

ARTICLE 1904 BINATIONAL PANEL

CASE NO. USA-89-1904-07

**IN THE MATTER OF NEW STEEL RAIL,
EXCEPT LIGHT RAIL, FROM CANADA
(Countervailing Duty Determination)**

SYDNEY STEEL CORPORATION,

Complainant,

v.

UNITED STATES DEPARTMENT OF COMMERCE,
INTERNATIONAL TRADE ADMINISTRATION,

Respondent,

BETHLEHEM STEEL CORPORATION,

Respondent-Intervenor.

GARY A. HORLICK of O'Melveny & Myers and THERESA A. LINK, Trade Consultant, both of Washington, D.C., argued for Complainant and were on the briefs.

THOMAS G. EHR, of the Office of Chief Counsel, Import Administration, International Trade Administration, U.S. Department of Commerce, Washington, D.C. argued for Respondent. With him on the brief was STEPHEN J. POWELL, Chief Counsel for Import Administration.

JAMES R. CANNON, JR. of Stewart and Stewart argued for Respondent-Intervenor Bethlehem Steel Corp. With him on the brief were EUGENE L. STEWART, TERRENCE P. STEWART and JESSICA WASSERMAN.

OPINION OF THE Panel

AND REMAND ORDER

DECIDED: June 8, 1990

Before David A. Gantz, Chairman,
Robert Pitt, John D. Richard, Michael D. Sandler
and Gilbert Winham, Panelists.

MEMORANDUM OPINION AND ORDER

I. Jurisdiction of the Panel

This is a review conducted pursuant to Article 1904 of the United States-Canada Free Trade Agreement ("FTA") and Title IV of the United States-Canada Free Trade Agreement Implementation Act of 1988, 19 U.S.C.A. § 1516a(g)(2) (West 1989), responding to a Request for Panel Review and complaint filed by Sydney Steel Corporation ("Sysco"), contesting the final affirmative countervailing duty determination by the U.S. Department of Commerce ("Commerce"), in New Steel Rail, Except Light Rail, from Canada, 54 Fed. Reg. 31,991 (1989), amended by, 54 Fed. Reg. 39,032 (1989). Thus, jurisdiction is founded on Article 1904.2 of the FTA and Section 516A(g)(2) of the Tariff Act of 1930, as amended ("the Act"), 19 U.S.C.A. § 1516a(g)(2) (West 1988).

Under Article 1904.3 of the FTA, this Panel is directed to apply the standard of review specified in Section 516A(b)(1)(B) of the Act, 19 U.S.C.A. § 1516a(b)(1)(B):

The Court shall hold unlawful any determination, finding, or conclusion, found... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

The standard of review is discussed at length in Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, Case No. USA-89-1904-02 (1990), at 3-5; we hereby adopt and incorporate that analysis and conclusions by reference.

II. Background

Commerce's Final Affirmative Countervailing Duty determination discussed numerous federal and provincial programs which were allegedly used to subsidize the Canadian steel rail industry, and ultimately determined the estimated net subsidy for all manufacturers or producers, except Algoma Steel Corporation Ltd. ("Algoma") to be 113.58% ad valorem, later reduced by amendment to 112.34% ad valorem. Sysco and Algoma initiated actions before the Panel, but of the Canadian producers only Sysco has appeared in this proceeding.

III. Summary of The Issues and the Panel's Decision

Sysco challenges three aspects of Commerce's final determination and amended order:

a) Commerce's treatment of grants for the payment of principal and interest on debentures as nonrecurring grants to be allocated over the life of the equipment (15 years in this instance) rather than expensed in the year received;

b) Commerce's conclusion that the explicit guarantee by a government of a loan to a firm owned by that government is a countervailable benefit is challenged by Sysco on the grounds that the normal commercial practice in the Canada countenances loan guarantees by parents to subsidiaries, regardless of whether the subsidiary is equityworthy or creditworthy; and

c) The Panel has also received a total of six communications relating directly or indirectly and the possible relevance of that case to the issues before this Panel.¹

Upon examination of the record and after full consideration of the arguments presented by the parties in their briefs and at a hearing held in Washington, D.C. on April 18, 1990, this Panel:

1. Letter from Bethlehem dated April 24, 1990 (Pub. Doc. No. 61); Letter from Sysco under Rule 70(1) dated April 29, 1990 (Pub. Doc. No. 63); Letter from Commerce dated May 4, 1990, commenting on Sysco's letter of April 29 (Pub. Doc. No. 68); Motion to strike from Commerce dated May 4, 1990, to strike Sysco's letter of April 29, (Pub. Doc. No. 69); Letter from Bethlehem dated May 7, 1990, opposing the "motion" of Sysco of April 29 (Pub. Doc. No. 70); and letter from Sysco in opposition to Commerce's motion to strike, dated May 14, 1990 (Doc. No. 72).

IV. Treatment of Grants for the Payment of Principal and Interest on Debentures

From 1982 through 1988, the Province of Nova Scotia ("PONS") provided Sysco with funds that were expressly to be used to repay interest and principal on outstanding Sysco debentures. Commerce concluded that these payments were countervailable grants, a conclusion that Sysco did not challenge. Commerce also concluded that the payments were not "recurring" and that, under existing practice, the benefits of each payment should be allocated over 15 years, beginning with the year of receipt. This means that each payment will be deemed to have generated 15 years of subsidy benefits, for which Sysco's products will be assessed countervailing duties over the same 15 year span -- if they are imported into the U.S.A.

