ARTICLE 1904
BINATIONAL PANEL REVIEW UNDER
THE UNITED STATES-CANADA FREE TRADE AGREEMENT

In the Matter of:	:	
CERTAIN FLAT-ROLLED CARBON STEEL PRODUCTS FROM CANADA	:	**USA-93-1904-05**

STELCO, INC., CONTINUOUS COLOUR COAT, INC. and DOFASCO INC.,

Complainants,

v.

U.S. INTERNATIONAL TRADE COMMISSION,

Respondent, and

BETHLEHEM STEEL CORP., AK STEEL CORP., GULF STATES STEEL INC. OF ALABAMA, INLAND STEEL INDUSTRIES INC., LTV STEEL COMPANY, INC., LUKENS STEEL CO., NATIONAL STEEL CORP., SHARON STEEL CORP., and U.S. STEEL GROUP, A UNIT OF USX CORP.,

Respondent-Intervenors.

DECISION OF THE PANEL

November 4, 1994

Before: **John M. Peterson, Chairman**
William E. Code
Harold Hongju Koh
Michael P. Mabile
Murray G. Smith

Appearances:

Christopher A. Dunn, Willkie Farr & Gallagher, argued for Stelco, Inc. and Continuous Color Coat, Inc.. With him on the brief was Matthew Nicely, Willkie Farr & Gallagher. Carrie A. Simon, Rogers & Wells, argued on behalf of Dofasco Inc. With her on the brief was William Silverman, Rogers & Wells.

Cynthia P. Johnson and James A. Toupin argued for the U.S. International Trade Commission. With them on the brief was Lyn M. Schlitt, General Counsel.

Michael H. Stein, Dewey Ballantine, argued for Bethlehem Steel Corp., AK Steel Corp., Gulf States Steel Inc. of Alabama, Inland Steel Industries Inc., LTV Steel Co., Inc., Lukens Steel Co., National Steel Corp., Sharon Steel Corp., and U.S. Steel Group, A Unit of USX Corp. With him on the brief was Alan Wm. Wolff, Dewey Ballantine, and Robert E. Lighthizer and John J. Mangan, Skadden, Arps, Slate, Meagher & Flom.

I. INTRODUCTION

This Binational Panel was constituted under Article 1904 of the United States-Canada Free Trade Agreement ("FTA") and Title IV of the United States-Canada Free Trade Agreement Implementation Act, 19 U.S.C. § 1516a(b)(2), in response to requests for panel review of the final affirmative injury determination of the United States International Trade Commission ("Commission") in the matter of certain corrosion-resistant steel flat products from Canada, see Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom, Inv. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and 731-TA-573-579, 581-592, 594-597, 599,609, and 612-619 (Final), USITC Pub. 2664, at 161 (Aug. 1993) ("Final Determination"). Complaints contesting the Commission's final

determination were filed by Stelco, Inc., Continuous Colour Coat, Inc., and Dofasco Inc. ("Complainants"). The Commission and Bethlehem Steel Corp., AK Steel Corp., Gulf States Steel Inc. of Alabama, Inland Steel Industries Inc., LTV Steel Co., Inc., Lukens Steel Co., National Steel Corp., Sharon Steel Corp., and U.S. Steel Group, a Unit of USX Corp. ("Respondents") appear in support of the Commission's determination.

Having reviewed the briefs, and upon consideration of the arguments of the parties at the hearing on August 4, 1994, the Panel concludes that the Commission's determination that the U.S. industry producing corrosion-resistant steel flat products, other than clad, has been injured by reason of dumped imports from Canada is supported by substantial evidence on the record and is otherwise in accordance with law. Therefore, we affirm that determination.

II. BACKGROUND

On June 30, 1992, a coalition of U.S. steel manufacturers[1] filed a petition with the Commission and the U.S. Department of Commerce ("Commerce") alleging that the domestic steel industry was materially injured or threatened with injury by reason of dumped imports from Canada, among other countries. In August, 1992, the Commission made preliminary affirmative dumping determinations with respect to corrosion-resistant steel products from Australia, Brazil, Canada, France, Germany, Japan, Korea, Mexico, New Zealand, and Sweden. Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France,

[1] The petition was filed by Armco Steel Co., L.P., Bethlehem Steel Corp., Geneva Steel, Gulf States Steel, Inc. of Alabama, Inland Steel Industries, Inc., Laclade Steel Co., LTV Steel Co., Inc., Lukens Steel Co., National Steel Corp., Sharon Steel Corp., USX Corp./U.S. Steel Group, and WCI Steel, Inc. Not all of these petitioners appeared in the investigation of corrosion-resistant steel flat products from Canada.

