

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

IN THE MATTER OF)
)
)
Carbon and Certain Alloy Steel)
Wire Rod from Canada)
(Final Injury Determination))
)
_____)

Secretariat File No.
USA-CDA-2002-1904-09

DECISION OF THE PANEL CONCERNING THE VIEWS ON REMAND
AND THE FINAL DETERMINATION OF THE INTERNATIONAL TRADE COMMISSION

PANEL*:

James R. Holbein, Chairman
Serge Anissimoff
Kevin C. Kennedy
David J. Mullan
Robert E. Ruggeri

COUNSEL:

For Ivaco Inc. and Ivaco Rolling Mills Inc.: Hunton & Williams (William Silverman,
Esq. and Richard P. Ferrin, Esq.)

For Domestic Industry Interested Parties: Collier Shannon Scott (Paul C. Rosenthal, Esq.,
Kathleen W. Cannon, Esq., and R. Alan Lubberda, Esq.)

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

* The Panelists wish to express their appreciation for the support received from Panel Assistant
Harj Mann, Esq.

I. INTRODUCTION

This Panel has been convened pursuant to Article 1904(2) of the North American Free Trade Agreement (“NAFTA”), and pursuant to the November 27, 2002 request for panel review by Ivaco Inc. and Ivaco Rolling Mills Inc., to review the final injury determination of the U.S. International Trade Commission (the “ITC” or “Commission”) in an antidumping and countervailing duty investigation involving steel wire rod from Canada. *See Carbon and Certain Alloy Steel Wire Rod from Canada*, 67 Fed. Reg. 66,662 (2002).¹ The Panel hereby renders its written decision in accordance with NAFTA Article 1904(8) and with Part VII of the Rules of Procedure for Article 1904 Binational Panel Reviews.

While familiarity with the history of this matter and with the prior decision of the Panel will generally be assumed throughout this decision, as an aid to the reader a brief summary of the posture of this case follows. On August 31, 2002, domestic producers of carbon and certain alloy steel wire rod filed a petition with the ITC and the Department of Commerce alleging that they were being materially injured by reason of steel wire rod imports from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Turkey, and Ukraine. On October 3, 2002, the ITC issued its final determination that subsidized imports from Brazil and Canada, and less-than-fair-value imports from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine, were materially injuring the domestic industry.² The Commerce Department thereafter issued countervailing duty orders on the subject imports from Canada and Brazil, and antidumping

¹ The ITC’s views were published in *Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine*, Inv. Nos. 701-TA-417-421 and 731-TA-953, 954, 956-59, 961, and 962 (Final) (USITC Pub. 3546 Oct. 2002).

² *Id.*

orders on the subject imports from Canada, Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago, and Ukraine.³

On November 27, 2002, Ivaco Inc. and Ivaco Rolling Mills Inc. (“Ivaco”), the Canadian producer and exporter, and the U.S. importer respectively of the subject imports, filed a Request for Panel Review of the ITC’s injury determination. Before the Panel Ivaco complained of the following six alleged errors by the Commission: (1) that the ITC erroneously refused to collect data for the most recent quarter then available (the second quarter of 2002); (2) that the ITC rejected as untimely certain second quarter 2002 U.S. producer financial information submitted by Ivaco; (3) that the ITC erroneously discounted the weight given to interim first quarter 2002 due to the pendency of the investigation; (4) that the ITC erroneously found as “significant” the volume of imports, the increase in that volume, and price underselling; (5) that the ITC erroneously determined that cumulated subject imports had significant price suppressing effects; and (6) that the ITC erroneously found that the subject imports were having a significant adverse impact on the domestic industry.⁴

Following oral argument on May 14, 2004, the Panel issued a decision on August 12, 2004, remanding three issues to the Commission with the following instructions: (1)

³ See Antidumping Duty Order on Wire Rod from Canada, 67 Fed. Reg. 65944 (Oct. 29, 2002); Countervailing Duty Orders on Wire Rod from Brazil and Canada, 67 Fed. Reg. 65871 (Oct. 22, 2002); Antidumping Duty Orders on Wire Rod from Brazil, Indonesia, Mexico, Moldova, Trinidad and Tobago and Ukraine, 67 Fed. Reg. 65945 (Oct. 29, 2002).

⁴ Complaint of Ivaco at 5-8 (Dec. 19, 2002). Ivaco also complained that the ITC erroneously cumulated imports from Canada with those from Brazil, Indonesia, Mexico, Moldova, Ukraine, and Trinidad and Tobago. As noted by the Panel in its August 12, 2004 decision remanding the ITC’s final determination, Ivaco raised the issue of cumulation in its complaint, but this issue was not pursued in Ivaco’s briefs. Pursuant to Rules 58 and 2 of the North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Reviews, the Panel ordered Ivaco to show cause why this issue should not be dismissed from the Panel review. See Decision of the Panel at 29-30. The Panel added that if no such filing was made within ten days of the publication by the NAFTA Secretariat of the Panel’s decision remanding the ITC’s final determination, then the issue would be dismissed. See *Id.* at 30. Ivaco has made no such showing, and the issue of cumulation is hereby dismissed.

provide reasons why the Commission did not collect second quarter 2002 data; (2) address all of Ivaco's arguments that purport to rebut the legal presumption that post-petition changes in subject import volume, price, and impact on the domestic industry were related to the pendency of the investigation; and (3) explain why the Commission rejected the information filed by Ivaco on September 24, 2002. The Panel reserved for later consideration issues 4-6 identified above. In accordance with the instructions of the Panel, the Commission issued its views on remand on October 12, 2004.

For the reasons fully set forth below, and on the basis of the administrative record, the applicable law, the written submissions of the participants, and the Panel hearing held in Washington, D.C. on May 14, 2004, the Panel affirms the ITC's Views on Remand and its Final Determination.

