RESULTS OF DETERMINATION PURSUANT TO PANEL REMAND

PURE MAGNESIUM FROM CANADA
North American Free Trade Agreement ("NAFTA")
Article 1904 Panel Review
USA-CDA-00-1904-06

SUMMARY

The Department of Commerce ("Commerce") has prepared these results of determination pursuant to the decision of the Binational NAFTA Panel in Pure Magnesium from Canada, USA-CDA-00-1904-06 (March 27, 2002) ("Panel Determination"). These results pertain to the Department's determination in Pure Magnesium from Canada: Final Results of Full Sunset Review, 65 Fed. Reg. 41436 (July 5, 2000) ("Final Results") that the revocation of the antidumping duty order on pure magnesium would be likely to lead to the continuation or recurrence of dumping. The Panel remanded this sunset review to Commerce with instructions to reconsider: (1) the Government of Quebec's ("GOQ's") claims regarding "good cause" under the standards set forth in section 752(c)(2) of the Tariff Act of 1930, as amended ("the Act"); and, (2) the determination to report the investigation rate as the margin of dumping likely to prevail if the order is revoked.

BACKGROUND

The Uruguay Round Agreements Act ("URAA") revised the Act by requiring that antidumping duty ("AD") orders be revoked after five years unless revocation or termination would be likely to lead to continuation or recurrence of (1) dumping, and (2) material injury to the domestic industry. 19 U.S.C. § 1675(d)(2)(A), 19 U.S.C. § 1675(d)(2)(B). The URAA assigns to Commerce the responsibility of determining whether revocation of an antidumping duty order would be likely to lead to continuation or recurrence of dumping. 19 U.S.C. § 1675(d)(2)(A).

In accordance with the schedule established for the initiation of sunset reviews of "transition orders,"[1] on August 2, 1999, Commerce initiated the sunset review of the AD order on pure magnesium from Canada. See Initiation of Five-Year (``Sunset'') Reviews, 64 Fed. Reg. 41915 (Aug. 2, 1999). Commerce received a Notice of Intent to Participate from the Magnesium Corporation of America ("Magcorp"), within the deadline specified in Commerce's regulations. See 19 C.F.R. § 351.218(d)(1)(i). See also Procedures for Conducting Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 63 Fed. Reg. 13516, 13520-13521 (Mar. 20, 1998) ("Sunset Regulations"). On August 4, 1999, the GOQ entered an appearance as an interested party and requested and received an administrative protective order. It participated no further in the sunset review. On the basis of complete substantive responses filed on behalf of Magcorp and Norsk Hydro Canada, Inc., ("NHCI"), Commerce determined to conduct a full sunset review.

[1] "Transition orders" refer to those antidumping and countervailing duty orders and suspended investigations in effect on January 1, 1995, the effective date of the URAA. 19 U.S.C. § 1675(c)(6)(C).

On February 29, 2000, Commerce published its preliminary results of the sunset review. See Pure Magnesium from Canada; Preliminary Results of Full Sunset Reviews, 65 Fed. Reg. 10768 (Feb. 29, 2000) ("Preliminary Results"). In its Preliminary Results, Commerce determined that the revocation of the AD order would be likely to lead to continuation or recurrence of dumping. Commerce based its determination on its finding that, although dumping was eliminated after the issuance of the order, import volumes of the subject merchandise declined dramatically. Census Bureau statistics indicated that imports of pure magnesium from Canada dropped 97 percent in the year following the issuance of the order and, although they increased in subsequent years, imports remained at less than 10 percent of their pre-order level. Commerce also preliminarily determined that it would report to the Commission the dumping margins from the original investigation. Commerce affirmed these findings in its Final Results.

During the sunset review, NHCI argued that good cause existed for Commerce to consider factors other than import volumes when making its likelihood determination, pursuant to section 752(c)(2) of the Act. Commerce declined to do so, maintaining that information submitted by NHCI failed to support its claim that good cause existed to consider other factors. NHCI had also argued that the dumping margin Commerce should report to the Commission should be zero, as, *inter alia*, it had received zero dumping margins in the four most recently completed administrative reviews. Commerce rejected NHCI's argument, citing the SAA at 890 and the House Report at 64, which provide that Commerce normally will select a margin from the investigation to report to the Commission, because that is the only calculated rate that reflects the behavior of exporters without the discipline of an order.

