

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

In the Matter of:)
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)

PURE MAGNESIUM FROM CANADA)
)
)
_____)

Secretariat File No:
USA-CDA-00-1904-06

DECISION OF THE PANEL
March 27, 2002

Before: Charles Owen Verrill, Jr.
Michael House
Edward Farrell
Edward C. Chiasson, Q.C.
Donald Brown, Q.C.

Appearances:

Stephen A. Jones,
King & Spalding, on behalf of Magcorp

Hamilton Loeb, Chris Cloutier, A. Jeff Ifrah and Patrick Togni
Paul, Hastings, Janofsky & Walker, on behalf of the Gouvernement du Quebec

Carol Mitchell,
Steptoe & Johnson, on behalf of Norsk Hydro Canada, Inc.

Robert Heilferty,
Office of the Chief Counsel for Import Administration, on behalf of the Investigating
Authority, the United States Department of Commerce.

PANEL DETERMINATION

NAFTA CHAPTER 19 PURE MAGNESIUM FROM CANADA FILE USA-CDA-00-1904-06

I. PROCEDURAL HISTORY OF THIS REVIEW

This Binational NAFTA Panel review considers a challenge to the final results of the full sunset review by the U.S. Department of Commerce ("DOC") of the antidumping orders concerning pure magnesium from Canada. Pure Magnesium From Canada; Final Results of Full Sunset Review, 65 Fed. Reg. 41,436 (July 5, 2000) ("Final Results"). In the Final Results, DOC determined that revocation of the antidumping order likely would lead to continuation or recurrence of dumping at margins of 21 percent ad valorem. On August 4, 2000, the Government of Quebec ("GOQ") filed a request for panel review with regard to the Final Results pursuant to Rule 34 of the North American Free Trade Agreement ("NAFTA") Article 1904 Panel Rules. Neither the respondent in the DOC proceedings, Norsk Hydro Canada, Inc. ("NHCI"), nor any other person joined in the GOQ request for panel review or filed such a request independently.

On August 23, 2000, the petitioner in the DOC proceedings, Magnesium Corporation of America ("Magcorp"), filed a motion pursuant to Rule 61 of the NAFTA Article 1904 Panel Rules to dismiss panel review in this case. A similar

motion was filed by DOC on October 20, 2000. Magcorp and DOC argued that GOQ did not have standing to request review and that since no other interested party had requested review, the review should be dismissed.

On September 5, 2000, GOQ and NHCI jointly filed a complaint pursuant to Rule 39 of NAFTA Article 1904 Panel Rules alleging the following errors of fact or law: first, DOC acted contrary to law in establishing an all others antidumping rate; second, DOC acted contrary to law and without substantial evidence in assuming that future imports from a potential producer would be dumped; third, DOC acted contrary to law in failing to consider factors other than the decline in post 1992 imports in evaluating the likelihood of future dumping; fourth, DOC lacked substantial evidence in ignoring the changes in the U.S. market.

The GOQ and NHCI contended in their complaint that they are “interested parties” within the meaning of Sections 516A(f)(3) and 771(9)(B) of the Tariff Act of 1930 (“the Act”), 19 U.S.C. §§ 1516a(f)(3), 1677(9)(B), and were parties to the proceeding. Accordingly, GOQ and NHCI contended that they have standing to commence this proceeding pursuant to NAFTA Article 1904.5.

Magcorp and DOC initially filed briefs limited to the standing issue and GOQ filed a responsive brief. In addition, all parties again argued the standing issue in their principal briefs as well as addressing the merit of the claims made by GOQ in its complaint. The Panel did not act on the motions to dismiss as a

preliminary matter, choosing instead to hear oral argument on the jurisdiction and all other issues at the same time. A hearing was held on December 3, 2001, at which time the Panel heard arguments on all the pending issues.

II. **THE PROCEEDINGS AT DOC**

In 1992, DOC initiated an investigation pursuant to a petition filed by Magcorp to determine whether pure magnesium from Canada was being sold in the United States at less than fair value. NHCI, the principal Canadian pure magnesium producer, responded to DOC's preliminary questionnaires, but did not provide required data on U.S. sales, home market sales, and cost of production. Lacking this information, DOC based the margin of dumping on "best information available." Pure and Alloy Magnesium From Canada: Final Affirmative Determination, 57 Fed. Reg. 30,939, 30,941 (July 13, 1992). After the International Trade Commission ("ITC") made an affirmative injury determination, DOC issued an antidumping order on August 31, 1992, requiring a cash deposit on imports of pure magnesium of 31.33 percent. Antidumping Duty Order: Pure Magnesium From Canada, 57 Fed. Reg. 39,390 (Aug. 31, 1992). Pursuant to a remand ordered by a binational panel, the margin was adjusted to 21 percent. See Pure Magnesium From Canada: Amendment of Final Determination of Sales at Less Than Fair Value and Order In Accordance With Decision and Remand, 58 Fed. Reg. 62,643 (Nov. 29, 1993).

After the dumping order was issued, NHCI made no sales to the United States during the periods covered by the first and second administrative reviews. During subsequent review periods, DOC found no dumping by NHCI, but refused to revoke the order because the sales examined were not made in commercial quantities. See, e.g., Pure Magnesium From Canada; Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part, 64 Fed. Reg. 50,489 (Sept. 17, 1999).

