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

IN THE MATTER OF:	
Alloy Magnesium from Canada, Final Results of U.S. Department of Commerce Countervailing Duty New Shipper Review	USA-CDA-2003-1904-02

DECISION OF THE PANEL

REVIEWING THE FINAL RESULTS OF THE

INTERNATIONAL TRADE ADMINISTRATION,

U.S. DEPARTMENT OF COMMERCE

September 9, 2005

Before: Harry B. Endsley, Chairman
Gilbert R. Winham
James R. Holbein
Serge Anissimoff
Paul C. LaBarge

Appearances:

Elliot J. Feldman, *Baker & Hostetler LLP*, on behalf of Magnola Metallurgy Inc. With him on brief were John J. Burke and Karl von Schriltz.

Hamilton Loeb, *Paul, Hastings, Janofsky & Walker LLP*, on behalf of the Gouvernement du Québec. With him on the brief was A. Jeff Ifrah and Matthew S. Dunne.

Stephen A. Jones, *King & Spalding LLP*, on behalf of U.S. Magnesium, LLC. With him on the brief was Joseph W. Dorn and Jeffrey M. Telep.

Jonathan J. Engler, Senior Attorney, Office of the Chief Counsel for Import Administration, on behalf of the Investigating Authority, the *International Trade Administration, United States Department of Commerce*. With him on the brief were John D. McInerney and Elizabeth C. Seastrum.

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I. INTRODUCTION AND PROCEDURAL HISTORY

A. Initiation of this Chapter 19 Proceeding

This Binational Panel was constituted under Article 1904(2) of the North American Free Trade Agreement[1/] ("NAFTA") and Section 516A(g) of the Tariff Act of 1930, as amended (the "Tariff Act" or "Act"),[2/] 19 U.S.C. § 1516a(g), in response to a request for panel review of the final results of a countervailing duty new shipper review. This new shipper review was conducted by the United States Department of Commerce ("Commerce"or "Department") and its results were published in the Federal Register on April 28, 2003 under the title of **Alloy Magnesium from Canada: Final Results of Countervailing Duty New Shipper**

1/ *North American Free Trade Agreement* ("NAFTA"), *signed at* Washington, D.C., Mexico City, and Ottawa, December 17, 1992 (supplemental agreements signed September 14, 1993); *reprinted in* H. Doc. 103-159, Vol. I, at 713 *et seq*. (1993) *and in* 32 I.L.M. 289 *et seq*. (1993); *entered into force* January 1, 1994. NAFTA Article 1904(2) provides, in principal part, as follows:

> An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

2/ 19 U.S.C. § 1516a pertains generally to judicial review in countervailing duty and antidumping duty proceedings, while paragraph (g) thereof involves review of countervailing duty and antidumping duty determinations involving "free trade area country merchandise," contemplating the formation of binational panels as a substitute for judicial review. U.S. countervailing duty law appears in Title VII of the *Tariff Act of 1930*, Act of June 17, 1930, ch 497, as set out in 19 U.S.C. §§ 1671 *et seq*. (the "Tariff Act" or "Act"). The Tariff Act was amended significantly effective January 1, 1995 by the *Uruguay Round Agreements Act* ("URAA"), Pub. Law 103-465, 108 Stat. 4809. The Tariff Act, as amended, is applicable to the instant proceeding. In addition, unless otherwise indicated, all citations to the Department's regulations are to 19 CFR part 351 (2001).

Review (Department file number C-122-815) from Canada, 68 Fed. Reg. 22,359 (Dep't Commerce Apr. 28, 2003) ("Final Determination").

Following publication of the Final Determination, the Gouvernement du Québec ("GOQ") timely filed a First Request for Panel Review under Rule 34 of the Rules of Procedure for Article 1904 Binational Panel Review[3/] ("NAFTA Panel Rules") on May 23, 2003. A Second Request was filed the same date by Magnola Metallurgy Inc. ("Magnola"). The GOQ and Magnola then joined together in filing, dated June 23, 2003, their Complaint which, under the requirements of Rule 39 of the NAFTA Panel Rules, set out their allegations of errors of fact or law in the Final Determination.[4/] Subsequently, on July 3, 2003, the Department entered its Notice of Appearance pursuant to Rule 40 of the NAFTA Panel Rules, as did U.S. Magnesium, LLC ("U.S. Magnesium").[5/]

In accordance with Rule 41 of the NAFTA Panel Rules, the Department, on July 21, 2003, transmitted to the NAFTA Secretariat, U.S. Section ("Secretariat") the administrative record, in CD-rom form, as well as its official index to the administrative record. The administrative record is divided into two portions, one of which is labeled "Public" and the other of which is labeled "Non-Public" and/or "Proprietary". The "Public" section consists of copies of all documents in the record of this action, with all confidential information redacted. The "Non-Public" or "Proprietary" section consists of complete, unredacted copies of only those documents that include confidential information. Documents bearing the latter designation are kept under seal.[6/]

3/ The *Rules of Procedure for Article 1904 Binational Panel Reviews* ("NAFTA Panel Rules") were published in the Federal Register on February 23, 1994 (59 Fed. Reg. 8,686).

4/ The allegations and averments set out in the Complaint are extensive and are deemed by the Panel to fulfill the Rule 39 requirements.

5/ All of the documents referenced in this paragraph are on file at the NAFTA Secretariat, U.S. Section ("Secretariat").

6/ In this opinion, the Panel will cite documents as "A.R.", referencing the administrative record. Unless otherwise noted as proprietary, all A.R. cites are to public documents. All page numbers will refer to the original, internal pagination of the document in question.

The Final Determination, as published in the Federal Register, is contained in the administrative record at A.R. 84. The Department's analysis and rationale supporting that Final Determination is contained in the accompanying **Issues and Decision Memorandum for the Final Results of the Countervailing Duty New Shipper Review of Alloy Magnesium from Canada** (Apr. 21, 2003) ("IDM") (A.R. 82) which was, in keeping with Department practice, incorporated into the Final Determination itself.

B. Procedural Background

On August 31, 1992, the Department published in the Federal Register its countervailing duty orders on pure magnesium and alloy magnesium from Canada, assessing a cash deposit rate of 21.61% *ad valorem* for all entries of this merchandise into the United States.[7/] On February 28, 2002, the Department received a timely request for a new shipper review from Magnola[8/] pursuant to Section 751(a)(2)(B) of the Tariff Act[9/] and Department regulation 19 C.F.R. § 351.214(d). In its request, Magnola certified that it had not exported alloy magnesium from Canada to the United States during the original period of investigation nor during any review period thereafter, and further that it had never

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7/ *See Pure Magnesium and Alloy Magnesium from Canada: Countervailing Duty Orders*, 57 Fed. Reg. 39,392 (Dep't Commerce Aug. 31, 1992). The Orders published a company-specific rate for Norsk Hydro Canada Inc., which was the only Canadian producer of magnesium at the time of the original investigation. An "all others" rate was also published which is the rate that applies to a previously uninvestigated producer until such producer obtains its own company-specific rate in a new shipper review.

8/ *See* A.R. 1.

9/ This Section, codified at 19 U.S.C. § 1675(a)(2)(B)(i), provides that "[i]f the administering authority receives a request from an exporter or producer of the subject merchandise establishing that —

(I) such exporter or producer did not export the merchandise that was the subject of an antidumping duty or countervailing duty order to the United States ..., and

(II) such exporter or producer is not affiliated ... with any exporter or producer who exported the subject merchandise to the United States ... during that period,

the administering authority shall conduct a review under this subsection to establish an individual weighted average dumping margin or an individual countervailing duty rate (as the case may be) for such exporter or producer."

been affiliated with an exporter or producer of that merchandise during these periods. Thereafter, on March 27, 2002, the Department initiated the requested new shipper review for the period January 1, 2001 through December 31, 2001 ("POR") covering both pure and alloy magnesium.[10/]

The original petitioner (and predecessor to U.S. Magnesium), on May 8, 2002, submitted allegations that countervailable subsidies, including a provincial labor subsidy, had been received by Magnola.[11/] Development of the factual record for the review began shortly thereafter when, on July 10, 2002, the Department issued its initial countervailing questionnaires to Magnola, the GOQ, and the Government of Canada ("GOC"). The Department received questionnaire responses from the GOQ on August 15, 2002, and from Magnola on August 16, 2002. Subsequent to the receipt of the initial questionnaire responses, the Department issued supplemental questionnaires, received comments from the petitioners, and received supplemental questionnaire responses from the GOQ, the GOC, and Magnola.[12/] On September 13, 2002, the Department published an extension of the time limit for the completion of the preliminary results of the new shipper review on alloy magnesium from Canada to January 21, 2003.[13/]. In the same order, the Department rescinded the review with respect to pure magnesium from Canada because Magnola's original request for the new shipper review had been for Magnola's sales of alloy magnesium from Canada only.

10/ *See Pure and Alloy Magnesium from Canada: Notice of Initiation of New Shipper Countervailing Duty Review*, 67 Fed. Reg. 15,794 (Dep't Commerce, Apr. 3, 2002) (A.R. 5).

11/ *See* A.R. 11. In its May 8, 2002 letter, Magnesium Corporation of America ("Magcorp"), predecessor to U.S. Magnesium, cited several "additional" Canadian Federal and Québec Provincial subsidy programs from which Magnola may have benefitted, one of which was a labor subsidy grant given by Emploi-Québec. Magcorp asserted that this grant was "a targeted grant which constituted a significant portion of Employment Quebec's budget for similar programs." *Id.* at 9. Magcorp was sold to U.S. Magnesium on July 31, 2002.

12/ *See Alloy Magnesium from Canada: Preliminary Results of Countervailing Duty New Shipper Review*, 68 Fed. Reg. 4,175 (Dep't Commerce Jan. 28, 2003) ("Preliminary Results") (A.R. 67).

13/ *See Alloy Magnesium from Canada: Extension of Time Limit for the Preliminary Results of the Countervailing Duty New Shipper Review and Pure Magnesium from Canada: Rescission of Countervailing Duty New Shipper Review*, 67 Fed. Reg. 50,819 (Dep't Commerce Sept. 13, 2002) (A.R. 27).

On August 9, 2002, in response to an internal memorandum of the Department recommending that the labor subsidy not be investigated,[14/] U.S. Magnesium disputed the bases for this recommendation, reiterating its claim that Magnola had received *de facto* specific subsidies from the GOQ program known as the Emploi-Québec Manpower Training Mandate ("MTM"), and providing documentation supporting that allegation.[15/] On August 19 and September 3, 2002, Magnola submitted comments objecting to the consideration of the new subsidies.[16/] On September 6, 2002, the Department determined to initiate an investigation of the MTM program, concluding that there was sufficient evidence presented to allow it to reconsider its earlier position.[17/]

C. Preliminary and Final Determinations

1. *Preliminary Determination*

The Department issued its Preliminary Results in *Alloy Magnesium from Canada: Preliminary Results of Countervailing Duty New Shipper Review*, 68 Fed. Reg. 4,175 (Dep't Commerce Jan. 28, 2003) ("Preliminary Results") on January 28, 2003.[18/] In this determination, the Department preliminarily found that the MTM program was established by the GOQ to provide financial support, in the form of grants, to companies with approved training programs. The Department also preliminarily found that the MTM grants that Magnola received in 1998 and 2000 constituted countervailable subsidies within the meaning of 19 U.S.C. § 1677(5). The Department found a financial contribution under 19 U.S.C. §

14/ *See* A.R. 15, *Memorandum to Richard W. Moreland, dated July 10, 2002, re: New Shipper Review; Pure and Alloy Magnesium from Canada*. This memorandum recommended against investigating the labor subsidy allegation.

15/ *See* A.R. 19. In its letter, U.S. Magnesium alleged that "the [Emploi-Québec] E-Q reports indicate that Magnola's grant was not one of their regular grants and appears to be specific, and that it accounted for a disproportionate share of E-Q's total grant awards and is therefore likely to be countervailable." *Id.* at 3.

16/ *See* A.R. 23 and 25.

17/ *See Memorandum to Richard W. Moreland re: New Subsidy Allegation – Canadian Magnesium New Shipper Review,* dated September 6, 2002 (A.R. 26).

18/ *See* A.R. 67.

1677(5)(D)(i) because the grants were a direct transfer of funds from the GOQ that conferred a financial benefit to Magnola in the amount of the grants.

To determine whether the MTM program was *de facto* specific, as required by the Act, the Department conducted a "disproportionate benefit" analysis on an industry-specific as well as on a company-specific basis according to 19 U.S.C. § 1677(5A)(D)(iii)(III). The Department found that from 1998 through 2001, Magnola received a disproportionately large amount of benefits compared to other recipients on both an industry-specific and company-specific basis:

> We reviewed the information available on the industry of recipients in the MTM program and compared the benefit amount received by the metals industry to the amounts received by all other recipient industries. We found that from 1998 through 2001, the metals industry received a disproportionately large amount of MTM benefits compared to other industries.
>
> We then conducted a company-specific analysis by comparing the benefits received by Magnola to those received by other major economic project recipients.... We found that from 1998 through 2001, Magnola received a disproportionately large amount of benefits compared to other major economic project recipients.

Preliminary Results at 4,177.

As a non-recurring subsidy, the Department, pursuant to 19 CFR § 351.524(b) and (d)(2), allocated the subsidy over a period corresponding to the average useful life ("AUL") of the renewable physical assets used to produce the subject merchandise, and applied the 14-year period established for magnesium under the Internal Revenue Service's 1977 Class Life Asset Depreciation Range System ("the IRS Tables"). In doing so, the Department rejected Magnola's claim for a 28-year company-specific AUL, determining that the rebuttable presumption in favor of the IRS Tables established by 19 CFR § 351.524(d)(2) was not overcome.[19/]

19/ 19 CFR § 351.524(d)(2) of the regulations creates a rebuttable presumption that the AUL will be taken from the IRS Tables. In order to rebut the presumption in favor of the IRS Tables, the challenging party must show that the IRS Tables do not reasonably reflect the company-specific AUL or the country-wide AUL for the industry in question, and that the difference between the company-specific or (continued...)

Specifically, the Department concluded that Magnola had been "unable to provide historical or actual depreciation costs because it was still in its start-up phase and not yet operating at commercial levels. Instead, Magnola provided an AUL calculation based on a prediction of future depreciation expenses and asset values (based on pre-production costs) over a 40-year horizon."[20/]

As for the applicable discount rate, the Department noted that, under 19 CFR § 351.524(d)(3), it was the Department's preference to use a company's long-term fixed-rate cost of borrowing in the same year a grant was approved as the discount rate. However, where a company does not have a loan that could be used as a discount rate, its next preference is to use the average cost of long-term fixed-rate loans in the country in question.

In this case, "Magnola did not have long-term, fixed-rate, Canadian dollar loans or other debt obligations during 1998 or 2000, the years in which the MTM grants were approved. Therefore, we used the Canadian average rate of return on long-term commercial bonds as discount rates for the years 1998 and 2000."[21/]

2. *Final Determination*

a. *Disproportionality Analysis*

Following the receipt of case and rebuttal briefs,[22/] the Department published its Final Determination on April 28, 2003, in which it found that the amount of the MTM grants that Magnola received were disproportionately large when compared to other companies, and continued to find them *de facto* specific on

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19/ (...continued)
country-wide AUL and the IRS Tables is significant. *See* 19 CFR § 351.524(d)(2)(i). For the difference to be considered significant, it must be one year or greater. *See* 19 CFR § 351.524(d)(2)(ii).

20/ Preliminary Results at 4,176.

21/ *Id.*

22/ *See* A.R. 69, 70, 72, 73, 74 and 80.

an enterprise-specific basis under 19 U.S.C. § 1677(5A)(D)(iii)(III).[23/] The issues raised in the case and rebuttal briefs were addressed in the companion IDM. The net subsidy rate for Magnola was determined to be 7 percent.

The IDM records in considerable detail the arguments of the parties and the Department's final position on those arguments. For their part, the respondents initially assert that the MTM program was substantially similar to other training programs that the Department has "repeatedly found not countervailable." Indeed, like its predecessor program in Québec, the MTM program (1) has no *de jure* or *de facto* limitations as to which enterprises, industries, or workers could receive program benefits; (2) is available to numerous industries; (3) is available to companies within broad industrial ranges, (4) is not limited by region or industry, and (5) employs identical eligibility criteria for all potential beneficiaries in order to receive the identified benefits.[24/]

Focusing particularly on the disproportionality issue, the respondents first argued that "the Department is precluded from making a finding of *de facto* specificity based on disproportionality merely because Magnola or its industry received a larger shares [sic] of benefits" and cites for this purpose *Bethlehem Steel Corp. v. United States* ("Bethlehem Steel"), 140 F. Supp. 2d 1354 (Ct. Int'l Trade 2001) and *AK Steel Corp. v. United States* ("AK Steel"), 192 F.3d 1367 (Fed. Cir. 1999). Based on these decisions, the respondents argued that "rigid" tests or approaches are not acceptable and that simple disparities in dollar amounts of benefits or perhaps even percentages of total benefits cannot stand. Rather, the

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23/ *See Alloy Magnesium from Canada: Final Results of Countervailing Duty New Shipper Review*, 68 Fed. Reg. 22,359 (Dep't Commerce Apr. 28, 2003) ("Final Determination") (A.R. 84).

24/ IDM at 7. The respondents cited for these purposes the original 1992 Magnesium investigation, *Pure Magnesium and Alloy Magnesium from Canada*, 57 Fed. Reg. 30,946, 30,948 (Dep't. Commerce July 13, 1992) ("1992 CVD Determination"); *Certain Laminated Hardwood Trailer Flooring (LHF) from Canada* ("Laminated Flooring"), 62 Fed. Reg. 5,201 (Dep't Commerce Feb. 4, 1997); *Certain Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 40,474 (Dep't Commerce July 29, 1998); and *Stainless Steel Sheet, Strip and Plate from the United Kingdom*, 48 Fed. Reg. 19,048 (Dep't Commerce Apr. 27, 1983).

"Department must consider whether Magnola and its industry received disproportionate benefits in relation to the industry's subsidized activity."[25/]

Secondly, the respondents argued that the MTM program should be viewed as non-specific because "all respondents were granted 50 percent of training costs after meeting certain objective criteria." Thus, the mere fact that one program beneficiary receives a greater share of benefits because it spent more on training than other such beneficiaries cannot lead to a finding of *de facto* specificity if the "program grants all eligible participants the same benefit percentage." Thus, no single company such as Magnola can receive a disproportionate share of MTM funding "where all parties are treated uniformly under [the] program."[26/]

As their third principal argument, the respondents asserted that the Department had "ignored" its statutory obligation to take into "account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy has been in operation." *See* Section 771(5A)(D)(iii) of the Act.[27/] Respondents further asserted that, to properly carry out this obligation, the Department should "compare[] the share of [Magnola's] benefits to the industry's share of the Québec economy." For its part, the GOQ argued that the very purpose of the MTM funds is to promote economic diversification, the same point made by the statute itself; that the MTM's predecessor program was determined by the Department to be not countervailable; and that the current program has been in operation only for a short time and that in the future, new beneficiaries "will dilute both Magnola's and the magnesium industry's share of benefits."[28/] The GOQ also faults the Department for failing to analyze, as it had previously done in *Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 Fed. Reg. 73,176 (Dep't

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25/ *Id.*

26/ IDM at 8.

27/ Also cited by respondents as authority for their position are the Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), *reprinted in* H.R. Doc. No. 103-106 (1994), Vol I, at 261 *and at* 1994 U.S.C.C.A.N. 4040, and the Issues and Decision Memorandum incorporated in *Certain Hot-Rolled Steel Flat Products from South Africa*, 66 Fed. Reg. 50,412 (Dep't Commerce Oct. 3, 2001).

28/ IDM at 9.

Commerce Dec. 29, 1999), "whether other factors explain or contribute to what may otherwise appear to be a disparity in the use of a government program." The failure to take all factual circumstances before the Department into account (*e.g.*, the innovative technology employed by Magnola, the burdens of the start-up phase, and the resulting training needs) are contrary both to the statute and to *AK Steel*.[29/]

For its part, the petitioner argued that the MTM program was *de facto* specific and that the Department should affirm its preliminary results. While certain of the petitioner's arguments supporting the reasonableness of the Department's company-specific disproportionality analysis were proprietary and not set out in the IDM, the petitioner did argue that the respondents' reliance on *AK Steel* and *Bethlehem Steel* were misplaced. *AK Steel* involved the revaluation of assets and *Bethlehem Steel* involved "the Department's longstanding analysis of electricity discounts," neither set of facts being apposite in this case. The Department's disproportionality and dominant use inquiries are not subject to rigid rules and must be determined on a case-by-case basis. In addition, the petitioner argued "the Department can make an affirmative finding of disproportionality where all beneficiaries receive the same percentage rate of benefits."[30/] Finally, citing other authorities, the petitioner asserted that the Department should "reject Magnola's argument that it should consider whether the industry's share of total benefits is comparable to the industry's share of gross domestic product of the economy as a whole."[31/]

Having considered these arguments, the Department determined that the MTM program was countervailable according to Section 771(5) of the Act. However, the Department limited its *de facto* specificity finding to a company-specific basis. In this respect, the Department noted that "a disproportionality

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29/ *Id.*

30/ IDM at 11.

31/ *Id.* Petitioner cited *Laminated Flooring*, 62 Fed. Reg. 5201, and *Certain Steel Products from Belgium* ("Belgium Final"), 58 Fed. Reg. 37,273 (Dep't Commerce July 9, 1993). In the latter investigation, the Department "made clear that its disporportionality [sic] analysis would be based on the steel industry's benefits amongst other users of the program and not on a comparison of the steel industry's share of Belgium's gross domestic product ('GDP')." *Id.*

analysis may be conducted on a company (*i.e.*, enterprise), industry, or group of companies or industries basis, but it need not be conducted on all of these."[32/]

As its initial point, the Department rejected the argument that its previous holdings regarding training programs similar to the MTM program (determining them to be non-countervailable) require the same result in the instant case. The Department suggested that the MTM program differed in funding levels, sources and funding requirements from the cases cited by the respondents,[33/] and noted that "the similarity of the MTM program to previously investigated programs is not necessarily relevant because legally and factually distinct programs merit distinct analysis."

The Department then addressed the disproportionality issue in the following terms:

> Because the grants Magnola received were disproportionately large when compared to other companies, we continue to find them *de facto* specific on a company basis under section 771(5A)(D)(iii)(III) of the Act. In conducting our disproportionality analysis, for the years in which Magnola received grants, we calculated Magnola's share of total MTM grants on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries. In so doing, we found that Magnola received a disproportionate percentage of MTM benefits because, as the second largest recipient overall, its percentage share was nearly three times higher than the next highest recipient. Furthermore, Magnola's grant was greater than the grants received by 99 percent of all the beneficiaries and over ninety times larger than the typical grant amount. Magnola's grant was vastly larger than the typical grant, regardless of whether we included or excluded small-scale recipients from our analysis.

IDM at 13.

As to the impact of *AK Steel* and *Bethlehem Steel*, the Department considered that neither decision was inconsistent with its analysis. The court in *AK Steel* in fact upheld the Department's disproportionality analysis and its finding of

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32/ *Id.* at 13.

33/ *Id.* at 12. The Department cited *Laminated Flooring*, 62 Fed. Reg. 5,201, the *1992 CVD Determination*, and *Stainless Steel Sheet and Strip in Coils from France*, 64 Fed. Reg. 30,774, 30,782 (Dep't Commerce June 8, 1999).

no *de facto* specificity, emphasizing that its analysis should not be based upon "rigid rules," but upon a factual, case-by-case analysis. In doing so, the court rejected the party's argument that predominant use or disproportionality should be based on an absolute comparison, as opposed to a percentage comparison. In the instant case, the Department considered that "Magnola's benefits from the MTM program were disproportionate to the benefits received by other companies on a percentage basis after reviewing the factual evidence contained on this proceeding's record."[34/]

The Department also agreed with petitioner that the facts of both *AK Steel* and *Bethlehem Steel* were distinguishable from the facts of the instant case, although *Bethlehem Steel* is properly citable for the court's observation that neither of the relevant statutory terms — "dominant" and "disproportionate" — are statutorily defined and that Commerce enjoys judicial deference in its reasonable interpretation of those terms. A significant factual distinction between *Bethlehem Steel* and the present case is the absence here of a "standard pricing mechanism" as is present in electricity tariffs, which was the subject of the *Bethlehem Steel* review. In the instant case, therefore, the Department determined that the comparison that could be made on the present record was "whether Magnola's MTM benefits, on a percentage basis, are disproportionate to those of all other recipients." On the basis of this analysis, the Department found "that Magnola's benefits, on a company-specific basis, are disproportionately large given the comparisons available on this record."[35/]

The Department then addressed the argument of respondents that specificity could not be found where "all recipients who met certain objectives were treated uniformly and received 50 percent reimbursement of their training costs." While agreeing with the factual substance of the point, the Department nevertheless regarded it as relevant to a *de jure* analysis, not to the *de facto* analysis that served as the basis for its holding in the present case:

> [T]he objective nature of the MTM program's eligibility criteria simply indicates that this program is not *de jure* specific.... A program's lack of *de jure* specificity does not mean that it cannot be *de facto*

34/ *Id.* at 14.

35/ *Id.*

> specific... [B]ecause our specificity analysis is performed sequentially, we may examine *de facto* specificity when we fail to find *de jure* specificity. *See* 19 CFR 351.502.

IDM at 14.

Finally, the Department addressed the argument that it had failed to meet its statutory responsibility under Section 771(5A)(D)(iii)(IV) of the Act by not considering the economic diversity of Québec and the longevity of the MTM program.[36/] The SAA, however, indicates "that the consideration of these additional criteria may be instructive on certain facts, but are not in themselves determinative of specificity or the lack thereof." Because the Department conducted its disproportionality analysis for the final results on a company-specific basis, it did "not find that an analysis between Québec's GDP and the shares received by the 'metals industry,' as proposed by Magnola, is instructive nor is such a comparison to GDP required under *de facto* specificity analysis." *See AK Steel* at 1384. The Department also noted that it had previously questioned and rejected the usefulness of such analysis in other decisions.[37/]

b. *Magnola's Company Specific AUL*

Magnola argued that in the Preliminary Results, the Department improperly used the 14-year AUL from the IRS Tables instead of its company-specific 28-year AUL. First, Magnola stated that 19 CFR § 321.524(d)(2)(ii) requires a party to show that its proposed company-specific AUL differs significantly from the AUL in the IRS Tables, a burden which it fulfilled in its questionnaire responses. Second, Magnola argued that the Court of International Trade, in two decisions, has held

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36/ *Id.* The Department noted that Section 771(5A)((D)(iii)(IV) of the Act states that "the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation." This language, however, is to be taken together with the relevant language of the SAA, section B.2.c.(3) at 22, which indicates that "the consideration of these additional criteria may be instructive on certain facts, but are not in themselves determinative of specificity or the lack thereof."

37/ *Id.* at 15. The Department cited the decision memorandum from *Certain Hot-Rolled Carbon Steel Flat Products from South Africa*, 66 Fed. Reg. at Comment 2, *Laminated Flooring,* 62 Fed. Reg. at 5,210, and *Belgium Final*, 58 Fed. Reg. at 37,290.

that a company specific AUL must be used when available if the IRS Tables do not "reflect the commercial and competitive advantage enjoyed by the firms receiving nonrecurring subsidies."[38/] In the present case, Magnola's advanced technology and production processes would not be reflected in the 1977 IRS Tables. Finally, Magnola asserts that there is no rebuttable rule requiring ten years of financial data for adopting a company-specific AUL because the 1998 Final CVD Regulations, *Countervailing Duties; Final Rule*, 63 Fed. Reg. 65,348 (Dep't Commerce Nov. 25, 1998) ("1998 Final CVD Regulations"),[39/] state that ten years of data is neither necessary nor appropriate in all cases.[40/]

For its part, the petitioner argued that the "ten years of historical asset and depreciation figures ... are required by a company-specific calculation" and that Magnola failed to show, as also required, that the IRS Tables "do not reasonably reflect the company's actual AUL."[41/] *See* 19 CFR § 351.524(d)(2).

