IN THE MATTER OF:

Pure Magnesium and
Alloy Magnesium
from Canada

USA-CDA-2000-1904-07

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:	)	
PURE MAGNESIUM AND ALLOY MAGNESIUM FROM CANADA (CVD)	)	Secretariat File No: USA-CDA-00-1904-07

DECISION OF THE PANEL

October 15, 2002

BEFORE:

CHARLES OWEN VERRILL, CHAIRMAN
MICHAEL HOUSE
EDWARD C. CHIASSON
DONALD J.M. BROWN
EDWARD FARRELL

DECISION OF THE PANEL CONCERNING THE REMAND DETERMINATION BY THE DEPARTMENT OF COMMERCE

NAFTA CHAPTER 19
PURE MAGNESIUM FROM CANADA
FILE USA-CDA-00-1904-07

1. PROCEDURAL HISTORY

On March 27, 2002, the Panel issued its decision concerning the challenge by the Gouvernement du Québec ("GOQ") and Magnesium Corporation of America ("Magcorp") to the final results of the full Sunset Review by the U.S. Department of Commerce ("DOC") of countervailing duty orders concerning pure magnesium from Canada. Pure and Alloy Magnesium from Canada, 65 Fed. Reg. 41,444 (July 5, 2000) (sunset review, final). The Panel's Determination, after spelling out the procedural history, remanded this Sunset Review to DOC with instructions to reconsider: (i) the determination to utilize the results of the sixth review as the subsidy rate to be reported to the ITC; (ii) the basis for the all others rate; and (iii) the reasons for the failure to investigate subsidies alleged to have been received by Magnola Metallurgy, Inc. ("Magnola"). Panel Determination, USA-CDA-00-1904-07 at 31 (Mar. 27, 2002) ("Panel Determination").

On June 10, 2002, DOC issued draft remand results to the GOQ, Norsk Hydro Canada, Inc. ("NHCI"), and domestic interested parties. While NHCI was a respondent in the initial investigation and filed the substantive response to the DOC notice of the initiation of this Sunset Review, NHCI has not been active in the proceedings before the Panel. Comments on the draft remand results were submitted by GOQ, which is an interested party in this proceeding, and by Magcorp, the original petitioner.

DOC issued the Final Results of Determination Pursuant to NAFTA Panel Remand of the Sunset Review of the Countervailing Orders on Pure Magnesium from Canada ("Remand Determination") on June 25, 2002. On July 15, 2002, the GOQ filed the Rule 73(2)(b) Challenge of the Determination on Remand by Gouvernement du Québec ("Rule 73(2)(b) Challenge"). GOQ's Rule 73(2)(b) Challenge contends that DOC improperly concluded that it was "required" to report an all others rate and that the rate selected was improper. U.S. Magnesium LLC (formerly Magcorp)[1] also filed a Rule 73(2)(b) Challenge, contesting the DOC's refusal to investigate alleged subsidies to Magnola. DOC responded to the Rule 73(2)(b) Challenges filed by the GOQ and U.S. Magnesium on August 5, 2002.

In conducting this review of the GOQ and U.S. Magnesium Rule 73(2)(b) Challenges, the Panel has followed the standard of review set forth in Part III of its decision of March 27, 2002. As therein noted, the Panel's authority derives from Chapter 19 of the North American Free Trade Agreement. In the conduct of this review, the Panel has applied the law of the United States as required by Article 1904.2.

2. CONSIDERATION OF THE GOQ CLAIMS CONCERNING THE ALL OTHERS RATE

The Panel remanded this sunset review to the Department of Commerce, inter alia, to consider further and to explain the basis for reporting an all others rate. DOC states that it has followed the Panel's direction ". . . and has concluded that it is appropriate to report an all others rate to the ITC, even though the original investigation involved only one producer." Remand Determination, at 8.

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[1] U.S. Magnesium purchased all of the assets of Magcorp on June 24, 2002, pursuant to an auction approved by U.S. Bankruptcy Judge Robert E. Gerber of the Southern District of New York. See Motion for Substitution of Party, filed by U.S. Magnesium on July 15, 2002.

DOC refers to section 735(c)(5)(A) of the Tariff Act of 1930, 19 U.S.C. §1673d(c)(5)(A), and says that the section " . . . now requires [DOC] to calculate an all others rate 'equal to the average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 776.'" Redetermination at 9. The Gouvernement du Québec asserts that this is a statement by DOC that it must report an all others rate. Rule 73(2)(b) Challenge at 1 (July 15, 2002).

Standing alone, it is not clear that the comment by DOC is an articulation of an obligation to report an all others rate. On its face, the reference speaks more to the mode of calculation than to an obligation to calculate, but at page 15 of its Redetermination, DOC says: "Since all Canadian producers/exporters are subject to these orders, [DOC] *must* report a net countervailable subsidy that is likely to prevail for all other exporters/producers if these orders were revoked" (footnote omitted, emphasis added). In addition, at page 14 of its Redetermination, the DOC refers to the position of the GOQ that no section of the Tariff Act ". . . 'imposes a requirement to establish an all others rate in a sunset review,'" and states, "We disagree with the GOQ."

The GOQ notes that the section to which DOC refers is found in the part of the Tariff Act dealing with antidumping duties (section 735, codified at 19 U.S.C. § 1673) and has nothing to do with countervailing duties which are the subject of this Sunset Review. GOQ further points out that the comparable provision relating to countervailing duties (section 705, codified at 19 U.S.C. § 1671(d)) does *not* apply in the case of sunset reviews by its very terms. Rule 73(2)(b) Challenge at 5. The Panel concurs that this is an appropriate reading of the statute. In the

circumstances of this case, the Panel considers that articulation of an all others rate is not appropriate unless it can be said to be required by legislation. The Tariff Act does not do so.