The sunset review of the antidumping duty order on pure magnesium from Canada was initiated on August 2, 1999. Initiation of Five-Year ("Sunset") Reviews, 64 Fed. Reg. 41,915 (Aug. 2, 1999). On August 4, 1999, GOQ entered an appearance as an interested party and filed a request for an administrative protective order which was approved. GOQ did not participate further in the review although it did receive confidential submissions by Magcorp and NHCI pursuant to the protective order. NHCI and Magcorp also entered appearances; both companies submitted substantive responses, factual information, and arguments during the DOC proceedings.

Preliminary results of the sunset review were published on February 29, 2000. Pure Magnesium from Canada; Preliminary Results of Full Sunset Review, 65 Fed. Reg. 10,768 (Feb. 29, 2000). During the subsequent proceedings at DOC, briefs were filed by NHCI and Magcorp, but not by GOQ. The Final Results of the

review were published on July 5, 2000. Final Results, 65 Fed. Reg. at 41,436. In that determination, DOC concluded that revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping at a margin of 21 percent. Id.

III. **PANEL JURISDICTION AND THE STANDARD OF REVIEW**

This Panel's authority derives from Chapter 19 of NAFTA. Article 1904.1 provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Pursuant to Article 1911, final results of sunset reviews of antidumping duty orders are "determinations" that are reviewable pursuant to Article 1904. In the conduct of this review, which involves a challenge to a DOC decision, Article 1904.2 requires the Panel to apply the law of the United States.¹ This includes the U.S. statutes, relevant legislative history, regulations and judicial precedents "to the extent that a court . . . would rely on such materials in reviewing a final determination of the competent investigating authority." In addition, Article 1904.3 requires the Panel

¹ Article 1904.2 states that panels are to apply the applicable statutes, precedents, regulations and other authorities that a court of the "importing Party" would rely on in review of a determination.

to apply the "general legal principles" and "the standard of review that a court" would otherwise apply.²

If this appeal were not before this Panel, it would be before the Court of International Trade ("CIT"); this Panel stands in the same position that the CIT would occupy but for Article 1904. The Panel must apply the substantive and procedural laws of the United States in the same manner that the CIT would apply them. The Panel is required to apply the standard of review specified in Section 516A(b)(1)(B) of the Tariff Act of 1930 which states that "{t}he 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." Under this standard, the Panel does not engage in de novo review and must restrict its review to the administrative record developed in the proceedings under review.

In reviewing DOC interpretations of the governing statute, the Panel follows the two-stage approach adopted by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) ("Chevron"). First, if the intent of Congress is unambiguous, the judiciary (i.e., the Panel) is the final authority to determine whether an administrative interpretation is consistent with clear congressional intent. However, if the statute were silent or ambiguous, the

² See also Article 1911 which prescribes the standard of review set forth in Section 516A(b)(1)(B) of the Tariff Act of 1930 when the importing Party is the United States. See Section 516A(b)(1)(B) of the Tariff Act of 1930, codified at 19 U.S.C. § 1516a(b)(1)(B) (2001).

"question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 842-43. The Panel simply evaluates whether the Department's statutory interpretations are "sufficiently reasonable." American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986) citing Chevron, 467 U.S. at 843. In this regard, the "agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding." Id. As long as the agency interpretation is reasonable, that is sufficient under the Chevron rule, and the interpretation must be upheld.

The Panel has considered the decision in United States v. Mead Corp., 533 U.S. 218 (2001) ("Mead"), where the Supreme Court held that certain administrative decisions of the Customs Service are not entitled to Chevron deference. In Mead, the Court adopted a lower deference standard where, inter alia, an administrative determination is not subject to deferential judicial review. (For example, where there is de novo judicial review of the agency decision, the review by the court is not deemed to be deferential.) This is not the case with respect to antidumping determinations where review is on the record, not de novo. See Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1382 (Fed. Cir. 2001), where the Court of Appeals for the Federal Circuit ("CAFC") concluded that antidumping determinations meet the Mead test for Chevron

deference and held “that statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under Chevron.” The Panel finds that this precedent is binding and accordingly will follow the Chevron deference rule as to statutory interpretations by DOC in the Final Results.

With respect to factual determinations, the Panel examines whether DOC has relied on such relevant evidence as a reasonable mind would consider to support the conclusion. Zenith Elecs. Corp. v. United States, 77 F.3d 426, 430 (Fed. Cir. 1996), reh’g denied Apr. 11, 1996. It “is not the ambit of the Court to choose the view which it would have chosen in a trial de novo as long as the agency’s decision is supported by substantial evidence.” Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-06, at 12-13 (Sept. 28, 1990), citing Hercules, Inc. v. United States, 673 F. Supp. 454, 479 (Ct. Int’l Trade 1987).

IV. **GOQ’S STANDING TO REQUEST REVIEW**

Magcorp and DOC contend that GOQ did not have standing to request this panel review because GOQ did not participate in the proceedings at DOC after filing a notice of appearance and application for administrative protective order. They point out that Section 516A(g)(8)(A)(i) of the Act provides that

An interested party who was a party to the proceeding in which a determination is made may request binational panel review of such determination by filing a request with the United States Secretary by no later than the date

that is 30 days after the date . . . that is applicable to such determination.

