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

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	) **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
(December 14, 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.

INTRODUCTION:

In its decision of August 16, 1993, this Binational Panel ("Panel") affirmed in part and remanded in part the final affirmative countervailing duty determination of the United States Department of Commerce, International Trade Administration ("ITA") concerning Pure and Alloy Magnesium from Canada.[1] The Panel remanded the ITA's determination in two respects:

(1) for the ITA to explain why, in determining the specificity of the SDI program subsidy, the ITA conducted its "disproportionality" analysis on an enterprise-by-enterprise basis rather than on an industry-by-industry basis; and

(2) for the ITA to explain why its use of Internal Revenue Service (IRS) depreciation tables for the useful life of equipment in the industry accurately reflects the commercial and competitive benefits received by Norse Hydro Canada from grants it received for the purchase of pollution control equipment.

Upon review of the ITA's remand determination, the applicable law, and the written submissions of the parties, the Panel **Affirms**.

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

In determining whether the SDI program conferred a countervailable benefit upon NHCI, the ITA relied upon the "disproportionality" prong of the specificity test in its

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

proposed regulations. [2] The ITA compiled and reviewed the information on an enterprise-by-enterprise basis, rather than on an industry-by-industry basis. This Panel held that, while the ITA has the discretion to conduct its analysis under either basis, it was obligated to present a sufficient explanation for whatever choice it made in exercising that discretion. Panel Decision at 36-37. Accordingly, the determination with regard to disproportionality was remanded for the ITA to "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." Id. at 39.

In its Remand Determination, the ITA explains that the Gouvernement du Quebec ("GOQ") had supplied it, in response to the countervailing duty questionnaire, with the list of individual SDI program recipients. Remand at 4.[3] The data had not been provided to the ITA on an industry basis. The ITA explains that the GOQ response data contained all that it needed to conduct the disproportionality analysis on an enterprise

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[2] Countervailing Duties, 54 Fed. Reg. 23,366 (1989).

[3] Because the SDI program had not been alleged initially by the petitioners, the ITA had not included it in the original questionnaire. GOQ provided the information in response to a general "catch-all" question about miscellaneous subsidies.

basis. The ITA asserts that, in order to have conducted the disproportionality analysis on an industry basis, it would have had to engage in the exercise of determining which industries the various enterprises belonged to. The ITA, as an initial matter, also would have had to determine how to classify the industries. NHCI and SDI, the agency which administers the program, each proposed numerous industry categories. The ITA also had the option of devising its own industry groupings.

The essence of the ITA's response on remand on this issue is that it was not obligated, once it already had the enterprise data in hand, to have engaged in the "needless conjecture" of compiling a list of industries and then determining which enterprises belonged to them. Remand at 6. This response is based on the premise, which this Panel accepted in its Decision, that the ITA has the discretion under the statute to employ either an industry or enterprise-based analysis. The ITA's position basically is that, since it had the choice under the statute to use either analysis, it was free to go forward with the enterprise-based information it already in hand.

This explanation of the ITA had been presented to the Panel and was considered in its Decision. The Panel found that it did "not answer the underlying question of why Commerce embarked on an enterprise-by-enterprise analysis in the first place." Panel Decision at 37. The ITA's response is that it had decided to use an enterprise analysis only after receiving the information from

GOQ on an enterprise basis.

The ITA, in its Reply submission, further explains that since it had already found specificity under the enterprise analysis, it was unnecessary to perform one on an industry basis. Reply at 6. While the ITA states that an industry analysis would have been "duplicative", id, it is not clear from the record what an industry analysis would have produced.

This raises the issue of whether the ITA may select an enterprise over an industry analysis depending on the result. To put the question another way: may the ITA refrain from carrying out an industry analysis simply because it has already produced a finding of specificity using an enterprise analysis. The Panel concludes that it can.

The ITA refers to its Softwood Lumber remand determination[4] where it had gone on to conduct an industry analysis after the enterprise analysis did not produce a finding of specificity. Given ITA's role, and statutory duty to determine the existence of countervailable subsidies, foregoing an industry analysis because an enterprise analysis has properly indicated specificity is not unreasonable. Congress has made it abundantly clear that the ITA is to ferret out all countervailable subsidies. For example, in discussing a provision in the 1988 trade law amendments concerning subsidies, the House Committee on Ways and

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[4] Certain Softwood Lumber Products from Canada: Remand Determination, USA-92-1904-01 (September 17, 1993).