Sysco has appealed the conclusion that the benefits are non-recurring. It has noted that Commerce's administrative practice is to expense "recurring" subsidies in the same year they are received and to allocate "non-recurring" subsidies over several years. Sysco claims that treating the debt service payments for the Sysco debentures as "non-recurring" subsidies is unsupported by substantial evidence on the record. For the reasons set out below, the Panel agrees with Sysco.

A. History of the Debentures

In 1967, Sysco became a crown corporation owned by PONS. In 1973, Sysco embarked on a program of capital investment. To finance the capital investment, it issued three series of debentures, Series A, B and C, with maturity dates in 1981, 1983 and 1993, respectively. The debentures were denominated in U.S. funds and in an aggregate amount of U.S. \$50 million. The only security behind each debenture was PONS's unconditional guarantee of the repayment of all principal and interest. This unconditional guarantee appeared on the face of the prospectus and on the face of each debenture. (Verification Report for Sydney Steel Corporation, Pub. Doc. No. 143, Ex. DEB-4.)

As part of Sysco's capital investment program in the 1970's, Sysco issued a fourth series of debentures in 1975. These Series D debentures were in Canadian funds and totalled approximately CAN \$66 million. They mature in 1996. The Series D debentures were secured by an unconditional guarantee of all principal and interest payments by Cape Breton Development Corporation, a Canadian federal crown corporation. (Verification Report for Sydney Steel Corporation, Pub. Doc. No. 143, Ex. DEB-5.)

Until 1981, Sysco made all payments under the debentures. These included sinking fund payments for the Series A and B debentures, as well as direct payments of principal and interest on the Series C debentures (beginning in 1979) and on the Series D debentures (beginning in 1976). (Pub. Doc. No. 83, passim.)

In 1981, Sysco adopted a business plan to modernize its plant. The plan relied largely on government grants under a General Development Agreement ("GDA") and a Canada--Nova Scotia Subsidiary Agreement for Modernization of Facilities at the Sydney Steel Corporation (the "Sysco Modernization Subsidiary Agreement"). Under the Modernization Agreement, PONS agreed to continue to service Sydney Steel Corporation's long-term debt during the term of this Agreement." (Pub. Doc. No. 45, Exhibit E (Attachment), p. 16.) Beginning in 1982 and continuing through 1988, PONS regularly budgeted, appropriated and paid to Sysco funds that were to be specifically used to pay the interest and principal due on the debentures. This continued even though the Modernization Agreement expired in 1984.

Under a 1984 Economic and Regional Development Agreement ("ERDA"), additional modernization grants were made to Sysco separate from the grants to service the debentures. However, under a subsidiary agreement in 1986, PONS agreed "to continue to provide sufficient working capital to enable Sydney Steel Corporation to continue its operations" -- including, presumably, provision of capital with which to continue to pay debt service on the debentures.

Thus, it appears PONS (1) formally agreed to cover debt service on the debentures during 1981-84 and 1986-88, but not 1984-86; (2) regularly acted to fund the annual debt service on the debentures during 1982-88; and (3) remained

the unconditional guarantor of all repayments under the Series C debentures, but not the Series D debentures (Series A and B were apparently retired in 1981 and 1983, respectively).

B. Applicable Law and Regulations

The countervailing duty provisions of the applicable U.S. statute, the Tariff Act of 1930, as amended, 19 U.S.C. 1671 et seq., are silent as to whether a subsidy should be expensed in a single year or treated as an ongoing benefit to the recipient spread over several years. A judicial and administrative practice has developed, however, for subsidies related to the funding of capital improvements and for "non-recurring" subsidies. Such subsidies are said to benefit the recipient over the life of its capital assets. The recipient will be deemed to have benefited from a subsidy (and be subjected to U.S. countervailing duties) over a standard useful life of the recipient's physical assets. E.g. Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina, 49 Fed. Reg. 18,006 (1984); Certain Steel Products from Italy, 47 Fed. Reg. 39,356 (1982). In the steel industry, that standard useful life is typically considered by Commerce to be 15 years, based on the 1977 Class Life Asset Depreciation Range System of the U.S. Internal Revenue Service, Rev. Proc. 77-10, 1977-1 C.B. 548 (RR-38). Cf. Ipsco, Inc. v. United States, Slip Opinion No. 89-1486 (Fed. Cir. April 3, 1990).

At oral argument, Bethlehem suggested that all money is fungible. Money used to pay interest on an old obligation arguably frees up other money to fund new capital improvements -- and thus all subsidies should be treated as related to Capital assets and should give rise to protracted countervailing duties over several years. But that is not the position expressed in the statute's legislative history:

Definition of "Net Subsidy". With respect to a "net subsidy" under subsection (b), the Committee intends that the Authority will determine the amount of a gross subsidy by determining the value of the subsidy bestowed or otherwise made available, to the extent such a subsidy is actually used....

