

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

In the Matter of:

PURE MAGNESIUM FROM CANADA

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

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-00-1904-06

1. PROCEDURAL HISTORY

On March 27, 2002, the Panel issued its decision concerning the challenge by the Gouvernement du Québec (“GOQ”) to the final results of the full Sunset Review by the U.S. Department of Commerce (“DOC”) of antidumping orders concerning pure magnesium from Canada. Pure Magnesium from Canada, 65 Fed. Reg. 41,436 (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 (1) GOQ’s claim that good cause exists to consider the other factors set forth in the Tariff Act of 1930, as amended, 19 U.S.C. § 1675a(c)(2), in the evaluation of the likelihood of recurrence or continuation of dumping, and (2) DOC’s determination to report to the International Trade Commission (“ITC”) the investigation rate as the margin of dumping likely to prevail if the order is revoked. Panel Determination, USA-CDA-00-1904-06, at 24-27 (Mar. 27, 2002) (“Panel Determination”).

On May 13, 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 a substantive response to the DOC notice of the initiation of this sunset review, NHCI has not been active in the sunset review. Comments on the draft remand results were submitted by GOQ, which is an interested party in this proceeding.

DOC issued the Final Results of Determination Pursuant to NAFTA Panel Remand of the Sunset Review of the Antidumping Order on Pure Magnesium from Canada (“Remand Determination”) on May 28, 2002. On July 15, 2002, the GOQ filed the Rule 73(2)(b) Challenge of Gouvernement du Québec to Redetermination on Remand (“Rule 73(2)(b) Challenge”). GOQ’s Rule 73(2)(b) Challenge contends that DOC improperly interpreted the “good cause” requirement of 19 U.S.C. § 1675a(c)(2), failed to consider changes in the magnesium market that made recurrence or continuation of dumping unlikely, refused to enter into the record information relevant to the likelihood determination, and wrongfully reported the investigation rate to the ITC. No other party filed a challenge to the Remand Determination. DOC responded to the Rule 73(2)(b) Challenge filed by the GOQ on August 5, 2002.

In conducting this review of the GOQ Rule 73(2)(b) Challenge, 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 America 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 CHALLENGE TO THE REMAND DETERMINATION

As noted above, GOQ challenged each of the conclusions in the Remand Determination and requests the Panel to consider information that DOC had excluded from the record as untimely filed. The Panel finds that certain of these challenges have merit and remands this proceeding to DOC for further action consistent with this opinion.

A. The DOC Interpretation of the “Good Cause” Requirement for Consideration of Other Factors in Evaluating Likelihood of Recurrence or Continuation of Dumping

Throughout this proceeding NHCI (which did not actively participate after the initial pleadings) and GOQ have urged DOC to find that good cause exists to consider factors other than the weighted average dumping margins determined in the investigation and subsequent reviews and the volume of imports in determining the likelihood of continuation or recurrence of dumping. They stress that section 752(c)(2) of the Tariff Act of 1930, *as amended* (“the Act”), 19 U.S.C. § 1675a(c)(2), authorizes DOC to consider price, cost, market or economic factors when “good cause” is shown and contend that there is such good cause in this Sunset Review.

In the Sunset Review Final Results, DOC concluded that it did not need to consider the other factors listed in section 752(c)(2) because the decline in subject imports after the antidumping order and the elimination of dumping was proof enough that revocation of the order would lead to continuation or recurrence of dumping. Pure Magnesium from Canada, 65 Fed. Reg. at 41,436. The Panel concluded that this amounted to an un rebuttable presumption that elimination of dumping and significant declines in imports are enough without more to support a finding of likelihood of continuation or recurrence of dumping, and remanded the Sunset Review to DOC with instructions to reconsider GOQ’s claims concerning good cause. Panel Determination at 24-28.

On remand, DOC first considered whether good cause exists for evaluation of factors other than elimination of dumping and declining imports. According to DOC, the sole basis for NHCI’s argument that good cause exists in this proceeding is the statement in the substantive response to the notice of initiation of the sunset review that there were zero margins in the four most recent administrative reviews. That statement, emphasizes DOC, “is the extent of NHCI’s argument that good cause exists for consideration of other factors.” Remand Determination at 3. DOC then concludes that “[w]e fail to see how the mere fact that NHCI was found not to have

been dumping in the most recent administrative reviews is a good cause for addressing other factors.” Remand Determination at 4. This is so, according to DOC, because the Sunset Policy Bulletin instructs that DOC “will ‘normally’ find likelihood where, *inter alia*, dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined significantly.” Id. Thus, DOC argues that since the elimination of dumping is one of the criteria for an affirmative likelihood finding, the fact that there have been zero margins can hardly be basis for a finding of good cause to consider other factors. Id.

