NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW
USA-95-1904-03

In the matter of:

COLOR PICTURE
TUBES FROM CANADA

Secretariat File No. USA-95-1904-03

Before: Howard N. Fenton, III (Chairperson)
Donald J.M. Brown
Peggy Chaplin
W. Roy Hines
Wilhelmina Tyler

DECISION OF THE PANEL

Appearances:

For Mitsubishi Electronics Industries, Inc.: Baker & McKenzie (Kevin O'Brien and Sandra E. Chavez).

For the U.S. Department of Commerce: Office of Chief Counsel for Import Administration (Stephen J. Powell, Edward S. Reisman and Lucius B. Lau).

For the International Brotherhood of Electrical Workers, Industrial Union Department, AFL-CIO; International Union of Electronic, Electrical Salaries, Machine and Furniture Workers, AFL-CIO; International Association of Machinists and Aerospace Workers, United Steel Workers of America: Collier, Shannon, Rill & Scott, PLLC (Paul D. Cullen, Lawrence J. Lasoff, Mary T. Staley and Lynn E. Duffy).

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I. INTRODUCTION

This Binational Panel ("Panel") was constituted pursuant to Article 1904 of the North American Free Trade Agreement to review the decision by the United States Department of Commerce, International Trade Administration ("Commerce") not to revoke the antidumping duty order respecting Color Picture Tubes from Canada.[1] Supporting Commerce's decision as interested parties are the International Association of Machinists and Aerospace Workers, the International Brotherhood of Electrical Workers, the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, the Industrial Union Department, AFL-CIO, and the United Steelworkers of America ("Unions"). Commerce's decision was challenged by Mitsubishi Electronics Industries Canada, Inc. ("Mitsubishi").

Mitsubishi challenged Commerce's decision on the grounds that Commerce had failed to comply with their own regulations and requested that the antidumping duty order on Color Picture Tubes from Canada be revoked.[2] For the reasons more fully set forth in this Opinion, the Panel affirms the decision of the Department of Commerce not to revoke the antidumping duty order.

II. BACKGROUND

On January 7, 1988 Commerce issued an "Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value; Color Picture Tubes From Canada".[3] During the five consecutive annual anniversary months following publication of the order, Commerce offered interested parties the opportunity to request an administrative review of the order, pursuant to 19 C.F.R. 353.22(a).[4] No review was requested. Commerce again offered interested parties the opportunity to request an administrative

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[1] 60 Fed. Reg. 27720 (May 25, 1995).

[2] A parallel action brought by Mitsubishi in the Court of International Trade has been dismissed due to lack of subject matter jurisdiction. *Mitsubishi Electronics Canada, Inc. v. Brown*, No. 96-39 (Ct. Int'l. Trade 1996).

[3] 53 Fed. Reg. 429 (Jan. 7, 1988).

[4] 54 Fed. Reg. 992 (January 11, 1989); 55 Fed. Reg. 2398 (January 24, 1990); 56 Fed. Reg. 1793 (January 17, 1991); 56 Fed. Reg. 66846 (December 26, 1991); 58 Fed. Reg. 4148 (January 13, 1993).

review in January, 1994.[5] A review was requested by the Unions and later withdrawn.[6]

19 C.F.R. 353.25(d)(4) provides the procedure for Commerce to follow when no interested party seeks an administrative review:

> (i) If for four consecutive annual anniversary months no interested party has requested an administrative review . . . of an order . . . , not later than on the first day of the fifth consecutive anniversary month, the Secretary will publish in the Federal Register notice of "Intent to Revoke Order".
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> (ii) Not later than the date of publication of the notice described in paragraph (d)(4)(i) of this section, the Secretary will serve written notice of the intent to revoke or terminate on each interested party listed on the Department's service list and on any other person which the Secretary has reason to believe is a producer or seller in the United States of the like product.
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> (iii) If by the last day of the fifth annual anniversary month no interested party objects, or requests an administrative review . . . , the Secretary at that time will conclude that the requirements of paragraph (d)(1)(i) for revocation ... . are met, revoke the order . . . , and publish in the Federal Register [a] notice [of revocation].

Pursuant to 19 C.F.R. 353.25(d)(4)(i) Commerce was required to publish a notice of "Intent to Revoke Order" no later than January 1, 1993, since no interested party had requested an administrative review during the first four consecutive annual anniversary months following publication of the antidumping duty order. However, no notice was published until December 28, 1994, almost two years after the date on which the regulations required that notice be given.[7]

Once the notice of intent to revoke was published by Commerce, the Unions objected to revocation of the order. Due to the objection, on May 25, 1995 Commerce published a Notice of Determination Not to Revoke the Antidumping Duty Order on Color Picture Tubes from Canada.[8]

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[5] 59 Fed. Reg. 564 (January 5, 1994).

