IN THE MATTER OF:

Pure Magnesium
from Canada
(Anti-Dumping Determination)

USA-92-1904-04

Available in Canada through

your local bookseller

or by mail from

Canada Communication Group--Publishing

Ottawa, Canada K1A 0S9

Catalogue No. E100-2/2-92-1904-04E

ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
UNITED STATES-CANADA FREE TRADE AGREEMENT
SECRETARIAT FILE NO. USA-92-1904-04

In the Matter of Pure Magnesium from Canada	) Before:	The Binational Panel
	)	Michael A. Kelen, Esq. (Chairman)
	)	Prof. William P. Alford
(Anti-Dumping Determination)	)	Michael H. Greenberg, Esq.
	)	Kenneth B. Reisenfeld, Esq.
	)	Prof. Gilbert R. Winham

FINAL DECISION OF THE PANEL

DATED OCTOBER 6, 1993

Appearances:

On behalf of the Complainant, Norsk Hydro Canada, Inc.: Michael H. Stein, Esq. and Carolyn A. Mitchell, Esq., Dewey, Ballantine

On behalf of Respondent, Magnesium Corporation of America: Kenneth R. Button, PhD., Economic Consultants Inc.

On behalf of the U.S. Department of Commerce: Robert J. Heilferty, Esq.

INDEX

INTRODUCTION

This Binational Panel was constituted pursuant to Chapter 19 of the United States-Canada Free Trade Agreement ("FTA") to review a July 6, 1992 U.S. Department of Commerce ("DOC") Final Affirmative Anti-dumping Duty Determination on pure magnesium from Canada. The DOC determined that pure magnesium from Canada was being sold in the United States at less than fair value as provided in Section 735 of the Tariff Act of 1930, and that the U.S. Customs Service required a cash deposit equal to 31.33% ad valorem on Canadian magnesium manufactured and exported by Norsk Hydro Canada Inc. ("NHCI") to the United States.

The Final Determination was with respect to a September 5, 1991 Magnesium Corporation of America ("MagCorp") Petition ("Petition") alleging that NHCI was dumping pure magnesium and alloy magnesium from Canada based upon price and cost information contained in the Petition. The DOC Final Determination held that the evidence supporting the Petitioner's dumping allegation regarding alloy magnesium was insufficient. The DOC rescinded its investigation with respect to alloy magnesium.

On August 10, 1992 NHCI filed a request for a Binational Panel Review of this DOC Final Anti-dumping Duty Determination, and identified the issues for which it

sought review.

After the parties had filed their respective briefs on this Panel Review, the DOC requested that this Panel remand the Final Determination back to DOC so that DOC could address certain elements of the constructed value calculations raised by NHCI in its complaint.

On May 27, 1993 DOC filed its Redetermination Pursuant to the Remand which allowed adjustments to certain elements of the constructed value as contended by NHCI such that the dumping margin and the anti-dumping duty was reduced from 31.33% to 21% ad valorem.

During the investigation, DOC issued NHCI an anti-dumping questionnaire. NHCI completed Part A of the questionnaire but failed to respond to Parts B, C or D. As a result, DOC determined in accordance with Section 776(c) of the Tariff Act of 1930, as amended, that it would use the Best Information Available ("BIA") since NHCI failed or was unable to produce the information requested. DOC determined the dumping margin based on the BIA contained in the Petition. NHCI did not challenge the use of BIA, but argued in this appeal that DOC should adjust certain elements in the Petitioner's constructed value calculations because they were not reasonably quantified or valued. The NHCI Request for a Binational Panel Review was narrow, challenging only four distinct constructed value calculations:

1. material costs;
2. depreciation expenses;
3. average wage rates; and
4. selling, general and administrative expenses ("SGA")

As a result of the Redetermination by DOC, the parties filed new briefs commenting on the Remand Redetermination. Thereafter an oral public hearing on this appeal took place in Washington on July 8, 1993.

After the Redetermination, the Canadian Complainant was satisfied with respect to redetermined material costs and depreciation expenses, so that its appeal was restricted to the appropriate wage rates to be attributed to the NHCI workers and its appropriate SGA.

