
I. INTRODUCTION

On May 6, 2005 Complainant Dofasco, Inc. filed a Notice of Motion under Rule 76(1) of the Article 1904 Panel Rules which Rule permits a request that a "...panel re-examine its decision for the purpose of correcting an accidental oversight, inaccuracy or omission..." The alleged omission is the failure of the Panel to comply, in its April 29, 2005 Order, with the requirement of Rule 72. Rule 72 states that when a panel issues a decision, it "... shall issue a written decision with reasons..." for its decision.

The Panel does not consider that its Order of April 29, 2005 is within the purview of Rule 76(1) as an accidental oversight, inaccuracy or omission. The Panel notes that it fully articulated its position regarding the issues underlying this proceeding in its October 19, 2004 Order of Remand and affirmed the Commission's Remand Determination in its Order of April 29, 2005. Nevertheless, in the interest of clarity, the Panel on May 12, 2005 issued an Order indicating it would "provide a Panel Order with explanation not later than May 20, 2005" and directed the U.S. Secretary to withhold the issuance of a Notice of Final Panel Action until further directed by the Panel.

II. ORDER

Accordingly, the Panel affirms the Remand Determination of the International Trade Commission and herein discusses the reasons for its decision. The U.S. Secretary is hereby directed to issue a Notice of Final Panel Action on the eleventh day following the issuance of this Decision.

III. DISCUSSION

A. Panel Opinion on Cumulation Determination in Light of High Capacity

Utilization Rates

1. Panel Remand of Oct. 19, 2004

In its Opinion of October 19, 2004, the Panel determined that the Commission’s decision to cumulate Canadian imports, in light of its consideration of the high capacity utilization rates in Canada, was unsupported by substantial evidence in the record. The Panel remanded the case to the Commission stating that:

If it still wishes to cumulate Canadian corrosion resistant steel products, the Commission must sufficiently explain and articulate – consistent with this opinion – the basis of its conclusion as to whether, in light of the high capacity utilization rates prevalent in Canada during the period of review, there exists substantial evidence in the record upon which to base the Commission’s determination that there was available excess capacity in Canada sufficient to lead to an increase in imports having a discernable adverse impact upon the domestic industry if the antidumping order were to be revoked.¹

2. Remand Determination of Dec. 3, 2004

a. International Trade Commission

On December 3, 2004, the Commission submitted its Views of the International Trade Commission on Remand (hereinafter cited as “Remand Determination”). The Commission stated that it based its determination on cumulation on a number of factors evidenced in the record. The Commission determined that, even if Canadian imports were to have remained stable, there was evidence in the record to demonstrate that Canadian imports would have a discernible adverse impact upon the domestic industry. The factors

¹ Remand Opinion of the Panel, October 19, 2004 (hereinafter cited as “Panel Opinion”), at 41.

cited by the Commission included the substantial volume of Canadian shipments into the U.S. market, consistent pricing below domestic prices, relatively significant share of the U.S. market, interchangeability of the Canadian and domestic market, maintenance of contacts with U.S. customers and channels of distribution into the U.S. market, and evidence of aggressive marketing into the U.S. market.²

The Commission, however, went further by determining that there was additional evidence in the record to indicate that Canadian imports would likely increase if the order was revoked. The Commission found that the Canadian producers already had substantial production capacity and that they were expected to increase their capacity beyond current levels. The Commission pointed out the importance of the U.S. market for Canadian producers.³ In addition, the Commission referenced evidence in the record to suggest that Canadian domestic demand was likely to decline, leaving additional capacity for production for sales to the U.S. market.⁴

In specific response to the issue of high capacity utilization rates referenced in the Panel's Remand Opinion, the Commission determined that the Canadians did have excess capacity during much of the period of review and that there was evidence on the record to indicate that the Canadians were increasing their capacity during 2000.⁵

b. Complainant Dofasco's Opposition of Jan. 5, 2005

On January 5, 2005, Complainant Dofasco submitted its Brief of Complainant Dofasco Inc. in Opposition to the Commission's Determination on Remand (hereinafter

² Remand Determination at 6-7.

³ *Id.* at 8.

⁴ *Id.* at 9.

⁵ *Id.* at 8.

cited as “Dofasco Opposition Brief”). Complainant argued that all of the new capacity to be added had been added during 1999 and the first quarter of 2000. The primary evidence in the record cited by Complainant was a change in the report of the Commission staff on Canadian capacity from “[Dofasco] will be adding capacity of *** tons this year” to “[Dofasco] added capacity of *** tons this year.”⁶

Complainant made additional arguments based on references to the record in opposition to the Commission’s conclusions on aggressive marketing and price underselling. The Panel finds these arguments to be unpersuasive and not sufficient to undercut the conclusion that the Commission’s determination was based upon substantial evidence in the record.

c. Commission Response of Feb.7, 2005

On February 7, 2005, the Commission submitted its Response by the U.S. International Trade Commission to Complainant’s Brief in Opposition to Remand Determination (hereinafter cited as “Commission Response Brief”). The Commission made extensive references to the record evidence submitted by Dofasco itself in support of the conclusion that some non-insignificant portion of the increase capacity came on line after the first quarter of 2000.⁷ The Commission also pointed out the obvious fact that the change in the Staff Report to reference capacity added in the past reflects the fact the report was written in November, well after the end of the first quarter of 2000. The Panel determines that the Commission Response Brief served to strengthen its conclusion that the finding of

⁶ Dofasco Opposition Brief at 2-3.

⁷ Commission Response Brief at 10-13.

discernable impact, given the condition of capacity utilization within the Canadian industry, was supported by substantial evidence in the record.

