

ARTICLE 1904 BINATIONAL PANEL REVIEW  
pursuant to the  
NORTH AMERICAN FREE TRADE AGREEMENT

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IN THE MATTER OF: )  
HARD RED SPRING WHEAT )  
FROM CANADA )

Secretariat File No.  
USA-CDA-2003-1904-06

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**DECISION OF THE PANEL ON THE REMAND DETERMINATION  
OF THE U.S. INTERNATIONAL TRADE COMMISSION**

PANEL MEMBERS:

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James R. Holbein  
Maureen Irish  
Kevin C. Kennedy, Chairperson  
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COUNSEL:

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For the North American Millers' Association Ad Hoc CVD/AD Committee: Weil, Gotshal & Manges LLP (M. Jean Anderson, Esq., and John M. Ryan, Esq.)

For the Investigating Authority: U.S. International Trade Commission, Office of the General Counsel (Michael Diehl, Esq.)

For the North Dakota Wheat Commission: Robins, Kaplan, Miller & Ciresi LLP (Charles A. Hunnicutt, Esq., and G. Brent Connor, Esq.)

## **I. INTRODUCTION**

This Panel has been constituted pursuant to Article 1904.2 of the North American Free Trade Agreement and appointed to review the material injury determination of the U.S. International Trade Commission involving imports of hard red spring wheat from Canada. In addition to the Investigating Authority, the U.S. International Trade Commission (“ITC” or “Commission”), the parties to this proceeding are the Canadian Wheat Board, the North American Millers’ Association Ad Hoc CVD/AD Committee, and the North Dakota Wheat Commission. While familiarity with the history of this matter and with the June 7, 2005 decision of the Panel will generally be assumed throughout this decision, as an aid to the reader a brief summary of the procedural history of this case follows.

Pursuant to a petition filed with the Commission on September 13, 2002, by the North Dakota Wheat Commission (“NDWC”), the Durum Growers Trade Action Committee, and the U.S. Durum Growers Association, the ITC conducted investigations involving imports of durum wheat and hard red spring wheat (“HRS wheat”) from Canada. The Commission reached preliminary affirmative injury determinations with respect to both products on November 25, 2002. The Department of Commerce subsequently issued final affirmative determinations that durum wheat and HRS wheat were being subsidized and sold at less than fair value in the United States. Thereafter, on October 16, 2003, the Commission unanimously determined that an industry in the United States was neither materially injured nor threatened with material injury by reason of imports of durum wheat. An evenly-divided Commission concluded, however, that

the domestic industry was materially injured by reason of imports of HRS wheat.<sup>1</sup> On October 23, 2003, the Commerce Department issued antidumping and countervailing duty orders on imports of HRS wheat from Canada.

On November 24, 2003, the Canadian Wheat Board (“CWB”) filed a request for NAFTA binational panel review with the U.S. Section of the NAFTA Secretariat. On December 23, 2003, the CWB and the North American Millers’ Association Ad Hoc CVD/AD Committee (“NAMA”) filed complaints alleging generally that the Commission’s final injury determination with respect to HRS wheat is unsupported by substantial evidence.

The Panel heard oral argument on March 9, 2005, and issued a decision on June 7, 2005, remanding the Commission’s affirmative injury determination with the following nine instructions: (1) explain why record evidence regarding pre- and post-petition prices is not sufficient to rebut the statutory presumption of 19 U.S.C. § 1677(7)(I), insofar as post-petition price data is concerned; (2) explain how post-petition volume and price data were factored into the Commission’s final determination and provide analysis that gives such data some weight, rather than no weight, in its determination; (3) explain how instances of underselling caused adverse trends in price or industry performance in the domestic industry; (4) analyze how increased volumes of the subject imports caused the domestic industry to suffer depressed prices, taking into account all contradictory evidence; (5) provide a new analysis of the impact of subject imports on the domestic

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<sup>1</sup> Commissioners Hillman and Miller voted in favor of an affirmative injury determination, while Chairman Okun and Commissioner Koplan voted in favor of a negative injury determination. Under U.S. law, an evenly divided vote of the Commission is deemed an affirmative determination. See 19 U.S.C. § 1677(11). Commissioner Lane did not participate in the investigation. Commissioner Pearson had not been sworn in as a Commissioner as of the date of the Commission vote.