NHCI'S PRELIMINARY MOTION

On April 12, 1993, MagCorp filed a brief to oppose NHCI's complaint. On April 27, 1993, NHCI filed a reply brief to respond to MagCorp's brief, and, additionally, a motion to strike certain portions of MagCorp's brief. NHCI's motion alleged that MagCorp's brief "fails to comport with Rule 62(1) of the Article 1904 [Panel] Rules which requires that case presentation and argument be made with reference and citation to evidence on the administrative record."

MagCorp responded on May 7, 1993 by indicating the sources on which its case presentation and arguments in brief were based.

The Panel deferred consideration of NHCI's motion to the time of the hearing. At that time, the Panel requested that NHCI proceed with its motion by raising during the course of the hearing specific objections to any case presentation or arguments by MagCorp made with reference or citation to evidence not on the administrative record. NHCI did not raise any objections during the course of the hearing. As such, NHCI's April 27, 1993 motion is considered withdrawn.

POINTS IN ISSUE

Based upon the Redetermination, the following points remain in issue:

1. NHCI alleges that DOC erred in calculating a constructed foreign market value by its adoption, as best information available, of information submitted by the Petitioner, MagCorp, that is alleged to be neither reasonably quantified nor valued by the evidence on the record with respect to wage rates or labour costs.

2. NHCI alleges that DOC erred in calculating a constructed foreign market value by its adoption, as Best Information Available, of information submitted by the Petitioner, MagCorp, that is alleged to be neither reasonably quantified nor valued by the evidence on the record with respect to selling, general and administrative costs, including research and development, general corporate costs and administrative costs. MagCorp submits that the redetermination erred in disallowing, in their entirety, the NHCI selling costs for lack of factual support on the record.

3. MagCorp contends that the Redetermination erred in increasing the depreciation allocation period for NHCI from 15 to 17 years. The DOC, in its June 17, 1993 "Reply to Comments Filed on the Redetermination" requested that the Panel ought to remand the case so that DOC might consider the NHCI 1991 Annual Report provided by MagCorp in order to determine whether the NHCI depreciation expense should be based on a 15 or 17 year period.

In its Decision, the Panel will consider each of these points in issue after first considering the "Standard of Review" which is applicable to this appeal.

STANDARD OF REVIEW

Under the FTA, a Binational Panel convened under Article 1904 to review a Final Antidumping or Countervailing Duty Determination of the DOC is required to apply the same standard of review and "general and legal principles" as would the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. See U.S.-Canada Free Trade Agreement, Articles 1904.3, 1911. Under the U.S. law, the courts' (and hence our Panel's) scope of review is limited. The standard of review is not one of de novo review. Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (CIT 1986), aff'd per curiam, 810 F.2d 1137 (Fed. Cir. 1987). Rather, the courts must affirm a determination of the DOC unless the determination is "unsupported by substantial evidence on the record, or otherwise [is] not in accordance with law." 19 U.S.C. §1516a(b) (1) (B); PPG, Industries Inc. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992).

The U.S. Supreme Court recently reaffirmed that under this standard,

> [a] court reviewing an agency's adjudicative action should accept the agency's factual findings if those findings are supported by substantial evidence on the record as a whole... The court should not supplant the agency's findings merely by identifying alternative findings that could be supported by substantial evidence.

Arkansas v. Oklahoma, ___ U.S. ___, 112 S.Ct. 1046, 1060 (1992) (emphasis in original; citation omitted).

Accordingly, our Panel's responsibility is not to weigh the merits of a set of findings proposed by the Respondent against those made by the DOC. To the contrary, this Panel's review is limited to determining whether the DOC's findings themselves are supported by substantial evidence on the administrative record. See, e.g., Pure and Alloy Magnesium From Canada (CVD) USA 92-1904-03 (August 16, 1993) at 6 (and cases cited therein at 6 n.8).

"Substantial evidence" is "more than a mere scintilla," Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), but is "something less than the weight of the evidence," Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). Summarily stated, it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison, supra at 229; accord Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984); Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

In this case, respondent NHCI challenges the Department's determination on the ground that DOC's selection of certain cost data as "best information available" ("BIA") allegedly was not supported by substantial evidence on the record. NHCI's Brief on Redetermination, June 7, 1993 at IV-4. NHCI does not contest that the Department was justified in using BIA. Id. at IV-3. Nor does NHCI dispute as a general proposition that the Department can rely on information provided by the Petitioner as BIA. Id. at IV-4 n.6. Rather the gravamen of NHCI's complaint is that the Department in certain limited instances chose the wrong information as BIA. According to NHCI, the BIA selected by the Department's International Trade Administration ("ITA") was not supported by substantial evidence on the record. This case thus poses the interesting issue of how to apply the substantial evidence standard to a determination that is based upon BIA.

