

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

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I. Introduction

This Binational Panel, convened under Chapter 19 of the North American Free Agreement (“NAFTA”)¹, is charged with considering a challenge to the injury determination by the United States International Trade Commission (“Commission”) in the Full Sunset Review of the countervailing duty and antidumping orders on corrosion-resistant carbon steel flat-rolled products from Australia, Canada, France, Germany, Japan, and Korea.

II. Procedural History

On September 1, 1999, the Commission instituted reviews pursuant to section 751 of the Tariff Act to determine whether revocation of the countervailing and antidumping duty orders on imports of corrosion-resistant steel from Australia, Canada, France, Germany, Japan, and Korea would be likely to lead to the continuation or recurrence of material injury to an industry in the United States.² The orders in question were imposed following the Commission's determinations in August 1993 which found that an industry in the United States was materially injured or threatened with material injury by reason of subsidized imports of corrosion-resistant steel from France, Germany and Korea and was materially injured or threatened with material injury by reason of less than fair value

¹ North America Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605, 682 (entered into force Jan. 1, 1994).

² 64 Fed. Reg. 47862 (Sept. 1, 1999), Pub. Doc. 8 at Appendix A.

("LTFV") imports of corrosion-resistant steel from Australia, Canada, France, Germany, Japan, and Korea.³

Following the institution of these reviews on December 3, 1999, the Commission determined to conduct full reviews for all orders in these grouped reviews to promote administrative efficiency.⁴ During the course of the review, the Commission obtained evidence as to the likely effect of revocation through its staff, as well as from party submissions and testimony during a hearing held on September 13, 2000.

Before reaching the issue of whether revocation of the orders would likely result in the continuation or recurrence of material injury, the Commission considered whether to exercise its discretion under 19 U.S.C. §1675a(a)(7)⁵ to cumulate the subject imports for purposes of assessing the likelihood or recurrence or continuation of material injury. In the case under review, the Commission determined that the criteria for cumulation had been met and cumulated subject imports from all six countries, including those of Canada about which Complainant objects. The Commission found that “[b]ased on the available information regarding the capacity and exports of the industries” in Canada and the other subject countries, “as well as their current exports to the United States, we find that subject imports from all six countries would be likely to have a discernible adverse

³ Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, and the United Kingdom, Inv. Nos. 701- T A319- 332,334,336-342,344,347-353, 731-TA-573-579,581-592,594-597,599-609, and 612-619 (Final), USITC Pub. 2664 (Aug. 1993).

⁴ See Explanation of Commission Determinations on Adequacy, USITC Pub.3364 at Appendix A.

⁵ 19 U.S.C. 1675a(a)(7) provides with respect to cumulation in five-year reviews that:
[T]he Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with the domestic like products in the United States market. The Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.

impact on the domestic industry if the orders were revoked.”⁶ In support of this determination, the Commission made the following findings that subject imports from Canada and the other subject countries would have a “discernible adverse impact”:

Subject imports from Australia, Canada, France, Germany, Japan and Italy [sic] have remained in the U.S. market in the years since the orders were imposed. The continuing presence of these subject imports in the domestic market indicates that subject foreign producers continue to have the contacts and channels of distribution necessary to compete in the U.S. market.

The corrosion-resistant steel industries in the subject countries devote considerable resources to export markets. While capacity utilization rates have topped *** percent in each of the subject countries during the period of review, there appears to be available excess capacity in each country.

We are mindful that the volume of subject imports has decreased from the time the orders were imposed. Yet in the context of this particular industry, including its weakened condition, we find that a likelihood exists that even a small post-revocation increase would have a discernible adverse impact on the domestic industry.⁷

On November 2, 2000, after considering all the record evidence, the Commission found that revocation of the countervailing and antidumping duty orders on subject imports of corrosion-resistant steel would likely lead to the continuation or recurrence of material injury within a reasonably foreseeable time to an industry in the United States.⁸ On December 1, 2000, the Commission published its final determination in the sunset reviews.⁹ It included a determination that revocation of antidumping duty order on corrosion-resistant carbon steel flat products from Canada¹⁰ would likely lead to

⁶ Certain Carbon Steel Products from Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, The Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and The United Kingdom, Inv. Nos. AA1921-197 (Review), 701-TA-231, 319-320, 322, 325-328, 340, 342, 348-350 (Review) and 731-TA-573-576, 578, 582-587, 604, 607-608, 612, 614-618 (Review), USITC Pub. 3364, at 47, Pub.Doc. 345 [hereinafter cited as “Public Determination”].

⁷ *Id.*

⁸ Public Determination, *supra* note 6, at 58.

⁹ 65 Fed. Reg. 75,301 (2000), as corrected, 65 Fed. Reg. 77,074 (2000).

¹⁰ Case no. 731-TA-614.

continuation or recurrence of material injury to an industry in the US within a reasonably foreseeable future.¹¹ On December 15, 2000, the US Department of Commerce published a notice announcing the continuation of certain orders based on the Commission's final determination, including the continuation of the antidumping duty order on corrosion-resistant carbon steel flat products from Canada.¹²

On December 28, 2000, Complainant Dofasco filed its request for review of the Commission's cumulation determination. On October 1, 2001, Complainant Dofasco filed its Brief ("Complainant's Brief") in which it raised the following issues :

1. In light of 19 U.S.C. § 1675a(a)(7), which stipulates the "[t]he Commission shall not cumulatively assess the volume and effects of imports of the subject merchandise in a case where it determines that such imports are likely to have no discernible adverse impact on the domestic industry," can the Commission legally cumulate Canadian imports with no evaluation of Canadian producers' arguments explaining why their imports either have a net beneficial impact on the domestic industry, or other economic arguments why Canadian producers' arguments would have no discernible adverse impact in the event of revocation?
2. Can the Commission determine that the domestic industry is "vulnerable" to material injury if the orders are revoked despite investors' willingness to make massive investments in new galvanizing capacity? Can the Commission find the domestic industry "vulnerable" if the domestic industry refuses to provide supporting documentation that their investments in massive new capacity were predicated on the continuation of the antidumping orders? Can the Commission find the domestic industry "vulnerable" if overwhelming record evidence demonstrates that the domestic industry's expansion was in response to general market conditions, specifically the shift in demand towards galvanized steel in general and hot-dipped galvanized steel in particular?
3. In light of 19 U.S.C. §1677(4)(A), which directs the Commission to assess likelihood of recurrence of material

¹¹ 65 Fed. Reg. 75,301 (2000).

¹² 65 Fed. Reg. 78,469 (2000).

injury in the context of the industry producing the like product, which in this case is corrosion-resistant steel, can the Commission make a finding of vulnerability, despite a “level of operating income [that] might not generally suggest vulnerability”¹³ on the grounds that “corrosion-resistant products are an important profit center”¹⁴ for other industries, recognized as legally distinct, that are operated by the same steel companies?¹⁵

On November 30, 2001, the Commission filed its Brief on behalf of the Investigating Authority (“Commission Brief”) and Bethlehem Steel Corporation, Ispat Inland, Inc., LTV Steel Company, Inc. and United States Steel LLC filed a joint brief (“Domestic Industry Brief”) in response to the Complainant’s Brief. On January 2, 2002, Complainant Dofasco filed its Reply Brief (“Complainant’s Reply Brief”). This Panel held a public hearing on June 30, 2004 to provide the participants to this NAFTA Panel Review the opportunity to be heard.

III. Jurisdiction

This Panel’s authority derives from NAFTA Article 1904(1), which provides that, upon proper request, “each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.” NAFTA Annex 1911 specifies that included among such final determinations are the results of five-year reviews by the Commission under section 751 (c) of the Tariff Act.¹⁶

¹³ Public Determination, *supra* note 6, at 56.

¹⁴ *Id.*

¹⁵ Complainant’s Brief, at 7.

¹⁶ 19 U.S. C. 1675(c), (2000).

IV. Governing Law

Pursuant to NAFTA Article 1904 (2), panels are to determine whether the determination of the investigating authority:

...was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.”¹⁷

With respect to the Binational Panel review process, the Panel replaces the regular court review of the Court of International Trade (“CIT”) and the CIT’s decisions constitute “judicial precedents” upon which Binational Panels will rely to determine the governing law of a case. Moreover, the Panel is bound by judicial precedents of the Court of Appeals for the Federal Circuit (“CAFC”)¹⁸ and by the United States Supreme Court. A decision of a binational panel is not binding on future panels, although it may be persuasive and acknowledged as guidance for a subsequent panel.¹⁹

V. Standard of Review

¹⁷NAFTA, Article 1904.2. As a consequence, it is quite possible that “different legal principles[,] depending on which NAFTA country is the ‘importing party,’ ...could lead to different results in different NAFTA Parties.” In the Matter of Gray Portland Cement and Clinker from Mexico [Fourth Administrative Review], USA-97-1904-02 (November 23, 1998), at 5. Illustrative of this point are the quite different standards of review under the laws of the three NAFTA countries. See NAFTA, Annex 1911; see also In the Matter of Cold-Rolled Steel Sheet, CDA-93-1904-09 (explaining Canada’s standard of review); and In the Matter of Cut-Length Plate Products from the United States, MEX-94-1904-02 (explaining Mexico’s standard of review).

¹⁸The CAFC has exclusive appellate jurisdiction over decisions of the CIT. 28 U.S.C. § 1295(a)(5)(1998).

¹⁹See In the Matter of Certain Corrosion-Resistant Carbon Steel Products from Canada, USA-93-1904-03 (October 31, 1994), at 78 note 254.