The Panel acknowledges that, in general, it has an obligation to defer to DOC’s reasonable interpretation of the statutory language it is authorized by Congress to administer. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Here, however, we conclude that deference is not required because the statute itself provides guidance on the good cause required to be shown where zero margins have been found in recent reviews. Specifically, section 752(c)(4)(A) of the Act, 19 U.S.C. § 1675a(c)(4)(A), provides a “Special rule,” which states that a zero dumping margin “shall not by itself require” a finding that revocation of an order “would *not* be likely to lead to continuation or recurrence of sales at less than fair value” (emphasis added). According to the Sunset Policy Bulletin, this provision means that while the Department “may consider the existence of zero” margins, a negative determination is not required when they exist. 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”). The SAA states that this clause is required because exporters “may have ceased dumping because of the existence of an order.” Therefore, according to the SAA, the “present absence of dumping is not necessarily indicative of how exporters would behave in the absence” of an order. Uruguay Round Agreements Act,

Statement of Administrative Action, at 890, *reprinted in* H.R. Doc. No. 103-316 (1994) (“SAA”).

The special rule of section 752(c)(4)(A) must be read in the context of DOC’s obligation to conduct a full investigation in sunset reviews. See AG der Dillinger Hüttenwerke v. U.S., 193 F. Supp. 2d 1339 (Ct. Int’l Trade 2002). DOC’s fact-gathering obligation in a full sunset review requires both that DOC adequately consider the evidence on the record *and* seek additional evidence that may be necessary to make its determination. Id. at 1348. The burden on an interested party to the proceeding is to raise the issue “with sufficient clarity to put Commerce reasonably on notice” of the information that it needs to consider. Id. at 1350. Section 752(c)(4)(A) makes clear that DOC may consider zero margins in evaluating likelihood of continuance or recurrence of dumping, but that a zero margin “by itself” does not require a likelihood finding. As the Court of International Trade has emphasized, “likely” in the context of a sunset review does not mean “possible” or “plausible,” but rather “probable.” See Usinor Industeel, S.A. v. U.S., 2002 Ct. Intl. Trade LEXIS 41, Slip Op. 2002-39, at 19 (Ct. Int’l Trade Apr. 29, 2002). Thus, renewed dumping must be the probable scenario. Given these contradictory *possible* interpretations of the significance of a zero dumping margin, DOC has an obligation to look further, to evaluate what the absence of dumping means in the proceeding under review, particularly where an interested party has cited zero margins as good cause for consideration of other factors. Otherwise, it is obvious that DOC would have no basis for assessing the significance of zero margins in the context of a specific proceeding.

In this sunset review, the substantive response of NHCI asserts that there was “good cause” because there were zero margins in four successive administrative reviews.¹ But that is not all. The response goes on to state as follows:

Among the “other factors” that the Department should consider in determining whether resumed dumping is likely are the relevant changes in exchange rates, for the reasons discussed in response to question G in the “General Information” section, above. In addition, the Department should take into consideration the following factors, which support the finding that NHCI is not likely to engage in future dumping should the order be revoked: (1) NHCI’s share of the U.S. pure magnesium market has dropped to insignificant levels and is not likely to substantially increase; (2) the Department has never found NHCI to be making sales below cost; and (3) since the time of the original investigation, U.S. import duties imposed on pure magnesium from Canada have been eliminated.

It seems clear that the “other” factors articulated by NHCI in the substantive response are relevant to the question of how the foreign producer and importer would react in the absence of an order. This is precisely the type of information DOC needs to fully evaluate the significance of past zero dumping margins, which is the relevant inquiry under section 752 (c)(4)(A).

Given the importance of “other factors” in determining the significance of zero margins, it seems clear that an allegation of a consistent history of zero dumping margins is sufficient good cause as a matter of law. Moreover, the Panel rejects DOC’s suggestion that NHCI’s assertion concerning zero margins was “unsubstantiated.” Remand Determination at 3. DOC made these determinations and cannot require a party to “substantiate” the existence of zero margins. Indeed, the SAA specifically indicates that the “facts available” in a review “may include prior agency determinations involving the subject merchandise.” SAA at 879. See also

¹ “Given the successive zero margins in four administrative reviews there is ‘good cause’ for consideration of other factors.” NHCI Substantive Response, at 9 (Sept. 1, 1999).