BIA is a rule which the U.S. Congress created to help the Department render antidumping and countervailing duty determinations in instances where a respondent refuses or is unable to produce information or where a respondent significantly impedes an investigation. 19 U.S.C. §1677e(c). In situations where the Department does not "receive a complete, accurate, and timely response to the Secretary's request for factual information," 19 C.F.R. §353.57, the ITA must "use the best information otherwise available." 19 U.S.C. §1677e(c).

BIA may be viewed "as an investigative tool" which the ITA may "wield as an informal club" to induce non-complying respondents to provide the ITA with the data needed to calculate accurate dumping margins. Atlantic Sugar, supra, at 1560. BIA is an also essential device to ensure that complex antidumping investigations are concluded within the statutory time periods. This often is a difficult feat particularly because the ITA does not have subpoena power to force responses from recalcitrant respondents. The Federal Circuit has observed:

> One may...view the rule, in light of the legislative history cited, as a club over the [agency's] head, which Congress has brandished to force that agency to arrive at some determination within the time allotted.

Atlantic Sugar, supra at 1560 (emphasis in original); see also Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1571-1572 (Fed. Cir. 1990).

DOC contends in this case that it was justified in making a "reasonable adverse inference" in selecting as BIA certain data concerning NHCI's costs. Redetermination Pursuant to Remand of May 28, 1993 at 5-6. DOC made its "reasonable adverse inference" by relying upon cost information contained in MagCorp's antidumping duty Petition.

DOC's reliance upon "reasonable adverse information" in its selection of BIA is legally supportable. In Rhone Poulenc v. United States 899 F.2d 1556 (Fed. Cir. 1984), the Federal Circuit Court examined a case where DOC had selected as BIA the highest prior cost margin from an earlier time period when it had an alternative to select lower margin data from a more recent time period. The Court held that a permissable interpretation of the best information statute allowed DOC to presume that the highest prior margin is the best information regarding current margins. The Court stated that the presumption "...reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were no so, the importer, knowing of the rule, would have produced current information showing the margin to be less." Id. (emphasis in original) at 1190. The presumption approved by the Court in Rhone Poulenc provides legal basis for DOC's assertion that it can make a reasonable adverse inference about BIA in the instant case. In both instances, the DOC's choice of data as BIA is only a presumption which can be rebutted by the respondent. Id. Moreover, an adverse inference, like the presumption used in Rhone Poulenc, "...induces importers to comply with agency questionnaires, an important practical consideration since ITA has no subpoena power." Id. at 1191.

BIA may not be the most accurate reflection of the underlying truth of the matter under investigation. BIA is merely a second best alternative to the more accurate information which, in many circumstances, can only be provided by a respondent. See Asociacion Colombiana de Exportadores de Flores v. United States, 704 F. Supp. 1114, 1126 (CIT 1989), rev'd in part upon remand, 717 F. Supp. 834 (CIT 1989), aff'd on other grounds, 901 F.2d 1089 (Fed. Cir. 1990), cert. denied, 111 S.Ct. 136 (1990) (" 'Best information available' is not necessarily accurate information, it is information which becomes usable because a respondent has failed to provide accurate information.")

The common short hand expression "best information available" loses sight of a significant term included in the statute. Congress provided that in making determinations where a respondent is not forthcoming, the ITA must use the best information "otherwise" available. Congress recognized that BIA may not be the best nor the most accurate information. Indeed, BIA only comes into play when the best and most accurate information has not been provided by the respondent.

Due to the fact that the selection of BIA often is, at best, a choice made out of necessity, a determination based upon BIA may not have the same quality of evidentiary support as one based upon a complete record. After all, in most BIA situations, the ITA does not have complete questionnaire responses from a respondent

and the Department may not have performed verification.

In instances where determinations based upon BIA are subjected to review under the substantial evidence standard, the findings should be upheld if there is reasonable evidentiary support in the record for the BIA. The reviewing court or panel must take into account Congress' desire to ensure that ITA can make complex decisions within the statutory timeframes. Nonetheless, a determination cannot be based upon mere assumption or conjecture. The BIA and its resulting findings must have reasonable factual support in the record.