There is, however, a special problem with regard to subsidies which provide an enterprise with capital equipment or a plant. In such cases, the net amount of the subsidy should be amortized over a

reasonable period, following the beginning of full scale commercial operation of the equipment or plant, and assessed in relation to the products produced with such equipment or plant during such a period. Furthermore, in calculating the ad valorem effect of non-recurring subsidy grants or loans, reasonable methods of allocating the value of such subsidies over the production or exportation of products benefitting from them will be used. Such methods should include relating the benefit of the commercial advantage to the recipient, or relating the value of a subsidy for acquiring assets to their anticipated useful life, based on generally accepted accounting principles.

H.R. Rep. No. 317, 96th Cong., 1st Sess. 74-75 (1979) (emphasis supplied).

Apparently based on this legislative history, Commerce has developed a practice, which is reflected in the "Supplementary Information" provided as an explanation to its proposed (but as yet unpromulgated) regulations:

Section 355.49(a) codifies existing practice by establishing a general rule concerning the allocation of countervailable benefits. Paragraph (a)(1) states the basic principle that the Secretary either must (1) expense the entire amount of a benefit to a single year, (2) allocate the benefit over two or more years,...

...Generally, the choice between expensing and allocation depends upon whether (1) the benefit in question is a recurring benefit, and (2) the Secretary can calculate a "grant equivalent" for the benefit at the time of its receipt....

54 Fed. Reg. 23,366, 23,375 (1989) (emphasis supplied).

Commerce has provided further guidance, in the form of a "three factor" analysis, to determine if a benefit is "recurring":

Factors the Department considers in determining whether a benefit is recurring are: (1) whether the program providing the benefit is exceptional; (2) whether the program is of longstanding; and (3) whether there is any reason to believe that the program will not continue into the future. See, e.g., Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 FR 25097 (1985); and Fresh Atlantic Groundfish from Canada, 57 FR 10041 (1986).

54 Fed. Reg. at 23,376. At oral argument, counsel for Sysco argued that the debenture grants were "recurring" both under these three factors and also under the general meaning of the term "recurring" as used in the statute's legislative history (quoted earlier above).

In its Final Affirmative Countervailing Duty Determination, Commerce applied its three factor analysis to find the grants for servicing the debentures to be "non-recurring" (and thus allocable over 15 years):

First, the government action of providing these grants is exceptional because it is not under any particular established

provincial program and because the provincial legislature must approve the funds each year. Moreover, if Sysco had turned a profit, it is unlikely the Province would have continued to provide the grants. Second, although these grants have been provided for several years, presumably they will terminate when the debentures are paid off in the near future. Third, if Sysco does become profitable in the future, the grants will probably stop. Therefore, we determine that these grants are non-recurring grants.

New Steel Rail, 54 Fed. Reg. at 31,996.

C. Analysis of Commerce's Conclusions

We next consider whether there is "substantial evidence" to support Commerce's conclusion that the payments to cover the debt service grants for Sysco's Series C and D debentures were subsidies whose benefit should be allocated over 15 years because they were "non-recurring."

1. We first address whether "substantial evidence" exists to find these payments to be "non-recurring" under the general meaning of that term as it is apparently used in the statute's legislative history. Sysco raised this point at oral argument, and it is potentially an alternative ground for upholding Commerce's conclusion.

The debt service subsidies do not, on their face, resemble one-time subsidies such as grants for new capital investment. The subsidies were earmarked not for any new investment, but, rather to service old debentures that had themselves been previously issued to fund an old investment.

Under generally accepted accounting principles, yearly interest charges are recorded as an expense in the annual income statement and the portion of long term debt due within one year is recorded as a current liability on the balance sheet. When the current principal portion of long term debt is paid, the payment is reflected as a current application of funds in the annual source and application of funds statement. In this case, each debt service subsidy was directed to be applied to the interest and principal due in a particular year. The benefit to Sysco was experienced in the individual year that each interest and principal payment was due and paid.

In a non-technical sense, the annual debt service of the debentures was a recurring event. The record shows that in each year beginning with 1982,

continuing through 1988, PONS planned to cover Sysco's debt service, PONS budgeted for these payments, it regularly sought and obtained appropriations to make the payments, and the appropriations were considered a "formality." (Pub. Doc. No. 136, p. 5.) The dates of receipt of each subsidy were tied, at verification, to dates the individual debt service payments were due on the debentures. (Pub. Doc. No. 143, pp. 4-5.) Under this general meaning of the word "recurring," the record does not contain "substantial evidence" to support Commerce's conclusion that these payments were isolated, "non-recurring" subsidies.

2. Next we consider whether, under Commerce's "three factor" analysis, there is "substantial evidence" to deem the Sysco debt service grants to be "non-recurring" subsidies whose benefits are allocable over several years (rather than solely in the year received).

Factor No. 1. Under the first factor, one must consider whether the program providing the benefit is "exceptional." Commerce found that the debt service grants were "exceptional" because there was not an established provincial program and because the provincial legislature must approve the payments each year. New Steel Rail, 54 Fed. Reg. at 31,996.

In our view, the evidence is unequivocal that PONS had an established "program" as that term is defined in Commerce's proposed regulations. Those proposed regulations would amend Section 355.2 of the current regulations by adding the following new definition:

(r) Program. "Program" means any act or practice of a government.

Proposed Rule, 54 Fed. Reg. at 23,379.

Certainly, PONS had an established "practice" of funding the debt service on the Sysco debentures.