The manner in which this Panel performs the reviewing function prescribed by the NAFTA is defined by the standard of review. Not only does the application of the proper standard of review guide the work of the Panel, it appropriately confines its function.²⁰ “Panels must conscientiously apply the standard of review,” “must follow and apply the law, not create it,” and “simply apply established law.”²¹

Since this case involves the exercise of the Panel’s reviewing function with respect to a number of issues, a clear elucidation of the Panel’s reviewing standard and its limits will explain how the Panel has exercised its reviewing authority. The standard of review required for U.S. Chapter 19 cases is dictated by § 516A(b)(1)(B) of the Tariff Act of 1930,²² which requires the Panel to “hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law”

A. Substantial Evidence

Many U.S. judicial decisions have considered or interpreted the substantial evidence standard and given additional meaning to the statutorily prescribed standard. The Supreme Court has stated that the standard means that “more than a scintilla [of evidence is necessary],...such relevant evidence as a reasonable mind might accept as

²⁰ Among the limited grounds for appealing a decision of a binational panel under NAFTA’s Extraordinary Challenge Procedure (see NAFTA, Annex 1904.13), is that the panel “manifestly exceeded its powers, authority or jurisdiction...for example, by failing to apply the appropriate standard of review.” NAFTA, Article 1904.13(ii) (emphasis added).

²¹ In the Matter of Certain Cut-to-Length Carbon Steel Plate From Canada, USA-93-1904-04 (October 31, 1994) and In the Matter of Gray Portland Cement and Clinker from Mexico [Fourth Administrative Review], USA-97-1904-02.

²² See NAFTA Annex 1911.

adequate to support a conclusion.”²³ A later case, Consolo v. Federal Maritime Commission,²⁴ elaborated by stating that substantial evidence can be “something less than the weight of the evidence.”

In assessing such “substantiality,” courts and binational panels must consider “the record in its entirety, including the body of evidence opposed to the [agency’s] view.”²⁵ Thus, the Panel’s role is “not to merely look for the existence of an individual bit of data that agrees with a factual conclusion and end its analysis at that.”²⁶ Rather, the Panel must also take into account evidence in the record that detracts from the weight of the evidence relied on by the agency in reaching its conclusion.²⁷

However, it is clear that the substantial evidence standard does not entitle courts or binational panels to “reweigh” the evidence or substitute its judgment for that of the original finder of fact, the agency.²⁸ It is well settled that “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”²⁹ The reviewing authority therefore may not “displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been

²³Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

²⁴383 U.S. 607, 620 (1966).

²⁵Universal Camera, 340 U.S. 474, 483-484

²⁶In the Matter of New Steel Rails from Canada, USA-89-1904-09 (August 13, 1990), at 9.

²⁷Universal Camera, 340 U.S. at 488; see also Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984); and Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348, 353 (Ct. Int’l Trade 1993).

²⁸In the Matter of Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11 (August 24, 1990), at 8; see also Metallwerken Nederland B.V. v. United States, 728 F. Supp. 730, 734 (Ct. Int’l Trade 1989).

²⁹Consolo, 383 U.S. at 620.

before it *de novo*.³⁰ The reasoning underlying this principle has been expressed by the Supreme Court in the following manner: “[The substantial evidence standard] frees the reviewing [authority] of the time-consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute.”³¹

This split of function --between agency and reviewing tribunal-- casts the reviewing body in the role of determining whether the administrative record³² adequately supports the agency’s decision,³³ which must be adjudged only on the grounds and findings actually stated in its determination,³⁴ not on the basis of *post hoc* argumentation of counsel.³⁵ In carrying out its review of an agency determination, a court or binational panel must stay strictly within the confines of the administrative record already in existence.³⁶ In short, binational panels may not engage in *de novo* review³⁷ and,

³⁰Universal Camera, 340 U.S. at 488; *accord* American Spring Wire Corp. v. United States, 760 F.2d 249 (Fed. Cir. 1985).

³¹Consolo, 383 U.S. at 620.

³²See NAFTA Art. 1904(2).

³³Daewoo Electronics Company v. International Union, 6 F.3d 1511 (Fed. Cir. 1993), *cert. denied*, 114 S. Ct. 2672 (1994).

³⁴Hussey Copper, Ltd. v. United States, 834 F. Supp. 413, 427 (Ct. Int’l Trade 1985), *citing* SEC v. Chenery, 318 U.S. 80, 87 (1943).

³⁵Maine Potato Council v. United States, 613 F. Supp. 1237, 1245 (Ct. Int’l Trade 1985) (“A counsel’s post hoc rationalization cannot substitute for a clear statement by the [agency] as to how it treated [a significant competitive factor].”).

³⁶See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-744 (1984). (“[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.... The task of the reviewing court is to apply the appropriate [] standard of review [] to the agency decision based on the record the agency presents to the reviewing court.” (citations omitted)).

³⁷Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (Ct. Int’l Trade 1986), *aff’d per curiam*, 810 F.2d 1137 (Fed. Cir. 1987).

consistent with that directive, may not make new factual findings that would amend the agency record. Indeed, the statutory requirement that review be “on the [administrative] record” means that the reviewing court or binational panel is limited to “information presented to or obtained by [the Department]...during the course of the administrative proceeding....”³⁸

In undertaking its review function in U.S. antidumping and subsidy cases, the courts often employ the vocabulary of “deference,” making it clear that the substantial evidence standard generally requires the reviewing authority to accord deference to an agency’s factual findings, its statutory interpretations, and its methodologies. Specifically, with respect to their review of agency fact-finding, courts and binational panels have noted that “deference must be accorded to the findings of the agency charged with making factual determinations under its statutory authority.”³⁹

However, the application of the substantial evidence standard and deference to agency decision-making does not mean abdication of the Panel’s authority to conduct a meaningful review of the agency’s determination.⁴⁰ The reviewing function is not superfluous, nor a rubber-stamp. Accordingly, deference has its bounds. An agency’s decision must have a reasoned basis.⁴¹ The reviewing authority may not defer to an

³⁸ 19 U.S.C. § 1516a(b)(2)(A)(i).

³⁹ In the Matter of Fresh, Chilled and Frozen Pork from Canada, USA-89-1904-11, at 6 (citing In the Matter of Red Raspberries from Canada, USA-89-1904-01, at 18-19 (Dec. 15, 1989). *Accord*, N.A.R., S.P.A. v. United States, 741 F. Supp. 936, 939 (Ct.Int’l Trade 1990) (“[D]eference is given to the expertise of the administration agency regarding factual findings.”).

⁴⁰ See Al Tech Specialty Steel Corp. v. United States, 651 F. Supp. 1421, 1424 (Ct.Int’l Trade 1986). (“This deference, however, should in no way be construed as a rubber stamp for the government’s interpretation of statutory provisions.” *See also Smith-Corona Group*, 713 F. 2d at 1571 (“The Secretary cannot, under the mantle of discretion, violate these standards or interpret them out of existence.”)

⁴¹ See Softwood Lumber from Canada (injury), USA-92-1904-02, at 15 (July 26, 1993); and American Lamb Co., 785 F.2d at 1004 (citing S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979

agency determination premised on inadequate analysis or reasoning.⁴² The extent of deference to be accorded agency determinations is dependent on “the thoroughness evident in [its] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements....”⁴³

To be accorded deference, therefore, there must be a rational connection between the facts found and the choice made by the agency.⁴⁴ A reviewing body may uphold an agency’s decision of less than ideal clarity, but its path of reasoning must be reasonably discernible,⁴⁵ and there must be an adequate explanation of the bases for the agency’s decision in order for the reviewing authority to meaningfully assess whether it is supported by substantial evidence on the record. The agency must articulate and explain the reasons for its conclusions.⁴⁶

B. In Accordance With Law

With respect to whether an agency has acted according to law, a reviewing tribunal may have greater latitude than in the case of agency fact-finding,

U.S.C.C.A.N. 381, 638); see also In the Matter of Fresh, Chilled and Frozen Pork, USA-89-1904-11, at 13 (Aug. 24, 1990).

⁴²Chr. Bjelland Seafoods A/C v. United States, 14 ITRD 2257, 2260, 1992 Ct. Int’l Trade LEXIS 213 (Ct. Int’l Trade 1992); USX Corp. v. United States, 655 F. Supp. 487, 492 (Ct. Int’l Trade 1987).

⁴³Ceramica Regiomontana, 636 F. Supp. at 965 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)), *aff’d*, 810 F.2d 1137 (Fed. Cir. 1987).

⁴⁴Bando Chem. Indus. v. United States, 787 F. Supp. 224, 227 (Ct. Int’l Trade 1992) (citing Bowman Transportation v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974), and Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)); Avesta AB v. United States, 724 F. Supp. 974, 978 (Ct. Int’l Trade 1989), *aff’d*, 914 F.2d 233 (Fed. Cir. 1990), *cert. denied*, 111 S. Ct. 1308 (1991).

⁴⁵Ceramica Regiomontana, S.A., 810 F.2d 1137, 1139 (Fed. Cir. 1987) (citing Bowman Transportation, 419 U.S. at 286).

⁴⁶See, e.g., Mitsubishi Materials Corp. v. United States, 820 F. Supp. 608, 621 (Ct. Int’l Trade 1993); USX Corp., 655 F. Supp. at 490; SCM Corp. v. United States, 487 F. Supp 96, 108 (Cust. Ct. 1980); Maine Potato Council, 613 F. Supp. at 1244-45; Bando Chem. Indus. 787 F. Supp. at 227.

depending on the particular of law and facts involved.⁴⁷ On issues of statutory interpretation, “deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well-settled principle of federal law.”⁴⁸ The Supreme Court has stated that “when a court is reviewing an agency decision based on a statutory interpretation, ‘if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.’”⁴⁹ Moreover, the CAFC has emphasized that “[d]eference to an agency’s statutory interpretation is at its peak in the case of a court’s review of Commerce’s interpretation of the antidumping laws.”⁵⁰ As a result of Congress’ “entrust[ing] in the antidumping field] the decision making authority in a specialized, complex economic situation to administrative agencies,”⁵¹ reviewing courts acknowledge that “the enforcement of the antidumping law [is] a difficult and supremely delicate endeavor [for which] [t]he Secretary of Commerce...has broad discretion in executing the law.”⁵²

⁴⁷ Alfred C. Aman and William T. Mayton, ADMINISTRATIVE LAW, §§ 13.4, 13.7-13.10 (1993). Professor Ernest Gellhorn and Ronald Levin state in their ADMINISTRATIVE LAW AND PROCESS (4th ed. 1997) “[As a] general rule of thumb. . . a reviewing court will give less deference to an agency’s legal conclusions than to an agency’s factual or discretionary determinations. . . The courts’ relative independence in declaring the law is a natural outgrowth of their traditional role in the American legal system. . . Policy considerations [also] reinforce the courts’ normal practice of giving less deference on legal issues.”