industry, explaining and analyzing, inter alia, why yields per acre and farm prices are the most relevant factors in determining the financial state of the domestic industry; (6) provide detail as to which prices have been used by the Commission in its analysis and whether prices have been used that are not at the level of sales to domestic milling operations; (7) examine the economic conditions of the grain trading companies and elevators to explain how the effect of imports was passed upstream to the farmers; (8) explain how the Commission has found injury by reason of the subject imports, rather than by reason of competition in third-country markets; and (9) explain how average farm prices for HRS wheat are based on the outcome of downstream transactions, and how subject imports are large enough to impact HRS wheat prices on the futures market of the Minneapolis Grain Exchange.

On October 5, 2005, the Commission issued its views on remand and, by a vote of 4-1, determined that the domestic industry is neither materially injured by reason of the subject imports nor threatened with such injury. The NDWC has challenged the Commission's negative injury remand determination, contending that the Commission committed both procedural and substantive errors.<sup>2</sup>

In accordance with NAFTA Article 1904.8 and Rules 72 and 73 of the Rules of Procedure for Article 1904 Binational Panel Reviews, the Panel hereby renders its decision on remand. For the reasons fully set forth below, and on the basis of the

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<sup>2</sup> The NDWC has not explicitly challenged the Commission's negative threat of material injury determination, presumably because it is of the view that the Panel's instructions tied the Commission's hands on remand and prevented it from issuing any remand determination other than an affirmative one. As explained more fully in Parts III.B.1 and III.B.2 below, we conclude that the Commission was not so constrained by our instructions. The Panel, therefore, accepts this portion of the remand determination as supported by substantial evidence and otherwise in accordance with law.

administrative record, the applicable law, and the written submissions of the parties, the Panel affirms the Commission's Views on Remand and Remand Determination.

## **II. STANDARD OF REVIEW**

In the previous decision of this Panel, we discussed at length the standard of review that is to be applied by a NAFTA Chapter 19 binational panel. The Panel is mindful of the standard of review to be applied and, therefore, will not restate the extensive case law interpreting this standard. We refer the reader to our June 7, 2005 decision, and we hereby incorporate by reference the Standard of Review section of that decision.

Suffice it to say that, pursuant to NAFTA Article 1904.3 and NAFTA Annex 1911, this Panel must apply the standard of review set forth in Section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B)(i), as well as the general legal principles that the Court of International Trade ("CIT") would apply in reviewing a final determination by the Commission.<sup>3</sup> Accordingly, this Panel must affirm any ITC determination, finding, or conclusion unless that determination, finding, or conclusion is either unsupported by substantial evidence on the record considered as a whole, or is otherwise not in accordance with law.

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<sup>3</sup> NAFTA Article 1911 provides a non-exhaustive list of such "general legal principles," including, for example, "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

### III. DISCUSSION

We summarize the Commission's views on remand, and then address the challenges of the NDWC and the responses thereto of the Investigating Authority, the CWB, and the NAMA.

#### A. The Commission's Remand Determination

On the basis of the Panel's June 7, 2005 decision and its instructions on remand, the Commission determined to adopt and incorporate by reference the dissenting views of Chairman Deanna Tanner Okun and Commissioner Stephen Koplan issued in the Commission's original determination. The Commission also provided a supplemental explanation of its remand determination, as well as an explanation pertaining to the remand instructions issued by the Panel. In connection with the latter, the Commission took the view that "[g]enerally, however, the Panel's instructions pertain to aspects of the majority's determination that are not in question here given our negative determination."<sup>4</sup>

With respect to the volume, price effects, and impact of the subject imports on the domestic industry, the Commission made the following findings. First, with regard to the volume of subject imports, subject imports from Canada declined in volume from 41 million bushels in marketing year 2000/01 to 11 million bushels in marketing year 2002/03. The volume of HRS wheat from Canada likewise declined sharply relative to U.S. production and U.S. apparent consumption. In response to the Panel's instructions, the Commission sought additional information from market participants as to whether