19 U.S.C. § 1516a(g)(8)(A)(i) (2001).

DOC and Magcorp concede that GOQ is an “interested party,” but contend that it was not a “party to the proceeding” and has no standing to seek panel review. To be a “party to the proceeding” it is necessary, they argue, to participate in the administrative proceeding by submitting factual and legal arguments to the administering authority. They contend that the mere filing of a notice of appearance and request for administrative protective order does not constitute such participation.

In response, GOQ argues that the filing of the notice of appearance and request for administrative protective order were sufficient to make it a party to the proceeding. It further argues that it appeared and made factual and legal submissions in the related ITC proceeding and that the DOC and ITC sunset proceedings constitute a single proceeding. Since GOQ participated as a party in the ITC proceeding, it argues that is sufficient to make it a party to the sunset review proceeding. In support of this contention, GOQ refers to statutory language that describes a sunset review as a single process that includes both DOC and ITC proceedings.

The Panel disagrees with the “one proceeding” argument. It is correct that a sunset review is a proceeding, but there are two distinct determinations that are necessary to the continuation of an antidumping or countervailing duty order: the determination by DOC on the likelihood of continuation or recurrence of dumping or the subsidy and the ITC determination of injury. These separate determinations are appealable pursuant to Section 516A of the Tariff Act. Indeed, GOQ itself recognized this when it filed separate requests for Panel review within 30 days of the DOC decision on July 5, 2000, and of the ITC determination on July 27, 2000. The Panel notes that these determinations have different filing deadlines and that meeting them is essential to jurisdiction. Thus, a request filed 30 days after the ITC determination date would not be timely with respect to the DOC determination, which always precedes the ITC action.

Since Section 516A of the Tariff Act refers to the “proceeding in which a determination is made,” we conclude that, in a sunset review, there are two proceedings in which a determination is made: the DOC proceeding concerning the likelihood of continuation or recurrence of dumping, and the ITC proceeding concerning injury. Both proceedings lead to final determinations, which are separately reviewable by the CIT or, where NAFTA Chapter 19 is applicable, by a binational panel. Because they are separate, GOQ’s participation in the ITC proceeding does not constitute participation in the DOC proceeding. They are

separate parts of the review and determinations in each are independently reviewable.³

A more difficult issue is whether the mere filing of a notice of appearance and request for administrative protective order were sufficient to make GOQ a party to the proceeding. DOC and Magcorp argue that while the U.S. statute does not define “party to the proceeding,” the CAFC in JCM, Ltd. v. United States, 210 F.3d 1357 (Fed. Cir. 2000) (“JCM”), defined “party to the proceeding” by reference to the DOC regulations which state that “a party to the proceeding” is “any interested party . . . which actually participates through written submissions of factual information or written argument, in a particular decision by the Secretary subject to judicial review.” Id. at 1360.

By itself, of course, the DOC regulation is not determinative of standing in this or any other panel review. It could not be because the authority whose decision is subject to review cannot limit the scope of that review or who may seek it, by adopting regulations.⁴ Indeed, DOC quite correctly noted in the preamble to a rulemaking that standing before bodies that undertake judicial review is a matter

³ The Panel notes that an interested party could seek review of the ITC determination but not the DOC determination and vice versa.

⁴ Comments of the CIT in Zenith Radio Corp. v. United States, 5 C.I.T. 155 (1983) (“Zenith”), are instructive: “The decision of the administrative agency to accept the participation of {an entity} . . . cannot control the Court’s understanding of a matter primarily related to the invocation of its powers of judicial review. The agencies {sic}receptiveness to participation by various parties does not generate standing for judicial review.” Id. at 156.

for their enabling legislation, although in interpreting that law, assistance might be obtained by the regime established by DOC in conducting its proceedings. It stated:

As to the arguments that the Department is attempting to limit a party's right to appeal to the court, we believe the comments prove too much. It is the province of Congress to regulate trade, but [that] does not argue that the Department has no authority to interpret statutory enactments on trade matters through its regulations. Section 516A(d) of the Act limits standing before the Court to "{a}ny interested party who was a party to the proceeding under section 303 of this Act * * * or title VII of this Act * * *." Those proceedings are administrative processes carried out before the Department and subject to its rules. We believe the Court will benefit from the agency's expertise as to the minimum participation in the administrative process that will make possible the party's exhaustion of its administrative remedies . . . The Court may disagree in the circumstances of a particular case that adherence to the regulatory requirements was consistent with Congressional intent, but that does not argue for ignoring our obligation to ensure, to the extent possible, the orderly, efficient, and equitable implementation of the law.

Antidumping Duties, 54 Fed. Reg. 12,742, 12,744 (Mar. 28, 1989).

DOC, in other words, is obligated to adopt procedural rules that ensure orderly implementation of the law, but it is up to the courts to determine the extent to which, in interpreting jurisdictional statutes, the DOC expertise in developing procedural rules will be adopted as guidance by the courts.