Means stated:

> This [new] provision would give the administering authority the flexibility to take such factors into account in determining the existence of, and measuring subsidies....The Committee believes that the these changes will ensure that the original intent of the Congress of covering under the CVD laws all bounties and grants by governments which aid specific industries or a group of industries by providing a competitive advantage in international commerce will be carried out.

H.R.Rep. No. 100-40 at 125-27 (100 Cong, 1st Sess.). It was not unreasonable for the ITA to have ended its analysis with the specificity finding under the enterprise analysis. Its clear statutory role is to uncover preferential subsidies. The ITA is not to create preferentiality where it does not exist. But it is also not bound to stop investigating when, under one analysis, specificity is not found.

A contrary result would be anomalous. In this case, had the ITA continued beyond the enterprise analysis and conducted an industry analysis which, assuming arguendo, resulted in a finding of non-specificity, how would the two results have been reconciled? If there is a reasonable basis for the ITA to use either method, and they produce different results, the ITA in its discretion is not barred from selecting the method which identified specificity. Therefore, having found specificity under the enterprise analysis, the ITA was not obligated to consider what the industry analysis would produce. In this sense, the ITA is reasonable in stating that an industry analysis would have been "needless."

The ITA's explanation of its use of the enterprise method was reasonable on the basis that:

(1) it had the discretion to use either an enterprise or industry analysis;

(2) it had the enterprise data already in hand before it embarked on the enterprise analysis; and

(3) it would have had to devise and classify the enterprises within industry groupings - a needless step once the enterprise analysis indicated specificity

EXPLANATION OF USE OF IRS DEPRECIATION TABLES

In our August 16, 1993 decision, at 49, the Panel addressed the issue of whether or not it was within the discretion of the Department to use the IRS tables to determine the useful life of equipment in the industry. We found similarities in the instant case with Ipsco Inc. v. United States, 701 F.Supp. 236 (CIT 1988), which the Government of Quebec had asserted required the use of a producer's depreciation schedule absent either (a) a justification of the use of IRS tables as adequately reflecting useful life or (b) the promulgation of a formal rule permitting the use of IRS tables.

Moreover, at 51-2, we found that "Ipsco envisioned that such regulations be in effect and not simply proposed." While explicitly recognizing the Department's discretion in implementing the statute, we stated, at P.53, that it was beyond the Department's discretion to estimate the average useful life of a firm's assets based on the IRS tables without also examining "records specifically relating to the units of the firm in question".

The issue, then, is whether the Department's review of financial records in the case was adequate to satisfy this

requirement. The Department asserts, that it was. It cites its review of financial statements provided by NHCI, its comparison of the IRS table's average useful life of assets to the various allocation periods that could be derived from NHCI's date and its conclusion that the allocation period called for by the IRS tables fall "within the range of calculated depreciation periods". September 18, 1993 Remand Determination at 11.

The Government of Quebec asserts, in its October 5, 1993 comments on the Remand Determination ("Comments"), at 16, that the Department's interpretation of the financial records is inappropriate. It claims that the proper allocation period is either [ ] years or [ ] years. Comments at 19-20. The Government of Quebec disputes consideration of Norsk Hydro's Norwegian assests, claiming that this amounts to an inappropriate projection of worldwide averages in view of the Department's internal memorandum on this subject. Comments at 18.

The Department in its October 25, 1993 Reply to Comments on Remand Determination ("Reply"), notes that the particular records which the Government of Quebec desires as the basis for determining the proper allocation period are unverified, rendering their use inappropriate. Reply at 9. Further, the Department disputes the Government of Quebec's characterization of its internal memorandum.

We find that the Department's review of financial records in this case was within the realm of reasonableness to justify its use of the IRS tables. Our decision is influenced by our understanding of the discretion which the statute and its legislative history afford the Department. The U.S. Congress, in its 1988 amendments to this statute, clearly recognized, and intended to broaden, this discretion of the Department to enforce this law. In this context, we find the Department's action to have been a reasonable exercise of its discretion and, therefore, affirm its use of the IRS tables, in view of its stated review of available financial records, to determine the useful life of the assets in question.

The Panel affirms the determination in all respects.

SIGNED IN THE ORIGINAL BY:

December 14, 1993
Date

John D. Richard, Chairperson
John D. Richard, Chairperson

December 14, 1993
Date

Bruce Aitken
Bruce Aitken

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