

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

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| |) | |
| IN THE MATTER OF: |) | |
| |) | |
| HARD RED SPRING WHEAT |) | Secretariat File No. |
| FROM CANADA |) | USA-CDA-2003-1904-06 |
| |) | |

PANEL MEMBERS*:

Serge Anissimoff
James R. Holbein
Maureen Irish
Kevin C. Kennedy, Chairperson
Paul C. LaBarge

COUNSEL:

For the Canadian Wheat Board: Steptoe & Johnson LLP (Richard O. Cunningham, Esq., Edward Krauland, Esq., and Matthew S. Yeo, Esq.)

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

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

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

* The Panelists wish to express their appreciation for the support received from Panel Assistants David Forrest, Asaph Ksienski, Nick Ranieri, and Jennifer Vieira.

DECISION OF THE PANEL

I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904.2 of the North American Free Trade Agreement and appointed to review the final affirmative injury determination of the U.S. International Trade Commission involving imports of hard red spring wheat from Canada. See Hard Red Spring Wheat from Canada, Inv. Nos. 701-TA-430B and 731-TA-1019B (Final), USITC Pub. 3639 (Oct. 2003).¹ In addition to the Investigating Authority, the U.S. International Trade Commission (“ITC” or “Commission”), the parties to this proceeding are the Canadian Wheat Board, the North American Millers’ Association Ad Hoc CVD/AD Committee, and the North Dakota Wheat Commission.²

¹ Notice of the Commission’s determination was published in the Federal Register on October 23, 2003. 68 Fed. Reg. 60,707, 60,708. In a parallel investigation, the Commission determined that imports of durum wheat from Canada were not materially injuring or threatening material injury to domestic producers of durum wheat. See Durum Wheat from Canada, Inv. Nos. 731-TA-430A and 731-TA-1019A (Final), 68 Fed. Reg. 60,707 (Oct. 23, 2003). No interested party requested panel review of the Commission’s final negative injury determination regarding Canadian imports of durum wheat.

² Pursuant to Rules 35 and 40 of the NAFTA Rules of Procedure for Article 1904 Panel Reviews, the Government of Canada filed a Notice of Appearance in connection with this NAFTA Chapter 19 binational panel review on January 8, 2004. On March 18, 2004, the U.S. International Trade Commission filed a Motion to Strike the Notice of Appearance of the Government of Canada, to which the Government of Canada (“GOC”) responded on March 29, 2004. Following oral argument, on January 10, 2005, the Panel issued its order granting the Commission’s Motion to Strike (Panelist Maureen Irish dissenting). The Panel ruled that because the GOC would lack standing to participate in a judicial review proceeding brought to challenge the ITC’s affirmative injury determination in this case, it likewise lacks standing to challenge that determination in this Chapter 19 panel review. The relevant NAFTA provisions and U.S. statutes are clear and unambiguous: The GOC does not have an express, unconditional right to appear and participate in a Chapter 19 panel review if it did not participate as an interested party in the administrative proceeding below.

Panelist Irish, in dissent, would have found that Articles 1904(2) and 1904(5) of NAFTA give a Party a right to participate in panel review that is not conditional on meeting a domestic standing rule.

The Panel’s decision on the motion to strike and the dissenting opinion are attached hereto as Appendix A.

The Panel hereby renders its decision in accordance with Article 1904.8 of the Agreement and Part VII of the Rules of Procedure for Article 1904 Binational Panel Reviews.

II. BACKGROUND

Pursuant to a petition filed with the Commission on September 13, 2002, by the North Dakota Wheat Commission (“NDWC”), the Durum Growers Trade Action Committee, and the U.S. Durum Growers Association, the ITC conducted investigations involving imports of durum wheat and hard red spring wheat (“HRS wheat”) from Canada. The Commission reached preliminary affirmative injury determinations with respect to both products on November 25, 2002. The Department of Commerce subsequently issued final affirmative determinations that durum wheat and HRS wheat were being subsidized and sold at less than fair value in the United States. Thereafter, on October 16, 2003, the Commission unanimously determined that an industry in the United States was neither materially injured nor threatened with material injury by reason of imports of durum wheat. An evenly-divided Commission concluded that the domestic industry was materially injured by reason of imports of HRS wheat.³ On October 23, 2003, the Commerce Department issued antidumping and countervailing duty orders on imports of HRS wheat from Canada.⁴

³ Commissioners Hillman and Miller voted in favor of an affirmative injury determination, while Chairman Okun and Commissioner Koplan voted in favor of a negative injury determination. Under U.S. law, an evenly divided vote of the Commission is deemed an affirmative determination. See 19 U.S.C. § 1677(11). Commissioner Lane did not participate in the investigation. Commissioner Pearson had not been sworn in as a Commissioner as of the date of the Commission vote.

⁴ The Department of Commerce found a countervailing duty rate of 5.29 percent for both durum and HRS wheat, and weighted-average dumping margins of 8.26 percent for durum wheat and 8.87 percent for HRS wheat, subsequently amended to 8.86 percent. See Final Affirmative Countervailing Duty Determinations:

On November 24, 2003, the Canadian Wheat Board (“CWB”) filed a request for panel review with the U.S. Section of the NAFTA Secretariat in accordance with Rule 34 of the NAFTA Article 1904 Panel Rules (“Panel Rules”). On December 23, 2003, the CWB and the North American Millers’ Association Ad Hoc CVD/AD Committee (“NAMA”) filed complaints in accordance with Rule 39 of the Panel Rules. Both the CWB and NAMA allege generally that the Commission’s final injury determination with respect to HRS wheat is unsupported by substantial evidence. Beyond that broad claim of error, the Complainants allege the following specific defects in the Commission’s determination. First, according to Complainants, the Commission erred in finding that the volume of subject imports was significant. Second, the Commission’s finding of significant price underselling and significant price suppression is allegedly unsupported by substantial evidence. Third, the Commission’s finding that prices declined between the 2000/01 and 2001/02 crop years, and the contribution of subject imports to that alleged price decline, is unsupported by substantial evidence. Finally, according to Complainants, the Commission failed to consider factors other than the subject imports as the cause of injury to domestic producers, including (1) the different level of trade at which the domestic product and the subject imports compete within the United States, (2) the impact on wheat prices of prices for HRS wheat on the Minneapolis Grain Exchange, and (3) the fact that prices for hard red winter wheat (“HRW wheat”), which the

Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 Fed. Reg. 52,747 (Sept. 5, 2003); Final Determinations of Sales at Less than Fair Value: Certain Durum Wheat and Hard Red Spring Wheat from Canada, 68 Fed. Reg. 52,741 (Sept. 5, 2003).

Commission determined to be a separate product from HRS wheat, move in tandem with prices for HRS wheat.⁵

Based on the parties' briefs and oral arguments, the Panel remands the determination to the Commission for resolution not inconsistent with this decision.

III. STANDARD OF REVIEW

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

All parties to this review agree that the applicable standard of review is the one specified in NAFTA Articles 1904.2-.3 and Annex 1911 of the NAFTA. Chapter 19 review panels are directed by Article 1904.3 to apply:

the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

These provisions therefore require that a Chapter 19 panel apply the standard of review and "general legal principles" that a federal court in the United States would otherwise apply in reviewing an ITC injury determination.⁶

⁵ In their respective complaints both Complainants included a count alleging that the Commission's determination that HRS wheat and HRW wheat constitute separate like products is in error. This issue was not briefed by either the CWB or NAMA. At the oral argument held on March 10, 2005, counsel for both Complainants confirmed that this Commission finding is no longer in issue.

⁶ Article 1911 provides a non-exhaustive list of such "general legal principles," including, for example, "standing, due process, rules of statutory construction, mootness, and exhaustion of legal remedies."