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<sup>4</sup> Hard Red Spring Wheat from Canada, Inv. Nos. 701-TA-430B and 731-TA-1019B (Remand), at 2, USITC Pub. 3806 (Oct. 5, 2005) [hereinafter Views of the Commission on Remand]. All references to the Commission's views on remand are to the public version of the Commission's remand determination.

farm prices for HRS wheat were affected by the filing of the petition on HRS wheat from Canada. (In its original determination, the Commission discounted post-petition data.) A majority of both grain elevator associations and grain trading firms that responded to the questionnaires indicated that the filing of the petition did not affect HRS wheat prices. This fact, coupled with the drought in Canada, led the Commission to conclude on remand that changes in prices and volume of subject imports from Canada subsequent to the filing of the petition were not related to the filing of the petition.<sup>5</sup> Accordingly, the Commission found that the volume of subject imports from Canada was not significant in absolute terms or relative to production or consumption in the United States.<sup>6</sup>

Second, with regard to the price effects of subject imports, the Commission found that adjusted price comparisons revealed mixed underselling, but no evidence of price depression or price suppression.<sup>7</sup> The Panel instructed the Commission to explain in greater detail the prices used in the price comparisons, particularly whether the prices used were for sales made at the same level of trade. Pursuant to the Panel's remand instructions, the Commission sent questionnaires to each industry participant that had supplied prices used in the adjusted company-specific and Minneapolis comparisons. The questionnaire responses confirmed that the prices used were purchase prices reported by millers that purchased from grain elevators and from large grain trading firms.

In price comparisons specific to one U.S. miller, the subject imports undersold the domestic product in 1 of 3 comparisons based on elevator prices, in 1 of 2 comparisons

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<sup>5</sup> See Views of the Commission on Remand at 7.

<sup>6</sup> See *id.* at 2.

<sup>7</sup> See *id.* at 3.

based on grain trading firm prices, and in 2 of 4 price comparisons involving combined data for No. 1 HRS wheat. In comparisons specific to another U.S. miller, the subject imports undersold the domestic product in 11 of 14 price comparisons involving No. 2 HRS wheat. For No. 1 HRS wheat purchased on a Minneapolis basis, subject imports undersold the domestic product in 8 of 11 comparisons using grain elevator prices, in 9 of 11 comparisons using grain trading company prices, and in 8 of 11 comparisons using the combined data. For No. 2 HRS wheat on a Minneapolis basis, subject imports undersold the domestic like product in 2 of 4 comparisons using grain elevator prices, in 9 of 16 comparisons using prices from purchases from grain trading companies, and in 8 of 16 comparisons using the combined data.

Nevertheless, while the frequency of underselling based on the supplemented record was greater than that observed in the original investigation, the estimated mean prices for subject imports and domestic No. 1 and No. 2 HRS wheat over the period investigated remain very similar.<sup>8</sup> In the Commission's words, "the difference remains too small to be statistically significant."<sup>9</sup> Moreover, the Commission found no underselling by subject imports of No. 1 HRS wheat compared on a Minneapolis basis since August 2002, and none for No. 2 HRS wheat compared on a Minneapolis basis since March 2002. In sum, although the observed underselling was high enough in frequency that it might have been significant under other circumstances, the Commission found it not significant here given that the estimated mean prices for domestic and subject

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<sup>8</sup> See *id.* at 6.

<sup>9</sup> *Id.*



HRS wheat were not statistically different, and that there was very little underselling during the last crop year examined in the remand investigation.<sup>10</sup>

Third, with respect to the impact of the subject imports on the domestic industry, the Commission noted that domestic wheat growers generally generated positive net returns (without government payments) in 2000, while net returns declined to a breakeven point or lower during 2001, as total product returns fell from peak levels, and total direct and overhead expenses increased. In 2002, however, net returns increased, as declining total product returns (as result of lower per acre yields due to drought conditions) were more than offset by declining expenses and increasing miscellaneous income.<sup>11</sup>

In short, the Commission concluded that the domestic industry was not being materially injured by reason of the subject imports.