REMAND

The GOQ has challenged certain findings made by Commerce in its Final Results before the Panel. On March 27, 2002, based on its findings pursuant to the GOQ's challenge, the Panel upheld Commerce's determination with respect to most issues. However, the Panel remanded to Commerce its sunset review to reconsider: (1) the Government of Quebec's ("GOQ's") claims regarding "good cause" under the standards set forth in section 752(c)(2) of the Tariff Act of 1930, as amended ("the Act"); and, (2) the determination to report the investigation rate as the margin of dumping likely to prevail if the order is revoked. On May 13, 2002, Commerce issued draft remand results to the GOQ, NHCI, and domestic interested parties. On May 21, 2002, the GOQ filed comments with respect to the draft results.

ANALYSIS

We have considered the Panel's instructions and have made a determination on remand concerning the likelihood of continuation or recurrence of dumping and the margin of dumping likely to prevail if the order were revoked. As discussed below, pursuant to this remand, we find that the continuation or recurrence of dumping is likely if the order were revoked at the margin of dumping determined in the original investigation.

Good Cause

During the litigation, the GOQ argued that NHCI had presented "evidence" during the sunset review indicating that market and business developments since the issuance of the order were the factors that accounted for the absence of greater volumes of pure magnesium exports to the United States by NHCI. Panel Determination at 24. Based on these factors, the GOQ argued that Commerce should have concluded in the sunset review that there would be no likelihood of the continuation or recurrence of dumping if the order were revoked. Instead, as the Panel notes, Commerce declined to consider these factors, concluding that it was not persuaded that any modification in the apparent focus of NHCI's business, rather that the issuance of the order, accounted for the drastic reduction in exports to the United States since the period prior to the issuance of the order.[2] Thus, Commerce determined that the information presented by NHCI did not provide good cause for taking additional factors into account in make its determination. *Id.*

The Panel rejected Commerce's finding, concluding that Commerce acted contrary to law when it refused to find that good cause exists "based solely on declining imports." Panel Determination at 28. Thus, upon remand, the Panel instructs Commerce to reconsider the GOQ's good cause claims under the standards set forth in section 752(c)(2) of the Act.

Section 752(c)(2) of the Act provides that, in making its determination of likelihood of continuation or recurrence of dumping, *if good cause is shown*, Commerce shall consider other price, cost, market, or economic factors as it deems relevant. According to the SAA, such other factors include the following:

> the market share of foreign producers subject to the antidumping proceeding, changes in exchange rates, inventory, levels, production capacity, and capacity utilization, any history of sales below cost of production; changes in manufacturing technology of the industry, and prevailing prices in relevant markets. SAA at 890.

The GOQ's good cause claim that the Panel has instructed Commerce to reconsider was made during the sunset review proceeding by NHCI. In its substantive response, NHCI argued that, "Given the successive zero margins in four administrative reviews there is 'good cause' for consideration of other factors."[3] That is the extent of NHCI's argument that good cause exists for the consideration of other factors. NHCI provides no support for this argument; it simply makes this unsubstantiated statement without any further explanation. Moreover, NHCI makes no other argument, statement, or assertion in support of its contention that good cause exists for the consideration of other factors.

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[2] 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 (July 5, 2000) ("Final Results Decision Memo") at 9.

[3] See NHCI's September 1, 1999, substantive response to the Notice of Initiation ("NHCI's Substantive Response") at 9.

We 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. Indeed, the level of dumping is a criterion that Commerce is required to consider in making its likelihood determination, pursuant to section 752(c)(1) of the Act.

Section 752(c)(1) provides that, in making its likelihood determination, Commerce shall consider (A) the weighted average dumping margins determined in the investigation *and subsequent reviews*; and (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the AD order.

The Sunset Policy Bulletin further instructs that Commerce 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. Sunset Policy Bulletin at section II.A.3.

The rationale NHCI uses to support its argument for Commerce to consider other factors in making its likelihood determination is actually a criterion which, when combined with a significant decline in imports, would lead Commerce to make an affirmative likelihood finding under section 752(c)(1) of the Act. Thus, we find that NHCI's rationale for its claim that good cause exists for the consideration of other factors pursuant to 752(c)(2) is misplaced.

Even if, *arguendo*, we considered NHCI's good claim argument to be compelling for the consideration of other factors, we find that those factors and NHCI's evidence supporting them would be insufficient to compel us to reverse our affirmative likelihood determination.