Germany, Italy, Japan, the Republic of Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, Inv. Nos. 701-TA-319-354 and 731-TA-573-620 (Preliminary), USITC Pub. 2549 (Aug. 1992).

Following preliminary determinations by Commerce that imports of certain flat-rolled carbon steel products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, and the United Kingdom had been sold at less than fair value ("LTFV"), 58 Fed. Reg. 7066 (Feb. 4, 1993), the Commission instituted final antidumping investigations Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619. After Commerce made its final LTFV determinations, 58 Fed. Reg. 37062 (July 9, 1993), the Commission determined, inter alia, that a domestic industry was materially injured by reason of dumped or subsidized imports of corrosion-resistant steel from Australia, Canada, France, Germany, Japan, and Korea. Final Determination at 192.

The Commission found that, with respect to corrosion-resistant steel, there were two like products: corrosion-resistant clad plate and corrosion-resistant steel other than clad plate. Id. at 163-167. A majority of the Commission decided that the domestic industry producing corrosion-resistant clad plate was not materially injured or threatened with injury by reason of the subject imports. The Commission decided, however, that the industry producing corrosion-resistant steel other than clad plate ("domestic industry" or "industry") was materially injured by reason of the subject imports. Accordingly, this Panel review addresses only the Commission's determination that the domestic industry has been materially injured by reason of imports of corrosion-resistant steel flat products, other than clad plate, from Canada.

III. CONTESTED DETERMINATION

In reaching affirmative determinations of material injury by reason of the subject imports, the majority of the Commission (Vice Chairman Watson, Commissioners Rohr, Crawford, and Nuzum)[2] found all types of corrosion-resistant steel other than clad plate to be one like product. In so doing, the Commission rejected the Complainants' assertion that automotive steel and aluminum-zinc ("AlZn") were sufficiently different to constitute separate like products.

The Commission reviewed the six factors that it normally considers in defining like product: "(1) physical characteristics and uses; (2) interchangeability of the products; (3) channels of distribution; (4) customer and producer perceptions of the products; (5) the use of common manufacturing facilities and production employees; and, where appropriate, (6) price." Final Determination at 163 n.11. Applying these factors, the Commission found that neither automotive steel nor AlZn was clearly distinguishable from other corrosion-resistant products such as to constitute separate like products.

The Commission described automotive steel as "corrosion-resistant sheet and strip used for automotive applications, or which has passed U.S. purchasers' qualification tests for automotive applications, or is expected to pass such qualification tests." Id. at 164. Because automotive steel covers a broad range of corrosion-resistant products, the Commission determined the "only clear distinction between automotive steel and non-automotive steel [to be] in the end use." Id. Automotive steel, moreover, was found to be manufactured using the same production processes

[2] Chairman Newquist did not find clad plate to be a like product separate from other corrosion-resistant carbon steel products.

and facilities as non-automotive steel. Id. No clear dividing line was discerned between the metallurgical make-up of automotive steel and that of non-automotive steel. Id.

Although it acknowledged that automotive steel generally was of higher quality, was sold at premium prices, and was manufactured on newer production lines, the Commission found that high-quality corrosion-resistant steel products also were sold in the non-automotive market. Id. While most automotive customers required suppliers to meet quality standards, this practice was not exclusive to the automotive sector; the Commission found that many non-automotive purchasers also required suppliers to meet qualifications based on the quality of their steel. Id. Finally, the Commission noted that both automotive and non-automotive steel passed through the same channels of distribution, in that a significant percentage of non-automotive steel was sold directly to end users, as was the case with most automotive steel. Based on these findings, the Commission concluded that automotive steel was not a like product separate from other corrosion resistant steel products. Id.

The Commission described AlZn as "a steel product with a coating of approximately 55 percent aluminum, 43.3 to 43.5 percent zinc, and 1.5 to 1.6 percent silicon." Id. Because it determined that AlZn steel shared with other corrosion-resistant steel "similar physical characteristics, overlapping end uses, similar channels of distribution, and similar production processes," it concluded that AlZn was not a separate like product. Id. at 165. Specifically, the Commission found that AlZn was interchangeable with other galvanized steel for uses such as roofing, that the same production facilities may be used to produce both AlZn and other corrosion-resistant steel products, and that many domestic facilities produce both AlZn and other galvanized steel products. Id.