⁴⁸ National R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992).

⁴⁹ American Lamb Co. v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986), *citing* Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, at 843 note 11 (1984).

⁵⁰ Koyo Seiko v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994), *citing* Daewoo Electronics, 6 F.3d at 1516.

⁵¹ S. Rep. No. 249, 96th Cong., 1st Sess. 252 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 638.

⁵² Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *see also* Consumer Prof. Div., SCM Corp. v. Silver Reed America, 753 F.2d 1033, 1039 (Fed. Cir. 1985).

Most cases of the Federal Circuit,⁵³ which opinions bind the CIT and binational panels,⁵⁴ have tended to follow the case of Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.⁵⁵ This landmark decision on deference to administrative interpretations of statutes requires, in essence, that federal courts defer to any reasonable interpretation by an agency charged with administration of a statute, provided that Congress did not clearly specify a contrary interpretation.

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for

⁵³ See e.g., Timken Company v. United States, 37 F.3d 1470, 1474 (Fed. Cir. 1994). A notable exception to the tendency to follow Chevron is Federal Mogul Corp. v. United States, 63 F.3d at 1579 ("Chevron constitutes a significant inroad into traditional judicial power, and is not lightly to be applied to just any agency decision or litigation position made on behalf of an agency.") See also Lasko Metal Products v. United States, 43 F.3d 1442 (Fed. Cir. 1994), note 3 at 1446 ("Suramerica[de Aleaciones Laminadas, C.A. v. United States], 966 F.2d 660, 665 (Fed. Cir. 1992)] relied on the Supreme Court's Chevron analysis. In Suramerica, the issue was whether the agency's official interpretation of its organic legislation was a permissible reading of the statute. The policy underlying the Supreme Court's grant in Chevron of special deference to agency regulations and similar official agency pronouncements does not extend to every agency action--it would not, for example, extend to *ad hoc* representations on behalf of the agency, such as litigation arguments. In this case the issue much like that in Suramerica--an officially mandated agency methodology considered by the agency to be within its statutorily granted discretion.") The generally willing reception of the Chevron approach is not always embraced by other circuits and by commentators. See e.g., Arent v. Shalala, Slip Op. No. 94-5271 (D.C.Cir. 1995, Nov. 14, 1995). (Arent involved an Administrative Procedure Act challenge to regulations of the Food and Drug Administration (FDA) to implement the Nutrition Labeling and Education Act (NLEA), 21 U.S.C. 321 *et seq.* The majority avoided Chevron, applying instead the standard set out in Motor Vehicle Manufacturers Ass'n v. State Farm, 463 U.S. 29 (1983), to uphold the FDA regulation. The Arent majority stated that "Chevron is principally concerned with whether an agency has authority to act under a statute... Thus, a reviewing court's inquiry under Chevron is rooted in statutory analysis and is focused on discerning the boundaries of Congress' delegation of authority to the agency; and as long as the agency stays within that delegation, it is free to make policy choices in interpreting the statute, and such interpretations are entitled to deference....The only issue [in Arent] is whether the FDA's discharge of [its] authority was reasonable. Such a question falls within the province of traditional arbitrary and capricious review under 5 U.S.C. 706 (23)(A)(1988)."

One commentator has noted that "Chevron [altered the distribution of national powers among courts, Congress, and administrative agencies [putting it into tension with] deeply engrained [principles and ideas, such as the principle of Marbury v. Madison which made it the function of judges to] say what the law is. "Cass R. Sunstein, *Law and Administrative After Chevron*, 90 COLO. L. REV. 2071, 2075 (1990). See also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L. J. 969, 976 (1992).

⁵⁴ See *supra* note 18 and accompanying text.

⁵⁵ 467 U.S. 837 (1984).

the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.”⁵⁶

The underlying rationale for the deference required by *Chevron* is the executive branch's political accountability compared with that of the judiciary's. In the words of the Supreme Court: “[F]ederal judges—who have no constituency--have a duty to respect legitimate choices by those who do.”⁵⁷

While there is continuing debate as to the application and scope of the *Chevron* principle to antidumping cases in which differing contexts of discretion are involved, the case provides a modicum of refuge from challenge, in favor of the Department's expertise in antidumping matters, and poses a significant burden to those arguing against deference for agency decisions.⁵⁸

Even with *Chevron*, deference to an agency's interpretation of the statute it is charged with implementing is not unlimited. A reviewing authority may not, for example, permit an agency “under the guise of lawful discretion or interpretation to contravene or ignore the intent of Congress.”⁵⁹ The Supreme Court itself has held that

⁵⁶ 467 U.S. at 842-843.

⁵⁷ *Id.* at 866.

⁵⁸ The *Chevron* Court is saying that if Congress has not made all the relevant policy choices, courts should uphold the discretion of the executive branch to fill in the policy gaps. This principle is based on the theory that the president is “directly accountable to the people,” whereas judges are not.

⁵⁹ *Cabot Corp. v. United States*, 694 F.Supp. 949, 953 (Ct. Int'l Trade 1988).

“no deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.”⁶⁰ Deference may also be given to the methodologies selected and applied by the agency to carry out its statutory mandate,⁶¹ which a court or binational panel may only review for reasonableness.⁶²

In summary, the applicable standard of review for this matter requires the panel to uphold the Commission’s Final Determination if it is supported by substantial evidence on the record and are not contrary to law, even if the panel would have reached a different conclusion if it had considered the case *de novo*.

VI. ISSUE #1

Can the Commission legally cumulate Canadian imports with no evaluation of Canadian producers’ arguments explaining why their imports either have a net beneficial impact on the domestic industry, or other economic arguments why Canadian producers’ arguments would have no discernible adverse impact in the event of revocation?

A. ARGUMENTS

⁶⁰Public Employees Retirement System of Ohio v. June M. Betts, 492 U.S. 158, 171 (1989). See also Texas Crushed Stone Co. v. United States, 35 F.3d 1535 (Fed. Cir. 1994), note 7 at 1541 (“Prior agency practice is relevant in determining the amount of deference due an agency’s earlier interpretation. An agency’s interpretation of a relevant provision which conflicts with agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held agency view.” Citing INS. V. Cardoza-Fonseca, 480 U.S. 421, 446 note 30, 107 S.Ct. 1207, 1221 note 30, 94 L.Ed. 2d 434 (1987).

⁶¹See Brother Industries, Ltd. v. United States, 771 F. Supp. 374, 381 (Ct. Int’l Trade 1991). (“Methodology is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.”)

⁶²Koyo Seiko Co. v. United States, 66 F.3d 1204, 1210-1211 (Fed. Cir. 1995) (“[O]ur inquiry is limited to determining whether Commerce’s model-match methodology...is reasonable.”) Even methodologies selected and applied by the agency to carry out its statutory mandate “still must be lawful, which is for the courts finally to determine.” Brother Industries, 771 F. Supp. At 381. See also Gifford-Hill Cement Co. v. United States, 615 F. Supp. 577, 582 (Ct. Int’l Trade 1985) (“If the use of [a submarket] analysis was improper, then the Commission’s findings would not be supported by substantial evidence.”)

1. COMPLAINANT

Complainant Dofasco argues that there is no indication that any of its arguments were considered by the ITC. It claims these three arguments were different from the other parties and the failure to specifically address them indicates that the decision on cumulation of Canada was not supported by substantial evidence. The three arguments Dofasco poses, claiming they were not specifically addressed, are that:

- Exports from Canada provide a net benefit to the domestic corrosion-resistant steel industry because cold-rolled sheet is toll processed in Canada and then shipped back to the U.S.;
- Trade between Canada and the U.S. is materially different from trade with the other nations whose imports were cumulated in this investigation; and
- There was no indication that the Investigating Authority examined whether Canadian companies could increase shipments to the U.S. if the order was removed, i.e. that there was adequate excess capacity in Canada.

Complainant further reminds the Panel of the governing statute with respect to cumulation ⁶³ which requires that:

(t)he Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

Moreover, the Complainant argues that the legislative history explains the intent of this provision with respect to addressing relevant arguments.

⁶³ 19 U.S.C. 1677f(i)(3)(B)

The Administration does not intend that the new section 777(i) alter existing law regarding public notice and explanation of antidumping and countervailing duty determinations. Existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency's determination be discussed so that the "path of the agency may reasonably be discerned" by a reviewing court. For example, current law requires the Commission to explain its reasoning, and particularly to address the three key factors of volume, price effects and impact, as well as any other relevant factor on which it has relied in its determination. To the extent there is precedent suggesting that the Commission is not required to address even the main arguments of the parties in its opinions, that precedent is disapproved.

On the other hand, neither existing law nor new section 777(i) require Commerce or the Commission in every case to discuss every statutory factor, particularly where certain facts are not germane to a particular industry or investigation, or to discuss each argument or fact presented by a party, regardless of how irrelevant or trivial. For example, if the Commission rejects a party's proposed definition of the like product, the Commission need not necessarily, later in its opinion, continue to reference arguments on causation made by the party on the assumption that its proposed like product definition would be accepted.