We agree with both Commerce and Bethlehem that this established practice did not begin under the 1967 Sydney Steel Corporation Act which established Sysco as a crown corporation. Although that statute authorizes PONS to "pay or advance to the Corporation" any amounts "necessary or incidental to the Corporation

attaining its object," this authorizing language appears too general to be considered a particular "act or practice" directed at debt service coverage.

An unequivocal basis for finding an established program is the combination of the 1981 Sydney Steel Modernization Agreement and the subsequent and regular practice of PONS to budget and fund all debt service payments for the Sysco debentures. In the Modernization Agreement, PONS agreed to service Sysco's long-term debts, including the debentures. (Pub. Doc. No. 45, Exhibit E (Attachment), p. 16.) Pursuant to this 1981 undertaking, PONS began the practice of servicing that debt. The 1981 undertaking combined with the regular practice that flowed from that undertaking resulted in an established "program." Although the Modernization Agreement itself terminated in 1984, the "program" it spawned continued.

There is simply no basis on this record to call this program an "exceptional" or isolated event, or a "one time shot in the arm" subsidy.

Commerce has noted that each year the appropriation for these subsidies had to be specifically approved by the Legislature in Nova Scotia. But there is no evidence that the approval was in any doubt, or even questioned by any single member of the Legislature. The funds were, in fact, regularly appropriated. The appropriations were one aspect of a practice that involved the initial commitment in 1981, the regular budgeting for the payments thereafter, the appropriations themselves and the actual funding. There was nothing "exceptional" about the practice.

Commerce has also noted that if Sysco (a firm Commerce found to be both uncreditworthy and unequityworthy) had turned a profit during the 1981-88 period, it is unlikely that PONS would have continued to provide the grants to cover debt service. That apparently hypothetical possibility does not convert an existing practice into an isolated or exceptional event. Furthermore, it would be inconsistent with Commerce's other findings, and inconsistent with the record, for us to acknowledge any likelihood that Sysco would have actually earned a profit during the relevant period.

Nothing in Commerce's proposed regulations or in the two cases cited in the proposed regulations (Live Swine and Fresh, Chilled and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097 (1985); and Fresh Atlantic Groundfish from Canada, 57 Fed. Reg. 10,041 (1986)) suggests that a government has to go through any rituals or formalities before an act, practice or program will be deemed "established" and not "exceptional." Indeed, it might seem presumptuous to tell foreign government entities what formalities they must adopt, before an ongoing program may be recognized as such in a U.S. countervailing duty investigation.

Factor No. 2. The second factor in the "three factor" analysis is whether a program is "longstanding." In this case, the program of debt service payments occurred during every year for eight years. We need not (and do not) decide how long a program must exist to be considered longstanding or whether the length of time may be affected by the underlying nature of the program. By any common meaning of the word, eight years out of eight years is "longstanding."

Commerce and petitioner have suggested that a program cannot be "longstanding" if its continuation depends on annual appropriations by the Legislature. In this case, the appropriation for the Sysco debenture debt service was a part of the overall provincial budget. Every longstanding and recurring program in Canada must undergo an annual budgetary and appropriation process. There is no evidence in the record that there was any threat of a negative vote to the provincial budget in any of the years in question; or, more importantly, any parliamentary opposition to the Sysco debenture line item in the budget. Indeed, the record generally supports the statement of Deputy Minister Alan Manuel that the appropriations for the Sysco debenture debt service were "a mere formality." (Pub. Doc. No. 136, p. 5.)

Factor No. 3. The third factor in the "three factor" analysis is whether there is reason to believe that the program will not continue into the future. The record indicates an expectation that the program would continue into the future, at least until the maturity of the debentures (1993 for the Series C debentures and 1996 for the Series D debentures).

Logically, future continuation of a program should be determined as of the time the program is first fully established. Any other reading of the third factor would allow one, in the latter years of a clearly recurring program, to conclude suddenly that the program was no longer recurring because it would soon end. In this case, the program seems to have been clearly established by 1985. Although the Sydney Steel Modernization Agreement had terminated the previous year, the Sydney debenture debt service grants had become, by 1985, an institutionalized feature of the provincial budget. The fact that these grants would terminate eight or eleven years in the future does not mean that the program would not continue during the intervening future years until the debentures matured.

We have to give words their common and rational meanings. The three factors adopted by Commerce were presumably intended to assist all concerned in giving effect to the term "recurring." The language of these three factors should not now be set up as a road block between the reader and the everyday meaning of the term "recurring." Even as of 1988, the record shows an expectation that the Sysco debenture debt service grants would continue into the future until the debentures matured. These were "recurring" grants.

D. Holding

We do not address or decide whether the "three factor" analysis is the appropriate or exclusive method for ascertaining whether a subsidy program is "recurring." Nor do we address or decide whether a subsidy program, if found to be non-recurring, must necessarily have its benefits allocated over more than one year. We conclude only that Commerce's determination that this subsidy program is "non-recurring" (and should thus be allocated over 15 years) is unsupported by substantial evidence on the record. It is unsupported whether one resorts to Commerce's "three factor" analysis or to the general meaning of the term "non-recurring," as used in the legislative history.