The Panel must determine whether the reference to the DOC regulation defining “party to the proceeding” in the JCM decision is a definitive statement by the CAFC concerning the meaning of that term that we are bound to follow.⁵ That is, did that decision adopt the DOC definition of “party to the proceeding” for purposes of its proceedings as the definition that is controlling for purposes of Section 516A? To resolve this issue, the Panel has carefully analyzed the JCM decision and its provenance.

In the underlying proceeding, JCM brought an action in the CIT to recover antidumping duties it had paid on the basis that the government had terminated a provisional measure. The defendant, United States, asserted that JCM could not seek that relief because JCM had not been a party to the proceeding that considered the measure and had not pursued available administrative remedies to set aside the measure. JCM responded that it could not have pursued the administrative remedies because DOC limited the number of respondents in the relevant proceeding for administrative convenience. Since JCM was not one of the respondents selected for review by DOC, it “could not have obtained the requisite standing under 19 U.S.C. § 1516a.” JCM Ltd. v. United States, No. 98-05-02248, slip op. 99-21 at 6 (Ct. Int’l Trade Mar. 1, 1999). JCM did not file an appearance or participate in the DOC proceeding.

⁵ Decisions by the CAFC are binding on the Panel because it is the reviewing court for the CIT.

The CIT articulated the issue it had to resolve as “whether Plaintiff would have been able to obtain standing, as that term is defined in 19 U.S.C. § 1516a(d) if it had pursued the available administrative remedies.” Id. at 5. The Court went on to recite the statutory requirement that to have standing a plaintiff “must be an ‘interested party’ and a ‘party to the proceeding.’” Id. It was conceded that plaintiff JCM was an interested party, so the sole question was whether it was a party to the proceeding.

The CIT first noted that because JCM was an interested party it was not precluded from participation in the proceeding. Id. at 6-7. To the contrary, the DOC regulations specifically permit such participation. The court noted that JCM “could have participated by submitting case briefs, rebuttals and comments.” Id. at 7. Had it done so “{t}his would have afforded the Plaintiff the right to judicial review.” Id. at 8. That, of course, is evident. The CIT did not rule on the issue whether the filing of an appearance by itself would have entitled JCM to judicial review. That question was not presented to the CIT because JCM did not file an appearance.

At the CAFC, the focus was again on whether JCM was precluded from participating in the DOC proceedings. The Court noted:

As the trial court correctly noted, where the Secretary of Commerce, through the ITA, exercises his statutory authority under Section 777(c) of the Tariff Act of 1930 (codified at 19 U.S.C. section 1677f-1(c)(2)(B) (1994)),

and limits the number of respondents in an antidumping investigation, he does not preclude an interested party, not chosen as a respondent, from participating through written submissions to the ITA.

JCM, 210 F.3d at 1360. JCM, however, did not participate at all, either by filing an appearance, a request for administrative protective order, or by submitting written submissions. The CAFC did not reach the issue of whether the filing of an appearance is sufficient for standing, or whether the DOC regulation constitutes the exclusive means by which to define “party to proceeding” for purposes of Section 516A of the Tariff Act.

While the statements in the CIT and CAFC opinions appear to link the DOC regulation with the actions necessary to obtain standing before a reviewing tribunal, they go no further than to suggest that, having met the standing requirement of the agency in the circumstances of JCM, a party would have standing before the reviewing court. The Panel is not, however, persuaded that those opinions necessarily adopt the DOC regulation as the exclusive definition of “party to the proceeding” for purposes of Section 516A, since neither the CIT nor the CAFC considered whether filing a notice of appearance alone would have been sufficient to confer standing.

The Panel’s analysis of the JCM decision is not inconsistent with the CIT decision in Encon Industries, Inc. v. United States, 18 C.I.T. 867 (1994) (“Encon”), which was relied upon by DOC at oral argument. In Encon, the issue was whether

the plaintiff had met the statutory requirement for standing by demonstrating that it had been a party to the DOC proceeding under review. As here, the plaintiff filed an appearance, but did not otherwise participate in the DOC proceeding. In considering whether this was sufficient to confer standing, the court referred to authority that held that providing notice of an appearance was sufficient to be a party to the proceeding⁶ and also to authority to the contrary.⁷ The court then stated that it was “inclined to view the participation requirement as intending meaningful participation, that is, action which would put Commerce on notice of a party’s concerns.” Id. at 867.

As a statement of policy, the CIT’s comment in Encon is instructive concerning the rationale for a standing requirement. It does not assist the Panel in deciding what is required at a minimum to have standing as a matter of jurisdiction under Section 516A of the Tariff Act. In Encon, the court observed that it “need not reach {a conclusion on whether filing an appearance suffices} in this case. Perhaps the issue would rarely need to be reached, because there is also the

⁶ The Zenith case was decided before the Commerce definition under review in this case; standing was granted to an entity on the basis of its counsel stating that he appeared for the entity. Zenith, 5 C.I.T. at 157.

⁷ American Grape Growers vs. United States, 604 F. Supp. 1245 (Ct. Int’l Trade 1985). This case also was decided before the Commerce regulation under discussion in the panel review was enacted and the lack of standing appears to be based more on a lack of interested party status than on participation. Although the court refused standing its comments on participation are instructive: “...the law is satisfied that by any form of notification or participation which reasonably conveys the separate status of a party. The participation requirement is obviously intended only to bar action by someone who did not take the opportunity to further its interests on the administrative level.” Id. at 1249.

statutory requirement that parties exhaust administrative remedies, where appropriate.” Encon, 18 C.I.T. at 868. This observation is important, since the court refused to take jurisdiction “because of failure to exhaust administrative remedies, whether or not Encon has technically satisfied the statutory standing requirements.” Id.