Despite finding that AlZn generally has corrosion-resistant properties superior to those of many other corrosion-resistant products, the Commission concluded that "the difference is one of

degree along a continuum of corrosion-resistant products." Id. at 166. Finding no clear dividing line between AlZn and other corrosion-resistant products, the Commission determined that AlZn was not a like product separate from other corrosion resistant steel products. Id.

The Commission acknowledged that overall demand increases were largest "for a variety of high precision corrosion-resistant products" and that this was influenced in particular by "the changing needs of the automotive industry." Id. at 168. Furthermore, the Commission's finding of relative price insensitivity related primarily to the precision-engineered sector of the market. The Commission, however, determined corrosion-resistant products, including certain niche products, to be a single like product because of the interchangeability in production facilities and similarities in distribution channels. See id. at 165.

The Commission found the conditions of competition in the domestic industry during the period of investigation to be characterized generally by an overall increase in demand along with increases in production capacity. Id. at 168. Demand increases were greatest for certain "high precision" products used in the automotive industry. Production was found to be based upon customer orders, and prices were arrived at pursuant to negotiations between buyers and sellers. The Commission also concluded that customers commonly required suppliers to become certified or pre-qualified and that automobile manufacturers had the most stringent requirements among all categories of end users. Id. at 168-169. Further, the Commission found that purchasers typically maintained a small number of approved suppliers and did not readily switch suppliers on the basis of lower quoted prices or any other single factor. The Commission noted that half of all purchasers reported that they had not switched suppliers during the past five years; those that did switch typically changed from one or two suppliers to one or two other suppliers. Id. at 169. The Commission characterized

the market as being relatively insensitive to price, based primarily on evidence relating to the precision-engineered sector of the market. Id. at 189.

Industry performance, in turn, was evaluated in light of these competitive conditions. The Commission determined that, despite increasing apparent consumption, the domestic industry's share of the market declined. While shipments generally increased, so did inventories. The number of production workers, hours worked, and total compensation declined overall, while productivity fluctuated but ended unchanged. Id. at 169-170. Net sales and operating income also fluctuated, but declined overall during the period of investigation. Both research and development and capital expenditures declined steadily throughout the POI. Id. at 170-171.

In evaluating the effects of the imports on the domestic industry, the Commission cumulated imports from Australia, Canada, France, Germany, Japan, and Korea. Id. at 172-179. As required by statute, the Commission's causation analysis examined the volume effects, price effects, and impact on the domestic industry of the cumulated imports. See 19 U.S.C. § 1677(7)(B)(i). The Commission found that the import volumes and market share of the subject imports were significant and generally increased during the period of investigation ("POI"). Final Determination at 188. Domestic production fluctuated during the POI, ending at a slightly higher level at the end of the period than at the beginning. At the same time, the domestic industry's share of the market declined steadily. On the basis of this increasing market penetration, the Commission concluded that the volume effects of the subject imports were significant. Id. at 189.

With respect to price effects, the Commission found that the market was "relatively insensitive to price"; consequently, the domestic industry could not win sales merely by offering competitive prices. Instead, domestic producers were forced to discount deeply to compete with the

dumped and subsidized imports. Id. In addition, the Commission determined that there were significant price effects by reason of depression and suppression of prices in the domestic market. Price depression or suppression was discerned both in instances of underselling, concentrated in the service center/distributor sector, and in overall downward price trends for corrosion-resistant steel products, where import prices declined at greater rates than prices of the domestic product. Id. at 190-191.

Finally, the Commission determined that the domestic industry had been adversely impacted by reason of the "significant and increasing volume and the price suppressing effects of the cumulated imports." Id. at 191. Industry attempts to increase high-precision steel capacity did not stop the loss of market share to imports, which entered the market in increasing volumes. Id. As a consequence, the domestic industry's spending on research and development decreased and its profitability declined considerably. Id. Because the domestic industry was found to compete with imports in most of the product categories under investigation, the Commission determined that the subject imports caused adverse price effects throughout the corrosion-resistant market. The Commission also concluded that, although the domestic industry may have been affected by the general economic downturn during the period of investigation, even when domestic consumption was declining, the subject imports continued to gain market share. Id. at 192.

Based on these findings, the Commission decided that the cumulated imports had a sufficient negative impact on the domestic industry to warrant an affirmative material injury determination.