V. Government Loan Guarantees to an Uncreditworthy, Unequityworthy Firm Owned by the Government

A. Commerce's Analysis and Views of the Parties

In its final determination in New Steel Rail, Commerce found that the Government of Nova Scotia's guarantee of commercial loans made to Sysco constituted a countervailable benefit. The justification for this determination is that Sysco was found to be unequityworthy and uncreditworthy - a finding not contested by Sysco - and therefore "the government's provision of loan guarantees to Sysco is not a reasonable commercial decision." Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail, from Canada, 54 Fed. Reg. 31,993, amended by, 54 Fed. Reg. 39,032 (1989). After coming to this conclusion Commerce then applied its standard formula to calculate the benefit received. Neither the methodology employed by Commerce nor the determination that Sysco was unequityworthy and uncreditworthy was challenged by counsel for Sysco. Sysco objected to Commerce's determination solely on the grounds that it conflicts with Commerce's Proposed Rule concerning loan guarantees by a government, namely that:

The explicit guarantee by a government of a loan to a firm shall not confer a countervailable benefit if the government is a principal owner or majority shareholder of the firm and it is a normal commercial practice in the country in question for owners or shareholders to provide loan guarantees on comparable terms to their firms.

54 Fed. Reg. 23,366, 23,381 (1989) (to be codified at 19 C.F.R. pt. 355) (proposed May 31, 1989).

Sysco argued that it is a wholly-owned crown corporation of the Government of Nova Scotia, which is uncontested, and it has cited evidence on the record to confirm that it is normal commercial practice in Canada for parent companies to guarantee the debt of their subsidiaries. (Pub. Doc. No. 138, p. 3 and No. 140, p. 13.) Sysco concluded that loan guarantees provided by the Government of Nova Scotia on commercial bank loans to Sysco do not confer a countervailable benefit.

Commerce defended its determination on the grounds that the proposed rule cited by Sysco was based on its past experience with government guarantees on

commercial loans to equityworthy companies, and that Sysco was a special case that required a departure from general practice. For Sysco, Commerce reverted to its standard practice of analyzing whether the loan guarantees were made on terms consistent with commercial considerations; in other words, would a "reasonable investor" have guaranteed the loans to Sysco? Commerce's answer to this question was negative. Finding Sysco to be unequityworthy and uncreditworthy, Commerce also found that no reasonable investor would have made loan guarantees to Sysco, and therefore it concluded the loan guarantees constituted countervailable benefits.

Bethlehem supported Commerce's determination by arguing it was consistent with the statutory definition of actionable subsidy as "the provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations." 19 U.S.C.A. § 1677(5)(A)(ii)(I) (West 1989). Bethlehem concluded Commerce would violate the statute if it ignored the loan guarantees. Bethlehem further argued that even if it was commercial practice in Canada for shareholders to guarantee loans, the normal practice involved a fee for this service of up to 2%. In their view the fact that no fee was involved established that it was not in accordance with normal commercial practice.

B. Panel's Analysis

The Panel finds ambiguous the evidence relied on by Bethlehem that in normal practice banks in Canada charge up to 2% for loan guarantees. For this evidence Bethlehem relies on a statement by Mr. Maize of the Canadian Imperial Bank of Commerce during verification. However, it is not entirely clear what Mr. Maize was referring to, or more importantly whether he was considering loan guarantees between parent and subsidiary corporations. Moreover, Mr. Maize prefaced his statement with the observation that "a straight bank loan guarantee is very rare." (Verification Report for the CIBC, Pub. Doc. No. 139, p. 3.) Simply on the face of it, a practice that is "rare" cannot be "normal;" hence the Panel is left with the evidence cited by Sysco, namely that it is normal practice in Canada for a parent company to provide loan guarantees to subsidiaries.

With respect to Sysco's argument based on Commerce's Proposed Rule regarding loan guarantees when the government is a principal owner or majority shareholder of the loan recipient, this rule was promulgated in the period between the preliminary and final determinations in New Steel Rail. It "codifies current practice" of Commerce in cases where governments are principal owners or shareholders of firms. Proposed Rules, 54 Fed. Reg. 23,366, 23,371 (1989). An earlier attempt to codify rules in this area, which arguably might bear on the instant case, makes even clearer the distinct role of governments as majority shareholders in the provision of loan guarantees. Carbon Steel from Argentina ("Subsidies Appendix"), 49 Fed. Reg. 18,006 (1984). This document states:

Loan guarantees are countervailable only if they are provided to a specific industry or group of industries and only if they are on terms inconsistent with commercial considerations....

A special case arises when the government acts as both guarantor and principal owner or majority shareholder of a company. Under these circumstances, a government guarantee is not countervailable if it is normal commercial practice in that country for owner or shareholder to provide guarantees on comparable terms to their companies". (emphasis supplied).

49 Fed. Reg. at 18,019.

Commerce has argued the above rule regarding government loan guarantees drawn from Proposed Rules and the "Subsidies Appendix" is inapplicable to the instant case, because the rule was created with equityworthy companies in mind and Sysco is not equityworthy. Commerce therefore argues it has correctly adapted the rule to be applicable to the facts in Steel Rails. Referring to Secretary of Agric. v. United States, 347 U.S. 645, 653-54 (1954), Commerce states in its brief that "[i]t is a well-settled principle of administrative law that an agency may depart from a practice followed in prior decisions if it explains the reasons for its so doing." (Commerce Brief at 19.) This argument is supported by Bethlehem, to wit that "Congress has granted ITA wide latitude in determining whether a bounty or grant exists." (Bethlehem Brief at 24 citing United States v. Zenith Radio Corp., 562 F.2d 1209 (C.C.P.A. 1977), aff'd, 437 U.S. 443 (1979).)