II. STANDARD OF REVIEW

In the previous decision of this Panel, we discussed at length the standard of review that is required to be applied by a binational panel established pursuant to NAFTA Chapter 19. The Panel is mindful of the standard of review to be applied and, therefore, sees no reason to once again recite the case law interpreting this standard. We refer the reader to the previous decision of this Panel, 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. Accordingly, this Panel will uphold 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.

III. THE ITC'S REJECTION OF IVACO'S REQUEST THAT THE PERIOD OF INVESTIGATION BE EXTENDED TO COVER THE 2nd QUARTER OF 2002

When the Commerce Department postponed its final determinations in the dumping investigations from June 17 to August 23, 2002, the ITC, on May 15, 2002, revised its own schedule to conform to that of the Commerce Department. This prompted a request on June 19, 2002, from Ivaco and the other respondents that the ITC collect second quarter 2002 data. On three subsequent occasions, Ivaco repeated that request. However, the ITC never collected that data nor did it respond to the multiple requests by Ivaco and the other respondents.

In its decision, the Panel rejected Ivaco's contention that the ITC was obliged to collect the most current data available and that, by refusing to do so, had thereby acted arbitrarily or capriciously. The Panel accepted that the setting of the period of investigation was a matter of discretion for the ITC, the exercise of which was entitled to considerable deference from this Panel.

However, the Panel did conclude that the ITC was obliged to respond with reasoned justification to requests that raised issues material to the investigation, including ones that asserted that the ITC should in the particular circumstances extend the period of an investigation or collect more recent data. In particular, the Panel concluded that the ITC was under an obligation to respond to the evidence and the relevant arguments with respect to volume, price effects, and impact of imports that Ivaco deployed in support of its contention for the collection of more recent data. In so doing, the Panel rejected

attempts on the part of the Commission in its brief and at the hearing to justify its failure by reference, *inter alia*, to considerations of administrative expediency. Ivaco was entitled to a response on the record. The Panel therefore remanded this issue to the ITC for it to provide a reasoned justification for the decision not to collect second quarter 2002 data.

In the Views of the ITC on Remand, the ITC advanced a number of justifications for its rejection of the request that it collect second quarter 2002 data. First, the ITC stated that it was not part of its general practice to expand the period of investigation even if the deadline for the completion of an investigation was extended. Next, it submitted that obtaining meaningful responses to update questionnaires is difficult especially where, as in this case, more than a very few questionnaire recipients were involved. On a substantive level, the ITC asserted that the arguments advanced for the gathering of a further quarter's data did not indicate that an additional quarter of data would differ significantly from the first quarter 2002 data already in the record or have a material effect on the ITC's analysis. An increase in the demand for steel in general during the second quarter 2002 and some price increases in steel wire rod were not enough justification, the Commission contended, particularly as the first quarter 2002 data provided a sufficient basis for analyzing these changed conditions of competition. The same was true with respect to arguments predicated on the end of the recession and the new region-specific quotas introduced in 2001. First quarter 2002 data already reflected increased U.S. consumption, and the changes to the wire rod TRQ with respect to regional specific quotas became effective in November 2001. Finally, the ITC rejected Ivaco's argument that because the Commission had expanded the period for which data

was collected in the cold-rolled steel investigations, that it should do likewise here. In rejecting Ivaco's argument, the ITC distinguished the changes to the TRQ for wire rod as being far less significant than the new 30% tariff on cold-rolled steel, a tariff that it described as "a newly-imposed remedy that significantly affected the market."

In its Brief in Opposition to the Commission's Remand Determination ("Remand Brief"), Ivaco's evidence and arguments that the ITC had erred in discounting first quarter 2002 data also supported its position that the ITC should have collected second quarter 2002 data. It also claimed that the ITC had erred in dealing with its request for the gathering of second quarter 2002 data by imposing the onus on Ivaco to establish that that data would make a difference. Finally, Ivaco continued to assert that there were no material differences between the situation in relation to wire rod and those under which the cold-rolled steel investigation was conducted. As there, the ITC should have responded positively to the request made to collect further data once the schedule was altered.

As will be more fully addressed in the Section V, *infra*, the Panel has rejected Ivaco's contention that the ITC decision to discount first quarter data 2002 was not in accordance with the law nor supported by substantial evidence on the record. To the extent that the same data and arguments are now advanced by Ivaco to contend that the ITC acted in an arbitrary and capricious manner in refusing to collect second quarter 2002 data in this matter, the Panel rejects them on the same basis.

The Panel also finds no reason to disagree generally with the ITC's position that parties must provide a sufficient evidential basis for the ITC to depart from its normal practice of neither extending the period of an investigation nor collecting further data.

Moreover, it is not for this Panel to substitute its judgment for that of the ITC as to whether, on the facts, such a positive exercise of discretion was warranted. Provided the ITC advances a reasoned justification for its position (which the ITC has now done in this case) and there is support in the evidential record for the position that it has adopted, there is no basis for the Panel to intervene.

In this instance, the ITC and Ivaco have advanced very different interpretations of the significance of certain events and data relating to the importation of steel wire rod during the relevant periods. However, the Panel finds no basis on which to treat as arbitrary or capricious or without evidential foundation the ITC's considered position that it was not necessary for it to collect further data in this case in order to fulfill its statutory mandate. Indeed, to the extent that Ivaco has relied on the "precedent" of the cold-rolled steel investigation, there seems to be strong support for the ITC's position that the impact of the new tariff regime there was far more drastic than the impact of the 2001 changes to the TRQ for wire rod. The Panel therefore rejects Ivaco's argument that the Commission, by purportedly acting inconsistently as between the two situations, had thereby been arbitrary or capricious.