Likewise with respect to the threat of material injury, the Commission found that because the United States did not account for the majority of shipments of HRS wheat by the subject Canadian producers and that the Canadian home market accounted for an increasing share of Canadian HRS wheat shipments, there was not a likelihood of a substantially increased volume of subject imports in the imminent future. The Commission also found no evidence that subject HRS wheat is likely to enter the United States at prices likely to have a significant depressing or suppressing effect on U.S. prices

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<sup>10</sup> See id. at 7.

<sup>11</sup> See id. at 3-4.

of HRS wheat. In sum, the Commission concluded that the domestic industry is not threatened with material injury by reason of subject imports from Canada.<sup>12</sup>

In addressing the balance of the Panel's remand instructions that could have a bearing on its remand determination, the Commission considered the Panel's instruction to examine exports of domestically-produced HRS wheat and competition in third-country markets. During the remand investigation, the Commission asked grain traders to identify how and when any changes in competition in export markets for HRS wheat affected HRS wheat prices in the United States. The Commission found no changes in competition in third-country markets beyond the effects of drought.<sup>13</sup> The Panel also instructed the Commission to explain why yields per acre and farm prices are the most relevant factors in determining the financial state of the domestic industry. The Commission explained that yields per acre and farm prices are among the elements incorporated in the calculation of "net returns," which it examined in its analysis of the impact of subject imports. Yields per acre and farm prices account for most of the positive side of the net return calculation, making them important in the Commission's consideration of the financial state of the domestic industry.

#### B. The North Dakota Wheat Commission's Challenges

The NDWC challenges the Commission's remand determination on the following six grounds: (1) the Commission improperly ignored the Panel's decision which, the NDWC claims, contains "the law of the case" and "a mandate"; (2) the Commission adopted wholesale the dissenting views in the original determination; (3) the

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<sup>12</sup> See id. at 4.

<sup>13</sup> See id. at 8.

Commission's finding regarding price underselling is unsupported by substantial evidence; (4) the Commission's decision not to discount post-petition data is unreasonable; (5) the Commission's finding that the impact of subject imports was not significant is unsupported by substantial evidence; and (6) the Commission failed to address several of the Panel's instructions on remand.

We address each of these challenges in turn.

1. The Law of the Case Doctrine and the Mandate Rule Are Not Applicable in This Case.

The NDWC insists that the law of the case doctrine precluded the Commission from “unilaterally chang[ing] its mind or conduct[ing] a de novo review of the entire proceeding.”<sup>14</sup> The law of the case doctrine stands for the proposition that when a court decides a rule of law, that decision continues to govern the same issues in subsequent stages in the same case. Arizona v. California, 460 U.S. 605, 618 (1983); Koyo Seiko Co. v. United States, 95 F.3d 1094, 1097 (Fed. Cir. 1996). The Panel is of the view that the law of the case doctrine is inapplicable in this case.

The Panel did not resolve any issues of law in its June 7, 2005 decision such as, for example, resolving an unsettled question of statutory interpretation that would trigger application of the law of the case doctrine. Compare, e.g., Siderca, S.A.I.C. v. United States, 350 F. Supp. 2d 1223, 1226 (Ct. Int'l Trade 2004) (“The common meaning of ‘likely’ [as used in 19 U.S.C. § 1675a(1)] is ‘probable,’ or, to put it another way, ‘more likely than not;’” the ITC is directed to apply this definition on remand); NMB Singapore Ltd. v. United States, 288 F. Supp. 2d 1306, 1352 (Ct. Int'l Trade 2003) (the statutory

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<sup>14</sup> NDWC Rule 73(2) Brief at 6.

term “likely” means “probable” in the context of ITC sunset reviews; the ITC is directed to apply this definition on remand). On the contrary, in its instructions the Panel left open the possibility that the Commission might reach a different determination on remand when, for example, it instructed the ITC to “[e]xplain why record evidence regarding pre- and post-petition prices is not sufficient to rebut the statutory presumption of 19 U.S.C. § 1677(7)(I), insofar as post-petition price data is concerned. If the Commission finds that such information is sufficient to rebut the presumption, then it must make a new determination on all factors that gives full weight to the evidence previously discounted.” Decision of the Panel at 65 (emphasis added).<sup>15</sup> As the Investigating Authority correctly

