]

However, the Panel is unwilling to go so far as to remand solely on the basis that past practice was not followed. It is clear from the statute that Commerce has a discretion to employ either an industry or enterprise approach.

Likewise, on the third issue raised by Quebec, the Panel is not prepared to state which method would be appropriate. By statute, this is the responsibility of Commerce. Furthermore, Commerce is in the best position to make such a decision as it has the requisite resources and expertise. However, as explained above, Commerce must make this decision on a reasoned basis.

We therefore remand this part of the determination to the authority with the direction that it reconsider the exercise of its statutory discretion as to whether the disproportionality analysis should be conducted on an enterprise or an industry basis, and to provide to the Panel a cogent explanation

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[24] 412 US 800, 37 L Ed 2d 350, 93 S Ct 2367 (1973).

[25] 37 L Ed 2d, at 362.

why it has exercised its discretion in a given manner.

3. Calculation of the Value of the SDI subsidy

The issue here is whether or not as Quebec contended, Commerce erred when it countervailed the full amount of the assistance because it is implicit in a finding of disproportionality that some of that is proportionate. Quebec submitted that Commerce should only countervail that amount that is above the line of proportionality. Countervailing the full amount "doesn't seem to [Quebec] to be correct or right or logical." (May 20, 1993 Hearing Transcript at 72-73.)

Quebec's Arguments

Quebec argued that Commerce incorrectly valued the amount of the countervailable benefit. Furthermore, that the countervailing duty law is intended to simply offset the benefit conferred and not to penalize firms that receive subsidies. Commerce's methodology, therefore, does not seek to sanction industries that receive preferential treatment, but merely to offset the advantage given to them by the preferential portion of the subsidy. (Complainant's Brief, Feb. 1 at 42-43.)

According to Commerce's Proposed Regulations and case history, Commerce should countervail only that portion of the program which is preferential. (Complainant's Brief, Feb. 1 at 41-42.) Quebec, therefore, concluded that the case should be remanded to Commerce with instructions to determine the "proportionate" level of benefits provided under Article 7, and only to countervail

against the amount provided to Norsk above that level. (Complainant's Brief, Feb. 1 at 43.)

Quebec's specific arguments were as follows:

1. Commerce should only have countervailed that portion of the assistance given to Norsk which exceeded the proportional amount of SDI benefits. (Complainant's Brief, Feb. 1 at 41.); and,

2. Commerce did not countervail the entire value of the benefit Norsk purportedly received from the electricity rate discount which Hydro-Quebec offered to Norsk. Rather, it only countervailed the amount that exceeded the generally available discount. Commerce's decision to countervail the entire grant given to Norsk under the SDI program, therefore, is inconsistent with the Department's holding regarding the value of Norsk's electricity discount. (Complainant's Brief, Feb. 1 at 43-44.)

Commerce's Arguments

Commerce contended that the identification of a domestic subsidy involves two separate elements: specificity and the provision of a benefit. Having made its specificity determination based on disproportionality, Commerce next looked at the nature of the benefit provided to Norsk. Because the benefit was a grant, Commerce countervailed the entire amount of the grant. (Commerce Brief at 30, 39.) Commerce, therefore, concluded that the calculation of the SDI benefit to Norsk should be affirmed.

Commerce's specific arguments were as follows:

1. The sole exception to Commerce's longstanding practice of countervailing the entire

amount of a grant applies to the treatment of "tiered" programs. Because SDI is not a tiered program, that exception does not apply to the grant received by Norsk. (Commerce Brief at 39-40.); and,

2. Commerce countervailed the entire amount of the grant in full accordance with its past practice and the Proposed Regulations. (Commerce Brief at 39.)

Discussion

As Commerce has noted, the identification of a domestic subsidy involves two separate elements: specificity and the provision of a benefit. (Commerce Brief at 38.) Commerce based its specificity determination on its finding of disproportionality. It then calculated the amount of the countervailable subsidy by first determining the nature of the benefit provided to Norsk. (Commerce Brief at 38.) Commerce determined that "NHCI received a grant under [the SDI] program." 57 Fed. Reg. at 30949; see also Commerce Brief at 38 [emphasis added]. The Panel finds that Commerce acted within its discretion in determining that the subsidy constituted a grant.