[6] Notice of Termination of Administrative Review, 59 Fed. Reg. 14607 (March 29, 1994).

[7] 59 Fed. Reg. 66906 (December 28, 1994).

[8] 60 Fed. Reg. 27720 (May 25, 1995).

Mitsubishi requests that the antidumping duty order be revoked pursuant to 19 C.F.R. 353.25(d)(4)(iii). Because no interested party objected by the last day of the fifth annual anniversary month of the publication of the order, Mitsubishi argues, the order should have been revoked, regardless of the fact that a notice of "Intent to Revoke Order" was not published as required by 19 C.F.R. 353.25(d)(4)(i). Commerce and the Unions, on the other hand, object to revocation of the order and argue that notice of intent to revoke must be given to interested parties so that they may have an opportunity to object, before revocation can occur. Thus, even though Commerce's publication of a notice of intent to revoke was untimely, there was ultimately an objection and the order therefore cannot be revoked.

III. STANDARD OF REVIEW

Pursuant to Articles 1904(2)-(3) of the North American Free Trade Agreement the Panel is to apply the standard of review provided in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended.[9] The standard of review requires that any determination unsupported by substantial evidence on the record, or otherwise not in accordance with law, be held unlawful by the Panel.[10] Also to be noted is that decisions of the U.S. Supreme Court and the U.S. Court of Appeals for the Federal Circuit are binding on this Panel.[11]

"Substantial evidence" has been defined by the Court of Appeals for the Federal Circuit as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion".[12] The Panel may not substitute its own judgment for that of the agency's when there are two legitimate alternative views.[13]

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9 19 U.S.C. 1516(a)(1)(B).

10 *Id.*

11 NAFTA Article 1904(3).

12 *Matsushita Electric Industrial Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984).

13 *Arkansas v. Oklahoma,* 503 U.S. 91, 113 (1992).

Additionally, the standard of review requires that the agency determination be in accordance with law. The Panel must defer to an agency's reasonable interpretation of the statute it has been charged with administering. [14]

IV. DISCUSSION

The issue before this panel is virtually identical to that considered by the United States Court of Appeals for the Federal Circuit in Kemira Fibres Oy v. United States[15] (Kemira). In that case, as here, the Department of Commerce neglected to publish notice of its "intent to revoke" an antidumping order after the time required for such notice under the department's regulations.[16] The regulations provide both that the department "shall publish" its notice of intent to revoke and that the antidumping order shall be revoked after five years if there is no objection.[17] The issue is the fate of the antidumping order when the five years is up and the department does not publish its notice of intent to revoke. Complainant Mitsubishi argues that the order expires after five years notwithstanding the failure of the department to publish its notice. The department argues that expiration can only occur after the department gives notice and no objections are raised.

Reluctantly, and for the reasons outlined below, this panel concludes that under the existing regulatory scheme the failure of the Commerce Department to publish its notice in this matter did not cause the antidumping order to lapse of its own accord, and that the department acted appropriately in withdrawing its notice of intent to revoke following the objections by the unions. The panel reaches this conclusion based on both the language of the regulations that it is called upon to apply, and the decision of the Court of Appeals for the Federal Circuit in Kemira, which is guiding precedent for the panel in this matter.

The regulations of the department present two conflicting imperatives. The first is the

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[14] *National R..R.. Passenger Corp. v. Boston & Marine Corp.,* 503 U.S. 407, 417 (1992). "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. 195, 198 (Ct. Int'l. Trade 1989) *aff'd.* 978 F.2d 1232 (Fed. Cir. 1992).

[15] 61 F.3d 867 (Fed. Cir. 1995).

[16] *Id.*at 869.