IV. THE ITC'S REJECTION OF INFORMATION PERTAINING TO THE INCREASED PROFITABILITY OF TWO OF THE PETITIONERS DURING THE 2nd QUARTER OF 2002

As part of its refusal to expand its inquiry to include data from the second quarter of 2002, the ITC rejected as "untimely" documentation that Ivaco filed on September 24, 2002. That documentation consisted of a letter attaching SEC reports showing that two of the petitioners (Keystone and Co-Steel) had increased their profits during the second

quarter of 2002. September 24, 2002 was some twenty days after the deadline for the filing of post-hearing briefs (September 4), one day before the release of the final staff reports to the parties (September 25), and three days before final comments were due (September 27).

In rejecting the filing of this documentation as “untimely,” the ITC failed to elaborate in any way on why that was so. After examining the relevant legislative provisions, Rules, and the ITC’s own Anti-Dumping and Countervailing Duty Handbook, the Panel found that there was no obvious legal basis for the rejection of the filing and that there was therefore no justification or reasoned conclusion on the record for this action on the part of the ITC. It therefore remanded for further explanation the ITC’s decision to reject the information filed by Ivaco on September 24, 2002.

In the Views of the ITC on Remand, the ITC attempted to justify its treatment of the information submitted by Ivaco. It did so on the basis of an asserted requirement that all additional information be included in the parties’ post-hearing briefs and that the acceptance of any information after that point was a matter of discretion for the ITC, a discretion that it exercised against Ivaco in this instance. The ITC did, however, proceed to reopen the record, placed the September 24, 2002 document on the record, allowed the parties to comment on it, and then examined the information contained in the submission. It then determined that that information did not affect its analysis in the investigation.

In light of the fact that the ITC has now added the information contained in Ivaco’s communication of September 24, 2002 to the record and evaluated that information, the Panel regards the issue of the earlier rejection of that information as

moot. In particular, it expresses no views on the ITC's justification in its Views on Remand for not accepting that information when it was filed.

As for the ITC's treatment of the data in question, its conclusion was that the data was "unusable" for not having provided an independent or a tipping-of-the-balance justification for collecting second quarter 2002 data. For the reasons identified above, the Panel has accepted that the ITC has now provided a reasoned justification for not granting the requests of Ivaco that the period of investigation be extended to include the second quarter of 2002. Our conclusion on that point is not affected by the ITC's evaluation of the data contained in the September 24, 2002 communication from Ivaco. The ITC has provided a reasoned basis for its determination that the information was not "usable" for the purposes of extending the period of investigation.

V. THE ITC REASONABLY EXERCISED ITS DISCRETION IN DECIDING TO DISCOUNT THE POST-PETITION, FIRST QUARTER 2002 DATA

In its Final Determination, the ITC discounted the weight granted to first quarter 2002 data on cumulated subject imports. Specifically, the ITC found that a decline in such import volumes in first quarter 2002 (as compared to first quarter 2001) was related to the pendency of the investigations. In the Commission's words,

[w]e have considered whether the volume of cumulated subject imports since the filing of the petition is related to the pendency of the investigations. We have determined that this is the case with respect to lower subject import volumes in interim 2002 as compared to interim 2001. Therefore we reduce the weight accorded to interim 2002 data for the purposes of our material injury determinations.⁵

⁵ Views of the Commission at 27 n.167 (Oct. 18, 2002).

The ITC made a similar conclusion about first quarter 2002 price and impact data.⁶ Before the Commission, Ivaco had argued on the record that changes in the post-petition data were not related to the pendency of the investigations and it had provided alternative explanations for those data changes.

The Panel in its first Decision held that the ITC had failed to address Ivaco's arguments on the record and had presented no discussion of the issue "so that the 'path of the agency might be reasonably discerned.'"⁷ The Panel remanded and directed the ITC to address Ivaco's arguments in this regard.

In the Views of the Commission on Remand, the ITC considered Ivaco's arguments at length and again concluded that the changes in the import data were related to the pendency of the investigations. In particular, the ITC also specifically determined that there was no sufficient evidence to rebut its presumption that the changes were caused by the pending investigations and to establish that the changes were related to factors other than the investigation.⁸ For the following reasons, we affirm.

A. The Statutory Framework

The statute, 19 U.S.C. § 1677(7)(I), provides the following:

The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under Part I or Part II of this subtitle is

⁶ "Because of the pendency of these investigations, and the drop in subject import volume in interim 2002, we find the data from the period 1999-2001 are more probative for our pricing analysis, and we have reduced the weight accorded to interim 2002." *Id.* at 28 n. 177 (emphasis added). "As with volume and pricing sections, we have focused our analysis on calendar years 1999 to 2001 data, and reduced the weight accorded to interim 2002 data due to the effect of the filing of the petition and the pendency of these investigations." *Id.* at 31 n.195 (emphasis added).

⁷ Panel Decision at 31 (citing the Statement of Administrative Action at 892).

⁸ Views of the Commission on Remand at 9.

related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury, threat of material injury, or material retardation of the establishment of an industry in the United States.

The Statement of Administrative Action, in turn, states as follows:

When the Commission finds evidence on the record of a significant change in data concerning the imports or their effects subsequent to the filing of the petition ... the Commission may presume that such change is related to the pendency of the investigation. In the absence of sufficient evidence rebutting that presumption and establishing that such change is related to factors other than pendency of the investigation, the Commission may reduce the weight to be accorded to the affected data.⁹

The Commission is, therefore, required to consider whether there has been any significant post-petition change in the data or their effects related to the investigation, (“The Commission *shall* consider whether.....”).¹⁰ Once it has done so, it has the discretion, if it wishes, to presume that, in fact, the change was related to the investigation (“the Commission *may* presume that such change is related....”).¹¹ Having made that presumption, the ITC also has the discretion whether to discount the data (“and if so, the Commission *may* reduce the weight accorded to the data....”).¹² Stated as a corollary, the ITC in its discretion may choose to discount such data unless there is “sufficient evidence rebutting that presumption and establishing that such change is

⁹ SAA, H.R. Rep. 316, 103 Cong., 2d Sess. vol. 1, 853-54 (1994); 1994 U.S.C.C.A.N. at 4186.

