

**UNITED STATES – CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL**

IN THE MATTER OF:)
)
CERTAIN CUT-TO-LENGTH) **USA-93-1904-04**
CARBON STEEL PLATE)
FROM CANADA)

OPINION AND ORDER OF THE PANEL

May 1, 1995

**STELCO, INC., IPSCO, INC.,
AND CERTAIN UNITED STATES STEEL PRODUCERS**

Complainants

v.

**INTERNATIONAL TRADE ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

Respondent

Before:

**Brian E. McGill, Chairman
Harry B. Endsley
Maureen Irish
Ross Stinson
Steven S. Weiser**

Appearances:

For Stelco, Inc.: Willkie, Farr, & Gallagher (Christopher Dunn and Edmund Sim).

For IPSCO, Inc.: Paul, Weiss, Rifkin, Wharton & Garrison (George Kleinfeld and Michael Velthoen); Brian Kelly, Inc. (Brian Kelly).

For Bethlehem Steel Corporation, Inland Steel Industries, Inc., and U.S. Steel Group (a unit of USX Corporation): Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan, Ellen J. Schneider, and James C. Hecht); Dewey Ballantine (Alan Wm. Wolff and Michael H. Stein).

For the U.S. Department of Commerce: Office of Chief Counsel for Import Administration (Stephen J. Powell, Elizabeth C. Seastrum, and Thomas H. Fine).

OPINION AND ORDER OF THE PANEL

I. BACKGROUND

The statute directs Commerce to compare sales of U.S. merchandise with sales of home market merchandise which is "such" or, if such merchandise is not available, "similar to," the U.S. merchandise.¹ "Such merchandise" is defined as "merchandise which is identical in physical characteristics" with subject merchandise.²

Where merchandise is not identical, the statute directs Commerce to adjust for cost differences between the two products compared, and in this way to compensate for any differences in the price derived solely from the physical difference between the two products compared.³ This is referred to as the difference in merchandise (or "difmer") adjustment, and is required by 19 U.S.C. §1677b(a)(4)(C). The statute states in relevant part:

(4) Other adjustments.--In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between United States price and the foreign market value... is wholly or partly due to

* * *

¹ 19 U.S.C. §1677(16).

² 19 U.S.C. §1677(16)(A).

³ Response of the Investigating Authority to Comments of IPSCO, Inc. in Opposition to the Determination on Remand. March 20, 1995 (hereinafter "Commerce Remand Response") at 8. Commerce recognized that, when it switched IPSCO's matches from the hierarchy IPSCO had used to the hierarchy Commerce used, it had affected two products which were considered "identical" and one which was considered "similar" under the hierarchy Commerce used. In the latter case, Commerce realized that it had failed to reflect the necessary changes to the difference in merchandise. Commerce corrected this error in the redetermination. Results of Redetermination Pursuant to Panel Remand (hereinafter "Remand Determination"), January 30, 1995, at 14. See also Clerical Error Memorandum on IPSCO. Remand Pub. Doc. 13.

(C) the fact that merchandise described in paragraph (B) or (C) of section 1677(16) of this title is used in determining foreign market value, then due allowance shall be made therefor.⁴

The Department observes that the statute is explicit. Commerce may only make an adjustment for differences between two products where it has identified such products as "similar" under section 1677(16) (B) or (C), and not where it has identified the merchandise compared as identical under section 1677(16)(A).⁵

IPSCO seeks a difmer adjustment arguing that for two product matches the match is not identical, even though the two products match all the hierarchy characteristics.⁶ Commerce responds that to identify merchandise which is "such or similar" Commerce uses a hierarchy of relevant characteristics of the merchandise in question. Where all characteristics match, Commerce considers the merchandise to be identical within the meaning of 19 U.S.C. § 1677(16)(A).⁷ Thus, because the two comparisons involved products which match all the hierarchy characteristics, Commerce believes no difmer is authorized.⁸ As its sole authority for this position, Commerce states that "[t]he Panel itself held that a determination that products are identical is based on the hierarchy."⁹

⁴ 19 U.S.C. §1677b(a) (4) (C).

⁵ Commerce Remand Response at 9.

⁶ See note 3, supra.

⁷ Remand Determination at 15 quoted in Commerce Remand Response at 7-8.

⁸ Remand Determination at 15.

⁹ Remand Determination at 15; see also Commerce Remand Response at 7, 10, and 12.

The Department also complains that the IPSCO challenge is merely reargument of the matching issue. In addition, the Department belatedly joins the domestic producers in objecting to IPSCO's presentation of argument to the panel based on IPSCO's alleged failure to address this issue previously.