According to the Proposed Regulations §355.44(a), "... in the case of a program providing a grant, a countervailable benefit exists in the amount of the grant." 54 Fed. Reg. at 23380. Furthermore, the preamble to the Proposed Regulations says: "paragraph (a) of §355.44 codifies Commerce's practice of treating the entire amount of a grant as a countervailable benefit." 54 Fed. Reg. at 23368 [emphasis added]. The Panel, therefore, concludes that Commerce countervailed the benefit in accordance with its past practice and Proposed Regulations.

Quebec submitted that Commerce must look at its Proposed Regulations and case history.

(Complainant's Brief, Feb. 1 at 41.) They argue that:

> [W]here a government program provides varying levels of benefits with different eligibility criteria, and one or more of such levels is not selective. . ., a countervailable benefit exists to the extent that a firm receives benefits under the program which are more favorable than the more benefits available under the program." Proposed Regulations, §355.44(n), 54 Fed. Reg. at 23368.

Quebec contended that "the Department will countervail only that portion of the program which is preferential." (Complainant's Brief, Feb. 1 at 42.)

Commerce has cited the same section of the Proposed Regulations. (Commerce Brief at 39.) While Quebec suggested that Commerce has to apply this section to the calculation of the subsidy, Commerce has cited this section to show the "only one exception to Commerce's long-standing practice of countervailing the entire amount of a grant." (Commerce Brief at 39.) This exception applies to tiered programs. In the case of a tiered program, Commerce determines the existence of a countervailable benefit by comparing the benefits received by a firm to the benefits it would have received under the most favorable, nonselective portion of the program in question. 54 Fed. Reg. at 23383.

Commerce argued that because the SDI program is not a tiered program, §355.44(n) of the Proposed Regulations does not apply. (Commerce Brief at 40.) Commerce, therefore, concluded that according to §355.44(a) of the Proposed Regulations, the entire amount of Norsk's grant is the countervailable benefit. Quebec stated that Commerce did not attempt to justify this distinction. (May 20, 1993 Hearing Transcript at 74.) However, in the Proposed Regulations, there is a distinction between tiered and non-tiered programs. We feel that it is within Commerce's discretion to make this distinction.

Furthermore, Quebec submitted that Commerce applied the layered approach to a program that was not a tiered program. (May 20, 1993 Hearing Transcript at 75.) According to Quebec, Commerce has used the type of analysis, which Commerce has to apply in case of a tiered program, in determining the value of the benefit Norsk purportedly received from the electricity rate discount which Hydro-Quebec offered to it. Commerce also cited a case (Preliminary Affirmative Countervailing Duty Determinations and Alignment of Final countervailing Duty Determination with Final Antidumping Duty Determinations: Certain Steel Products from Korea, 57 Fed. Reg. 57761 (1992)). Complainant's Brief, April 19 at 25; May 20, 1993 Hearing Transcript at 78. Quebec argued that the "Department has already . . . broken precedent and that it has not limited this principle." (May 20, 1993 Hearing Transcript at 78.)

However, Commerce responded by stating that the Complainants have cited non-grant programs. (May 20, 1993 Hearing Transcript at 155-156.) They submitted, furthermore, that "these cases don't address the fact that here, you had a grant which cut under the regulations is required to be countervailed in the full amount." The Panel agrees with Commerce. The cases cited by Quebec involve loans and can, therefore, be distinguished from the present case, which involves a grant.

In view of these considerations, the Panel affirms the calculation of the countervailing duty by Commerce.