In sum, the courts have not definitively adopted the DOC regulation as the controlling definition of “party to the proceeding” for purposes of Section 516A. Indeed, as noted in Encon, there are conflicting authorities on whether the entry of an appearance by itself is sufficient to become a party to the proceeding. In resolving this issue, the Panel believes that depriving an interested party of standing to seek judicial review is a serious matter. A binational panel must be reluctant to deprive an interested party of standing to initiate and maintain a review when it has appeared in a proceeding.

In this case, it is agreed that GOQ is an interested party. The GOQ filed an appearance, which entitled it to receive all filings submitted by the parties. It also took the necessary steps to obtain access to business confidential information and received such information. Further, at the hearing, DOC counsel conceded that if GOQ had filed a document stating that it agrees with the submissions of another party, GOQ would have been a “party to the proceeding” with standing to request a panel review. The absence of such a statement is said to be fatal. The Panel

cannot agree that basing jurisdiction on this distinction is consistent with a reasonable interpretation of the “party to the proceeding” provision of Section 516A of the Tariff Act. The Panel concludes that where a party has filed a notice of appearance and taken steps to obtain confidential information, it has become a party to the proceeding for purposes of Section 516A.

We do not see any prejudice to DOC from the Panel’s conclusion. If an interested party were to file a notice of appearance and then fail to participate in the proceedings, it runs the risk that the reviewing court would refuse to consider any issues not presented to the agency pursuant to the exhaustion doctrine. Indeed, this result is required by 28 U.S.C. § 2637(d), discussed infra. This was, in fact, the holding in Encon where the appeal was dismissed on exhaustion – not jurisdictional – grounds. In this proceeding, the Panel has declined to consider two issues raised by GOQ for precisely this reason. See Parts V.C., V.E., infra.

Therefore, the Panel concludes that the JCM decision does not require that “party to the proceeding” be defined by reference to the DOC regulations. Further, the Panel concludes that the filing of an appearance and taking steps to obtain confidential information is sufficient to confer party to the proceeding status and that GOQ has standing in this review.

v. ISSUES RAISED BY GOQ

As noted above, GOQ raised four issues in the joint complaint that was filed with NHCI. These issues were somewhat modified during the briefing and in counsel's presentation at the hearing. The Panel will rule on the issues as modified.

A. The Claim That Commerce Inverted the Statutory Standard in finding a likelihood of Renewed Dumping if the Order Expires

GOQ argues that the sunset provisions create a presumption that antidumping orders "would terminate at the five-year mark" absent a clear showing that absent the discipline of orders the dumping would continue to distort trade. In support of this contention, GOQ cites Article 11 of the WTO Antidumping Agreement ("AD Agreement"), which provides that

any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition . . . , unless the authorities determine, in a review initiated before that date . . . that the expiry of the duty would be likely to lead to continuation or recurrence of dumping or injury.

Congress implemented this requirement in the Uruguay Round Agreements Act ("URAA") by adopting new sections 751(c)-(d) and 752(b) to the Tariff Act of 1930. Section 751(c)(1)(C) requires DOC and ITC to commence a review to determine whether "sunsetting" an AD order after five years "would be likely to lead to continuation or recurrence of . . . dumping . . . and material injury." 19

U.S.C. § 1675(c)(1) (2001). In addition, Section 751(d) provides that DOC shall revoke an antidumping duty order unless it finds in a sunset review that dumping would be likely to “continue or recur.” 19 U.S.C. § 1675(d)(2)(A) (2001).

GOQ claims that DOC has been "faithless" to both the statute and the WTO requirement by inverting the governing standard explicit in the words of Sections 751 and 752. In support of this claim, GOQ cites the DOC regulations, 19 C.F.R. § 351.222(i)(ii), which state that DOC will revoke an order where the "Secretary determines that revocation or termination is not likely to lead to continuation or recurrence . . . of dumping." Based on this regulatory provision, GOQ argues that there has been an inversion of the statutory and WTO presumption that orders should terminate after five years unless there is a finding concerning the likelihood of continuation or recurrence of dumping.

The Panel concludes that DOC has not "inverted" the statutory standard for revocation of antidumping duty orders. Section 751(c) of the statute plainly requires a "likely" test. So does 19 C.F.R. § 351.218(b) (2001) of the DOC regulations, which spells out the criteria for a sunset determination. Further, the DOC's Policies Regarding the Conduct of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 Fed. Reg. 18,871 (Apr. 16, 1998) ("Sunset Policy Bulletin") repeatedly refers to the "likely" test. For example the Bulletin states, "The URAA assigns to the Department of

Commerce . . . the responsibility of determining whether revocation of an antidumping or countervailing duty order . . . would be likely to lead to a continuation or recurrence of dumping or a countervailable subsidy.” Sunset Policy Bulletin, 63 Fed. Reg. at 18,872. Similar language stating the “likely to lead to lead to continuation or recurrence” standard appears throughout the Sunset Policy Bulletin.