Annex 1911 defines the standard of review to be applied in a panel review as “the standard set forth in section 516A(b)(1)(B) of the Tariff Act of 1930, as amended.” Section 516A(b)(1)(B), in turn, defines that standard of review as follows:

The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

19 U.S.C. § 1516a(b)(1)(B)(i). Accordingly, the standard of review for the instant proceeding includes the “substantial evidence” standard as set out in section 516A(b)(1)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(b)(1)(B)(i).

A. The Substantial Evidence Standard of Review

The Panel must affirm the ITC’s Final Determination “unless we conclude that the . . . determination is not supported by substantial evidence or is otherwise not in accordance with law.” PPG Industries, Inc. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992). The U.S. Supreme Court has explained what quantum of evidence constitutes “substantial evidence” in the following terms:

Substantial evidence is more than a mere scintilla, and must do more than create a suspicion of the existence of the fact to be established. “It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” . . . and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from is one of fact for the jury.

NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)(quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). Accord Consolo v. Federal Maritime Comm’n, 383 U.S. 607, 619-20 (1966); Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). Substantial evidence thus constitutes “something less

than the weight of the evidence.” Consolo v. Federal Maritime Comm’n, 383 U.S. at 619-20.

The Court of Appeals for the Federal Circuit has applied the same interpretation of “substantial evidence” in reviewing administrative agency determinations in international trade investigations. As noted by the Federal Circuit, “The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” Matsushita Electric Industrial Co. v. United States, 750 F.2d 927, 933 (1984) (quoting Consolo v. Federal Maritime Comm’n, 383 U.S. at 619-20). To this rule the Court of International Trade has added that it is “not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record.” Koyo Seiko Co., Ltd. v. United States, 810 F. Supp. 1287, 1289 (Ct. Int’l Trade 1993) (quoting Timken Co. v. United States, 699 F. Supp. 300, 306 (1988), aff’d, 894 F.2d 385 (Fed. Cir. 1990)). Neither a Chapter 19 panel nor a reviewing court “may . . . substitute its judgment for that of the [agency] when the choice is ‘between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.’” American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1276 (Ct. Int’l Trade 1984), aff’d sub nom. Armco, Inc. v. United States, 760 F.2d 249 (Fed. Cir. 1985) (quoting Universal Camera Corp. v. NLRB, 340 U.S. at 488).

Nevertheless, as the Federal Circuit stressed in Gerald Metals, Inc. v. United States, 132 F.3d 716, 720 (1977), the substantial evidence standard of review requires more than a mere assertion of evidence that justifies the Commission's determination.

Rather, the Commission must also take into account contradictory evidence or evidence from which conflicting inferences could be drawn. The ITC must show that domestic producers are injured by reason of the subject imports. See 19 U.S.C. § 1671d(b)(1). This standard requires a showing of a causal, not merely temporal, connection between the subject imports and material injury. Gerald Metals v. United States, 132 F.3d at 720. In other words, in reaching an affirmative injury determination, the Commission must examine contradictory evidence and alternative causes of injury “to ensure that the subject imports are causing the injury, not simply contributing to the injury in a tangential or minimal way.” Taiwan Semiconductor Indus. Ass’n v. Int’l Trade Comm’n, 266 F.3d 1339, 1345 (Fed. Cir. 2001).

From the foregoing discussion it is abundantly clear that under the substantial evidence standard of review a panel may not undertake a de novo review of the Investigating Authority’s determination. See Cabot Corp. v. United States, 694 F. Supp. 949, 952-53 (Ct. Int’l Trade 1988); Ceramica Regiomontana, S.A. v. United States, 636 F. Supp. 961, 965 (Ct. Int’l Trade 1986), aff’d, 810 F.2d 1137 (Fed. Cir. 1987); Luciano Pisoni Fabbrica Accessori v. United States, 640 F. Supp. 255, 256 (Ct. Int’l Trade 1986). On the contrary, panel review of a final injury determination is conducted “upon the administrative record.” Article 1904.2. The requirement that panel review be “on the record” means that such a review must be limited to “information presented to or obtained by [the ITC] . . . during the course of an administrative proceeding” 19 U.S.C. § 1516a(b)(2)(A)(i). Consideration of information that was not presented to or obtained by the ITC during the course of its investigation would be well beyond the scope of panel review.

B. The “Otherwise Not in Accordance with Law” Standard of Review

Not only must the ITC’s determination be supported by substantial evidence, but its determination must also be “in accordance with law.” Section 516A(b)(1)(B) of the Tariff Act of 1930, as amended, 19 U.S.C.A. § 1516a(b)(1)(B). In determining whether the ITC's interpretation of the governing statute is “in accordance with law,” a panel is to accord deference to the Investigating Authority’s reasonable interpretation of the statute that it administers. As observed by the Federal Circuit, “The Supreme Court has instructed that the courts must defer to an agency's interpretation of the statute an agency has been charged with administering provided its interpretation is a reasonable one.” PPG Industries, Inc. v. United States, 928 F.2d 1568, 1571 (Fed. Cir. 1991) (citing in support Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16 (1965); K Mart v. Cartier, Inc., 486 U.S. 281, 291 (1988); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 131 (1985)).

In accordance with this fundamental principle of administrative law, the ITC is given wide latitude in administering and interpreting the antidumping and countervailing duty laws. As a consequence, “appellant's burden on appeal is a difficult one, for it must convince us that the interpretation . . . [of the Investigating Authority] is effectively precluded by the statute.” PPG Industries, Inc. v. United States, 928 F.2d at 1573. This deference extends to the Investigating Authority’s interpretation of its own regulations as well. As noted by the CIT in the context of judicial review of a Commerce Department determination, “Since Commerce administers the trade laws and its implementing regulations, it is entitled to deference in its reasonable interpretations of those laws and regulations.” PPG Industries, Inc. v. United States, 712 F. Supp. at 198.

Nevertheless, despite the substantial deference that reviewing courts accord to investigating authorities' determinations and statutory interpretations, that deference is not unfettered. In the words of the CIT, "The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." Saudi Iron & Steel Co. v. United States, 675 F. Supp. 1362, 1365 (Ct. Int'l Trade 1987). As the CIT has further observed:

[T]he substantial evidence standard requires courts generally to defer to the methods and findings of an agency's investigation [T]he Court must not permit an agency in the exercise of that discretion to ignore or frustrate the intent of Congress as expressed in substantive legislation that the agency is charged with administering. . . . Were the scope of the discretion accorded to the agency unlimited, there would be no point in the (statutorily mandated) judicial review here undertaken.

Armco, Inc. v. United States, 733 F. Supp. 1514, 1519 (Ct. Int'l Trade 1990) (citations omitted). Accord Cabot Corp., 694 F. Supp. at 953 (and cases cited therein).

Finally, it is a vital and time-honored principle of U.S. administrative law that 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 conclusions being sufficiently clear. As the U.S. Supreme Court ruled 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."

332 U.S. 194, 196-97 (1947) (quoting United States v. Chicago, M., St. P. & P.R. Co., 294 U.S. 499, 511 (1935)). The Supreme Court has underscored this point in its post-

Chenery opinions. See, e.g., Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962)(“The courts may not accept appellate counsel’s post hoc rationalizations for agency action; Chenery requires that an agency’s discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself”) Accord Elec. Consumers Res. Council v. FERC, 747 F.2d 1511, 1513 (D.C. Cir 1984); SKF USA Inc. v. United States, 254 F.3d 1022, 1028 (Fed. Cir. 2001); Rhodia Inc. v. United States, 185 F. Supp. 2d 1343 (Ct. Int'l Trade 2001); A. Hirsh, Inc. v. United States, 729 F. Supp. 1360, 1362 (Ct. Int'l Trade 1990). The rationale for the Supreme Court’s insistence on reasoned decision making is simple but fundamental: If an agency fails to meet this standard of reasoned decision making, it deprives the parties of their opportunity for a fair and transparent proceeding and makes impossible the task of the reviewing authority. In short, an agency’s reasoning process must be transparent before a reviewing body is able to review the agency's determination.