Likewise, Commerce and the Commission need not issue explicit findings of fact or conclusions of law. Such findings and conclusions, while appropriate for adjudicatory proceedings, are not appropriate for antidumping or countervailing duty proceedings, which are investigatory in nature and which do not allow an extensive period of time in which to write a determination. Instead, the agencies must specifically reference in their determinations factors and arguments that are material and relevant, or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument.⁶⁴

2. THE COMMISSION

The Commission argues that its reasoning for cumulation of Corrosion-Resistant Steel was as follows:

In these reviews, the statutory requirement that all corrosion-resistant steel reviews be initiated on the same day is satisfied. Based on the available information regarding the capacity and exports of the industries in Australia, Canada, France Germany, Japan, and Korea as well as their current exports to the United States, we find that the subject imports from all six countries would be

⁶⁴ H.R. Rep. 103-826, pt.1, at 98 (1994), *reprinted in* 1994 U.S.C.C.A.N.4042, 3869-70 (citations omitted).

likely to have a discernible adverse impact on the domestic industry if the orders were revoked. The volume and price trends varied for subject imports from all six countries but none was distinct from all others. We also find that a reasonable overlap of competition between the subject imports and domestic like product is likely to exist if the orders were revoked. We do not find any significant differences in the conditions of competition among the subject countries. We, therefore, have exercised our discretion to cumulate subject imports from Australia, Canada, France, Germany, Japan, and Korea.⁶⁵

While the Commission accepts that it does not specifically address the Complainant's three arguments as to why Canada should have been treated differently from the other exporting countries, it cites *Dastech Int'l Inc. v. USITC*,⁶⁶ pointing out that "(t)he Commission is presumed to have considered all of the evidence in the record"⁶⁷, and that there is substantial evidence in the record to support its conclusions.

3. DOMESTIC INDUSTRY

The domestic industry reiterates the basic position of the Commission that the ITC was under no obligation to address each and every argument advanced by Dofasco. Moreover, the Commission's determination that Canadian imports would "likely" have a more than "no discernible adverse impact" on the domestic industry is supported by substantial evidence. Thus, the evidence submitted by the Complainant did not require the Commission to refuse to cumulate imports from Canada.⁶⁸

The domestic industry further argued that the record indicated Canadian producers had available excess capacity to increase exports if the anti-dumping order was revoked, and even a small volume of imports may have a "discernible adverse impact"

⁶⁵ Public Determination, at 47.

⁶⁶ 963 F. Supp. 1220.

⁶⁷ *Id.*, at 1226. See also *Grupo Industrial Camesa v. United States*, 853 F. Supp. 440

⁶⁸ Domestic Industry Reply Brief, at 18, citing *Nat'l Ass'n of Mirror Mfrs.*, 12 C.I.T. at 780, 696 F. Supp. At 648-49.

(“DAI”).⁶⁹ Canadian producers would almost certainly increase shipments to its largest export market⁷⁰, and contracts with U.S. automakers make it more likely that Canadian imports would have a DAI.⁷¹

B. PANEL DECISION AND ANALYSIS

In the case of cumulation in five-year reviews, the authority to cumulate is found in 19 USC §1675a(a)(7) and it prohibits cumulation in a case where the Commission finds that “such imports are likely to have no discernible adverse impact on the domestic industry.”⁷² Thus, in reviewing the Commission’s determination to cumulate, the Panel is mindful that a different level of adverse impact or harm is needed to support a cumulation decision than is demanded of an affirmative injury determination. The court in *Usinor Industeel, S.A., et al. v. United States*⁷³ explained there are different legal requirements for each.

An adverse impact, or harm, can be discernible but not rise to a level sufficient to cause material injury. The different standards reflect the nature of the cumulation analysis. Certain imports are to be cumulated to assess causation of material injury, but the no “discernible impact” provisions provide a safe harbor of sorts for certain imports viewed in isolation. Plaintiffs’ theory would defeat the purpose of cumulation, i.e., to guard against the “hammering” effect of imports which, in isolation, do not cause material injury determination is greater than that necessary to find there will not likely be no discernible adverse impact from imports of a particular country.⁷⁴

Notwithstanding the different levels of adverse impact or harm required in each, the Panel notes that the standard of review it must apply in reviewing each agency action

⁶⁹ Domestic Industry Reply Brief, at 11.

⁷⁰ *Id.*, at 14.

⁷¹ *Id.*, at 25-26.

⁷² 19 USC §1675a(a)(7).

⁷³ Slip Op. 03-118, 2003 WL 22080731 (CIT, Sept. 8, 2003), *appeal docketed*, No. 04-1082 (Fed. Cir., Dec. 1, 2003).

⁷⁴ *Id.* at *2(CIT).

remains the same—it must find that the Commission’s determinations are supported by substantial evidence and in accordance with law.

Also, as indicated above in the Panel’s discussion of the standard of review to be applied, the obligation of the Commission goes beyond merely stating general conclusions regarding the evidence. The Commission’s obligation to address, on the record, the relevant and material arguments of a party is governed by law, and the “path of the agency” in reaching its conclusion should be reasonably discernible in order for a reviewing body to perform its role of determining whether there was substantial evidence to support the decision and that the Commission acted in accordance with law.⁷⁵ While the Commission is presumed to have considered all of the arguments and evidence submitted by the parties,⁷⁶ significant arguments or evidence that would seriously undermine a determination must be dealt with by the Commission.⁷⁷ Thus, the Commission is required to discuss material and relevant factors going into its decision,

⁷⁵ 19 USC §1677f(i)(3)(B), along with its legislative history, below, states the Commission’s responsibilities:

The Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

Existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency’s determination be discussed so that the “path of the agency may be reasonably discerned” by a reviewing court. Uruguay Round Trade Agreements, Statement of Administrative Action, H.R. Doc. No. 316, vol. 1, 103d Cong., 2d Sess. 892 (1994)[hereinafter, “SAA”].

See also *supra* 64.

⁷⁶ Dastech Int’l, Inc. v. USITC, 963 F. Supp. 1220, 1226 (1997).

⁷⁷ The CIT in ALTX, Inc. v. United States, stated: “While the commission need not address every argument and piece of evidence, it must address significant arguments and evidence which seriously undermines its reasoning and conclusions. 167 F. Supp. 2d 1353 (CIT 2001) [hereinafter “ALTX”], quoted with approval in Usinor Beautor v. United States, Slip Op. 02-70, 2002 WL 1998315 (CIT, July 19, 2002) [hereinafter “Usinor Beautor”].

but it is not obligated to address just any arguments or evidence submitted, unless they would somehow seriously undermine the Commission's determination.⁷⁸

It is with an understanding of these considerations and an appreciation of the applicable standard of review that the Panel examines the Complainant's arguments.

1. Canadian Imports Provide Net Benefit to the Domestic Industry

Dofasco contends that exports from Canada provide a net benefit to the domestic corrosion-resistant steel industry because of the cold-rolled sheet which is toll processed in Canada, and then shipped back to the United States. However, Complainant does not offer any explanation why such imports of corrosion-resistant steel provide a net benefit to the domestic industry as a whole. While such imports may have some benefit to National Steel, that company does not constitute the domestic industry as a whole. Therefore, the Commission's conclusion was reasonable that corrosion-resistant steel imported from Canada and sold in the United States market would have a discernible adverse impact upon the domestic industry.

Accordingly, we conclude that the importation of corrosion-resistant steel processed in Canada from cold-rolled sheet originally exported from the United States does not constitute substantial evidence to refute the determination of the Commission to cumulate imports in the underlying investigation. Contrary to the Complainant's assertions, this Panel determines that this argument of the Complainant does not represent

⁷⁸ Judge Wallach in *Usinor Beautor*, *id.* at *15, stated:
[The evidence cannot be] peripheral or ancillary to the Commission's determination. Rather, it has [to have]...direct and material bearing on the proper resolution of the various issues present to the Commission, and ...call[] the accuracy and legitimacy of the Commission's findings and conclusions squarely into question....[E]very party before an agency of the United States has a right to expect a fair and logical determination containing as much analysis as is necessary to adequately demonstrate the basis for its conclusions.

a significant one or evidence which seriously undermines the reasoning or the conclusions of the Commission and, thus, that the Commission was not required to address it in its determination.

2. Trade between Canada and U.S. is Materially Different

The second argument made by Complainant is that trade between Canada and the United States is materially different from trade with the other nations whose imports were cumulated in this investigation. Complainant argues that since the conditions of competition are different, the question of discernible adverse impact should have been examined in a different frame of reference. Dofasco points to the integrated nature of the North American steel industry. The largest user of corrosion-resistant steel is the automobile industry. Since automobiles are produced on both sides of the border, it is the customer, rather than the producer, who dictates where the merchandise is to be shipped. Further, Dofasco is a member of the leading domestic trade association, and through a joint marketing agreement, is helping to increase the North American share of the American market. Dofasco also observes, as evidence of the integrated nature of the North American market, that while Canada has dumping orders on corrosion-resistant steel, shipments to Canadian automobile manufacturers are exempt from these orders.

The Panel does not quite know what to make of these arguments. While Complainant's description of the integration of the North American industry may be accurate, it does not deal with the question of whether the lifting of the dumping order would have a discernible adverse impact on the U.S. industry.

We conclude that the fact that the North-American industry may be integrated to a greater or lesser extent does not constitute substantial evidence to refute the discernible adverse impact determination of the Commission and to cumulate imports in the underlying investigation. Furthermore, contrary to Complainant's assertion that this argument demanded a Commission response in its Determination, the Panel decides that Complainant's argument does not represent a significant one or evidence which seriously undermines the reasoning or the conclusions of the Commission, and therefore the Commission was not required to address it in its Determination.

3. Canadian Excess Capacity

The third argument raised by Dofasco in opposition to the Commission's discernible adverse impact determination relates to market conditions in Canada. Dofasco argues that Canadian imports were likely to have no discernible adverse impact because: (1) Canadian producers as a whole were operating at full capacity, (2) demand had skyrocketed in the Canadian market, and (3) the U.S. auto companies, as the major customers of Canadian corrosion-resistant steel for automotive applications, dictated whether Canadian imports of corrosion-resistant steel would go to their auto plants in Canada or the U.S.

The Commission did not address these arguments in its Determination. In the Commission's Reply Brief to the Complainant's Brief, the Commission referenced evidence in the record that it believes refuted the second and third claims of Dofasco, indicated above. More specifically, the Commission argued that evidence in the record demonstrated that the demand in Canada was not as robust as claimed by Dofasco and

that Dofasco had not demonstrated any evidence in the record that U.S. auto companies dictated where Canadian produced corrosion resistant steel would be produced.⁷⁹ The Panel finds that, with respect to these two claims, the record provides substantial evidence for the determination of the Commission. Furthermore, this Panel determines that these claims do not represent a material argument or evidence which seriously undermines the reasoning or the conclusions of the Commission and that the Commission was not required to address it in its determination.