The Panel is mindful of the need for deference to the judgment of administrative agencies acting within their statutory authority. This approach, common to both Canada and the United States, is reflected in the standard of review and is cited in numerous cases, e.g., American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986). The Panel further accepts that an agency may depart from previous practice if it gives adequate reasons for doing so. However, a question arises as to exactly what practice Commerce followed in previous cases. The leading case cited in Proposed Rules related to government loan guarantees where the government is also principal owner or majority shareholder of the assisted firms, is Carbon Steel from Venezuela, 50 Fed. Reg. 11,227 (1985). In that case, Commerce was obliged to determine whether the Venezuelan company SIDOR was equityworthy. Commerce did not answer this question directly, which makes comparison to New Steel Rail less than straightforward. However, Commerce did conclude that "... SIDOR was not a reasonable commercial investment from 1980 through 1984, and, thus the government equity infusions in 1981, 1982 and 1983 were on terms inconsistent with commercial considerations." Id. at 11,230. However, Commerce did not countervail loan guarantees that the government of Venezuela was alleged to have given SIDOR. Commerce's full justification for its actions is as follows:

Petitioner alleges that the Government of Venezuela provides loan guarantees to state-owned companies, reducing lender risk and thus lowering interest costs to SIDOR.

According to the response, it is common commercial practice in Venezuela for shareholders to guarantee a company's loans. A 1976 law authorizes the government to guarantee the loans of state-owned enterprises involved in the basic sectors of production. Consequently, we preliminarily determine that government loan guarantees to state-owned companies are not inconsistent with commercial considerations and, therefore, are not countervailable.

Id. at 11,230.

It is unclear from the action in Carbon Steel on what basis Commerce distinguished its practice in the present case from that in Carbon Steel. It would appear that Commerce's decision not to countervail in Carbon Steel was

based on its conclusion that it was a common practice in that country to guarantee loans, even where the company in question appears to be unequityworthy. Thus, on its face, Carbon Steel appears to be inconsistent with Commerce's claim that the instant case presented Commerce with new factual circumstances that required a change from established practice or policy.

In Secretary of Agric. v. United States, 347 U.S. 645 (1954), which Commerce cited to support its position, in fact the Court held that the action of the agency in question - the Interstate Commerce Commission - was invalid because "the Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision." 347 U.S. at 653. Similarly, the question arises in the instant case whether Commerce has sufficiently justified its action according to law and on the basis of substantial evidence on the record. The uncertainty surrounding Commerce's rule regarding loan guarantees to government owned firms has led this Panel to examine the statutory basis of Commerce's practice on this subject. The statutory provision in question, 19 U.S.C. § 1677(5)(A)(ii)(I) defines actionable subsidies as "the provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations."

The crux of the matter is Commerce's position that loan guarantees by a government to an unequityworthy and uncreditworthy subsidiary are ipso facto inconsistent with commercial considerations, and therefore constitute actionable subsidies. This conclusion is reached on the basis that Sysco is unequityworthy and uncreditworthy - which is not contested - and that therefore any economic transactions (including loan guarantees) between the parent and subsidiary are not based on commercial considerations. However, this conclusion has not been supported by substantial (or for that matter, any) evidence on the record, such as a demonstration that in Canada firms or governments would regard loan guarantees provided to an unequityworthy or uncreditworthy subsidiary to be inconsistent with commercial considerations. By contrast, Commerce has gathered evidence that it is a normal commercial practice in Canada for parent companies,

including governments, to provide loan guarantees to their subsidiaries. (Pub. Doc. No. 136, p. 3; Pub. Doc. No. 138, p. 3; and Pub. Doc. No. 140, p. 13.)

The Panel is of the opinion that Commerce errs when it assumes that loan guarantees to unequityworthy and uncreditworthy subsidiaries are necessarily inconsistent with commercial considerations. There are various reasons based on sound commercial practice that a parent firm might wish to keep an unequityworthy subsidiary in operation, e.g., because continued operations at a loss are cheaper than a shutdown, the belief that operation of the subsidiary can be improved over time, essential nature of the subsidiary's products to operations of the parent or affiliates, cyclical nature of the subsidiary's business, etc. Under such circumstances, loan guarantees which cost the parent little and are valuable to the subsidiary are one mechanism to accomplish such objectives. For example, it is arguable that both Sysco and the Government of Nova Scotia benefited from the guarantees. It may be that the loan guarantees were a cost-effective means to reduce the losses for a subsidiary which the Government of Nova Scotia was ultimately committed to support. Accordingly, the Panel finds that Commerce's conclusion that "Nova Scotia's provision of loan guarantees to Sysco was not a reasonable commercial decision" is not supported by substantial evidence on the record.