IV. DISCOUNTING OF POST-PETITION DATA

A. Background

The period of investigation in the instant case covered the three marketing years of 2000/01, 2001/02, and 2002/03.⁷ The volume of subject imports increased from 41 million bushels in marketing year 2000/01 to 46 million bushels in marketing year 2001/02. However, the volume of subject imports fell precipitously to 11 million bushels in marketing year 2002/03. In the course of its volume analysis the Commission discounted the lower volume of subject HRS wheat imports in 2002/03 relative to the

⁷ A marketing year tracks the harvest period. In the case of wheat the marketing year begins in June and ends the following May.

prior two marketing years based on the filing of the petition (the petition was filed on September 13, 2002, which was the start of the second quarter of the 2002/03 marketing year). In the Commission's view, the decline in the volume of subject imports in the second quarter of the 2002/03 marketing year was attributable in significant part to the pendency of the investigation.⁸ For this reason, the Commission stated that it was according "less weight" in its analysis to the lower post-petition subject imports volumes compared with those observed prior to the filing of the petition.⁹

The Commission also found that the increase in prices for HRS wheat in marketing year 2002/03 was attributable "in significant part" to the filing of the petition.¹⁰ Average prices for HRS wheat were \$2.94 per bushel in 2000/01 and \$2.89 per bushel in 2001/02. HRS wheat prices rose to \$4.49 per bushel in October 2002 (the month after the filing of the petition) due in part to the pendency of the investigation, according to the Commission.¹¹

In response to the argument that the increase in prices was due to drought conditions, the Commission acknowledged that the drought "likely had a contributing effect on the higher observed prices," but added that it did not "attribute all price increases to the drought."¹² The Commission cited the following evidence in support of its position that the filing of the petition, rather than drought conditions, was responsible

⁸ Commission's Determination ("CD") at 38. Unless otherwise noted, all references to the Commission's Determination are to the public version.

⁹ Id. at 38-39; Confidential Version of Commission Determination at 62-63.

¹⁰ CD at 43.

¹¹ Id. at 42.

¹² Id. at 42 n.358.

for the decline in the volume of subject imports and for the rise in HRS wheat prices late in the period of investigation (“POI”): (1) subject imports did not decline at all in 2001/02, which was also a drought year; (2) several purchasers indicated that they canceled or postponed purchases due to the pendency of the investigation; (3) Canadian exports of HRS wheat to the United States declined more sharply than Canadian exports of HRS wheat to third-country markets in marketing year 2002/03; and (4) the decline in domestic production in marketing year 2002/03 (25.1 percent) was outpaced by an even greater decline in domestic demand (37.3 percent), so that the drought alone could not explain the increase in prices.¹³ In the Commission’s view, “the price spike observed in October of 2002 . . . was above and beyond the price increases associated with drought conditions and occurred in the first full month following the filing of the petition.”¹⁴

By giving “less weight” to the volume and price data collected for the 2002/03 marketing year, the Commission in effect limited its volume and price analyses to the first two years of the period of investigation.

B. Contentions of the Parties

1. Contentions of the Complainants

In contesting the Commission’s conclusion that the pendency of the investigation explains the post-petition increase in prices, Complainant CWB makes several arguments

¹³ Id. at 38, 42 & n.358.

¹⁴ Id. at 42.

to the Panel.¹⁵ First, the CWB contends that the increase in prices for HRS wheat in October 2002 was attributable to simultaneous drought conditions in major wheat-producing regions of the world, which in turn caused a worldwide increase in prices.¹⁶

Second, the CWB takes issue with the Commission's finding of price increases in marketing year 2002/03 based on the decline in production compared to the decline in domestic consumption, thereby further discounting the role that drought conditions played in price increases in the fall of 2002. The CWB argues that the Commission's analysis is flawed because it fails to take into account downstream exports of U.S. wheat. If such U.S. export sales are taken into account, then apparent U.S. consumption declined by only 13.9 percent, significantly less than the 25.1 percent decline in domestic production attributable to the drought. The Commission itself recognized this fact.¹⁷ Thus, according to the CWB, the Commission failed to fully take into account the role that drought conditions played in driving up wheat prices in the fall of 2002.¹⁸

Third, and most importantly, the CWB faults the Commission for failing to address price trends for the entire eight-month period after the filing of the petition to the end of the 2002/03 marketing year. After the "price spike" noted by the Commission in October 2002 of \$4.49 per bushel, prices for HRS wheat thereafter steadily declined to \$3.60 per bushel by May 2003. The CWB notes that these steady price declines all occurred in the complete absence of subject imports from the U.S. market, thus

¹⁵ Complainant North American Millers Association did not address this specific issue in its opening or reply briefs. In addition, the CWB did not challenge the Commission's finding that the pendency of the investigation explains in part the post-petition decline in the volume of subject imports.

¹⁶ CWB Brief at 72.

¹⁷ See CD at 42 n.358.

¹⁸ CWB Brief at 73 n.160.

purportedly undercutting the Commission’s finding that prices increased in response to declining import volumes, but supporting the CWB’s contention that HRS wheat prices bear no relationship to imports of HRS wheat.¹⁹ In sum, in the view of the CWB, 19 U.S.C. § 1677(7)(I) does not permit the Commission to examine only a certain portion of the post-petition period while ignoring contrary evidence from a different portion of that same period.

2. Contentions of the Investigating Authority and Respondent

For its part, the Commission argues in its brief to the Panel that substantial evidence supports the Commission’s finding that the pendency of the investigation resulted in price increases.²⁰ Counsel for the ITC submits that the Commission did not attribute the post-petition price increases solely to the filing of the petition, but also took into account drought conditions. Nevertheless, counsel for the ITC contends that the Commission correctly concluded that the pendency of the investigation had price effects that went beyond the effects of the drought. While prices rose during the first quarter of the 2002/03 marketing year as information came in regarding the extent of the drought, the Commission explains, prices “spiked” in October 2002, the first full month following the month in which the petition was filed. This price change, the Commission argues, is attributable to the filing of the petition,²¹ although the Commission concedes that post-

¹⁹ Id. at 73-74.

²⁰ ITC Brief at 102.

²¹ Id. at 103.

petition price increases were attributable to the pendency of the investigation only in part.²²

In response to the CWB's contention that a worldwide drought was responsible for the price increases observed in the fall of 2002, the Commission notes that MGE prices – the primary source of information for HRS wheat – were highest in September 2002, but then declined in October 2002 even as HRS wheat prices increased that same month.²³ The Commission adds that although domestic production decreased by 25.1 percent in marketing year 2002/03 compared to marketing year 2001/02, that is still less than the 37.3-percent decline in apparent U.S. consumption of wheat. This fact, the Commission maintains, further establishes that the drought alone could not explain the price increases observed in the fall of 2002. However, the Commission concedes that when U.S. wheat exports are accounted for, apparent U.S. consumption fell by only 13.9 percent.²⁴ Nevertheless, counsel for the ITC insists that it was not improper for the Commission to consider changes only in U.S.-derived demand rather than overall demand because (1) the Economic Research Service of the U.S. Department of Agriculture does the same in its analysis of projected supplies, and (2) the MGE acknowledges “that various factors affecting supply and demand in the United States drive MGE prices.”²⁵ Thus, counsel for the ITC concludes, “[a] 37.3 percent decline in domestic use is certainly relevant in that context.”²⁶

²² Id. at 102-03.

²³ Id. at 105.

²⁴ Id. at 106.

²⁵ Id.

²⁶ Id. at 106-07.