IV. CONTENTIONS OF THE PARTIES

A. Complainants

Complainants argue that the Commission erred by failing to conduct a segmented market analysis in its injury determination after the agency in fact found that the industry comprised at least two segments: a "precision-engineered" products segment and a "traditional" products segment. Complainants further claim the Commission did not properly analyze the volume effects of the imports on the domestic industry and that the Commission's analysis of price effects was unsupported by substantial evidence. To the extent the Commission's price effects analysis is incorrect, Complainants argue that the Commission's affirmative injury determination cannot be based on volume effects alone. Finally, Complainants claim that the Commission committed legal error because it failed to make a specific finding of material injury in its determination.

B. Commission and Respondents

The Commission and Respondents counter that the Commission did not make a finding that the corrosion-resistant steel market was segmented and that the agency is not required by law to consider the effects of imports on a disaggregated basis. Respondents aver that Complainants' market segmentation argument is actually a disguised attempt to reargue the "like product" issue that Complainants unsuccessfully raised before the Commission. The Commission also contends that it applied the correct legal standard in determining whether an industry in the United States was materially injured. Although the statute requires the Commission to consider and explain

its analysis of the three primary factors -- volume of imports, effect on prices, and impact on domestic producers -- it does not require detailed discussion of every piece of information considered. Further, the Commission asserts, its findings concerning volume and price effects caused by the subject imports were supported by substantial evidence. Last, the Commission argues that it made a specific finding of material injury in its determination, as required by law.

V. STANDARD OF REVIEW

Article 1904(3) of the FTA requires this Panel to apply the standard of review and "general legal principles"[3] that a U.S. court would apply in reviewing a Commission determination.[4] That standard is dictated by section 516A(b)(1)(B) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516a(b)(1)(B)), which 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." Id.[5]

Substantial evidence has been defined by the United States Supreme Court as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting

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[3] These principles include, for instance, "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." FTA art. 1911.

[4] Under the FTA, an Article 1904 Binational Panel Review of an injury determination in a U.S. dumping duty action must be conducted in accordance with U.S. law. FTA art. 1902(1).

[5] For purposes of Panel review, the "law" consists of "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." FTA art. 1904(2). The "substantial evidence" standard mandated by the FTA refers specifically to evidence "on the record," and Article 1904(2) of the FTA expressly limits the Panel's review to the "administrative record" filed by the Commission.

Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). Substantial evidence is "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." Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966). The reviewing Panel must not reweigh the evidence, or substitute its judgment for that of the Commission. Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 8 (Aug. 24, 1990); see also Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989). The reviewing authority therefore may not "displace the [agency's] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo." Universal Camera Corp., 340 U.S. at 488; accord 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).

Nevertheless, an agency determination must be supported by the administrative record as a whole, including evidence that detracts from the substantiality of the evidence relied upon by the agency. Universal Camera, 340 U.S. at 477. Finally, the agency determination must be grounded in the record evidence; substantial evidence consists of facts that support the agency's findings. Baltimore & Ohio Ry. v. Aberdeen & Rockfish Ry., 393 U.S. 87, 91-92 (1968). Where there is conflicting evidence, there must be "some justification, supported by substantial evidence in the record," for relying on one set of facts over another. Timken Co. v. United States, 894 F.2d 385, 388-89 (Fed. Cir. 1990).

The substantial evidence standard generally requires the reviewing authority to accord deference to an agency's factual findings and the methodologies selected and applied by the agency. See, e.g., Hercules, Inc. v. United States, 673 F. Supp. 454, 463 (Ct. Int'l Trade 1987); Manufacturas Industriales de Nogales, S.A. v. United States, 666 F. Supp. 1562, 1567 (Ct. Int'l Trade 1987)); Brother Industries, Ltd. v. United States, 771 F. Supp. 374, 381 (Ct. Int'l Trade 1991) ("Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion."). Commission determinations are presumed to be correct, and the burden of demonstrating otherwise is on the party challenging a determination. 28 U.S.C. § 2639(a)(1); see Hannibal Indus., Inc. v. United States, 710 F. Supp. 332, 337 (Ct. Int'l Trade 1989).

Although review under the substantial evidence standard is limited, the Panel nonetheless must conduct a meaningful review of the Commission's determination. It is well established, for instance, that an agency's determination must have a reasoned basis. American Lamb Co., 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); see also Fresh, Chilled and Frozen Pork, USA 89-1904-11, at 13 (Aug. 24, 1990). The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning. USX Corp., 655 F. Supp. 487, 492 (Ct. Int'l Trade 1987).