4. Whether SDI Assistance Given to Norsk was Recurring and should be Expensed in the Year of Receipt

Quebec has submitted that the Article 7 assistance granted to Norsk should be treated as a recurring grant and thus, expensed in the year of receipt. Specifically, Quebec argued:

1. That the reimbursements for interest payments on an outstanding debt was tied directly to annually recurring interest payments and therefore, should be treated as recurring grants and expensed in the year of receipt. (Complainant's Brief, Feb. 1 at 44);
2. That the assistance provided to Norsk was conditioned upon a documented showing of interest payments on the outstanding debt and could be reasonably viewed as converted interest-free loans. (Complainant's Brief, Feb. 1 at 45 and 46);
3. That the assistance given to Norsk was in the form of an interest assumption which may be treated under Commerce's interest-free loan methodology. (Complainant's Brief, Feb. 1 at 45);
4. That by refusing to apply the interest-free loan methodology to the present case, Commerce's current ruling contradicted both its own recent precedent and past Panel holdings. (Complainant's Brief, Feb. 1 at 45);
5. That the outstanding obligation-new investment distinction is irrelevant to the determination of whether the grant is recurring or non-recurring. (Complainant's Brief, Feb. 1 at 49); and,
6. That Commerce's three-part test presented in the Proposed Regulations and

applied to distinguish recurring from non-recurring benefits has been rejected in recent steel decisions by Commerce. (Complainant's Brief, Feb. 1 at 50 and 51).

In response Commerce presented the following arguments:

1. That the SDI grant was tied to the purchase of fixed assets and not an assumption of interest. (Commerce Brief at 42);
2. That the interest-free loans made to Norsk would be capped as a percentage of the amount spent by Norsk on environmental control equipment. Without further evidence of future disbursements, this constituted a single act of assistance by Quebec rather than a recurring grant. (May 20, 1993 Hearing Transcript at 80 and 81);
3. That even if Commerce were to characterize the assistance as a loan assumption, the interest-free loan methodology would not apply in the present case because it is Commerce's normal practice to treat interest assumption and rebates as grants rather than loans. (Commerce Brief at 44);
4. That in determining whether a grant was recurring, Commerce considered the recipient's awareness, at the time it took out the loans, that interest rebates would be available in the future. (Commerce Brief at 44);
5. That only a discrete number of payments occurred, over a finite period of time, with the first such payment allocated for the costs of a feasibility study. (Commerce Brief at 42);
6. That Commerce, applying the test under New Steel Rail, examined the nature of the program to determine whether the benefits were recurring. Commerce

> characterized the assistance to Norsk as one benefit allocated over a period time. Because Quebec failed to present evidence to show that such assistance would recur, Commerce treated the grant as nonrecurring. (Commerce Brief at 44 and 45).

Consequently, Commerce concluded that the grants, which are used to spur new capital investment, are comparable to grants given to fund outstanding debts. Therefore, this benefit is not recurring and should be amortized over the useful life of the equipment.

Discussion

On July 14, 1988, SDI entered into a grant contract in which it agreed to reimburse Norsk for interest payments made on outstanding debt obligations. (Complainant's Brief, Feb. 1 at 44.) According to the terms of the contract between Quebec and Norsk, the SDI grant was calculated as a percentage of the cost of pollution control equipment. (May 20, 1993 Hearing Transcript at 158.) Moreover, the contract also provided that part of the grant could be used to reimburse government funding of the feasibility study which was provided under a subsidy agreement. (Commerce Brief at 42.)

Quebec asserted that because the interest payments made on the outstanding debt obligations were directly tied to recurring interest payments, Commerce should have treated the assistance as a recurring grant. (Complainant's Brief, Feb. 1 at 44.) Commerce, on the other hand, correctly observed that the assistance was authorized in one act and completely disbursed, partially for a feasibility study, and should therefore be considered nonrecurring grants.

(Commerce Brief at 42 and 43.)

The two terms of the contract alone fail to constitute a recurring loan agreement as envisioned by standard Department policy. As Commerce's briefs states, the pertinent legislative history instructs that:

> [T]here is a special problem in the case of nonrecurring subsidy grants or loans, such as those which aid an enterprise in acquiring capital equipment or a plant" a reasonable method of valuing the subsidy must be used." Commerce Brief at 43 citing S. Rep. No. 249, 96th Cong., 1st Sess. 85 (1979) [emphasis added].