WAGE RATES OR LABOUR COSTS

In its Redetermination, the DOC adhered to the BIA finding on labour costs it made in the Final Affirmative Determination, published July 13, 1993, from which the original appeal to this Panel was taken by NHCI. We affirm DOC on this issue.

In continuing to use the estimated hourly wage Petitioner MagCorp provided in its Petition to calculate NHCI's constructed value, DOC concluded:

> "Because petitioner's estimated hourly wage for magnesium workers falls within the range for different industries in the manufacturing sector, we find it was supported by information in the petition." Redetermination, p.10

NHCI attacks this finding, asserting that DOC has "continued in its Redetermination to ignore the evidence of record which showed they [the wage rates] were unreasonably overstated." NHCI June 7, 1993 brief, at IV-6. NHCI seeks to support this assertion by claiming that DOC inappropriately accepted MagCorp's use of high wage rates in the Canadian "vehicles and motors" sector rather than those in the allegedly more analogous "metalworking" sector or, alternatively, an average manufacturing wage rate which NHCI calculated from information also contained in the Petition.

MagCorp defends its use of $16.45 (U.S.) per hour in the Petition as an "extraordinarily conservative" estimate of NHCI's 1991 labour costs. MagCorp June 7, 1993 brief at 13, 15-16. It points out that the excerpt from the Canadian Business Magazine on which it relied for Canadian wage data*, provided not only average automotive worker hourly compensation in Quebec, where NHCI's Becancour plant is located, but also indicated that wages in the Quebec electrometallurgical industry, of which magnesium is a part, are "higher."

---

* Quebec: the Right Choice for Your Next Automotive Investment, Canadian Business Magazine, October 1989, attached to MagCorp's Revisions filed with DOC on

September 19, 1991.

In his July 8, 1993 argument before the Panel, MagCorp's economist, Dr. Kenneth R. Button, explained this assertion by noting that, while the excerpt only states expressly that Quebec's electrometallurgical industry, among others, "pays high wages," from the excerpt's implicit comparison of these industries' wages to auto wages in Quebec, "the message is clear that the wages in these named industries are higher than those in the auto sector." Transcript of Oral Argument, July 8, 1993 ("Transcript") at p. 115.

Dr. Button, in his submission, also took issue with NHCI's argument that magnesium production falls within the "metalworking" industry rather than the "electrometallurgical" industry. He noted that the dictionary definition of electrometallurgical, "the use of electricity to purify metals or reduce metallic compounds to metals," more properly describes the magnesium production process than does "the shaping of liquid metal into...ingot or slab form" (NHCI, June 28, 1993, Reply Brief, p.10) the NHCI's definition of metalworking. Transcript at p. 116.

MagCorp, in addition to noting that its $16.45 (U.S.) per hour estimate of NHCI's average Quebec wage rate was lower than the $16.61 (U.S.) auto wage rate, supported its assertion that this was an "extraordinarily conservative" estimate by pointing out that the auto rate was given for 1989. The Petition was filed in August, 1991. In 1990 alone, Canadian wage rates rose 7.5%, which would increase the

$16.61 surrogate rate at least to $17.86, had there been an inflation adjustment.

MagCorp June 7, 1993 brief, p.15.

DOC, in support of its Redetermination, notes that it concluded that MagCorp's $16.45(U.S.) estimate of NHCI's average wage rate was reasonable because:

> "Where specific wage information for the industry in question is not reasonably available to petitioner, it was reasonable to use a [sic] hourly labour rate that falls within the range of wage rates for different industries in the manufacturing sector." Response Brief of the Investigating Authority, June 17, 1993, at 11.

DOC states, as it did in its Redetermination, that it "did not attempt to 'fine tune' the BIA." It asserts that only the reasonableness of its methodology was at issue on the remand. It also notes:

> "With respect to the estimate [sic] labor amount, NHCI has not demonstrated that the methodology used in the initiation was plainly inaccurate." Id.

DOC concludes, therefore, that it properly found Petitioner MagCorp's "estimated hourly labor rate for the magnesium industry to be reasonable."