The Commission Response Brief also included additional references to the record in support of the Commission’s conclusions with respect to the weakening of demand in the Canadian market, the aggressive marketing in the U.S. market, and the selling of Canadian product below the price of domestic producers.⁸

d. Response of U.S. Steel of Feb. 7, 2005

On February 7, 2005, the United States Steel Corporation submitted Rebuttal Comments of United States Steel Corporation Regarding the Remand Determination of the U. S. International Trade Commission (hereinafter cited as “U.S. Steel Response Brief”). The U.S. Steel Rebuttal Comments contained arguments in support of the Commission’s conclusions on the likely increase in Canadian exports, aggressive marketing, and price underselling, with references to evidence on the record. In the view of the Panel, the U.S. Steel Rebuttal brief supports the conclusion that the determination of the Commission was supported by substantial evidence in the record.⁹

3. Motion by Complainant of Feb. 15, 2005 for Leave to Reply

Following the submission of the Commission and U.S. Steel Response Briefs, Complainant filed Motion for Immediate Remand, or in the Alternative, for Leave to Reply (hereinafter cited as “Complainant’s Motion”) on Feb. 15, 2005. Complainant argued that

⁸ Commission Response Brief at 14-16 and 21-29.

⁹ In addition, the U.S. Steel Response Brief included a discussion of two decisions relating to the same affirmative injury determination as is involved in this panel review with respect to corrosion resistant steel imported from France and Germany. These cases are addressed in a subsequent section of this panel opinion.

the Commission in its Response Brief had argued, for the first time, “that Dofasco’s new capacity could not have been fully reflected in its 1999 and first quarter 2000 data, because the data reported in Dofasco’s questionnaire response did not add up to [] tons of total new capacity to which Dofasco referred in the hearing in the original administrative proceeding.”¹⁰

In its Order of March 29, 2005, the Panel “in the interest of a just review” granted Complainant the opportunity “to submit a brief for the limited purpose of explaining from the existing record why the Commission’s finding regarding unused production capacity is, as Complainant has alleged, inconsistent with the record evidence.” It also gave the Commission and U.S. Steel opportunities to respond.

a. Complainant’s Brief of March 31, 2005

On March 31, 2005, the Complainant submitted its Brief of Complainant Dofasco Inc. in Response to the Panel’s March 29, 2005 Order (hereinafter cited as the “Supplemental Brief of Complainant”). Complainant argued that the discrepancy in the amount of capacity for the “subject merchandise” and the total increased capacity to be added to Canadian production, was accounted by the increase in capacity for “non-subject merchandise” (i.e. alloy corrosion resistant steel) that was also added in 1999/2000.¹¹ Reference was made by Complainant to written and oral statements in the record relating to capacity of Canadian producers to produce both the subject and non-subject merchandise. Furthermore, Complainant argued that when a witness for the Canadian producers stated that all [] tons of capacity were included in the questionnaire response,

¹⁰ Complainant’s Motion at 2.

¹¹ Supplemental Brief of Complainant at 3-6.

he “was referring to the proportion of the [] total of [] that is subject merchandise (as opposed to non-subject alloy corrosion-resistant steel).”

b. ITC’s Response of April 11, 2005

On April 11, 2005, the Commission submitted its Response by the International Trade Commission to Complainant’s Brief in Response to the Panel’s March 29, 2005 Order (hereinafter cited as “Panel Order Response Brief”). The Commission made several arguments in further support of its determination that excess capacity came on line after the first quarter of 2004. These included a reference to statements made in the Dofasco’s questionnaire response to the effect that the [] line was in a “ramp-up” stage during the first quarter of 2000.¹² Furthermore, the Commission pointed out that all of the increased capacity could be applied to the production of both subject and non-subject merchandise. Moreover, Complainant’s questionnaire response indicated that the conversion of the line from subject to non-subject and the reverse was easily accomplished.¹³

c. U.S. Steel Response of April 12, 2005

On April 12, 2004, U.S. Steel submitted its revised Rebuttal Comments of the United States Steel Corporation Regarding the Response Filed by Dofasco, Inc. to the Panel’s Order of March 29, 2005 (hereinafter cited as “U.S. Steel Response to Panel Order”). In its submission, U.S. Steel also made reference to statements by the Complainant indicating that not all of the increased capacity to produce the subject merchandise was in place by the end of the first quarter of 2000.¹⁴ U.S. Steel also included an analysis of the ratios between the

¹² Panel Order Response Brief at 6.

¹³ *Id.* at 8.

¹⁴ U.S. Steel Response to Panel Order at 3 and 5-6.

production of subject and non-subject merchandise during the period of review, noting that a relatively significant modification in such ratios would have had to have taken place at the time the new capacity was on line to support the Complainant's allegation that all increase capacity for subject merchandise was on line by the end of the first quarter of 2000.

4. Panel Decision and Discussion

a. Remand Determination

The Panel notes that inherent in any Sunset Review is the question of what changes in the level of exports will occur if the order is terminated. Thus the issue of changes in capacity of the respondent producers is always a factor for consideration for the Commission as was the case in the underlying investigation that is the subject of this panel review. Much of the Complainant's argument rests on the Staff Report which was based upon evidence furnished by Complainant regarding levels of capacity both during the period of review and subsequent thereto. Any evidence in the underlying investigation that was considered by the Commission was available to Complainant and was submitted by Complainant. If there was further evidence to demonstrate that all increases in capacity had occurred by the end of the first quarter of 2000, it should have been submitted by Complainant during the investigation. Furthermore, if there were written or oral statements made by the Complainant that undercut this conclusion, as there was in this investigation, Complainant also had the opportunity to interpret such statements in support of its position during the investigation.

Furthermore, Complainant alleges that during the panel review itself, the Commission did not raise the issue until its response to the Complainant's Response Brief.

This, however, does not appear to be the case. In its Remand Determination, filed on December 3, 2004, the Commission explicitly stated:

Nevertheless, the record indicates that subject imports from Canada likely would increase if the order was revoked. The Canadian producers have substantial production capacity, similar to the capacity they had at the time of the original investigation when they more than doubled their exports to the United States.¹⁵ According to the record, Canadian producers planned to increase their capacity by an additional * short tons in 2000, an increase of *** percent. Thus, it is likely that Canadian producers would have excess production capacity despite relatively high capacity utilization rates between 1997 and 1999.¹⁶**

The issue was clearly raised in the Remand Determination of the Commission filed in December 3, 2005. What may have been new in the Commission's submission was additional evidence from the record (i.e. the portion of the new capacity that came into operation before and after the first quarter of 2000) in support of its consistent position that additional Canadian production capacity came on line after the first quarter.