¹⁰ 19 U.S.C. §1677(7)(I) (emphasis added).

¹¹ SAA at 854 (emphasis added).

¹² 19 U.S.C. §1677(7)(I) (emphasis added). *See, Nucor Corp. v. United States*, 318 F. Supp. 2d 1207, 1241-42 (CIT 2004); *Committee for Fair Beam Imports v. United States*, 25 ITRD 1699, 2003 WL 21555105 (CIT 2003); *Altix Inc. v. United States*, 167 F. Supp. 2d 1353, 1361 n.10 (CIT 2001) (“[t]he ITC...is not required to discount the data even if the agency finds a change in data to be related to the pendency of the investigation.”).

related to factors other than pendency of the investigation.” The ITC separately considered changes in post-petition import volume, price effects, and impact of imports.¹³ As will become apparent in what follows, we accept that the ITC reached a reasonable conclusion supported by substantial evidence on the record when it determined that there was “significant [post-petition] change in data” for all three categories to justify it presuming that those changes were “related to the pendency of the investigation”. The critical question therefore became whether, in the decision on our remand, the ITC reached a reasonable conclusion supported by substantial evidence when it found that the petitioners had not rebutted the presumption that the significant changes in all three categories were related to the pendency of the investigation.

¹³ The ITC asserts that only this Panel, and not the statute, requires it to consider each of the three factors separately. Views of the Commission on Remand at 10. The short answer is that, since Ivaco had attempted to rebut the presumption with various evidence on each of the three factors, the ITC cannot ignore them. The Panel only ordered the ITC to consider the various points Ivaco raised in rebuttal. Panel Order at 19-21, 31.

However, it does appear that in its original Final Determination the ITC actually determined that only import volume data had changed due to the investigations. Views of the Commission at 27 n. 167. Yet, on that basis, the ITC discounted not only import volume, but first quarter price effects data and impact data as well. The ITC argues now in dicta that the statute requires it only to consider whether a change in any one factor – not all three – was caused by the investigation. Views of the Commission on Remand at 10. It is true that 19 USC §1677(7)(I) does state that the ITC shall consider whether any change in volume, price effects, or impact of imports was related to the investigation. But the ITC may then only discount the data it has so considered. For instance, it cannot discount price data if it has only considered volume data changes. The SAA explains that when the ITC has found evidence of a significant change in data, “it may presume that such change is related to the pendency of the investigation”. SAA at 854. The statute does not authorize the ITC to presume anything about other data not found to have changed. Moreover, if there is no sufficient evidence “that such change” is related to factors other than the investigation, the ITC may then discount “the affected data”. *Id.* The statute says nothing about the ITC discounting all the other data as well. It is logical that if the ITC (i) found only one factor to have changed; (ii) then presumed that the one change was caused by the investigation, and (iii) finds that there is no sufficient evidence to the contrary about that one change, it cannot discount more than the changed data. Where the ITC has presumed a change related to an investigation, it has only discounted that factor. *See, e.g., Nippon Steel Corp. v. United States*, 350 F. Supp. 2d 1186, 1203 (CIT 2004) (only price data discounted). Therefore, if the ITC wishes to discount all three categories, as it has now done on remand, then it must make the necessary findings about all three, which it has also now done on remand. But, since its protestations to the contrary are dicta, we need not consider them further.

B. Import Volume Effects

In the case of import volume, the Commission found that, from 1999 to 2001, subject import volume increased steadily, while U.S. market share held by cumulated subject imports increased. Apparent domestic consumption dropped from 2001-2002.¹⁴ The ITC also found that the absolute volume of cumulated subject imports dropped in interim 2002 compared to interim 2001, despite increased domestic consumption. The Commission found “significant” a change from a steady increase in imports over three years to a drop in interim 2002 when demand was higher.¹⁵

The ITC tied the change to events in the pending investigation: the petitions were filed in August 2001, the ITC’s preliminary determination was in October 2001, and the Commerce Department imposed preliminary countervailing duties on imports from Canada in February 2002. The ITC found that these “elements of the investigation, and the expectation of future duties” caused the decline in interim 2002.¹⁶

Ivaco points out that subject imports actually continued to increase from August to October 2001 following the filing of the petition and before the ITA’s preliminary determination.¹⁷ However, as the domestic producers point out, the record contains evidence that the import shipment import lead time is nearly three months.¹⁸ This delay

¹⁴ Views of the Commission on Remand at 11-12.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 13.

¹⁷ Ivaco Post-Remand Brief at 5.

¹⁸ Final ITC Staff Report at II-28; Domestic Industry Interested Parties Post-Remand Brief at 6.

supports the Commission's finding that volume decreases in response to the petition therefore began in November 2001, and continued into early 2002 in response to the October 2001 ITC preliminary determination.¹⁹ And even if the lead time were not a factor, imports *did* drop in November 2001 following the ITC preliminary determination. Either scenario proposed by the ITC is rational.

Ivaco argues that the drop in subject import volume in late 2001, and in the first two months of 2002 compared to 2001, was due to "distortions" in the Section 201 tariff-rate quota program ("TRQ") on imports of carbon steel wire rod.²⁰ November 2001 as the beginning of a new TRQ quarter. It was only until March 2002, the beginning of a new TRQ quarter, that imports rose sharply, although not as much as in March 2001.