NHCI argued in the sunset review that good cause existed for Commerce to consider the following factors when making its likelihood determination:

- NHCI's share of the U.S. pure magnesium market has dropped to insignificant levels and is not likely to substantially increase;
- Commerce has never found NHCI to be making sales below cost;
- Since the original investigation, U.S. import duties imposed on pure magnesium from Canada have been eliminated.

We address each of these factors below.

NHCI's share of the U.S. pure magnesium market has dropped to insignificant levels and is not likely to substantially increase

NHCI maintains that a shift in the U.S. import market from Canada to other suppliers of imported pure magnesium subsequent to the issuance of the order would preclude NHCI from increasing its market share to "significant" levels, "even if the order is revoked." NHCI's

Substantive Response at 9-10. In addition, NHCI claims that, since the issuance of the order, it has drastically changed its product mix and marketing strategy. NHCI states that because it is primarily an alloy magnesium producer, if it were to export pure magnesium to the United States at pre-order levels, it would have to abandon its commitment to servicing its alloy magnesium customers. Given the long-term contracts in place, NHCI maintains that this is simply not commercially feasible.[4]

We reject NHCI's arguments as unsubstantiated. NHCI claims that the presence of its current international competitors in the U.S. market preclude it from increasing its market share. However, it has provided no evidence to support this claim. In fact, an objective analysis of import statistics would indicate that it was the imposition of the order that caused the shift to other suppliers of imports of pure magnesium. Import statistics indicate that, once the order was issued against imports of pure magnesium from Canada, imports from Canada *immediately* dropped to zero for more than two years and then increased slightly over the life of the order and have remained at less than 10 percent of their pre-order levels. NHCI does not dispute this. In contrast, total U.S. imports of pure magnesium have remained steady or increased over the life of the order, indicating that other foreign suppliers made up for the imports accounted for by Canada prior to the imposition of the order. Thus, we find it reasonable to conclude that prior to the order, Canadian producers were only able to maintain their share of import levels by dumping. We consider NHCI's activity prior to the imposition of the order to be highly probative of what its activity would be if the order were revoked. Therefore, we find it to be likely that, in order to NHCI to regain its pre-order level of imports, NHCI would have to resume dumping.

In addition NHCI provided no evidence to support its claim that changes in its market and business strategy would preclude it from increasing its share of pure magnesium exports absent the order. 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. Moreover, NHCI never rebutted Magcorp's claim that NHCI could easily shift from production of alloy magnesium to pure magnesium, as the precursor of alloy magnesium in the production process is pure magnesium.[5] Nor did NHCI dispute the evidence provided by Magcorp indicating that NHCI was planning to double its production capacity at its Bécancour, Quebec plant from 43,000 metric tons to 86,000 metric tons. *Id*. at 23. This refutes NHCI's claim that it would be unable to service its current alloy magnesium customers if it increases shipments of pure magnesium. Finally, NHCI did not even provide samples of its long-term contracts with alloy magnesium customers to support its claim that they exist and would preclude it from shifting to increased production of pure magnesium.

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[4]See NHCI's April 19, 2000, case brief ("NHCI's Case Brief") at 6.

[5]See Magcorp's Sept. 1, 1999, substantive response ("Magcorp's Substantive Response") at 32.

Commerce has never found NHCI to be making sales below cost

NHCI claims that Commerce has never found NHCI to have made sales below cost, a "fact" further supporting a finding that NHCI is not likely to engage in future dumping. NHCI's Substantive Response at 10. Again, NHCI simply makes this claim and fails to provide any evidence or further argument to support it. Furthermore, it fails to explain how the absence of a finding by Commerce as to whether NHCI had sold subject merchandise in the home market at prices below cost of production proves that it will not dump absent an order.

Since the original investigation, U.S. import duties imposed on pure magnesium from Canada have been eliminated.

Finally, NHCI claims that the elimination of the 4.8 percent import duty on pure magnesium from Canada supports a negative likelihood finding because NHCI's U.S. prices no longer require the deduction of import duties in calculating U.S. price. NHCI's Substantive Response at 10. Again, NHCI provides no evidence to support this claim and, indeed, we believe that there is no logic in this claim. If NHCI were correct that the absence of the import duty adjustment had such a large impact on whether NHCI were dumping pure magnesium in the United States, then, since the elimination of the import duty, NHCI should have been able to resume exporting at pre-order levels without engaging in dumping. On the contrary, its imports have remained at less than 10 percent of their pre-order level.