The New Steel Rails Panel decision, while not binding on this Panel, was debated by the parties. We distinguish it factually.

The term "recur" is generally defined as "to occur or come up again or repeatedly." Webster's II (1984). With respect to assumption of interest, Commerce, however, has narrowly qualified the term "recurring grant" in previous cases to incorporate the recipient's awareness at the time it took out the loans "that the government would assume part of the interest [and that] those interest contributions would be treated as a reduced rate loan." (Commerce Brief at 44.) The New Steel Rails case can be distinguished because as the New Steel Rails Panel stated, the debt service subsidies in the New Steel Rails case do not resemble one-time subsidies, such as grants for new capital equipment. (May 20, 1993 Hearing Transcript at 159.)

In light of the legislative history of the law with regard to non-recurring grants one could decide either way. The Panel therefore decides that it is within the broad discretion of Commerce to decide that it is a non-recurring grant.

5. The Appropriate Allocation Period for Grants Given to Norsk Hydro Canada, Inc. (NHCI) for the Purchase of Pollution Control Equipment

Quebec has argued that Commerce should have used the depreciation period used by Norsk instead of the IRS tables for the useful life of equipment in the industry. Quebec's arguments were as follows:

1. In the Ipsco case (Ipsco, Inc. v. United States, 701 F. Supp. 236 (CIT 1988), the CIT said that the use of IRS tables rather than a producer's own depreciation is improper unless Commerce either (a) explains why the IRS tables adequately reflect the useful life of the company's actual assets, or (b) it had promulgated formal rule through a rulemaking procedure. Quebec maintains that neither condition has been met. (May 20, 1993 Hearing Transcript at 85.);
2. Quebec submits that Commerce used similar arguments as those rejected in Ipsco by asserting that the company-specific data provided on the record was inadequate and that the use of IRS tables consequently is justified. It submits that just as in Ipsco, Commerce did not justify why the IRS tables reflect the useful life of Norsk's assets. (Complainant's Brief, Feb. 1, at 53.); and,
3. Finally, Quebec submits that Commerce's actions are inconsistent with Ipsco because while Commerce referred to regulations proposed in 1989 that would require it to use the IRS tables, those regulations have never been promulgated. (Id. at 54 and May 20, 1993 Hearing Transcript at 85.)

Therefore, Quebec maintains that the case should be remanded with an order to Commerce to use

Norsk's amortization schedule or at least to explain and justify its chosen amortization schedule. (Complainant's Brief, Feb. 1, at 54.)

Commerce defended its allocation of the benefit of the grant over fourteen years, the average life of assets in the magnesium industry according to the 1977 Class Life Asset Depreciation Range System developed by the IRS. Its requirements were as follows:

1. Commerce submits that the standard amortization period is consistent with its "Proposed Regulations and Administrative Practice." Its standard administrative practice is to allocate benefits over the average useful life of the firm's physical assets. Commerce cites countervailing duty determinations in two duty determinations (see Commerce Brief at 45-46 and May 20, 1993 Hearing Transcript at 160), relating to the United Kingdom and France, respectively, to attempt to justify its position;
2. Commerce argued that the use of a firm's estimation of useful life, based on its accounting records, "suffers from the fact that a firm may select a useful life for a variety of reasons, such as tax liability or to qualify for a tax subsidy." (Commerce Brief at 46.);
3. Commerce submits that its actions were justified because the use of each producer's accounting practice might result in substantially different benefit allocations for two different producers whose cases are otherwise similar. Commerce submits that it is within its discretion to seek a uniform method of determining allocation periods. (Commerce Brief at 46 and May 20, 1993 Hearing Transcript at 160.); and,

4. Finally, Commerce attempted to justify its actions as consistent with Ipsco in that the Proposed Regulations were issued as a "partial response" to the Ipsco ruling, which noted that Commerce had not promulgated regulations regarding the IRS tables. (Commerce Brief at 47 and May 20, 1993 Hearing Transcript at 161.) Commerce further stated that it "has both (sic) promulgated regulations which it adhered to consistently." (Hearing Transcript at 161.)