Furthermore, there must be a rational connection between the facts found and the choice made by the agency. Bando Chem. Indus., Ltd. v. United States, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 285 (1974) and Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). There must be an adequate explanation of the bases for the agency's decision in order for the reviewing authority

meaningfully to assess whether the decision is supported by substantial evidence on the record. The Commission therefore must clearly articulate the reasons for its conclusions. See, e.g., Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 623-24 (Ct. Int'l Trade 1993).

VI. DISCUSSION

A. Market Segmentation

The first issue before the Panel is whether the Commission properly analyzed the effects of the subject imports on the domestic industry as a whole, rather than on different segments of the industry. For the following reasons, the Panel finds that the Commission's findings with respect to the aggregated domestic industry were reasonable and in accordance with law.

Complainants' market segmentation argument is based upon two premises: (1) that the Commission made a finding that the domestic market for corrosion-resistant steel products was in fact segmented; and (2) that, having found such segmentation, the Commission was required by law to analyze separately the effects of the subject imports on each of the market segments. The antidumping statute provides in pertinent part:

> If --
>
> (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
>
> (2) the Commission determines that --
>
> (A) an industry in the United States --

> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

19 U.S.C. § 1673. As used in this statute, the term "industry" is defined as "the domestic producers as a whole of a like product . . . ." 19 U.S.C. § 1677(4)(A). The legislative history indicates that the term "industry in the United States" comprises "all the domestic producer facilities engaged in production of" the like product. S. Rep. No. 249, 96th Cong., 1st Sess. 82 (1979). The Commission is required to assess the effects of dumped imports in relation to domestic production of the like product within the industry. 19 U.S.C. § 1677(4)(D).

In its final determination, the Commission found that there were two domestic industries corresponding to the single class or kind of corrosion-resistant steel products found by the Commerce Department: (1) producers of corrosion-resistant product other than clad plate; and (2) domestic producers of clad plate. Final Determination at 164-66. The Commission specifically considered and rejected Complainants' argument that automotive steel and aluminum-zinc coated sheet constituted separate like products, concluding that no clear distinctions could be drawn between these products and other corrosion-resistant products as a whole. Id.

Complainants do not challenge the Commission's like product determination. Rather,

in their brief Complainants argued that the Commission found the domestic industry was segmented, but failed to take this segmentation into account in analyzing the effects of the subject imports on the industry's separate "precision-engineered" and "traditional" segments. Complainants, however, identified no such "market segmentation" finding in the Commission's determination. The excerpts from the Commission's determination relied upon by Complainants merely discuss such market conditions as the prevalence of quality standards and pre-qualification requirements, the faster-paced expansion of demand, the increase in market share by imports, and infrequent switching among suppliers in the automotive products sector. The Panel determines that the Commission made no finding that the market was segmented.

At oral argument, Complainants backed away from their contention that the Commission had found distinct "precision-engineered" and "traditional" market segments. Indeed, when asked by the Panel, Complainants could not identify the dividing line between the two alleged segments. Tr. at 31, 175. Instead, Complainants argued that the Commission found many distinctions among products and market segments but failed to establish clear dividing lines among these products and segments. Complainants urged the Panel to order a remand directing the Commission to analyze the effect of the imports in light of this market "segmentation." Id. at 32.

The Panel finds Complainants' argument unpersuasive. The Commission did not find any clear segmentations of the market, but rather differences of "degree along a continuum of corrosion resistant products." Final Determination at 166. While the Commission did not explicitly state that it had considered and rejected market segmentation, it is not required to state expressly each of its findings. This said, however, the Panel notes that, had the Commission in fact rejected a segmented-market analysis, it would have been preferable for the Commission to make an explicit

statement to this effect.

Consistent with its discussion of like product issues, the Commission's assessment of the conditions of competition, the condition of the domestic industry, and the effects of imports on the industry were made entirely on a consolidated basis, without reference to any segmentation in the corrosion-resistant market. Although the agency's discussion of its price analysis was "sector-sensitive" in the sense that it focused on the service center/distributor sector of the market, it is apparent that the Commission adopted this approach because price effects were more discernible there. See Final Determination at 190. We are satisfied, therefore, that it was within the Commission's discretion to conduct such an analysis and that its doing so did not amount to a finding that a segmented market existed.