Complainant had ample opportunity to respond to the arguments raised in the December 3, 2004 Remand Determination of the Commission when it filed its Opposition Brief on January 5, 2005, over a month later. More specifically, Complainant was on notice regarding the Commission's argument and Complainant had the opportunity to cite any and all evidence that supported its allegation that all increased capacity was in place by the end of the first quarter of 2000. Furthermore, Complainant had the opportunity to "interpret" any evidence that could be construed to undercut its argument, knowing that the Commission was likely to reference additional evidence in the record in its subsequent

¹⁵ At this point, the Remand Determination cites Memorandum INV-X-232 that amended the staff report on Canadian capacity that is the focus of the Complainant's argument.

¹⁶ Remand Determination at 7.

Response Brief to support its view, given the importance the Complainant attributed to the capacity argument in its Opposition Brief.

b. Complainant's Motion for Leave to Reply

The Panel agreed to provide the Complainant with a further opportunity to provide argument and evidence on the record in support of its position on the increase in capacity in order to provide all Parties full opportunity to submit its views on the Commission's discernible impact determination. However, in the view of the Panel, the arguments of the Complainant do not constitute substantial evidence to demonstrate with any degree of assurance that all capacity to produce subject merchandise was in place by the end of the first quarter of 2000. While Complainant offered various post-hoc interpretations of testimony which was heard during the Commission's hearing in this case, such interpretations do not, in the view of the Panel, constitute substantial evidence which undercut the Commission's findings.

It is the decision of the Panel that, for the reasons stated herein, the determination of the Commission that there would exist increased capacity in Canada to produce and ship corrosion resistant steel to the

United States following the period of review was supported by substantial evidence in the record and was otherwise in accordance with law. Furthermore, the Panel determines that, based upon all of the factors considered by the Commission in making its discernible adverse impact/cumulation determination, including the trends in capacity utilization, such

determination was supported by substantial evidence in the record and was otherwise in accordance with U.S. law.

Pursuant to NAFTA Article 1904(2), the Panel is required to review whether the determination of the investigating authority:

was in accordance with the antidumping or countervailing duty law of the importing country. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

In this regard, the Panel notes that its final opinion in this case is supported by the opinion of the of the U.S. Court of International Trade (“CIT”) in its remand review of the corrosion-resistant steel injury determination applicable to imports from France and Germany.¹⁷ In that case, French and German producers petitioned the CIT for a review of the injury determination claiming--as with the Canadian producers in this review--that the high capacity utilization rates in those countries precluded the Commission from finding that the revocation of the order would lead to an increase in exports to the United States.¹⁸ The Court originally concluded that, in light of the high capacity utilization rates in France and Germany, the Commission’s decision to cumulate imports was unsupported by substantial evidence in the record. The court remanded the case back to the Commission to properly address the data, including a greater discussion of its reasoning.

¹⁷ Usinor Industeel, S.A. v. US, Consul. Ct , No. 01-00010 Slip Op. 02-70 (CIT July 19, 2002).

¹⁸ It should be noted that in the case of producers in one of these countries, the capacity utilization percentage figures were higher than those in the case of Canadian producers. In addition, the volume of imports from Canada was higher than the volume of imports from France or Mexico.

The Commission filed its brief on remand using arguments similar to those offered by the Commission in its submissions before this Panel. The CIT in its remand opinion upheld the determination of the Commission to cumulate imports of corrosion-resistant steel from both France and Germany under circumstances similar to those in the present case, notwithstanding the relatively high capacity utilization levels in those countries.¹⁹

Thus, for the reasons set forth above, the Panel decides that the International Trade Commission's Remand Determination is AFFIRMED with respect to its determination to cumulate based in part upon its finding that there was available excess capacity in Canada sufficient to lead to an increase in imports having a discernible adverse impact upon the domestic industry if the antidumping order were revoked.

B. The Commission's Vulnerability Analysis on Remand

1. Remand by Panel

On October 19, 2004, this Panel remanded back to the Commission its vulnerability finding. This Panel was concerned that the wording utilized by the Commission in explaining its vulnerability finding created uncertainty as to whether the Commission was focused on the corrosion resistant or broader steel industry.²⁰ Specifically, this Panel stated:

If the Commission still chooses to find that the Domestic Industry is in a vulnerable or weakened state, the Commission must sufficiently explain and articulate –consistent with this opinion–the basis of its

¹⁹ Usinor Industeel, S.A. v. US, No. 01-00010, Slip Op. 04-65 (Ct. Int'l Trade, June 9, 2004)

²⁰ Panel Opinion at 41

conclusions as to whether the Commission's analysis of the impact of Canadian imports involves the profits of the domestic corrosion-resistant steel industry or those of the broader steel industry, and the impact of the profit analysis upon the Commission's affirmative vulnerability determination regarding the domestic corrosion-steel industry.²¹

2. Remand Determination

Upon remand, the Commission explained that its "profit center" finding was an attempt to explain that profits were crucial to the corrosion resistant steel industry being competitive and staying in business. However, it agreed that the wording in question created the impression, albeit erroneous, that the Commission considered the "ripple effect" of the likely impact of subject imports on the entire steel industry. The Commission modified its profit center finding and revised its vulnerability analysis. It emphasized that it based its analysis on the record facts pertaining to the corrosion-resistant steel industry.²²

The Commission reconsidered its likely impact determination confirming that cumulated subject imports would likely have a significant adverse impact on the domestic industry within a reasonably foreseeable time. The Commission found that the increasing volume of lower priced subject imports and their significant market share depressed prices and negatively affected the domestic industry with respect to market share, capacity utilization, financial position and research and development expenditures. It further found that that the imposition of the orders had a positive effect on the domestic industry's performance increasing profit margins, as well as research and development expenditures.²³

²¹ *Id* at 42.