Setting aside, *arguendo*, the issue of whether Ivaco's TRQ arguments to the ITC and Panel have been inconsistent, we turn to the Commission's analysis of them. The ITC rejects Ivaco's evidence on the TRQ effect because approximately half the subject imports (*i.e.*, those from Canada and Mexico) are not even subject to the TRQ. Subject imports from only three countries were lower in interim 2002 than 2001: Mexico, Indonesia, and Ukraine. It is reasonable to conclude that Mexico's decrease was unrelated to the TRQ since it was not covered by that program. As the ITC argues, Ivaco has not explained how the TRQ, and not the investigations, would be responsible for the declines of Indonesia and Ukraine's imports.²¹

¹⁹ Compare *Altex, Inc.*, 167 F. Supp. 2d at 1361, where the court held that the ITC had failed to explain why the import lead-time period it chose was more reasonable than the one proposed by the plaintiff.

²⁰ Ivaco Post-Remand Brief at 7.

²¹ Views of the Commission on Remand, at 15-16.

The Commission also found that the TRQ had a greater impact on the volume of nonsubject rather than subject imports.²² All nonsubject country imports and only half the subject imports were covered by the TRQ. Yet, compared to the same period in 2001, nonsubject imports rose in early 2002 while subject imports fell. Ivaco's response is that it presented "an alternative explanation" which is sufficient to rebut the ITC's presumption. We disagree.²³ The ITC's conclusion that Ivaco has failed to rebut the presumption with "sufficient evidence" is reasonable and supported by substantial evidence. It is not enough for Ivaco to merely posit an alternative theory to rebut this presumption. "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."²⁴ Unless irrational or unsupported by evidence, the ITC's consideration, analysis, and, ultimately, rejection of Ivaco's theory will stand.

C. Import Price Effects

The Commission found that underselling by cumulated subject imports was less extensive in first quarter 2002 than first quarter 2001 because the pending investigation caused subject import prices to follow domestic prices more closely. It concluded that

²² Views of the Commission on Remand at 16-17.

²³ Ivaco incorrectly states throughout its post-remand brief that the Panel, in its Decision, found that Ivaco had rebutted the ITC's presumption. The Panel merely found that the ITC had failed to consider Ivaco's points of rebuttal. ("This Panel is of the view that the proper place to have Ivaco's material arguments determined is by the Commission and on the record. The Panel is not, otherwise, in a position to assess the correctness of any party's views or make any finding of fact." Panel Decision at 26.)

²⁴ Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984) (*quoting* Consolo v. Federal Maritime Comm'n, 383 U.S. at 619-20); PPG Industries, Inc. v. United States, 978 F.2d 1232, 1237 (Fed. Cir. 1992).

this resulted in fewer instances of underselling in interim 2002.²⁵ Price suppression of domestic product by subject imports in interim 2002 was also less than it had been in 1999 through 2001.²⁶

Ivaco argues that domestic product prices had already begun to increase earlier in 2001, before the petition filing, thereby rebutting any connection between reduced underselling in interim 2002 and the investigation. Ivaco also argues that the ITC has failed to explain why the underselling decline in interim 2002 is different from the declines in earlier quarters. Ivaco challenges the ITC's conclusion that only the first quarter 2002 underselling decline was due to the pending investigation.

However, the Commission found that the interim 2002 price effects *were* different from the prior quarters. The earlier domestic price increases were accompanied by steady increases in the cost of goods sold ("COGS"), thereby creating domestic price suppression. This finding was supported by sufficient evidence in the record.²⁷ In interim 2002, though, the domestic prices increased while COGS *decreased*. Moreover, the net sales value of the domestic like product increased in interim 2002 as well.²⁸ At the same time, subject imports decreased. Therefore, the Commission reasonably found that the nature and cause of the import price effects of underselling and price suppression were different in interim 2002 than before.

²⁵ Views of the Commission on Remand at 17-18.

²⁶ *Id.* at 20.

²⁷ Views of the Commission on Remand at 19.

²⁸ *Id.* at 20.

The Commission also concluded that the earlier domestic price increases “do not explain lower levels of underselling by subject imports in interim 2002.” This is an entirely plausible and reasonable determination: the reduction in underselling, and the continued price suppression, in interim 2002 could not be a function of increased prices in an earlier period.

Ivaco also asserts that the increased domestic prices in interim 2002 were produced by “soaring” demand for wire rod brought on by the end of the economic recession. However, this explanation, too, does not rebut the Commission’s presumption that the effects were due to the investigation. The ITC has relied on substantial evidence in the record that the increase in U.S. consumption was somewhat underwhelming and that the domestic industry’s share of the market actually decreased during this market improvement.²⁹

D. Impact of Subject Imports

The ITC determined on remand that “there was a significant change in the impact of cumulated subject imports after the filing of the petition in these investigations, and that this change was related to the pendency of the investigations.”³⁰ The change was that the domestic industry had improved in the following respects in interim 2002 over interim 2001: operating margin, domestic industry production, capacity utilization, sales and shipments measured in value (but not quantity), productivity, and capital expenditures for the domestic industry were all higher in interim 2002.

²⁹ *Id.* at 21.

³⁰ *Id.* at 22.

The Commission found that domestic prices were able to increase when the volume of lower-priced subject imports began to subside in interim 2002.³¹ The ITC also determined that the domestic industry, due to its high fixed costs, was able to produce wire rod more efficiently when it did so in greater quantities in interim 2002. Again, the ITC found that less competition from subject imports in interim 2002 contributed to this improvement.

Ivaco claims that a surge in lower priced nonsubject imports, at the same time as subject imports declined in interim 2002, confirms that the improvement in the domestic industry could not have been tied to the import investigation.³² However, the ITC determined that the nonsubject imports did not undersell the domestic product or subject imports. The Commission acknowledged the increase in nonsubject imports, but not that they were priced lower than subject imports. The Commission concluded that “[t]he existence of nonsubject imports in the market does not detract from the impact of the subject imports on the domestic industry.”³³ Ivaco calls this a “non-answer” to its argument, but we do not agree. There is no convincing evidence of record that the nonsubject imports were cheaper than others. We agree with the Commission’s rejection of Ivaco’s reliance on AUV data, for the reasons cited in its remand determination.³⁴ Therefore, the ITC’s conclusion that the improvement in the domestic industry was related to the filing of the petition is not necessarily precluded or contradicted by the

³¹ *Id.* at 23.