The Department's holding on this issue was the same as that reached in the Preliminary Results, namely, that Magnola's company-specific AUL should be rejected because it did not meet the requirements of 19 CFR § 351.524(d)(2)(iii). In particular:

> Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the AUL of the renewable physical assets used to produce the subject merchandise. Pursuant to 19 CFR 351.524(d)(2)(i) and (ii), we presumptively use the AUL listed in the IRS Tables, unless a party claims and establishes that (1) the IRS Tables do not reasonably reflect the recipient company's AUL or the country-wide AUL for the industry under investigation and (2) the difference between the two AULs is significant (*i.e.*, different by one year or more). Where the presumption is rebutted, we will use the

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38/ *See British Steel PLC v. United States* ("British Steel"), 879 F. Supp. 1254, 1289 (Ct. Int'l Trade 1995), and *Ipsco Inc. v. United States* ("Ipsco"), 687 F. Supp. 614 (Ct. Int'l Trade 1988).

39/ 1998 Final CVD Regulations, 63 Fed. Reg. 65,348 (Nov. 25, 1998)

40/ Magnola cites to the 1998 Final CVD Regulations, 63 Fed. Reg. at 65,396, and argues that "its company-specific AUL, which was calculated by applying the straight-line method of depreciation used by Magnola's parent, is reliable regardless of whether ten years of historical data is present." *Id.*

41/ *Id.* at 16.

> company's own AUL or the country-wide AUL as the allocation period if it is calculated according to 19 CFR 351.524(d)(2)(iii). *Id.* 19 CFR 351.524(d)(2)(iii) sets forth that in calculating a company-specific AUL, the company must, inter alia, base its depreciation on an estimate of the actual useful lives of its assets, and the AUL is calculated by dividing the actual annual average gross book values of the firm's depreciable productive fixed assets by the company's aggregated annual charge to accumulated depreciation, *for a period considered appropriate by the Secretary*. (Emphasis added.) As indicated in the Preamble to the 1998 CVD Regulations, 63 FR at 65,397, the Department has generally considered the "appropriate period" to be 10 years of actual historical data *(i.e.*, data for the POR and the preceding nine years).

IDM at 17.

In the instant case, Magnola "calculated a 28-year company-specific AUL based on future estimated depreciation expenses and asset values" which the Department found was not "calculated in a manner consistent with the requirements under our regulations for rebutting the use of the presumptive IRS AUL."[42/] In addition, while the Department recognized that it does not require, in all cases, that a company-specific AUL be based on 10 years of actual historical data, in this instance, "Magnola's company specific AUL is not based on *any* actual historical data.... Rather, Magnola has calculated its company-specific AUL using future estimated depreciation expenses and asset values. This prospective, theoretical calculation clearly does not meet the regulatory requirements for rebutting the presumptive IRS AUL."[43/]

c. *Magnola's Discount Rate*

Magnola asserted that it financed its operations with capital from its parent company, Noranda, and therefore, that Noranda's cost on long-term loans should be used as the discount rate in the final results. This approach would be consistent with 19 CFR § 351.524(d)(3)(A), which expresses the Department's preference for using "the costs of long-term fixed rate loans of the firm in question."[44/]

42/ *Id.* at 17.

43/ *Id.*

44/ *Id.* at 18.

The petitioner, however, contended that the Department cannot use Noranda's cost on long-term loans because of the rates of Magnola's owners, Noranda and the *Societe Generale du Financement*, "do not reflect the actual rates charged to Magnola."[45/]

Considering these arguments, the Department:

> agree[d] with Magnola that 19 CFR 351.524(d)(3) provides that, in selecting the discount rate used to allocate non-recurring benefits over time, the Department's preference is to use the cost of long-term fixed-rate loans of the "firm in question." Magnola, not Noranda, is the "firm in question" subject to the instant proceeding. Magnola, among other things, is a separately incorporated company and is the recipient of the subsidy benefits under review.... We note that Magnola did not report any commercial debt obligations of its own, but rather it reported the rate at which its parent company, Noranda, borrowed funds. Because Magnola is the "firm in question" within the meaning of 19 CFR 351.524(d)(3)(i)(A) and because it did not have any commercial debt obligations during the years the MTM grants were approved, we continue to find that the Canadian long-term commercial bond rate is the most appropriate discount rate available in this proceeding. *See* 19 CFR 351.524(d)(3)(i)(C).

IDM at 18.

D. Briefing, Oral Hearing, and Recent Panel Events

After the Panel was constituted, it received in a timely fashion both public and proprietary Rule 57(1)[46/] briefs filed jointly on March 22-23, 2004 by the GOQ and Magnola addressed to the *de facto* specificity issue. On March 22, 2004, Magnola alone filed a public supplemental Rule 57(1) brief addressed to the AUL and discount rate issues. On May 21, 2004, the Department filed its public Rule 57(2) response brief, and on May 20-21, 2004, U.S. Magnesium filed both public and proprietary response briefs. Thereafter, on June 7-8, 2004, Magnola filed its public and proprietary Rule 57(3) reply briefs.

The Panel has issued three interim orders, the first dated December 21,

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45/ *Id.*

46/ NAFTA Panel Rule 57 governs the filing of briefs by the parties in a Chapter 19 proceeding.

2004 addressing an initial Consent Motion to Revise Briefing Schedule and related motions which were filed prior to the constitution of the Panel; the second dated April 19, 2005 setting May 6, 2005 as the date for oral argument on the merits of the Department's Final Determination; and the third dated July 19, 2005 extending time for issuance of the Panel's opinion until September 9, 2005.

II. THE STANDARD OF REVIEW

This Binational Panel's review of the Department's Final Determination is circumscribed by the standard of review set out in Article 1904(3) of the NAFTA, which requires that:

> The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

NAFTA Art. 1904(3).

Annex 1911 points to 19 U.S.C. § 1516a(b)(1)(B) as the applicable U.S. standard of review, which statute requires the Panel to "hold unlawful any determination, finding, or conclusion found … to be unsupported by substantial evidence on the record or otherwise not in accordance with law…". A failure by the Panel to apply the appropriate standard of review may result in the Panel being determined to have exceeded its authority.[47/]

This Panel is also limited to a review of what is contained in the "administrative record"[48/] as compiled by the investigating authority.[49/] Accordingly, the Panel may not review the matter *de novo* and must restrict its review to the administrative record developed during the underlying proceeding.[50/]

47/ *See* NAFTA Art. 1904(13).

48/ NAFTA Art. 1911 defines the term "administrative record" to mean: (a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of *ex parte* meetings as may be required to be kept; (b) a copy of the final determination of the competent investigating authority, including reasons for the determination; (c) all transcripts or records of conferences or hearings before the competent investigating authority; and (d) all notices published in the official journal of the importing Party in connection with the administrative proceeding.

49/ *See* NAFTA Art. 1904(2). The investigating authority, in this instance, is the United States Department of Commerce.

50/ *Porcelain-on-Steel Cookware from Mexico*, USA-97-1904-07 at 2 (April 30, (continued...)

NAFTA requires that binational panels apply the standard of review that courts of the importing country would apply.[51/] In this instance, therefore, the Panel is bound by, and must apply, the laws of the United States, which are deemed to include its "relevant statutes, legislative history, regulations, administrative practices, and judicial precedents to the extent that a court of the [United States] would rely on such materials in reviewing a final determination of the competent investigating authority."[52/] Judicial precedents, for this purpose, will include decisions of the United States Court of International Trade ("CIT"), the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), and the United States Supreme Court.[53/] Decisions of the Supreme Court and the Federal Circuit are binding on Article 1904 binational panels; by contrast, decisions of the CIT may be persuasive but are not considered to be binding precedent.[54/]

"*Substantial Evidence on the Record*"

The determination as to whether an agency determination, finding or conclusion is supported by "substantial evidence" on the record obviously turns on the meaning of the term itself. Although not precisely defined by the statute, it has been the subject of considerable judicial scrutiny. The Supreme Court has stated that substantial evidence is "more than a mere scintilla [of evidence]" and is "such relevant evidence as a reasonable mind might accept as adequate to support a

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50/ (...continued)
1999)

51/ NAFTA Art. 1904(3).

52/ NAFTA Art. 1904(2). As stated in *Pure Magnesium from Canada*, USA-CDA-00-1904-06 at 6 (Mar. 27, 2002), "[s]trict adherence by binational panels to the requirements in Article 1904(3) that panels apply the judicial standard of review of the importing country is the cornerstone of the binational panel process. NAFTA, therefore, requires the Panel to apply the substantive and procedural laws of the United States in the same manner that a U.S. court would apply them."

53/ *Id.*

54/ *See Rhone Poulenc v. United States*, 583 F. Supp. 607, 612 (Ct. Int'l Trade 1984) (A decision of the CIT is "valuable, though non-binding, precedent unless and until it is reversed."). Likewise, a decision of one Article 1904 binational panel is not binding on future panels. *See Certain Corrosion-Resistant Carbon Steel Products from Canada*, USA-93-1904-03 at 78 n. 254 (Oct. 31, 1994).

conclusion."[55/] Elaborating on that standard, the Supreme Court has indicated that substantial evidence could be "something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[56/]

It is well established that this standard requires that a court or panel accord deference to the agency's factual findings.[57/] However, deference does not suggest that the reviewing body is permitted to abdicate its responsibility to review meaningfully the agency's findings. Its review must entail more than a mere cursory review or a rubber-stamping of those findings. The court or panel must ensure that a reasoned basis supports the agency's decision and that its determination is not premised on inadequate analysis or faulty reasoning.[58/] The degree of deference which is to be accorded to the agency always remains contingent upon "the

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55/ *See Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). *See* also *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

56/ *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 620 (1966). *See also USX Corp. v. United States*, 655 F. Supp. 487, 489 (Ct. Int'l Trade 1987) ("The views of this court may not be freely substituted for those of [the agency]; nor may reversal be predicated solely on an interpretation of the facts that seems more reasonable.") and *Matsushita Elec. Indus.*, 750 F.2d at 933 (The mere fact that appellants "can point to evidence of record which detracts from the evidence which supports the [agency]s decision and can hypothesize a reasonable basis for a contrary determination is neither surprising nor persuasive. It is not the function of a court to decide that, were it the [agency], it would have made the same decision on the basis of the evidence.").

57/ *See, e.g., American Silicon Techs. v. United States*, 334 F.3d 1033 (Fed. Cir. 2003); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997); *Hercules, Inc. v. United States*, 673 F. Supp. 454, 463 (Ct. Int'l Trade 1987) (agencies have "broad discretion in the enforcement of trade laws.") (quoting *Manufacturas Industriales de Nogales, S.A. v. United States*, 666 F. Supp. 1562, 1567 (Ct. Int'l Trade 1987)); and *Brother Industries, Ltd. v. United States*, 771 F. Supp. 374, 381 (Ct. Int'l Trade 1991).

58/ *Chr. Bjelland Seafoods A/C v. United States*, 14 ITRD 2257, 2260, 1992 Ct. Int'l Trade LEXIS 213 (Ct. Int'l Trade 1992); *USX Corp. v. United States*, 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987). *See also Universal Camera*, 340 U.S. at 477, and *American Lamb Co. v. United States*, 785 F.2d 994, 1004 (Fed. Cir. 1986) (*citing* S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 638).

thoroughness evident in [its] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements…"[59/]

Deference to the agency's findings also presupposes a rational connection between the facts found and the choices made by the agency.[60/] While the standard does not insist upon ideal clarity, the agency's path of reasoning must be reasonably discernible.[61/] There must also be an adequate explanation of the rationale for the agency's decision in order for the court or panel to assess meaningfully whether it is supported by substantial evidence on the record. The agency must articulate and explain the reasons for its conclusions.[62/]

In determining whether the substantial evidence standard has been met, the court or panel must consider the record as a whole. This Panel must, in other words, examine all of the evidence on the record, including that which supports the agency's findings as well as that which detracts from it.[63/] While the Panel may not reweigh the evidence or substitute its opinion for that of the administrative

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59/ *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 965 (Ct. Int'l Trade 1986) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987)).

60/ *Bando Chem. Indus. v. United States*, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (*citing Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)); *Avesta AB v. United States*, 724 F. Supp. 974, 978-9 (Ct. Int'l Trade 1989), *aff'd* 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991).

61/ *Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir.1987) (*citing Bowman Transportation*, 419 U.S. at 286).

62/ *Mitsubishi Materials Corp. v. United States*, 820 F. Supp. 608, 621(Ct. Int'l Trade 1993); *USX Corp*., 655 F. Supp. at 490; *SCM Corp. v. United States*, 487 F. Supp. 96, 108 (Cust. Ct. 1980); *Maine Potato Council v. United States*, 613 F. Supp. 1237, 1244-45 (Ct. Int'l Trade 1985); and *Bando Chem. Indus.*, 787 F. Supp. at 227.

63/ *Universal Camera*, 340 U.S. at 483-484.

agency,[64/] it is tasked with considering the body of evidence opposed to the agency's view.

The Panel's review must be conducted strictly on the basis of what is contained within the administrative record compiled by the agency[65/] and may not engage in *de novo* review or make new factual findings which amend that record.[66/] In addition, the Panel's review must address the agency's rationale and its findings as set out in the determination itself.[67/] Counsel's *post hoc* rationalizations in the briefs or at oral argument cannot rectify an agency's lack of articulation in its determination.[68/]

"*In Accordance with Law*"

In order to determine whether the Department's interpretation and application of the countervailing duty statute is "in accordance with law," the Panel must undertake the two-step analysis prescribed by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* ("Chevron"), 467 U.S. 837 (1984). Under the first step, the Panel reviews the Department's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. If it is determined that Congress has directly spoken to the issue at hand, then the agency must be required to apply the law as it

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64/ The possibility of drawing two inconsistent conclusions from the evidence does not mean that the agency's conclusion is unsupported by substantial evidence. *See Consolo*, 383 U.S. at 620. This holds true even if the reviewing body would have made a different choice had the matter been before it *de novo*. *See Universal Camera*, 340 U.S. at 488; *American Spring Wire Corp. v. United States*, 590 F. Supp. 1273, 1276 (Ct. Int'l Trade 1984), *aff'd sub nom. Armco, Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

65/ *Daewoo Electronics Company v. United States*, 6 F.3d 1511 (Fed. Cir.1993), *cert. denied*, 114 S .Ct. 2672 (1994).

66/ *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-744 (1985).

67/ *Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 427 (Ct. Int'l Trade 1993).

68/ *Maine Potato*, 613 F. Supp. at 1245.

is written.[69/] "To ascertain whether Congress had an intention on the precise question at issue, [the Panel] employ[s] the 'traditional tools of statutory construction.'"[70/] "The first and foremost 'tool' is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter."[71/] Beyond the statute's text, the tools of statutory construction "include the statute's structure, canons of statutory construction, and legislative history."[72/]

If, after employing the first prong of *Chevron*, the Panel determines that the statute is silent or ambiguous with respect to the specific issue before it, the question then becomes whether the Department's construction of the statute is a permissible one.[73/] Essentially, this is an inquiry into the reasonableness of the Department's interpretation.[74/] "In determining whether the Department's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions and the objectives of the antidumping scheme as a whole."[75/] Provided that the Department has acted rationally, the Panel may not substitute its construction or judgment for

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69/ *Windmill Int'l Pte., Ltd. v. United States*, 193 F. Supp. 2d 1303 (Ct. Int'l Trade 2002).

70/ *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (*citing Chevron*, 467 U.S. at 843 n.9).

71/ *Id.* (citations omitted).

72/ *Id.* (citations omitted), but *see Floral Trade Council v. United States*, 41 F. Supp. 2d 319, 323 n.6 (Ct. Int'l Trade 1999) (noting that "[n]ot all rules of statutory construction rise to the level of a canon") (citation omitted).

73/ *Chevron*, 467 U.S. at 843.

74/ *See Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996).

75/ *Mitsubishi Heavy Indus., Ltd. v. United States*, 15 F. Supp. 2d 807, 813 (Ct. Int'l Trade 1998).

that of the agency.[76/] The same principles apply to an agency's interpretation of its own regulations.[77/]

There are permissible limitations to the deference to be accorded to an agency's interpretation. As noted above, an agency may not, under the guise of lawful discretion or interpretation, contravene or ignore the intent of Congress.[78/] Agency practice must yield to statutory language and, in cases where such practice is changed, the level of discretion is contingent upon the explanation given for the change.[79/] The agency must justify any departure it makes from settled practice with a reasonable explanation that itself is supported by substantial evidence on the record.[80/] While the agency enjoys a presumption of good faith and conscientious

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76/ *See IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992); *See also Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (holding that "a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another.").

77/ *Cathedral Candle Company v. United States*, 400 F.3d 1352, 1363 (Fed. Cir., 2005) ("[I]t is well settled that an agency's interpretation of its own regulations is entitled to broad deference from the courts. (Citations omitted.) Deference to an agency's interpretation of its own regulations is broader than deference to the agency's construction of a statute, because in the latter case the agency is addressing Congress's intentions, while in the former it is addressing its own.").

78/ *Cabot Corp. v. United States*, 694 F. Supp. 949, 953 (Ct. Int'l Trade 1988)

79/ *Public Employees Retirement System of Ohio v. June M. Betts*, 492 U.S. 158, 171 (1989); *Texas Crushed Stone Co. v. United States*, 35 F.3d 1535, 1541 n. 7 (Fed. Cir. 1994) ("Prior agency practice is relevant in determining the amount of the deference due an agency's earlier interpretation. An agency's interpretation of a relevant provision which conflicts with an agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") *(citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987)).

80/ *Western Conference of Teamsters v. Brock*, 709 F. Supp. 1159, 1169 (Ct. Int'l Trade 1989); *National Knitwear and Sportswear Ass'n v. United States*, 779 F. Supp. 1364, 1369 (Ct. Int'l Trade 1991). *See also Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283-84 (Fed. Cir. 2004) (indicating that even if the Department has statutory discretion, it must either act consistently with its "routine practice for addressing like situations,... or provide a reasonable explanation as to why it departs therefrom) (*citing Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.")).

exercise in the carrying out of its responsibilities,[81/] it must nevertheless observe the basic principles of due process and fundamental procedural fairness.[82/]

Methodologies are the means by which an agency carries out its statutory mandate and they are generally regarded to be within its discretion.[83/] The court or panel must therefore accord deference to the agency's use of methodology, limiting its review to an analysis of the methodology's reasonableness.[84/] However, where the use of a methodology is improper, then any of the findings which flow from it would not be supported by substantial evidence.[85/]

In conclusion, the applicable standard of review requires that this Panel uphold the Department's Final Determination if it (a) is supported by substantial evidence on the record and (b) is not contrary to law, even if this Panel would have reached a different conclusion had it considered the case *de novo.* This is the standard of review that has been applied to this case.

81/ *Saha Thai Steel Pipe Co. v. United States*, 661 F. Supp. 1198, 1202 (Ct. Int'l Trade 1987).

82/ *Sigma Corp. v. United States*, 841 F. Supp. 1255, 1267-68 (Ct. Int'l Trade 1993); *Usinor Sacilor v. United States*, 893 F. Supp. 1112, 1141 (Ct. Int'l Trade 1995); and *Creswell Trading Co. v. United States*, 15 F.3d 1054, 1062 (Fed. Cir. 1994).

83/ *Brother Industries* at 381.

84/ *Koyo Seiko Co. v. United States*, 66 F. 3d 1204, 1210-1211 (Fed. Cir.1995)

85/ *Gifford-Hill Cement Co. v. United States*, 615 F. Supp. 577, 582 (Ct. Int'l Trade 1985).

III. SUMMARY OF THE DECISIONS OF THE PANEL

A. With respect to the *de facto* specificity issue, a majority of the Panel decides to uphold the Department's Final Determination. Chairman Endsley and Panelist Holbein write the Panel opinion while Panelist Winham writes separate, concurring views. Panelists Anissimoff and LaBarge dissent.

B. With respect to the AUL calculation issue, the Panel unanimously upholds the Department's Final Determination.

C. With respect to the discount rate issue, the Panel unanimously upholds the Department's Final Determination.

IV. DISCUSSION AND ANALYSIS

A. Whether the Department's Findings and Determinations Concerning the Conferral of Benefits by Québec to Magnola as Constituting a *De Facto* Specific Countervailable Subsidy Are Supported by Substantial Evidence on the Record and Are in Accordance with Law

1. *Contentions of the Parties*

Magnola and the GOQ

The Rule 57(1) brief filed jointly by Magnola and the GOQ (collectively, the "Canadian Complainants") sets out in considerable detail the background of the case, including that of Magnola and the MTM program itself, as well as the standard of review applicable to this Panel review. In defining the specific issues for review, the Canadian Complainants assert that:

- The current MTM program is identical in all material respects with prior training programs that the Department has consistently found to be non-countervailable;

- The Department's analysis was inconsistent with the purposes of the statutory disproportionality provision;

- The Department measured disproportionality in absolute terms (despite feigning the application of a percentage-based standard), contrary to binding Federal Circuit precedent;

- The Department's disproportionality finding is inconsistent with previous administrative decisions, which the Department effectively ignored;

- The Department ignored its statutory obligation to consider the diversification of Québec's economy and the longevity of the MTM program.

The views of the Canadian Complainants on each of these issues will be summarized below.

A. Consistency with Prior Administrative Decisions

The Canadian Complainants first note that:

> The MTM Program is precisely the type of training assistance program that Commerce routinely has held to be non-countervailable — applicants are qualified according to objective criteria, and once qualified, all beneficiaries receive the same percentage of program funds across a wide range of industries. MTM assistance was available without regard for the geographic location of the applicants. Indeed, "applicants {for MTM Program benefits} included enterprises in every sector of the economy and in every region of Québec." There was no evidence that program participants were concentrated in a particular geographic area and, whether considered on an enterprise or industry basis, participants were not limited in number. From 1998 to 2001, GOQ provided assistance to over 3900 enterprises. Enterprises in at least eleven different industries received MTM benefits for major economic projects. The record thus established (without controversy before Commerce) that thousands of enterprises throughout all sectors of the Québec economy participated in manpower training through the partial funding available under the MTM Program.

Canadian Complainants Rule 57(1) brief at 17 (citations omitted).

They next note that when the Department investigated the predecessor Manpower Training Program, it concluded in that investigation that the program was generally available and not countervailable, based on findings that (1) the funds were generally available to all applicants who met the criteria; (2) there were no *de jure* or *de facto* limitations pertaining to the enterprise or industrial sector employing the workers; and (3) the program was offered and provided to enterprises and workers in a "large number and broad range" of industries." *See* 1992 CVD Determination.

The Canadian Complainants argue that this result was consistent with "a long line of investigations into training assistance programs, all of which resulted in a determination that the relevant training assistance program was neither specific

nor countervailable."[86/] Indeed, Canadian Complainants insist that "the only training assistance programs found countervailable were expressly limited to particular regions or industries."[87/]

Despite the Department's concession in the Final Determination that "the MTM program is available to all industries and all enterprises in Québec that met the five objective criteria,"[88/] it effectively attempted "to bypass its prior practice" by declaring the previous no-subsidy holdings to be "not persuasive," adding that "the similarity of the MTM program to previously investigated programs is not necessarily relevant because legally and factually distinct programs merit distinct analysis."[89/] In the Canadian Complainants' view, however, the Department never got around to performing this "distinct analysis."[90/]

86/ Canadian Complainants Rule 57(1) brief at 18. The Canadian Complainants cite *Laminated Flooring*, 62 Fed. Reg. at 5,206, *Stainless Steel Sheet and Strip in Coils from France*, 64 Fed. Reg. at 30,782; *Belgium Final*, 58 Fed. Reg. at 37,285; *Certain Carbon Steel Products from Austria,* 50 Fed. Reg. 33,369, 33,372 (Dep't Commerce Aug. 19, 1985); *Carbon Steel Wire from Trinidad and Tobago*, 49 Fed. Reg. 480, 486 (Dep't Commerce Jan. 4, 1984); *Steel Pipe and Tube Products from South Africa*, 48 Fed. Reg. 24,407 (Dep't Commerce June 1, 1983); *Certain Steel Products from South Africa*, 47 Fed. Reg. 39,379, 39,382 (Dep't Commerce Sept. 7, 1982); and *Carbon Steel Structural Shapes, Hot-Rolled Plate and Bar from the United Kingdom*, 47 Fed. Reg. 39,384, 39,388 (Dep't Commerce Sept. 7, 1982).

87/ Canadian Complainants Rule 57(1) brief at 20. For this purpose, the Canadian Complainants cite *Stainless Steel Bar from Italy*, 66 Fed. Reg. 30,414, 30,423 (Dep't Commerce June 6, 2001); *Certain Pasta from Italy*, 61 Fed. Reg. 30,288, 30,294 (Dep't commerce June 14, 1996); *Certain Steel Products from Italy*, 58 Fed. Reg. 37,327, 37,335 (Dep't Commerce July 9, 1993); *Certain Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. at 40,487-88; *Stainless Steel Sheet, Strip, and Plate from the United Kingdom*, 48 Fed. Reg. 19,048, 19,051 (Dep't Commerce Apr. 27, 1983); and *Carbon Steel Structural Shapes, Hot-Rolled Plate and Bar from the United Kingdom*, 47 Fed. Reg. 39,384 (Dep't Commerce Sept. 7, 1982).

88/ IDM at 12.

89/ *Id.*

90/ Canadian Complainants Rule 57(1) brief at 21. The Canadian Complainants add: "But declaring that principle is not a substitute for conducting an analysis of the ways in which the challenged program actual [sic] differs from or resembles the prior programs regularly found to be non-countervailable. Here Commerce seems to have believed that it need do no more than state that prior cases are 'not

(continued...)

Had the Department done so, it would have found that those programs, like the MTM program, provided for (a) automatic eligibility based upon objective criteria; (b) general availability to all enterprises and industries; and (c) distribution of funds based on an unbiased formula that assured similarity of treatment of recipients. In addition, it was not uncommon for the recipients in those cases to be "among the largest recipients of assistance under the training program at issue."[91/] On these grounds, the Canadian Complainants consider that there is no "rational basis" for distinguishing the case at hand from the Department's prior administrative decisions.

B. Consistency with the Statute

The Department's disproportionality analysis is called for by section 771(5A)(D)(iii)(III) of the Act, codified at 19 U.S.C. § 1677(5A)(D)(iii)(III), which provides that:

> In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:...
>
> (iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exists: ...
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.

The Act further provides that:

> [i]n evaluating the factors set forth above in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

90/ (...continued)
persuasive,' without providing any explanation of why that is so." *Id.*

91/ Canadian Complainants Rule 57(1) brief at 22.

The Canadian Complainants agree with the Department's finding in the Final Determination that the MTM program was not *de jure* specific.[92/] Moreover, they agree that the Department performed the sequential analysis called for by Department regulation 19 C.F.R. § 351.502(a), finding that the MTM program was not *de facto* specific under subclause (I) (*actual recipients are "limited in number"* — the MTM Program was used by a large number of recipients") or under subclause (II) (*one enterprise or industry is "a predominant user" of the subsidy* — no one company or industry predominated in the use of the MTM program).

Their argument centers on the third subclause quoted above — "disproportionately large amount of the subsidy" — and specifically to the Department's finding that the MTM program benefits provided to Magnola were "disproportionately large when compared to other companies."[93/] The basis for this finding was said to be that:

> Magnola received a disproportionate percentage of MTM benefits because, as the second-largest recipient overall, its percentage share was nearly three times higher than the next highest recipient. Furthermore, Magnola's grant was greater than the grants received by 99 percent of all the beneficiaries and over ninety time larger than the typical grant amount. Magnola's grant was vastly larger than the typical grant, regardless of whether we included or excluded small-scale recipients from our analysis.
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> IDM at 13.

The Canadian Complainants argue that the Department's analysis is "circular" (assuming what the statute requires the Department to affirmatively demonstrate — that large training grants to large employers are in fact "disproportionate" for purposes of subsidy law) and the results "anomalous" (large new plants with new technology will always need more extensive workforce training than smaller plants or established plants with merely upgraded equipment — and will under the Department's interpretation always be subject to a *de facto*

92/ A benefit program can be *de jure* specific only "[w]here the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry...." 19 U.S.C. § 1677(5A)(D)(i).