The evidence in the designated administrative record is admittedly lean, perhaps because of Sysco's mistaken view that it was the subject of a blanket exemption. While this lack of information may be attributable to both parties, the fact remains that Commerce is required to ground its conclusions on the facts set out in the administrative record, e.g., "...[A]ny methodology employed must reasonably and accurately reflect factual information contained in the administrative record as a whole." RSI (India) PVT., Ltd. v. United States, 687 F. Supp. 605, 610 (Ct. Int'l Trade 1988).

The Panel remands the determination in New Steel Rail to Commerce on the grounds that Commerce's conclusion that in normal commercial practice, or based on commercial considerations, parent firms would not provide loan guarantees to unequityworthy or uncreditworthy subsidiaries is not supported by substantial

evidence on the record. Commerce must either: (i) produce substantial evidence from the administrative record that parent firms in Canada would regard loan guarantees to unequityworthy subsidiaries as inconsistent with commercial considerations, or (ii) determine that Provincial loan guarantees in the instant case do not confer countervailable benefits.

VI. **Calculation of the Benefit to Sysco from Studies Funded Under the Economic Planning Subsidiary Agreement**

In its final determination in New Steel Rail, Commerce found countervailable grants provided for studies conducted under a Canada-Nova Scotia Subsidiary Agreement for Economic Development Planning (known as the "EPA"). The EPA was a subsidiary agreement to an Economic and Regional Development Agreement ("ERDA") between the Government of Canada and the Government of the Province of Nova Scotia. Under the EPA, various studies were undertaken to assist the two governments in making decisions regarding the proposed modernization of Sysco (Supplemental response of Province of Nova Scotia, Pub. Doc. No. 70, p.4.) Although both the federal government and the province funded this program, Commerce countervailed only the portion of the funds provided by the Government of Canada (50%), since that portion was limited to companies in Nova Scotia. Commerce determined that the funds supplied by the province were not countervailable because they were not limited to a specific enterprise or industry. New Steel Rail, 54 Fed. Reg. 31,991 (1989), amended by, 54 Fed. Reg. 39,032 (1989).

Sysco does not dispute Commerce's finding that the federal portion of the funding for the program is countervailable. However, Sysco objects to Commerce's decision to attribute the benefit to Sysco during the review period in this case, 1 April 1987 - 31 March 1988 (Sysco's fiscal year). Sysco also contends that, in calculating the amount of the total subsidy to Sysco, Commerce "double-counted" the benefits provided by the federal government under the program, thereby overstating the subsidy. Sysco has therefore requested that the Panel

remand to Commerce to recalculate the ERDA benefit using the "correct" methodology and "correct" fiscal year.

A. Determination of the Correct Fiscal Year

Sysco contends that the ERDA benefit should be attributed to Sysco's fiscal year 1986 - 1987 rather than fiscal year 1987 - 1988. Sysco cites as evidence the Province of Nova Scotia Supplemental Response dated 18 January 1989 (Pub. Doc. No. 70, p.5) which shows the ERDA period for the studies as being 1986 - 1987. Sysco's fiscal year 1986 - 1987, however, includes only the first 3 months of 1987. There is no evidence on the record that ERDA period 1986 - 1987 coincides with Sysco's fiscal year 1986 - 1987. References elsewhere in the same document to "GDA periods" of "1977 - 1981" and "1982 - 1984" imply that ERDA period 1986 - 1987 includes all of 1987. Commerce's decision to begin allocating the grant amount in Sysco's fiscal year 1987 -1988 was thus reasonable. Moreover, Commerce made a specific request for information from Sysco regarding the dates when the amounts were disbursed under the studies. (Letter to Embassy of Canada, February 10, 1989, Pub. Doc. No. 84.) Commerce did not obtain any additional information in the response of Sysco and was entitled to rely on substantial evidence on the record that the benefit was attributable to the 1987-1988 period.

B. Calculation of the Benefit

Sysco's second contention is that the benefit attributed to Sysco under the EPA had already been attributed to Sysco in the calculation of the Benefit under a second ERDA subsidiary agreement entitled "Canada-Nova Scotia Subsidiary Agreement, The Sydney Steel Corporation Stage II, Modernization of Facilities" (also referred to by various parties as the "Sysco Modernization Subsidiary Agreement", "Business Plan Stage II" and "Sysco Modernization Program Phase II"). Sysco has failed to direct the Panel to any evidence on the admittedly opaque administrative record that the benefit calculated under the EPA had already been included in the benefit calculated under the Sysco Modernization Subsidiary Agreement. Counsel for Sysco at the hearing before the Panel directed the Panel to Pub. Doc. No. 70, the Province of Nova Scotia Supplemental Response dated 18

January 1989 as the best evidence of Sysco's contention. Such document provides no indication that the cost of the studies under the EPA was included in the cost of the studies under the Sysco Modernization Subsidiary Agreement. To the contrary, it is the conclusion of the Panel that Pub. Doc. No. 70 evidences separate categories and costs. Accordingly, Commerce was entitled to add 50% of the cost of the studies under the EPA to total benefits received based on substantial evidence on the record that the cost was separate and had not already been included in another category, and its decision to do so is affirmed.