DOC refers to paragraph III.B.1 of the Sunset Policy Bulletin which states that normally DOC will provide a subsidy rate to the International Trade Commission ("ITC"). Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed. Reg. 18871, 18875 (Apr. 16, 1998) ("Sunset Policy Bulletin"). While the Sunset Policy Bulletin must be afforded deference, it does not require DOC to report an all others rate. Rather, it provides guidance to DOC in the exercise of its mandate. The use of the word "normally" supports the non-absolute nature of DOC's task. Its obligation is to exercise discretion, not to make absolute the approach that is taken in "normal" circumstances.

In this case, NHCI was the beneficiary of a disproportionate benefit from a Province of Quebec program. The program itself did not meet the definition of a countervailable subsidy; instead, NHCI was deemed to have received a disproportionate share in one year (and one year only) of the funds available, thus making the program specific. No other person presently is exporting. If another person were to do so, it might or might not apply for assistance from the program. If assistance were granted, it would not lead to a countervailing order unless the grant were deemed specific because it was provided disproportionately. In that event, the amount of the grant would be specific to the applicant and its effect specific to the economic circumstances of the applicant.

DOC refers to its decision in Live Swine from Canada, 64 Fed. Reg. 60301 (Nov. 4, 1999) (sunset review, final) wherein it held that " '. . .we normally will not determine that the

mere availability of a program indicates the likelihood of continuation or recurrence of a countervailable subsidy where there is a long track record on non-use of the program'." Redetermination at 17. That is the situation in this case.

The countervailing duty continues against NHCI in order to reflect the remaining unamortized portion of the subsidy granted to it in accordance with the normal non-recurring subsidy methodology. There is no logical link between that allocation and programs benefiting others in the market, of whom there are none, let alone possible entrants in the future.

In sunset cases, the focus of DOC is on "likely" future subsidization. At first instance, the inquiry concerns "possible" importation by uninvestigated companies that might evade the order. The Court of International Trade has stated clearly that in a sunset review "likely" is equated with "probable." Usinor Industeel, S.A. v. U.S., 2002 Ct. Int'l Trade Lexis 41, Slip. Op. 2002-39 (Ct. Int'l Trade Apr. 29, 2002) As is asserted by the GOQ: "An all others rate . . . is not based on any assessment of probability or likelihood. It is simply an arithmetic construct, an averaging of company-specific rates that is designed . . . to serve as proxy for uninvestigated companies . . . ." Redetermination at 10.

The debate concerning the selection of the appropriate rate supports the Panel's view that none is appropriate. Using either the remaining amortized benefit of the subsidy to NHCI or relating it to the original grant to NHCI appears to have no logical connection with any other potential exporter. Thus, the Panel concludes that, in the circumstances of this case, DOC's reporting of an all others subsidy rate is neither supported by substantial evidence nor in accordance with law.

3. DOC'S DETERMINATION REGARDING MAGNOLA

In its original decision, the Panel remanded DOC's decision not to investigate a new producer, Magnola, finding that DOC's stated rationale, i.e., that Magnola was not an "interested party" under 19 U.S.C. § 1677(9)(A), was inadequate and irrelevant to its determination not to investigate allegations of newly provided countervailable subsidies to Magnola as part of the sunset review. The Panel specifically instructed DOC on remand to determine whether Magcorp had shown "good cause" for DOC to consider Magcorp's allegations of newly provided countervailable subsidies pursuant to section 752(b)(2)(B) of the statute, 19 U.S.C. §1675a(b)(2)(B). Panel Decision at 28-29.

On remand, after considering each of the various items of evidence submitted by Magcorp, DOC concluded that good cause did not exist to investigate whether Magnola had received subsidies because there was no indication that Magnola had produced subject merchandise. "The fact that Magnola planned to become a producer of the subject merchandise at some point in the future," DOC stated, "is not a basis for concluding that export sales of the subject merchandise to the United States are likely." Redetermination at 13. "[I]n the absence of commercial production of the subject merchandise," DOC noted, "there is an insufficient basis for calling future sales likely." Id. DOC further concluded that "because the record contains no evidence that, at the time of these sunset reviews, Magnola had entered into commercial production of pure or alloy magnesium, let alone exported the merchandise to the United States, . . . Magnola was not a producer or exporter 'subject to the review' within the context of section 752(b)(2)(B)." Id.

The Panel concludes that DOC's remand determination on this issue is supported by substantial evidence and is in accordance with law. Specifically, we agree with DOC that there

cannot be good cause to investigate programs newly alleged to provide countervailable subsidies if the programs are alleged to benefit only a new producer that has not even begun commercial production, much less begun making sales. This conclusion, we find, is buttressed by the second portion of section 752(b)(2)(B), which states that DOC will consider such newly alleged programs "only to the extent that [DOC] makes an affirmative countervailing duty determination with respect to such programs and with respect to the exporters or producers subject to the review." If the only beneficiary of the newly alleged programs has not yet begun producing or exporting and thus cannot be subject to the sunset review, good cause cannot exist to investigate the newly alleged programs under the terms of the statute.

For these reasons, the Panel affirms DOC's remand determination with regard to this issue.

CONCLUSION

The Panel remands the matter to DOC with instructions to amend its determination by removing the reporting of an all others subsidy rate. The Panel further instructs DOC to file its further remand determination within 45 days of the date of this order.

SIGNED IN THE ORIGINAL BY:

Charles Owen Verrill, Jr. Chairman
Charles Owen Verrill, Jr. Chairman

Edward Chiasson, Q.C.
Edward Chiasson, Q.C.

Michael House
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