AG der Dillinger Hüttenwerke, supra, 193 F. Supp. 2d at 1348 (“Commerce is to rely on information from prior determinations as well as from submission by the parties in the sunset proceedings”).

In conclusion, the Panel holds that where a party alleges that there is good cause because of zero margins, the DOC must consider that such an allegation is good cause to consider other factors in order to fulfill the mandate of the special rule of section 752(c)(4)(A). As the SAA and Sunset Policy Bulletin emphasize, while zero dumping margins are not necessarily indicative of how the exporter would react in the absence of an order, they can so indicate. To resolve which of these possibilities is *probable* in a given case, other factors must be considered if alleged by the parties.

B. The Consideration Of Other Factors By Doc In The Remand Determination

In the Remand Determination, DOC “arguendo” considered the “other factors” alleged by NHCI and found them “insufficient to compel us to reverse our affirmative likelihood determination.” Remand Determination at 4. We note that DOC limited its consideration of other factors to the three points advanced in the NHCI Substantive Response.² Based on our review of this “consideration,” the Panel concludes that DOC’s evaluation of these other factors did not fulfill its obligation “to consider adequately the evidence on the record, or to seek additional evidence necessary to make its determination.” AG der Dillinger Hüttenwerke, 193 F. Supp. 2d at 1348.

² NHCI also argued that exchange rates were a relevant factor to be considered. However, GOQ withdrew this claim at the hearing before the Panel.

The Remand Determination concludes that the arguments made by NHCI are “unsubstantiated.” Remand Determination at 5. For example, DOC observed that

NHCI submitted no proof that it is primarily a producer of alloy magnesium, that it would have to abandon its alloy magnesium customers if it increased shipments of pure magnesium to the United States, or that the long-term contracts it has in place with its alloy magnesium customers preclude it from increasing shipments of pure magnesium. Id.

This passage suggests that failure to submit “proof” with the substantive response will be enough to defeat a claim that “other factors” indicate that there is no likelihood of recurrence or continuation of dumping.³

The Panel is troubled by the limited consideration given to the other factors alleged by NHCI and GOQ. This is not the full consideration required by DOC in sunset reviews. AG der Dillinger Hüttenwerke, supra. On the contrary, it suggests a formalistic approach that is out of place in an administrative proceeding. Indeed, DOC totally ignored GOQ’s arguments and presentations, referencing instead only those made by NHCI.

DOC concluded that NHCI would have to resume dumping to regain its pre-order level of imports and that this was conclusive on the likelihood issue. Remand Determination at 5. However, both GOQ and NHCI claimed that there were changes in product mix and marketing strategy that made it unlikely that NHCI would attempt to regain its pre-order level of imports. GOQ points out in its Rule 73(2)(b) Challenge that NHCI’s case brief made the factual assertion that it had become primarily an alloy producer – an assertion that was certified by company officials. Rule 73(2)(b) Challenge at 10. We fail to see why this written testimony was not

³ The Panel recognizes that the Remand Determination at 5, n.4, does reference NHCI’s Case Brief. But this reference is made in the context of the DOC’s conclusion that NHCI’s arguments are unsubstantiated.

considered “proof” by DOC. After all, if DOC requires certifications by company officials concerning factual statements in a pleading, it cannot claim that these statements are not proven.

GOQ also notes that information supplied by MagCorp for the record showed that NHCI had achieved a substantial and sustained level of alloy magnesium shipments to the United States. Rule 73(2)(b) Challenge at 9-10. Finally, GOQ referenced the annual reviews wherein changes in the magnesium market were noted by DOC in its reviews of the periods subsequent to the magnesium order. Thus, DOC itself commented in a recent review that

Respondent [NHCI] explains that after the imposition of the antidumping duty order, it redirected its marketing strategy toward other export markets and developed a strong home market for pure magnesium. NHCI, along with other interested parties, notes that it also increased its production and sales of alloy magnesium to the extent that by 1997, it had become primarily a producer of alloy magnesium. Pure Magnesium From Canada, 64 Fed. Reg. 12977, 12980 (Mar. 16, 1999) (admin. review, final).

We find no indication that DOC considered any of these points in the Remand Determination.