The Panel, however, is more troubled by the determination of the Commission that the Canadian producers had available capacity to increase shipments to the U.S., given the high capacity utilization percentage figures found in the administrative record. The volume of imports and the potential to increase such volume on a post-order basis are significant elements in the determination of whether imports would have a discernible adverse impact if the orders were revoked. Yet, despite the fact that the Canadian capacity utilization was very high, the Commission merely stated in its Determination that "...while capacity utilization rates have topped *** percent in each of the subject countries during the period of review, there appears to be available excess capacity in each country."⁸⁰ Thus, given the very high rate of capacity utilization of the Canadian producers indicated in the record, the Panel determines that the rather simplistic conclusion of the Commission with respect to the availability of excess capacity is not based upon substantial evidence in the record.

⁷⁹ The Commission further argues that this argument is not properly before the Panel for review because it was not raised by Dofasco before the Commission.

⁸⁰ Public Determination at 47.

The Panel notes that in the *Usinor Beautor* case,⁸¹ the Court of International Trade was faced with the same question regarding the high capacity utilization rates of producers in France and in Germany in the same sunset investigation and Determination by the Commission. In that case, Judge Wallach held that:

An agency determination must be supported by concurrent agency reasoning and not by *post hoc* reasoning by the agency or its counsel. Indeed, the Supreme Court has said that “an agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Motor Vehicle Mfg. Ass’n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 50, 12 L. Ed. 36 (1983).

As a result, the court finds the Commission’s decision to cumulate French imports, in light of its treatment of the French capacity utilization data, unsupported by substantial evidence. If it still wishes to cumulate French CRCS on remand, the Commission must properly address this data and sufficiently demonstrate its reasoning.

....

As a result, and for the same reasons articulated in the preceding discussion of French capacity utilization, the court finds the Commission’s decision to cumulate German imports, in light of its treatment of the German capacity utilization data, unsupported by substantial evidence. In its remand determination, the Commission must properly address this data and include a greater discussion of its reasoning...⁸²

Accordingly, the Panel decides that the Commission’s determination in this instance is not supported by substantial evidence on the record and remands this aspect of the determination to the Commission for further explanation, as specified in Section IX of this Opinion.

⁸¹ *Usinor Beautor*, *supra* note 77, at *11-12.

⁸² *Id.*

VII. ISSUE #2

Assuming antidumping orders are revoked, can the Commission determine that the domestic industry is “vulnerable” if:

- (i) investors are willing to make massive investments in the domestic industry to create new galvanizing capacity;**
- (ii) the domestic industry refuses to provide supporting documentation that its investments in massive new capacity were predicated on continuation of the antidumping orders; and**
- (iii) overwhelming record evidence demonstrates that the domestic industry’s expansion was in response to general market conditions, specifically the shift in demand towards galvanized steel in general and hot-dipped galvanized steel in particular.**

A. ARGUMENTS OF THE PARTIES

1. COMPLAINANT

The Complainant seeks a remand of the Commission’s finding of “vulnerability” as being “unsupported by substantial evidence” on three grounds. It says that the Commission failed to:

- take into account the domestic industry’s receipt of hundreds of millions of dollars of new capital by private investment (the “private investment argument”).
- draw an adverse inference against the domestic industry for its failure to answer certain questions concerning capital expenditures and, specifically, the reasons those expenditures were made (the “adverse inference argument”);
- take into account the Domestic Industry’s capacity increases which reflected a market shift towards galvanized steel and particularly hot dipped galvanized steel (the “market shift argument”).

In summary, the Complainant contends that these arguments and the evidence in the record in their support establish that the Domestic Industry is healthy and, therefore, could not be vulnerable. Thus, any conclusion to the contrary as made by the Commission could not, it asserts, be supported by substantial evidence. Accordingly, it seeks remand of these matters to the Commission for reconsideration of the vulnerability determination.

2. THE COMMISSION

The Commission argues that its finding that the domestic industry is in a “weakened state” is supported by substantial evidence. It found the domestic industry was vulnerable to material injury if the antidumping orders are revoked because since 1997—while net sales volumes and values increased—operating income, capacity utilization levels, unit sales values, and operating margins all declined.⁸³

With respect to the Complainant’s argument relating to increased capital investment, the Commission argues that there may be other reasons than the current condition of the industry why such investments can be made. In addition, the industry raised such investment from sources other than outside investors, including through the sales of plant facilities. Despite such investment, the industry was in a state of vulnerability based upon the Commission’s analysis of the factors referenced in the preceding paragraph.

With respect to the failure of the industry to provide documentation for the assertion that such investments were based on continuation of the antidumping order, the Commission argues that any such reliance was irrelevant to the ITC’s vulnerability

⁸³ Public Determination, *supra* note 6, at 55-56.

determination. Furthermore, the Commission argues that the industry did in fact attempt to provide such information to the best of its ability.

Finally, with respect to Complainant's argument concerning the expansion of the of the industry in response to market conditions, the Commission argues that the impact of any shift in market demand did not undercut the negative impact of imports on the industry's overall operating income, capacity utilization levels, unit sales values, and operating margins. In other words, the alleged shift in demand did not undercut the determination that the industry was vulnerable.

3. THE DOMESTIC INDUSTRY

In their response brief, the Domestic Industry argues that, with respect to domestic investment, it was correct for the Commission to focus on the condition of the industry at the time of the sunset review rather than on the fact that domestic producers were able to generate investment at some prior time.⁸⁴

With respect to the failure to provide information supporting the contention that new capacity investments were predicated upon continuation of the order, the Domestic Producers argue that the Commission did not specifically ask whether past investments had been premised on orders. Instead the Commission sought and was provided information showing how the revocation of the order would injure the domestic industry.⁸⁵

⁸⁴ Domestic Industry Reply Brief, at 43.

⁸⁵ Id at 39.

With respect to changes in domestic demand, the Domestic Producers argue that the record refutes any suggestion that the increases in demand insulated the industry from injury.⁸⁶

B. PANEL DECISION AND ANALYSIS

In response to the Complainant's three arguments with respect to the Commission's finding of vulnerability of the industry, the Panel addresses each individually below.

1. Private Investment Argument

The Complainant submits in support of its Private Investment Argument that the Commission failed to adequately consider the extraordinary influx of funds into the Domestic Industry's sector during the period of review and the Domestic Industry's use of these funds to update, modernize and reduce costs. The Complainant states "industries that are truly 'vulnerable' are not likely to receive massive inflows of investments, because investors are reluctant to invest in 'vulnerable' industries."⁸⁷

This argument is premised on the Complainant's own view of investors' motivations, knowledge and reluctance. The Panel finds that the Commission did examine the questions of modernization, capital expenditures to reduce costs, and trends in the cost of goods sold in its determination of vulnerability.⁸⁸

In finding that the Domestic Industry was vulnerable, the Commission said in part:

⁸⁶ *Id.* at 42

⁸⁷ Complainant's Brief, at 27-28.

⁸⁸ See e.g., Public Determination, *supra* note 6, at 50-51.

Nonetheless, based on the most recent data available, we find that the domestic industry is currently vulnerable to material injury if the orders are revoked. While net sales volumes and values increased from 1997 through 1999, operating income decreased continuously from 1997 to 1999, by a total of ***. Capacity utilization levels *** percent in 1997 to *** percent in 1999. Per-short-ton sales values and COGS for the combined domestic producers decreased for the same period but unit sales values decreased more than the decline in total unit costs. Operating [profit] margins dropped from *** percent to *** percent.⁸⁹

Based upon these factors, the Commission concluded that the domestic industry was in a weakened state as contemplated under the statute's vulnerability criterion, notwithstanding the fact that investments had been made in the industry.

In addition, the Commission in its Reply Brief referenced evidence in the record to the effect that a portion of the investment came not from outside investors but from such sources as the sales of existing plants. Furthermore, we note that the period during which such investments were made did not necessarily coincide with the period of investigation during which the Commission analyzed the vulnerability of the industry.

The Panel finds that the Commission's finding of vulnerability is supported by substantial evidence in the record, notwithstanding that investments had been made in the industry. Contrary to the Complainant's claim that the Commission should have specifically addressed this argument in its Determination, the Panel finds that this argument does not represent a significant one or evidence which seriously undermines the Commission's reasoning and conclusions, and therefore the Commission was not required to address it in its determination.

2. The Adverse Inference Argument

⁸⁹ Public Determination, *supra* note 6, at 55 and 56.

The Complainant's adverse inference argument concerns the Commission's request for information and documents from the domestic producers to support their suggestion that capital expenditures to, *inter alia*, increase production capacity were predicated on the continuation of the antidumping order. The Complainant cited a lack of responding documentation from the Domestic Producers and requested that an adverse inference be drawn against the Domestic Producers. The adverse inference sought to be drawn is that the capital expenditures undertaken were totally unrelated to the continuation of the Orders and in fact predicated on the general health of the industry, which would tend to negate vulnerability.

We note from the record that it was not clear whether, in fact, such information was actually requested from the Domestic Industry. The Commission focused its investigation, and properly so, on the condition of the industry and the potential impact of imports, were the order to be revoked.

With respect to the refusal of the Commission to draw adverse inferences for the alleged failure to provide information regarding actions predicated upon the order, the Panel chooses not to interfere with the procedure and process adopted by the Commission in reaching its decision. Such decisions are inherently for the Commission to decide, and in this case they do not seem to have been taken unreasonably.⁹⁰ In such a case, the Panel would have no legal authority to intervene with the determination of the Commission not to draw adverse inferences.

⁹⁰ It is noted that the Commission discussed its discretion to draw adverse inferences in five-year reviews, but declined to do so in this case, specifically with regard to respondent's failure to respond to questionnaires and instead relied on evidence in the record from the original investigations and information collected by the Commission since. Public Determination, *supra* note 6, at 17.