Similarly, the Commission made one distinction among products in its analysis of the impact of imports on the domestic industry. This was in response to the Complainants' argument that, because the domestic industry did not produce a number of so-called "niche" products, there was no competition between the imports and domestic products. The Commission addressed this point by noting that there was in fact significant domestic production of such niche products. Id. at 192.

In short, the Panel finds that the Commission did not find that the corrosion-resistant steel market was segmented. Complainants also argue that the dumping statute requires the Commission to analyze import volume and price effects within the context of the conditions of competition distinctive to the individual "segments" of the domestic industry. See 19 U.S.C. § 1677(C)(iii). Because the Panel concludes that the Commission did not find the corrosion-resistant steel industry to be segmented, the Panel determines that it is not necessary to address Complainants' claims regarding whether the Commission properly analyzed the volume and price effects of the

imports.

B. Import Volume

Complainants argue that the Commission erred in finding that the volume of subject imports during the POI was significant, within the meaning of the dumping statute, because the imports' increased market share was concentrated in the precision-engineered market sector. According to Complainants, the Commission also failed to take into account the limited production capacity of the domestic industry "qualified" to produce certain precision-engineered products and that, as a consequence, imports did not displace domestic shipments.

The dumping statute requires the Commission to consider "the volume of imports of the merchandise which is the subject of the investigation." 19 U.S.C. § 1677(7)(B)(i). In evaluating the volume of imports of the subject merchandise, the Commission "shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(B)(ii). The Commission is required to "explain its analysis" of whether the volume of imports is significant. See 19 U.S.C. § 1677(7)(B)(i).

The Commission found that the cumulated volume of the subject imports was significant. Although the Commissioners comprising the majority considered different combinations of countries in their cumulative analyses, the increases in the volume and market share of the cumulated imports considered by each Commissioner were readily apparent and generally increased throughout the POI. The volume of cumulated imports examined by each Commissioner increased absolutely; in each case imports declined from 1990 to 1991, but then increased in 1992 to levels well

above those of 1990. Final Determination at Table 96. The imports' share of the domestic market also increased during the POI, while the domestic producers' market share declined. Id. at Table 107.

Complainants argue that the Commission's finding that import volume was significant was not supported by substantial evidence because the Commission failed to take into account that the domestic market was segmented. As discussed above, the Commission did not find that the market was segmented. As required by statute, the Commission evaluated the volume effects and found them to be significant. The volume trends described by the Commission are readily discernible from the record. The Panel concludes that the record contains substantial evidence supporting the Commission's finding that the volume of subject imports during the POI was significant.

C. Price Effects

Complainants claim that the Commission's pricing analysis is not supported by substantial evidence or otherwise in accordance with law. Complainants argue that the Commission's price effects findings are illogical and contradictory when viewed in light of record evidence of certain conditions of competition in the domestic industry.

Complainants contend that the Commission erred in finding that domestic producers were forced by low-priced imports to engage in deep discounting to win sales. The Commission concluded:

> The domestic industry appears to be in a position of "catch-up" with the imports in this market, as they try to expand their shipments to use the additional capacity which has come on line in recent years. Because of the relative insensitivity of the market to price, the industry is in the difficult position of trying to capture market share from the dumped and subsidized imports in a situation in which simply offering competitive prices is unlikely

> to have much effect. Deep discounting from the prices of the dumped and subsidized imports are the domestic industry's only recourse to capture the market share needed.

Final Determination at 189. Complainants attack the Commission's discounting finding, claiming primarily that the domestic producers did not have production capacity sufficient to meet demand for certain precision-engineered application steels. Under these circumstances, Complainants contend, no amount of discounting could allow domestic producers to win sales back from imports.

As discussed above, the Commission did not perform a segmented-market analysis of price effects and was not required to do so.[6] Thus, the only question is whether substantial evidence exists to support a finding that deep discounting took place.

Both the Commission and Respondents point to affidavit evidence to the effect that purchasers commonly used existing relations with steel suppliers as leverage against domestic producers to negotiate lower prices. See, e.g., Respondents' Posthearing Brief, Vol. 5 at Exh. 17 (conf. vers.), Admin. Doc. 199 (List 2). The affidavits attest to a number of instances in which domestic producers were forced to discount their prices for corrosion-resistant products below the prices of imports. See, e.g., Respondents' Posthearing Brief, Vol. 5 at Exh. 19 (conf. vers.), Admin. Doc. 199 (List 2) and Exh. 18 (conf. vers.), Admin. Doc. 124 (List 2). This evidence supports the Commission's finding that the domestic producers engaged in discounting to win sales. The Panel must accord substantial deference to the Commission's findings, and the ultimate question is "whether there was [record] evidence which could reasonably lead to the Commission's conclusion."