²² Remand Determination, at 11

²³ Remand Determination, at 12

Notwithstanding some improvement, the Commission found that the most recent data suggested that the domestic industry was vulnerable to material injury if the orders were revoked. The Commission noted that even though there was an increase in net sales quantities and values between 1997-1999, industry unit value sales decreased sharply resulting in corresponding declines in operating income and capacity utilization levels. The Commission, looking at comparables into the year 2000, noted that the decline in capital expenditures was consistent with the decline of key financial factors, including unit net sales values, operating income, and operating income margins.²⁴

The Commission concluded that the domestic industry was in a “weakened” state and that the revocation of the order would likely lead to significant cumulated subject import volume increases at prices which would undersell the domestic like product causing significant price depression and the further erosion of the domestic like product’s market share. It reasoned that this price and volume decline would have a significant adverse impact on the domestic industry’s production, shipment, sales, and revenue levels which would negatively impact profitability, employment levels, ability to raise capital and maintain necessary capital investments.²⁵

3. Contentions of the Parties

a. Complainant Dofasco

Dofasco argued that that the Commission’s vulnerability finding remains unsupported by substantial evidence. It argued that the Remand Determination fails to

²⁴ *Id.*, at 12-13.

²⁵ *Id.*, at 14.

comply with the Panel's instructions, contradicts its earlier findings and is speculative. Moreover, it argues that the Remand Determination does not adequately deal with contradictory evidence.²⁶

Dofasco asserts that the Remand Determination does not comply with the Panel's instructions in that it fails to analyze the impact of the profit analysis upon the affirmative vulnerability determination. The Complainant contends that the Commission does not even attempt to distinguish whether its analysis of the impact of imports involves the profits of the corrosion-resistant steel industry or those of the broader steel industry. Dofasco argues that the Commission's only discussion of vulnerability in the context of the impact of the Canadian exports is conclusory and the vulnerability finding is made within the context of cumulated imports, without specific reference to Canada.²⁷

Dofasco also argues that the Remand Determination contradicts the Commission's earlier characterization of the domestic industry's profits and is unsupported by substantial evidence. Dofasco contends that this allegedly results-driven analysis attempts to dismiss the operating margin figure by arguing that industry profits dropped from similar levels a decade ago. It argues that the Commission should be estopped from taking a position in its Remand Determination that is inconsistent with its original determination. In any event, it argues that this position is not supported by substantial evidence because the Commission failed to take into account contradictory evidence. Dofasco also argues that the Commission's new position on profit margins is entirely speculative. Dofasco contends that

²⁶ Dofasco Opposition Brief, *supra* note 6.

²⁷ *Id.*, at 12-13.

the Commission’s implication that an otherwise healthy profit margin could decline in the face of import competition is without foundation.²⁸

Dofasco contends that the Remand Determination fails to adequately consider the contrary evidence. It contends that the Commission “cherry-picks” data with respect to capital expenditures and other key financial indicators. Complainant reasons that by ignoring other factors which show improvement, the Commission mischaracterizes the condition of the domestic industry.²⁹

Dofasco argues that there is no explanation in the Remand Determination addressing why the cited negative trends are more probative of the domestic industry’s health than the uncited positive trends. Dofasco insists that it is not requesting that the evidence be reweighed, but rather that the Panel find positive evidence that the Commission actually weighed all the probative evidence, rather than selectively considered data.³⁰

b. ITC Response

In its Response Brief, the Commission argued that its Remand Determination was compliant with the Panel’s remand instructions. It argued that the confusing language was addressed and that the vulnerability analysis was based solely on the facts pertaining to the corrosion-resistant industry.

The Commission argued that it again examined the relevant data pertaining to the industry’s condition. It argues that it noted, for the period of 1997-1999, the industry’s net

²⁸ Dofasco Brief, at 14-16.

²⁹ Dofasco brief, at 16-18

³⁰ Dofasco Brief, at 19

sales volumes and values, operating income capacity utilization and operating profits. It responded to the concern of an ostensibly healthy operating profit margin by explaining that in the context of a capital intensive industry, this level would not protect the domestic industry from import competition following revocation, as occurred in the past.

The Commission argued that Dofasco's challenges to the vulnerability analysis are unfounded. It noted that the CIT in Usinor³¹ sustained the Commission's finding that the corrosion resistant industry was vulnerable to material injury from subject imports if the orders were revoked. The Commission argues that its discussion of operating income trends, in its vulnerability analysis, was reasonable and consistent with record evidence. It asserts that the Dofasco's estoppel argument is meritless. It argued that the operating margin would not protect the domestic industry from import competition upon revocation because the record indicates that the critical conditions of competition have remained essentially the same between the original period of investigation and the review period. The Commission noted that the industry remains capital intensive, price remains an important determinant in the purchasing decision, substitutability remains high between imports and the domestic product, and that there is an increasing demand for corrosion-resistant steel.³²

The Commission argues that its vulnerability analysis considered all the pertinent evidence. It argues that Dofasco's arguments on this point ignore the Commission's findings or simply present alternate approaches to analyzing the record evidence. The Commission contends that Dofasco's arguments relating to capital expenditures are nothing more than Dofasco's interpretation of the evidence which, even if reasonable, would not undermine the

³¹ Usinor Industeel, S.A. v. US , No. 01-00010 Slip Op. 02-70 (CIT July 19, 2002)

³² Commission Response Brief at 29-36.

Commission's determination. The Commission argues that it is entitled to adopt a reasonable methodology as a means of performing the statutorily required analysis and as such its decision to examine capital expenditures as a measure of vulnerability is not only reasonable, but preferable to Dofasco's proposed alternative. The Commission also contends that it was reasonable for it not to place great weight on the research and development figures because they only accounted for a small fraction of overall operations. Finally, the Commission argues that Dofasco's sales trends argument is without merit because once the sales trends are placed into context, it is obvious that the Commission need not cite every sales trend. ³³

The Commission argues that this Panel should not reverse the Remand Determination. It contends that a court reviewing an agency should, except in exceptional circumstances, remand back to the agency for corrective action. It reasons that while a reversal might be permissible in rare circumstances, it is not generally an appropriate response by a Panel reviewing an agency. It argues that even if reversal was a legally permitted option, it is not warranted in the circumstances because the Remand Determination was compliant with the Panel's remand instructions. ³⁴

³³ Commission Response Brief at 36-40

³⁴ Commission Response Brief, at 40-42.

c. U.S. Steel Response

US Steel argued that the Commission complied with the remand instructions and that Dofasco's arguments regarding the Commission's vulnerability finding are meritless. It contends that the Commission's analysis of the impact of Canadian imports clearly related to the corrosion resistant industry and not the broader steel industry. US Steel further contends that the vulnerability finding is not inconsistent with the original determination because the Commission never determined that the corrosion resistant industry needed higher margins to support other industries. It reasons that when all the evidence is considered, the vulnerability of the domestic industry is evident.