VII. Treatment of Ipsco v. United States

The Panel concludes that the issue of whether Commerce should have calculated a country-wide duty rate for Sysco, in place of the company-specific rate, as allegedly required by Ipsco v. United States, Slip. Op. 89-1486 (Fed. Cir. April 3, 1990), is not properly before it. Insofar as the Panel can ascertain from the administrative record, Sysco at no time prior to the final determination challenged Commerce's methodology in calculating Sysco's subsidy on a firm-specific rather than country-wide basis. Sysco did not raise this issue in its complaint to the Panel. At the hearing, in response to a question, counsel for Sysco indicated that "we are not suggesting that the issue in IPSCO is on point, here." (Tr. at 26). Most significantly, Sysco has made no motion to amend the complaint under Rule 63. It did not assert the relevance of Ipsco until twelve days after the hearing, even though Ipsco was decided more than two weeks before the hearing, and at no time has suggested that the principal issues decided in Ipsco is relevant to any of the issues set out in the complaint.

The Ipsco case has been raised in six post-hearing submissions to the Panel, including Sysco's April 29, 1990, submission under Rule 70(1), the Department's motion under Rule 63 to strike the Sysco submission, and various responses thereto. (See note 1, supra.) These submissions discuss various procedural aspects of the post-hearing submission of information to the Panel, and the substantive applicability or inapplicability of Ipsco. However, none of them a) assert that the calculation of a country-wide (rather than firm-specific)

countervailing duty rate is relevant to the three issues that were raised in the complaint and are now before this Panel; or b) seek amendment of the complaint to include the country-wide calculation of countervailing duties as a issue to be decided.²

A. Ipsco's Holding on Country-wide Rates is Not Relevant to the Three Issues before the Panel.

As Commerce correctly observed in its motion to strike,

The issue raised by Sysco [in the April 29, 1990, letter], and addressed in the Ipsco decision, concerning the calculation of a country-wide countervailing duty rate is not relevant to this Panel review, as Sysco did not appeal to this Panel that aspect of the Commerce final determination in this matter. None of the parties involved discussed the issue in their respective briefs, nor did Sysco raise the issue at oral argument, when other, relevant issues of the Ipsco decision were addressed.

(Motion to Strike, Pub. Doc. No. 69, at 2.)

At best, Sysco argues that "the issues which Sysco has appealed are intertwined with the larger calculation error." (Response of Sysco to Commerce's motion to strike, Pub. Doc. No. 72, at 4.) This is probably true of many other issues equally relevant to the calculation of countervailing duties -- such as whether a particular program is countervailable-- which are likewise not before this Panel. However, even Sysco does not contend that the Ipsco case is relevant to the three issues before this Panel for review.

B. There has Been No Attempt to Amend the Complaint

Despite the number of post-hearing submissions on Ipsco, none moves to amend the complaint so as to add the country-wide calculation of countervailing duties as is the issue in this case. Yet, Rule 7(a) limits this Panel's review to issues raised in the complaint:³

Panel review shall be limited to (a) The allegations of error of fact or law, including the jurisdiction of the investigating

2. Bethlehem treats Sysco's April 29 letter as a motion to amend in its own submission of May 7, 1990. However, Sysco at no time seeks amendment of the complaint, or characterizes its submission as such, even in its subsequent filing of May 14, 1990, in response to Commerce's motion to strike.

3. The text of Rule 7(a) neither explicitly authorizes nor explicitly prohibits the amendment of a complaint. The Panel does not decide in this case whether or not a complaint may be amended under Rule 7(a) or otherwise.

authority, that are set out in the Complaints filed in the Panel review....

Until such time as a motion to amend is filed and granted, the Panel remains without jurisdiction to consider a new issue, including the issue raised in Ipsco.

The Panel believes that there are sound reasons for strict adherence to Rule 7(a), and for the procedures specified in Rules 63-66. These procedures are designed to assure that when a major procedural or substantive issue is brought before the Panel, the other parties will have a timely opportunity to respond in such a manner as to assure that the Panel has before it all necessary information to make an informed decision.⁴ In this case, because no motion to amend was made, that did not occur. Rather, the six submissions, neither individually or in the aggregate, satisfactorily address the procedural and substantive questions the Panel would have to resolve in order to decide the issue raised by Ipsco. In the absence of such a motion, and full responses thereto, and the lack of relevance of the holding in Ipsco to the issues currently before the Panel, it would be inappropriate for the Panel to attempt to decide the applicability to the present case of the substantive issue raised by Ipsco to Commerce's countervailing duty calculations in this matter, and the Panel thus declines to do so. (This decision renders the motion to strike moot, and the Panel consequently does not decide whether Sysco's April 29, 1990, letter is timely or otherwise meets the requirements of Rule 70.)

4. We note that in this instance, in addition to the substantive issue of the applicability of Ipsco, questions were raised concerning exhaustion of administrative remedies and the timeliness of any action by Sysco, whether under Rule 70 or Rule 63, as well as the extent to which Bethlehem and Sysco's submissions of April 24 and April 30, respectively, were consistent with the letter and spirit of Rule 70.

Accordingly, for the reasons stated above, the determination of Commerce in Case No. C-122-805, New Steel Rail, Except Light Rail, from Canada (Countervailing Duty Determination) is AFFIRMED in part and REMANDED for further proceedings consistent with this opinion, as more fully specified in part III, above.

Date

David A. Gantz,
Chairman

Date

Robert Pitt

Date

John D. Richard

Date

Michael D. Sandler

Date

Gilbert Winham