The only place where the "not likely" language appears is in 19 C.F.R. § 351.222(i), which provides that DOC “will revoke an order” where the Secretary determines that “revocation or termination is not likely to lead to continuation or recurrence.” That regulation has an obvious procedural purpose that does not require a "not likely" test during the substantive proceedings in a sunset review. In the opinion of the Panel, the "not likely" reference in this section does not represent an "inversion" of the statutory and URAA "likely" standard.

Our analysis begins with 19 C.F.R. § 351.218 (2001) (“Sunset Reviews under Section 751(c) of the Act”), which contains “rules regarding the procedures for sunset reviews.” Section 351.218(b) states that the Secretary will conduct a review to determine whether revocation of an antidumping or countervailing duty order “would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy.” The regulations go on to state that if the determinations by the Secretary (and the International Trade Commission) were affirmative, the

order would remain in place. 19 C.F.R. § 351.218(a) (2001). If either determination were negative, the order would be revoked. Id. There is no indication in these regulatory provisions of an inverted standard.

The regulation cited by GOQ appears later in a section that deals with the procedures that apply where the Secretary has not made an affirmative finding under 19 C.F.R. § 351.218(a). Specifically, Section 351.222(i) provides that if DOC, after an investigation, concludes that the continuance or recurrence of the dumping is not likely based on application of the Section 351.218 standard (“likely to lead”), it will revoke the order. Given the placement of this language in a section devoted to procedures, the Panel does not believe that it represents an inversion of the appropriate statutory standard which is clearly articulated in 19 C.F.R. § 351.218.

In this case, DOC specifically found that continuance or recurrence of the dumping was likely. See Final Results, 65 Fed. Reg. at 41,436 (“As a result of this review, the Department finds that revocation of the antidumping duty order would likely lead to continuance or recurrence of dumping”). DOC’s decision memorandum concluded that “dumping . . . will continue or recur if the order were revoked.” See Memorandum from Jeffrey A. May to Troy H. Cribb re: Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada, Final Results, at Interested Party Cmt. 1 (July 5, 2000) (“Final Results Decision

Memorandum”). These findings indicate that DOC performed the analysis in accordance with the "likely" standard mandated by the AD Agreement, the Statute, the DOC regulations, and the Sunset Policy Bulletin.

There is no evidence in this record that DOC utilized an "inverted" standard in concluding that there was a likelihood of continuance or recurrence of the dumping. The regulation provision cited by GOQ is not referred to in the Final Results or the accompanying Final Results Decision Memorandum. This is not unexpected since 19 C.F.R. § 351.222(i) only applies when the Secretary has determined that revocation is not likely to lead to continuation or recurrence of the dumping. Only in that event, after a substantive determination by the Secretary that continuation or recurrence is not likely, would 19 C.F.R. § 351.222(i) be applicable. Since the Secretary here found that continuation or recurrence of the dumping is likely, there was no reason for DOC to refer to 19 C.F.R. § 351.222(i), since that section is only implicated when DOC has already concluded that continuance or recurrence of the dumping is not likely. Therefore, DOC's decision cannot be characterized as an "inversion" of the statutory standard.

B. The Claim that Commerce Failed to Consider “Dramatic” Shifts in the U.S. Magnesium Market that Explain the Decline in Shipments of Magnesium Subject to the Order

In finding that dumping was likely to continue or recur, DOC first noted that imports of pure magnesium from Canada dropped significantly after the original order. Because of this decline in imports, DOC concluded that the zero margin in the four most recently completed administrative reviews was not indicative of what would occur in the absence of a dumping order. Instead, relying on the SAA and the Sunset Policy Bulletin,⁸ DOC concluded that the decline in imports after the order indicated that it was likely that dumping would continue or recur if the order were revoked. See Final Results Decision Memorandum, at Interested Party Cmt. 1.

GOQ contends that NHCI presented evidence in the review proceedings concerning market and business developments that shows a significant change in the circumstances from those present when the antidumping order was first issued, and that these market factors accounted for the absence of greater volumes of pure magnesium exports by NHCI. These factors included a change in the demand in the U.S. market, a change in NHCI’s product and customer mix, and increased

⁸ SAA refers to the Statement of Administrative Action found in Message from the President of the United States to Congress concerning the Uruguay Round Trade Agreements. See H.R. Doc No. 103-316 (1994). The SAA was approved by Congress in Section 101(a)(2) of the URAA.

demand for NHCI magnesium that was not subject to the order because of the closure of a U.S. facility producing that product. According to GOQ, DOC was required to consider these developments in evaluating whether dumping is likely to continue or recur, because 19 U.S.C. § 1675 a(c)(2) states that the Department “shall consider” such “other price, cost, market, or economic factors” when “good cause” is shown.