³² Ivaco Post-Remand Brief at 8.

³³ Views of the Commission on Remand at 26 n.77.

³⁴ *Id.* See also *U.S. Steel Group v. United States*, 96 F.3d 1352, 1363-64 (Fed. Cir. 1996).

influx of such nonsubject imports. If the nonsubject imports have not been shown to be cheaper, than their presence in interim 2002 did not necessarily have the impact claimed by Ivaco.

Ivaco claims that restructuring by some inefficient domestic producers reduced the cost of production, thereby improving the industry's financial health. The ITC in its remand found that the operating margin improvements were relatively widespread in interim 2002, and not limited to a few inefficient producers. Although Ivaco claims in its remand brief that the restructuring extended beyond the few firms it had originally cited, there is no basis for this in the record. The Commission in its remand relies upon the domestic industry's anecdotal evidence that increasing subject imports were a factor in plant shutdowns, bankruptcies, and other difficulties.³⁵

Ivaco also points to "cost-cutting" measures undertaken by the domestic industry, whose positive effects were delayed until the recession ended in interim 2002. The ITC disputes that the end of the recession was a positive benefit for this industry in interim 2002: U.S. apparent domestic consumption may have improved, but other indicia were down.³⁶ The ITC also refutes any connection between increased consumption in interim 2002 with an increase in domestic industry profitability since the domestic industry's share of the market was lower in interim 2002.

At most, Ivaco's rebuttal presents alternative theories which do not preclude the Commission's conclusions. The Commission is not obligated to demonstrate that Ivaco's

³⁵ *Id* at 24.

³⁶ These included lower sales volume by quantity, lower employment indicators in general, and lower U.S. market share. *Id.* at 25.

alternative theories are wrong. However, Ivaco must demonstrate with sufficient evidence that “factors *other than* the pendency of the investigation” caused the changes and this it has not done. In other words, Ivaco must adduce sufficient evidence that the Commission was wrong in this regard.³⁷ Considering the degree to which Ivaco’s explanations failed to rebut the ITC’s presumptions, and the amount of evidence marshaled by the Commission to substantiate its own position, we affirm on this issue.

VI. STATUTORY FACTORS USED TO DETERMINE MATERIAL INJURY

Having disposed of the issues remanded to the Commission in the Panel’s previous decision, it is now necessary to review the claims concerning the Commission’s findings on the statutory factors of volume, price and impact of subject imports. In making material injury determinations, the Commission must consider the volume of imports, their effect on prices for the domestic like product, and their impact on domestic producers of the like product in the context of U.S. production operations.³⁸ The Commission may also consider other relevant economic factors to determine whether there is material injury by reason of subject imports.³⁹

³⁷ Consolo v. Fed. Mar. Comm’n, 383 U.S. 607, 620 (1966).

³⁸ 19 U.S.C. § 1677(7)(B)(i).

³⁹ 19 U.S.C. § 1677(7)(B)(ii).

A. Volume of Subject Imports

In its evaluation of the volume of imports, the Commission considered whether the volume of imports or any increase in volume, in absolute terms or relative to domestic production, was significant.⁴⁰

1. Volume Effects of Nonsubject Imports

Ivaco argued in its brief that the Commission did not “thoroughly address the issue of nonsubject imports, their increasing volumes over the period of investigation, and their impact on the health of the domestic industry.”⁴¹ However, Ivaco admits that “Subject imports did increase market share more than nonsubject imports from 1999 to 2001.”⁴² Much of Ivaco’s argument concerns the increases in nonsubject imports in 2002, which the Commission properly discounted as described in Section V, *supra*. In addition, the Commission did not err when it declined to extend the POI. *Id.* While the Commission could certainly have provided more explanation for its findings, it clearly weighed the evidence of the volume of cumulated subject imports, market penetration, market share, and domestic producer’s market share in making the following determination:

Therefore, it was the cumulated subject imports, and not the nonsubject imports, that gained significant market share previously held by the domestic industry from 1999 to 2001.⁴³

⁴⁰ 19 U.S.C. § 1677(7)(C)(i).

⁴¹ Complainant’s Brief to the Panel at 29 (March 31, 2003).

⁴² *Id.* at 30.

⁴³ Commission Final Determination, *supra* note 1, at 27 (footnote omitted).

Ivaco argues that the Commission has not met its obligation under Gerald Metals, Inc. v. United States, 132 F. 3d 716 (Fed. Cir. 1997), to rely upon adequate evidence that the injury caused to the domestic industry was “by reason of” the subject imports.⁴⁴ The Commission found that it was “cumulated subject imports, and not the nonsubject imports, that gained significant market share previously held by the domestic industry from 1999 to 2001.”⁴⁵ This finding demonstrates that the Commission weighed the evidence on the record concerning the volumes of subject and nonsubject imports in making its material injury determination. The volumes of subject imports and market share relative to domestic production was substantially greater than the volume and market share of nonsubject imports throughout the POI.⁴⁶ In particular, the Commission found that a much larger increase in subject imports’ market share than the much smaller increase in nonsubject imports’ market share was the main contributor to the decline in domestic producers’ market share from 1999-2001.

Ivaco raised related arguments in its reply brief that the Commission should have examined “trends regarding nonsubject imports in conjunction with subject imports, and relating those trends to the health of the domestic industry,” in order to “test whether the volume effects of subject imports are significant.”⁴⁷ Ivaco also posits that it was nonsubject imports, not subject imports, that filled the market when domestic capacity

⁴⁴ Complainant’s Brief to the Panel at 32 (March 31, 2003).

⁴⁵ Commission Final Determination at 27.

⁴⁶ Commission’s Brief to the Panel at 10-11 (May 30, 2003).