For the reasons discussed above, we find that NHCI's claim that good cause exists to consider other factors fails. Moreover, even if it were appropriate for Commerce to consider other factors, we find that, whether we consider each factor individually or *in toto*, they have no impact on our affirmative likelihood determination. Consequently, we find upon remand that revocation of the AD order on pure magnesium from Canada would be likely to lead to the continuation or recurrence of dumping.

Rate to Report to the Commission

In section II.B.1 of the Sunset Policy Bulletin, Commerce states that it normally will provide to the Commission the margin that was determined in the final determination of the original investigation. This comports with the SAA, which instructs that Commerce will normally select this rate because it is the only calculated rate that reflects the behavior of exporters without the discipline of an order in place. SAA at 890. As the Panel noted, the SAA also states that Commerce *may* select a more recently calculated rate from an administrative review if, for instance, dumping margins have declined and imports have remained steady or increased over the life of the order. Panel Determination at 29.

During the sunset review, NHCI argued that Commerce should report a margin of zero to the

Commission, the rate Commerce calculated in the four most recently completed administrative reviews. Among its reasons in support of this argument is NHCI's claim that, since the time of the investigation, "NHCI has drastically changed its product mix and marketing strategy." NHCI's Case Brief at 9.

In its final results, Commerce determined that NHCI had not provided convincing evidence to report a margin other that the investigation rate. Consequently, pursuant to the SAA and the Sunset Policy Bulletin, Commerce decided to report to the Commission the rate determined in the investigation.

The Panel has rejected Commerce's reasoning and, upon remand, has instructed Commerce to reconsider its determination to report the investigation rate as the margin of dumping likely to prevail if the order were revoked. Panel Determination at 33. In doing so, the Panel has instructed Commerce to consider whether the market and product changes advanced by NHCI are sufficient to overcome the normal preference for the investigation rate. Panel Determination at 29.

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 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.

Conclusion

We have followed the Panel's instructions and reconsidered in this sunset review: the GOQ's good cause claims and Commerce's determination to report to the Commission the investigation rate as the margin of dumping likely to prevail if the order is revoked. Upon remand, we continue to find that revocation of the AD order on pure magnesium from Canada is likely to lead to the continuation or recurrence of dumping at the rate determined in the investigation.

Comment 1 - Likelihood Standard

The GOQ claims that, in making its likelihood determination, Commerce displayed a "misapprehension" of the likelihood standard under the statute. Specifically, the GOQ challenges Commerce's reference to the guidance provided in the Sunset Policy Bulletin that Commerce normally will find likelihood where import volumes declined after the imposition of the order. The GOQ claims that the Panel found this "approach" to be inconsistent with the statute, and that the Sunset Policy Bulletin is an interpretive guide, not a replacement for the statute. According to the GOQ, Commerce is required to be forward looking when making its likelihood determination, not backward-looking, which is inconsistent with the statute.

In addition, citing to a decision by the Court of International Trade made subsequent to the Panel's remand order, the GOQ claims that Commerce's likelihood determination here reflects Commerce's "desire" to treat the likelihood standard as permitting the order to continue where dumping is a *possible*, rather than a *probable*, result of the revocation of an order, and this is inconsistent with the statute. See Usinor Industeel, S.A. v. United States, Slip Op. 02-39 (CIT, April 29, 2002), where the Court found that *likely* means *probable*, not *possible.*

Commerce's Position

We disagree with the GOQ. The Panel did not find in its remand that Commerce's practices under the Sunset Policy Bulletin were inconsistent with the statute. Instead, the Panel instructed Commerce to consider the GOQ's good cause arguments in making its likelihood determination. Panel Determination at 33. As explained in the **Good Cause** section above, we have done so here and, consistent with section 752(c)(2) of the Act, we find that NHCI's claim that good cause exists to consider other factors fails. Moreover, even if it were appropriate for Commerce to consider other factors, we find that, whether we consider each factor individually or *in toto*, they have no impact on our affirmative likelihood determination. Consequently, we continue to find upon remand that revocation of the AD order on pure magnesium from Canada would be likely to lead to the continuation or recurrence of dumping.

Comment 2 - Other Magnesium Dumping Cases

The GOQ argues that, in making its likelihood determination, Commerce was required to have considered changes in the U.S. magnesium market that led to dumping investigations on imports of magnesium from Russia, Ukraine, China, and Israel, subsequent to the imposition of the antidumping order on pure magnesium from Canada.