Also, the Panel does not accept the argument that if the Domestic Industry's capital expenditures were not predicated on the continuance of the Orders, that fact should automatically lead to a conclusion and finding that the industry was "not vulnerable". The Commission made its determination upon a reasonable analysis of the appropriate factors. It seems clear that the Complainant desires that its arguments and supporting evidence be given greater weight than the arguments and evidence relied upon by the Commission. In effect the Complainant is asking the Panel to reweigh the evidence leading to the conclusions of the Commission in favor of the Complainant's interpretation. That is something that this Panel cannot do under the applicable standard of review, as described above.

The Panel finds that the Commission's finding of vulnerability is supported by substantial evidence in the record, notwithstanding that no information was provided confirming the investments had been made in the industry on the assumption that the order would not be revoked. Thus, contrary to the Complainant's contentions that the Commission was required to address this argument in its Determination, the Panel finds that this argument would not seriously undermine the Commission's reasoning and conclusions, and therefore the Commission was not required to address it.

3. The Market Shift Argument

The Complainant's market shift argument is unclear to the Panel and, in any case, does not appear to undercut the Commission's finding of vulnerability. As set out in the Panel's discussion of the standard of review, *supra*, it is not the panel's role to reweigh

the evidence or displace the Commission's ultimate choice between the parties' conflicting views of that evidence.

The Panel notes that the Commission did consider the Domestic Industry's capacity, capacity utilization and capacity expansions and did acknowledge the increase in demand for hot-dipped corrosion-resistant steel.⁹¹ Indeed the Complainant itself acknowledges that the Commission considered and discussed these very factors, but disputes the Commission's treatment of the same and in particular submits that its factors should outweigh the other factors suggesting vulnerability.

Notwithstanding the increase in demand, or any shift in demand, the Commission determined, based upon its review of the evidence in the record, that the Domestic Industry was vulnerable. The Panel finds that the Commission's determination on vulnerability is based upon substantial evidence in the record, even though there was some evidence indicating that there was an increase and shift of demand in the market.

VIII. ISSUE # 3

Is the Commission's determination of likelihood of recurrence of material injury (under 1677 (4)(A)) based upon a vulnerability analysis of corrosion – resistant products as an important profit center for industries other than the corrosion-resistant steel industry.

A. ARGUMENTS

1. COMPLAINANT

The Complainant argues that the Commission has committed reversible error by linking the corrosion resistant steel industry with other sectors of the steel industry. In its

⁹¹ Public Determination, *supra* note 6, at 49-51.

determination, the Commission stated: “[C]orrosion resistant products are an important profit center for the domestic industry...”⁹² The Complainant’s position is that the Commission’s determination improperly joined the corrosion resistant steel industry with other upstream industries, such as the hot-rolled and cold rolled steel. It reasons that this linkage perpetually relegates the corrosion resistant steel industry to a “vulnerable or so-called weakened state” because it is burdened with carrying several product lines which the Commission has previously identified as separate industries.⁹³

The Complainant reasons that even though various Commissioners appear to equivocate on the extent to which they relied on general industry data, the inescapable reality is that the Commission’s determination posits a “ripple-effect” theory where profits in one line affects other lines. The Complainant argues that this ripple effect is even more pronounced where the product line in question is one which is expected to support chronically unprofitable product lines. The Complainant acknowledges the Commission’s disavowal of this “ripple-effect” theory, but argues that it remains implicit in its reasoning and, in any event, is a disavowal buried in a footnote which is rejected by three of the Commissioners.⁹⁴

The Complainant argues that reliance on the ripple theory constitutes reversible error because the Commission must, as a matter of law, assess the likelihood of recurrence of material injury in the context of the industry producing the like product (*i.e.* corrosion resistant steel) and not in the context of any collateral impact on industries producing upstream products. The Complainant further argues that this logic functionally leads to an irrebuttable presumption that the corrosion resistant steel industry will always

⁹² Public Determination, *supra* note 6, at 56-57.

⁹³ Complainant’s Reply Brief, at 24-25.

⁹⁴ Complainant’s Reply Brief, at 25-26.

be in a weakened state susceptible of injury because no level of profit will suffice when it must carry the burdens of separate industries operated by integrated steel companies.⁹⁵

The Complainant also contends that this panel should reject the Commission's assertion of harmless error. It argues that the Commission's determination, and especially its implicit conclusion that the domestic industry will be endangered by any unused capacity in Canada relies heavily on the vulnerability analysis which, in turn, depends on the Commission's "ripple effect" findings.⁹⁶

2. THE COMMISSION

The Commission argues that it did not look beyond the domestic industry and did not consider the ripple effect on the overall steel industry. It argues that it understood that the loss of profits sustained by this particular industry would not only affect the domestic producers ability to remain competitive, but could put them out of business. The Commission expressly stated that while it considered data relating to the overall steel industry, it did not rely on it. It went on to clarify, "We realize that in certain practical matters it is difficult to separate an industry from the larger commercial entity to which it belongs. Yet our statutory mandate is clear and we must reach our determination based on the state of the industry as defined in 19 USC 1677 (4)(A)."⁹⁷

The Commission further argues that even if the Panel were to find error with respect to its vulnerability determination, it would nonetheless be harmless because it

⁹⁵ Complainant's Reply Brief, at 26

⁹⁶ Complainant's Reply Brief, at 26

⁹⁷ Commission Brief, at 45-46.

also found that revocation of the orders would lead to significant volume and price declines which would have a significant adverse impact on the industry.⁹⁸

3. THE DOMESTIC INDUSTRY

The Domestic Producers support the contentions of the Commission. They argue that the record shows that the Commission did base its vulnerability analysis upon a review of the corrosion resistant industry and explicitly disavowed any reliance on any evidence relating to other industries. They argue that when the opinion is properly read, the Commission determined that the need for continued profitability and the ability to invest was essential not to the welfare of the entire US steel industry, but to the continued existence of the US corrosion resistant steel industry.⁹⁹

B. PANEL DECISION AND ANALYSIS—PROFIT CENTER ARGUMENT

In determining whether the domestic industry is materially injured or threatened with material injury by reason of subject imports, the Commission must first define “like product” to determine the relevant domestic industry. The Act defines “domestic like product” as “a product which is like, or in the absence of like , most similar in characteristics and uses with, the article subject to an investigation....”¹⁰⁰ The relevant “industry” is defined as “the producers as a whole of a domestic like product , or those producers whose collective output of a domestic like product constitutes a major

⁹⁸ Commission Brief, at 46.

⁹⁹ Domestic Industry’s Reply Brief, at 45-47.

¹⁰⁰ 19 U.S.C. 1677 (10).

proportion of the total domestic production of the product.”¹⁰¹ In sunset reviews, the Commission is also directed to take into account “its prior injury determinations.”¹⁰²

In the present case, the definition of the domestic industry was settled earlier. While the domestic industry argued, at the administrative hearing, that the definition of domestic like product should be expanded beyond the scope of subject merchandise, the Commission determined not to expand the domestic like products and found three like products consisting of cut to length plate, cold rolled steel and corrosion resistant steel (excluding clad plate), consistent with its 1993 determinations.¹⁰³ With respect to corrosion resistant steel, in accordance with its like product definition, the Commission defined the domestic industry as the domestic producers of the domestic like product of all corrosion-resistant steel, excluding clad plate.¹⁰⁴

Notwithstanding the Commission’s determination of the domestic industry, its discussion of the domestic industry’s vulnerability to material injury if the orders were revoked has created considerable doubt with respect to whether it limited its analysis to the domestic corrosion industry. Particularly, in its discussion of operating margins, the Commission appears to have concluded that while this level of operating income is not by itself troubling, the relative value added margins of corrosion resistant steel product made it an important profit center for the domestic industry.¹⁰⁵ It went on to state that the level

¹⁰¹ 19 U.S.C. 1677(4)(A).

¹⁰² 19 U.S.C. 1675a(a)(1)(a).

¹⁰³ Public Determination, *supra* note 6, at 7.

¹⁰⁴ *Id.*, at 11.

¹⁰⁵ The statement of the Commission was:

While this level of operating income might not generally suggest vulnerability, **corrosion resistant products are an important profit center for the domestic industry** because they are among the highest value-added carbon steel products. The level of profits earned on this product therefore may have a particularly important impact on the ability of firms to remain

of profits on these products were particularly important for the domestic firms to remain in operation and make the necessary investments. What remains unclear from this statement is whether the domestic firms that are referenced are limited to the ones which produce corrosion resistant product or whether they are a broader group of firms which produce a variety of steel products, including corrosion resistant products. If it is the former, the analysis might escape complaint, but if it is the latter, then the analysis is subject to the criticism that it went beyond the industry as defined in USC 1677 (4)(A).

The paragraph discussion of operating margins is further called into question by the five footnotes appended to it, wherein various Commissioners attempt to reconcile their views with the wording of the paragraph. In the first footnote, the Commission specifically recognizes that it must reach its decision “based on the state of the industry as defined in 19 USC 1677(4)(A)”.¹⁰⁶ However, while acknowledging that it looked at evidence pertaining to the overall industry, it states that it did not rely on it.¹⁰⁷ It clarified that “in certain practical matters it is difficult to separate an industry from the larger commercial entity to which it belongs”.¹⁰⁸

In a subsequent footnote, Commissioners Okun and Hillman note that they do not join the preceding footnote. While they also do not rely on the vulnerability data relating to the overall domestic industry, they note that there may be instances where particular evidence which is not severable from the industry as defined in 1677 (4)(A) may

in operation and to make necessary investments. Based on the foregoing, we conclude that the domestic industry is in a “weakened state” as contemplated by the statute’s vulnerability criterion.

Id., at 56-57 (emphasis added).