Turning finally to the CWB's argument regarding the decline in prices during the second half of marketing year 2002/03 – a time when subject imports were absent from the U.S. market and non-traditional exporters began selling wheat on world markets – counsel for the ITC responds in two ways. First, counsel argues, having made the finding that post-petition price increases are attributable to the pendency of the investigation, the Commission was free to ignore all price data during the spring of 2003.²⁷ Second, the fact that prices declined during the spring of 2003 does not undercut the Commission's finding that the pendency of the investigation was responsible for the price spike in October 2002. Moreover, ITC counsel adds, although by May 2003 HRS wheat prices had declined to \$3.60 per bushel from the October 2002 high of \$4.49 per bushel, prices nevertheless remained higher than those observed prior to the filing of the petition.²⁸ Thus, even in the absence of subject imports in the U.S. market and the presence of non-traditional exports of wheat on world markets during the second half of the 2002/03 marketing year, HRS wheat prices were still higher than they had been prior to the filing of the petition. Counsel for the ITC suggests that a reasonable inference to be drawn from these facts is that the pendency of the investigation accounts for the higher prices late in the POI and not, as the CWB would have it, that subject imports have no bearing on the price of HRS wheat.²⁹

In its brief to the Panel respondent North Dakota Wheat Commission stresses that a number of purchaser questionnaire responses establish that U.S. purchasers of Canadian

²⁷ Id. at 107.

²⁸ Id. at 108. Prices ranged from \$2.80 to \$3.03 per bushel during marketing year 2001/02.

²⁹ Id. at 108-09.

wheat either postponed, canceled, or reduced their purchases of subject imports because of the pendency of the investigation.³⁰ In response to the CWB's argument that U.S. wheat prices and imports are decoupled – as evidenced by the monthly decline in U.S. wheat prices during the second half of the 2002/03 marketing year when Canadian wheat imports were absent from the U.S. market – the NDWC argues that the Commission was entirely justified in finding that the pendency of the investigation affected post-petition prices for HRS wheat.³¹ The NDWC points out that when Canadian wheat imports were absent from the U.S. market in the second half of the 2002/03 marketing year, HRS wheat prices during that period were still higher than prices the year before when subject imports were present in the U.S. market.³² These facts, the NDWC contends, support the Commission's finding that the pendency of the investigation affected post-petition prices for HRS wheat.

C. Analysis

The starting point for analysis is, of course, 19 U.S.C. § 1677(7)(I), that establishes a statutory presumption authorizing the Commission to discount post-petition data, and the Statement of Administrative Action, which explains that this statutory presumption is rebuttable. Section 771(7)(I) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(I), authorizes the Commission to discount the weight accorded to post-petition volume, price, and impact data. That section provides as follows:

³⁰ NDWC Brief at 60.

³¹ Id. at 62 & n.153.

³² Id. at 62.

The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition . . . is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury

As further explained in the Statement of Administrative Action to the Uruguay

Round Agreements Act:

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

Uruguay Round Trade Agreements, Statement of Administrative Action, H.R. Doc. No. 316, vol. 1, 103d Cong., 2d Sess. 853-54 (1994) (“SAA”). Also relevant is 19 U.S.C. § 1677f(i)(3)(B), that provides as follows:

[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.

19 U.S.C. § 1677f(i)(3)(B) thus obligates the Commission to explain the basis for its decision to discount post-petition data in the face of evidence and relevant arguments presented by the CWB to the contrary.

For the reasons explained more fully below, the Panel reaches the following conclusions on the Commission’s finding regarding the pendency of the petition. First, the Panel remands to the Commission its finding that the pendency of the investigation explains the post-petition increase in prices of HRS wheat. The Panel instructs the Commission to explain why record evidence regarding pre- and post-petition prices for

HRS wheat does not rebut the statutory presumption as to price data. Second, in its determination the Commission states that it gave “less weight” – not that it gave “no weight” – to post-petition volume and price data. However, based on the Commission’s near-exclusive focus on 2000/01 and 2001/02 data in making its volume and price effects findings, the Panel remands to the Commission for an explanation of how the Commission gave some weight to 2002/03 marketing year volume and price data – rather than no weight – when making those two findings.

1. The Decision to Discount Post-Petition Price Data

Regarding the Commission’s finding that the pendency of the investigation explains the post-petition increase in prices of HRS wheat, record evidence shows that in the months immediately preceding the filing of the petition (from June through September 2002), the U.S. price of No. 1 HRS wheat increased 40 percent. The price increase from June to July 2002 was 12.7 percent; from July to August 2002, 10.6 percent; and from August to September 2002, 16.9 percent.³³ On the other hand, the price increase from September to October 2002 was a mere 0.5 percent.³⁴ Similarly, record evidence shows that in the months immediately preceding the filing of the petition (again, from June through September 2002), the U.S. price of No. 2 HRS wheat also increased by more than 40 percent. The price increase from June to July 2002 was only 0.8 percent for No. 2 HRS wheat. However, from July to August 2002, the price for No. 2 HRS wheat increased 24.2 percent; and from August to September 2002, the price

³³ See Final Staff Report to the Commission, Table V-6.

³⁴ See id.

increased 16.1 percent.³⁵ On the other hand, the price of No. 2 HRS wheat from September to October 2002 actually declined 4.1 percent.³⁶

The fact that the October 2002 price for No. 1 HRS wheat was the single-highest monthly price over the entire POI apparently led the Commission to label that October 2002 price as a “price spike.” However, as just noted, the October 2002 price of No. 1 HRS wheat is a reflection of a steady pre-petition run-up in prices in a market attempting to adjust to and factor in the impact of a drought on wheat prices – a market that is predominantly a contract market, not a spot market.³⁷ Given this uncertain market and the unstable supply of wheat brought on by the drought, it is hardly surprising that prices continued to increase into October 2002.

Against this backdrop of a significant run-up in prices in the months just before the filing of the petition, it strikes the Panel as a misnomer to label the October 2002 price increase as a “price spike.” An accurate characterization of No. 1 HRS wheat prices in October 2002 would be a “price peak,” not a “price spike.” An accurate characterization of No. 2 HRS wheat prices in October 2002 would be a “price decline” from the previous month. The Commission’s characterization of the October 2002 price increase as a “price spike” aside, what is most troubling is the Commission’s attribution of these price increases to the pendency of the investigation. It appears to the Panel that the Commission may very well have confused coincidence with causation when it

³⁵ See *id.*, Table V-7.

³⁶ See *id.*

³⁷ The Final Staff Report notes that in the case of HRS wheat, 30 percent of purchases were in the spot market and 70 percent by contract. The percentage of such contracts that were considered short (under 30 days) was 42 percent for U.S. HRS wheat; medium (between 30 and 90 days), 36 percent; and long (over 90 days), 22 percent. In the case of Canadian western red spring wheat, the comparable percentages were 27 percent (short), 38 percent (medium), and 35 percent (long). See *id.* at V-8, V-9, and Table V-3.

attributed the October 2002 increase in wheat prices to the pendency of the investigation rather than to the drought. The correlation of these two factors – an increase in October 2002 prices for No. 1 HRS wheat and the filing of the petition – may be sufficient to permit the Commission to invoke the statutory presumption. However, the 2002/03 marketing year price data drawn from the Commission’s own Final Staff Report seriously erode the statutory presumption invoked by the Commission regarding the effect of the pendency of the investigation on post-petition wheat prices. In the Panel’s view, sufficient record evidence exists to rebut the statutory presumption.