Consequently, Commerce concluded that an allocation period of fourteen years, which is in accordance with IRS tables, is appropriate.

Discussion

The Panel finds that the circumstances of this case are similar to the Ipsco case, with the exception that, since Ipsco, Commerce has proposed regulations incorporating IRS tables for allocation purposes. Commerce considers the "proposal" of the regulations to constitute "promulgation." The word "promulgate" is ambiguous to the extent that it can imply either proposal or putting into effect. (Webster's New Collegiate Dictionary at 922 (1973). However, we find that Ipsco envisioned that such regulations be in effect and not simply proposed.

The Ipsco Court repeatedly referred to "economic reality" or "commercial reality" as the standard in determining the useful life of assets and the appropriate allocation period. 701 F. Supp. at 238, 239, 241 (CIT 1988). In Ipsco the Court noted that:

> [I]t is unclear from the record why ITA believes that the IRS depreciation schedule for replaceable physical assets is a reasonably accurate indicator of economic reality in the light of plaintiffs' verified financial records." 701 F. Supp. at 238

(CIT 1988).

That is precisely the same situation as presented here. Commerce referred to the Proposed Regulations as only a "partial response" to Ipsco and made no effort to justify its decision in terms of the economic realities of the present case.

Furthermore, Ipsco Court also implied some reservation in accepting the IRS tables as an unqualified standard, even if the use of such tables were promulgated by regulation. It stated:

> If ITA wishes to promulgate a regulation incorporating such tables for allocation purposes or, more likely, creating a presumption in favor of such tables, it may be able to do so." 701 F. Supp. at 240 (CIT 1988.) [emphasis added]

The Panel recognizes that producers' accounting records do not necessarily reflect the economic reality of assets' useful lives. However, it does not follow that we therefore should substitute industry averages from the IRS tables that may bear little relation to the situation of a particular producer.

The Panel recognizes Commerce had discretion in implementing the statute. However, we believe it to be beyond this discretion, and inconsistent with the binding precedent of the Ipsco ruling, for Commerce to estimate the average useful life of a firm's assets without examining, in addition to IRS tables, records specifically relating to the units of the firm in question. The IRS tables and the producer's records are elements that should be considered, but neither should be deemed *a priori*, without reasoned explanation, to constitute economic or commercial reality in and of itself.

Consequently, we order that, as to this issue, the case be remanded to Commerce to review more thoroughly the financial record presented in this case to attempt to ensure that the

use of the IRS tables results in an allocation period that satisfies the standard of the Ipsco case of "an allocation period which will accurately reflect the commercial and competitive benefit received by the plaintiffs in this case." (Ipsco, Inc. v. United States, 701 F. Supp. at 241 (CIT 1988)). Further, we order Commerce to set forth an explanation of its reasoning in support of whatever decision it finally reaches.

C. The Value of Norsk's Water Subsidy

In its final determination Commerce found that Norsk's contract with La Societe du Parc Industriel du Centre du Quebec [hereinafter "Industrial Park"] exempted it from paying water bills.

> Since no other company receives such an exemption, we determine this program to be countervailable since benefits are limited to a specific enterprise or industry, or a group of enterprises or industries.
>
> To calculate the benefit under this program, we divided the amount NHCI should have paid for industrial water for the period of investigation by NHCI's total sales of Canadian manufactured sales for the period under investigation. On this basis, we calculated an estimated subsidy of 1.43 percent ad valorem for NHCI." 57 Fed. Reg. 30946, 30948 (1992).

In its appeal to this Panel the complainants do not contest that Norsk's exemption from paying the water bills constituted a countervailable subsidy.[26] Rather, they argue that Commerce has incorrectly calculated the subsidy.

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[26] Quebec's Brief at 54. Also, statement of Patrick Macrory, Quebec's counsel, at the hearing of the Panel, Hearing Transcript at 86-87.

According to Norsk and Quebec, Commerce calculated the subsidy on the basis of Norsk's invoices for water instead of the value of the actual water used. The Industrial Park billed Norsk on the basis of forecasted water use, rather than actual consumption.