US Steel rejected Dofasco's attempts to characterize the ITC analysis as "cherry picking". It argues that the Commission considered the contradictory evidence and that the record evidence overwhelmingly supports the vulnerability finding. It contends that the Commission analyzed the relevant data which included industry unit value sales, operating income, operating profits, capacity utilization and capital expenditures. Furthermore, it argues that rather than seriously challenge the Commission's findings, Dofasco proffers alternate trends and indicia. It argues that the Commission's approach has been endorsed by the CIT in this set of reviews and should be similarly affirmed by this Panel.³⁵

Finally, US Steel argued that this Panel should not order the Commission to enter a negative determination. It contends that the only proper course for this Panel is to affirm the Commission's remand in full. It reasons that the normal remedy in administrative

³⁵ US Steel Response Brief, at 15-24.

proceedings is a remand and that any precedent to the contrary, cited by Dofasco, is distinguishable on the facts or not controlling.³⁶

4. Panel Decision and Discussion

In its original determination, the Commission found that the domestic corrosion-resistant industry was vulnerable to material injury from the subject imports upon the revocation of the orders.³⁷ This vulnerability finding was, in part, based on the Commission's finding that while the industry's level of operating income might not generally suggest vulnerability, corrosion-resistant products are an important profit center for the domestic industry.

This Panel found the wording in the Commission's vulnerability analysis to be problematic. This Panel noted that the Commission's wording in reference to the "profit center" left unclear whether the domestic industry referenced was the corrosion-resistant steel industry or the broader steel industry. As such, this Panel held that the language utilized cast doubt about the considerations that were made by the Commission.³⁸

In its Remand Determination, the Commission agreed that its "profit center" language created the impression that the Commission considered the "ripple effect" of the likely impact of subject imports on the broader steel industry. It therefore modified this finding and revised the vulnerability analysis accordingly. It also emphasized that it based its analysis on the record facts pertaining to the corrosion-resistant steel industry.³⁹

³⁶ US Steel Response Brief at 25-27.

³⁷ Commission Review Determination, at 85.

³⁸ Panel Opinion, at 39-41

³⁹ Remand Determination at 11

The Commission analyzed the data concluding that the domestic industry was vulnerable to material injury upon revocation of the orders. The Commission considered the domestic industry's increase in net sales volumes and values, along with its declining operating income, capacity utilization and operating profit margins for the period between 1997-1999.⁴⁰

The Commission also went on to explain that while initially the domestic industry's operating profit margins might appear healthy, the reality suggested otherwise. The Commission noted that as this was a capital intensive industry, it might not be protected by this level of operating profit margin in the circumstances of import competition resulting from the revocation of the orders. The Commission emphasized how operating profit margins dropped dramatically in the period between 1997-1999 and noted how operating profit margins almost disappeared during the original investigation.⁴¹

In consideration of the Commission's Remand Determination and the various contentions and arguments by the Complainant, the Panel finds that the Commission complied with its remand instructions. The Commission clarified that its analysis of imports involved the profits of the corrosion-resistant steel industry. Furthermore, the Commission explained that in the context of this particular domestic industry, the recorded profit margins were insufficient to insulate it from the import competition which would occur upon revocation.

⁴⁰ *Id.* at 12-13

⁴¹ *Id.* at 31-32

The applicable standard of review confines this Panel to upholding the Commission's determination when it is supported by substantial evidence and in accordance with law.⁴² Whether the Commission might have utilized different methodologies, or otherwise approached the evidence, is beyond the purview of this review. The deference owed to the Commission in such reviews requires that the Commission's choice of methodology be upheld if reasonable, and it precludes a reweighing of the evidence. Accordingly, this Panel **AFFIRMS** the Commission's vulnerability finding. As the Panel affirms the Commission, it does not reach the question of whether this Panel can, or should, reverse the Commission or order a negative entry.

SO ORDERED.

Signed in the original by:

Robert E. Lutz, II
Robert E. Lutz, II, Chairman

Serge Anissimoff (dissenting)

Daniel A. Pinkus
Daniel A. Pinkus

Nick Ranieri
Nick Ranieri

Mark R. Sandstrom
Mark R. Sandstrom

ISSUE DATE: May 20, 2005

⁴² See Panel Opinion, at 7-16.

Article 1904 Binational Panel Review
Pursuant to the
North American Free Trade Agreement

**IN THE MATTER OF:
CORROSION-RESISTANT
CARBON STEEL FLAT
PRODUCTS FROM
CANADA**

Full Sunset Review

Secretariat File No.
USA-CDA-00-1904-11

DISSENTING OPINION OF PANELIST SERGE ANISSIMOFF

I have not had the benefit of considering any written reasons of my fellow panelists in preparing my Dissent. I make reference to Part VII, Rule 72 of the Rules of Procedure for Article 1904, Binational Panel Reviews, requiring a Panel to issue “a written decision with reasons”. Insofar as I am aware, the Panel majority has chosen to conclude proceedings with an affirmation Order.

Two issues are presented for discussion, which were fully briefed by the participants.

ISSUE #1 – Cumulation of Canadian Imports

The Panel remanded the Commission's decision to cumulate Canadian imports as a finding unsupported by substantial evidence having regard to the high capacity utilization rates in Canada.

The Panel directed the Commission to sufficiently explain and articulate the basis of its conclusions as to whether, in light of the high capacity utilization rates prevalent in Canada during the period of review, there existed substantial evidence in the record upon which to base the Commission's determination that there was available excess capacity in Canada sufficient to lead to an increase in imports having a discernible adverse impact upon the domestic industry if the antidumping order was to be revoked.

The important factual context in deciding whether or not to cumulate Canadian imports, concerns the Commission's finding that the U.S. domestic industry was in a weakened or vulnerable condition.¹ As such, the Commission found that a likelihood existed "that even a small post revocation increase would have a discernible adverse impact on the domestic industry". As can be seen, the Commission's impact concern was not with existing Canadian imports. The impact concern was with the potential that Canadian imports would increase and damage a vulnerable industry.