Moreover, record evidence shows that prices gradually declined over the six-month period after October 2002 at a time when subject imports were absent from the U.S. market. Nowhere in its determination does the Commission address this record evidence showing that post-petition prices gradually declined, even though subject imports were totally absent from the U.S. market. It appears to the Panel that the Commission was improperly selective in choosing post-petition data to support its finding regarding the effect of the pendency of the investigation on wheat prices, single-mindedly focusing on wheat prices in the first month following the month in which the petition was filed, while failing to address declining wheat prices for the rest of marketing year 2002/03. In its determination the Commission does not explain why this record evidence, coupled with the drought, does not rebut the Commission’s finding that it was the pendency of the investigation that accounts for the so-called “price spike” in October 2002. As mandated by Gerald Metals, Inc. v. United States, 132 F.3d at 720, the Commission must take into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Furthermore, the Commission attempts to downplay the impact of the drought on prices in marketing year 2002/03 by pointing to the demand for and supply of wheat in that year. As noted above, the Commission observed that the domestic supply of wheat decreased by 25.1 percent in marketing year 2002/03 compared to marketing year 2001/02. The Commission pointed out, however, that that is still less than the 37.3-percent decline in U.S.-derived demand for wheat. This fact, the Commission maintains, further establishes that the drought alone could not explain the price increases observed in the fall of 2002.³⁸ Tellingly, however, the Commission concedes that when U.S. wheat exports are factored into the demand-side of the equation, apparent U.S. consumption fell by only 13.9 percent.³⁹ Under that scenario, the demand for wheat would still exceed the supply, and one would naturally expect prices to rise. Nevertheless, counsel for the ITC insists that it was not improper for the Commission to limit its consideration to changes in U.S.-derived demand rather than overall demand because (1) the Economic Research Service of the U.S. Department of Agriculture does the same in its analysis of projected supplies, and (2) the MGE states that various factors affecting supply and demand in the United States drive MGE prices. Thus, counsel for the ITC concludes, “[a] 37.3 percent decline in domestic use is certainly relevant in that context.”⁴⁰

First of all, ITC counsel’s contentions amount to a post-hoc rationalization. As noted by the Federal Circuit in SKF USA Inc. v. United States, 254 F.3d 1022, 1028 (2001), “we generally decline to consider the agency’s new justification for the agency

³⁸ See CD at 42 n.358.

³⁹ See *id.*

⁴⁰ ITC Brief at 106-07.

action.” See also Rhodia Inc. v. United States, 185 F. Supp. 2d 1343 (Ct. Int'l Trade 2001) (“Although Commerce's brief addresses in greater detail the reasons that integrated producers have higher overhead costs, the ‘post hoc rationalizations’ of counsel [cannot] supplement or supplant the rationale or reasoning of the agency.”). More importantly, the Panel fails to see how the way in which the USDA handles supply and demand data necessarily relates to an ITC determination of material injury in an AD/CVD investigation. Data is gathered and organized by various government agencies for a variety of different purposes, making the legal and factual context pivotal to an interpretation of such data. Taking a USDA methodology for analyzing data and then mechanically relying upon it in an ITC material injury investigation strikes the Panel as yielding a determination that is not based upon substantial evidence. Similarly, the quote from the MGE that counsel for the ITC relies upon – that “various factors affecting supply and demand in the United States drive MGE prices”⁴¹ – is so sweeping and vague as to be meaningless. Thus, even if the USDA and the MGE analyze and place emphasis on data in a particular way, the Panel fails to see how that necessarily has any bearing in an ITC material injury investigation, at least in the absence of further elaboration or explanation by the Commission. In addition, even assuming that the USDA and MGE information cited by counsel for the ITC has some relevance for the specific issue before us, the Commission is not relieved of the obligation to consider all record evidence when making its finding regarding the affect of the pendency of the investigation – in this case, the role of U.S. wheat exports when calculating overall demand.

⁴¹ Id. at 106.

2. The Weight Given to Post-Petition Data

Assuming arguendo that the Commission was justified in discounting post-petition volume and price data due to the pendency of the investigation, the Commission nevertheless states in its determination that it gave “less weight” in its analysis – not that it gave “no weight” – to the lower post-petition import volumes and higher post-petition prices compared to pre-petition volumes and prices. Yet, its affirmative determination rests on data drawn exclusively from the 2000/01 and 2001/02 marketing years, indicating that the Commission in fact gave no weight to data for the 2002/03 marketing year. While the statute might authorize the Commission to completely ignore post-petition data if substantial evidence supports such a deep discount, in this case the Commission concedes that drought conditions existed in Canada and the United States in marketing year 2002/03, which in turn affected the post-petition volume and price of HRS wheat. In the face of such record evidence, any Commission finding that post-petition data would be given no weight would clearly not be based on substantial evidence. Yet, it appears from its determination that the Commission discounted all post-petition price and volume data by 100 percent based on the pendency of the investigation, thus totally ignoring the effect of the drought when weighting that post-petition data.

Finally, the Panel notes that in its brief to the Panel the Commission states that “the Commission may give post-petition data less weight in its material injury analysis if there is any change in the volume, price effects or impact of the subject imports related to the filing of the petitions.”⁴² The Commission proceeds to note that in its final determination the Commission discounted post-petition volume data, and then adds the

⁴² Id. at 98.

following statement: “Having found the condition precedent satisfied [i.e., that post-petition volumes of subject imports declined due in part to the filing of the petition], the Commission exercised its discretion to give less weight to post-petition data on the volume and price effects of subject imports in making its material injury determination.”⁴³ Thus, in its brief to the Panel the ITC appears to argue that under the statute if the Commission finds that a post-petition change in any one of the three factors – volume, price, or impact – was caused by the pendency of the investigation, then it may discount post-petition data for all three factors.

It is true that 19 U.S.C. § 1677(7)(I) does state that the ITC shall consider whether any change in volume, price effects, or impact of imports was related to the pendency of the investigation. But the ITC may then only discount the data it has so considered. For instance, it cannot discount price data if it has only considered volume data changes. The statute does not authorize the ITC to presume anything about other data not found to have changed as a result of the initiation of an investigation. The SAA explains that when the ITC has found evidence of a significant change in data, “it may presume that such change is related to the pendency of the investigation.”⁴⁴ Moreover, if there is insufficient rebuttal evidence “that such change” is related to factors other than the investigation, the ITC may then discount “the affected data.”⁴⁵ The statute says nothing about the ITC discounting all the other data as well. It is thus not a reasonable interpretation of the statute to say that if the ITC (1) found only one factor to have changed (e.g., volume), (2) then presumed that the one change was caused by the

⁴³ Id. at 99 (emphasis added).

⁴⁴ SAA at 854.

pendency of the investigation, and (3) then found that there is insufficient evidence to the contrary to rebut the presumption, that (4) the Commission can then discount post-petition data for the price effects and impact factors as well.

Indeed, where the ITC has presumed that a post-petition change of a relevant factor is related to the pendency of an investigation, it has only discounted that one factor and not “piggy-backed” the other factors. See, e.g., Nippon Steel Corp. v. United States, 350 F. Supp. 2d 1186, 1203 (CIT 2004)(only price data discounted); Corus Staal BV v. U.S. Int’l Trade Comm’n, 2003 WL 1475045, at 8 (CIT 2003)(“The Commission, having found that changes in subject import volume, price effects, and impact were related to the pendency of the investigation, acted within its discretion in discounting post-petition data [emphasis added].”). See also Altx, Inc. v. United States, 167 F. Supp. 2d 1353, 1360 (“If the Commission finds that a change in the volume, price effects, or impact of subject imports since the filing of the petition is related to the pendency of the investigation, it may reduce the weight accorded to the relevant data [emphasis added].”). Therefore, on remand if the ITC wishes to discount both post-petition volume and price data, then it must make the necessary statutory findings for each factor independently.

D. Conclusion

For the reasons fully elaborated above, the Panel remands to the Commission for an explanation as to why record evidence is not sufficient to rebut the statutory presumption of Section 771(7)(I) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(7)(I), insofar as post-petition price data is concerned. In addition, for the reasons fully elaborated above, the Panel also remands for an explanation of how the Commission

⁴⁵ Id.

factored post-petition volume and price data by giving such data some weight – not no weight – in its final determination.⁴⁶ In connection with both remand issues, the Commission’s explanation “must be set forth with such clarity as to be understandable.” Securities & Exchange Comm’n v. Chenery Corp., 332 U.S. 194, 196 (1947). In other words, the Commission needs to refine its analysis in such a manner that the Panel can discern the path of its reasoning. See A. Hirsh, Inc. v. United States, 729 F. Supp. 1360, 1362 (Ct. Int’l Trade 1990) (“although ITC is allowed wide latitude in its decision-making in this area, it is not exempt from articulating its reasoning”).