DOC refused to consider this evidence, concluding that it was not necessary “to consider other factors” and that it would “not consider good cause arguments in this case.” See Memorandum from Jeffrey A. May to Robert S. LaRussa re: Issues and Decision Memo for the Sunset Review of Pure Magnesium from Canada, Preliminary Results, at 11 (Feb. 29, 2000) (“Preliminary Results Decision Memorandum”). In the Final Results, DOC acknowledged that it will consider other factors than import volume under Section 752(c)(2) where “good cause” is demonstrated. But, DOC concluded, good cause to consider such factors had not been shown:

While the apparent focus of NHCI’s business may have been modified since the order was issued, we are not persuaded that this change, rather than the issuance of the order accounts for the drastic reduction in exports to the United States since the period prior to the order. The information presented by NHCI therefore, does not provide good cause for taking additional factors into account in making our determination.

Final Results Decision Memorandum, at Interested Party Cmt. 3.

In its brief before this Panel, DOC contends that although dumping was eliminated by NHCI, export volumes declined significantly after imposition of the order. According to DOC, this decline indicated that NHCI was able to eliminate dumping only by dramatically reducing exports to the United States. Brief of DOC at 37 (July 19, 2001) (“DOC Brief”). DOC then argues that it was this dramatic drop-off in import volumes that caused DOC to conclude that it was unnecessary to entertain the good cause arguments advanced by NHCI. *Id.* (citing Preliminary Results Decision Memorandum at 11). According to DOC, “it was most likely the issuance of the antidumping duty order that accounted for the drastic reduction in exports to the United States.” DOC Brief at 39. DOC argues that it was not improper for the agency to rely on the data showing declines in imports volumes “rather than” other factors proposed by NHCI. *Id.*⁹

The Panel does not accept DOC’s explanation for its refusal to consider other factors that may have been responsible for the decline in imports. We note that the Sunset Policy Bulletin states that the DOC “normally” will determine that revocation of an antidumping order will lead to continuation or recurrence of

⁹ DOC also argues that it need consider only those factors that “it deems relevant,” citing 19 U.S.C. § 1675a(c)(2). DOC Brief at 39. The Panel notes, however, that DOC in this case determined that “good cause” to consider other factors – the threshold finding under the statutory scheme – had not been shown. Having refused even to undertake consideration of other factors, DOC here had no occasion to analyze whether any particular factors were to be deemed “relevant” to the overall inquiry. Indeed, DOC below made no such findings of “relevancy” as to particular other factors; this was consistent with its decision that there was not good cause even to consider such other factors.

dumping where “dumping was eliminated after the issuance of the order . . . and import volumes for the subject merchandise declined significantly.” See Sunset Policy Bulletin, 63 Fed. Reg. at 18,872. The use of the word “normally” obviously indicates that there will be instances where these factors will not be conclusive.

The SAA, while noting that the cessation of imports after an order is “highly probative” of the likelihood that dumping would recur, goes on to state that the purpose of the good cause/other factors provision is to “permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping margins.” SAA at 890. This is precisely what NHCI tried to do. DOC’s refusal to consider such information proffered by NHCI solely because of declining import volumes is clearly inconsistent with the “good cause” provision as interpreted by the SAA.

The Panel concludes that DOC’s determination in the Final Results amounts to an un rebuttable presumption that declining or zero margins and significant declines in imports are sufficient – without more – to support a finding of likelihood of continuation or recurrence of dumping. This is evident from the DOC’s refusal to find “good cause” precisely because of the presence of those two factors. This presumption is inconsistent with the word “normally” in the Sunset Policy Bulletin because the use of this word obviously means there will be cases

where the normal rule will not be applied. The Panel concludes that DOC acted contrary to law when it refused to find that “good cause” exists based solely on declining imports. The DOC position amounts to an unauthorized conclusive presumption that is inconsistent with the statute and the Department’s Sunset Policy Bulletin.¹⁰

C. **The Claim that DOC Erred in Reporting the Investigation Rate to the ITC**

GOQ argued that DOC erred in reporting to the ITC a dumping margin rate of 21 percent for NHCI, rather than the zero percent dumping margins determined in the four most recent administrative reviews under the pure magnesium dumping order. According to GOQ, these reviews demonstrate that a zero percent margin is the rate most likely to prevail in the post-review period and that DOC was wrong to ignore these results solely because there was a decline in exports after the original order. See Brief of GOQ at 31-34 (Apr. 20, 2001).

In the decision memorandum, DOC rejected the use of the recently determined zero rates based on the finding that NHCI’s exports of pure magnesium from Canada “have consistently remained at less than 10 percent of their pre-order

¹⁰ Although DOC argues that the data relied upon by NHCI as to other factors was removed from the record below, DOC Brief at 38, GOQ cites information remaining in the record that it believes supports consideration of the other factors urged by NHCI. Reply Brief of GOQ at 12-13 (Aug. 3, 2001). On remand, DOC is to consider all information that is properly in the record in making its redetermination as to this issue.

levels” and concluded that this fact indicates that “NHCI cannot sell at pre-order levels without dumping.” Final Results Decision Memorandum, at Interested Party Cmt. 3. Doc did not respond to the NHCI argument that the decline in imports reflected a change in product mix and marketing strategy. Instead, DOC relied on the SAA which states that DOC “normally” will select the rate from the investigation, “because that is the only calculated rate that reflect the behavior of exporters without the discipline of an order.” Id. The Panel does not find this explanation adequate.