¹⁰⁶ *Id.*, at 57, fn 389.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

nonetheless be relevant in assessing vulnerability.¹⁰⁹ In another footnote, Commissioner Bragg also takes the opportunity to not join footnote 389. While Commissioner Bragg did not rely on the evidence pertaining to the overall domestic industry, she noted that it does nonetheless support a finding of vulnerability.¹¹⁰

In yet another footnote, the Commission claims to have considered, but not relied on, the econometric model presented by the domestic producers stating that its timeframe during the time the orders were in place is of limited value in assessing likely future conditions in the market as requested by the statute.¹¹¹ In the final footnote to the paragraph, Commissioner Askey dissents with respect to Germany.¹¹²

The parties agree that the like product under consideration is limited to corrosion resistant steel and that the Commission's analysis should be limited to the corrosion resistant domestic industry. Consistent with this position, the Commission claims that while it may have looked at evidence pertaining to the overall industry, it relied only upon that evidence relating to the corrosion resistant industry. This Panel is mindful of concerns raised by the Commissioners that some evidence pertaining to the overall industry also affects the corrosion resistant industry and that, practically speaking, this evidence is at times difficult to apportion between the overall industry and the corrosion resistant industry.

While these concerns were raised by the Commission at the Panel Hearing and in its Determination, we find the actual wording in the Determination to be wanting. In particular, we are concerned about the discussion relating to vulnerability and operating

¹⁰⁹ *Id.*, at fn 390.

¹¹⁰ *Id.*, at fn 391.

¹¹¹ *Id.*, at fn 392.

¹¹² *Id.*, at fn 393.

margins. We agree with the Complainant that, contrary to Section 1677(4)(A), a fair reading of the reference to “profit center” in the Determination relates to the overall industry and not specifically the corrosion resistant industry. Contrary to the position adopted by the domestic producers¹¹³, to suggest otherwise would lead to the non-sensical reading that corrosion resistant steel is an important profit center of the corrosion resistant steel industry.¹¹⁴ At best, the Panel finds that the reference in the Determination is confusing and casts doubt about the considerations that were made by the Commission.

The Panel does not see this as being mere harmless error. We note that the Commission has found that revocation of the orders would lead to volume and price declines for the domestic corrosion resistant industry that would negatively impact the domestic industry.¹¹⁵ However, we find that the Commission’s determination that any unused Canadian capacity would prove harmful is, at least in part, based on its vulnerability finding which is linked to the “ripple-effect”. This is simply not a case where “one of six criteria” can be isolated from the rest of the Determination. The Panel therefore concludes, pursuant to the applicable standard of review, that the Commission’s determination is not supported by substantial evidence and not in accordance with law.

IX. CONCLUSION AND REMAND

For the reasons set forth in this opinion, the Panel hereby finds that:

¹¹³ See Domestic Industry’s Brief, at 47; and Transcript of Public Hearing, In the Matter of Corrosion-Resistant Carbon Steel Flat Products from Canada, USA-CDA-00-1904-11, Washington, D.C., June 30, 2004, at 123 [hereinafter, “Transcript”].

¹¹⁴ Transcript, *supra* note 113, at 102.

¹¹⁵ Commission’s Brief, at 46.

- 1) the Commission's decision to cumulate Canadian imports, in light of its consideration of the high capacity utilization rates in Canada, is unsupported by substantial evidence; and
- 2) the Commission's determination that the Domestic Industry is in a "weakened state", in light of its "profit center" rationale, is unsupported by substantial evidence and not in accordance with law.

Accordingly, the Panel remands the case to the Commission.

- If it still wishes to cumulate Canadian corrosion resistant steel products, the Commission must sufficiently explain and articulate—consistent with this opinion—the basis of its conclusions as to whether, in light of the high capacity utilization rates prevalent in Canada during the period of review, there exists substantial evidence in the record upon which to base the Commission's determination that there was available excess capacity in Canada sufficient to lead to an increase in imports having a discernible adverse impact upon the domestic industry if the antidumping order were to be revoked.
- If the Commission still chooses to find that the Domestic Industry is in a vulnerable or weakened state, the Commission must sufficiently explain and articulate—consistent with this opinion—the basis of its conclusions as to whether the Commission's analysis of the impact of Canadian imports involves the profits of the domestic corrosion-resistant steel industry or those of the broader steel industry, and the impact of the profit analysis upon the Commission's affirmative vulnerability determination regarding the domestic corrosion-resistant steel industry.

The Commission shall return a decision on remand on or before December 3, 2004.

BY:

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

Serge Anissimoff
Serge Anissimoff

Daniel A. Pinkus
Daniel A. Pinkus

Nick Ranieri
Nick Ranieri

Mark R. Sandstrom
Mark R. Sandstrom

Date: October 19, 2004

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

OPINION OF PANELIST SERGE ANISSIMOFF

I have read the Panel's majority decision but am unable to join with it in its reasons for the Remand. My reasons for remanding the issues are as follows:

The issue concerns the Arguments made by parties before the Commission which are left unaddressed by the Commission in its determination. The Complainant says that its arguments and evidence were not expressly addressed by the Commission in its determination.

The obligation to discuss relevant and material arguments legally springs from 19 U.S.C. § 1677f(i)(3)(B) along with the legislative history as found at the Uruguay Round Trade Agreements, Statement of Administrative Action, H.R. Doc. No. 316, Vol. 1, 103d Cong., 2d Sess. 892 (1994)(hereinafter "SAA"). Shortly stated, the Commission is

legally obliged to discuss in its determination the relevant and material arguments made by interested parties, in this case the Complainant.¹

Equally the Commission is presumed by law to have considered all of the arguments and evidence of the interested parties in making its determination.² However, *Dastech Int'l*, as recognized in *Usinor Beautor v. United States*³, in no sense gives a *carte blanche* to the Commission to not address in its determination the material and relevant arguments of a party.

The majority interprets the case of *Usinor Beautor* as changing the law, and indeed the Standard of Review, in the area of "unaddressed arguments". The majority is of the view that the Panel must first assess and determine whether an argument is a significant one which seriously undermines the reasoning or conclusions of the Commission before a remand can be ordered. In the case of an argument which does not meet that precondition, the Panel is of the view that the Commission is not required to address that argument in its determination.

Before proceeding further, I am particularly concerned with the notion that the Commission is at liberty to not address the arguments made by the interested parties on the basis suggested by the majority. I am concerned with the suggestion that the Commission is at liberty to ignore arguments which are deemed "not worthy" and to decline any further comment with respect thereto. For example, there is no legal basis,

¹ *Carbon and Certain Alloy Steel Wire Rod from Canada*, Secretariat File No. USA-CDA-2002-1904-09)

² *Dastech Int'l*, 21 CIT at 475, 963 F.Supp. at 1226 (hereinafter "*Dastech*")

³ Slip Op. 02-70, 2002 WL1998315 (CIT, July 19, 2002) (hereinafter "*Usinor Beautor*")

in my view, for screening an argument made by an interested party to ensure that it is not frivolous and vexatious.

I would have thought that each and every argument made by an interested party is important to that party and constitutes, in whole or in part, that party's case which it submits to the Commission for determination. While existing law obviously contemplates the need for those arguments to be "material and relevant", those considerations are well known legal concepts that are entrenched in the legal jurisprudence. I would have thought that if there were proper objections to evidence and argument before the Commission, on the grounds of irrelevancy or non-materiality, the Record would have indicated the Commission's decision in that regard. Certainly, in the case of the Complainant's arguments there were no such rulings made.

In my view, the majority is of the opinion that the law concerning "unaddressed arguments" has been changed or modified in the way suggested, requiring the Commission to only address *significant* evidence and arguments which *seriously undermine* the Commission's reasoning and conclusions. This limitation, in my view, does not exist under US domestic law.

Before proceeding further it would be useful to set out the salient passages of the decision of the Court in *Usinor Beautor v. United States*⁴ concerning the principle in

⁴ Slip Op. 02-70, 2002 WL1998315 (CIT, July 19, 2002)

*Dastech Int'l v. United States*⁵ that the Commission is presumed to have considered all the arguments and evidence on the Record. That decision issues a warning against the Commission's use of *Dastech Int'l v. United States*⁶ "as a talismanic justification for the total absence of any specific discussion" concerning the arguments or evidence of a party before the Commission.

The Judge goes on to elaborate:

Regardless of any presumption in its favor, the Commission is in no way absolved under *Dastech* of its responsibility to explain or counter salient evidence that militates against its conclusions. The court is troubled by the repeated generic invocation of *Dastech* as a shield against examination of the Commission's failure to present required analysis of the record evidence. *Dastech* prefaces its entire discussion of this presumption with a requirement that the ITC present a "reviewable, reasoned basis" for its determination and added that "[e]xplanation is necessary, of course, for this court to perform its statutory review function." *Dastech Int'l*, 21 CIT at 475, 963 F.Supp. at 1226 (quoting *Bando Chem. Indus. , Ltd. v. United States*, 17 CIT 798, 799 (1993)). Moreover, *Dastech* cites *Granges Metallverken AB*, 716 F.Supp. 17, 13 CIT at 478, which states that "it is an abuse of discretion for an agency to fail to consider an *issue* properly raised by the record evidence" though there is no statutory requirement that the Commission respond to each piece of evidence presented by the parties. *Id.* (emphasis added) (citing *Timken Co. v. United States*, 10 CIT 86, 97, 630 F.Supp. 1327, 1337-38 (1986), rev'd in part, *Koyo Seiko Co. v. United States*, 20 F.3d 1156 (Fed.Cir.1994)). *Dastech* also cites *Roses, Inc. v. United States*, 720 F.Supp. 180, 13 CIT 662 (1989), which indicates that the presumption the agency has considered all the evidence is rebuttable and that "the burden is on the plaintiff to make contrary showing." *Id.* at 668 (citations omitted).

⁵ 21 CIT at 475, 963 F.Supp. at 1226.

⁶ 21 CIT at 475, 963 F.Supp. at 1226.

And finally the Judge specifically addresses the fact that the Commission in *ALTX, Inc. v. United States*⁷ was made aware of certain key evidence which it declined to discuss in the following terms:

Moreover the Commission's responsibility to answer to evidence that undermines the Commission's findings and conclusions has recently been reiterated by the courts in *ALTX, Inc. v. United States*, 167 F.Supp.2d 1353 (CIT 2001). In that case, the Commission was made aware of certain key evidence, but declined to discuss it, instead including only superficial mention of that evidence in its final determination. This court ultimately found the determination unsupported by substantial evidence:

The Final Determination merely cites to record evidence containing data on subject import indicators throughout the POI. This off-handed reference to annual data cannot, by itself, constitute an acknowledgment of the Plaintiffs' arguments, much less a reasoned explanation for discounting them, as the statute requires. Furthermore, whatever discretion the Commission may have to reject deliberately the conclusions found in the agency's Staff Report, *it may not through its silence simply ignore Staff Report analysis that contradicts the Commission's own conclusions where an interested party has specifically brought the possibly conflicting evidence to the agency's attention ...*

Id. at 1359 (emphasis added).