The Complainants assert that Norsk's actual consumption was far less than the forecasted use in the water bill. They contend that Norsk received no benefit from not having to pay for the water it did not use. In their view, the subsidy should be limited to the exemption for payment of actual consumed water. They further contend that Commerce had verified Norsk's actual use.[27]

Commerce responded that the actual use is irrelevant since all companies in the Industrial Park are normally billed for their "hypothetical/forecasted" - and not actual - water use. Commerce reasoned that, but for its exemption, Norsk would have had to pay for the forecasted use. Therefore, the subsidy should be measured by that benefit. (Commerce brief at 51).

The Complainants respond that the record is silent on how the forecasted rates were determined by the Industrial Park for other users. Without such data, they claim that Commerce could not have measured what these other users - and, hence, Norsk - would have paid for water absent the exemption.[28] Moreover, they claim that it is "commercially inconceivable" that, had it not been exempted, Norsk would not have been able to adjust any bill that was not based on actual consumption.[29] The Complainants assert that Commerce should have made further inquiries to determine what procedure might exist for the water users to pay only for actual

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[27] Quebec Brief at 54-55.

[28] Quebec Reply Brief at 37-38.

[29] Statement of Patrick Macrory, Quebec's counsel, Hearing Transcript at 88.

consumption.

The Panel does not accept the Complainants' argument that Norsk's subsidy must be limited to what its actual water usage might have been.[30] The Panel also does not conclude that Commerce was remiss in not having determined what, if any, procedure might be in place in Quebec for Norsk and the other Industrial Park companies to contest or adjust their water bills. Commerce was not obligated to look beyond the actual bills received by Norsk and to speculate whether Norsk might have been able to adjust them in the future.

Commerce's determination that Norsk's benefit should be measured against the normal billing rate, based on forecasts, was amply supported by the evidence. Commerce verified that Norsk's water bills corresponded to the actual invoices from the water supplier.[31] Furthermore, Commerce had been told by the Industrial Park itself that "all the companies in the industrial park have contracts based on hypothetical/forecasted water usage."[32] Regardless of how those forecasted rates had been determined, the record is clear that Norsk, but for its exemption, would have been billed at that rate.

Accordingly, Commerce's determination with regard to the subsidy based on

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[30] There does not appear to be any clear evidence in the record of NHCI's actual water usage. At verification Commerce was given NHCI actual water usage figures "based on the rate in effect before the Industrial Park changed the billing system to one based on forecasted rather than actual water consumption." Id. at 7.

[31] Commerce Memorandum, Verification Report of Norsk Hydro Canada, N.P.R. 27 at 5.

[32] Commerce Memorandum, Verification Report of Quebec (including Hydro-Quebec and the Institute of Magnesium Technology), N.P.R. 30 at 6.

Norsk's exempted water bills is affirmed.

V. DISPOSITION

For the reasons stated above, the Panel hereby *remands* as follows:

1. That part of Commerce's determination where it conducted the disproportionality analysis on an enterprise-by-enterprise basis rather than by an industry-by-industry basis with the direction that it reconsider the exercise of its statutory discretion as to whether the disproportionality analysis should be conducted on an enterprise or industry basis, and to provide to the Panel a cogent explanation why it has exercised its discretion in a given manner; and,
2. That part of Commerce's determination concerning the appropriate allocation period for grants given to Norsk for the purchase of pollution control equipment with directions to consider the IRS tables and the producers records, in a manner that satisfies the standard articulated in the IPSCO case of "an allocation period which will accurately reflect the commercial and competitive benefit received by the plaintiffs in this case", and with further directions to provide a satisfactory explanation for its reasoning in support of whatever decision it reaches.

The Panel *affirms* Commerce's determination in all other respects.

The Panel hereby directs Commerce to provide the results of the remand within thirty (30) days of the date of this decision.

Signed in the original by:

Date	John D. Richard, Chairperson
Date	Bruce Aitken
Date	Jean-Gabriel Castel
Date	Robert E. Ruggeri
Date	J. Christopher Thomas