93/ IDM at 13.

subsidy risk).[94/] The Canadian Complainants observe that the only way Magnola could have survived the Department's disproportionality analysis was for several new large plants of Magnola's scale to have been established during the POR. If that had been true, "no argument could be made that Magnola received disproportionate amounts" even Magnola's benefits would have still been greater than 99 percent of all beneficiaries and over 90 times larger than the typical grant.[95/]

The Canadian Complainants fault the Department's analysis as being inconsistent with the underlying purposes of the statutory disproportionality provision. They argue that "[t]he law on subsidies begins with the principle that governmental assistance that is made available generally to all users in an economy is permissible and non-countervailable. Only when assistance is limited to a subset of users, whether overtly (*de jure*) or by use of a covert restriction (*de facto*), does the law recognize a concern for trade-distortive effects."[96/] They then add:

> The subsidies law further recognizes that some programs that appear generally available may, in practice, benefit a select few.... A program that is available to all but used by only a few may be *de facto* specific. So too may a program that is available to all but predominantly used by one company. Similarly, "the granting of disproportionately large amounts of subsidy to certain enterprises" may be a basis for suspecting abuse of the rule that protects generally-available programs. The "disproportionately large" subclause is therefore a mechanism to permit policing of circumvention of the rules in which a recipient is targeted or favored by the granting government, despite appearances of neutrality.

Canadian Complainants Rule 57(1) brief at 29.

With these principles in mind, the Canadian Complainants note that under the MTM program, (1) the application criteria were objective; (2) the amounts of the grants were determined by pre-established formulas; and (3) no covert circumvention problem existed because Magnola's training costs were reimbursed

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94/ Canadian Complainants Rule 57(1) brief at 26-27.

95/ *Id.* at 27.

96/ *Id.* at 28.

only up to a level of 50 percent ("no company would spend $2 to obtain a covert reimbursement of $1").[97/]

They also insist that the statutory disproportionality analysis must be "read in conjunction with the other portions of the specificity rules, which make clear that a granting authority that adheres to objective criteria and conditions of general applicability is not engaging in the provision of a specific benefit"[98/] and, indeed, with the dictionary definition of the term (an action is disproportionate if it is "unsuitable to something else in bulk, form, value, or extent.").[99/] Thus, a grant is not "unsuitable" simply because it is large; it becomes "unsuitable" only "if its size is not driven by the size of the recipient and by the objective factors spelled out in the relevant award criteria."[100/] In the Canadian Complainants' view, this is precisely the failing of the Department's analysis in this case.

C. Compliance with Case Law

The Canadian Complainants argue that the Department's Final Determination is inconsistent with case law, particularly the binding Federal Circuit decision in *AK Steel*. They view this decision as "confirming that it is not the size of the benefit itself that controls 'disproportionality' analysis."[101/] In that decision, the Federal Circuit expressly noted that a methodology that concluded that "a benefit conferred on a large company might be disproportionate merely because of the size of the company" would produce "an untenable result."[102/]

From a factual standpoint, the *AK Steel* decision involved a Korean government asset revaluation program which allowed Korean companies making an initial public offering to revalue their assets even though they did not meet the

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97/ *Id.* at 29-30.

98/ *Id.* at 30.

99/ *Id. citing* Websters Revised Unabridged Dictionary (1998) (definition of *disproportionate*).

100/ *Id.*

101/ *Id.* at 31.

102/ *See AK Steel*, 192 F.3d at 1385.

normal threshold for such revaluations. Some 207 Korean companies revalued under the program including the leading steel producers; indeed, Korea's large steel producers had obtained some 86% of the overall benefits under the revaluation program, with nearly 76% of the benefits going to POSCO. Even on these facts, which were far more dramatic than those involved in the present case, the Federal Circuit "rejected this 'size of benefit' argument."[103/]

The Canadian Complainants find that the present case "stands on all-fours with *AK Steel*," although "the overall share of the MTM benefits realized by Magnola amounted to a mere [ ], a far cry from the 86% in *AK Steel*."[104/] Moreover, the Department's analysis, despite "incantation[s]" to the contrary, was a formulaic one simply relying on the argument that "99 percent" of the grants to others were smaller than the grant to Magnola and that the Magnola grant was "ninety times larger than the typical grant amount."[105/] In effect, the Department's analysis is, simply, *Magnola is big, therefore its MTM benefit was disproportionate*.[106/]

The Canadian Complainants also point to relevant language in the *Bethlehem Steel* decision:

> The mere fact that the steel industry received a greater monetary benefit from the program than did other participants is not determinative of whether that industry was "dominant" or receiving "disproportionate" benefits. In virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits than another group. To impose countervailing duties on an industry where disparity alone is demonstrated, but no evidence is produced indicating that the benefit was industry specific, is anathema to the purpose of the countervailing duty laws. Although the steel industry received over 51% of the discounts afforded by the VCA program during the period of investigation, there is nothing in the record to indicate this percentage was disproportionately higher than would be expected. Commerce, consistent with its prior practice, examined the Korean steel industry

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103/ Canadian Complainants Rule 57(1) brief at 33.

104/ *Id.* at 33-34.

105/ *Id.* at 34.

106/ *Id.* at 34-35.

> and concluded that one of its characteristics was the large consumption of electricity.

Bethlehem Steel at 1369.

So, too, in the instant case. It is an inherent characteristic "of a new greenfield plant, using a new technology to produce magnesium from a previously untested source in an area in which the workforce has minimal prior exposure to the type of manufacturing operations being introduced, that large manpower training expenses will be required."[107/]

D. Consistency with Other Disproportionality Decisions

The Canadian Complainants next assert that the Department's analysis "cannot be squared with its other disproportionality decisions."[108/] Initially, they quote from the Department itself how the disproportionality analysis should be conducted:

> Our typical specificity analysis examines disproportionality by reference to actual users of the program. In other words, we compare the share of the subsidy received by producers of the subject merchandise to the shares received by other industries using the program.

Live Cattle from Canada, 64 Fed. Reg. 57,040, 57,061 (Dep't Commerce Oct. 22, 1999).

> In prior cases where the Department has found disproportionality ..., we analyzed whether respondents received a disproportionate share of benefits by comparing their share of benefits to the collective or individual share of benefits provided to all other users of the program in question.

Standard Chrysanthemums from the Netherlands ("Standard Chrysanthemums"), 61 Fed. Reg. 20,406, 20,407 (Dep't Commerce May 6, 1996).

Summarizing these statements, the Canadian Complainants state that "Commerce typically first compares the subject producer's share of total

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107/ *Id.* at 36.

108/ *Id.* at 36-42.

disbursements to the shares of all other enterprises, both as individual enterprises and as a collective group, and then repeats the same exercise on an industry level."[109/] Had the Department applied that analysis in this case, Canadian Complainants believe that the Department would have found that Magnola's share of MTM program benefits was "dwarfed" by the share allocated to others. The Canadian Complainants note that, surprisingly, the Department never even referred to the fact, in the Final Determination or the IDM, that Magnola's share of overall MTM benefits was so small.

As a general measure of the Department's other administrative decisions, the Canadian Complainants provide the rule of thumb that "[i]n prior cases addressing the disproportionality factor, Commerce has consistently found that a share below the 25% range is insufficient to constitute a 'disproportionately large' benefit to the recipient."[110/] "Conversely, where Commerce has found disproportionality, the recipient's share has consistently been at least 25 percent of the total program benefit."[111/] They then inquire as to how the [ ]share of benefits to Magnola under the MTM program can be less than the benefits share in all of the

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109/ Canadian Complainants Rule 57(1) brief at 37.

110/ *Id.* at 38. The Canadian Complainants cite *Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 Fed. Reg. 5,967, 5,975 (Dep't Commerce Feb. 8, 2002) (4.7% share of total disbursements); *Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 66 Fed. Reg. 50,410 (Dep't Commerce Oct. 3, 2001) (9.2% share of program benefits); *Fresh Atlantic Salmon from Chile*, 62 Fed. Reg. 61,803, 61,808 (Dep't Commerce Nov. 19, 1997) (4.4% of total disbursements); *Certain Pasta from Italy*, 61 Fed. Reg. 30,288, 30,296 (Dep't Commerce June 14, 1996) (4.9% share of benefits); *Antifriction Bearings from Singapore*, 60 Fed. Reg. 52,377, 52,378-79 (Dep't Commerce Oct. 6, 1995) (6.3% share of benefits); *Belgium Final*, 58 Fed. Reg. at 37,280-81 (7.3% and 17.3% shares of program benefits); *Iron Ore Pellets from Brazil*, 51 Fed. Reg. 21,961, 21,963 (Dep't Commerce June 17, 1986) (4.3% of benefits); and *Carbon Steel Structural Shares from Korea*, 49 Fed. Reg. 47,284, 47,289 (Dep't Commerce Dec. 3, 1984) (5% to 8% of total benefits). *Id.* at 38-39.

111/ *Id.* at 40, *citing Live Cattle from Canada*, 64 Fed. Reg. at 57,060-61 (25-30% of total disbursements); *Stainless Steel Plate in Coils from Italy*, 64 Fed. Reg. 15,508, 15,525-26 (Dep't Commerce Mar. 31, 1999) (50.52% share of total program benefits); *Standard Chrysanthemums*, 61 Fed. Reg. at 20,407 (36% of total disbursements); *Certain Textile Mill Products and Apparel from Thailand*, 49 Fed. Reg. 49,661, 49,662 (Dep't Commerce Dec. 21, 1984) (45% share of program benefits); and *Grain-Oriented Electrical Steel from Italy*, 59 Fed. Reg. 18,357, 18,361 (Dep't Commerce Apr. 18, 1994) (34% of total disbursements).

prior cases in which the Department entered negative disproportionality determinations. Citing *Antifriction Bearings from Singapore* ("Antifriction Bearings"), 60 Fed. Reg. 52,377 (Dep't Commerce Oct. 6, 1995), the Canadian Complainants argue that the Department "has regularly distinguished small shares of the program benefits from large shares in conducting disproportionality analysis" and should have done so here.[112/]

E. Statutory Obligation to Consider Diversification and Longevity

Finally, the Canadian Complainants argue that the Department, in performing its disproportionality evaluation, "bluntly ignor[ed]" the statutory requirement under Section 1677(5A)(D)(iii) to consider the economic diversification of the granting country (Québec) and the length of time the program has been in operation.[113/] The statute itself provides:

> In evaluating the factors set forth in subclauses (I), (II), (III), and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.

19 U.S.C. § 1677(5A(D)(iii).

Subclause (III), as referenced in the statute, is the disproportionality provision.

The Canadian Complainants assert that "[n]othing in the plain statutory language gives Commerce discretion to ignore or overlook these factors," but that in the Final Determination, "Commerce interpreted this statutory obligation as discretionary, on grounds that the [SAA] ... somehow frees Commerce of the obligation the statutory language imposes upon it."[114/] As a non-statutory instrument, however, it "cannot overcome or modify the plain language of the statute"[115/] or, to

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112/ Canadian Complainants Rule 57(1) brief at 42.

113/ *Id.*

114/ *Id.* at 43.

115/ *Id.* at 43, *citing Pure Magnesium from Canada* at 9-10 (finding that the Department acted contrary to law by interpreting a non-statutory instrument to

(continued...)

quote Circuit Court decisions, "trump the plain meaning of a statute."[116/]

Even taking the language of the SAA at face value, however, Canadian Complainants believe that there is nothing in that language to suggest that the Department "is free entirely to ignore [the statutory] criteria."[117/] By giving these criteria no consideration, the Department has acted contrary even to the SAA, giving clear grounds for remand. Emphasizing their relevance to the province of Québec and the present case, the Canadian Complainants underscore the purposes underlying these additional criteria:

> [The *de facto* specificity analysis] cannot fairly be conducted without reference to the economic diversification of the granting country. A country with limited economic diversity may create a generally available program that, because of the limited number of industries in the country, will be used only by a "limited ... number" of actual recipients, or in which one enterprise or industry may be "a predominant user," or in which one enterprise or industry may receive a "disproportionately large" share of the benefits. In each instance, the statutory factor can be properly assessed only by taking into account the economic diversification evidence. What may be preferential for a broad, diverse manufacturing economy will not be preferential in a narrower, less diverse economy.

Canadian Complainants Rule 57(1) brief at 45 (citations omitted).

U.S. Department of Commerce

The Department's Rule 57(2) brief supports its Final Determination and makes the following essential points:

- The Department properly exercised its statutory discretion in making its disproportionality finding;

- The Department followed its prior disproportionality determinations by

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115/ (...continued)
permit the use of a "conclusive presumption that {was} inconsistent with the statute").

116/ *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 25-26 (D.C. Cir. 2002); and *Ramadan v. Chase Manhattan Corp.*, 229 F.3d 194, 201 (3rd Cir. 2000).

117/ Canadian Complainants Rule 57(1) brief at 44.

comparing the relative amounts of MTM program benefits received by Magnola to the amounts received by other Québec enterprises;

- The Department properly chose to examine disproportionality on an enterprise-specific, as opposed to an industry-specific, basis;

- The countervailability of previous Québec worker training programs is irrelevant to the present case;

- The Department properly considered economic diversification of Québec in making its disproportionality determination.

These points are summarized below.

A. Statutory Discretion

The Department argues that it has "broad discretion to determine what constitutes a 'disproportionate benefit'" under the countervailing duty law, citing both *AK Steel* ("determined on a case by case basis taking into account all the facts and circumstances of a particular case") and *Bethlehem Steel* ("Because neither 'dominant' or 'disproportionate' are defined in the relevant statute, this Court is obligated to defer to Commerce's reasonable interpretation thereof").[118/] The Department believes that it reasonably interpreted the term "disproportionate" in the statute "to mean whether Magnola's MTM benefits, on a percentage basis, are disproportionately large compared to those of other recipients."[119/] Indeed, this was the same test applied by the Department and considered by the Federal Circuit in *AK Steel*.[120/] As in the latter case, the Department expressed the amounts received

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118/ Department Rule 57(2) brief at 18.

119/ *Id.* at 19.

120/ *Id.* The Department quotes from the opinion to the effect that "it was not error for Commerce to rely on record evidence demonstrating no disproportionality based on the relative percentage benefit rather than on the absolute benefit conferred." *See AK Steel*, 192 F.3d at 1385.

by Magnola and the other recipients "in percentage terms (*i.e.*, percentage of the amount disbursed)."[121/]

The Department then restates its fundamental findings as set out in the IDM:

> [The Department] calculated Magnola's share of total MTM grants on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries. In so doing, we found that Magnola received a disproportionate percentage of MTM benefits because, as the second largest recipient overall, its percentage share was three times higher than the next highest recipient. Furthermore, Magnola's grant was greater than the grants received by 99 percentage of all the beneficiaries and over ninety times larger than the typical grant amount.
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> IDM at 14.

On the basis of the foregoing factual record,[122/] the Department's conclusion was that Magnola's MTM grants were disproportionately large when compared to other companies and that it "reasonably interpreted the statutory term 'disproportionate' to mean substantially greater than amounts received by other recipients of MTM grants."[123/]

B. The Department's Disproportionality Test Follows Past Practice

The Department stresses that its

121/ *Id.*

122/ As to the finding of "second largest recipient overall," the Department in fact found that the total amount of Magnola's training grant, measured as a percent of all training grants, was the second largest of any enterprise in Québec, out of more than 3900 recipients of MTM grants. *See* Department Rule 57(2) brief at 26-27.

123/ *Id.* at 20. The Department cites, in this connection, *Live Cattle from Canada*, 64 Fed. Reg. at 57,061; *Laminated Flooring*, 62 Fed. Reg. at 5,205; *Stainless Steel Bar from Italy*, 67 Fed. Reg. 3,163 (Dep't Commerce Jan. 23, 2002) incorporating Issues and Decision Memorandum dated Jan. 15, 2002 at Comment 9; and *Standard Chrysanthemums*, 61 Fed. Reg. at 20,407 ("comparing their collective or individual share of benefits provided to all other users of the program in question").

> practice in making disproportionality determinations is to compare the relative amount of benefit that a given industry or enterprise receives from a subsidy program compared to other industries or enterprises in the same country. Commerce does this because a comparison of relative "amounts" is required by the express language of the statute, which directs Commerce to determine whether "[a]n enterprise or industry receives a disproportionately large amount of the subsidy."

Department Rule 57(2) brief at 21 (emphasis in original; citations omitted).

As noted in *AK Steel*, however, the Department is permitted to express those amounts in percentage terms (*i.e.*, percentage of the amount disbursed), as opposed to simple absolute terms.

The Department notes that its analytical approach can involve comparisons between industries and comparisons between enterprises. "In industry-specific cases, the Department examines the amount of a given subsidy received by a particular industry, compared to the amounts provided to all other industries that received the subsidy."[124/] In enterprise-specific cases, "it compares the relative amount of benefits received by individual producers of the subject merchandise, compared to other individual users of the subsidy. In other words, Commerce typically compares the amount of subsidy received by an individual enterprise to the total amount disbursed by the authority, and to the amounts received by other companies."[125/]

The Department cites, in support of the latter standard, *Certain Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 40,474, 40,491 (Dep't Commerce July 29, 1998) wherein the Department had found that the recipient company, Bolzano, was the largest single recipient of the subsidy at issue and had received a larger share of the benefits than the average recipient:

> While assistance was provided to a number of firms during this period, Bolzano received a much larger share in comparison to the total aid awarded. In fact, Bolzano was the largest single recipient of restructuring assistance. Bolzano received far more than the average recipient over this period. Thus, we conclude that the restructuring

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124/ *Id.* at 23.

125/ *Id.* at 24.

> assistance granted to Bolzano ... is *de facto* specific within the meaning of section 771(5A)(D)(iii) of the Act....
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> *Certain Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. at 40,491.

C. Examining Disproportionality on an Enterprise-Specific Basis

The Department first notes that the statute permits it to conduct its disproportionality analysis on either an industry or enterprise basis.[126/] Applying an enterprise-specific analysis in this case, the Department found that the total amount of Magnola's training grant, measured as a percent of all training grants, was the "second largest of any enterprise in Québec, out of more than 3900 recipients of MTM grants." Then, comparing the amount received by Magnola to the amounts received by other recipients of MTM grants in Québec, the Department found that the amount of Magnola's grant was "nearly three times higher than the next highest recipient," "greater than the grants received by 99 percent of all beneficiaries," and "ninety times larger than the typical grant amount."[127/]

The Department then addresses the rule of thumb advanced by the Canadian Complainants Rule 57(1) brief to the effect that the Department has "consistently found no specificity where the recipient's share of subsidy benefits is less than 25%."[128/] The Department asserts that "Commerce has never established a threshold percentage above which a *prima facie* case for disproportionate benefit is automatically established" and to do so would be contrary to the Department's mandate to consider the particular facts and circumstances of each case. Moreover, in "all but one" of the cases to which the Canadian Complainants refer, the Department had conducted an industry-specific analysis and not an enterprise-specific analysis.[129/] The Department finds the Canadian Complainants' criticism to

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126/ *Id.* at 26, *citing* IDM at 13.

127/ *Id.* at 26-27.

128/ *Id.* at 27 *citing* Canadian Complainants Rule 57(1) brief at 7.

129/ *Id.* The Department goes on to state that "[i]t is not surprising that when Commerce aggregates together an entire industrial sector that the amount of subsidy attributable to that sector may be relatively larger than when Commerce is analyzing the quantum of subsidy received by an individual enterprise. In other words, a given industry (the aggregate of multiple individual producers), taken as a whole, could be expected to receive a larger portion of the gross budget of a

(continued...)

be an "apples to oranges" contrast and misleading.[130/]

As to the Canadian Complainants' assertion that the Department's analysis was "circular,"[131/] the Department notes that the Canadian Complainants do not point to any evidence on the record to establish that large employers always have large training needs and cites record evidence that "many of the companies identified by the GOQ as recipients of MTM grants are much larger employers than Magnola but appear to have received substantially less money during the period of review."[132/] The Department also disputes the allegation that its methodology was "size-driven," noting that "the Department's disproportionality determination in no way turns on or even refers to Magnola's relative size."[133/]

Addressing the related point made by the Canadian Complainants — that the relatively high level of MTM grants to Magnola are due to the inherent characteristics of a start-up operation[134/] — the Department points to the SAA for the principle that such inherent characteristics are irrelevant to a *de facto* specificity analysis ("the fact that the use of the subsidy may be limited due to the inherent characteristics of the good or service in question would be irrelevant for purposes of a *de facto* specificity analysis."). *See* SAA at 932.

Finally, the Department responds to the Canadian Complainants' assertion that a finding of *de facto* specificity is inappropriate in this case because there is no evidence to suggest that "the MTM program was used to funnel other financial

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129/ (...continued)
government subsidy program than any given individual producer." *Id.* at 27-28 (emphasis in original).

130/ *Id.* at 28.

131/ *Id. citing* Canadian Complainants Rule 57(1) brief at 26 ("a large employer with a large workforce will always have larger training needs, and therefore will receive larger funding amounts, than smaller employers").

132/ *Id.*

133/ *Id.*

134/ *Id.* at 29.

support to Magnola under the guise of manpower training funding."[135/] The Department finds this argument to be incorrect as a matter of law:

> The statute does not require the Department to determine the cause of any *de facto* specificity that occurs as a result of the government action.... No intent or purposeful government action is required to show that a specific industry is receiving the benefit.

Department Rule 57(2) brief at 29-30.

D. Administrative Decisions Regarding Previous Québec Training Programs are Irrelevant

The Department next argues that the fact that predecessors to the MTM program were determined not to be countervailable is not relevant to the Department's determination in this case.

> It is well-established that the replacement of a government program previously found to be non-specific does not automatically render its successor non-specific. *See Stainless Steel Plate in Coils from Italy: Final Countervailing Duty Determination*, 64 Fed. Reg. 15,508, 15,526 (Dep't Commerce Mar. 31, 1999) ("Just because a program may replace or succeed a non-specific program, the finding of non-specificity for the earlier program does not carry over to the replacement or successor program"). In this case, Commerce similarly noted that "the similarity of the MTM program to previously investigated programs is not necessarily relevant because legally and factually distinct programs merit distinct analysis."

Department Rule 57(2) brief at 30, *citing* IDM at 12.

Moreover, while the Canadian Complainants argue that a line of manpower training program cases were identical in all material ways to the MTM program, the Department states that "in fact those programs were not factually identical or were analyzed under a different part of the statute."[136/] Thus, the Department argues that it did provide the "distinct analysis" required and asserts that the Canadian

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135/ *Id,. citing* Canadian Complainants Rule 57(1) brief at 29.

136/ *Id.* at 31, *citing* IDM at 12 ("funding levels, sources and funding requirements differed among the labor programs cited by the respondents").

Complainants' criticism that the Department departed from its settled practice without explanation to be "a legal red herring."[137/]

E. The Department Did Consider the Economic Diversification of Québec

As its final argument on the issue of *de facto* specificity, the Department states that it "properly took into account the economic diversification of the [sic] Québec in making its disproportionality determination in this case."[138/] Contrary to the allegation that the Department had "ignored its statutory obligation to consider the diversification of Québec industries and the length of the MTM program,"[139/] the Department suggests that it considered the Canadian Complainants' arguments and "properly determined that they were not probative."[140/]

In its argument, the Department cites to both the Act and the SAA:

> The Act provides that Commerce, in evaluating whether a *de facto* specific benefit has been conferred, "shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation. [Citing 19 U.S.C. § 1677(5A)(D)(iii)(IV)] The statute does not require any particular finding or analysis, but simply that the Department consider the economic structure of the jurisdiction in making any specificity determination. As the SAA explains, the requirement that Commerce "take into account" economic diversification does not mean that this factor is dispositive in a determination of specificity.[141/]

137/ *Id.*

138/ *Id.*

139/ *Id.* at 32, *citing* Canadian Complainants Rule 57(1) brief at 42.

140/ *Id.* at 32.

141/ The Department cites to the SAA at 931: "The Administration intends that these additional criteria serve to inform the application of, rather than supersede or substitute for, the enumerated specificity factors. (That is, while they are not additional indicators of whether specificity exists, these criteria may provide a clearer context within which the *de facto* factors would be analyzed). Thus, for example, with respect to economic diversification, in determining whether the number of industries using a subsidy is small or large, Commerce could take account of the number of industries in the economy in question."

Department Rule 57(2) brief at 32.

The Department then argues that in the Final Determination (IDM at 14-15) it clearly did take into account the Canadian Complainants' request that the Department examine "the relative contribution of the Québec metals industry to Québec's GDP."[142/] The problem, however, was one of relevance:

> However, the Department concluded that because the agency had conducted its final specificity analysis on an enterprise-specific basis (not on an industry-specific basis) that the industry-wide GDP-based diversification argument proffered by the parties was not probative of specificity in this case: "we do not find that an analysis of Québec's GDP and the shares [of the MTM subsidy] received by the 'metals industry' as proposed by Magnola is instructive." The reason it was not instructive, Commerce explained, was that the extent of economic diversification on the basis of an industry's relative contribution to GDP was not "determinative of specificity or the lack thereof" when considering the case of Magnola, which was being evaluated on an enterprise-specific basis.

Department Rule 57(2) brief at 33.

Finally, the Department asserts that the Canadian Complainants have shifted their diversification argument from that made at the administrative level (emphasizing "thousands of beneficiaries of the manpower training program spread through every segment of Québec's economy.... Magnola and the industry to which it belongs received only a small portion of total funding") and that made on appeal ("Québec has limited economic diversification").[143/] The Department regards this as *post hoc* argument of counsel and suggests that the Canadian Complainants are precluded from raising it now.

U.S. Magnesium

The Rule 57(2) brief filed by U.S. Magnesium provides additional background information concerning Magnola and the MTM program and then begins its argument by reference to the discretion and deference owed to the

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142/ Department Rule 57(2) brief at 33.

143/ *Id.* at 33-34.

Department as a result of the *AK Steel* and *Bethlehem Steel* decisions.[144/] It then reasons:

> Thus, the only guidance provided by the countervailing duty statute and controlling case law is that the recipient enterprise's subsidy is countervailable if it is "disproportionately large." The statute provides no guidance with respect to the manner in which the "disproportionately large" determination is to be made, and Commerce has broad discretion to make the determination on a case-by-case basis.
>
> In light of these principles, Commerce has the discretion to evaluate whether subsidies are "disproporationately [sic] large" using facts and comparisons of its choosing so long as they are based on substantial evidence on the record.

U.S. Magnesium Rule 57(2) brief at 12.

Citing *AK Steel* ("it was not error for Commerce to rely on record evidence demonstrating no disproportionality based on the relative percentage benefit rather than on the absolute benefit conferred on [the enterprise]"), U.S. Magnesium argues that "[i]t is similarly within the range of Commerce's discretion 'to rely on record evidence demonstrating no disproportionality based on the relative percentage' of subsidy received by Magnola as compared to other subsidy recipients."[145/] U.S. Magnesium also argues in footnote that the Department didn't engage in a single-minded, mechanical analysis — large companies always have large training needs — but instead "evaluated a variety of ratios in determining that Magnola's share of the MTM subsidy was disproportionate."[146/]

U.S. Magnesium points to *AK Steel* and *Bethlehem Steel* a second time, first to confirm the Department's broad discretion to determine disproportionality on a case-by-case basis, but otherwise to suggest that both cases — which upheld Department determinations of no *de facto* specificity — are distinguishable on the

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144/ U.S. Magnesium Rule 57(2) brief at 12.

145/ *Id.* at 13.

146/ *Id.* at 13 n. 27.

facts.[147/] In *AK Steel*, for example, the determination that Pohang Iron and Steel Company ("POSCO") had not benefitted by a countervailable subsidy was due to the facts that "the average increase in asset value for all companies that participated in the program was greater than POSCO's, and that a large percentage of companies revalued their assets by a greater percentage than POSCO."[148/] None of those facts were present in the instant case; indeed, "the factual basis of the case for finding disproportionality in AK Steel was much weaker than in this new shipper review."[149/]

In the case of *Bethlehem Steel*, notwithstanding that the Korean steel industry was the largest single user of an electricity curtailment program, the Department gave a negative subsidy determination because the electricity discounts were "consistent with the standard pricing mechanism." The Department also argued that "the steel industry is one of the largest industries in Korea and thus would be expected to receive the greatest amount of benefit from the VCA program."[150/] U.S. Magnesium's review of the case concludes that:

> Commerce's long-standing practice for analyzing electricity subsidies is not applicable to a labor subsidy and not relevant in determining whether its analysis in this case was in accordance with law. Moreover, unlike [sic] situation in Bethlehem Steel, the level of MTM benefits received by Magnola is not what "would be expected," nor does it "reflect commercial realities." As the GOQ concedes, the Magnola project was extraordinary in its scope and its need for government assistance.