II. DECISION AND ANALYSIS

We address the IPSCO challenge for two reasons. First, difmer adjustments were on the minds and in the papers of the parties. Indeed, IPSCO used the difmer framework to support its original argument. In its reply brief in the original panel proceedings, IPSCO complained that:

After merging home market sales of these products into one category for comparison to U.S. price, the Department actually had to make a "difference in merchandise" adjustment to compensate for the use of products that were no longer physically identical in its dumping analysis. [Citations]. If the Department had utilized the identical product comparisons reported by IPSCO, it would not have needed to make any "difmer" adjustment.¹⁰

In its brief to the panel in the original proceedings, Commerce summarized the model matching process in this way:

In order to ensure accurate calculations of dumping margins, Commerce is required by the statute to ensure that the products compared in the U.S. and home markets are identical or as similar as possible. In carrying out this requirement, Commerce identifies a hierarchy of significant characteristics which it uses to match products. Commerce then makes an adjustment to the

¹⁰ IPSCO Reply Brief, June 7, 1994, at 31-32.

home market price to account for any physical difference between the home market product and the U.S. product.¹¹

Commerce went on to describe the difmer adjustment process in some detail.¹² With respect to difmers, Commerce concluded "the statute ensures that dumping margins are not "created" merely due to the fact that the merchandise sold at home was "worth" more due solely to physical differences."¹³ Most important, the Department directed specific attention to its final determination in the underlying investigation, where it noted "that the matches resulting from the hierarchy to which IPSCO objects fall within the Department's 20% difmer safety net, ensuring that we compare merchandise of 'approximately equal commercial value.'"¹⁴

The panel must also address the issue raised by the IPSCO challenge because Commerce's remand determination proceeds in part from apprehending unintended meaning from the language of the panel finding. In its opinion, the panel acknowledged Commerce's discretion in the establishment of a product characteristic hierarchy as an aid in its selection of product matches.¹⁵ The panel noted that IPSCO's argument rested on the contention that "its internal product classification system identifies identical goods, and by law must be elevated over the Department

¹¹ Response Brief of the Investigating Authority to the Brief of IPSCO, Inc. (hereinafter "Commerce Response to IPSCO"), May 23, 1994, at 41.

¹² Commerce Response to IPSCO at 46, n.38.

¹³ *Id.* at 42.

¹⁴ 58 Fed. Reg. at 37109 quoted in Commerce Response to IPSCO at 46.

¹⁵ Certain Cut-to-Length Carbon Steel Plate from Canada, USA-93-1904-04 (October 31, 1994), at 15 citing United Engineering & Forging v. United States, 779 F. Supp. 1375, 1380-82 (Ct. Int'l Trade 1991), aff'd without op., 996 F.2d 1236 (Fed. Cir. 1993).

matches of non-identical goods resulting from the use of the product characteristic hierarchy." The panel noted that "rarely are objects exactly the same in all physical respects." The panel could not say that IPSCO's proposed matches identified identical goods any better than did the Department's matches. The panel found that Commerce "does not abuse its discretion by adhering to a hierarchy established in the course of an investigation."¹⁶

Nevertheless, the hierarchy is only an administrative tool. As the Department has stated: "the hierarchy represents one of the streamlining steps which the Department has adopted in order to make the task of completing nineteen simultaneous flat-rolled steel investigations possible within the statutory time frames."¹⁷ Accordingly, this panel, in another proceeding, found that the Department possesses discretion to depart from strict application of an established hierarchy to achieve more accurate product matches.¹⁸ As discussed below, the panel finds here that Commerce has the discretion to find that matched products are not identical even though they may meet all the product characteristics contained in the matching hierarchy.

¹⁶ Id. at 16.

¹⁷ 58 Fed. Reg. at 37109 quoted in Commerce Response to IPSCO at 46.

¹⁸ See, Certain Corrosion-Resistant Carbon Steel Products From Canada, USA-93-1904-03 (October 31, 1994), Section VII. C.

Difmers are important adjustments which are required by statute and which may work to the advantage or disadvantage of a respondent based on the particular facts of a case.

Commerce's difmer regulations provide that it "will make a reasonable allowance for differences in the physical characteristics of merchandise compared to the extent that the Secretary is satisfied that the amount of any price differential is due to such difference."¹⁹ In determining the difmer, the Department "normally will consider differences in the cost of production, but, where appropriate, may also consider differences in the market value."²⁰ The regulation also provides that no difmer adjustment will be made for identical merchandise, but does not define identical.²¹

Difmers are also used to cast a "safety net." Under Commerce's "20% difmer test," home market models are rejected for comparison where the resulting difmer adjustment would exceed 20 percent of the cost of manufacture of the product sold in the United States. The test prevents Commerce from selecting comparison models when a difference in merchandise adjustment would be so large as to cause significant distortions in the calculation of home market price.²²

As noted earlier, Commerce found here that "the matches resulting from the hierarchy to which IPSCO objects fall within the Department's 20% difmer safety net."²³ Thus, this case

¹⁹ 19 C.F.R. §353.57(a).