V. PRICE UNDERSELLING AND PRICE DEPRESSION

A. Background

The Commission found that HRS wheat imports significantly undersold and had significant price depressing effects on the domestic product. It reasoned that the domestic product and subject imports are highly interchangeable, thus rendering price an important purchase factor. It further found that the decline in the industry’s financial performance during the period examined was attributable, in significant part, to declines in prices when subject import volumes were at their highest.⁴⁷

Concluding that the volume of subject imports was significant both in absolute and relative terms, the Commission went on to analyze the price effects of HRS wheat imports. The ITC collected pricing data for HRS on multiple bases. Conventional price

⁴⁶ Should the Commission conclude that the statutory presumption of 19 U.S.C. § 1677(7)(I) has been rebutted as to post-petition price data, then this part of the remand insofar as it concerns post-petition price data will be rendered moot.

⁴⁷ As discussed in Part IV above, the Commission gave less weight to post-petition price data. See CD at 40 n.343.

comparisons were modified to develop comparisons that were company and place specific.⁴⁸ Conventional price comparisons revealed predominant underselling.⁴⁹ Company- and place-specific comparisons also revealed significant underselling in just over 50 percent of the comparisons.⁵⁰ The Commission found varying margins of underselling, depending on the comparison used, and added that this mixed underselling was significant, “given that half of the combined place- and company-specific comparisons showed underselling by subject imports, in a market for a commodity product sold by grade, with pricing information readily available to market participants.”⁵¹

The ITC then went on to find evidence of significant price depressing effects by subject imports, both on a yearly and monthly basis. It found that average prices received by farmers declined in marketing years 2000/01 and 2001/02. It further found that this decline was coincident with a significant increase in the volume of subject imports that increased in absolute terms. The Commission then found that prices increased in marketing year 2002/03 when the volume of imports fell, in part due to the pendency of the investigation.⁵² The ITC also found that monthly price changes confirmed that subject imports had significant price depressing effects on domestic sales with monthly prices received by farmers being the lowest in 2001/02 when import volumes were at their

⁴⁸ This was done to control for variations in transportation costs due to differences in delivery destinations. CD at 40-41.

⁴⁹ Id. at 40.

⁵⁰ Id.

⁵¹ Id. at 41.

⁵² Id.

highest. It added that the absence of lost sales or revenues allegations were not meaningful to the price effects analysis.⁵³ As noted in Part IV above, the Commission limited its analysis of price effects to the pre-petition period by invoking the statutory presumption of 19 U.S.C. § 1677(7)(I).⁵⁴

In sum, the Commission found that average farm prices fell while there were significant subject import volume increases between 2000/01 and 2001/02. On this basis, the ITC concluded that the frequency of underselling was significant and that subject imports had price depressing effects during the POI.⁵⁵

B. Contentions of the Parties

1. Contentions of the Complainants

The CWB argues that the ITC's underselling analysis and significant price depression findings are not supported by substantial evidence and are not made in accordance with law. First, with regard to price underselling, the CWB argues that the ITC's underselling analysis is neither supported by substantial evidence nor is it in accordance with law because the ITC failed to find a causal link between mixed underselling and injury to domestic producers. The CWB contends that the Commission's causation analysis focuses entirely on price suppression/depression resulting from subject import volumes and not from underselling.⁵⁶ The CWB claims that the record is devoid

⁵³ Id. at 41-42.

⁵⁴ Id. at 42.

⁵⁵ As discussed in Part IV above, the ITC attributed in significant part import volume declines and sharp increases in domestic prices at the end of the POI to the filing of the petition and, therefore, accorded less weight to post-petition data in its analysis. See id. at 42.

⁵⁶ CWB Brief at 45.

of any underselling patterns or correlation between underselling and injury. The ITC's failure to establish a causal relationship between mixed underselling and injury precludes it from relying on its underselling findings to support an affirmative determination, according to the CWB.⁵⁷

The CWB argues in more detail that the ITC failed to show that the evidence of mixed underselling was significant or even occurred. It argues that the ITC relied on monthly price comparisons studies that revealed underselling in approximately half of the comparisons. Complainants further contend that the ITC statistical analysis was the only one that accounted for critical price determinative factors, including protein, timing, dockage, and test weight, and that this study proves that any underselling was not significant.⁵⁸

The CWB maintains that the ITC's monthly price comparison analysis failed to take into account acknowledged critical price determinative factors. The first study failed to take into account any of the recognized factors influencing prices, including transportation costs and protein content. Moreover, the CWB contends, the second study – comparing CWB and U.S. grain trader sales on a company- and place-specific basis – failed to make adjustments for protein content that was a critical determinant of price, thereby undermining the validity of the comparisons.⁵⁹

Second, regarding the ITC's significant price depression analysis, the CWB alleges that the ITC's finding of significant price depression is neither supported by

⁵⁷ *Id.* at 47.

⁵⁸ *Id.* at 51-54.

⁵⁹ *Id.* at 56-60.

substantial evidence nor is it in accordance with law for a variety of reasons. The CWB claims that subject imports did not cause a reduction in farm prices and that the ITC finding is, at best, a mere temporal connection that does not rise to the level of a causal connection between the volume of imports, Minnesota Grain Exchange (“MGE”) prices (discussed in Part VIII below), and prices received by farmers. The ITC’s finding of significant price depression is based on a single year-over-year comparison.⁶⁰ Monthly comparisons were used without explanation of their independent value.⁶¹ To the extent that monthly comparisons have any value, they refute the existence of a temporal relationship between imports and farm prices, according to the CWB. Therefore, the CWB insists that the month-over-month comparisons are blatant attempts to cherry-pick data that mistake coincidence for causation.⁶²

Finally, the CWB argues that the ITC misstates the causal significance of the strong correlation of HRS wheat and HRW wheat price trends. The CWB reasons that because the ITC found that prices for HRS wheat and HRW wheat were correlated to an extraordinarily high degree, this is compelling evidence that price trends for HRS wheat are materially determined by factors unrelated to the subject imports. The CWB continues that the Commission’s discussion of the relationship between HRS wheat and HRW wheat is divorced from any measure of the relative significance of subject HRS wheat imports to HRS wheat price trends. The CWB contends that this undermines the Commission’s assumption that subject imports significantly depress average farm prices

⁶⁰ Id. at 23.

⁶¹ Id. at 26.

⁶² Id. at 28-29.

for HRS wheat, while other factors cause HRW wheat prices to follow the same trend.⁶³ According to the CWB, this problem with causation extends to the evidence that HRS wheat prices follow global price trends. The CWB argues that the location economics analysis reflects a misunderstanding of the function of the MGE and basis-point pricing. Even if the ITC's assertion that HRS wheat prices are influenced by local as well as global factors, the CWB maintains, the Commission fails to evaluate its causal significance in relation to the accepted evidence that prices are determined in relation to global supply and demand factors, as well as global price trends. Further, according to the CWB, there is an absence of evidence that the five-cent decline in prices between marketing years 2000/01 and 2001/02 bore any causal relationship to the volume of imports or that this decline was materially distinguishable from global price trends. In so doing, the CWB alleges that the ITC failed to analyze contradictory evidence to ensure that that the imports are causing the injury and not minimally contributing to it.⁶⁴

NAMA argues that the ITC is attempting to uphold a flawed price effects analysis with post hoc rationalizations. It contends that the ITC ignored substantial evidence, choosing instead to rely upon inherently incorrect price comparisons.⁶⁵ Even though the ITC attempts to diminish the importance of its underselling analysis, the price comparisons were critical to its affirmative determination. NAMA further notes that the ITC itself admits that the price data it mainly relied upon was a flawed conventional price

⁶³ Id. at 34-38.