U.S. Magnesium Rule 57(2) brief at 15.

The next principal point made by U.S. Magnesium is that there are no absolute benchmarks for determining whether a subsidy is "disproportionately large," referencing the rule of thumb advanced by the Canadian Complainants that the Department consistently finds subsidy shares below 25 percent of the total

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147/ *Id.* at 14-15.

148/ *Id.* at 14, *citing AK Steel,* 192 F.3d at 1385.

149/ *Id.*

150/ *Id.* at 15

available subsidy are not "disproportionately large."[151/] U.S. Magnesium asserts that the Department has "never articulated a threshold subsidy ratio below which a subsidy cannot be 'disproportionately large,'" and to do so would be a violation of *AK Steel*'s mandate to conduct these analyses on a case-by-case basis taking into account all relevant facts and circumstances.

U.S. Magnesium also makes the observation, as did the Department itself, that all but one of the administrative determinations cited by the Canadian Complainants involved subsidies evaluated on an industry-specific, not an enterprise-specific, basis.[152/] However, even if the Department has invoked a 25 percent test, "Commerce is free to alter that practice to meet the unique circumstances of this case so long as it explains its departure from past practice."[153/] U.S. Magnesium then adds:

> As described above, the MTM subsidy in this case was unique, because it was bestowed on more than 3900 subsidy recipients. Consequently, no single enterprise received a majority or even a substantial minority of the available subsidy, and predicating a specificity analysis on receipt of at least 25 percent [sic] the available subsidy would not provide a useful tool for determining whether any one enterprise received a disproportionately large subsidy.

U.S. Magnesium Rule 57(2) brief at 18.

U.S. Magnesium's final argument in its Rule 57(2) brief is that the Department did in fact consider the diversification of Québec's industries and the

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151/ *Id.* at 16 *et seq.*

152/ *Id.* at 17. U.S. Magnesium adds that "[t]he two types of analysis cannot be compared. Because there are fewer industries within the relevant economy than there are enterprises, the percentage share of subsidy received by one industry as opposed to another typically will be greater than the percentage share of one enterprise as opposed to another. This is particularly true here. The MTM subsidy was bestowed upon more than 3900 small-scale and major enterprises. It would be highly unlikely that a single enterprise would receive more than 25 percent of the total MTM subsidy available given this number of recipients."

153/ *Id.* at 18, *citing British Steel Plc v. United States*, 127 F.3d 1471, 1475 (Fed. Cir. 1997) ("An agency is obligated to follow precedent, and if it chooses to change, it must explain why.... Once an agency justifies its change with sufficient, reasoned analysis, however, the revised policy deserves the same deference as the original policy.").

longevity of the MTM program.[154/] U.S. Magnesium quotes from the Act and the SAA and states, simply, that "economic diversification is not determinative of specificity."[155/] It approves the Department's rejection of the statutory requirement "as immaterial," taking into account the fact that the Department had conducted its *de facto* specificity analysis on an enterprise-specific, as opposed to an industry-specific, basis.

As to the Canadian Complainants argument that "the SAA cannot obviate the statutory requirement that Commerce consider these factors, because it is not an authoritative statement of the law," U.S. Magnesium argues that the Canadian Complainants "misrepresent the authority of the SAA."[156/] U.S. Magnesium points to 19 U.S.C. § 3512(d)[157/] and to case law[158/] to support the Department's reliance on the SAA in interpreting the statutory requirement to consider the economic diversification of the jurisdiction providing the subsidy.[159/] In addition, by reference to the IDM at 15-16, U.S. Magnesium finds it clear that the Department did "consider" the extent of diversification of economic activities within Québec despite its rather conclusory assessment that "an analysis between Québec's GDP and the shares received by the 'metals industry,' as proposed by Magnola, is {not} instructive nor is such a comparison of GDP required under the *de facto* specificity analysis."[160/]

154/ *Id. et seq.*

155/ *Id.* at 19.

156/ *Id.*

157/ 19 U.S.C. § 3512(d) provides that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application."

158/ U.S. Magnesium cites *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1309 (Fed. Cir. 2001); *Koenig & Bauer-Albert AG v. United States*, 259 F.3d 1341, 1345 (Fed. Cir. 2001); and *Usinor Industeel, S.A. v. United States*, 215 F. Supp. 2d 1356, 1357 (Ct. Int'l Trade 2002).

159/ U.S. Magnesium Rule 57(2) brief at 20.

160/ *Id., citing* IDM at 15-16.

Magnola (Reply)

Magnola's Rule 57(3) Reply brief argues that the Department has mischaracterized *AK Steel*. It argues that the Federal Circuit held in *AK Steel* that an enterprise's or industry's relatively large share of benefits does not, in and of itself, support a finding of disproportionality:

> The domestic producers' argument that Commerce must analyze ... disproportionality by looking at the percentage of the total benefit of a subsidy program accruing to a particular company or industry is not correct.... The domestic producer's methodology could produce an untenable result, *i.e.*, that a benefit conferred on a large company might be disproportionate merely because of the size of the company.

Magnola Rule 57(3) brief at 10, *citing AK Steel*, 192 F.2d at 1385.

Magnola points, as well, to the similar holding of the CIT in *Bethlehem Steel*:

> The mere fact that the steel industry received a greater monetary benefit from the program than did other participants is not determinative of whether the industry was "dominant" or receiving "disproportionate" benefits. In virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits than another group. To impose countervailing duties on an industry where disparity alone is demonstrated, but no evidence is produced indicating that the benefit is industry specific, is anathema to the purpose of [sic] countervailing duty laws.

Magnola Rule 57(3) brief at 10-11, *citing Bethlehem Steel*, 140 F. Supp. 2d at 1369.

Finally, Magnola points to the *Bethlehem Steel* language that "where ... the eligibility requirements are explicitly stated and all parties receive the same discount, there can be no exercise of discretion and no favorable treatment afforded to any one industry."[161/]

161/ Magnola Rule 57(3) brief at 11, *citing Bethlehem Steel*, 140 F. Supp. 2d at 1370.

Magnola then argues that these decisions vindicate the view that:

> where a program provides funding on an equal basis, regardless [sic] the size of the company receiving benefits, there can be no disproportionality. Magnola received the same 50 percent reimbursement of eligible expenses as all other MTM participants. It was bigger than most (but not all) other program participants. Thus, it received proportionate, not disproportionate, MTM reimbursements. Its participation conformed precisely to the terms pronounced by the courts in *AK Steel* and *Bethlehem Steel*.

Magnola Rule 57(3) brief at 11.[162/]

Turning to the consistency of the present case with facts of *AK Steel* and *Bethlehem Steel*, Magnola notes that the Department argued that its analysis was "entirely in accord with every aspect" of *AK Steel*, while U.S. Magnesium argued that *AK Steel* and *Bethlehem Steel* were "distinguishable on the facts."[163/] Magnola argues that both are wrong: the facts of *AK Steel* and *Bethlehem Steel* are analogous to the facts of the present case but the courts' holdings "are incompatible with Commerce's disproportionality analysis [in the present case]."[164/] It argues that:

> [t]he court in *AK Steel* held that it would have been "untenable" for Commerce to have analyzed disproportionality with reference to POSCO's absolute share of program benefits. Commerce's focus on Magnola's absolute share of MTM Program benefits in analyzing disproportionality is no less untenable in this case.

Magnola Rule 57(3) brief at 13.

162/ Magnola adds that both the Federal Circuit and the CIT "have held that Commerce must consider whether an enterprise or industry has received a disproportionate share of benefits in relation to the enterprise's or industry's share of the targeted activity, be it electricity or manpower training. Where eligible participants receive the same benefit as a percentage of the targeted activity, "this clearly indicates uniformity of treatment among all parties" and precludes a finding of *de facto* specificity." *Id.* at 12, *quoting Bethlehem Steel*, 140 F. Supp. 2d at 1369.

163/ *Id.*

164/ *Id.* at 12-13.

In the case of *Bethlehem Steel*, the court noted that:

> Although the steel industry received over 51% of the discounts afforded by the VCA program during the period of investigation, there is nothing in the record to indicate this percentage was disproportionately higher than would be expected. Commerce, consistent with its prior practice, examined the Korean steel industry and concluded that one of its characteristics was the large consumption of electricity.... The record indicates that under the VCA program all eligible participants receive the same discount regardless of industry. This clearly indicates uniformity of treatment among all parties and provides substantial record support for Commerce's conclusion that the VCA program was non-specific.

Magnola Rule 57(3) brief at 14, *quoting Bethlehem Steel*, 140 F. Supp. 2d at 1369.

On this basis, Magnola argues that its relatively large share of total MTM program benefits was not "disproportionately higher than would be expected," given the characteristics of its operations resulting in large manpower training needs. Despite the Department's argument that the methodology for analyzing electricity subsidies is unique, Magnola asserts that the principle of *AK Steel* and *Bethlehem Steel* is generally applicable: "Commerce cannot find that a program granting the same level of funding to all participants grants disproportionate funding to any one participant."[165/]

Magnola then disputes the Department's assertion that its "unusual needs as a start-up operation" is legally irrelevant to its *de facto* specificity analysis, as well as unsubstantiated on the record.[166/] The Department's assertion had been based on a limited quotation from the SAA, but Magnola suggests that the full text should be quoted ("*where a government confers a subsidy through the provision of a good or service*, the fact that the use of the subsidy may be limited due to the

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165/ *Id.* at 15. Magnola adds: "Under both the VCA program and the MTM Program, participants received the same level of reimbursement based on their usage of electricity or expenditures on manpower training, precluding a finding that any one participant received disproportionate benefits. That one program concerned electricity and the other manpower training is immaterial." And again: "The courts said in *AK Steel*, and again in *Bethlehem Steel*, that the size of the company or industry should not matter, and that a larger company or industry should be expected to receive a larger proportion of a program's benefits." *Id.*

166/ *Id.* at 16.

inherent characteristics of the good or service in question would be irrelevant for purposes of a *de facto* specificity analysis." *See* SAA at 932; emphasis added). Magnola argues that, in the present case, limitation in use is not the concern; instead, it is proportionate distribution in the background of widespread use. It suggests that the SAA's language would be appropriate in situations such as *Carbon Black from Mexico*, 51 Fed. Reg. 13,269, 13,271-13,272 (Dep't Commerce Apr. 18, 1986), wherein the Department had to apply some alternative test due to the absence of other purchasers of carbon black, whose data, if it had existed, could have been used to determine the preferentiality of carbon black pricing.

Magnola also strongly disputes the allegation that its training needs, as a startup operation, are unsubstantiated on the record. Magnola cites its detailed Human Resources Development Plan, which was on the record, as well as the basic finding that it received the second greatest amount of MTM program benefits, covering the same 50 percent of manpower training expenses as every other MTM participant.

Turning to the 25 percent benchmark analysis made in the Canadian Complainants Rule 57(1) brief, Magnola first notes that the Department's standard methodology ("whether the amount of a benefit received by an enterprise or industry was disproportionate in comparison to the actual amounts received by other enterprises or industries") should be considered relevant to situations "where the level of program benefits varies from participant to participant, but the courts in *AK Steel* and *Bethlehem Steel* rejected this approach to analyzing disproportionality for programs that provide the same level of benefits to all participants."[167/] In its view, the fact that the Department found that all beneficiaries under the MTM program are reimbursed 50 percent of their training expenses means that there is no exercise of discretion and that there could be no proper finding of *de facto* specificity.

As to the argument that the Department has never found an industry or enterprise share of total program funding less than 25 percent to be disproportionate, Magnola notes the Department's response that all but one of these cases concern an industry-wide analysis, and then states:

167/ *Id.* at 19 (citation omitted).

> Commerce offers no example, however, of an enterprise-specific analysis in which Commerce found that an enterprise had received a disproportionate share of benefits when that enterprise's share was less than 25 percent of total program funding, much less the [ ] share of total MTM grants received by Magnola.

Magnola Rule 57(3) brief at 20.

Finally, Magnola asserts that the Department simply possesses no discretion to ignore the diversification of the Québec economy in its analysis of *de facto* specificity:[168/]

> Commerce cannot satisfy its statutory obligation to "take into account the extent of diversification of economic activities within" Québec by declaring that such an analysis is not "instructive," and need not be performed. "Shall" is not a discretionary term.

Magnola Rule 57(3) brief at 20-21.

Under *Chevron*, neither a court nor a panel owes an agency's interpretation of a statute any deference where that interpretation conflicts with the plain meaning of the statute.

2. Analysis and Decision of the Panel

A majority of the Panel upholds the Department's Final Determination on the *de facto* specificity issue.

As noted above, the Canadian Complainants have raised a series of objections to the Department's determination on *de facto* specificity. These objections include issues of interpretation of the statute, the selection and use of particular methodologies, and past administrative practice. The Canadian Complainants have not contested the specific factual findings made by the Department in this case,[169/] but since the applicable standard of review[170/] requires

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168/ *Id.* at 20.

169/ As will be noted *infra*, however, the Canadian Complainants do complain about a finding that was not made.

170/ Under NAFTA Annex 1911 and 19 U.S.C. § 1516a(b)(1)(B), the panel must "hold (continued...)

that the Panel examine whether there is substantial evidence on the record to support the Department's Final Determination, the Panel will begin with that inquiry. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison*, 305 U.S. at 229.

"Substantial Evidence on the Record"

In the IDM, the Department made the following specific factual findings:

> [W]e calculated *Magnola's share of total MTM grants* on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries. In so doing, we found that Magnola received a disproportionate percentage of MTM benefits because, as the *second largest recipient overall*, its percentage share was *nearly three times higher than the next highest recipient*. Furthermore, Magnola's grant was *greater than the grants received by 99 percent of all the beneficiaries* and *over ninety times larger than the typical grant amount*. Magnola's grant was vastly larger than the typical grant, regardless of whether we included or excluded small-scale recipients from our analysis.

IDM at 13 (emphases added).

The record evidence upon which the Department relied to support these findings came from two submissions by the GOQ, namely: (1) the October 3/4, 2002 first supplemental questionnaire response, A.R. 7 (Prop.) and A.R. 35 (Pub.), and (2) the December 13, 2002 second supplemental questionnaire response, A.R. 12 (Prop.).

In Question #7 of its first supplemental questionnaire, the Department asked the following specific questions:

> "How many companies have applied for benefits under this [MTM] program in the year the financial assistance or benefit was approved and each of the preceding three years? How many applicants have received financial assistance/benefit" [during this period]?

First Supplemental Questionnaire Response, Question #7

170/ (...continued)
unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record or otherwise not in accordance with law...".

In its October 3, 2002 response, A.R. 35, the GOQ provided, as an answer to Question #7, a brief table of data indicating the number of businesses that received financial "assistance" from Emploi-Québec during the POR:

Fiscal Year	Businesses Receiving Assistance
1998-1999	2,617(1)
1999-2000	955
2000-2001	361

In its Note (1), as superscripted to the 2,617 figure, the GOQ stated: "In 1998-1999, the system in place could not distinguish recipients by type of project. The figures indicated pertain to *all* employment measures offered to businesses by Emploi-Québec." (Emphasis added).

The data furnished by the GOQ in response to Question #7 was, therefore, accurate (responsive) in part and inaccurate (non-responsive) in part. Note (1) indicates that in the first fiscal year of the program, the GOQ could not segregate out purely MTM program data from the class of "all employment measures offered to businesses by Emploi-Québec." Therefore, the first fiscal year data was manifestly an overstatement in terms of the numbers of companies enjoying benefits under the MTM program and in the aggregate amount of those benefits.[171/]

Nevertheless, the Department accepted the response, declining to invoke its "facts available" rule. *See* 19 CFR § 351.308 ("The Secretary may make determinations on the basis of the facts available whenever necessary information is not available on the record, an interested party ... withholds or fails to provide information requested in a timely manner and in the form required..., or the Secretary is unable to verify submitted information.").

171/ Counsel for U.S. Magnesium at the oral hearing stated that "[t]he total number of recipients here is, in our view, wildly overstated. The Government of Québec admitted on the record that it could not segregate recipients of MTM subsidies with other types of subsidies provided by the Labor ministry of Québec for the period 1998 and 1999, which included 67% of all recipients during this four-year period." Transcript at 130. *See also* comments by counsel for the Department. Transcript at 88-89.

In its second supplemental questionnaire response, A.R. 12 (Prop.), the GOQ provided the Department with the total amounts of MTM program assistance applied for and received by Magnola during the POR (Tab 6) and a list of 50 *companies* that were approved for *major*-project funding under the MTM program, accompanied by the amount each such company received under the program (Exhibit 10). In its first supplemental questionnaire response, A.R. 7 (Prop.), the GOQ provided a list of *major* MTM program beneficiaries by *industry*, indicating the amounts of MTM program benefits received by each category of industry recipient (Tab 2). This latter response also revealed the aggregate number of individual small-project recipients (3933) and the aggregate amount of benefits that accrued to all such recipients.

All of this data (with the exception of the *industry*-related data) found its way into the Department's Calculation Memorandum of April 21, 2003, A.R. 23 (Prop.) and A.R. 81 (Pub.), entitled "Calculation of Final Results." On the final page thereof, the Department included a table (hereinafter called the "Benefits Table") showing the major-project beneficiaries by company, including the *absolute amount* received under the MTM program by each company and its related *percentage* of the total benefits received.[172/] Added to this data were the aggregate amounts for "Total Major Economic Projects" and "Total Small-Scale Projects," which were then combined to show the "Total MTM benefits" amount. The Department also referenced the total number of "Small-scale beneficiaries," the total number of "Large scale beneficiaries, "the "Total MTM beneficiaries," and the "Average MTM benefit".

In the following paragraphs, the data contained in the Benefits Table will be cross-referenced to the specific findings made by the Department in the Final Determination.

> Finding #1 ("*We calculated Magnola's share of total MTM grants on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries*")

172/ The Benefits Table makes it clear that all percentages and averages included therein were calculated by the Department ("Percentages and averages calculated by DOC") based, of course, on the absolute amounts provided by the GOQ.

Magnola's share of total MTM benefits, which has been publicly identified as approximately 2%, is identified on the Benefits Table and has not been contested. The *individual* shares of "all other MTM beneficiaries" are also set out in the Benefits Table and, of course, the *collective* share of all other MTM beneficiaries would then approximate 98%.[173/] Clearly, the Department's first finding is based on substantial evidence on the record and, apart from the argument of Canadian Complainants concerning the absence of a formal finding regarding the "all other recipients" share, is uncontested.

Finding #2 (Magnola was "*the second largest recipient overall*")

This finding is obvious from the Benefits Table, is based on substantial evidence on the record, and is uncontested.

Finding #3 (Magnola's "*percentage share was nearly three times higher than the next highest recipient*")

This finding is obvious from the Benefits Table, is based on substantial evidence on the record, and is uncontested.

Finding #4 ("*Magnola's grant was greater than the grants received by 99% of all the beneficiaries*")

173/ Canadian Complainants make much of the fact that the Department did not formally compare "Magnola's share of the total MTM Program disbursements to that of all other enterprises as a group," Canadian Complainants' Rule 57(1) brief at 38, characterizing this as a "selective omission of [a] central fact...." The Panel agrees that the Department did not make a formal finding that (again using the publicly identified approximation of the percentage share of the total MTM program benefits enjoyed by Magnola) 2% subtracted from 100% will generate an "all other recipients" share of 98%. At the oral hearing, counsel for the Department confirmed that the Department's "analysis did not turn on the relative amount received by Magnola as an entity compared to the overall amount disbursed by the Government of Québec. That was not the basis for this determination." Transcript at 87-88. Counsel also confirmed, however, that this "all other recipients" share was "on the record with this investigation and the Department certainly took it into consideration." Transcript at 88. In making this statement, counsel then promptly alluded to the fact-finding problems with the data supplied by the GOQ with respect to the first year of the MTM program. *Id.*

Considering that the Department accepted the number of 3983 beneficiaries as participating under the MTM program, this finding is obvious from the Benefits Table, is based on substantial evidence on the record, and is uncontested.

Finding #5 ("*Magnola's grant was ... over ninety times larger than the typical grant amount*")

Considering that the Department calculated the "Average MTM Benefit" in the Benefits Table, the finding that Magnola's percentage share of benefits was more than 90 times that average amount[174/] is obvious from the Benefits Table, is based on substantial evidence on the record, and is uncontested.

The above review of the administrative record clearly establishes that the Department based its findings on record evidence, specifically the two supplemental questionnaire responses submitted by the GOQ. While that evidence was defective in part (*e.g.*, the small-scale project information in the first fiscal year), the Panel notes once again that the Department accepted that data and has no difficulty for its part in concluding that the evidence overall is "substantial" and fully supportive of the Department's findings and conclusions.

The Panel turns now to questions concerning whether the Final Determination is "in accordance with law" and, initially, the question whether the Department's interpretation of the statute is a permissible one.

"In Accordance with Law"

Interpretation of the Statute

The relevant statutory language, in this *de facto* specificity case, is contained in 19 U.S.C. § 1677(5A)(D)(iii)(III), which states as follows:

> (D) In determining whether a subsidy ... is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following *guidelines* shall apply:

174/ In making its final finding, the Department used the expression "typical grant amount" but, manifestly, it in fact was using as its comparator the "Average MTM Benefit" which it had calculated and specified in the Benefits Table.

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> (iii) Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following *factors* exist:
>
> ***
>
> > (III) An enterprise or industry receives *a disproportionately large amount* of the subsidy....

19 U.S.C. § 1677(5A)(D)(iii)(III) (emphases added).

In reaching its Final Determination, the Department agreed "with the respondents that the MTM program is not *de jure* specific." IDM at 13. Based on the record evidence, it found that the MTM program was "available to all industries and all enterprises in Québec that met the five objective criteria." *Id.* Thus, the Department found that the MTM program was not *de jure* specific under sections 771(5A)(D)(i) and (ii) of the Act.[175/]

Turning then to the four *de facto* "factors" set out in the statute,[176/] the Department concluded that the first factor[177/] was not applicable since the

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175/ *Id.* Clauses (i) and (ii) of the statute provide as follows:

> (D)(i) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law.
> (ii) Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not specific as a matter of law, if —
>
> > (I) eligibility is automatic,
> > (II) the criteria or conditions for eligibility are strictly followed, and
> > (III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification....

176/ It is clear that the presence of a single factor mandates a finding of *de facto* specificity. *See Bethlehem Steel*, 140 F. Supp. 2d at 1368 ("The *de facto* specificity test is concerned with the effect of benefits provided to individual recipients rather than on the nominal availability of benefits and, therefore, the presence of a single factor mandates a finding of *de facto* specificity.").

177/ *See* 19 U.S.C. § 1677(5A)(D)(iii)(I) ("The actual recipients of the subsidy, whether (continued...)

beneficiaries under the MTM program were not "limited in number," and that the second factor[178/] was not applicable since Magnola was the second largest beneficiary under the MTM program and was not, therefore, the "dominant" or "predominant" user. Accordingly, the Department focused on the third factor, which is where an enterprise or industry receives "a disproportionately large amount" of the subsidy.

The Department did not, in the IDM, set out an express definition or indicate the precise meaning of the statutory term "disproportionately" (or "disproportionate"), but it did cite *Bethlehem Steel* ("Because neither 'dominant' nor 'disproportionate' are defined in the relevant statute, this Court is obligated to defer to Commerce's reasonable interpretation thereof." *Bethlehem Steel*, 140 F. Supp. 2d at 1369) as well as the Federal Circuit decision in *AK Steel* ("Determinations of disproportionality and dominant use are not subject to rigid rules, but rather must be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case." *AK Steel*, 192 F.3d at 1385).

In its Rule 57(2) brief to the Panel, however, the Department stated that it "reasonably interpreted the statutory term 'disproportionate' to mean *substantially greater than amounts received by other recipients of MTM grants*"[179/] (emphasis added) without reference to any extrinsic benchmarks or standards.[180/] The Department also stressed in its brief that the statute calls directly for a comparison of "amounts."[181/] The Panel accepts these characterizations by the Department as a

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177/ (...continued)
considered on an enterprise or industry basis, are limited in number.").

178/ *See* 19 U.S.C. § 1677(5A)(D)(iii)(II) ("An enterprise or industry is a predominant user of the subsidy.")

179/ *See* Department Rule 57(2) brief at 20 and Transcript at 81-82.

180/ *See* Transcript at 82, 85.

181/ *See* Department Rule 57(2) brief at 21 ("The Department's practice in making disproportionality determinations is to compare the relative amount of benefit that a given industry or enterprise receives from a subsidy program compared to other industries or enterprises in the same country. Commerce does this because a comparison of relative 'amounts' is required by the express language of the statute, which directs Commerce to determine whether '[a]n enterprise or industry receives a disproportionately large amount of the subsidy.'" (Emphasis in original)). *See* (continued...)

faithful representation of its own interpretation of the statutory clause at issue in this case.

Under the applicable standard of review, as established in the Supreme Court's landmark *Chevron* decision, in cases where the statute is silent or ambiguous with respect to the specific issue being addressed, the question becomes whether the agency's construction of the statute is "a permissible one."[182/] A reviewing court or panel may not simply apply the statutory construction that it believes is best or preferable, but must instead limit its inquiry to whether the agency's construction is a *permissible* or *reasonable* one. This principle is uniformly cited and employed by the Federal Circuit and the CIT in antidumping and countervailing duty cases. Moreover, in the precise context of the statutory language at issue here, a very recent Federal Circuit decision may also have some impact on the application of this principle and standard.[183/]

181/ (...continued)
also Live Cattle from Canada, 64 Fed. Reg. at 57,061 ("Our typical specificity analysis examines disproportionality by reference to actual users of the program. In other words, we compare the share of the subsidy received by producers of the subject merchandise to the shares received by other industries using the program.") and *Laminated Flooring*, 62 Fed. Reg. at 5,205 ("In 1993 and 1994, the wood products industries group was consistently among the largest beneficiaries under the program. Leclerc's share of financing as a percentage of total authorized financing was also large relative to the shares received by other users. Taken together, these facts support a determination that the assistance received by Leclerc was disproportionate in 1993 and 1994.").

182/ *See Chevron*, 467 U.S. at 843 ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

183/ *See Carolina Tobacco Co. v. Bureau of Customs and Border Protection*, 402 F.3d 1345 (Fed. Cir. 2005) in which the Federal Circuit commented on certain regulatory "guidelines" adopted by Customs: "Guidelines are just that. They provide suggested standards for government officials to use in performing their duties. They do not impose explicit requirements, but merely indicate appropriate courses for the officials to follow." *Id.* at 1348. As noted in the text above, the introductory language to 19 U.S.C. § 1677(5A)(D)(iii)(III) itself uses the term "guidelines" which, if a similar analysis were to prevail, suggests that the Department should enjoy more, rather than less, discretion in its interpretation of
(continued...)

After considering the arguments of the parties, the Panel considers that the Department's construction of the statutory term "disproportionate" is both permissible and reasonable. The Panel agrees that the disproportionality provision calls for a comparison of "amounts" — in the language of the statute, "a disproportionately large amount." The Panel agrees that comparisons of amounts can involve comparisons of *absolute numbers* as well as of appropriately calculated *percentages*,[184/] and recognizes that *AK Steel* has specifically upheld Departmental findings based upon relative *percentage* benefits.[185/] The Panel agrees that, in the context at hand and as a matter of simple logic, the notion of a "disproportionality" between absolute numbers (or calculated percentages) must involve *some* concept of substantiality or materiality.[186/]

In this specific case, the Department has indicated that "disproportionate" means that the amount (calculated as a percentage) of MTM benefits that were received by Magnola was *substantially greater* than the relative percentage amounts received by other recipients of MTM grants, taking into account all the facts and circumstances of the case.[187/] Under the applicable standard of review, which allows broad discretion to the Department to determine what constitutes a disproportionate benefit, the Panel fails to discern error in this construction or interpretation of the statute. Certainly, it is unable to conclude that the Department's interpretation diverges in some way from any other expression of Congressional intent on the subject or is otherwise an illogical or inherently unreasonable construction of the term. Moreover, the Panel is unable to conclude that the Department's interpretation is inconsistent with a proper reading of the

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183/ (...continued)
the statutory standards for both *de jure* and *de facto* specificity.

184/ Of course, any calculated percentages are based upon, and are a mathematical function of, the absolute numbers to which they relate.