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<sup>15</sup> The Panel instructed the Commission on remand as follows:

1. Explain why record evidence regarding pre- and post-petition prices is not sufficient to rebut the statutory presumption of 19 U.S.C. § 1677(7)(I), insofar as post-petition price data is concerned. If the Commission finds that such information is sufficient to rebut the presumption, then it must make a new determination on all factors that gives full weight to the evidence previously discounted.
2. Explain how post-petition volume and price data were factored into the Commission’s final determination and provide analysis that gives such data some weight, rather than no weight, in its determination. If the Commission finds that either category of evidence is not discounted, then it must make a new determination that gives such undiscounted evidence full weight in its analysis of the relevant factor.
3. Explain how instances of underselling caused adverse trends in price or industry performance in the domestic industry.
4. Analyze how increased volumes of the subject imports caused the domestic industry to suffer depressed prices taking into account all contradictory evidence and render a new determination based on the analysis.
5. Provide a new analysis of the impact of subject imports on the domestic industry, explaining and analyzing (a) how fluctuating yields may leave the domestic industry vulnerable as a result of price depression of the subject imports, (b) how yield fluctuations were accounted for, and (c) why yields per acre and farm prices are the most relevant factors in determining the financial state of the domestic industry.
6. Provide detail as to which prices have been used by the Commission in its analysis and whether prices have been used that are not at the level of sales to domestic milling operations. Having regard to the substantial evidence requirements discussed above, if prices that are not at the level of sales to domestic milling operations have been used, the Commission must explain how such prices show sales in competition with sales of imports at the same level of trade, or how they have been adjusted to reflect the same trade level as imports. If price comparisons could not be made at the same level of trade, the Commission must explain what link exists between prices at the different levels that supports the conclusions of the Commission. If some prices chosen do not involve comparisons at the same level of trade and cannot be adjusted, the Commission is instructed to reject them and reconsider its analysis of price underselling.

points out, “The Panel did not require the Commission to reach any particular outcome . . . , nor did it otherwise dispose of the issues.”<sup>16</sup>

What we have said so far largely disposes of the NDWC’s closely related argument that the mandate rule precluded the Commission from reaching a negative injury determination on remand.<sup>17</sup> The mandate rule obligates lower courts and administrative agencies to follow the mandates of appellate courts and bodies. See, e.g., United States v. Bell, 5 F.3d 64, 66 (4<sup>th</sup> Cir. 1993). In this case, for example, had the Panel affirmed the Commission’s original determination, it would have left nothing for the Commission to do on remand but to carry out the Panel’s order.

The long and the short of the matter is that the Panel in its June 7, 2005 decision did not mandate that the Commission reach a specific result or resolve an issue in a particular way on remand. Compare, e.g., Second Remand Decision of the Panel, Certain Softwood Lumber Products from Canada, Secretariat File No. USA-CDA-2002-1904-07, at 7 (Aug. 31, 2004) (on remand the panel directs the ITC to issue a negative threat of material injury determination), aff’d, Opinion of the Extraordinary Challenge Committee, Certain Softwood Lumber Products from Canada, Secretariat File No. EEC-2004-1904-

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7. Examine the economic conditions of the grain trading companies and elevators to explain how the effect of imports was passed upstream to the farmers.
  8. Examine the exports of domestically-produced HRS wheat and explain how the Commission has found injury by reason of the subject imports, rather than by reason of competition in third-country markets.
  9. Analyze and explain how average farm prices for HRS wheat are based on the outcome of downstream transactions, and subject imports are large enough to impact HRS wheat prices on the futures market of the MGE, specifically taking into account the proprietary information found at page 56 of the CWB’s Brief.

Thus, contrary to the NDWC’s assertion that the Panel’s instructions mandated an affirmative injury determination on remand, the Panel’s instructions certainly contemplated the possibility of a negative ITC injury determination on remand.

<sup>16</sup> Investigating Authority Rule 73(2) Brief at 11 (footnote omitted).

<sup>17</sup> See NDWC Rule 73(2) Brief at 3-5, 23-28.