⁶⁴ Id. at 38-43.

⁶⁵ NAMA Reply Brief at 1.

analysis that did not control for transportation costs. NAMA concludes that this renders the Commission's decision-making path unclear and contradictory.⁶⁶

2. Contentions of the Investigating Authority and Respondent

For its part, the ITC argues that because the governing statute does not define the term "significant," or specify the methodology by which to determine the extent of price underselling, the Commission thus has broad discretion to determine whether a given set of facts constitutes significant price underselling. Because the Commission's choice of methodology was reasonable, it therefore must be upheld. The ITC maintains that its methodology adjusted for transportation costs, as well as other factors that could potentially affect price comparisons. It further contends that, in addition to the price comparison methodology, it employed a statistical analysis when multiple data points existed in order to account for other factors, such as protein content. The ITC insists that the mean prices developed by the statistical technique were not inconsistent with its finding of mixed price underselling.⁶⁷ The ITC concludes that its methodology was reasonable, while the Complainants present an alternative, albeit inferior, view of the conditions of competition.⁶⁸

In short, because the ITC has broad discretion to interpret undefined terms in statutes that it is charged with administering, and because it determined that mixed

⁶⁶ Id. at 3-4.

⁶⁷ ITC Brief at 60.

⁶⁸ Id. at 67-74.

underselling occurring in 40-50 percent of sales was significant in the circumstances of this investigation, its determination must be affirmed.⁶⁹

Regarding its price depression analysis, the ITC contends that rather than take issue with the evidence, the Complainants impermissibly focus on an alternate view of the facts. The ITC conducted its price depression analysis in the context of the same conditions of competition that it used in its underselling analysis: significant volumes of subject imports, interchangeability, importance of price in the purchasing decision, relative elasticity of price, and a domestic industry that is highly sensitive to adverse price changes. The Commission contends that both on a yearly and monthly basis, the evidence shows an inverse relationship between the volume of subject imports and farm prices for the domestic product. Thus pricing data, whether on a yearly or monthly basis, considered in the context of the conditions of competition, had significant price depressing effects during the period examined.⁷⁰ In rebutting the CWB's allegations, the ITC further contends that its price-depression finding was based not only on yearly comparisons, but on monthly prices as well.⁷¹

The ITC continues that both global and local factors influence HRS wheat prices, contending that the presence of significant volumes of highly interchangeable HRS wheat, that cannot feasibly be sold elsewhere, can significantly depress U.S. farm prices.⁷² The ITC submits that the Complainants' argument that local factors do not

⁶⁹ Id. at 75-78.

⁷⁰ Id. at 87-90.

⁷¹ Id. at 97. Specifically, the ITC cites higher subject import volumes for each of the months between November 2001 and March 2002, when compared to the same months one year prior.

⁷² Id. at 109-13.

influence prices is merely an invitation to reweigh the evidence and fails to show that the ITC's findings are unsupported by substantial evidence or otherwise not in accordance with law.

Finally, the ITC contends that it explained that the correlations between price movements of HRS wheat and HRW wheat do not undermine its price depression finding. The ITC insists that prices for HRS wheat and HRW wheat were not the same, even if there were correlations in price movements. Price movement correlations were observed between wheat of all classes and even between wheat and other agricultural products. The ITC maintains that the Complainants' argument with respect to the closeness in the price spread between HRS wheat and HRW wheat does not undermine the ITC's analysis, but is rather an alternative view of the evidence laden with inaccuracies that invites the Panel to impermissibly reweigh the evidence.⁷³

Turning to the contentions of respondent NDWC, the NDWC dismisses the CWB's assertions as gross mischaracterizations, arguing that monthly and annual data support the ITC's finding of the price-depressing effects of subject imports.⁷⁴ It contends that, contrary to the Complainants' assertion, local conditions play an important role in establishing domestic prices.⁷⁵ The NDWC also points out that the ITC's underselling analysis properly accounted for transportation costs and protein levels.⁷⁶ Finally, the NDWC argues that HRS wheat and HRW wheat prices do not follow identical patterns.⁷⁷

⁷³ Id. at 127-30.

⁷⁴ NDWC Brief at 51-62.

⁷⁵ Id. at 63-73.

⁷⁶ Id. at 73-83.

⁷⁷ Id. at 83-90.

C. Analysis

The governing statute requires the ITC to look for significant price underselling and price depression by subject imports vis-à-vis the domestic like product. The statute reads in pertinent part:

In evaluating the effects of imports such merchandise on prices, the Commission shall consider whether-

- (1) there has been significant price underselling by the imported merchandise as compared with the price of the domestic like products of the United States, and
- (2) the effects of imports of such merchandise otherwise depress prices to a significant degree or prevents price increases, which would otherwise have occurred, to a significant degree.

19 U.S.C. § 1677(7)(C)(ii). The governing statute thus requires the ITC to examine the significance of underselling and the causal connection between imports and price depression or suppression. See *Altx, Inc. v. United States*, 167 F. Supp. 2d at 1365. The Commission's findings must be supported by substantial evidence to ground an affirmative injury determination. Under the applicable standard of review, the Commission enjoys a broad discretion to employ the appropriate methodologies and interpret statutory terms. However, this discretion is not unfettered and requires that the ITC sufficiently articulate its rationale so that the reviewer might reasonably discern its path of logic.

The Panel agrees that the Commission is entitled to Chevron deference when interpreting undefined terms that appear in Title VII of the trade remedies law. The agency that is charged with administering a particular statute has been conferred the authority to resolve statutory ambiguities. Committee for Fairly traded Venezuelan Cement v. United States, 372 F.3d 1284, 1289 n.2 (Fed. Cir. 2004). Given that “significant” is not defined in the statute, the ITC enjoys broad discretion in determining whether a certain frequency of underselling is significant. The Panel further agrees that the case law supports the proposition that the frequency of mixed underselling is case specific and what might constitutes “significant” price underselling under one set of circumstances may fall short in a different set of circumstances. See, e.g., Coalition for the Preservation of American Brake Drum & Rotor Aftermarket Mfrs. v. United States, 15 F. Supp. 2d 918, 924 (Ct. Int’l Trade 1998) (ITC has discretion to make reasonable interpretations of evidence with respect to underselling). The Panel finds, therefore, that in the circumstances of this case it was not unreasonable for the ITC to find mixed underselling and to find that it was “significant.”

In the particular circumstances of this case, the ITC developed methodologies and interpreted statutory terms, but failed to ensure that the sales comparisons that it relied upon were meaningful. The ITC’s underselling determination is based, in part, on its mixed underselling finding. The Panel agrees with the Complainants that even though the ITC found underselling to be significant for the purposes of the statute, it cannot serve as the basis for its material injury finding unless the Commission establishes a causal link between such underselling and injurious effects to the domestic industry. A finding of underselling does not by itself establish that it was the source of the injury. The ITC

needs to analyze the underselling in terms of the domestic industry's performance. See Altx, Inc. v. United States, Slip. Op. 2002-65, 2002 Ct. Int'l Trade Lexis 66, *36 (Ct. Int'l Trade Dec. 31, 2002). The Commission's causation analysis is focused on price depression caused by the subject imports, rather than price underselling.⁷⁸ As such, there is a legally insufficient analysis of the relationship between underselling and adverse effects on the domestic industry. Even though the ITC submits that price underselling was not the cornerstone of its analysis, the Panel finds that it is sufficiently important to the Commission's analysis that any shortcomings must be addressed on remand.