185/ *See AK Steel*, 192 F.3d. at 1385 ("[I]t was not error for Commerce to rely on record evidence demonstrating no disproportionality based on the relative percentage benefit rather than on the absolute benefit conferred.").

186/ Presumably, the Department could interpret the term "disproportionate" in terms of "material difference" as opposed to "substantial difference." The latter construction is generally considered to be the more rigorous one and, thus, the Department has in fact employed the construction most favorable to respondents.

187/ *See* Department Rule 57(2) brief at 19-20.

Federal Circuit's decision in *AK Steel*[188/] or the CIT's decision in *Bethlehem Steel*.[189/] Finally, as will be noted *infra*, the Panel is unable to find that the

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188/ In *AK Steel*, 192 F.3d at 1385, the Federal Circuit upheld the Department's comparisons of *percentage* shares of subsidy benefits and rejected the argument that the Department must rely on comparisons of *absolute* shares. (*See* quotation in note 185). The court then went on to add:

> The domestic producers methodology could produce an untenable result, *i.e.*, that a benefit conferred on a large company might be disproportionate *merely because of the size of the company*. (*Id.* Emphasis added)

Canadian Complainants argue that this language represents the true holding of the case and that the Department must construe and apply the statute in a manner that ensures that subsidies to large companies aren't countervailed merely because they are large and might naturally draw more benefit from a government program than would a small company. The Panel, however, reads this language as commentary or *dicta* and not as the holding of the case. The Panel does not believe that the Federal Circuit intended by this language to impose for all new *de facto* specificity cases a heavily fact-specific but otherwise unelaborated standard pursuant to which the Department would have to assess the proper impact of the *de facto* specificity statute on large as opposed to small companies or industries. There is no indication in the statute, the regulations, *AK Steel* itself, or any other binding judicial precedent that the Department is, or should be, generally required to assess the "suitability" of subsidies for large as opposed to small companies, or to assess whether a large subsidy is reasonably to be "expected" in one set of circumstances but not in another. This is not to say that the Department *cannot* take such factors into account, assuming that a proper record supports the Department's decision to do so, but it is to say that the statute should not be interpreted to *compel* the Department to do so in all cases. The Panel assumes that in the language quoted above the Federal Circuit was simply making the common sense observation that a comparison of *percentage shares* is inherently a more useful analytical tool — one that by its nature places absolute numbers in an overall context — than a simple comparison of *absolute numbers* which, by themselves, provide little useful context for the analysis and could more readily be susceptible to the misinterpretation that bigness is badness.

189/ In *Bethlehem Steel*, 140 F. Supp. 2d at 1369, the CIT upheld the Department's determination that a program in which Korean producers received reduced electricity rates in return for curtailing usage was not a specific benefit. Despite a finding that the Korean steel industry had received more benefits under the program than any other sector, the Department held that this was not determinative, a position upheld by the court:

> The mere fact that the steel industry received a greater monetary benefit from the program than did other participants is not determinative of

(continued...)

Department's interpretation is inconsistent with its current or past administrative practice.

Canadian Complainants also offer the argument that the Department's construction of the term "disproportionate" is inconsistent with its dictionary definition:

> An action is disproportionate if it is "unsuitable to something else in bulk, form, value, or extent."

Canadian Complainants Rule 57(1) brief at 30, *citing* Webster's Revised Unabridged (1998).

The implication of Canadian Complainants' argument is that the above is the sole definition of the term "disproportionate" and that this sole definition should be the driver of the statutory interpretation of the term "disproportionately" for U.S. countervailing duty law purposes. The Panel notes, however, that various online and other print dictionaries provide numerous other definitions of the term, such as the following:

189/ (...continued)

> whether that industry was "dominant" or receiving "disproportionate" benefits. In virtually every program that confers *benefits based on usage levels* one or more groups will receive a greater share of the benefits than another group. To impose countervailing duties on an industry where *disparity alone* is demonstrated, but no evidence is produced indicating that the benefit was industry specific, is anathema to the purpose of the countervailing duty laws. (*Id.* Emphases added)

Canadian Complainants focus on the "disparity alone" language to support their argument that large companies, who might be expected to draw more from government programs, cannot be penalized for doing so. The Panel reads the court, however, as merely recognizing that these electricity cases are of a unique nature and are cases where the subsidy benefits are directly tied solely to "usage levels." ("Commerce, consistent with its prior practice, examined the Korean steel industry and concluded that one of its inherent characteristics was the large consumption of electricity." *Id.*). In the Panel's view, the Canadian Complainants are simply attempting to take a rule developed in the context of unique circumstances and generalize that rule to all *de facto* specificity cases. The Panel is not persuaded that this is a correct or reasonable interpretation of the court's ruling.

> Out of proportion, as in size, shape, or amount.
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> American Heritage, 4th Edition.
>
> Too large or too small in comparison to something else.
>
> Freesearch Dictionary (online).

Of greater significance, however, is that the Department simply did not rely upon dictionary definitions to interpret the statutory clause in question. Moreover, the Panel is aware of nothing in the law that *requires* the Department to utilize dictionary definitions for the purpose of construing provisions of U.S. countervailing duty law, and the Panel sees nothing in the definitions that have been cited that is, in a meaningful way, inconsistent with the interpretation that the Department reached.[190/] Thus, the Panel rejects Canadian Complainants' argument on this point and moves on to address their criticisms of the Department's chosen methodology.

Methodology

The Canadian Complainants have challenged various methodologies used by the Department in reaching its findings and conclusions, arguing that they too are not "in accordance with law." From a standard of review perspective, it is well established that reviewing courts evaluate methodologies only for reasonableness and do not substitute their judgment for that of the agency. In *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 44 F. Supp. 2d 229 (Ct. Int'l Trade 1999) ("Coalition"), the CIT observed:

> Commerce need not prove that its methodology was the only way or even the best way as long as it was a reasonable way. When an agency's method is challenged, the proper role of this court is to determine whether the methodology used by the agency is in accordance with law, and as long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's

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190/ Indeed, the Panel notes that the latter definition quoted above could in fact very reasonably have been cited by the Department in *support* of its construction of the statute.

> conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.
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> *Coalition*, 44 F. Supp. 2d at 258 (citations, internal quotation marks, brackets, and original ellipses omitted).

Accord, Ceramica Regiomontana, 636 F. Supp. at 966, *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (*citing Chevron*, 467 U.S. at 843 and *Abbott v. Donovan*, 570 F. Supp. 41, 47 (Ct. Int'l Trade 1983)).

The methodologies that the Department selected and used in this case were based on:

- the language of the statute and its interpretation of the key statutory phrase: "a disproportionately large amount";
- its decision to conduct an enterprise-to-enterprise, as opposed to an industry-to-industry, analysis;
- its past administrative practice in disproportionality cases, which has involved individual-to-individual comparisons of benefits received as well as individual-to-collective comparisons;
- its selection of particular comparators (*i.e.*, its express findings) as quoted above from the IDM; and
- its decision to use direct comparisons of "amounts" without reference to any extrinsic benchmarks such as Gross Domestic Product (GDP), standard pricing mechanisms, or the like.

Because the question of statutory interpretation has already been addressed above, the Panel will review the remaining elements below.

Enterprise-to-Enterprise Analysis

With respect to the Department's selection of an enterprise-to-enterprise analysis, the Department made the following statements in the IDM:

> [W]e have limited our *de facto* specificity finding to a company basis.

IDM at 13.

> Under section 771(5A)(D)(iii)(III) of the Act, a disproportionality analysis may be conducted on a company (*i.e.*, enterprise), industry, or group of companies or industries basis, but it need not be conducted on all of these.

IDM at 14.

The Department made the same point in its Rule 57(2) brief at 26 ("The Department in this case determined to conduct its disproportionality analysis on an enterprise-specific basis, noting that the statute provides that this analysis may be conducted on either and [sic] industry or enterprise basis.").

The Panel agrees with the Department's interpretation of the statute[191/] — as allowing it to conduct *either* an enterprise-to-enterprise or industry-to-industry analysis — and finds no error in this aspect of the Department's methodology.

Past Administrative Practice

As to the types of comparisons made by the Department in previous cases, the Department indicated in its Rule 57(2) brief that "when the Department considers the question of disproportionality on an enterprise-specific basis, as in this case, it compares the relative amount of benefits received by individual producers of the subject merchandise, compared to other individual users of the subsidy." Department Rule 57(2) brief at 24. The Department cited a number of past administrative decisions as illustrating its use and application of this methodology:

> In each of the years in which Bolzano received funds under this program Bolzano received a significant percentage of total assistance awarded. While assistance was provided to a number of firms during this period, Bolzano received a much larger share in comparison to the total aid awarded. In fact, *Bolzano was the largest single recipient of restructuring assistance. Bolzano*

191/ 19 U.S.C. § 1677(5A)(D)(iii)(III) provides: "An *enterprise or industry* receives a disproportionately large amount of the subsidy...." (Emphasis added).

> *received far more than the average recipient over this period*. Thus, we conclude that the restructuring assistance granted to Bolzano under Articles 13 through 15 of Law 25/81 is *de facto* specific within the meaning of section 771(5A)(D)(iii) of the Act because Bolzano received a disproportionate share of benefits.

Certain Stainless Steel Wire Rod from Italy, 63 Fed. Reg. at 40,491 (emphasis added).

> In prior cases where the Department has found disproportionality, we analyzed whether a program provided a disproportionate share of benefits by comparing their *collective or individual share* of benefits provided to all other users of the program in question.

Standard Chrysanthemums, 61 Fed. Reg. at 20,407 (emphasis added).

> During verification, we collected a chart indicating the amount of tariff reductions Inchon, Kangwon, and DSM received during the POI under the tariff reduction program. *We also obtained a chart listing the total amount of tariff reductions received by all companies during the POI under the program. Comparing the two lists*, we found that the respondent companies were not dominant users of the program, nor did they receive a disproportionate share of benefits under the program.

Structural Steel Beams from Korea, 65 Fed. Reg. 41,051, Issues and Decision Memorandum at Section II(A) (emphasis added).

> Commerce relied on record evidence ... that POSCO was not a dominant user of and did not receive a disproportionate benefit from the revaluation program. POSCO was not a dominant user because over 200 companies from a wide variety of industries revalued their assets pursuant to TERCL Article 56-2. Also, *POSCO did not receive a disproportionate benefit because in the same year when POSCO revalued its assets upward by 94.0%, the average increase in asset value was 94.2%. Moreover, for the companies for which complete data was available, 81 out of 181 companies revalued their assets by a greater percentage than POSCO*. Thus, Commerce's conclusion that the asset revaluation pursuant to TERCL Article 56-2 was not *de facto* specific is supported by substantial evidence.

AK Steel, 192 F.3d at 1385 *reviewing* the results of *Certain Steel Products from Korea*, 58 Fed. Reg. 37, 338 (Dep't Commerce July 9, 1993) (emphasis added).

As the Department suggests, these decisions, the last one of which was upheld by the Federal Circuit, clearly support a methodology which compares benefit amounts on an individual basis — comparing the respondent beneficiary's

subsidy amount (expressed as an *absolute amount* or as a *percentage*) with the subsidy amounts received by other individual recipients (or with the average of those other subsidy amounts).

Numerous other administrative precedents also support this methodology and practice. See, for example, *Live Cattle from Canada*, 64 Fed. Reg. at 57,061 ("Our typical specificity analysis examines disproportionality by reference to actual users of the program. In other words, we compare the share of the subsidy received by producers of the subject merchandise to the shares received by other industries using the program.") and *Carbon Steel Wire Rod from Brazil*, 67 Fed. Reg. 5,967 (Dep't Commerce Feb. 8, 2002) (Steel sector, which received 4.7% of funds distributed under program, not a disproportionate user when telecom sector received 33.77%, utilities received 13.9%, and autos received 8.2%).

The quotation from *Standard Chrysanthemums*, however, notes that it is also the practice of the Department, from time to time, to draw a comparison between an individual (*i.e.*, the respondent's) subsidy share and the "collective share" of all remaining subsidy beneficiaries.[192/] Counsel for the Department specifically made this point at the oral hearing.[193/]

In the Panel's view, the Department's past practice clearly establishes that it has regularly compared individual subsidy amounts to individual subsidy amounts and, when appropriate, individual subsidy amounts to the remaining collective

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192/ *See also Antifriction Bearings*, 60 Fed. Reg. at 52,379 ("In prior cases where the Department has found disproportionality [citations omitted], we analyzed whether respondents received a disproportionate share of benefits by comparing their share of benefits to the collective or individual share of benefits provided to all other users of the program in question. Similarly, in this case, we compared the share of benefits received by AFBs under Part X to the individual and collective share of benefits provided to all others.").

193/ *See* the following statements: ("[T]he Department's analysis in this case was certainly consistent with its overall approach to making disproportionality determinations.... We have compared the amounts received by individual recipients to other recipients and, in some cases, taken into account the amount received overall into the program." Transcript at 90-91.) and ("The practice of looking at amounts of benefits in relation to other recipients and in some cases to the overall amounts disbursed under a program. The Department has conducted this analysis in both ways." Transcript at 86.).

amount. It has done either[194/] and it has done both.[195/] In the Panel's view, each of these methodologies is consistent with the statutory requirement, is long-standing in application, and has never been overturned on appeal. Each of these methodologies is a reasonable interpretation of the statute and its purposes. Each of these methodologies is entitled to deference on appeal, as would be the use of either method alone or in combination with each other. Therefore, the Panel upholds this aspect of the methodology employed by the Department. The Panel does so both as a general matter and in terms of the Department's specific selection of an individual-to-individual comparison as was done in this case.

Department's Selection of Particular Comparators in the IDM

As to the latter point, the Panel notes that the Department did not, in so many words, explain why it *chose* this form of analysis over the individual-to-collective analysis. In the IDM, however, the Department did suggest why it *rejected* the latter. ("The comparison that can be made on this record is whether Magnola's MTM benefits, on a percentage basis, are disproportionate to those of all other recipients." IDM at 15.). This focus on the factual record was confirmed by counsel for the Department at the oral hearing.[196/]

The factual findings made by the Department in the IDM have been quoted above. The point has also been made that the information provided by the GOQ in its first supplemental questionnaire response had significant defects (or was significantly non-responsive to the questions specifically asked by the Department); nevertheless, the Department did not reject this information overall. The fact that the information was not rejected in its entirety, however, does not suggest that the Department became then powerless to select an analytical method (*ie., the individual-to-individual comparison*) that would largely avoid the problems

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194/ *See Standard Chrysanthemums*, 61 Fed. Reg. at 20,407 ("comparing their collective *or* individual share") (Emphasis added).

195/ *See Antifriction Bearings*, 60 Fed. Reg. at 52,379 (drawing comparisons "to the individual *and* collective share of benefits provided to all others") (Emphasis added).

196/ *See* the following comment: ("In this case, our analysis did not turn on the relative amount received by Magnola as an entity compared to the overall amount disbursed by the Government of Québec. That was not the basis for this determination." Transcript at 87-88.).

introduced by this defective information.

To illustrate, the *second largest overall* comparator, the *three times higher than the next highest* comparator, and the *greater than 99%* comparator were indisputably all free from the defect in the record evidence provided by the GOQ. Even the last comparator (*over 90 times larger than the typical grant amount*) was largely free of such defect, although the total grant amount and the average grant amount, which would be used to make up that calculation, would obviously be overstatements. In contrast, if the Department had instead focused its analysis on an *individual-to-collective share comparison*, the defects in the record evidence would have been *emphasized*, not de-emphasized. The Panel finds that the Department's approach in this instance was reasonable and well within its discretion.

No Extrinsic Benchmarks

The final aspect of the Department's chosen methodology was to compare "amounts" without reference to any *extrinsic benchmarks* such as Gross Domestic Product (GDP), standard pricing mechanisms, or the like, as has happened in a very limited number of prior cases. In its Rule 57(2) brief, the Department noted that in *Certain Steel Products from Korea*, 58 Fed. Reg. at 37,345, it had

> applied a disproportionality analysis that involved a comparison of the share of the long-term loans received by the Korean steel industry with the industry's share of GDP. That was an exceptional case, and the Department has in no other case used a comparison of industry size to GDP as a measure of disproportionality.

Department Rule 57(2) brief at 22, n. 49.

This position is consistent with the statement of Department counsel at the oral hearing[197/] and the Panel upholds this aspect of the Department's chosen

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197/ *See* the following statements: ("[T]he Department's practice in its many cases dealing with ... disproportionately has been precisely that, to look at the relative amounts received by other parties without [external] reference on the whole. There is one case which was unusual circumstances [referencing *Certain Steel Products from Korea*, 58 FR 37,338], but that is correct. The Department does not look to external benchmarks normally, like GDP or other extrinsic measures, to make its disproportionality determination." Transcript at 82.). ("The Department (continued...)

methodology. Again, the choice of methodologies lies within the Department's sound discretion and its decision here to avoid use of a specialized rule in a situation which does not call for such a rule is not for a court or panel to criticize.

The Panel now addresses two arguments made by Canadian Complainants that also impact the question of the Department's methodology. The first is the argument that the Department has "never found disproportionate use of a government program, any program, let alone a manpower training program, where a company's share or an industrial sector's share was less than 25%."[198/]

Counsel for Magnola characterizes this 25% test as an "informal rule"[199/] and not a rigid rule,[200/] but nevertheless insists that "Commerce has set [this rule] as its continuous, constant, effective benchmark."[201/]

The Department rejects this assertion outright:

> Commerce has never established a threshold percentage above which a *prima facie* case for disproportionate benefit is automatically established. Such an approach would be contrary to the Department's mandate under the Act to consider the particular facts and circumstances of each case. Moreover, in all but one of the cases to which the GOQ refers in which the benefits received equaled 25% or more of overall subsidies conferred

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197/ (...continued)
in its prior cases, time and again, has not made reference to external benchmarks to make that determination. The analysis has been a comparison, again and again, of amounts." Transcript at 85.).

198/ Comment by counsel for Magnola. Transcript at 46. In Canadian Complainants' Rule 57(1) brief at 38, the same point is made in the following language: "In prior cases addressing the disproportionality factor, Commerce has consistently found that a share below the 25% range is insufficient to constitute a 'disproportionately large' benefit to the recipient. The line of cases establishing this point is steady and long [citations omitted]. Conversely, where Commerce has found disproportionality, the recipient's share has consistently been at least 25 percent of the total program benefit [citations omitted]."

199/ Transcript at 46.

200/ *Id.* at 47. Counsel asserts that the Department has not set a rigid rule because "[i]t would then fear gaming of the number" (*i.e.*, manipulating the results so that they would come in just above the number in question). *Id.*

201/ *Id.*

> involved industry-wide analysis, not enterprise-specific analysis. It is not surprising that when Commerce aggregates together an entire industrial sector that the amount of subsidy attributable to that sector may be relatively larger than when Commerce is analyzing the quantum of subsidy received by an individual enterprise.
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> Department Rule 57(2) brief at 27-28 (emphases in original).[202/]

U.S. Magnesium also disagrees with the Canadian Complainants on this point:

> [T]he MTM subsidy in this case was unique, because it was bestowed on more than 3900 subsidy recipients. Consequently, no single enterprise received a majority or even a substantial minority of the available subsidy, and predicating a specificity analysis on receipt of at least 25 percent [sic] the available subsidy would not provide a useful tool for determining whether any one enterprise received a disproportionately large subsidy.
>
> U.S. Magnesium Rule 57(2) brief at 18.

The Panel does not accept Canadian Complainants 25% threshold or "informal" rule argument. The Panel has found no administrative decision by the Department where it indicated that it had "set," was adopting, was applying, or even where it referred to, such a 25% test. Moreover, the Panel believes that the Department has it right when it states that it must avoid such a "rigid rule" and must, instead, consider issues on a case-by-case basis, taking into account the particular facts and circumstances of the case before it. *See AK Steel*, 192 F.3d at 1385. Finally, even if the Department had manifested some favorable response to the notion of a "threshold" test, the Panel does not understand, from an analytical standpoint, how a *single* percentage threshold could be utilized for *both* industry-wide cases (which would involve large aggregated numbers) and enterprise-specific cases (which would involve small dis-aggregated numbers).

The second broad argument made by Canadian Complainants is that *all* of a long line of investigations into training assistance programs, except for regional or

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202/ *See also* Department counsel's comments at the oral hearing: ("[O]ur practice is to take into account the facts and circumstances of the case, of particular industries, particular countries. It would not be possible to say that a given number is, per se, disproportionate." Transcript at 92.) and ("All of these cases involve different types of subsidy programs. They have been allocated and distributed in different ways for different reasons to different individuals. It is not possible to isolate one factor no matter how satisfying it may be to be able to use as a quantitative benchmark." Transcript at 93.).

selected industry cases, have resulted in determinations that the relevant programs were neither specific nor countervailable.[203/] Canadian Complainants cite a number of administrative decisions in support of this proposition and complain that the Department effectively "bypass[ed] its prior practice" as a whole, as well as its decision in the predecessor training program, in reaching the results it did in this case.

For its part, the Department notes that a "finding of non-specificity for [an] earlier program does not carry over to the replacement or successor program,"[204/] and suggests that:

> [I]n fact those programs were not factually identical or were analyzed under a different part of the statute. As the Department explained in this case, "funding levels, sources and funding requirements differed among the labor programs cited by the respondents." For this reason, the countervailability of previous subsidy programs is not dispositive as to countervailability in subsequent cases.

Department Rule 57(2) brief at 31 *quoting* IDM at 12.

Considering the admonition of *AK Steel* that *de facto* specificity investigations must be conducted on a fact-specific basis, which is the practice of the Department in any event, the Panel is inclined to agree. The Panel is also not persuaded by Canadian Complainants' list of authorities in support of its proposition that all investigations into training assistance programs have resulted in determinations of non-specificity.[205/] In any event, the Panel must consider what the

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203/ Canadian Complainants Rule 57(1) brief at 18 and 20. Canadian Complainants also refer to the "settled Commerce practice of treating manpower training programs as non-countervailable." *Id.* at 23.

204/ Department Rule 57(2) brief at 30, *quoting Stainless Steel Plate in Coils from Italy*, 64 Fed. Reg. at 15,526.

205/ *Laminated Flooring*, 62 Fed. Reg. 5,201, the first case cited by Canadian Complainants, on its face addressed two programs involving training assistance, one of which was held not to be countervailable (the Program for Development of Human Resources), but the other of which was found to be countervailable (SDI Expansion and Modernization Program). (As clarification to the Panel, counsel for Magnola at the oral hearing stated that "SDI money could have been used for manpower training" but in fact this was not done in that case. Transcript at 147. This information was "volunteered" by counsel, however, and does not appear

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Department has done in *this* case, based upon its own record evidence, and under the standards set out in current law. On this basis, the Panel finds itself unable to agree that the Department has "bypassed" its prior practice or that those cases compel a particular result in this case.

Finally, the Panel has also considered the Canadian Complainants allegation that the Department has "ignored" its statutory obligation to take into "account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy has been in operation." *See* Section 771(5A)(D)(iii) of the Act. The Panel finds this argument unpersuasive.

B. Whether the Department's Findings and Determinations Concerning the Calculation of Magnola's Company-Specific Average Useful Life of Assets (AUL) Rate by Reference to U.S. IRS Tables Are Supported by Substantial Evidence on the Record and Are in Accordance with Law

1. Contentions of the Parties

Magnola

Magnola filed its Supplemental Rule 57(1) Brief on March 22, 2004 addressing two calculation issues, which it defined as (A) whether the Department's use of a 14-year Average Useful Life ("AUL") from the IRS Tables, rather than Magnola's company-specific 28-year AUL, was supported by substantial evidence

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205/ (...continued)
from the decision itself.) *Steel Pipe and Tube from South Africa*, 48 Fed. Reg. 24,407, never reached the issue addressed because it was determined that the government had not provided any funding, and there was simply no basis for a subsidy case to begin with. The early to mid-1980s cases do little more than state that the training program in question was generally available and thus was not specific to companies or industries, with little or no factual development. The Department appears in these cases to have been conducting, solely or primarily, a *de jure* analysis. In any case, they were decided prior to the current formulation of the statute.

and contrary to law, and (B) whether the Department's use of a Canadian average long-term interest rate, rather than the cost of capital for Noranda, Magnola's parent company, was supported by substantial evidence and contrary to law. The GOQ did not participate in this supplemental brief.

Magnola asserts that the Department unlawfully calculated the subsidy attributed to the POR by using a 14-year AUL from the IRS Tables "despite the record evidence showing that Magnola's AUL is 28 years."[206/] As the Department had explained in the Final Determination, Magnola's company-specific AUL was not "calculated in a manner consistent with the requirements under our regulations for rebutting the use of the presumptive IRS AUL" because it was "not based on *any* actual historical data" but was instead based on "*future estimated* depreciation expenses and asset values."[207/]

In Magnola's view, however, both the regulations and applicable case law dictate a "presumption in favor of using a company's actual AUL, not the IRS Tables," and such presumption applies whether the company has been in business for decades (which would have "actual historical data") or is a start-up or new company (which would not).[208/] Magnola argues that the Department has effectively created a *per se* rule requiring the use of the IRS Tables "unless a company has been in business for decades."

The critical determinant, however, is the fact that Magnola placed evidence on the record establishing the basis upon which its 28-year AUL was calculated (which was based upon its parent Noranda's accounting policies) and, under the applicable regulations, the Department must use that company-specific AUL because it differs significantly from the IRS Tables.[209/] Indeed, 19 C.F.R. § 351.524(d)(2)(ii) provides that the Department will use the company-specific AUL instead of the IRS Tables if the company demonstrates that the difference between the IRS Tables and the company-specific AUL is "significant," with that term

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206/ Magnola Supplemental Rule 57(1) brief at 3.

207/ IDM at 17. (Emphasis added).

208/ Magnola Supplemental Rule 57(1) brief at 4.

209/ *Id.* at 4-5.

defined as "one year or more." In this case, the difference between the 14-year AUL under the IRS Tables and the 28-year company-specific AUL is self-evident.

In *British Steel PLC v. United States* ("British Steel"), 879 F. Supp. 1254, 1289 (Ct. Int'l Trade 1995) and *Ipsco, Inc. v. United States* ("Ipsco"), 687 F. Supp. 614 (Ct. Int'l Trade 1988), the CIT "held that Commerce may not utilize an AUL from the IRS Tables when a company-specific AUL is available, because the IRS Tables would not 'reflect the commercial and competitive advantage enjoyed by the firms receiving nonrecurring subsidies.'"[210/] On the basis of these authorities, Magnola asserts that the Department's reliance on the 14-year AUL from the IRS Tables is contrary to law.

Magnola also criticizes the Department's "irrebutable *per se* rule" that new companies without historical data from audited financial statements will receive an AUL from the IRS Tables.[211/] Conceding that the Department "prefers to verify company-specific AULs using ten years of financial data," Magnola notes that in the Preamble to the Department's 1998 Final CVD regulations the Department has "recognized" that ten years of data would be neither necessary nor appropriate in all cases.[212/] On this basis, Magnola argues that the use of the 14-year AUL was unsupported by substantial evidence.

In addition, Magnola rejects the Department's requiring of historical data before a company-specific AUL may be used "because such data by definition cannot exist for start-up companies such as Magnola, and nothing in the law authorizes a prejudice against such companies." Not only would such a rule violate the principles of the *British Steel* and *Ipsco* decisions, the AUL from the IRS Tables would not even provide a fair approximation of Magnola's AUL because it reflects old technology and not the newly developed technology and production processes actually in use by Magnola.[213/] In addition, there is nothing on the record to suggest

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210/ *Id.* at 5, *quoting British Steel*, 879 F. Supp. at 1289.

211/ *Id.* at 6.

212/ *Id,. citing* 1998 Final CVD Regulations, 63 Fed. Reg. at 65,397.

213/ *Id.*

that Magnola's straight-line method of asset depreciation would be any less reliable than an AUL based on "actual historic data."[214/]

U.S. Department of Commerce

The Department initially notes that its regulations "establish the presumption that the AUL of assets in CVD investigations is to be set at the rate provided for in the IRS Tables. A respondent may rebut this presumption if it establishes that (1) the IRS Tables do not reasonably reflect the recipient company's AUL or the country-wide AUL for the industry under investigation, and (2) the difference between the two AUL's is significant."[215/] If respondents establish both of these elements, then the Department may use the company's own AUL or the country-wide AUL as the allocation period, provided that the AUL is otherwise calculated according to the Department's regulations:

> A calculation of a company-specific AUL will not be accepted [sic] the Secretary unless it satisfies the following requirements: the company must base its depreciation on an estimate of the actual useful lives of assets.... A company-specific AUL is calculated by dividing the aggregate of the annual average gross book value [sic] of the firm's depreciable productive fixed assets by the firm's aggregated annual charge to accumulated depreciation, for a period considered appropriate by the Secretary...."