[6] To the extent that the Commission's discussion of its price analysis focused on the service center/distributor sector of the market, it did so because price effects were more discernible there. Accordingly, we conclude that it was within the Commission's discretion to adopt such an analysis and that its doing so did not constitute a finding of market segmentation.

Matsushita Elec. Ind. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984). Although the evidence is not overwhelming, the Panel finds that the record contains evidence to support the Commission's determination.

The Panel finds no inconsistency between the Commission's conclusion that the market for corrosion-resistant steel was "relatively insensitive to price" and its findings with respect to discounting by the domestic industry. Complainants reason that sellers would engage in discounting only where the market is sensitive to price changes. Although customers apparently did not readily switch suppliers merely because of a price advantage, the Commission found that price was not unimportant. Final Determination at 190. Indeed, customers considered price the second most critical factor, next to quality, in their purchasing decisions. Id. at n.230. This suggests that price discounting to dislodge established suppliers was a logical competitive tactic. Further, the fact that purchasers did not readily switch suppliers lends support for the finding that deep discounts were required to win sales. In short, the Commission's discounting theory is supported by substantial evidence and is not in conflict with other record evidence or the Commission's other findings.

In explaining its finding that the domestic market was relatively price-insensitive, the Commission stated that "price changes are not likely to cause shifts in volume in the short term." Id. at 189. This follows from the finding that "[p]urchasers typically maintain a few approved suppliers and do not readily switch suppliers from order to order because of a lower quoted price or for any other single factor." Id. at 169. Although purchasers apparently required significant enticements to switch suppliers, the Commission nonetheless noted that "[o]ur finding of the relative price insensitivity of the market does not mean that the prices of the [subject] imports are having no effect." Id. at 189. Evidence of record demonstrated that purchasers did shift suppliers, and that price was

a factor, if not the most important factor, in many of these shifts.

Complainants also challenge the Commission's finding with respect to underselling by imports. Complainants do not claim that underselling did not occur, but that it was limited to products outside the automotive sector of the market. Because incidents of underselling did not predominate across the "precision-engineered" sector of the market, Complainants urge, the Commission's finding that underselling was significant is not supported by substantial evidence. In addition, Complainants argue that this determination must be set aside because the Commission found underselling not to be significant in its investigation of cold-rolled steel imports during the same period.

In discussing its findings with respect to overselling and underselling, the Commission stated that

> [a] mixed pattern of underselling and overselling is observed, with a greater number of instances overall of overselling by the subject imports however, particularly in the sales to distributors/service centers, there was generally a higher percentage of underselling. . . . we found the underselling present to be significant. Further, we find the existence of overselling, in and of itself, not determinative of whether the cumulated imports contributed to the decline or otherwise suppressed or depressed domestic prices.

Final Determination at 190 (footnotes omitted).

With respect to Complainants' challenge to the Commission's underselling findings, it is well-established that there is no statutory yardstick for measuring the "significance" of underselling. The Commission is required to determine on a case-by-case basis the effects of underselling on the domestic producers involved in each investigation. In addressing this specific issue, the CIT has recognized that "Congress chose to give the ITC broad discretion in analyzing and

assessing the significance of the evidence on price undercutting." Copperweld Corp. v. United States, 682 F. Supp. 5521, 565 (Ct. Int'l Trade 1988); cf. S. Rep. 249, 96th Cong., 1st Sess. 88 (1979)("the significance of a particular factor is for the ITC to decide"). The Commission having considered the record and determined that underselling in one sector was significant, and having supported its conclusions regarding the effects of imports on pricing, this Panel may not second-guess the Commission or re-weigh the evidence. See Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int'l Trade 1989).

Moreover, there is no requirement that the Commission reach the same conclusion with respect to incidents of underselling as it did in its investigation of the cold-rolled steel industry. Commission determinations are sui generis; each investigation is performed on a case-by-case basis and is based on the particular record developed therein. See, e.g., Citrosuco Paulista, 704 F. Supp. 1075, 1087-88 (Ct. Int'l Trade 1988). Contrary to Complainants' contention, it is of no moment that the Commission found underselling to be significant in the corrosion-resistant industry but not in the unrelated cold-rolled industry. Cf. Maine Potato Council v. United States, 613 F. Supp. 1237, 1244 n.7 (Ct. Int'l Trade 1985). The determination in this investigation was based on an entirely different record and the Commission is under no obligation to render factual findings consistently in separate investigations.