While the ITC need not address every argument and piece of evidence, it must address significant arguments and evidence which seriously undermines its reasoning and conclusions. When considered individually, every discrepancy discussed here might not rise to the level of requiring reconsideration of the overall disposition, but taken as a whole, the

⁷ 167 F.Supp.2d 1353 (CIT 2001).

court finds that the ITC decision is not substantially supported and explained.

Id. at 1373 (emphasis added) (footnotes omitted).

As in *ALTX*, the evidence here is not peripheral or ancillary to the Commission's determination. Rather, it has direct and material bearing on the proper resolution of the various issues presented to the Commission, and it calls the accuracy and legitimacy of the Commission's findings and conclusions squarely into question. As a result, unsupported assertions that this evidence was addressed and considered without greater discussion in the Review Determination is unsatisfactory and the Commission cannot rely on the presumption set forth in *Dastech* to avoid its obligations. While a foolish consistency may be the hobgoblin of little minds, every party before an agency of United States has the right to expect a fair and logical determination containing as much analysis as is necessary to adequately demonstrate the basis for its conclusions.

As can be plainly seen, the Judge's analysis neither suggests a different legal standard for the requirement to address arguments by interested parties nor requires the Panel to use a different legal Standard of Review when reviewing the Commission's determination which omits any discussion of a party's argument. I agree entirely with the above-quoted passages, which explains how *Dastech Int'l v. United States*⁸ may not be used to shield against non-analysis of a party's argument and evidence.

In my view the Court in *Usinor Beautor* is perfectly clear that "key" evidence (and argument) absolutely needs to be addressed in a determination. The case does not stand for the proposition that only "key" or significant arguments and evidence needs to be addressed by the Commission. I accordingly disagree with this aspect of the Panel's Opinion and find the repeated invocation or mantra that a particular argument or

⁸ 21 CIT at 475, 963 F.Supp. at 1226.

evidence "does not represent a significant one or evidence which seriously undermines the reasoning or the conclusions of the Commission and that the Commission was not required to address it in its determination" (Pages 21-22 and 24, Panel Opinion); "the Panel finds that this argument does not represent a significant one or evidence which seriously undermines the Commission's reasoning and conclusions, and therefore the Commission was not required to address it in its determination" (Page 31, Panel Opinion); and "the Panel finds that this argument would not seriously undermine the Commission's reasoning and conclusions, and therefore the Commission was not required to address it" (Page 33, Panel Opinion)⁹; ... as a condition precedent to exercising a reviewing function entirely unnecessary and simply wrong.

The Panel's apparent reformulation of the law and Standard of Review requires that an initial evidentiary type assessment of the importance of a party's argument or evidence be made to see whether it qualifies or rises to the level of a "review point". Indeed, one may very well wonder how a Panel is supposed to determine *a priori* the "importance of an argument or evidence" given conflicting views and arguments of the parties before it.

It is not for the Panel to gauge the "significance or importance value" of a party's argument and evidence initially tendered to the Commission. Rather it is the obligation of the Commission to address all of the arguments in the context of the other arguments, which it is required to do by law. And where the argument or evidence is relevant and material to the agency's determination, the Commission's failure to discuss

⁹ See Panel's Opinion at pages 21- 22, 24, 31and 33.

in its determination those arguments and evidence may require a Remand. Indeed it is readily apparent that all of the arguments and evidence of a party constitutes its entire case and would always *prima facie* be relevant and material.

It is only after the Commission has made its treatment of relevant and material arguments and evidence known to the parties in its determination, that the Panel can usefully undertake the review process. Without the prior analysis, the review process is stalled.

The obligation of the Commission to address, on the record, the relevant and material arguments of a party is governed by law and is tied to the principle that the “path of the agency may be reasonably discerned” in reaching its conclusion must be reasonably discernible in order to permit an effective review of that agency’s decision to take place. 19 U.S.C. § 1677f(i)(3)(B) along with the legislative history reproduced below establish the standard.

19 U.S.C. § 1677f(i)(3)(B) - The Commission shall include in a final determination of injury an explanation of the basis for its determination that addresses relevant arguments that are made by interested parties who are parties to the investigation or review (as the case may be) concerning volume, price effects, and impact on the industry of imports of the subject merchandise.

Existing law does not require that an agency make an explicit response to every argument made by a party, but instead requires that issues material to the agency’s determination be discussed so that the ‘path of the agency may be reasonably discerned’ by a reviewing court.¹⁰

¹⁰ Uruguay Round Trade Agreements, Statement of Administrative Action, H.R. Doc. No. 316, vol. 1, 103d Cong., 2d Sess. 892 (1994)(hereinafter “SAA”)

Indeed, under U. S. Administrative law, an agency's ruling in an adjudicative proceeding must be supported by reasoned decision making, with the various connections among the agency's fact findings, its reasoning process, and its conclusion being sufficiently clear. As the U.S. Supreme Court observed in *Securities & Exchange Comm'n v. Chenery Corp.*:

If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."¹¹

It is of course trite to point out that it is always helpful and useful to have the benefit of the Commission's own analysis of the evidence and the argument considered important by the Complainant on the Record. This is always preferable to receiving the Commission counsel's well-intended but *post-hoc* arguments with respect to why the Commission did not address any particular argument or piece of evidence. The fact that the Commission does not address the arguments or the evidence of a party may expressly warrants a remand as recently discussed in the NAFTA Article 1904 Panel Decision in the matter of Carbon and Certain Alloy Steel Wire Rod from Canada, Secretariat File No. USA-CDA-2002-1904-09 (August 12, 2004).

My point, I believe, is aptly illustrated when the Panel wonders out loud saying, "it does not quite know what to make of" an argument in connection with the Complainant's

¹¹ 332 U.S. 194, 196-97 (1947) (quoting *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935)).

submissions concerning the integrated nature of the North American Steel Industry. The Panel will never "know what to make" of any competing or conflicting facts or arguments, simply because the Panel is not a fact finding body and merely sits in review. Any such, findings of fact on the evidence must precisely be made by the Commission in the first instance. Indeed the crux of the Complainant's arguments is that relevant and material arguments were made before the Commission which the Commission did not address.

PROFIT CENTER RATIONALE

The operative passage reflecting the Commission's vulnerability reads as follows:

While this level of operating income might not generally suggest vulnerability, corrosion-resistant products are an important profit center for the domestic industry because they are among the highest value-added carbon steel products. The level of profits earned on this product therefore may have a particularly important impact on the ability of firms to remain in operation and to make necessary investments. Based on the foregoing, we conclude that the domestic industry is in a "weakened state" as contemplated by the statute's vulnerability criterion.¹²

The Panel is of the view that the cited language creates considerable doubt with respect to whether it (i.e. the language) refers solely to the Corrosion Resistant Steel Industry or to the broader Steel Industry which produces a variety of steel products including corrosion resistant products.

¹² US ITC Publication 3364, November 2000 at 55 and 56.

The Commission expressly states that corrosion resistant steel products "are an important profit center for the domestic industry" and connects the importance of this finding to the health and welfare of the non-corrosion resistant steel product lines. The inescapable conclusion is that it is those other steel product lines which are vulnerable.

It would indeed be nonsensical to interpret the language to suggest that corrosion resistant steel products are an important profit center of the corrosion resistant steel industry. In my view, neither the language used, nor a review of the record, leaves any doubt about what the Commission meant. There is no doubt in my mind that the Commission determined as a question of fact that the corrosion resistant steel industry would not be vulnerable to material injury if the Orders were to be revoked. In fact it expressly states that the level of operating income would "not generally suggest vulnerability".

The only subsequent fact that converts "non-vulnerability" of the Industry to "vulnerability" is the profit center rationale, namely: that the profits from the corrosion resistant steel industry are needed to support to the economic health of the overall steel industry. This in my view is a fundamental misdirection of the specific industry focus required when finding vulnerability.

As concerns the reference to the footnotes, I have always understood that a "footnote analysis" will always be subservient to and explanatory of the main "non-footnote analysis". As such any discussion of the footnotes does not detract from the meaning I

take from the operative passage as a matter of giving the words their plain and ordinary meaning.

Even then, Footnote 389 of the Commission's Decision confirms that "the larger commercial entity", meaning the overall steel industry, is a clear focus for the Commission. The fact that the Commission recognizes its mandate under 19 USC 1677(4)(A) is insufficient in my mind to take away the misdirection of finding vulnerability. The reason again is that there is no analysis of how the Commission severed the corrosion resistant industry from the overall steel industry when reaching the conclusion that the subject industry was in a "weakened state".

As well, the majority notes that particular evidence pertaining to the overall industry which also affects the corrosion resistance industry was "practically speaking difficult to apportion as between the overall industry and the corrosion resistant industry". In my view there can be no such quandary. It is precisely the task of the Commission to apportion, resolve and attribute the evidence to the corrosion resistant industry. The Commission is required to make express findings of fact on this important question. I would have thought that any difficulty in making a finding of fact would be resolved against the party seeking to affirmatively establish that fact on the principle that "he who asserts must prove". Certainly the question of doubt cannot be resolved against the Complainant as that would not be logical.

And finally there is, in my view, discord between a view of the industry as "vulnerable" and a view of the industry as the very picture of health (as argued by the Complainant), which requires resolution. In remanding on this ground I would desire that the Commission expressly address all of the evidentiary indices of health of the corrosion-resistant steel industry in finally determining whether or not the industry is vulnerable.

SERGE ANISSIMOFF
SERGE ANISSIMOFF
OCTOBER 19, 2004
LONDON, ONTARIO, CANADA