⁴⁷ Complainant’s Reply Brief to the Panel at 33 (June 16, 2003).

exited.⁴⁸ The Commission looked at the reduction in domestic capacity and the absolute volumes of both subject and nonsubject imports, and used its market share analysis to conclude that subject imports were entering in higher volumes and increasing market share greater than nonsubject imports. While the Panel has the power to remand to the Commission for a fuller explanation of its findings, it should use that power reasonably, and not as a futile and pointless exercise. In this instance, the Panel can follow the path of the Commission's reasoning, which is supported by substantial evidence on the record. The Panel must therefore affirm the findings of the Commission.

2. *Effects on the Business Cycle of the Recession and Recovery*

Ivaco argued during the investigation that “the volume effects of subject imports were insignificant, because the domestic capacity withdrawn from the market overwhelmed any insignificant volume effects of subject imports.”⁴⁹ In response, the Commission argued that the domestic industry was never able to operate at full capacity even though a substantial amount of production exited the market and the remaining production capacity could not meet domestic consumption.⁵⁰ The Commission evaluated the condition of the domestic industry in the impact section of its determination,⁵¹ and clearly found that subject imports were increasing at the expense of domestic production.

Throughout the POI, the Commission found that the domestic industry was in distress while subject imports were increasing at a greater relative rate than nonsubject

⁴⁸ *Id.* at 34.

⁴⁹ Complainant's Brief to the Panel at 33.

⁵⁰ Argument by Counsel for the Commission, Hearing Transcript at 118 (May 14, 2004).

⁵¹ Commission Final Determination at 30-33.

imports. The Commission considered the economic conditions during the POI, notwithstanding that it did not mention the recession explicitly. Counsel for the Commission noted that the Commission considered the effects of the recession in its analysis of apparent consumption, and found that the inability of the domestic industry to operate at full capacity despite substantial capacity lost during the POI was caused by the increase in subject imports.⁵² Ivaco offers an alternative explanation that the amount of capacity that left the market was huge in comparison to the relatively smaller amount of increase in subject import volumes. In other words, the industry was in distress caused by factors other than the increase in subject imports. The problem with that scenario is that the Commission reviewed all of the information on the record, had a comprehensive analysis provided by the staff, and reasonably concluded that subject imports were an important cause of the problems experienced by the domestic industry.

The Panel is mindful, as it must be, of the standard that governs its review of Commission determinations: "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."⁵³ It is "not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record."⁵⁴ The Panel is bound by the standard of review to affirm the Commission when it has relied upon substantial evidence on the

⁵² Argument by Counsel for the Commission, Hearing Transcript at 118 (May 14, 2004).

⁵³ Matsushita Electric Industrial Co., Ltd. v. United States, 750 F.2d at 933 (Fed. Cir. 1984).

⁵⁴ Koyo Seiko Co., Ltd. v. United States, 810 F. Supp. 1287, 1289 (Ct. Int'l Trade 1993) (quoting Timken Co. v. United States, 699 F.Supp. 300, 306 (1988)), aff'd, 894 F.2d 385 (Fed. Cir. 1990); Can-Am Corp. v. United States, 664 F.Supp. 1444, 1450 (Ct. Int'l Trade 1987).

record in making its determination. The Panel can follow the path of the reasoning of the Commission and understands the evidence relied upon, so it therefore has no option but to affirm the Commission's finding on this argument.

B. Price Effects of Subject Imports

1. Underselling

Ivaco argued in its brief before the Panel that there is a "\$20-\$30 per ton price premium for the convenience of domestic product" that should have been applied to the current investigation because it was applied in an earlier investigation.⁵⁵ Ivaco then urges the Panel to remand to the Commission for it to apply a \$25 per ton adjustment to all subject imports, which would eliminate the underselling finding by the Commission. The Commission addressed the "price premium" argument directly in its determination.⁵⁶

The Commission distinguished the record in the 1997 investigation from the current investigation on the basis that in 1997, "subject imports generally [had] significantly longer lead times and larger minimum order sizes than domestic producers, and cannot be canceled once ordered."⁵⁷ The current investigation found no significant differences on these issues between subject imports and domestic production. The Commission also analyzed the cumulative underselling by product and all countries to

⁵⁵ Complainant's Brief at 37. *See* Certain Steel Wire Rod from Canada, Germany, Trinidad & Tobago, and Venezuela, Inv. Nos. 701-TA-371 (Final), USITC Pub. 3075 (Nov. 1997).

⁵⁶ Commission Final Determination at 29 n.183.

⁵⁷ *Id.*

conclude that subject imports undersold domestic products in 66.8 percent of all comparisons, which it went on to conclude was significant.⁵⁸

On this issue the Panel finds that the Commission fulfilled its obligation imposed by the standard of review because it relied upon substantial evidence on the record to find price underselling by subject imports. While the invitation by Ivaco to require the Commission to adjust the prices so as to eliminate the underselling is provocative, the Panel could find no legal basis to do so in the briefs or other cases cited.

Ivaco also pointed out that the Canadian products oversold the U.S. products in 54 quarters and undersold in only 24 quarters.⁵⁹ This issue is interesting because it points out the problem with cumulation cases in a NAFTA context. Taken in isolation, using only Canadian data, Ivaco makes a plausible argument that there should not be a finding of “significant” price underselling by Canadian producers. Unfortunately for Ivaco, the Panel cannot isolate the NAFTA component from the investigation as a whole. When the Commission cumulates subject imports and that finding is not challenged by complainants, nor remanded on any basis to the Commission for further action, then the Panel must look only at the cumulative data in assessing whether the Commission properly relied upon substantial evidence to make its determination. Therefore, the Panel affirms the Commission determination on this issue.