Department Rule 57(2) brief at 36, *quoting* 19 C.F.R. § 351.524(d)(2)(iii) (Department's emphasis).

In the Department's view, this language self-evidently requires the Department to determine the "aggregated annual charge to accumulated depreciation" by reference to *historical data* kept in the ordinary course of business in the company's books and records.[216/] Insofar as the appropriate period is concerned, the Department has generally considered "10 years of actual historical data (*i.e.*, data for the period of review and the preceding nine years)" to be appropriate, although "it may exercise its discretion to accept information from a

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214/ *Id.* at 7.

215/ Department Rule 57(2) brief at 35, *citing and quoting* 19 C.F.R. § 351.524(d)(2)(i).

216/ *Id.* at 36.

shorter period if the circumstances warrant."[217/] In this case, however, the Department found that Magnola had not demonstrated *any* actual historical aggregated annual depreciation charges that would allow it to accept the proposed 28-year AUL as representative of the actual useful lives of its assets.[218/]

As to Magnola's arguments that the 14-year AUL from the IRS Tables do not provide a fair approximation of Magnola's AUL, and that Magnola has in fact relied on a straight-line depreciation method, the Department responds that:

> [t]he difficulty with Magnola's position ... is that it did not demonstrate that its proposed 28-year AUL of assets is something other than theoretical. The record contains no evidence that this rate was ever actually applied in the company's normal books and records. Because the information proposed by Magnola was entirely theoretical — and not based on any actual historical data (including any data for the POR) — Commerce correctly determined that the regulations precluded it from relying on Magnola's data for purposes of calculating the company's AUL in this proceeding.

Department Rule 57(2) brief at 37-38.

2. Analysis and Decision of the Panel

The Panel upholds the Department's selection of the 14-year AUL from the IRS Tables.

The Department reasoned in the IDM as follows:

> Pursuant to 19 CFR 351.524(b), non-recurring subsidies are allocated over a period corresponding to the AUL of the renewable physical assets used to produce the subject merchandise. Pursuant to 19 CFR

217/ *Id,. citing* the 1998 Final CVD Regulations, 63 Fed. Reg. at 65,397.

218/ *Id.* at 36-37, *quoting* from the IDM: "While it is true that the Department does not require, in all cases, that a company-specific AUL be based on 10 years of actual historical data, in this instance, Magnola's company specific AUL is not based on *any* actual historical data (including any data for the POR). Rather, Magnola has calculated its company-specific AUL using *future estimated* depreciation expenses and asset values. This prospective, theoretical calculation clearly does not meet the regulatory requirements for rebutting the presumptive IRS AUL. Accordingly, we are continuing to use the 14-year AUL for magnesium from the IRS Tables." IDM at 17 (Department's emphasis).

> 351.524(d)(2)(i) and (ii), we presumptively use the AUL listed in the IRS Tables, unless a party claims and establishes that (1) the IRS Tables do not reasonably reflect the recipient company's AUL or the country-wide AUL for the industry under investigation and (2) the difference between the two AULs is significant (*i.e.*, different by one year or more). Where the presumption is rebutted, we will use the company's own AUL or the country-wide AUL as the allocation period if it is calculated according to 19 CFR 351.524(d)(2)(iii). *Id.* 19 CFR 351.524(d)(2)(iii) sets forth that in calculating a company-specific AUL, the company must, *inter alia*, base its depreciation on an estimate of the actual useful lives of its assets, and the AUL is calculated by dividing the actual annual average gross book values of the firm's depreciable productive fixed assets by the company's aggregated annual charge to accumulated depreciation, *for a period considered appropriate by the Secretary*. (Emphasis added.) As indicated in the Preamble to the 1998 CVD Regulations, 63 FR at 65,397, the Department has generally considered the "appropriate period" to be 10 years of actual historical data *(i.e.*, data for the POR and the preceding nine years).

IDM at 17.

While Magnola insists that the Department's regulations create a "presumption in favor of using a company's actual AUL,"[219/] the Panel accepts the Department's characterization of its own regulations ("we presumptively use the AUL listed in the IRS Tables").[220/] Thus, the actual presumption under 19 CFR § 351.524(d)(2)(i) and (ii) is for the use of an AUL selected under the IRS Tables which will be used *unless* a party claims and establishes that (1) the IRS Tables do not reasonably reflect the recipient company's AUL, and that (2) the difference between the two AULs is "significant." If the presumption is successfully rebutted, then the Department will utilize the recipient company's own AUL provided or on condition that it has been calculated in according with 19 CFR § 351.524(d)(2)(iii).

219/ In its Rule 57(1) brief, Magnola asserts that "[t]he controlling regulations and caselaw establish a presumption in favor of using a company's actual AUL, not the IRS tables. That presumption applies whether the company has been in business for decades or is a new company.... The law, however, requires Commerce to use Magnola's company-specific AUL because it differs significantly, by more than one year, from the IRS tables." *Id.* at 4.

220/ The 1998 Final CVD Regulations also provide: "In a departure from our current practice and from the 1997 Proposed Regulations, we have adopted a rebuttable presumption that non-recurring benefits will be allocated over the number of years corresponding to the average useful life (AUL) of a firm's renewable physical assets, as set forth in the [IRS Tables]." *Id.* at 65,395.

The latter regulation states, in pertinent part, as follows:

> A calculation of a company-specific AUL will *not be accepted* by the Secretary unless it satisfies the following requirements: the company must base its depreciation on an estimate of the actual useful lives of assets and it must use straight-line depreciation.... A company-specific AUL is calculated by dividing the aggregate of the annual average gross book values of *the firm's* depreciable productive fixed assets by *the firm's* aggregated annual charge to accumulated depreciation, for a period considered appropriate by the Secretary....

19 CFR § 351.524(d)(2)(iii) (emphases added).

The above regulation utilizes the term "the firm" to identify the entity whose book values and accumulated depreciation should be utilized in making the company-specific AUL calculation. The Department's own regulations define this term to mean:

> For purposes of subpart E (Identification and Measurement of Countervailable Subsidies), "firm" is used to refer to the *recipient of an alleged countervailable subsidy*, including any individual, company, partnership, corporation, joint venture, association, organization, or other entity.

19 CFR § 351.102 (emphasis added).

Since it was Magnola that was the "recipient" of the alleged countervailable subsidy,[221/] it is clear that for the Department to "accept" its company-specific AUL calculation, Magnola would have to carry out the calculation by dividing the aggregate of its annual average gross book values of its depreciable fixed assets by its aggregated annual charges to accumulated depreciation for a period of ten years or such other period as it could convince the Department to accept. The difficulty here, of course, is that, as a start-up, Magnola was in no position to offer such historical data and thus was in no position to satisfy the condition that the Department places on a company that otherwise might be in a position to rebut the presumption for use of the IRS Tables.

221/ The Preamble to the 1998 Final CVD Regulations confirms that Magnola itself is the focus of the inquiry ("Therefore, as set forth in paragraph (d)(2), we will use the AUL listed in the IRS Tables for the industry under investigation, unless parties claim and establish that these tables do not reasonably reflect the AUL of the renewable physical assets *for the firm or industry under investigation*.") *Id.* at 65,396 (emphasis added).

In the IDM, the Department acknowledged this difficulty:

> While it is true that the Department does not require, in all cases, that a company-specific AUL be based on 10 years of actual historical data, in this instance, Magnola's company specific AUL is *not based on any actual historical data* (including any data for the POR). Rather, Magnola has calculated its company-specific AUL using *future estimated* depreciation expenses and asset values. This *prospective, theoretical calculation* clearly does not meet the regulatory requirements for rebutting the presumptive IRS AUL. Accordingly, we are continuing to use the 14-year AUL for magnesium from the IRS Tables.

IDM at 17 (emphases added).

The Panel has considered the Department's regulations on this issue and finds them to be free of any significant ambiguity[222/] and finds, as well, that the Department has applied those regulations properly to the facts on the record.

As indicated above, the Panel is not dissuaded by Magnola's assertion that the regulations presumptively favor company-specific AUL's, an assertion that is belied by the language of the regulations themselves. Moreover, Magnola's assertion that the Department has created a *per se* rule requiring the use of the IRS Tables "unless a company has been in business for decades" is belied by the Department's own statement of the rule suggesting 10 years of data is appropriate but noting its apparent flexibility on this issue.[223/]

222/ The Department indicates that it interprets 19 CFR § 351.524(d)(2)(i) as establishing *two* preconditions to rebut the presumptive use of the IRS Tables. First, the IRS Tables do not reasonably reflect the company-specific AUL and, second, the difference is significant. 19 CFR § 351.524(d)(2)(iii) then states that the Department "will not accept[]" a company-specific AUL which does not comply with that provision's calculation conditions. The Preamble to the 1998 Final CVD Regulations, however, makes it clear that the calculation provision is itself a precondition to a successful rebuttal of the use of the IRS Tables ("If a party can show that a company's AUL meets all of the requirements set forth in paragraph (d)(2)(iii), and that the company-specific AUL differs from the IRS tables by one year or more, we will consider that the presumption has been rebutted and will use the company's own AUL for purposes of its analysis.") *Id.* at 65,397. It thus may be more accurate to say that there are three preconditions to a successful rebuttal of the presumptive use of the IRS Tables.

223/ In the 1998 Final CVD Regulations, the Department indicated that "we are still (continued...)

The Panel notes also Magnola's related assertion that the law does not authorize a "prejudice" against start-up companies but considers that Magnola is in effect raising a policy dispute regarding the proper scope of a regulation previously adopted in a formal, rule-making process.[224/] Moreover, even if the existing rules do operate in a manner that "prejudices" startups, it nevertheless remains a legal requirement for the Department to have an adequate evidentiary basis for making any company-specific finding. In this case, there is no evidence on the record that would enable the Department to make such a finding. Thus, the Panel regards the Department's determination on this issue to have been made in accordance with law.

Magnola relied in its supplementary Rule 57(1) brief on the *British Steel* and *Ipsco* decisions and the Panel takes note that in its Rule 57(2) brief, the Department made no reference to those decisions. Magnola reads *British Steel* and *Ipsco* as insisting that the Department "not utilize an AUL from the IRS tables when a company-specific AUL is available, because the IRS tables would not 'reflect the commercial and competitive advantage enjoyed by the firms receiving nonrecurring subsidies.'"[225/]

The active language that the CIT was addressing in these decisions was contained in legislative history to the *Trade Agreements Act of 1979*:

223/ (...continued)
evaluating whether 10 years of data are necessary or appropriate." *Id.* at 65,397. The Department does appear to insist that there be at least some considerable historical experience.

224/ *See* 1998 Final CVD Regulations, 63 Fed. Reg. at 65,349 n. 1 (list of Federal Register publications developing final post-Uruguay Round regulations). The Preamble to and the text of the 1998 Final CVD Regulations contains no discussion of the possible applicability of the allocation and calculation rules to start-up situations, and the Panel is constrained to consider statutes and regulations in the form actually existing, and not in the form that a party would like them to exist.

225/ Magnola Supplemental Rule 57(1) brief at 5, *quoting* from *British Steel*, 879 F. Supp. at 1289. In note 8, Magnola gives a more complete quotation ("Simply applying a standard method [the IRS Tables] in the name of consistency, does not ensure the reasonableness of either the method or the resulting period, in this or any other particular case. This is especially apparent in light of the emphasis which Congress has placed on discerning the commercial and competitive benefit to the recipient.")

> Reasonable methods of allocating the value of such subsidies over the production or exportation of the products benefiting from the subsidy must be used. In particular, a reasonable period based on the *commercial and competitive benefit* to the recipient as a result of the subsidy must be used.

S. Rep. No. 96-249, at 85-86 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 471-472 (emphasis added).

As counsel for the parties are well aware, there has been a lot of water under the bridge since that statement was made. The question of allocating subsidy benefits over time has been the subject of at least four court challenges, two proposed rule makings, two lengthy remand proceedings, and ultimately the adoption of the 1998 Final CVD Regulations. In the Panel's view, the adoption of the latter rules effectively satisfied the real criticisms of the CIT in the prior *British Steel* and *Ipsco* decisions regarding the use of the IRS Tables methodology:

> Because Commerce has not yet promulgated final regulations with regard to its allocation methodology, this Court does not regard the agency's use of the IRS tables in these cases as the application of a firm rule. *Ipsco II*, 12 CIT at 1132, 701 F. Supp. at 240. The Court, therefore, must consider the evidentiary basis supporting Commerce's decision to use the IRS tax tables.

British Steel, 879 F. Supp. at 1294 n. 48.[226/]

Without extending the point further, the Panel considers that its primary duty in this instance is to review the Department's interpretation and application of the allocation rules as written and contained in the 1998 Final CVD Regulations, not the legislative history of the *Trade Agreements Act of 1979* or the derivative statements

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226/ Additionally, the court stated: "The Court considers the provisions set forth in the *Proposed Regulations*, except where Commerce has indicated otherwise, as statements of the agency's position with respect to the matters addressed in the provisions. [citation omitted] Because the agency has not yet published the provisions contained in the Proposed Regulations in a final form pursuant to the APA [Administrative Procedure Act], 5 U.S.C. § 553 (1988), the Court does not regard the provisions as a codification of the agency's practice, but rather as merely published notice of its intent to codify those provisions. [citation omitted] Consequently, this Court will consider whether the agency based its decision on the facts presented in these particular cases. *See Ipsco I*, 12 CIT at 372, 687 F. Supp. at 626 ('ITA must explain the basis for its decision based on the facts of [the] case' in the absence of a promulgated final regulation)." *Id.*

made by the CIT in the *British Steel* and *Ipsco* decisions under an entirely different regulatory framework. The Panel has done so and decided to uphold the Department in both respects. The Panel finds that the Department's determination on this issue is supported by substantial evidence on the record and is otherwise in accordance with law.

C. Whether the Department's Findings and Determinations Concerning the Use of the Canadian Long-term Commercial Bond Rate to Calculate Magnola's Cost of Capital Are Supported by Substantial Evidence on the Record and Are in Accordance with Law

1. Contentions of the Parties

Magnola

Magnola's Supplemental Rule 57(1) brief addresses a second alleged calculation error, asserting that the Department "inflated the subsidy calculation by substituting a Canadian average long-term interest rate for the actual interest rate incurred on the borrowings used to finance Magnola's operations."[227/] Magnola notes that the Department's regulation, 19 C.F.R. § 351.524(d)(3)(A), expresses a preference for the use of "[t]he cost of long-term, fixed-rate loans of the firm in question," but disputes that the phrase "firm in question" necessarily limits the purview of the regulation to a situation where Magnola itself has to have the long-term, fixed-rate loans in order to qualify.

Magnola points to the record evidence indicating that its financing needs were provided through capital from its owners, in particular, from funds borrowed by its parent company, Noranda, which were then internally supplied to Magnola. Accordingly, Magnola asserts that "its cost of long-term, fixed-rate loans is ... the same as Noranda's. Commerce can use only Noranda's interest rates on long-term

227/ Magnola Supplemental Rule 57(1) brief at 7-8.

loans as the discount rate, because the cost of these loans is Magnola's cost of capital."[228/]

U.S. Department of Commerce

In its Rule 57(2) response brief, the Department agrees that in selecting the discount rate to allocate non-recurring benefits over time, its preference is to use the cost of long-term fixed-rate loans of the "firm in question." If there are no such loans, the regulations provide the Department with the discretion to use "[a] rate that the Secretary considers to be most appropriate."[229/] Because Magnola was the "firm in question," not Noranda, the Department selected a discount rate it deemed "most appropriate":

> Because Magnola is the "firm in question" within the meaning of 19 CFR 351.524(d)(3)(i)(A) and because it did not have any commercial debt obligations during the years the MTM grants were approved, we continue to find that the Canadian long-term commercial bond rate is the most appropriate discount rate available in this proceeding.

IDM at 18.

As to the contention that Magnola had financed its operations with capital from its parent company, Noranda, the Department reiterated its finding in the Final Determination which had rejected the use of Noranda's cost of capital (in the absence of any record evidence that Magnola's cost for the long-term loans was identical to that of its corporate parent):

> Magnola, not Noranda, is the "firm in question" subject to the instant proceeding. Magnola, among other things, is a separately incorporated company and is the recipient of the subsidy benefits under review. Accordingly, only Magnola's commercial debt obligations would fall within the purview of 19 CFR 351.524(d)(3)(i)(A). We note that Magnola did not report any commercial debt obligations of its own, but rather it reported the rate at which its parent company, Noranda, borrowed funds.

IDM at 18.

228/ *Id.* at 8.

229/ Department Rule 57(2) brief at 38, *citing* 19 C.F.R. § 351.524(d)(3)(A) and 19 C.F.R. § 351.524(d)(2)(iii).

The Department concludes its response by indicating that "without record evidence relating to the commercial debt obligations of Magnola as the firm in question, and no evidence that Magnola's cost of capital was the rate at which Noranda borrowed funds, the Department properly exercised its discretion to select the discount rate it deemed most appropriate."[230/]

2. Analysis and Decision of the Panel

The Panel upholds the Department's selection of the Canadian long-term commercial bond rate as the appropriate discount rate for this proceeding.

After considering the arguments made by Magnola and by petitioners in the underlying investigation, the Department stated in the IDM as follows:

> We agree with Magnola that 19 CFR 351.524(d)(3) provides that, in selecting the discount rate used to allocate non-recurring benefits over time, the Department's preference is to use the cost of long-term fixed-rate loans of the "firm in question." Magnola, not Noranda, is the "firm in question" subject to the instant proceeding. Magnola, among other things, is a separately incorporated company and is the recipient of the subsidy benefits under review. Accordingly, only Magnola's commercial debt obligations would fall within the purview of 19 CFR 351.524(d)(3)(i)(A). We note that Magnola did not report any commercial debt obligations of its own, but rather it reported the rate at which its parent company, Noranda, borrowed funds. Because Magnola is the "firm in question" within the meaning of 19 CFR 351.524(d)(3)(i)(A) and because it did not have any commercial debt obligations during the years the MTM grants were approved, we continue to find that the Canadian long-term commercial bond rate is the most appropriate discount rate available in this proceeding. *See* 19 CFR 351.524(d)(3)(i)(C).

IDM at 18.

19 CFR § 351.524(d)(3)(i) itself provides:

> The Secretary will select a discount rate based upon data for the year in which the government agreed to provide the subsidy. The Secretary will use as a discount rate the following, in order of preference:

230/ *Id.* at 40

> (A) The cost of long-term, fixed-rate loans of the firm in question, excluding any loans that the Secretary has determined to be countervailable subsidies;
>
> (B) The average cost of long-term, fixed-rate loans in the country in question; or
>
> (C) A rate that the Secretary considers to be most appropriate.

19 CFR § 351.524(d)(3)(i).

Magnola asserts that the Department should have selected and used preference (A) in this proceeding, insisting that the phrase "firm in question" is not limited to instances where Magnola itself has to have taken out one or more long-term, fixed-rate loans. Magnola argues that where, as here, its operations are internally financed by its parent, Noranda, the phrase "firm in question" should be interpreted to permit the application of preference (A) in this proceeding. The Department took precisely the opposite view and applied preference (C), selecting the Canadian long-term commercial bond rate, as the most appropriate discount rate.

In the previous section, the Panel quoted the regulatory definition of the term "firm" as "the recipient of an alleged countervailable subsidy," 19 CFR § 351.102, which, in this instance, is Magnola, not Noranda. Thus, the Panel is of the view that the Department's interpretation — and application — of the regulation is correct.

However, the Panel does note that 19 CFR § 351.524(d)(3)(i) provides that three solutions should be considered by the Department *in order of preference*. If alternative (A) is rejected, as occurred in this case, then the Department is to consider alternative (B), pertaining to the average cost of long-term, fixed-rate loans in [Canada]; if the latter solution is also rejected, then the Department is to employ alternative (C), the general provision would allows the Department to use a rate that it considers to be the "most appropriate." On the face of it (*see* quotation above from the IDM at 18), the Department appears to have skipped from alternative (A) to (C) without any stated consideration of alternative (B). On the other hand, Magnola itself appears to consider that the Department did go from a rejection of alternative (A) to the utilization of alternative (B): "Commerce inflated the subsidy calculation by substituting a Canadian average long-term interest rate for the actual interest rate incurred on the borrowings used to finance Magnola's operations. There is no

excuse for using an average rate for all companies in Canada...."[231/] Whichever is correct, the Panel notes that Magnola's real criticism in this case is the Department's rejection of alternative (A), not whether the Department utilized alternative (B) or (C) in order to derive its ultimate choice of the Canadian long-term commercial bond rate. Thus, the Panel sees no purpose nor any sensible basis to conclude that the regulation has been misapplied by the Department.

As a general proposition, however, the Panel does have concern that the Department's regulations should — to employ the *Bethlehem Steel* vocabulary — reflect "commercial realities," and it is both a commercial reality and common practice for consolidated enterprises to finance their operations through external borrowing at the parent level and internal borrowing from the parent at the subsidiary level. While it is impossible to know what the Department would have done with different record evidence before it, the Panel does note the following statements made by the Department on this issue, both in the IDM and in its Rule 57(2) brief:

> We note that Magnola did not report any commercial debt obligations of its own, but rather it reported the rate at which its parent company, Noranda, borrowed funds.

IDM at 18.

> [W]ithout record evidence relating to the commercial debt obligations of Magnola as the firm in question, and no evidence that Magnola's cost of capital was the rate at which Noranda borrowed funds, the Department properly exercised its discretion to select the discount rate it deemed most appropriate.

Department Rule 57(2) brief at 40.

These statements appear to constitute an acknowledgement of these common financing practices, and to suggest that if Magnola had placed adequate evidence on the record, including the precise nature and relationship between Noranda's external cost of capital and Magnola's internal cost of capital, the outcome might well have been different.

231/ *See* Magnola Supplemental Rule 57(1) brief at 7-8.

For the present, however, the Panel is limited to a review whether the Department's interpretation and application of the regulation is supported by substantial evidence on the record and is in accordance with law. The Panel decides in the affirmative on both counts.

V. ORDER OF THE PANEL

For the foregoing reasons, the Department's Final Determination is AFFIRMED in all respects. The United States Secretary is ORDERED to issue a Notice of Final Panel Action at the appropriate time under NAFTA Panel Rule 77(1).

Issued: September 9, 2005

SIGNED IN THE ORIGINAL BY:

Harry B. Endsley, Chairman
Harry B. Endsley, Chairman

Gilbert R. Winham
Gilbert R. Winham
(Concurring in part and joining)

James R. Holbein
James R. Holbein

Serge Anissimoff
Serge Anissimoff
(Dissenting in part)

Paul C. LaBarge
Paul C. LaBarge
(Dissenting in part)

CONCURRING OPINION OF PANELIST GILBERT R. WINHAM REGARDING
THE DE FACTO SPECIFICITY ISSUE
September 7, 2005

I agree with my colleagues in the majority that under the applicable standard of review Commerce has broad discretion to determine what constitutes a disproportionate benefit, and that Commerce's determination in Alloy Magnesium is in accordance with law and supported by substantial evidence on the record. I disagree with the majority decision because it does not reflect how close Commerce's determination comes to the point where a reviewing Panel would be justified to interfere.

* * *

Commerce determined in its Issues and Decision Memorandum (IDM) that Magnola's subsidy under the MTM program was disproportionate and therefore de facto specific and actionable for the following three reasons: Magnola's "percentage share was nearly three times higher than the next highest recipient", "Magnola's grant was greater than the grants received by 99 percent of all the beneficiaries", and its grant was "over ninety times larger than the typical grant amount." Commerce made no statement regarding the amount of the subsidy received by Magnola, either as an absolute figure or as a percentage share of the program. While the Panel could speculate why no statement regarding the amount of the subsidy was made, the Panel recognizes that it is mandatory to read Commerce's determination for what it is, and not to engage in post hoc rationalization of this determination. ["...it is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." State Farm, 103 S.Ct. 2856 at 2870 (1983); "An agency determination must be supported by concurrent agency reasoning and not by post hoc reasoning by the agency or its counsel" Usinor v. United States, 2002 WL 1998315 at 12 (CIT).

Commerce's determination can be questioned on the basis of statutory interpretation, practice and comparative analysis.

First, statutory interpretation. Commerce is obliged to support its determinations with statutory interpretations that are "sufficiently reasonable" [American Lamb, 785 F.2d 994 at 1001 (Fed. Cir. 1986)]. Commerce itself has stated that: "It is sufficient if the interpretation in question has a rational basis that comports with the object and purpose of the underlying statute." [Commerce Rule 57(2) Brief at 12]. The countervailing duty statute has no preamble, therefore the place to examine the object and purpose of the statute is the Statement of Administrative Action (SAA) ["When considering governing statutes and legislative intent, especially the Uruguay Round Agreements Act ("URAA"), a Panel, such as this one must consider the authoritative weight of the Statement of Administrative Action (SAA)...which was declared by the U.S. Congress to be an authoritative expression of the United States." Commerce Rule 57 (2) Brief at 10]

The section of the SAA dealing with "specificity" has five sub-sections, beginning with (1) Specificity of Domestic Subsidies. [H.R. Doc. No. 103-316, (1994) at 929]. Sub-section (1) states: "The Administration intends to apply the specificity test...as an initial screening mechanism

to winnow out [for non-application of CVDs] only those foreign subsidies which are truly available and widely used throughout an economy. .... The specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability and use of a subsidy, the benefit is spread throughout an economy." (Italics in original).

The language of sub-section (1) indicates that the object and purpose of the United States Administration is to investigate foreign subsidies and subsidy programs and not individual companies per se. The intent is to apply the specificity test in order to determine the extent to which the benefit of a subsidy is spread throughout an economy. This interpretation is supported by the language of the countervailing duty statute, which states that a subsidy is de facto specific if "[a]n enterprise or industry receives a disproportionately large amount of the subsidy." (Italics added) [19 U.S.C. § 1677(5A)(D)(iii)(III)].

Commerce's IDM is totally silent on the amount of the subsidy received by Magnola. Commerce's reasoning fails to evaluate a foreign subsidy program, such as whether "the benefit is spread throughout an economy." [SAA, supra, at 930] Instead, it puts in its place only an analysis of what one company received in comparison to others, which may or may not be a determinant of whether an enterprise received "a disproportionately large amount of the subsidy." [19 U.S.C. § 1677(5A)(D)(iii)(III)]. Commerce's interpretation of "disproportionality" in this case may not be consistent with a plain reading of the SAA, and it may not "comport with the object and purpose of the underlying statute." [Commerce Rule 57(2) Brief, supra, at 12]. Further, by failing to assess the amount of the subsidy provided to Magnola, Commerce has not directed its analysis toward the "...availability and use of a subsidy", [SAA, supra, at 930] as required by both the statute and the SAA.

Second, practice. With the exception of the instant case, Commerce has followed a practice when interpreting "disproportionality" of evaluating the amount of the total subsidy received by an enterprise or industry.

Parties to the instant case placed 39 documents under the heading "Department of Commerce Determinations" in the Joint Appendix of Authorities for this case. One document was a list of regulations and three were determinations related to the instant case. Of the remaining 35 determinations, 12 do not involve an analysis of disproportionality. Of the next 23 determinations that involve an analysis of disproportionality, 3 report the industry or enterprise share of the subsidy compared to the industry or enterprise share of GDP or GNP; 8 report the industry or enterprise share of the subsidy compared to the total subsidy disbursed by the program; 11 report the industry or enterprise share of the of the subsidy compared to the total subsidy disbursed by the program and the industry or enterprise share of the subsidy compared to the shares received by other industries or enterprises in the program; and one (1), namely, Pure Magnesium and Alloy Magnesium from Canada, 57 Fed. Reg. 30946 (July13, 1992) makes an industry to industry or enterprise to enterprise comparison only.

In only one other case besides the instant case did Commerce report only on the industry or enterprise share of the subsidy compared to the shares received by other industries or enterprises

in the program in the context of a disproportionality analysis.