²⁰ 19 C.F.R. §353.57(b).

²¹ *Id.*

²² Commerce Response to IPSCO, at 46, n.38 citing Small Business Telephone Systems from Korea, 54 Fed. Reg. at 53145; Final Determination of Sales at Less than Fair Value: Certain Internal Combustion Industrial Forklift Trucks from Japan, 53 Fed. Reg. 12552, 12567 (1988).

²³ Final Determination, 58 Fed. Reg. at 37109; see Commerce Response to IPSCO at 45-46.

illustrates that it is possible that two products might match all the hierarchy characteristics, but still possess a physical distinction resulting from a production process which is responsible for a difmer adjustment amounting to more than 20 percent of U.S. cost of manufacture. Under Commerce's argument, it could not examine whether such a match should be disqualified, which would create a large hole in the difmer safety net.

The panel finds that neither the statute, nor Commerce regulations, provide that the product characteristic hierarchy conclusively controls whether products are identical for purposes of a difmer adjustment.²⁴ The panel declines Commerce's invitation to adopt such an inflexible rule here. An interpretation which would deny Commerce the discretion to make a difmer adjustment unnecessarily restricts Commerce's ability to make fair and accurate determinations.

²⁴ Although not directly before us, we believe the same reasoning applies to the adjustment authorized by 19 U.S.C. §1677(4)(A) and (B).

The panel also finds that the Department has admitted that the two products at issue here are not identical. In its brief to this panel in the original proceedings, the Department stated:

The distinction which IPSCO discusses between cut-to-length and heavy plate is subsumed within Commerce's "edge" criterion, as cut-to-length and heavy plate invariably have different edges.²⁵ Commerce determined that, while that criterion was one to be considered, it is less significant than several of the other criteria. Thus, when selecting similar merchandise, where other criteria were satisfied, Commerce matched the products, despite the fact that the edge criterion differed between the two products.²⁶

The panel's review of the Department questionnaires disclosed that while an edge criterion was part of the hierarchy for hot-rolled sheet, no edge criterion appeared in the cut-to-length plate matching hierarchy.²⁷ Regardless of the confusion respecting the hierarchy, the panel is of the view the Department's statements are an acknowledgement that the products at issue here have different physical characteristics and the panel so finds.²⁸ The Department's regulations clearly provide that where matched products differ in a physical characteristic and that this results in a price differential, an adjustment should be made, particularly if the adjustment claim can be

²⁵ The Commerce footnote here added that: "As IPSCO explains in its brief, pl. br. at 26, cut-to-length plate can be made either in individual sections, or unwound and sheared from a coil. Because of the 'shearing,' the two forms of cut-to-length plate have different edges." Commerce Response to IPSCO at 43, n.34.

²⁶ Commerce Response to IPSCO at 44.

²⁷ Certain Cut-to-Length Carbon Steel Plate from Canada, USA-93-1904-04 (October 31, 1994), at 15 citing General Issues Doc. 40, Fiche 11, Frame 44.

²⁸ Moreover, the physical distinction is clearly of record as Commerce stated in its Response Brief that: "in the second position on the hierarchy, where Commerce had requested the criterion of 'specification/grade,' IPSCO instead reported whether the product was coiled or discrete plate." Commerce Response to IPSCO at 44.

supported with cost of production data.

Accordingly, the panel remands this issue to the Department to make difmer adjustments for the matches at issue in a manner consistent with its policy of making difmer adjustments for non-identical merchandise or to exclude the matched product if it falls into the difmer safety net. In all other respects, the Department's remand determination is affirmed.

The Department is directed to file its second remand determination within 30 calendar days of this decision. Chapter 19 Dispute Resolution Panels were created to ensure just and speedy resolution of disputes involving agency final determinations. Because of the limited nature of this remand, the panel believes the Department will be able to accept and consider the comments of parties and complete the remand results within the time frame specified here.

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CERTAIN CUT-TO-LENGTH)	SECRETARIAT FILE NO.
CARBON STEEL PLATE)	USA-93-1904-04
FROM CANADA)	

REMAND ORDER

The Panel orders the Department of Commerce to make a determination on remand consistent with the instructions and findings of this opinion. The remand determination shall be made within 30 days.

ISSUED ON MAY 1, 1995

SIGNED IN THE ORIGINAL BY:

Brian E. McGill, Chairman
Brian E. McGill, Chairman

Harry B. Endsley
Harry B. Endsley

Maureen Irish
Maureen Irish

Ross Stinson
Ross Stinson

Steven S. Weiser
Steven S. Weiser