Commerce's Position

We disagree. The Panel's remand instructions were clear that Commerce was to reconsider the GOQ's claim regarding good cause under the standards set forth in section 752(c)(2) of the Act. As noted above, it was NHCI that made the good cause claim during the sunset review proceeding. NHCI did not include in its good cause claim the argument that Commerce should consider changes in the U.S. magnesium market that led to antidumping duty investigations on imports of pure magnesium from other countries. Consequently, we have not considered this argument for purposes of these remand results.

Comment 3 - The Lack of Below Cost Findings

The GOQ reiterates its argument that the lack of a history of sales in the home market made at below the cost of production is directly relevant to the question of whether it is probable that NHCI would resume dumping if the antidumping order were revoked. The GOQ then attempts to tie the lack of a history of below cost sales with Commerce's findings in recent administrative

reviews that NHCI had made sales to the United States at zero dumping margins, demonstrating that NHCI does not need to engage in dumping in order to participate in the U.S. market.

Commerce's Position

We disagree with the GOQ. The GOQ has confusingly attempted to tie the issue of whether NHCI has ever made sales in the home market at less than the cost of production to Commerce's finding that NHCI has not dumped in the U.S. market in recent administrative reviews. As stated above, the Panel has instructed Commerce to reconsider the GOQ's good cause claim made during the sunset review. That claim was actually made by NHCI, and NHCI's specific claim with respect to this issue was that, because Commerce never found it to have made sales in the home market at below cost, NHCI would not be likely to dump in the future if the order were revoked. This reasoning is illogical, as it implies a direct relationship between selling of subject merchandise in the home market at below cost with dumping.

Comment 4 - NHCI's Commitment to the Alloy Market

The GOQ argues that in order to make an affirmative likelihood determination, Commerce would have to affirmatively find that it is probable that, as a direct consequence of the revocation of the order, NHCI would resume shipping pure magnesium to the U.S. market. The GOQ claims that the fact that imports dropped off in 1992 does not demonstrate that NHCI would have to dump in 2000-2001 in order to regain market share. The GOQ reiterates its arguments that NHCI is now predominantly an alloy magnesium producer and, consequently, would not be likely to resume or continue to dump pure magnesium if the order were revoked. In doing so, the GOQ takes issue with certain specifics of Commerce's findings.

The GOQ challenges Commerce's finding that NHCI submitted no proof that: 1) it is primarily a producer of alloy magnesium; 2) it would have to abandon its alloy magnesium customers if it increased shipments of pure magnesium to the United States; or, 3) the long-term contracts it has in place with alloy magnesium customers preclude it from increasing shipments of pure magnesium. The GOQ maintains that Commerce established in administrative reviews that NHCI had adapted its U.S. strategy to sell alloy magnesium. In doing so, it quotes a summarization of NHCI's "explanation" in its briefs filed in the fifth administrative review of the AD order that, as a result of the imposition of the AD order, it has redirected its marketing strategy toward other export markets and developed a strong home market for pure magnesium.[6]

In addition, the GOQ claims that NHCI submitted certified proof in its case brief that it was primarily an alloy magnesium producer, and that it could not switch its production from alloy to pure magnesium. In making its likelihood determination, Commerce would have to find that

[6]The GOQ references Pure Magnesium From Canada; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke Order in Part, 64 Fed. Reg. 12977, 12980 (March 16, 1999). ("Final Results of Fifth Review")

NHCI probably would make that switch if the order were revoked. The GOQ also cites to information that is not on the record of the sunset review that supposedly documents NHCI's shift to the production of alloy magnesium and a large percentage of its alloy output committed to long-term contracts.[7]

The GOQ further argues that, despite Commerce's finding to the contrary, NHCI did dispute Magcorp's claim with respect to its plant expansion. The GOQ also claims that it is uncontested that ground has never been broken on any expansion by NHCI. The GOQ maintains that Magcorp did not submit any evidence that NHCI was likely to ignore the construction of a new magnesium production plant in Canada by Magnola, making plant expansion by NHCI unlikely.