The SAA does refer to instances where dumping margins have declined and imports remain steady or increase as an example of a situation where DOC “may” justify selection of a rate from a more recent review. SAA at 890-91. However, we do not read this example as creating an absolute mandate for the investigation rate when margins and import volumes have declined even if a convincing explanation (other than inability to sell without dumping) is offered for that decline in import volumes. Such a presumption would not be consistent with the SAA statement that “in certain instances, a more recently calculated rate may be more appropriate.” Id. Accordingly, the Panel remands the issue to DOC for consideration whether the market and product changes advanced by NHIC are sufficient to overcome the “normal” preference for the investigation rate.

D. The Claim that Commerce Acted Contrary to Law in Reporting an All Others Rate to the ITC

GOQ challenged DOC's decision to report an "all others rate" of 21 percent to the ITC as being contrary to law. In the proceeding under review, GOQ did not make submissions on this issue to DOC and NHCI did not address this issue in its submissions to DOC. As a result, before the Panel, the position of DOC and Magcorp was that the Panel should dismiss the claim because of the exhaustion doctrine.

The doctrine of exhaustion of administrative remedies requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the court. As was stated in Unemployment Compensation Commission of Alaska v. Aragon, 329 U.S. 143, 155 (1946), "A reviewing court usurps the agency's function when it sets aside the administrative determination on a ground not theretofore presented and deprives the {agency} of an opportunity to consider the matter, make its ruling, and state the reasons for its action." There is no absolute requirement of exhaustion in the CIT. See Alhambra Foundry Co. v. United States, 685 F. Supp 1252, 1255-56 (Ct. Int'l Trade 1988).

There was no disagreement between the parties to this review proceeding that the doctrine of exhaustion is applicable. Indeed, there could not be because 28 U.S.C. § 2637(d) directs the CIT to "where appropriate, require the exhaustion of

administrative remedies.” Counsel for GOQ submits that although NHCI had not raised or dealt with the “all others rate” in the sunset review conducted by DOC, dismissal would not be appropriate because this issue involves a “pure legal question” and as such, came within an exception to the exhaustion doctrine. The requirements, for the “pure question of law” exception include: the argument must be of a purely legal nature, the inquiry requires no further fact finding by the agency, and the inquiry does not cause undue delay. Rhone Poulenc, S.A. v. United States, 583 F. Supp. 607 (Ct. Int’l Trade 1984).

The question of an “all others rate” would seem to be a question of the application of the law to the facts and not a pure question of law. Here, the DOC relied on the Sunset Policy Bulletin which authorizes an all other rate “for companies not specifically investigated or for companies that did not begin shipping until after the order was issued.” Sunset Policy Bulletin, 63 Fed. Reg. at 18,873. Based on this authority, DOC concluded on the basis of the record that an all others rate was justified. GOQ did not challenge the Sunset Policy Bulletin per se, but rather the fact that DOC had no basis on this record for the all others rate selected. There is not a pure question of law at issue.

In addition, the Panel does not believe that DOC was bound by statute to choose between either the pre-order rate or the latest review rate. By virtue of the provisions of 19 U.S.C. § 1673d(c)(5), DOC is given the discretion to use any

“reasonable method” to establish the estimated “all others rate.” That being so, the decision as to the “all others” rate necessarily will not be one of strictly legal interpretation but is one that is peculiar to the particular facts of this case.

In the circumstances of this case, the Panel concludes that the question raised by GOQ concerning the all others rate is not one of “pure law” and that it does not come within the exception of the exhaustion doctrine. In accordance with 28 U.S.C. § 2637(d), we hold that this claim by GOQ must be dismissed.

E. The Claim that Commerce Ignored the Exchange Rate Factor

During the hearing, GOQ abandoned the arguments set forth in its brief regarding the exchange rate issue. This issue had not been raised at the administrative proceeding by NHCI. For this reason, the doctrine of exhaustion precluded GOQ from raising this issue on review. The Panel dismisses this claim of error.

VI. CONCLUSION

We remand this matter to DOC to reconsider: (1) the GOQ's claims regarding "good cause" under the standards set forth in Section 752(c)(2) of the statute; and (2) the determination to report the investigation rate as the margin of dumping likely to prevail if the order is revoked.

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

Donald Brown
Donald Brown

Edward Chiasson
Edward Chiasson

Edward Farrell
Edward Farrell

Michael House
Michael House

SIGNED IN THE ORIGINAL ON MARCH 27, 2002.

**ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT**

IN THE MATTER OF:	)	
	)	
PURE AND ALLOY MAGNESIUM	)	SECRETARIAT FILE NO.
FROM CANADA	)	USA-CDA-00-1904-06
FULL SUNSET REVIEW - ANTIDUMPING		

ORDER OF THE PANEL

The Panel issued its final decision on March 27, 2002 without advising the Investigating Authority of the due date for the redetermination on remand in this matter.

Therefore, it is **ORDERED** that the date for the redetermination on remand from the Investigating Authority is 60 days from the date of this order or May 27, 2002.

ISSUED ON MARCH 27, 2002.

SIGNED IN THE ORIGINAL BY:

Charles Owen Verrill
Charles Owen Verrill, Chair

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

Michael House
Michael House

Donald Brown, Q.C.
Donald Brown, Q.C.

Edward Farrell
Edward Farrell