01USA (Aug. 10, 2005). On the contrary, what the Panel sought on remand from the Commission was a further explanation and a re-examination of several issues that the ITC addressed in its original determination. Had the Commission summarily ignored or refused to comply with those instructions, a different case might be presented. But that is not the case before us. As explained more fully below, the Commission addressed all of the Panel's instructions that were pertinent in the context of its negative injury remand determination.

In sum, the law of the case doctrine and the mandate rule are inapplicable in this case. Neither precluded the Commission from reaching a negative injury determination on remand.

## 2. The Commission's Adoption of the Original Dissenting Views Was Not Improper.

In its second argument, the NDWC makes much of the fact that the Commission on remand adopted and incorporated by reference the dissenting views of Chairman Okun and Commissioner Koplun that were made in the original investigation. If the NDWC's point is that this practice constitutes error per se, then the NDWC would have us honor form over substance. The adoption of dissenting views after a remand is not uncommon. See, e.g., Taiwan Semiconductors Indus. Ass'n v. United States, 118 F. Supp. 2d 1250 (Ct. Int'l Trade 2000); Altx, Inc. v. United States, 2002 WL 31968233 at \*1 (CIT Dec. 31, 2002), aff'd, 370 F.3d 1108 (Fed. Cir. 2004). On the other hand, if the NDWC's point is that it was somehow caught off guard by the Commission's volte-face, and was thus deprived of an adversarial opportunity, it had every opportunity to make argument both at the Commission level during the course of the remand proceeding and now before this

Panel in its Rule 73(2) brief. Finally, if the NDWC's point is that a de novo review on remand was improper, that too is wrong. As the CWB stresses and as the case law confirms, "the new commissioners had a duty to evaluate the merits of the injury determination de novo."<sup>18</sup>

In short, it was not error for the ITC on remand to adopt the dissenting views of the Commission in the original affirmative injury determination.

3. The Commission's Finding of No Significant Price Underselling Is Supported by Substantial Evidence and Is Otherwise in Accordance with Law.

The NDWC next argues that the Commission's finding regarding price underselling is unsupported by substantial evidence.<sup>19</sup> However, the NDWC essentially offers an alternative view of the evidence, rather than an argument that the Commission's price determination is not supported by substantial evidence. The NDWC spotlights the undisputed finding on remand that the frequency of underselling was higher than what was found to exist in the original investigation. In its underselling analysis, the Commission considered both monthly price comparisons, as well as a staff statistical analysis of prices that accounted for factors such as protein content, dockage, and test weight. However, the Commission found that the monthly comparisons for the final year of the investigation, in combination with mean prices for wheat, were critical to its

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<sup>18</sup> CWB Rule 73(2) Brief at 7 (quoting Taiwan Semiconductor Indus. Ass'n v. United States, 118 F. Supp. 2d 1250, 1254 (Ct. Intl Trade 2000), aff'd, 266 F.3d 1339 (Fed. Cir. 2001)).

<sup>19</sup> See NDWC Rule 73(2) Brief at 10-15.

underselling analysis, trumping the price comparisons in the first two years of the period of investigation.<sup>20</sup>

The NDWC maintains that the statistical analysis conducted by the ITC staff is flawed and unreliable because it did not account for differences in moisture content. As the Investigating Authority and the NAMA point out, however, the NDWC did not raise this argument below and should be precluded from raising it here.<sup>21</sup> In any event, even if the NDWC has not waived its right to challenge the staff statistical analysis on appeal, the NAMA adds that the NDWC's challenge is irrelevant because adjusting for moisture content is inconsequential in the protein content comparison between U.S. and Canadian wheat.<sup>22</sup>

In addition, the NDWC does not dispute the Commission's finding that underselling did not lead to price suppression or price depression to a significant degree. Thus, even assuming arguendo that the NDWC is correct that there was significant price underselling during the period of investigation, the NDWC does not dispute the Commission's conclusion that such underselling did not suppress or depress prices to a significant degree or cause a significant increase in the volume of subject imports, a necessary predicate to an affirmative injury determination. As noted by the Court of International Trade, "[U]nderselling alone is legally insufficient to support an affirmative injury determination." Coalition for Preservation of Amer. Brake Drum & Rotor Aftermarket Mfrs. v. United States, 15 F. Supp. 2d 918, 924-25 (1998). The NDWC's tacit concession regarding the ITC's determination on price suppression and depression

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<sup>20</sup> See Views of the Commission on Remand at 7.