Commerce's Position

We continue to find that information on the record of the sunset review fails to prove that NHCI's retreat from the U.S. pure magnesium market immediately after the imposition of the AD order on pure magnesium was a direct result of anything other than the imposition of the order. There is no evidence on the record of the sunset review indicating that any long-term contracts NHCI has with its alloy magnesium customers prevent NHCI from increasing it production of pure magnesium in the future. In addition, contrary to the GOQ's argument, during the sunset review proceeding, NHCI never disputed Magcorp's claim with respect to NHCI's planned plant expansion. In its September 13, 1999, submission, NHCI merely argued that many of the production expansions announced in Canada and around the world were still in the initial assessment stages, and that Commerce should not rely on announcements of intentions to increase production capacity as a basis for determining what will occur in the future. During the sunset review, NHCI did not refute its own announced plant expansion at Becancour. The GOQ's claim that ground has not yet broken on the expansion is unsupported and, in any event, information submitted in response to the draft remand results, nearly two years after Commerce issued the Final Results. We have limited our determination here to the record of the sunset review proceeding and the good cause argument made therein.

The GOQ further claims that Commerce "established" in the Final Results of Fifth Review that NHCI adapted its U.S. strategy to sell alloy magnesium. This is not the case. NHCI claimed during the fifth administrative review that it had become primarily an alloy magnesium producer when arguing that it would be incorrect for Commerce to use the original period of investigation as a benchmark for NHCI's normal commercial behavior, when making its determination whether to revoke the order. In that case, Commerce determined that NHCI had not made U.S. sales in commercial quantities during the administrative review period, and that evidence indicated that "NHCI has not completely redirected its market focus toward alloy magnesium but, in fact, maintains significant pure magnesium sales volumes in other pure magnesium markets." Final Results of Fifth Review, 64 Fed. Reg. at 12980. Moreover, when making its arguments on this

[7]NHCI had submitted this information on April 10, 2000, but was rejected by Commerce on April 17, 2000, as untimely.

point in the Final Results of Fifth Review, NHCI actually admits that it redirected its U.S. marketing strategy after the imposition of the antidumping duty order. *Id*. Evidence on the record of the sunset review suggests that in the pure magnesium industry, as in other industries that produce commodity products, marketing strategies can change quickly. For example, after the imposition of the order, other producers around the world reacted quickly to supply the U.S. import market when Canadian suppliers retreated.

Therefore, we continue to find that there is insufficient evidence on the record of the sunset review to support NHCI's claim that it would be unable to increase its sales of pure magnesium to the United States if the order were revoked.

Comment 5 - Rate to Report to the Commission

The GOQ contends that the question Commerce was to address upon remand when reconsidering the dumping margin to report to the Commission was not whether the market and product changes advanced by NHCI are sufficient to overcome the normal preference for the investigation rate, as instructed by the Panel. According to the GOQ, Commerce's normal preference for reporting the investigation rate is not supported by the statute. The GOQ claims that both the SAA and the Policy Bulletin are inconsistent with the statute, arguing that the statute establishes an equal preference for margins determined in the investigation and subsequent administrative reviews. The GOQ argues that neither the SAA nor the Policy bulletin can reset the priorities of the statute.

However, the GOQ then cites to the SAA, contending that Commerce's finding was wrong "as a matter of law" because the investigation rate was based on best information available ("BIA"). The SAA provides that Commerce will normally use the original investigation rate because it is the only *calculated* rate that reflects the behavior of exporters without the discipline of an order in place. Because the investigation rate was based on BIA, the GOQ claims that the only calculated rates for NHCI are the zero margins calculated in the recent annual reviews and, consequently, Commerce should report a rate of zero to the Commission.

Commerce Position

We disagree with the GOQ. The Panel's clear, explicit, and limited instructions upon remand with respect to this issue were for Commerce to reconsider its determination to report the investigation rate as the margin of dumping likely to prevail if the order were revoked and, when doing so, consider whether the market and product changes advanced by NHCI are sufficient to overcome the normal preference for the investigation rate. The Panel did not find the SAA's and the Policy Bulletin's provision for Commerce's normal preference for reporting the investigation rate to the Commission to be inconsistent with the statute; nor did it find that the use of a BIA rate from the investigation to be inconsistent with the statute, SAA, or Policy Bulletin.

As discussed above, we continue to find that NHCI provided insufficient evidence in the sunset

review to support its claim that changes in its product mix and the marketing strategy support a conclusion that the margin of dumping likely to prevail if the order were revoked is zero. Therefore, we find that NHCI's claim is insufficient to overcome Commerce's normal preference for reporting the investigation rate to the Commission.

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Bernard Carreau
Acting Assistant Secretary
for Import Administration

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(Date)