The Panel concurs. As discussed in detail earlier, the application of the "substantial evidence" standard of review in this case is tempered by DOC's legitimate use of BIA. Where, as here, NHCI has chosen not to answer DOC's questionnaire, DOC is entitled, to draw a reasonable adverse inference against NHCI in its selection of BIA.

As has often been stated, to refer to BIA as "best information" is something of a misnomer. The best information as to NHCI's wage rates are the rates themselves, which NHCI has chosen not to supply. Therefore, DOC properly looked to the information provided by MagCorp in the Petition. 19 U.S.C 1677e(b); 19 C.F.R. §353.37(b)(1993). In doing so, DOC assessed whether this information constituted what was "reasonably available to petitioner," and concluded affirmatively. As the above analysis indicates, MagCorp demonstrated that it has drawn reasonable and supportable inferences from published data.

In sum, DOC's BIA finding of NHCI's estimated wage rate is supported by substantial evidence in the record and is otherwise in accordance with law.

SELLING, GENERAL AND ADMINISTRATIVE COSTS (SGA)

DOC followed its regulations concerning BIA (19 C.F.R. §353.37 [1991]), and in the absence of information provided by NHCI, it assigned a value for SGA costs based on information submitted MagCorp.

In its Redetermination on Remand, DOC found that two components of total SGA costs -- namely R&D and corporate G&A -- were correctly calculated and supported by information in the Petition submitted by MagCorp. However, DOC also found that selling expenses were incorrectly calculated due to inadequate evidence, with the result that DOC disallowed the amount previously included for these expenses in total SGA costs. On Redetermination, the change on selling expenses and other issues caused DOC to revise the overall margin of dumping for NHCI to 21%.

There are three issues raised by the parties that bear on total SGA costs, namely R&D, corporate G&A, and selling costs.

On the first issue, NHCI argues that the administrative record does not contain information on which DOC could correctly construct NHCI's research costs. Instead, DOC has estimated these costs based on an article entitled "Large Investments by Norwegian Standards" contained in the Petition. NHCI contends that this article cannot serve as a basis to construct NHCI's R&D costs because it relates to the production of magnesium in Norway, not Canada, and because it describes historic costs over the period 1970-1985, and not current costs. Furthermore, NHCI claims the Petitioner has not complied with DOC's regulations by providing data from its own experience, or that of U.S. industry generally, which could serve as a basis to construct NHCI's research costs.

On the second issue, NHCI argues that the amount used by DOC for corporate G&A is unsupported by evidence on the administrative record. This amount was taken from an expert's affidavit contained in MagCorp's Petition, which estimated corporate G&A based on a range as a percentage of sales, and which claimed that the rate used for NHCI would be similar to U.S. practice. NHCI argues that DOC cannot reasonably draw the inference that the rate used is consistent with the experience of either MagCorp or U.S. industry generally, and it claims that the record does not explain how the range of percentages was calculated or what expense items were included in those figures. Moreover, NHCI argues the affidavit provides evidence that R&D expenses were double-counted by DOC in constructing NHCI's costs.

The further argument of NHCI bearing on the two issues above is that the total constructed SGA costs for NHCI, of which R&D and corporate G&A are components, are beyond the 12 to 15% range that MagCorp has certified as its own SGA expenses, and are also beyond the 11.33% SGA costs of the U.S. magnesium industry that can be calculated from data provided in MagCorp's Petition. NHCI claims the total SGA costs attributed to it by DOC result from the agency's selection of cost data that is unreasonable and not supported by evidence on the record. Finally, pursuant to the argument about total SGA costs, NHCI has claimed in oral argument that under normal DOC practice, interest expenses are part of SGA, but that in the constructed costs for NHCI, DOC has included interest as a separate line item. NHCI argues that if interest expenses are included in total SGA, the latter figure is in the range of double the experience of MagCorp with SGA costs.

On the third issue, MagCorp claims that the basis for its estimate of NHCI's selling expenses was its own experience of selling magnesium for years, together with an expert's affidavit that NHCI has established large sales and marketing departments in locations in North America. MagCorp states that in rejecting its estimate, DOC has in effect assigned a zero selling expense to NHCI. MagCorp argues that it is inappropriate for NHCI -- which did not submit information to DOC on its actual costs -- to escape selling costs entirely in DOC's constructed costs model.