Complainants further attack the Commission's findings that prices for corrosion-resistant steel in the domestic market were suppressed or depressed, claiming these findings to be unsupported by substantial evidence in the record. Complainants argue that the Commission has offered only post hoc argument of counsel to defend its price effects analysis and has impermissibly compared weighted-average price data for all cumulated imports, instead of comparing domestic

prices to the prices reported for imports from each of the individual countries. Further, complainants argue that record evidence does not support a finding that import prices declined faster than domestic prices or that imports were price leaders.

> Regarding price trends, the Commission stated:
>
> > We found discernible patterns of price movements throughout the period of investigation which show price suppression and/or price depression in a significant number of instances. Generally, most import prices fluctuated somewhat, but trended downward during the period of investigation. The domestic prices similarly tended to trend downward during the period examined. We found that the imported prices fell in a substantial number of instances, at a greater rate overall than the domestic product.

Final Determination at 191. The Commission's brief points to record evidence supporting its finding that for the majority of products for which comparisons could be made, prices of both imports and domestic products declined during the POI, and import prices fell at a greater rate. The Commission identified this trend in both the end-user/manufacturer and service center/distributor sectors. The Commission's analysis compares domestic prices with the weighted average prices for imports as cumulated by the various Commissioners.

Complainants offer their own data to contradict the Commission's findings and demonstrate that for the most part import prices did not decline faster than domestic prices. Complainants perform a country-by-country comparison with domestic prices rather than employing a cumulated analysis. This, they claim, is both more accurate and comports with Commission practice. Complainants' price comparisons also use only data where import and domestic prices can be compared over at least 10 months. Complainants argue that the Commission's use of all available

pricing data in its comparisons skews the results.

The Panel finds that the Commission's finding that prices, led by imports, declined during the POI is supported by the evidence of record. It is the Commission's role to weigh the evidence of record and to choose the methodology by which it analyzes that evidence. See Metallverken Nederland, 728 F. Supp. at 734. The data used by the Commission indicate the trend noted in the Final Determination of overall price declines by both imports and domestic products. Data further reflect that import prices declined at a greater rate than did domestic prices. This evidence comports with the Commission's findings.

The methodology used by the Commission was reasonable. Contrary to Complainants' argument, the agency did not employ an impermissible methodology that ignored the fact that the Commissioners did not all use the same group of countries in their cumulation analyses. Rather, the Commission provided separate analyses for the groupings used by each of the Commissioners. Further, it is not apparent that the Commission used a novel methodology that would require an explanation on the record. The Panel finds that the balance of Complainants' arguments concerning the Commission's pricing analysis are insufficient to set aside the Commission's determination.

Because the Panel finds the Commission's pricing effects analysis to be adequately supported by evidence on the record (although hardly a model of clarity), it need not address Complainants' argument that volume effects alone cannot support an affirmative injury finding.

Last, Complainants argue that the Commission's determination is flawed because it makes no specific finding of material injury. The Panel finds that Complainants' claim is contradicted by the record. The introductory sentence of the Commission's determination states that

> Based on the information obtained in these final investigations, we determine that the industry in the United States producing corrosion-resistant steel, other than clad plate, is materially injured by reason of less than fair value (LTFV) and subsidized imports from Australia, Canada, France, Germany, Japan and Korea.

Final Determination at 161. By this language the Commission clearly expressed its determination that the domestic industry was materially injured by reason of the subject imports. The Panel therefore agrees with the Commission that its affirmative material injury finding is adequately reflected in the record.

CONCLUSION AND ORDER

The Panel concludes that the Commission's affirmative material injury determination with respect to dumped imports of flat-rolled, corrosion-resistant carbon steel products from Canada is supported by substantial evidence in the administrative record and is otherwise in accordance with law. Accordingly, the Panel affirms the Commission's determination. The U.S. Secretary of the NAFTA Secretariat is hereby directed to issue a Notice of Final Panel Action on the 11th day following the issuance of this Decision.

SO ORDERED.

SIGNED IN THE ORIGINAL BY:

JOHN M. PETERSON
John M. Peterson

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