[17] 19 C.F.R. Section 353.25(d)(4).

requirement that antidumping orders expire or lapse if five years pass without a request for an administrative review.[18] The second is that the department publish timely notice of its intent to revoke the order, before it lapses, to enable potential affected persons to object.[19] In Kemira the department delayed ninety days in publishing its notice of intent to revoke, and then initiated an administrative review of the order.[20] Kemira sought a preliminary injunction in the Court of International Trade against the department in initiating an administrative review.[21] The CIT granted the injunction on the grounds that the failure of any party to request an administrative review or to object to the revocation of the order by the fifth anniversary required the department to revoke the order.[22]

The CAFC reversed. While expressing dismay over the failure of the department to follow its own rules in publishing a timely notice of its intent to revoke the antidumping order, the court found that the failure to publish did not deprive the department of the authority to retain the order following an objection based on delayed publication.[23] Further, the court held that since Kemira had been unable to demonstrate how it had been prejudiced by the failure to publish in a timely manner, there was no basis for granting the injunction.[24]

Mitsubishi argued before this panel that the much longer delay in this case, almost two years, provided a sufficient basis for finding prejudice to distinguish this case from Kemira. The panel is not unsympathetic to the argument. Indeed, there is language in the Kemira decision indicating that an extended delay might provide the basis for the requisite showing of prejudice.[25] Mitsubishi suggested that the duties levied during the period of the department's delay offered a quantifiable basis for finding prejudice. However, the language and operation of the regulatory scheme here causes the panel to conclude that prejudice is a chimera that will likely elude even the most sympathetic reviewers. For so long as parties

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[18] 19 C.F.R. Section 353.25(d)(4)(iii).

[19] 19 C.F.R. Section 353.25(d)(4)(i).

[20] *Kemira,* 61 F.3d at 869.

[21] *Kemira Fibres Oy v. United States,* 858 F. Supp. 229 (Ct. Int'l. Trade 1994).

[22] *Id.* at 234.

[23] *Kemira,* 61 F.3d at 875.

[24] *Id.*

[25] *Id.* at 875-76.

opposing revocation may defeat it by mere mention, no complainant can overcome the argument that no prejudice exists because objection would have been raised whenever notice was published. Timely notice would have been met with timely objection.

In this case there is ample evidence that the vigilance of the unions would not have been relaxed had the notice been timely given. While this is obviously a form of modest speculation by the panel and the parties, it is as credible, if not more so, than the speculation complainant invites that the unions may not have objected. And it is this speculation that the panel would have to give credence to in concluding the nearly two years of antidumping duties provides the level of prejudice necessary to meet the standard articulated in Kemira. Given the burden on the complainant to demonstrate significant prejudice, the panel concludes that it has not made such a showing.

Like the federal circuit panel in Kemira, the panel is not sanguine about the conduct of the Commerce Department in this matter. Notwithstanding assurances of department counsel that both cases represented inadvertent errors that will be solved by computerization, the panel is concerned that the department lacks any incentive to give the five-year "sunset" provision meaning. So long as the "required" revocation of the order must be preceded by the "required" notification, the department has no reason for concern over failure to meet the deadline. These regulations reflect the department's efforts to implement the sunset provisions for antidumping orders under the 1994 General Agreement on Tariffs and Trade. Their unfortunate interplay seems to dilute the mandatory nature of that provision and the U.S. obligation under the GATT.[26]

V. CONCURRING OPINION OF PANELIST W. ROY HINES

I concur in the Panel's finding to affirm the decision of the Department of Commerce not to revoke the antidumping duty order. However, I do not fully share the views set forth in the discussion relating to the decision.

My difficulty relates to two points. First, concerns the statement that the regulations present two "conflicting imperatives". In my view, the two requirements of CFR 353.25 ("notice of intent to revoke" and "revocation") are clearly sequential and mandatory steps in the process. As such, an antidumping order cannot expire or lapse of its own accord. Positive actions are required to (a) issue the notice of intent to revoke and (b) if no objection is received, revoke the order by the Secretary. Second, relates to the discussion of prejudice and the implication that if the Panel found "prejudice" the matter might be remanded to Commerce for an action other than the issuance of a new notice of "intent to revoke". As I understand Article 1904 of NAFTA, a remand to this effect would not be possible since the

Panel would be limited to a remand ordering the application of the provisions of the U.S.

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[26] General Agreement on Tariffs and Trade 1994. See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 11, Sec. 11.3.

antidumping law as set out in CFR 353.25 in accordance with the sequence provided therein."

VI. DISPOSITION

For the reasons stated above, the Panel hereby affirms the decision of the Department of Commerce not to revoke the antidumping duty order on Color Picture Tubes from Canada.

Signed in the original by:

May 6, 1996	Howard N. Fenton, III, Chairperson
Date	Howard N. Fenton, III, Chairperson
May 6, 1996	Donald J.M. Brown
Date	Donald J.M. Brown
May 6, 1996	W. Roy Hines
Date	W. Roy Hines
May 6, 1996	Peggy Chaplin
Date	Peggy Chaplin
May 6, 1996	Wilhelmina Tyler
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