In previous cases, Commerce has indicated that it generally follows a practice of calculating and reporting on the industry or enterprise share of a subsidy compared to the total subsidy disbursed by the program. For example, Commerce stated: "In prior cases where the Department has found disproportionality...we analyzed whether respondents received a disproportionate share of the benefits by comparing their share of benefits to the collective or individual share of benefits provided to all other users of the program in question."[Antifriction Bearings, 60 Fed. Reg. 52377 at 52379 (Oct. 6, 1995)] Commerce indicated that: "The fact that AFBs received ...6.3 percent of the total value of allowances bestowed is not evidence of disproportionality under the department's practice."[Id, italics added]

In another case, Commerce stated: "The steel industry's share ...expressed as a percentage of all SNCI investment loans outstanding was as follows: In 1975, 17.2 percent; in 1980, 29.2 percent; in 1984, 20.9 percent; in 1985, 17.7 per cent; in 1986, 16.9 per cent; in 1987, 15.6 per cent; and in 1988, 13.5 per cent. We do not find disproportionality in 1987 and 1988 as the steel industry's share of benefits dropped significantly."[Steel Products from Belgium, 58 Fed. Reg. 37273 at 37280 (July 9, 1993)]. This case further indicates that Commerce has followed a practice of calculating the share an industry or enterprise receives of a total subsidy, and assessing that share against a benchmark to determine disproportionality.

In the instant case, Commerce stated that: "...when the Department considers the question of disproportionality on an enterprise-specific basis...Commerce typically compares the amount of subsidy received by an individual enterprise to the total amount disbursed by the authority, and to the amounts received by other companies." [Commerce Rule 27(2) Brief at 24, italics added]. Commerce further stated: "As the Department has explained, in cases dealing with disproportionality 'the proper question to ask is what portion of a program's funding was provided to a specific enterprise or industry, or company....'" [Id at 21, citing to Carbon Steel Flat Products from South Africa, 66 Fed. Reg. 50412 (Oct.3, 2001), italics added].

In the instant case, Commerce provided no report or judgment on what Commerce itself claimed is the "proper question" to ask in matters of disproportionlity. The portion of MTM benefits received by Magnola was proprietary, but in past cases where such figures may have been proprietary, Commerce indicated in general terms whether a figure was "small" or "large". Commerce made no similar effort in this case.

It appears from an analysis of past Commerce determinations, as well as Commerce's own language in the instant case, that Commerce follows a practice in matters of disproportionality of asking what portion of a program's funding is provided to a specific industry or enterprise. This should not be surprising, since this is what is called for in the countervailing duty statute. Commerce did not follow this practice in the instant case. Commerce should have applied its practice or provided a reasonable explanation why it departed from that practice. ["Despite Commerce's statutory discretion,...if Commerce has a routine practice for addressing like situations, it must either apply that practice or provide a reasonable explanation as to why it departs therefrom." Save Domestic Oil, 357 F.3d 1278 (Fed. Cir. 2004) at 1283].

Third, comparative analysis. Commerce supported its analysis in the instant case with its decisions in AK Steel, 192 F.3d 1367 (Fed. Cir. 1999) and Bethlehem Steel, 140 F.Supp.2d 1354 (CIT 2001), noting that "those decisions are consistent with our analysis in the instant proceeding." [IDM at 14]. Commerce stated in its Rule 57(2) Brief at 25 that: "The Department's analysis in this case is entirely in accord with every aspect of the CAFC's holding in AK Steel." These statements are apparently incorrect.

Commerce received absolute figures on the amounts that Magnola and other beneficiaries received of MTM grants. Commerce then calculated the percentage share of each beneficiary of the total grant, a figure presumably derived by dividing the absolute amount received by each beneficiary by the total figure of all MTM grants, producing a percentage share for each recipient. Commerce then compared these percentage shares. ["...we calculated Magnola's share of total MTM grants on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries." IDM at 14]. The result showed that Magnola (a large company) received a larger share than many other companies, which Commerce determined to be "disproportional". Evidence presented at the hearing, and not in the IDM, indicated that Magnola received approximately 2 percent of the total benefits of Quebec's MTM program.

In AK Steel, the subsidy was Korea's Tax Exemption and Reduction Control Act (TERCL), which permitted a company making an IPO to revalue assets without meeting certain statutory requirements. The Korean steel company POSCO took advantage of the Act and revalued its assets by 94 per cent, a figure presumably derived by dividing POSCO's revalued asset value by its original asset value. Over 200 companies also took advantage of TERCL, and the average upward revaluation was 94.2 per cent for all companies. Because all companies received proportionately equivalent benefits (ie, around 94 percent), Commerce determined there was no "disproportionality" in the benefits received, even though POSCO (a large company) received 75 percent of the total benefit disbursed by the TERCL program.

Bethlehem Steel presents a similar factual record to that of AK Steel because recipients were given a benefit related to electricity use. Large industries use more electricity than small industries. Large recipients in the Bethlehem case received a greater amount of the financial benefits afforded by the subsidy program in absolute terms, but the benefits were comparable to small users if the relative size of the industry was taken into consideration. Therefore, the benefit was not determined to be "disproportional."

Assets or electricity use are a measure of company size. What Commerce did in AK Steel and Bethlehem Steel is to make comparisons of subsidy received between companies while holding constant the size of company. In other words, Commerce worked with percentages that removed the effects of company size in making comparisons to the shares these companies received of the benefits of a subsidy program. There was no equivalent effect in the percentages derived in Alloy Magnesium, hence the comparison of Magnola to POSCO is specious. For the percentages used in the case of Magnola to be equivalent to that of POSCO, it would be necessary to hold company size constant, for example, by dividing for each company the subsidy received

from the MTM program by some measure of company size (such as company assets, electricity use, number of employees, or the like). Were this done, there is no assurance that Magnola would appear to be a relatively large recipient of an MTM subsidy when compared with other recipients. It is possible that it would have been an average recipient, similar to the case of another large company, POSCO.

Subject to its interpretations having a rational basis, Commerce is free to interpret "disproportionality" on a factual, case-by-case basis without the application of rigid rules. However, it is questionable whether Commerce is free to make comparisons between percentages in different cases apparently unmindful that the percentages are derived through different procedures and therefore have different meanings when compared. In AK Steel, Commerce stated it "determined predominant use or disproportionality based on a percentage basis rather than on an absolute basis." [IDM at 14-15]. In Alloy Magnesium, Commerce stated it "determined that Magnola's benefits from the MTM program were disproportionate to the benefits received by other companies on a percentage basis...." [IDM at 15]. For the purpose of making inferences, Commerce apparently believed that because it was using the term "percentage" it was making the same statistical analysis in Alloy Magnesium as it had made in AK Steel, and it said so explicitly. ["The Department's interpretation in this case (Alloy Magnesium) was precisely the same as that applied in AK Steel." Commerce's Rule 57(2) Brief at 19, italics added]. This belief was patently erroneous, and it produced an invidious comparison for Magnola.

The factual and analytical basis underlying Commerce's determination in Alloy Magnesium does not create confidence that the agency's "interpretation in question has a rational basis that comports with the object and purpose of the underlying statute." [Commerce Rule 57(2) Brief, supra, at 12, italics added]. Most puzzling is the fact that in AK Steel, a company that received 75 per cent of the total benefits of a subsidy program was determined by Commerce not to receive a "disproportionately large amount of the subsidy" [19 U.S.C. § 1677(5A)(D)(iii)(III)], whereas in Alloy Magnesium a company that received slightly over 2 per cent of the total benefits of a subsidy program was determined by Commerce to receive a "disproportionately large amount of the subsidy."[Id.]

* * * *

The issue in Alloy Magnesium is ultimately Commerce's interpretation of the phrase "the subsidy is specific if...an enterprise or industry receives a disproportionately large amount of the subsidy." [19 U.S.C. § 1677(5A)(D)(iii)]. Despite the misgivings expressed above, it should be recognized that the applicable standard of review sets a high bar for any reviewing panel or court to interfere with a determination of Commerce. As noted in the majority opinion, considerable deference should be given to the interpretations Commerce makes of the countervailing duty statute, and to the subsequent determinations Commerce takes based on those interpretations.

The word "disproportionality" is not defined in the statute. Although I have argued that Commerce's interpretation of this word in the instant case may not have carried out the intent of Congress, this matter does not seem clear enough for interference to be justified.[...where Congress has failed to provide clear guidance on an issue, we defer to the interpretation

Commerce has given to its own governing statute." Fujitsu, 88 F.3d 1034 at 1038 (Fed. Cir. 1996)]. In Alloy Magnesium, Commerce has provided reasons to support the determination that it made, those reasons could not be said to be irrational, and therefore Commerce's action has met the minimum standard in law it is required to meet. ["Though a court may reject an agency interpretation that contravenes clearly discernible legislative intent, its role when that intent is not contravened is to determine whether the agency's interpretation is 'sufficiently reasonable'". American Lamb, 785 F.2d 994 at 1001 (Fed. Cir. 1986) citing Federal Election Committee v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 39 (1981)]

The purpose of a high standard of review is, inter alia, to safeguard the role for agency expertise in public policy, and to increase the uniformity of agency decisions. ["By giving the agency discretionary power..., Congress places a premium upon agency expertise, and, for the sake of uniformity, it is usually better to minimize the opportunity for reviewing courts to substitute their discretion for that of the agency." Consolo v. Federal Maritime Commission, 383 U.S. 607 at 621 (1966)]. Regrettably, neither expertise nor uniformity of decision appears to have been enhanced by the exercise of agency discretion in Alloy Magnesium.

Gilbert R. Winham
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ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF: **Alloy Magnesium from Canada,** Final Results of U.S. Department of Commerce Countervailing Duty New Shipper Review	USA-CDA-2003-1904-02

OPINION OF SERGE ANISSIMOFF
(DISSENTING IN PART)

I am obliged to my colleagues for their comprehensive views which I have had the benefit of reading. I would like to additionally express my own views for remanding in connection with the de facto specificity issue. I agree with the majority insofar as the IV(B) and IV(C) issues are concerned.

We are concerned with the question of whether a subsidy is de facto specific and therefore countervailable on the grounds of being "disproportionately large". Congress's exact expression of the law is as follows:

> In determining whether a subsidy (other than a subsidy described in sub-paragraph (B) or (C)) is a specific subsidy, in law or in fact,

> to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply:
>
> …
>
> (iii) where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exists:
>
> …
>
> (III) An enterprise or industry receives a disproportionately large amount of the subsidy.[1]

Additional relevant statutory language which bears on the question concerns certain mandatory assessments that must be made in deciding matters of this kind, namely:

> In evaluating the factors set forth in subclauses (I), (II), (III) and (IV), the administering authority shall take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.[2]

The program held by the Department of Commerce (hereinafter the "Agency") to be a subsidy is the MTM program promulgated and administered by a Ministry of

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[1] 19 U.S.C. § 1677 771(5A) (D) (III)
[2] 19 U.S.C. § 1677 771(5A) (D)

the Province of Quebec. The MTM program is essentially a job training program of general application. There are some 3900 users of the program who account for 98% of the total funds disbursed under the program. The remaining 2% of the funds disbursed under the MTM program received by Magnola are at issue in this case.

The objective specifics of the MTM program include its availability to all industries and all enterprises in Quebec that met the five objective criteria, namely: job preparation; job integration; job management; job stabilization; and job creation. Once the five objectives are met, companies are eligible to receive reimbursement of 50 percent of their labor training expenses. Access to the program is not limited to a special industry or enterprise, or to a specific group of industries or enterprises. The program is entirely objective. Eligibility is automatic. The eligibility criteria are clearly stated and strictly followed.

It was argued that the MTM program was similar to a predecessor job training program in the Province, and indeed like other job training programs previously held to be not countervailable by the Agency. This argument was rejected on the grounds that the MTM program under consideration was not exact in all respects with either the predecessor program or any other program considered in previous decisions and required a distinct analysis. Regretfully the key material distinguishing features disqualifying the MTM program from the benefit of earlier decisions were not explained by the Agency in any specific detail. Because the

MTM program was found to be not factually "exact" in all respects, I move to a consideration of the main issues in this case as I see them.

In holding that the MTM program was de facto specific, the Agency made the following key factual findings:

> [W]e calculated Magnola's share of total MTM grants on a percentage basis and compared Magnola's share to the percentage shares of all other MTM beneficiaries. In so doing, we found that Magnola received a disproportionate percentage of MTM benefits because, as the second largest recipient overall, its percentage share was nearly three times higher than the next highest recipient. Furthermore, Magnola's grant was greater than the grants received by 99 percent of all the beneficiaries and over ninety times larger than the typical grant amount. Magnola's grant was vastly larger than the typical grant, regardless of whether we included or excluded small-scale recipients from our analysis.[3]

It is apparent that there is no mathematical logic or statistical rigor to the analysis or comparators used. As the "second largest recipient" it stands to reason that Magnola's grant would be greater than the other recipients' grants … save one. Whether the resulting calculations amount to 99% or some other like number

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[3] Issues and Decision Memorandum for the Final Results of the Countervailing Duty New Shipper Review of Alloy Magnesium from Canada (Apr. 21, 2003) at 13.

makes no analytical difference and cannot serve as a "different" comparator. Comparing Magnola's percentage share to the next largest unknown recipient's share does not assist in the least in understanding why a "3 times factor" is significant.

Quite simply, the Agency found Magnola's benefit to be "large" when compared to the benefits received by the other recipients. The question of course is when does a benefit become "disproportionately large". It is not merely a question of size alone.

The Agency accordingly held the MTM program to be de facto specific solely on the basis that Magnola received a benefit which in absolute terms was "large" in comparison to the benefit received by other recipients. It is clear that the only disproportionality analysis performed was to compare the size of the benefit *inter se* as between Magnola and other recipients. Disproportionality was not considered.

It is fundamental that one of the principal tasks in any legal undertaking is to interpret or construe the law which is to be applied. Apart from the plain ordinary meaning conveyed by the express words used in the Statute, the law may require additional construction in order to give it the necessary meaning to permit its application to the findings of fact to be made in the case.

In determining whether the ITC's interpretation of the statute is "in accordance with law"[4], the Panel is to afford deference to the agency's reasonable interpretation of the statute which it administers. This deference extends to the administering authority's interpretation of its own regulations as well.[5]

The Supreme Court has further stated that "when a court is reviewing an agency decision based on a statutory interpretation, 'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[6]

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.[7], is the seminal decision concerning deference to administrative interpretations of statutes. *Chevron* requires that federal courts defer to any reasonable interpretation by an agency charged with administration of a statute, provided that Congress did not clearly specify a contrary interpretation.

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to

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[4] Section 516A(b)(1)(B) of the Tariff Act of 1930, *as amended,* 19 U.S.C.A. §l516a(b)(1)(B)

[5] "Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations." *PPG Industries, Inc. v. United States*, 712 F.Supp. at 198 (Ct. Int'l Trade 1989), *aff'd*, 978 F.2d 1232 (Fed. Cir. 1992).

[6] American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986), *citing* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, at 843 note 11 (1984).

[7] 467 U.S. 837 (1984).

> the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[8]

Accordingly, a reviewing authority may not, for example, permit an agency "under the guise of lawful discretion or interpretation to contravene or ignore the intent of Congress."[9]

The Supreme Court itself has further held that "no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."[10]

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[8] 467 U.S. at 842-843.

[9] *Cabot Corp. v. United States*, 694 F.Supp. 949, 953 (Ct. Int'l Trade 1988).

[10] *Public Employees Retirement System of Ohio v. June M. Betts*, 492 U.S. 158, 171 (1989). *See also Texas Crushed Stone Co. v. United States*, 35 F.3d 1535 (Fed. Cir. 1994), note 7 at 1541 ("Prior agency practice is relevant in determining the amount of deference due an agency's earlier interpretation. An agency's interpretation of a relevant provision which conflicts with agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *Citing INS. V. Cardoza-Fonseca*, 480 U.S. 421, 446 note 30, 107 S.Ct. 1207, 1221 note 30, 94 L.Ed. 2d 434 (1987).

Similarly, in *AK Steel Corp. v. United States*[11], the United States Court of Appeals for the Federal Circuit stated:

> When a word is undefined in a statute, the agency and the reviewing court normally give the undefined word its ordinary meaning. See *Perrin v. United States*, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979) ("A fundamental cannon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.")

It follows that any inherent discretion, however wide, which is necessarily granted to an Agency to construe the law it is mandated by Congress to apply and administer, is constrained by the wording specifics of the law as originally written. In our case it was not argued that the Agency has been given an absolute discretion by the statute to decide a de facto specificity case in whatever way the Agency deems just.

This task of construing or interpreting the law was not done in this case, nor apparently in any other prior case. In fact the closest we come to a statement of the law is a summation offered by the Agency's legal counsel to the effect that

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[11] 226 F.3d 1361, Revised Opinion Issues September 12, 2000, at 1371.

the Agency "reasonably" interpreted the statutory term “disproportionate” to mean "substantially greater than amounts received by other recipients of MTM grants". This as mentioned is not an interpretation expressly made by the Agency in the exercise of its statutory mandate. It is a lawyer's interpretation and assessment of what law the Agency applied in this case. However able, it is irrelevant to this Review.

It is therefore perfectly clear that the Agency has not applied itself to the task of construing the law. Equally, counsel’s opinion of what the law consists of is not a valid patch for the Agency's failure to interpret the law that it was mandated by Congress to apply. It also follows that it is not the task of this Panel to speculate on what the law should be since everyone agrees that it is the Agency's jurisdictional prerogative in the first instance to interpret the law. Neither is it our role to approve and adopt counsel's statement of the law aforesaid.

I would accordingly remand and require the Agency to construe the statute since without this first step there can be no effective Review of the legal component of the Agency's decision. It also follows that without the interpretive step, the entire process of determining whether or not a subsidy is specific becomes subjective and arbitrary. Moreover, the judicial endorsement of the view that cases of this type are to be decided on a “factual case by case basis without the application of

rigid rules"[12] simply cannot mean that the adjudicative process should take place without the law component and become purely discretional.

Thus we as a Panel are unable to assess the reasonableness of the construction the Agency placed on the law because we are absent the construction.

The issue is further aggravated by robust attempts to explain this omission in part by placing reliance on the *Chevron* case which may be read to telescope or narrow the question of interpretation into one of whether or not the Agency's "answer" is based on a permissible construction of the statute. The commencement point for this approach is stated to be in cases where the statue is "silent or ambiguous" with respect to specific issues being addressed.

There was no argument made in this case that the statute was ambiguous. As well, it is not apparent to me that the use of the words "disproportionately large" in the statute constitutes the necessary "silence or ambiguity" requiring a departure from the normal rules of statutory construction requiring, *inter alia*, that words in a statute are to be given their plain ordinary meaning. In general terms, the plain ordinary meaning of the words "disproportionately large" requires comparison of the benefit received to some benchmark such as, for example, the total amount of the subsidy disbursed. Indeed this appears to be expressly called for by the statute. Certainly the words used in the statute are not

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12 *AK Steel Corp.* v. *United States*, 192 F.3d 1367 at 1385

meaningless. But regardless of any "silent" component to the law, there was nonetheless a total absence of construction by the Agency. Nowhere does the Agency state what the law is.

Chevron does not dispense with the need for the Agency to construe the law. Thus, however great the deference to be extended to the Agency's construction of the law, Review can only be exercised with reference to the law so construed which step is absent in this case.

Another approach by a Panel in reviewing an Agency's decision is to infer a construction of the law solely from the result obtained in the case. In other words to consider whether the Agency's decision is based upon a permissible construction of the statute. It is clear that Agency ruled on the basis that Magnola received a size of benefit which was "large" enough to be countervailable. Thus the Agency's "size analysis" is of no assistance in construing the law since "disproportionality" was not addressed by the result.

It is a well-known principle of statutory construction that when the legislature uses two different words in a statute, each must poses and carry with it its own distinct meaning. A finding that a large benefit was granted, however large, does not answer the question of whether or not the benefit was disproportional.

On this line of reasoning the Agency's inherent interpretation of the law as making specific and countervailable benefits that in its view “are large when compared to those received by other recipients”, ignores the statutory requirement that the benefit be also disproportionate and any such interpretation is accordingly unreasonable.

In this case the need for a disproportionality analysis issue is sharply focused because the MTM program is entirely objectively based and there is no preferential or special treatment given to users of the benefit. The above recited facts concerning MTM the program also explain why the benefit was large in absolute terms given Magnola's innovative technology, the burdens of start up phase and the resulting needs. That evidence is central to any consideration of disproportionality.

Remarkably that evidence is disqualified and rejected outright by the Agency on the ground that its only relevance is to the issue of de jure specificity. Because the Agency finds that the MTM program is not de jure specific under Section 771(5A)(d)(I), that holding somehow makes irrelevant Magnola's prima facie objective and proportional access and use of the MTM program on an equal footing with other applicants and recipients. There is no logic in ignoring “evidence of proportionality” and to do so is my view unreasonable and wrong.

Given that the issue at hand is “disproportionality”, any and all evidence bearing on that determination is relevant and needs to be considered. And this is so regardless of the relevance of any fact to any other issue in the case. The existence of other issues in the case does not carve out and disqualify the operative subsisting facts for purposes of the disproportionately analysis. Thus, one of the key and central fact considerations arguing against disproportionately was not even considered.

Yet another available approach by a Panel in reviewing an Agency's decision is to consider the methodology used by the Agency in reaching its decision. The purpose of this approach is to determine whether or not the methodology used represents an inherent interpretation of the Statute and is therefore reasonable.

Noting that this approach nonetheless leaves the law unconstrued, it is equally apparent that there is no recognizable methodology or analytical method inherent in the Agency’s decision. At most it is a repetitive comparison of raw size-type data of benefits received by users of the MTM program which apparently enabled the Agency to reach the conclusion that the benefit received by Magnola was "too large" and therefore "disproportionately large".

In this regard it is most instructive that we have judicial pronouncements that any methodology or process that solely depends on the absolute size of the benefit conferred cannot stand.

In *AK Steel Corp. v. United States*[13] the Court reviewed Commerce's findings regarding whether Korean steel manufacturers received preferential access to medium and long-term credit. The Court, in considering arguments by the domestic producers that the absolute benefit conferred on a Korean steel manufacturer (POSCO) constituted disproportionality, stated:

> [I]t was not error for Commerce to rely on record evidence demonstrating no disproportionality based on the relative percentage benefit rather than on the absolute benefit conferred on POSCO. The domestic producers' methodology could produce an untenable result, i.e., that a benefit conferred on a large company might be disproportionate merely because of the size of the company.

The United States Court of Appeals for the Federal Circuit concluded that the subsidy was not specific despite the fact that POSCO received a far greater benefit in absolute terms than did the vast majority of the other beneficiaries under the program. As can be seen the size of the benefit alone, no matter how large, does not tip the scales in a disproportionality analysis.

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[13] 192 F.3d 1367 (Fed. Cir.1999)

In *Bethlehem Steel Corporation v. United States*[14] the United States Court of International Trade (USCIT) found that although the steel industry in Korea received more benefits in monetary terms pursuant to the program in question than any other sector, this factor alone was not determinative of the specificity issue.

Specifically the court stated:

> The mere fact that the steel industry received a greater monetary benefit from the program than did other participants is not determinative of whether that industry was "dominant" or receiving "disproportionate" benefits. In virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits than another group. To impose countervailing duties on an industry where disparity alone is demonstrated, but no evidence is produced indicating that the benefit was industry specific, is anathema to the purpose of the countervailing duty laws.[15]

The Court went on to note that disproportionality could not be established because there was nothing in the record to indicate that this was higher than expected.

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[14] 140 F. Supp. 2d 1354

Similarly, since Magnola paid for a greater workforce, and indeed like any other subscriber under the MTM programme paid the full amount of those relevant expenses, they were entitled to receive benefits of half their expenditure. This was not higher than expected and significantly represented only 2% of the total benefits conferred under the MTM program.

While various arguments were made concerning the real holdings in those cases, I would have thought that the unmistakable one is that any methodology based solely on size of the benefit received is untenable ad anathema for the purpose of CVD laws. Any such methodology is fatally flawed and unreasonable.

It is also apparent that apart from recurring themes, there is no standard methodology employed by the Agency in deciding specificity cases. Since the facts of one case have no precedent value to the facts of another case little help can be obtained from a consideration of the prior cases. Thus the analysis of methodologies to determine their reasonableness leads to a blind canyon since there is no accepted methodology responsive to the dictates of the law. And as mentioned, proceeding without an initial interpretation of the law renders the process entirely discretionary and arbitrary without the protective umbrella of the law.

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[15] ibid

It is apparent, however, from a consideration of prior cases that the Agency has never proceeded in the fashion it did in this case. In no prior case did the Agency solely consider the size of the benefit received and compared that benefit to the size of benefit received by other enterprises in making its disproportionality analysis. Variously, the Agency has:

(1) compared the size or percentage share of the benefit to GDP or GNP;

(2) considered the enterprise's share of the subsidy when compared to the total subsidy dispersed by the program; and

(3) compared (i) the enterprise's share of the subsidy to the total subsidy dispersed by the program together with (ii) the enterprise's share of the subsidy when compared to the shares received by other enterprises in the program.

In no prior case did the disproportionality analysis abruptly stop at a comparison of only the enterprise's share of the subsidy to the share received by other enterprises. This is of more than passing importance in this case given that 98% of the MTM benefits was received by some 3900 companies. Magnola's 2% share of the total benefit is a number never previously associated with disproportionality. What is even more strange is that the 2% share was not ever discussed or analyzed in the context of the disproportionality analysis and prima facie ignores the fact that a 2% benefit could not reasonably lead to a suggestion of disproportionality on any reading of the cases.

I accordingly expressly disagree with the majority's attempt to justify the non-analysis of the 2% share on the entirely speculative grounds that Magnola provided defective information with the result that the Agency selected an analytic method that might best account for obvious defects. This is, with respect, complete speculation and I expressly protest that this panel is entitled to engage in these kinds of factual reflections or rationalizations. We are not a fact finding body and must take the facts as found. The relevant fact is that Magnola received 2% of the entire benefit and there were some 3900 users.

The Complainants also argued that the objectivity of the MTM program created a safe haven for the program. While this argument is not definitive since there are other statutory criteria which may bear on the question of whether or not a subsidy is specific, it nonetheless needs to be addressed given that the Statement of Administration contemplates a safe haven or an exclusion from the ambit of the CVD laws.

Congress has expressed itself clearly on 19 U.S.C. § 1677 771(5A) (D), in *The Uruguary Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103-316, (1994) at 929-930 (the "SAA"):

> To clarify future application, this Statement describes in some detail how the Administration intends to administer section 771(5A)(D). … The specificity test was intended to function as a

> rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability *and use* of a subsidy, the benefit of the subsidy is spread throughout an economy.

It does not appear to me that the Agency had any regard for this statement of Congress's intention I considering whether the MTM program qualified for a general exemption.

As a general matter, it is a vital and time-honored principle of U.S. administrative law that an agency's ruling in an adjudicative proceeding be supported by reasoned decision making, with the various connections among the agency's fact findings, its reasoning process, and its conclusion being sufficiently clear. As the U.S. Supreme Court observed in *Securities & Exchange Comm'n v. Chenery Corp*.:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong. 332 U.S. 194, 196-97 (1947) (*quoting*

United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511 (1935)).

In short, an agency's reasoning process must be transparent before a reviewing body can be asked to review an agency decision. An agency's failure to meet this standard of reasoned decision making deprives the parties of their opportunity for a fair and transparent proceeding and makes impossible the task of the reviewing authority. That is what happened here.

The Agency is further charged in a mandatory way to consider, *inter alia*, the level of diversification under Section 771(5A)(D) of the statute. The Agency, this time in full reliance on the Statement of Administrative Action, noted that since these additional criteria served only to inform the adjudicative process with respect to the enumerated specificity factors, the required analysis was not mandatory after all. Ultimately the Agency dispensed with these mandatory statutory considerations because of its decision to proceed only on an enterprise (and not industry) specific basis. The Agency also noted that it had previously questioned and rejected the usefulness of such analysis.

The above analysis cannot stand since I do not see how either (a) the Statement of Administrative Action, (b) a factual procedural relevance determination by the Agency, or (c) previous assessment of uselessness … can trump a statute. There is no discretion given in the statute, or any dependency placed on the

mandatory requirement. It is clear that the analysis must be completed regardless and … of course, may serve to instruct and inform its decision.