<sup>21</sup> See Investigating Authority Rule 73(2) Brief at 26-27; NAMA Rule 73(2) Brief at 9-10.

<sup>22</sup> See NAMA Rule 73(2) Brief at 11-12.



undercuts its contention that the Commission's price effects analysis is unsupported by substantial evidence.

Moreover, the governing statute directs the ITC to consider whether there has been "significant" price underselling. As we stated in our June 7, 2005 decision, because the term "significant" is not defined in the statute, the ITC enjoys broad discretion to determine whether a certain frequency or degree of underselling is significant. What might constitute "significant" price underselling in one set of circumstances may fall short in a different set of circumstances. See, e.g., Coalition for the Preservation of Amer. Brake Drum & Rotor Aftermarket Mfrs., 15 F. Supp. 2d at 924 (ITC has discretion to make reasonable interpretations of evidence with respect to underselling). While the underselling that the Commission observed in this case was high enough in frequency that it might have been significant in other circumstances, the Commission found that it was not significant here because (1) the differences in mean prices between the domestic like product and the subject imports "remains too small to be statistically significant," and (2) more importantly, "there was very little underselling during the last crop year examined in this remand investigation."<sup>23</sup>

In its appeal of the Commission's finding of no significant price underselling, the NDWC essentially offers an alternative view of the evidence. Regardless of which view of the record is more reasonable, as long as the Commission's determination is supported by substantial evidence, it must be affirmed on appeal. As the Federal Circuit observed in Nippon Steel Corp. v. Int'l Trade Comm'n, 345 F.3d 1379 (Fed. Cir. 2003):

[I]t is ultimately irrelevant to our decision whether the Commission or the Court of International Trade did better at drawing the most reasonable

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<sup>23</sup> Views of the Commission on Remand at 6, 7.

inferences from the economic documents as compared to the prior testimonial assertions. Under the statute, only the Commission may find the facts and determine causation and ultimately material injury – subject, of course, to Court of International Trade review under the substantial-evidence standard.

Nippon Steel Corp., 345 F.3d at 1381. The Panel concludes that the ITC finding of no significant price underselling in the circumstances of this case is supported by substantial evidence.

4. The Commission’s Decision Not to Discount Post-Petition Data Was Reasonable.

The NDWC’s fourth contention is that the Commission’s decision to give full weight to post-petition data is unreasonable.<sup>24</sup> Section 771(7)(I) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(I), authorizes the Commission to discount the weight accorded to post-petition volume, price, and impact data. The statute permits the Commission to discount post-petition data – “the Commission may reduce the weight accorded to the data for the period after the filing of the petition” (emphasis added) – but it does not require the Commission to do so. The Commission found that the volume of subject imports began to decline as early as April 2002, some five months before the filing of the petition. The Commission attributed this decline in import volume to drought conditions in Canada.

In addition, based on new data gathered during the remand proceeding, a majority of grain trading firms and grain elevator associations responding to the ITC’s

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<sup>24</sup> See NDWC Rule 73(2) Brief at 15-17. In a corollary argument the NDWC insists that the Commission’s finding that the volume of subject imports was not significant is not supported by substantial evidence. See NDWC Rule 73(2) Brief at 17-20. The NDWC’s volume argument in essence rehashes its argument that the Commission erred in not discounting post-petition data, including volume, price, and impact data.

questionnaire stated that the filing of the petition did not affect domestic HRS wheat prices. Accordingly, the Commission on remand determined not to reduce the weight accorded to volume and price data for the 2002/03 marketing year.

The Panel concludes, therefore, that the Commission's decision not to discount post-petition data is reasonable.

5. The Commission's Determination that the Impact of Subject Imports Was Not Significant Is Supported by Substantial Evidence.