¹ This issue is relevant to both the cumulation issue (#1) and the vulnerability issue (#2).

The high capacity utilization of the Canadian industry, of course, argues against the industry's ability to increase its exports into the United States. The Panel found that the Commission's finding of a likelihood of increase of Canadian imports was unsupported by substantial evidence. In fact, in its Remand Determination the Commission accepts the truth of this proposition saying "it is true that the high rates of capacity utilization may limit the ability of the Canadian industry to expand its sales to the United States through increased production"².

In responding to the Panel's direction, the Commission did not straightways address the question of high capacity utilization as that fact relates to the Canadian Industry's ability to increase exports. Instead, the Commission was of the opinion that Canadian imports at current levels could still have a discernible adverse impact on the domestic industry if the Order was revoked and so found. That finding, however, is not the remanded explanation that the Panel requested and accordingly that analysis and opinion by the Commission is not in response to any direction from the Panel and does not answer the Remand.

The Commission also sought to answer the Remand by referring to the unused capacity in Canada notwithstanding the reported high capacity utilization rates. Again, that analysis was not in response to any direction from the Panel, especially given that the Panel already determined that the mere availability of excess or unused capacity did not, in and of itself, lead to the conclusion that

² Remand Determination, Page 8.

Canadian producers would be able to increase production...referring to any such proposition as being rather simplistic.

In response, however, to the Panel's Remand direction, the Commission advanced for the very first time, the factual proposition that Canadian producers planned to increase their capacity by an additional [*****] short tons in 2000 (new capacity). In view of that finding, the Commission concluded that Canadian producers would have excess production capacity despite relatively high capacity utilization rates between 1997 and 1999. That was the centerpiece of the Commission's response to the Remand direction, which finding was vigorously opposed by the Complainant and supported as vigorously by counsel for the Commission and U.S. Steel, see *infra*.

It is important to pause and note that the claimed new capacity is in fact very large. Quantitatively, it compares directly to the existing level of exports from Canada which in 1999 stood at [*****] short tons. The finding of new capacity certainly takes the Complainant by surprise and obviously has the effect of conclusively establishing the likelihood of a discernible adverse impact. The Complainant challenges this key new finding saying it is plainly erroneous and unsupported by substantial evidence.

The Complainant states that the new capacity was already included in the capacity utilization figures provided for the period of investigation and there was

accordingly no new capacity left to come online in 2000. In particular the Complainant cites the amendment (November 1, 2000, Memorandum INV-X-232) which changed the language: “[*****] will be adding capacity of [*****] short tons this year...” to “[*****] added capacity of [*****] short tons this year...”.

The Complainant also referred, *inter alia*, to uncontradicted evidence given by a Dofasco witness concerning the inclusion of the new capacity on a filed questionnaire:

Question: Mr. Heffner did you include all of the 450,000 tons in your questionnaire?

Response: Mr. Martin; Yes, we did.

While elsewhere in this opinion³ I summarize in greater detail the various arguments made by the participants concerning this issue, the above evidence starkly challenges the Commission's key new finding of significant, available new Canadian capacity coming on stream in 2000.

Recalling that the Panel is not a fact finding body, I find nonetheless that there is no clear evidentiary underpinning for the Commission's new capacity finding. The available evidence in fact appears to support the Complainant's proposition that the new capacity was already included in the high capacity utilization figures.

³ Appendix A hereto, summarizes the post-Remand briefs of the participants. Appendix B hereto, summarizes the briefs filed pursuant to the Panel's Order on the Complainant's motion (new capacity).

Since the factual question of the availability of new capacity is both new and pivotal, I would remand this issue to the Commission to make appropriate findings of fact having regard to the arguments of the parties discussed *infra*.

On Remand, the Commission also found that Canadian demand was weakening, which factor would create an additional incentive to increase exports into the U.S.. The Commission referred with approval to the fact that the Panel found that the Canadian producers' contention regarding likely strong demand for subject goods in Canada was "refuted by the evidence on the record". With respect I find that the Commission misapprehends the Panel's finding for the following reasons.

The Complainant argued before the Commission against the likelihood of discernible adverse impact determination on, *inter alia*, the grounds that:

1. Canadian producers as a whole were operating at full capacity; and
2. Demand had skyrocketed in the Canadian market.

The Panel found that the Commission did not address any of these arguments in its determination. As such, the argument before the Panel by the parties' counsel with respect to the import of these issues was *post hoc* and no findings of fact were in any event made. In point of fact, the Panel went on to hold that the claims of full capacity and high demand did not represent a material argument or evidence which seriously undermined the reasoning of the conclusions of the

Commission and the Commission was therefore not required to address the arguments in its determination. I disagreed with the latter view expressed by the majority. However for present purposes the point must be made that the Panel did not find that the “Canadian producers contention” regarding likely strong demand in Canada is “refuted by the evidence on the record”.

Taking matters further, I do not understand how the Commission avoids the opposite view when referring to testimony of the Complainant’s own witness that “demand is forecast to grow, perhaps at a slower rate than currently” and refers to this fact as “evidence to the contrary”. This evidence, on its face, indicates that demand will in fact grow (year to year) meaning that the next year’s production will numerically exceed last year’s. The evidence also indicates the rate of growth will be slower than currently given. Thus this evidence is entirely consistent with the Complainant’s proposition of high demand for the subject goods in Canada.

Accordingly I find that the Commission’s finding that demand in Canada is weakening is not supported by substantial evidence and must in any event be qualified. The evidence is that the demand in Canada continues to increase and this fact is consistent with the Canadian producers arguments that they will be unable to increase exports to the United States because of this strong demand in Canada, which will consume of all of their production having regard to the high capacity utilization rates.

ISSUE #2 – Vulnerability of the U.S. Industry

The Panel found that the Commission's determination that the domestic industry was in a weakened state was unsupported by substantial evidence and not in accordance with law.

The Commission was directed to explain the basis of its conclusions as to whether the Commission's analysis of the impact of Canadian imports involved the profits of the domestic corrosion resistant steel industry or those of the broader steel industry. Bearing in mind that it would be nonsensical to find that the corrosion resistant products are an important profit center of the corrosion resistant steel industry, the Commission's "profit-center" view appeared to be clearly misdirected and contrary to law as discussed in the Panel's decision.