DOC also states that “NHCI never rebutted Magcorp’s claim that NHCI could easily shift from production of alloy magnesium to pure magnesium.” Remand Determination at 5. The Panel notes, however, that NHCI officials certified as accurate the statement in its case brief that, due to NHCI’s contractual customer commitments and the current business strategy, NHCI could not switch production from alloy to pure magnesium. NHCI Case Brief, Pub. Doc. 41, at 5 (Apr. 19, 2000) (hereinafter “NHCI Case Brief”). Furthermore, although DOC stated that NHCI did not dispute MagCorp’s evidence of a plant expansion, NHCI in fact did dispute this claim in its Case Brief, which was certified by company officials. On remand, DOC is instructed to evaluate these factual assertions in view of the certifications which lend authenticity to the rebuttal arguments. In this context, the Panel notes that Magcorps’ claim, as articulated by DOC,

“that NHCI could easily shift from production of alloy magnesium to pure magnesium”, and the implication that this would result in the resumption of dumping, standing alone is insufficient as a matter of law to meet the standard articulated by the Court in Usinor, *supra*, that such a recurrence was likely, i.e. probable rather than possible.

The Panel concludes that DOC failed in the Remand Determination to consider adequately the evidence on the record of both the Sunset Review and the numerous administrative reviews that preceded it and which DOC had notice it should consider. See AG der Dillinger Hüttenwerke, *supra*, at 1350. Instead, DOC improperly placed the burden of proof on NHCI (and GOQ) and then found that burden had not been met. This is inconsistent with DOC’s mandate under the statute. Accordingly, the Panel remands the Remand Determination to DOC for further consideration of the record consistent with this opinion.

C. Rejection Of NHCI’s Additional Evidence Concerning Long Term Contracts And Alloy Magnesium Commitments.

During the sunset review, NHCI submitted as attachments to its Case Brief details concerning long term contracts and the extent of its alloy business. DOC rejected this information because it was not submitted within 35 days of the notice of the sunset review. GOQ now requests the Panel to order DOC to reopen the record to obtain additional information related to the economic and market changes affecting the importation of pure and alloy magnesium. Rule 73(2)(b) Challenge at 3. In support of this request, GOQ cites Union Camp Corp. v. U.S., 53 F. Supp. 2d 1310 (Ct. Int’l Trade 1999) and NAFTA Panel Rule 73(2)(a). Id. at 16. The Panel concludes that GOQ has waived the right to raise this issue because it was not mentioned in the Complaint or in the briefs to the Panel. However, the Panel is concerned that the proffered evidence would in fact shed light on DOC’s determination of the likely conduct of

importers absent an order given the zero margins in the four most recent reviews. This could, of course, be clarified by the attachments to the NHCI Case Brief that were rejected for failure to comply with the 35-day rule. Accordingly, on remand, we instruct DOC to (i) obtain the views of the parties concerning whether this is an appropriate case in which to supplement the record pursuant to NAFTA Panel Rule 73(2)(a), and (ii) after due consideration of those views and of DOC's fact gathering obligations in full sunset reviews, determine whether the record should be supplemented in this case.

D. The Rate To Be Reported To The ITC

The Panel's remand instructed DOC to consider whether the market and product changes advanced by NHCI are sufficient to overcome the "normal" preference for the investigation rate specified by the SAA. Panel Decision at 29. DOC's response to this instruction was as follows:

As discussed under the **Good Cause** section of this determination, there is no evidence on the record of the sunset review to substantiate NHCI's claim that changes in its product mix and the marketing strategy support a conclusion that the margin of dumping is likely to prevail if the order were revoked is zero. For this reason, we find upon remand that NHCI's unsupported claim is insufficient to overcome the SAA's explicit preference for reporting to the Commission the dumping margin from the investigation. Remand Determination at 7.

The Panel concludes that this is not a satisfactory analysis for the reasons articulated previously in this opinion. We disagree that there is "no evidence" of record to substantiate the NHCI claims and instruct DOC to reconsider this issue for the reasons stated earlier in this opinion.

CONCLUSION

For the foregoing reasons, the Panel again remands the Remand Determination to DOC (i) for further consideration of the record concerning the "other factors" which are required to be

taken into account pursuant to our conclusion in Sections 2 and 3 of this opinion; (ii) for consideration of whether this is an appropriate case in which to supplement the record after obtaining the views of the parties; and (iii) to reconsider whether the normal preference for the investigation rate should not be followed here. The Panel instructs DOC to provide a report in 45 days detailing how it will comply with these instructions and to complete the remand 60 days thereafter.

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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