ARTICLE 1904 BINATIONAL PANEL REVIEW
PURSUANT TO
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
Certain Corrosion-Resistant Carbon Steel Flat Products from Canada	)	**Secretariat File No. USA-CDA-2000-1904-11**
	)	**PUBLIC DOCUMENT**

ORDER

Upon consideration of the briefs filed on behalf of the Complainant, the Investigating Authority and United States Steel Corporation in response to the Panel's Order of March 29, 2005, and upon consideration of all papers and proceedings filed with respect to the Panel's review of the Remand Determination herein, the Panel affirms the U.S. International Trade Commission's determination on remand. 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.

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: April 29, 2005

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 opinion[3] 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 Foundry[4], 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, Dofacsco'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 no-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.