Recalling further that the Commission found that the existing level of operating income did not generally suggest vulnerability, we are left with the position that existing and apparently healthy levels of profit nonetheless are in respect of an industry which is vulnerable and in a weakened state. The reason now advanced by the Commission for the Industry's vulnerability is that the existing level of profits somehow impacts the ability of firms to remain in operation and to make necessary investments. Taking that view at face value, the industry would be perpetually vulnerable, simply because it depends, as any other industry does, on profit.

The Commission does seek to clarify its of vulnerability finding. It indicates that what it meant to say was that the down stream effect of the profit analysis impacts the ability of firms to remain in operation and to make the necessary investments. In that regard, I do not see any discussion or analysis of evidence supporting the proposition that the firms can somehow go out of business or become incapable of making the "necessary investments" because of Canadian imports and their impact on profits. Since the existing level of profit was found to not suggest vulnerability what is required is a discussion of why a level of profit that does not normally suggest vulnerability, is nonetheless consistent with a finding of vulnerability. With respect, I do not see any such discussion.

Moreover, the Commission in fact abandons its said profit-based view and seeks to modify its finding by essentially stipulating and pointing to a new set of non-profit factors to establish vulnerability.

The Commission's new finding of vulnerability is made *de novo* and is not a valid response to the Remand since it does not squarely address the point of the Remand and implies a failure of the original analysis of vulnerability.

Bearing in mind that the statutory authority for the Panel to remand is found in article 1904(8) authorizing the Panel "to remand a determination for action not in consistent with the Panel's decision", it follows that a remand substantially

telescopes the entire review process potentially into an “either/or” remand direction. This means that if the remanded issue cannot be legally supported, the opposite result must follow. There is no room, in my view, for changing the entire basis of the decision in response to a remand which cannot be satisfactorily answered by the Commission. To hold otherwise is to have no finality to the Commission’s decision making process. A remand is the centerpiece of Panel review requiring, as is provided under U.S. law, a direct, relevant and satisfactory response establishing that a determination is supported by substantial evidence and is in accordance with law.

I accordingly find that the Commission has not answered the Remand and the determination of vulnerability is contrary to law and in any event not supported by substantial evidence.

Equally, in responding to the Remand the Commission does not, in my view, analyze and in fact omits to analyze the impact of Canadian imports on profits, thus failing to respond to the Remand direction.

<<Serge Anissimoff>>

SERGE ANISSIMOFF
APRIL 29, 2005
LONDON, ONTARIO, CANADA

APPENDIX A - DISSENTING OPINION OF SERGE ANISSIMOFF
SUBMISSIONS OF THE PARTICIPANTS CONCERNING NEW CAPACITY

Given the importance of the new capacity issue and the absence of any analysis by the Panel, I summarize herewith the various arguments and submissions made by the parties.

The Commission

In its “Views of the U.S. International Trade Commission on Remand”, dated December 3, 2004 (hereinafter the “Remand Determination”), the Commission addresses the excess capacity issue essentially as follows. It finds that Canadian producers planned to increase their capacity by an additional [*****] short tons in 2000 (the new capacity) and would accordingly have significant excess production capacity despite relatively high capacity utilization rates between 1997 and 1999.

It found that consumption and demand in the Canadian Market was declining, so capacity utilization rates were likely to drop and given the: (1) interchangeability of the subject import and domestic products; (2) aggressive marketing to the U.S. market by Canadian Producers; and (3) lower price of the Canadian product, so that even if subject import volume and market share were to remain stable, the existing levels of imports would be likely to have a discernible impact on the

domestic industry if the Order was revoked.

The Complainant

The Complainant, in its “Brief in Opposition to the Commission’s Determination on Remand”, dated January 5, 2005 (the “Complainant’s Brief”) disagreed with the Remand Determination arguing that:

1. The alleged New Capacity was already included In the Capacity Utilization figures from the Period of Review and there was accordingly no new capacity left to come on line in 2000. In particular the Complainant referred to an amendment (November 1, 2000, Memorandum INV-X-232) which changed the language: “[*****] will be adding capacity of [*****] short tons this year...” to “[*****] added capacity of [*****] short tons this year...”.
2. The Commission’s assertions regarding “aggressive marketing to the U.S. market” were unsupported by substantial evidence as the only evidence cited by the Commission was either totally irrelevant or spoke to marketing in the Canadian and not the U.S. market;
3. The Commission’s assertions regarding price of the Canadian product were unsupported by substantial evidence because pricing data was only received for one of seven selected products, or 1.8 percent of total

subject imports from Canada, and there was no evidence that this pricing was in any way representative; and

4. The Commission erred as a matter of law by asserting that the continuation of existing volume levels would constitute a “discernible adverse impact”, referring to Neenah Foundry⁴, wherein the Court of International Trade (“CIT”) found that imports of iron metal castings from India would have no discernible impact on the domestic industry despite the fact that these imports captured 17 percent of the U.S. market. Neenah Foundry holds that the no discernible impact test is not limited to a test or measurement of import volume alone.

The International Trade Commission

The U.S. International Trade Commission (“ITC”) in its “Response to the Complainant’s Brief”, dated February 7, 2005 (the “ITC Brief”) responded with significantly more detail than appeared in the Commission Determination.

The ITC pointed to the following evidence regarding availability of the new capacity:

1. 450,000 short tons (per year) of capacity was to be added by Dofasco between 1999 and 2000;
2. The new line came online in May 1999;

⁴ Neenah Foundry Co. v. United States, 155 F. Supp 2d 766, 776 (Ct. Int’l Trade 2001)

3. By the end of the year, the new line was only producing [*****] short tons (as reported by Mr. Martin of Dofasco);
4. Performing calculations and analysis to show that according to a Dofasco foreign producer questionnaire response, Dofasco's capacity increased by only [*****] short tons between 1998 and 1999;

The ITC then submitted that of the 450,000 short tons of new capacity, at most, [*****] was online by the end of 1999. The ITC then submitted that [*****] short tons of new capacity remained left to be brought online in 2000.