The NDWC's fifth argument is that the Commission's determination that the impact of subject imports on the domestic industry was not significant is unsupported by substantial evidence.<sup>25</sup> Once again, however, as is the case with the NDWC's challenge to the Commission's underselling determination, the NDWC essentially offers an alternative view of the evidence, rather than an argument that the Commission's impact determination is not based on substantial evidence. The Commission found that domestic wheat growers generated positive net returns in 2000, which turned to breakeven or lower in 2001, but which increased in 2002. Rather than tackle this critical Commission finding head on, the NDWC instead renews its argument that the Commission did not make any finding that some event other than the filing of the petition caused the decline in subject import volumes. The heart of the NDWC's position is that the Commission in its remand determination failed to discount post-petition data when making its industry impact determination.<sup>26</sup>

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<sup>25</sup> See *id.* at 20-23.

<sup>26</sup> See *id.* at 21-22.

The NDWC relies heavily upon the CIT's decision in Nucor Corp. v. United States, 318 F. Supp. 2d 1207, 1242 (2004), aff'd, 414 F.3d 1331 (Fed. Cir. 2005), where the court affirmed the ITC's decision not to discount post-petition data based on the pendency of a parallel Section 201 safeguards proceeding. Unlike in the Nucor Corp. case, the NDWC submits, there is no evidence in the present case that is sufficient to rebut the statutory presumption. Contrary to the NDWC's assertion that there is no substantial evidence to rebut the statutory presumption regarding post-petition data, the record is plain that the 2002 drought in Canada, with its attendant decline in production, was the signal event that caused the precipitous falloff in subject import volumes in the 2002/03 marketing year.<sup>27</sup> The Commission also relied on supplemental questionnaire responses indicating that the filing of the petition did not affect wheat prices.<sup>28</sup> Having identified causes other than the filing of the petition for the post-petition decline in import volumes and increase in HRS wheat prices, the Commission acted reasonably and in accordance with law by concluding that the statutory presumption regarding post-petition data had been rebutted.

In short, the Commission's determination regarding the impact of subject imports on the domestic industry is supported by substantial evidence.

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<sup>27</sup> See Durum and Hard Red Spring Wheat from Canada, Dissenting Views of Chairman Okun and Commissioner Koplan, at 20, 51 n.408 (USITC Pub. 3639 Oct. 2003).

<sup>28</sup> See Views of the Commission on Remand at 7.

6. The Commission Addressed All of the Panel's Instructions that Were Germane to a Negative Injury Determination.

Finally, the NDWC contends that the Commission failed to address several of the Panel's instructions.<sup>29</sup> In its remand determination the Commission made it plain that it was not ignoring any of the Panel's instructions on remand. At the same time, however, the Commission made the following observation concerning the remand instructions:

While these instructions were directed to the Commission's affirmative material injury determination in the original investigations, certain aspects of them could be understood to warrant additional explanation of the dissenting views as well. Generally, however, the Panel's instructions pertain to aspects of the majority's determination that are not in question here given our negative determination.<sup>30</sup>

We agree with this assessment of the Panel's instructions on remand. The Panel is satisfied that the Commission adequately responded to all instructions that were germane to its negative injury remand determination (namely, Instructions 1, 2, 5, 6, 7, and 8). The ITC's negative remand determination rendered irrelevant other instructions (namely, Instructions 3, 4, and 9), making a Commission response to them pointless.

#### IV. CONCLUSION

Having thoroughly reviewed the Commission's remand determination and the briefs of all the parties, the Panel AFFIRMS the Commission's Views on Remand and its Remand Determination. The U.S. Secretary is hereby:

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<sup>29</sup> See NDWC Rule 73(2) Brief at 24-28.

<sup>30</sup> Views of the Commission on Remand at 2.

ORDERED to issue a Notice of Final Panel Action at the appropriate time after the issuance of this decision.

Date of Issuance: December 12, 2005

Signed in the original by:

Serge Anissimoff  
Serge Anissimoff

James R. Holbein  
James R. Holbein

Maureen Irish  
Maureen Irish

Kevin C. Kennedy  
Kevin C. Kennedy, Chairperson

Paul C. LaBarge  
Paul C. LaBarge