2. Price Depression and Suppression

Ivaco challenged the Commission’s finding of a “cost-price” squeeze that left domestic producers unable to raise prices in a period of increasing costs. To support this

⁵⁸ *Id.*

⁵⁹ Complainant’s Brief at 39.

challenge, Ivaco provides a “metal margin” versus “metal spread” analysis to demonstrate that the cost-price squeeze did not exist.⁶⁰ The Commission performed a price suppression analysis in which it found that the domestic industry’s cost of goods sold (COGS) as a share of net sales was increasing over the POI, but they were not able to raise prices to cover the increased costs. The finding was made in the context of the deteriorating condition of the industry. Despite shrinking U.S. consumption, the market share of lower-price subject imports “contributed significantly” to the inability of the domestic industry to raise prices.⁶¹

As to the metal margin and metal spread argument, the Commission did not rely upon either type of analysis because both are measures of materials costs, and exclude the elements of factory overhead and SG&A expenses, which were a significant component of COGS. Therefore, the Commission concluded that a metal margin or metal spread analysis was inappropriate to use in the wire rod industry due to the conditions of competition in that industry.⁶²

After a thorough review of the arguments, the Panel finds that the Commission determination on this issue is supported by substantial evidence on the record and was made in accordance with law, and is therefore affirmed.

3. Role of Nonsubject Imports

Ivaco made an argument that a late surge in nonsubject imports in 2002 should have been considered by the Commission in its price analysis. The Commission

⁶⁰ *Id.* at 39-42.

⁶¹ Commission Final Determination at 29-30.

⁶² Commission Brief at 66.

treatment of the 2002 data has been dealt with in Section V, *supra*. The Panel affirms the Commission Determination on this issue as described in more detail above.

4. Price Trends

Ivaco argued that the Commission ignored an argument that there was no correlation between domestic prices and import prices during the POI. The Commission failed to address the issue directly in its determination, in its brief, or at the hearing. Counsel for the domestic industry argued that because “the Commission found an inability to raise prices in the face of rising costs caused by the surge in low-priced subject imports that significantly undersold the domestic industry at significant margins of underselling, ... the Commission adequately justified the correlation between the subject import and domestic prices.”⁶³ While Ivaco is technically correct that the Commission failed to address this specific nuance of the overall question of the effect of subject import prices, the Panel is persuaded that the Commission implicitly took into account price trends in order to make its cost-price squeeze analysis. As the Panel has already affirmed that analysis, it affirms on this issue as well.

C. Impact of Subject Imports

Ivaco’s primary argument in opposition to the Commission’s impact analysis is based on the Commission’s discounting of the first quarter 2002 data showing that the domestic industry’s economic health was improving. As we have already determined that the Commission properly discounted that data, there is no basis for further review of that argument.

⁶³ Brief of Domestic Industry Interested Parties at 54 (May 30, 2003).

Ivaco strenuously argued throughout its brief that the Commission makes false connections because it inappropriately links unrelated phenomena, the post hoc ergo propter hoc fallacy.⁶⁴ The thrust of Ivaco's argument is that the industry was in serious trouble from conditions that had nothing to do with subject imports. For example, Ivaco argued that:

In the process of avoiding evaluation of respondents' voluminous evidence that bankruptcies and other exits by domestic producers during the period of investigation were unrelated to subject imports, the Commission made sweeping, conclusory statements unsupported by substantial evidence. The Commission stated that 'we conclude from the record evidence that although additional factors may have contributed to certain domestic producers' financial problems, subject imports were a significant cause of material injury to the entire industry, including the loss of sales and market share to lower-priced subject imports.' Final Determination, at 32. What support does the Commission cite for these conclusions? The statement of one of the petitioners, and the petitioner's posthearing brief.⁶⁵

The Commission responded to this argument in its brief by noting that the SAA requires the Commission "to examine other factors to ensure that it is not attributing injury from other sources to the subject imports."⁶⁶ The Commission analyzed the evidence before it, and the brief cites to various pieces of evidence, often filed by the domestic industry, in support of its finding that subject imports had an adverse impact on the health of the domestic industry. While Ivaco points to alternative interpretations of the evidence, and makes plausible arguments that the condition of the domestic industry

⁶⁴ Complainant's Brief at 48.

⁶⁵ *Id.* at 48-49 (footnotes omitted).

⁶⁶ Commission Brief at 69, *citing* Taiwan Semiconductor Indus. Ass'n v. United States, 266 F. 3d. 1339, 1345 (Fed. Cir. 2001), *citing* to SAA at 852. *See also* Commission Brief at 69-73, and Final Determination at 30-33.

deteriorated due to factors other than subject imports, this Panel cannot review the evidence *de novo* in order to draw different conclusions from those of the Commission. The Commission went to considerable effort to review the evidence on the record, analyze it in the context of the business cycle and conditions of competition of the wire rod industry and found that subject imports were having a significant adverse impact on the domestic industry.⁶⁷ While many of the statements in the impact section of the Commission's analysis are, indeed, conclusory, as argued by Ivaco, the Panel is persuaded by the determination and the Commission's Brief that all of the factors relevant to the impact finding were referenced adequately in the volume and price sections of the determination.⁶⁸ For the reasons described above, the Panel affirms the Commission's adverse impact finding.

VII. Conclusion

After a thorough review of the Commission's determination, the briefs of all parties, the remand determination and related arguments, oral argument and the hearing transcript, and the various sources cited and provided to the Panel in the Joint Appendix, the Panel AFFIRMS the Commission's Final Determination, as amended by the Determination on Remand. The U.S. Secretary is hereby:

⁶⁷ Final Determination at 33.

⁶⁸ Commission Brief at 69.

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

Date of Issuance: April 18, 2005

Signed in the original by:

Robert E. Ruggeri
Robert E. Ruggeri

Serge Anissimoff
Serge Anissimoff

Kevin C. Kennedy
Kevin C. Kennedy

David J. Mullan
David J. Mullan

James R. Holbein
James R. Holbein, Chairman