Referring then to interim 2000 figures, the ITC submitted that if all of the remaining new capacity was brought on line in interim 2000, the interim capacity data should show an increase of ([*****] short tons/year divided by 4 quarters/year) or [*****] short tons. Given that the comparison of interim 1999 and interim 2000 showed an increase of [*****] short tons, the ITC then further submitted that most of that [*****] increase occurred after May 1999 (1st Quarter 2000) by reason of the [*****] short ton increase in capacity that was effected by the end of 1999.

The ITC argued that there was a significant proportion of the newly added capacity that was yet to come on line in 2000 and therefore the Canadian capacity utilization figures will likely decrease since there was some roughly quantifiable portion of the newly added capacity which was not reflected in the

figures by interim 2000. It based this conclusion on the following interpretations of the evidence:

1. Prior to the end of interim 2000 (March 31, 2000) not all of the new capacity was added as per the above reproduced calculations using the figures for capacity utilization; and
2. The Commission, in amending its report via Memorandum INV-X-232, was stating that **by November 1, 2000**, all of the new capacity had been added, not that by Interim 2000 the capacity had been added (emphasis added).

In response to the Complainant's other arguments, the ITC referred to evidence on the record in support of its assertions regarding aggressive marketing to the U.S. and underselling (price) and argued that its finding of a discernible impact was not restricted to the volume levels, but had regard for the interchangeability of the products, underselling, aggressive advertising and impending weakness (declining demand) in the Canadian market.

As concerns the aggressive marketing issue, the ITC's counsel referred to the loss of a single contract by [*****] to Dofasco on the basis of price. As well the ITC quotes the domestic industry's hearing witness who said that Dofasco's CEO was "salivating over the U.S. market."⁵

⁵ Page 24, ITC Brief, quoting from Cold-Rolled Hearing Transcript at 36-37, List 1 Doc. 200.

As concerns price, the ITC submitted that the Complainant was precluded from arguing that the price comparison products were not representative of Canadian pricing in the market, because it agreed to the seven products selected and furthermore proposed two of those products. The ITC further argued that the Complainant's argument cannot be raised for the first time on an appeal, noting that "Dofasco never made this argument to the Panel during the rounds of briefing and argument held by the Panel before its first decision in this appeal".⁶ Finally the ITC argued that the Complainant in any event failed to provide support for the allegation that the pricing evidence used was not representative.

U.S. Steel

U.S. Steel Corporation ("U.S. Steel"), in its Rebuttal Comments of United States Steel Corporation Regarding the Remand Determination of the U.S. International Trade Commission, dated February 7, 2005 (the "U.S. Steel Brief"), supported the above noted arguments by the ITC.

⁶ Footnote 65, Page 25, ITC Brief. In fact, the Complainant appears to have made this precise argument in the Brief of Complainant Dofasco Inc. dated October 1, 2001, at page 21.

APPENDIX B - DISSENTING OPINION OF SERGE ANISSIMOFF

THE COMPLAINANT'S MOTION (NEW CAPACITY) & THE PANEL'S ORDER

Under cover of letter dated February 15, 2005 the Complainant brought a motion before the Panel, requesting, *inter alia*, that an immediate remand issue re-opening the record to collect evidence concerning the alleged new capacity, or in the alternative, that the Complainant be granted a limited right of reply to respond to the ITC's new arguments and newly cited evidence concerning the new capacity. The motion was opposed by the ITC's counsel and U.S. Steel.

On March 29, 2005, the Panel issued its Order on the motion, granting the Complainant a limited right of reply. The Panel noted that "it had specifically remanded the Commission's finding of excess capacity for explanation and articulation and there remained a factual dispute regarding the record evidence. The Panel further granted the ITC and U.S. Steel Corporation a further right of reply thereto. All participants filed briefs.

In the "Brief of Complainant Dofasco Inc., in response to the Panel's March 29, 2005 Order", dated March 31, 2005, the Complainant opposed the ITC and U.S. Steel's arguments concerning the new capacity on the grounds that they constitute *post-hoc* rationalizations.

In particular, the Complainant alleged that the arguments contained in the ITC's Brief were *post-hoc*, made by counsel and not arising out of the Remand Determination. The Complainant argued that even if the Panel agreed with the ITC's new reasons to reject Dofasco's data, those reasons could not be argued for the first time by the ITC's counsel. Rather the Commission must, by law, explain the basis for its determination on the record.⁷

The Complainant then further provided the following argument and evidence rebutting the post-hoc arguments of the ITC and U.S. Steel:

1. The calculations by the ITC's (and U.S. Steel's) counsel were incorrect;
2. The calculations did not have regard for the ratio of subject versus non-subject imports that were brought on line;
3. Direct evidence by Dofasco (October 27, 2000 Final Comments) indicating that all of the new capacity was included in the interim figures previously provided; and
4. Dofasco's testimony (Mr. Martin) that all of the new capacity was included in the questionnaire response was accurate for subject merchandise.

The Complainant concluded that since the new capacity was included in the capacity utilization figures during the period of review, there was no new or

⁷ Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

further excess capacity to be brought on line. Thus the Commission's finding of a discernible adverse impact rested primarily on an erroneous finding of new capacity. The resulting finding of a discernible adverse impact and the resulting decision to cumulate was unsupported by substantial evidence.

In its "Response by the U.S. International Trade Commission to Complainant's Brief in Response to the Panel's March 29, 2005 Order", dated April 11, 2005 (the "ITC's Motion Reply") the ITC contended:

1. Dofasco planned to add substantial capacity during 2000;
2. The DSG line was not fully online in interim 2000;
3. All of Dofasco's production capacity can be used for either subject or non-subject production based on market demand; and
4. The new capacity is one of many factors used by the Commission to find a discernible adverse impact, and even at existing levels the Canadian producers subject import volumes were sufficient to create a discernible adverse impact.

In its "Rebuttal Comments of the United States Steel Corporation Regarding the Response filed by Dofasco, Inc. to the Panel's Order of March 29, 2005", dated April 11, 2005 (the "U.S. Steel Motion Rebuttal"), U.S. Steel incorporates many of the ITC's arguments and further argues that the Dofasco witness testimony is not credible by reason of the ITC's calculations.