The Panel notes that in the case of antidumping actions initiated by Petition, U.S. law requires DOC to:

> "determine whether the petition alleges the elements necessary for the imposition of a[n] [antidumping] duty...and contains information reasonably available to the petitioner supporting the allegations." 19 U.S.C. §1673a(c)(1).

DOC regulations further require that a Petition:

> "...shall contain the following, to the extent reasonably available to the petitioner: ...(7) All factual evidence (particularly documentary evidence) relevant to the calculation of the United States price of merchandise and the foreign market value of such or similar merchandise...(if unable to furnish information on foreign sales or costs, provide information on production costs in the United States, adjusted to reflect production costs in the home market country of the merchandise)..."

19 C.F.R. §353.12(b).

On the basis of the above statutory law and agency regulation, NHCI is correct in asserting that U.S. antidumping law required MagCorp's Petition to provide reasonably available evidence of NHCI's costs, or the adjusted costs of the U.S. magnesium industry (including MagCorp itself), supporting the allegations of dumping. Reply Brief of NHCI of June 28, 1993 at 4-5.

The Panel further notes that this antidumping action is proceeding on the basis of constructed value of foreign market value (19 C.F.R. §353.50); and, in the absence of information from the respondent, on the basis of BIA (19 C.F.R. §353.37). As observed by DOC (Redetermination Pursuant to Remand of May 28, 1993 at 5-6), these circumstances oblige DOC to balance the statutory requirement that determinations be based on substantial evidence with the requirements of the BIA rule itself, which is intended to induce respondents to provide timely and accurate information. In balancing these requirements, DOC has argued that the BIA rule permits DOC to make reasonable adverse inferences about the costs of NHCI, presumably based upon information in the Petition that was reasonably available to the Petitioner and that supported the allegation of dumping.

In addressing the three issues involving SGA costs before it, the Panel was first concerned to assure that the figure for NHCI's total SGA expenses and the individual components of that figure constituted reasonable adverse inferences. Regarding total SGA costs, Petitioner provided a range of percentages based on its own experience, and DOC settled on a percentage for NHCI's total SGA costs that was slightly above the range.

MagCorp subsequently confirmed at the oral hearing that the DOC figure was consistent with its own recent experience. The Panel finds that DOC has met the requirements of U.S. law. DOC was not required to produce the actual figure for NHCI's SGA expenses, which only the respondent can do, but only to make a reasonable inference based on BIA about those expenses, and it has done so. Furthermore, on the matter of interest costs, the Panel finds that this subject was raised by NHCI almost wholly in rebuttal so that DOC and MagCorp had no opportunity to respond. The Panel consequently declines comment on this matter.

The Panel then examined the components of total SGA costs -- namely, R&D, corporate G&A and selling expenses -- in the context of DOC's constructed value for total SGA costs that appeared reasonable and in line with MagCorp's experience. On R&D, DOC based its constructed cost on an article that included a statement by the general manager of NHCI's magnesium division that NHCI spent NOK $130 million on magnesium research over the years 1970-85. This information was used as a surrogate for NHCI's actual R&D expenses. It is unclear whether this surrogate data constitutes evidence on NHCI's costs or on production costs in the United States. See 19. C.F.R. §353.12(b). However, in the context of this case and the total SGA costs constructed by DOC, it was reasonable for DOC to assume Petitioner's estimate of NHCI's R&D expenses reflected U.S. practices. Conversely, it would be unreasonable to reject available evidence and assume that NHCI had no R&D

expenses.

On corporate G&A, DOC based its constructed costs on an expert's affidavit appended to the Petition. The affidavit stated that corporate G&A as a percentage of sales usually ranges between 1.5% and 3.0%, and that figure of 2.34% was used for NHCI's costs. NHCI objects that the affidavit does not explain how the figures are calculated, nor does it make clear that the figures reflect U.S. experience. The Panel disagrees, and in this case finds the estimate of an expert adequate to constitute evidence without requiring corroborating information on how the figures were calculated. The Panel also concurs with DOC that the estimate of corporate G&A contained in the affidavit was intended to reflect U.S. practice.

On the matter of double counting raised by NHCI, the Panel finds the evidence ambiguous, but notes that the administrative record contains no evidence of double counting, and moreover, that double counting is not apparent in the constructed value assigned to NHCI's total SGA costs.