I would have remanded and asked Commerce to interpret the law and apply all of the facts in making its decision, having further regard to the SAA and the mandatory requirement of the statute not inconsistent with this decision.

LaBarge, Paul, dissent from the decision of the majority.

[LaBarge, Paul, speaking as to the dissent]

As a Panel, we are faced with three interrelated issues in this complaint. The Canadian Complainants (as defined below) have presented the following issues before this Panel:

- Whether the Department of Commerce's (hereinafter referred to as "Commerce") finding and determinations concerning the conferral of benefits by the Government of Quebec (hereinafter referred to as "GOQ") to Magnola Metallurgy Inc. (hereinafter referred to as "Magnola", and together with GOQ, the "Canadian Complainants") as constituting a *de facto* specific countervailable subsidy are supported by substantial evidence on the record and are in accordance with law;

- Whether Commerce's finding and determinations concerning the calculation of Magnola's company-specific average useful life of assets ("AUL") rate by reference to U.S. IRS tables are supported by substantial evidence on the record and are in accordance with law; and

- Whether Commerce's finding and determinations concerning the use of the Canadian long-term commercial bond rate to calculate Magnola's cost of capital are supported by substantial evidence on the record and are in accordance with the law.

For the reasons discussed below, I cannot agree with the decision of the majority that the benefits received by Magnola are *de facto* specific and therefore constitutes a countervailable subsidy. I find that Commerce erred in its interpretation of 19 U.S.C. § 1677 771(5A) (D) (III) and as such the finding is contrary to law and cannot be upheld.

I concur with the result, but not the reasons, of the majority regarding Commerce's findings and determinations concerning the calculation of Magnola's AUL with reference to the IRS tables. I can agree that it would have been possible for Magnola to rebut the presumption against using the IRS tables if this presumption does not reasonably reflect Magnola's AUL and the difference between the two is significant. Simply stating that Magnola, as a subsidiary company, is following the accepted practices and policies of Noranda, Inc. (hereinafter referred to as "Noranda"), its parent organization, is not substantial evidence that would rebut the presumption in favour of following the IRS tables. I am cognizant of the difficulty for Magnola in obtaining actual evidence outlining the depreciation of the

Greenfield before the project has begun to depreciate, however some evidence is required in order rebut this presumption. Without some actual evidence outlining the depreciation of the Greenfield project, I agree with the majority decision that Commerce's decision to use the IRS tables, and not a company specific AUL, is supported by substantial evidence and is accordance with law. It should be mentioned that if Magnola had in fact provided some evidence as to the depreciation of the assets, other than the current practices and policies of the parent organization, this member of the Panel may have been otherwise persuaded.

I concur with the decision and the reasons of the majority regarding the Commerce's determination to use the Canadian long-term commercial bond rate to calculate Magnola's discount rate. However, it should be mentioned that in the commercial realities of today's economic landscape, many organizations are able to gain competitive advantages by the use of various corporate structures. These realities are such that subsidiary companies will frequently benefit from an established parent company when obtaining necessary funding. A strict interpretation and distinction between a parent company and its subsidiaries, as used by the Commerce in this case, ignores not only the commercial reality but also places arbitrary obstacles in the path of companies who now have one less avenue of available funding. I am of the view that the position taken by Commerce places such barriers in a corporate structure, as we have in this case, that are unfounded. Magnola received the necessary funding in this case from its parent company Noranda, to distinguish between Magnola and Noranda because the funds from the MTM Program were received by Magnola and not Noranda to be an arbitrary distinction. Stating that a subsidiary is the *firm in question* and completely distinct from its parent company ignores the impact and benefits obtained through corporate structuring by the organization as a whole. However, in the determination of what rate is to be used in calculating Magnola's discount rate, Commerce has the discretion to use a rate that it considers to most appropriate[1]. The Canadian long-term commercial bond rate may not be correct, but it is reasonable in the circumstances and I agree with the majority that the determination by Commerce to use the Canadian long-term commercial bond rate in the calculation of Magnola's discount rate is not a determination that is unsupported by substantial evidence nor is it otherwise not in accordance with law.

The statement of the case and the history of the proceedings have been fully set forth in the decision of the majority and, as such, are incorporated hereinafter, but will not be reproduced.

The Canadian Complainants argued that Commerce erred in its determination that the Province of Quebec's Manpower Training Measure Program (the "MTM Program") is *de facto* specific. Commerce, on the other hand, argues that their finding that the subsidy granted to Magnola is a disproportionately

[1] 19 C.F.R. § 351.524(d) (3) (A).

large amount of the subsidy and is therefore *de facto* specific is consistent with the language and the purpose of 19 U.S.C. § 1677 771(5A) (D) (III) (the "Statute"). Commerce argues that this determination is supported by substantial evidence and must be upheld in accordance with 19 U.S.C. § 1516a (b) (B) (i), which provides that "the court shall hold unlawful any determination, finding, or conclusion found…in an action brought under paragraph (2) of subsection (a) of this section, to be unsupported by substantial evidence on the record, or otherwise not in accordance with law,…"

This panel must sustain a final determination of Commerce unless it is found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law"[2]. Any determination made by Commerce that is not consistent with the language and purpose of the statute, is therefore not in accordance with law and cannot be upheld. In making this determination, this Panel must apply the standard of review as set out in Annex 1911 and follow the general legal principles that a court of the importing Party otherwise that would apply to a review of a determination of the competent investigating authority[3].

The role of this Panel is twofold. As a Panel, we must first determine if Commerce has correctly interpreted the applicable legislation. Any determination made by Commerce must be made in accordance with the language and purpose of the Statute. Commerce is the agency of the U.S. Government that Congress has directed to administer the Statute. This duty to uphold and enforce the underlying values and principles of the Statute entails great responsibility. This authority does not, however, provide Commerce with the latitude to expand, delete, re-write, or interpret the language of the Statute in a way that is inconsistent to the purpose and intent of the Statute as set down by the framers of the legislation. If this Panel determines that Commerce has correctly interpreted the legislation, we must then determine if their decision is in accordance with the purpose of the Statute and is supported by substantial evidence, thus being in accordance with law.

Generally, under the laws of the United States, when reviewing an agency's construction of a statute of which it administers, if the statute is silent or ambiguous with respect to the specific issue, the determination for the reviewing court is whether or not the agency's determination is based on a permissible construction of the statute. The Statute specifically states that:

> "(iii) where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exists:

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[2] 19 U.S.C. § 1516a (b) (1) (B) (i).
[3] NAFTA Article 1904(3).

(III) An enterprise or industry receives a *disproportionately* large amount of the subsidy." (Italics added).

Commerce has found the MTM Program to be *de facto* specific because, in Commerce's opinion, the size of the subsidy received by Magnola is a disproportionately large amount of the total subsidy. This determination was based on the fact that Magnola received a subsidy that was "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount". These facts are not in dispute by the Canadian Complainants.

This Panel is not charged with determining if Commerce has made the correct decision, but if Commerce has made a decision that is sufficiently reasonable based on the available evidence. The role of this Panel is neither to engage in a *de novo* review of the evidence nor to substitute a reasonable decision of its own for an otherwise reasonable decision of Commerce. The Panel is charged with determining whether Commerce's decision is supported by substantial evidence and in accordance with law based on the entire administrative record.

Commerce subsequently argues that its decision should be afforded deference and thus must be upheld. The concept of deference was considered by the U.S. Supreme Court in Chevron[4], where the Court noted that deference is to be given to an agency's *reasonable* construction of the statute to which it administers. Deference can only be given if the interpretation is a *reasonable* interpretation. The Court in Chevron stated that if the intent of Congress is clear, that is the end of the matter, the court and the agency must give effect to the unambiguously expressed intent of Congress. If, on the other hand, Congress has intentionally left gaps within the language of the legislation to allow the agency to fill those gaps through reasonable interpretations, it is not open to this panel to substitute its own reasonable interpretation for an otherwise reasonable interpretation made by the agency. However, as indicated in Chevron, if a court using traditional tools of statutory construction and interpretation, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect[5].

The court in Chevron stated that "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer"[6]. The court in PPG Industries[7] stated that "since Commerce administers the trade law and it's implementing regulations, it is entitled to deference in its reasonable interpretation of those laws and regulations". I agree with the

[4] Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778. ("Chevron")
[5] Chevron at 2782, note 9.
[6] Chevron at 2778.
[7] PPG Industries, Inc. v. United States, 928, F.2d 1568.

majority decision that decisions of Commerce are to be afforded deference, but deference can only be afforded to reasonable interpretations. If discretion is afforded to arbitrary decisions of Commerce, then the end result is a diminution or elimination of the role and authority of Congress and substitution of power in the hands of Commerce, or any agency charged with similar roles[8].

In my view, the majority has afforded Commerce an excessive degree of deference and I cannot agree with that decision. Deference is not an absolute concept to be used to blindly to accept an agency's determination or construction of a statute simply because Congress mandated a particular agency to administer that specific statute. If Commerce makes an interpretation that is not in accordance with law, deference cannot be used to save such an interpretation. The limiting factor of deference is that of reasonableness. The Court in Chevron was charged with reviewing the agency interpretation of a term not otherwise defined. The term at issue in Chevron did not have an ordinary meaning but was an encompassing term that was used to include various pieces of equipment if the equipment was possessed of certain characteristics. Whether or not any specific piece of equipment was to be included in what was considered to be "stationary source" was a matter for agency to determine. We are not challenged with such a situation. Instead, this Panel is faced with the situation where Commerce would have this Panel accept a meaning other than the plain and ordinary meaning of "disproportionate", without providing substantial evidence warranting this departure from the plain and ordinary meaning. As discussed below, I cannot agree with the majority that this alternative meaning is plausible nor reasonable in the circumstances of this case and it is not consistent with the underlying purpose and intent to the Statute.

The majority accepts Commerce's argument that because the term "disproportionately" is not defined in the statute, the Panel should uphold Commerce's interpretation thereof. In principle I agree with the majority, subject to the proviso that Commerce's interpretation must be a reasonable interpretation of the specific language chosen by Congress. Commerce has suggested that receipt of amounts "substantially greater than amounts received by other recipients of MTM [Program] grants"[9] is a reasonable interpretation of "disproportionate". The issue I am now faced with is whether or not this interpretation of "disproportionate", which is contrary to the ordinary and plain language meaning of "disproportionate", is a reasonable interpretation.

When a specific word or term is not defined in the text of a statute, the starting point for any reviewing agency is to give such undefined word or term its ordinary meaning. As the Court noted in AK

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[8] Sedgwick, Theodore, "A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law", at 192, "…it is not to be supposed that a subject so important as the construction and interpretation of laws is to be left to the mere arbitrary discretion of the judiciary. This would be to put in their hands power really superior to that of the Legislature itself".

[9] Response Brief of the Investigating Authority, at 20.

Steel, "a fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"[10]. A canon of statutory construction is to follow the plain meaning of statutory text, except where the text suggests an absurd result[11].

When reviewing the language of the Statute, this Panel must determine the plain and ordinary meanings of the words used and use these ordinary and plain language meanings to interpret the Statute. This Panel must interpret the Statute in accordance with the plain and ordinary meaning unless there exists a compelling reason for not following their plain and ordinary meaning. Customary statutory interpretation provides that the first assumption in reading words of any text is that the drafter is using the words in their plain and ordinary sense. If, after reading the text, there exists some evidence that the drafters are not using the words in their ordinary sense, then the readers are to re-examine the language of the text to determine if an alternative meaning was being intended[12]. With this guiding principle, we must presume that Congress has chosen the words of the Statute with much care and thought and not without reason. Absent evidence to the contrary, we, as a Panel and as individuals reading the Statute, are entitled to read and interpret the Statute while relying on the plain and ordinary meaning of the terms chosen by Congress.

This Panel is entitled to reject the plain and ordinary meaning of a word in the Statute if there exists compelling reasons not to follow it. If the ordinary meaning of the chosen words would yield a result that is contrary to the purpose of the legislation, then this Panel may interpret the word or words contrary to their plain and ordinary meaning to avoid such a result. However, this alternative meaning must be plausible and consistent with the underlying purpose and intent of the Statute and must be one that the legislation can reasonably bear. The Statement of Administrative Action ("SAA"), in dealing with specificity of domestic subsidies, states that "the Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy" and "the specificity test was intended to function as a rule of reason and to avoid the imposition of countervailing duties in situations where, because of the widespread availability and use of a subsidy, the benefit of the subsidy is spread throughout an economy. Conversely, the specificity test was not intended to function as a loophole through which narrowly focused subsidies provided to or used by discrete

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[10] AK Steel, et al. v. United States, et al., 226 F.3d 1361, Revised Opinion Issued September 12, 2005, at 1371, quoting from Perrin v. United States, 444 U.S. 37, 42, 62 L. Ed. 2d 199, 100 S. Ct. 311 (1979).
[11] Eskridge, William N., Jr., "Dynamic Statutory Interpretation" at 323 in discussing the canons of statutory construction that have been used or developed by the Rehnquist Court from the 1986 to 1991 terms.
[12] Sullivan, Ruth. "Statutory Interpretation" at 41.

segments of an economy could escape the purview of the CVD law."[13] In the current situation, Magnola was one of over 3,900 individual recipients of benefits under the MTM Program comprising over 11 different industries.

In order for this Panel to accept an interpretation that is not consistent with the plain and ordinary meaning of "disproportionate", such as the interpretation put forward by Commerce, the interpretation must be plausible from a linguistic point of view, however implausible it may be from a legislative or policy point of view[14]. Neither this Panel, nor Commerce, are permitted to add words to the text of the Statute, nor are we permitted to otherwise change the meaning of the legislation. Congress is a competent user of the English language and we must realize that Congress chose the term "disproportionate" specifically for its plain and ordinary meaning, otherwise Congress would have chosen another term with a meaning more applicable for their purpose and intent.

Commerce argues that their interpretation of "disproportionate", being "substantially greater than amounts received by other recipients of MTM [Program] grants" is a reasonable alternate interpretation of "disproportionate". To determine if this interpretation is a reasonable alternate meaning, the Panel must ask what evidence there is to support such a departure from the ordinary meaning of "disproportionate". Commerce argues that because Magnola received a subsidy that was "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount", this is substantial evidence to support such an interpretation. The fact that Magnola received a subsidy that was "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount" is neither conclusive nor supportive evidence to deviate from the plain and ordinary meaning of "disproportionate" and accept the alternative meaning proposed by Commerce. This process must be considered as a mixed question of fact and law. Commerce is solely interpreting the Statute based on the evidence presented. Such an analysis is flawed. Commerce is required to interpret the language of the Statute in accordance with its terms and then make a factual interpretation to determine if the present circumstances fall into that interpretation. This is not what Commerce has done in the instant case.

Alternate meanings can only be accepted in situations where there is confusion regarding the intent of the drafters or if the drafters purposefully left a gap open to allow an administering body to make the determination. This is not the situation we are faced with. In this situation, Commerce has ignored the plain and ordinary meaning of "disproportionate" and instead has tried to convince this Panel to

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[13] The Uruguay Round Agreements Act, Statement of Administration Action, H.R. Doc. No. 103-316, (1994) at 929-930.
[14] Sullivan, Ruth. "Statutory Interpretation", at 158.

accept their alternate meaning. The ordinary meaning of "disproportionate" is "being out of proportion", and "proportion" can be defined as a "harmonious relation of parts to each other or the whole", and similarly as a "proper share" [15]. The plain and ordinary meaning of "disproportionate" in the context of the Statute is therefore an amount that is not a proper or equal share of the subsidy. Commerce has not provided anything, by way of evidence or explanation, to show that Magnola received anything other than their "proper share". The only thing Commerce has clearly showed is that Magnola has received, in absolute terms, more of a financial benefit than "99% of the beneficiaries". Commerce has not provided any evidence that the amount received by Magnola was, in the words of Chief Justice Carman in Bethlehem Steel, "disproportionately higher than would be expected"[16].

Commerce is attempting to fit the legislation into the facts instead of interpreting the legislation and applying the facts to the interpretation. The facts, as presented, indicated that Magnola has received a subsidy that was "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount". What is being lost and not given appropriate weight by Commerce is that Magnola spent nearly three times more on training than the next recipient, spent an amount greater than the spending by 99% of all beneficiaries and spent an amount ninety times larger than the typical spending of the remaining recipients. The underlying purpose of the MTM Program is improving and developing the labour market in the province of Quebec. All enterprises in the province of Quebec are eligible to participate in the program to the extent of 50% of their training costs if the project satisfies the following policy directives; job preparation; job integration; job maintenance; job stabilization; and job creation[17]. The evidence clearly shows that Magnola received their proportionate entitlement under the MTM Program, consistent with the terms of the program and the same percentage entitlement of all other qualified recipients. These facts do not show disproportionality in any plausible interpretation of the word.

Commerce would like to persuade this Panel to adopt their alternative interpretation of "disproportionate" because of the fact that Magnola received a subsidy that was "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount". Commerce argues that these facts are sufficient evidence to allow the Panel to adopt their alternative meaning of "disproportionate" and then Commerce argues that these same statistics are further evidence that the alternative meaning has been satisfied. Commerce is arguing that these statistics are substantial evidence to (i) allow the Panel to accept their alternative

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[15] Merriam-Webster Dictionary. www.m-w.com.
[16] Bethlehem Steel Corporation, et al. v. United States, et al., 140 F. Supp. 2d 1354 ("Bethlehem Steel"), at 1369.
[17] Joint Brief of the Complainants Governement du Quebec and Magnola Metallurgy Inc., at 5.

meaning of "disproportionate", (ii) show that the alternative meaning of "disproportionate" has been met, and (iii) leads to a finding of *de facto* specificity under the Statute.

I cannot agree with the majority that this circular reasoning can be upheld. The fact Magnola received a subsidy that was "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount" is not substantial evidence nor is it a compelling reason to persuade this Panel to adopt an alternative meaning of "disproportionate". That analysis is a measurement of size not of proportion. This Panel must interpret the term "disproportionate" in accordance with its plain and ordinary language meaning and size is not in and of itself determinative of proportion. There is no evidence to support Commerce's interpretation of "disproportionate" and Commerce cannot be allowed to interpret the Statute contrary to the underlying and fundamental purpose Congress enacted. If Congress wanted *de facto* specificity to be found in cases where one recipient received a benefit that was "substantially greater than amounts received by other recipients", then Congress would have legislated it. Commerce's role is to uphold and enforce the Statute, not to re-draft or interpret it in such a manner as to create a result that is clearly contrary to the language and purpose of the Statute.

Even if I assume that Commerce has in fact correctly interpreted the Statute, I still cannot uphold the decision. Commerce contends that the MTM Program is *de facto* specific because Magnola received a disproportionately large amount of the total subsidy granted to all recipients based on Magnola's benefits were "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount". Commerce contends that because of the size of the subsidy received by Magnola, this results in a disproportionately large amount of the subsidy. The determination is based on Commerce's analysis of the subsidy received by Magnola compared to the absolute real dollar values of the subsidy provided to all recipients. An analysis based solely on a comparison between recipients and not incorporating an analysis of the individual recipients to the subsidy as a whole does not provide conclusive evidence of disproportionality.

Magnola did in fact receive a benefit that was, in absolute terms, larger than the other recipients. Inequality does not mean disproportionality. If the comparison is made based on the real dollar-for-dollar amount received by each recipient, then the only comparison being made is how much each company spends on training. Any company with a large training need will have a much higher real dollar-for-dollar benefit simply because they have incurred a larger training cost. The court noted in Bethlehem Steel that "to impose countervailing duties on an industry where disparity alone is demonstrated, but evidence is produced indicating that the benefit was industry specific, is anathema to the purpose of the

countervailing duty law."[18] All participants were treated equally under the MTM Program and the amount received by Magnola cannot be disproportionate because all recipients, including Magnola, received the same proportion. There is nothing, as in Bethlehem Steel, to indicate that the subsidy received by Magnola, is any more than what would be expected.

The court in Bethlehem Steel, noted that "the mere fact that the steel industry received a greater monetary benefit from the program than did other participants is not determinative of whether that industry was "dominant" or receiving "disproportionate" benefit. In virtually every program that confers benefits based on usage levels one or more groups will receive a greater share of the benefits than another group."[19] In Bethlehem Steel, the larger recipients also received a greater amount of the benefits in absolute terms, but the benefits were comparable to smaller recipients if the relative sizes of the industries were taken into consideration. Therefore, there was no finding of *disproportionality*. The Court held the size of the recipient constant when making the comparison. The percentage comparison that was used removed the effects caused by the relative sizes of the individual recipients and such a comparison was not performed in the instant case as Commerce only compared the real dollar amounts received by each recipient. The program in question in Bethlehem Steel (VCA) is akin to the MTM Program in that all eligible participants received the same discount regardless of industry. The court noted that this "clearly indicates uniformity of treatment among all parties and provides substantial record support for Commerce's conclusion that the VCA program was non-specific"[20]. The court went on to say that "where, as with the VCA program, the eligibility requirements are explicitly stated and all parties receive the same discount, there can be no exercise of discretion and no favourable treatment afforded to any one industry"[21]. This case, and the statements therein, are directly on point with our current situation.

Commerce has indicated that when it is faced with the question of disproportionality on an enterprise-specific basis, Commerce will typically compare the amount of subsidy received by an individual enterprise to the total amount disbursed by the authority, and to the amount received by other companies[22]. Commerce has only compared the amount received by Magnola to the relative amounts received by other recipients of MTM Program benefits. A comparison of the subsidy received by one recipient to the amount received by another recipient does not provide any evidence as to whether or not the amount is "large" or "disproportionately large" without an accompanying analysis of the amount of the subsidy received compared to the total subsidy disbursed to all recipients. Pursuant to the MTM Program, all recipients of the MTM Program received the same proportion of the subsidy. All recipients

[18] Bethlehem Steel, at 1369.
[19] Bethlehem Steel, at 1369.
[20] Bethlehem Steel, at 1369.
[21] Bethlehem Steel, at 1369-1370.
[22] Response Brief of the Investigating Authority at page 24.

received 50% of their training costs. This was not a program based on discretion but was based on the actual and provable incurred training costs of each recipient. The fact that Magnola received an amount that was the second largest dollar amount does not mean it was disproportionate. The problem with this reasoning is that the comparison being made by Commerce is in real dollar value, not each recipient's proportional entitlement. The only argument Commerce is making is that Magnola's absolute real dollar-for-dollar amount is larger than other recipients, but they cannot make the argument that Magnola received more than their "proportionate" entitlement. "Disproportionately" does not occur because one company takes advantage of its benefits for a larger real dollar amount than another company. Commerce is arguing that Magnola's proportionate result is so much larger than those of other recipients that it must be considered as disproportionate.

The Court in AK Steel stated that decisions involving the issue of disproportional benefits are to be determined on a case-by-case basis taking into account all the facts and circumstances of a particular case. I accept this position, however what has failed to come to the forefront of this analysis is the fact that the MTM Program is a two-tiered program. The first tier included companies that are subject to a benefits ceiling of $100,000. Of the over 3,900 companies receiving benefits, over 98% are subject to this ceiling. Clearly the statistics, although technically accurate, do not clearly represent the present circumstances. Magnola did receive a benefit greater than 99% of the recipients, but over 98% of the recipients were subject to a benefits ceiling. The second tier companies, which include Magnola, the second largest benefits recipient, are not subject to any ceiling and their benefits are only limited by their training costs and job creation. Commerce has argued that Magnola's benefits received under the MTM Program are disproportionate compared, on a percentage basis[23], to the benefits received by other recipients under the MTM Program. Magnola did receive a benefit that that was "nearly three times higher than the next recipient, greater than the grants received by 99% of all beneficiaries and ninety times larger than the typical grant amount", however this amount is only slightly greater than 2% of the total subsidy granted under the MTM Program.

Continuing with a case-by-case analysis, Commerce has not given appropriate weight to specific factors of this case. The Canadian Complainants argue that Commerce failed to consider the diversity of Quebec in coming to their *de facto* specificity determination. Unfortunately, the Canadian Complainants have not presented any evidence to suggest this is the case and I will not make such a determination without specific evidence. The primary reason for the large subsidy granted to Magnola was their large cost of training. This was due to the recent construction, development and implementation of a new Greenfield project. This is an important and relevant fact that was due much consideration and analysis

[23] Issues and Decision Memorandum for the Final Results of the Countervailing Duty New Shipper Review of Alloy Magnesium from Canada, at 15.

by Commerce. The primary reason for the large outlay of training expenses was this newly developed and implemented Greenfield project, together with its benefits to the Quebec labour force, something that should have received considerable weight in a this particular case-by-case analysis.

Guidance can be taken by what Commerce has done is similar previously determined disproportionality analysis. The parties to this review have presented the Panel with 35 previous determinations, 23 of which involved a disproportionality determination. Of these 23 previous determinations, 3 used comparisons to GDP or GNP; 8 involve a comparison of the industry or enterprise share of the subsidy to the total benefits provided by the program in questions; and 11 used both a comparison of the individual industry or enterprise to the total benefits disbursed by the program and a comparison of the industry or enterprise share with the share received by the other industries and enterprise. In none of the cases has Commerce solely made a comparison between the benefits received by an individual industry or enterprise to the other individual industries or enterprises. The reason that Commerce has not performed such an analysis is that the percentage of the total benefits disbursed by the MTM Program to Magnola, is considerably less than the percentage that was received by other companies in past cases where disproportionality was also not found.

In Antifriction Bearings from Singapore[24], Commerce concluded that 6.3% of the total value of the allowances granted was not evidence of disproportionality. In Certain Steel Products from Belgium[25], Commerce did not find disproportionality based on 15.6% and 13.5% of the total benefits granted. In Fresh Atlantic Salmon from Chile[26], Commerce did not find disproportionality based on 4.4% of the total benefits received. Commerce found disproportionality in Live Cattle from Canada[27] based on a finding that industries in question received 25-30% of the total benefits received. In Stainless Steel Plate in Coils from Italy[28], Commerce found disproportionality based on an enterprise's receipt of 50.52% of the total benefits disbursed. While Magnola's received benefits were only slightly greater than 2% of the total subsidies granted pursuant to the MTM Program, several of the other companies received benefits in the range of 0.5% and less than 4% of the total subsidies granted. Based on this comparison of the individual

[24] Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof (AFBs) From Singapore; Final Results of Countervailing Duty Administrative Reviews, 60 FR 52377 ("Antifriction Bearing").
[25] Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Belgium, Part IV, 58 FR 37273
[26] Preliminary Negative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination With Final Antidumping Duty Determination: Fresh Atlantic Salmon From Chile
62 FR 61803
[27] Final Negative Countervailing Duty Determination; Live Cattle From Canada
64 FR 57040
[28] Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils From Italy
Part III, 64 FR 15508

enterprises receiving benefits under the MTM Program, it is difficult to understand how Commerce found disproportionality based on the similarities of the subsidies received by the these enterprises.

Commerce has stated that when they consider the issue of disproportionality on an enterprise-specific basis, they typically compare the amount of the subsidy received by an individual enterprise to the total amount disbursed by the program in question[29]. Commerce has also stated that the proper question to ask is what portion of the particular program's total funding was provided to a specific enterprise[30]. This type of analysis was described by Commerce in Antifriction Bearings, as "in prior cases where the Department has found disproportionality…we analyzed whether respondents received a disproportionate share of the benefits by comparing their share of benefits to the collective or individual share of benefits provided to all other users of the program in questions."[31] It would appear from the language and from the empirical evidence presented that Commerce follows a practice of comparing the amount of the benefit received by one enterprise to that total amount of the benefits disbursed by the program. It is my view that Commerce has developed a practice of comparing the amount received by an individual industry or enterprise to the total amount disbursed by the program. Commerce has neither performed such an analysis nor have they provided a reasonable explanation as to why it departed therefrom[32].

For the reasons outlined above, I am of the opinion that, contrary to the majority decision, Commerce's finding of *de facto* specificity is not supported by substantial evidence and is otherwise not in accordance with law.

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[29] Response Brief of the Investigating Authority at 24.
[30] Response Brief of the Investigating Authority at 21 citing Carbon Steel Flat Products from South Africa.
[31] Antifriction Bearings, at 52379.
[32] Save Domestic Oil, Inc. v. United States et al., 357 F.3d 1278, at 1283-1284.