On selling expenses, DOC rejected Petitioner's estimate on the grounds of inadequate evidence on the record. Furthermore, because the Petitioner did not relate its estimate of NHCI's selling expenses to its own experience, DOC claimed it lacked a reference point by which to judge the estimate. The Panel is disinclined to question DOC's action on this matter, given that Petitioner's evidentiary support for selling expenses was substantially weaker than for other components of SGA costs. While it may appear unusual to assign a zero value for selling expenses, the Panel notes that if Petitioner's estimate of selling expenses were included, the constructed value of NHCI's total SGA expenses would exceed substantially, and perhaps unreasonably, that of MagCorp or the U.S. magnesium industry generally.

In sum, the Panel finds DOC's constructed values with respect to NHCI's total SGA costs, R&D costs, corporate G&A costs, and its rejection of Petitioner's estimate of selling costs, supported by substantial evidence on the record and in accordance with law.

DEPRECIATION PERIOD AND DOC REQUEST FOR A REMAND

In its Redetermination of May 27, 1993, DOC increased the depreciation period for NHCI from 15 to 17 years. MagCorp argues that DOC erred in increasing the depreciation period, and as evidence MagCorp has cited the NCHI 1991 Annual Report which it submitted as part of its April 28, 1992 rebuttal brief. NCHI filed a letter with the DOC shortly after the above-mentioned April 28, 1992 submission objecting to the inclusion of this evidence on the record of this proceeding because it was submitted after the regulatory deadline had passed. Subsequently, DOC, in its "Reply to Comments Filed on the Redetermination" requested that the Panel remand the case so that DOC might consider the NCHI 1991 Annual Report in order to determine whether depreciation expenses for NCHI should be based on a 15 or 17 year period.

The Panel is faced therefore with the substantive issue of deprecation period and the procedural issue of timely submission of information.

The question of timeliness of submissions of factual information in antidumping proceedings is governed by 19 C.F.R., §353.31, which in relevant part provides that:

> "The Secretary will not consider in the final determination of the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit. The Secretary will return such information to the submitter with written notice stating the reason for return of the information."

19 C.F.R. §353.31(a)(3)

It is a well established principle of administrative law that "an administrative agency must follow its own regulations." See e.g. United States v. Nixon, 418 U.S. 683, 694-696, 94 S. Ct. 3090, 3100-02, 41 L. Ed. 2d 1039 (1974). Citizen Watch Co. v. United States, 733 F. Supp. 383 (CIT 1990). While there have been cases where DOC has been allowed to accept untimely information contrary to the Regulations, these exceptions are granted only in "unusual situations." The facts of the instant situation would not suggest that this an "unusual situation" in which it would be reasonable to allow DOC to disregard the clear meaning of its own regulation. We are not dealing here with a situation in which DOC requested an additional submission by MagCorp nor one in which MagCorp is merely correcting minor errors in data it earlier filed.

With respect to the substantive issue, if MagCorp wishes to pursue an argument that the depreciation period ought to be shortened, it can do so during the Annual Review of the dumping determination which is the appropriate time to submit new up-to-date factual information such as the 1991 Annual Report.

Therefore, the Panel affirms the Redetermination as correct with respect to the depreciation period, and denies the DOC request for a Remand to consider the 1991 Annual Report of NHCI.

PANEL CONCLUSIONS AND DECISION

The Panel finds that the DOC BIA determination of NHCI's estimated wage rates or labour costs is supported by substantial evidence in the record and is otherwise in accordance with the law.

The Panel finds that the DOC constructed value calculation regarding NHCI's total SGA cost, R&D costs and corporate G&A costs, and its rejection of MagCorp's estimate of the selling costs, to be supported by substantial evidence on the record, and in accordance with the law.

The Panel denies the DOC Request for a Remand to consider the 1991 Annual Report of NHCI, and rejects MagCorp's submission that the Redetermination erred by increasing the NHCI depreciation period from 15 to 17 years.

In view of the foregoing, this Panel affirms the DOC Redetermination Pursuant to Remand.

SIGNED IN THE ORIGINAL BY:

Michael A. Kelen, Chairman

William P. Alford

Michael H. Greenberg

Kenneth B. Reisenfeld

Gilbert R. Winham

DECISION ISSUED ON OCTOBER 6, 1993