Moreover, as explained in greater detail in Part VII below, the ITC's underselling analysis is fatally flawed because it does not speak to whether the subject imports undersold the domestic industry. The domestic industry was defined as the farmers of HRS wheat. However, the underselling found by the ITC related to sales comparisons to U.S. grain trading companies. In so doing, the ITC offered no explanation of the relevance of this downstream market to the upstream farmer's market. Under the circumstances, the ITC failed to articulate a rational connection between the facts found and the choices made. See Altx, Inc., 167 F. Supp. 2d at 1366; Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974).

Regarding price depression, the ITC contends that underselling was a contributing factor to the domestic industry's injury, along with volume and price depression.⁷⁹ While the ITC declined to hold that a significant volume of subject imports could itself lead to

⁷⁸ See CD at 41-43.

⁷⁹ ITC Brief at 82.

material injury,⁸⁰ it also rejected the Complainants' assertion that import volume was not significant. The Commission appears to have found that subject import volumes depressed domestic prices.

The Panel concludes that the ITC's finding that increased volumes of subject imports depressed prices is not supported by substantial evidence. As discussed more thoroughly in Part VIII below, the ITC's analysis fails to appreciate the role that the MGE plays in setting prices. By selectively utilizing some data while not adequately addressing contradictory data, the Commission fails to show a causal connection between the subject imports and material injury. See Gerald Metals v. United States, 132 F.3d at 720. In addition, the ITC has failed to analyze contradictory evidence and inferences to ensure that subject imports are the cause of the injury and not simply contributing towards it in a tangential or minimal way. See Taiwan Semiconductor v. United States, 266 F.3d at 1345.

The ITC's price depression analysis rests on a bifurcated model of global and local price factors. In essence, while the Commission recognizes the importance of global factors, its analysis posits an independent, local factors model. While the Panel recognizes the broad discretion that the ITC exercises when analyzing price depression, the Panel finds that the Commission failed to adequately consider the importance of the MGE in establishing local prices. Furthermore, the Panel finds that while the ITC considered the importance of absolute subject import volumes, it failed to examine the impact that such imports have in affecting MGE prices.⁸¹

⁸⁰ CD at 26 n.238.

⁸¹ Panelist Irish dissents from the Panel's findings concerning the MGE price, as set out in Part VIII below. She would affirm the Commission's determination on the issue of the treatment of the MGE price.

D. Conclusion

For all the foregoing reasons, the Panel remands to the Commission with instructions to issue a determination regarding price underselling and price depression that is not inconsistent with the Panel's decision.

VI. IMPACT ON THE DOMESTIC INDUSTRY

A. Background

In its determination the Commission made the following findings regarding the economic condition of the domestic industry. First, it noted that HRS wheat production fell from 502 million bushels in 2000/01 to 476 million bushels in 2001/02, and then to 357 million bushels in 2002/03.⁸² Acres planted with HRS wheat gradually increased during the POI, but acres harvested declined in 2002/03 after having increased in 2001/02 from 2000/01. Average yields of HRS wheat declined over the POI.⁸³ The Commission found that drought accounted for "sharp declines in production and yields" in 2002/03, while the drop in production in 2000/01 and 2001/02 was due to "normal fluctuations in agronomic conditions."⁸⁴

In addition, sales of HRS wheat declined during the POI, but the domestic industry's market share, based on total shipments of domestic HRS wheat, was 92.5 percent in 2000/01, 90.9 percent in 2001/02, and 97.6 percent in 2002/03.⁸⁵ Inventories

⁸² CD at 43.

⁸³ Id. at 44.

⁸⁴ Id.

⁸⁵ Id. at 44-45.

increased from 194 million bushels in 2000/01 to 210 million bushels in 2001/02, then declined to 141 million bushels in 2002/03. Collective wages paid to hired labor fell between 2000 and 2002 from \$39 million to \$29.4 million. The domestic HRS wheat industry experienced positive net returns in 2000, a drop in 2001, and a significant improvement in 2002 compared to 2001, although “in most cases net returns in 2002 did not approach net returns for 2000.”⁸⁶

The Commission found that the financial state of the domestic HRS wheat industry is primarily a function of farm prices and yields per acre. Yields declined each year, and prices declined in 2001 but improved in 2002. Total product return declined in each of those years. According to the Commission, when fluctuations in average yields are taken into account, the record indicates that price-driven changes negatively impacted total product return and thereby contributed to the industry’s worst performance in 2001, when subject import volumes were high and domestic prices were depressed.⁸⁷ Because yields fluctuate significantly from year to year, the domestic industry is “particularly vulnerable to injury as a result of price depression by subject imports,” in the view of the Commission.⁸⁸

The Commission concluded that subject imports had a material adverse impact on the domestic industry through their significant volume and price effects.

B. Contentions of the Parties

⁸⁶ Id. at 46.

⁸⁷ Id.

⁸⁸ Id. at 47.

1. Contentions of the Complainants

The CWB contends that the Commission's impact analysis is based on its finding that imports increased between 2000/01 and 2001/02, depressing farm prices by five cents per bushel, and thereby contributing to a decline in total product return to farmers.⁸⁹ In other words, according to the CWB, the ITC's finding of material impact is entirely derivative of its finding that imports significantly depressed average U.S. farm prices. Consequently, the CWB argues, the Commission's finding of material impact must fail for all the reasons that its finding of significant price effects must likewise fail (described above in Part V.B.1).

2. Contentions of the Investigating Authority and Respondent

The Commission contends that the Complainants concede critical aspects of the ITC's material impact finding. The ITC submits that the CWB's sole challenge with respect to material adverse impact is whether price depression was caused in significant part by subject imports.⁹⁰ However, the ITC counters that it relied not only on price effects but also on significant volume effects in making its material impact finding.⁹¹

C. Analysis

In the course of making its material injury determination, the Commission is directed to consider "the impact of such merchandise on domestic producers of domestic

⁸⁹ CWB Brief at 92-93.

⁹⁰ ITC Brief at 134.

⁹¹ Id. at 135.

like products . . . ,” 19 U.S.C. § 1677(7)(B)(i)(III), in addition to considering the volume of subject imports and the price effects of such imports. In examining the impact of subject imports on the domestic industry, the Commission is required to consider all relevant economic factors that bear on the state of the industry. Such factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single factor is dispositive. See 19 U.S.C. § 1677(7)(C)(iii).

The Commission’s decision finds adverse material impact largely through its price/yield analysis. Crop yields are an autonomous factor that is largely unmanageable in the farming context. Certainly, there is no obvious causal connection to Canadian imports. Therefore, the Commission’s finding of adverse material impact rests on the negative impact that subject imports have on prices received by farmers.

The Commission tries to have it both (or indeed many) ways in accounting for yields. It states that “[t]he fact that yields fluctuate significantly from year to year leaves the domestic industry particularly vulnerable to injury as a result of price depression by subject imports”⁹² Yet at the same time the Commission “would not expect that normal fluctuations in yield in non-drought years would be enough to tip an industry experiencing positive net returns in all states and tenure types to net losses or net returns approaching zero.”⁹³ Even more puzzling is the following statement: “When fluctuations in average yields are taken into account.”⁹⁴ It is far from clear how one standardizes or

⁹² CD at 47.

⁹³ Id. at 48.

⁹⁴ Id. at 46-47.

normalizes fluctuations in yield in non-drought years. In any event, it is not at all clear how that was done in this case.

Nor is it clear how the Commission reaches the conclusion that yields are “fluctuating significantly,” and are significant enough to cause farmers to be vulnerable to price changes, unless the industry is perpetually vulnerable (an issue that is beyond the scope of this review). The fact that the Commission “would not expect” changes in yield to explain the effects on domestic farmers’ financial health strikes the Panel as an insufficient analysis. There are obviously many factors that potentially have a bearing on the health of the domestic HRS wheat industry.⁹⁵ The Commission states that the most relevant factors in determining both total product return⁹⁶ and the financial state of the domestic HRS wheat industry⁹⁷ are yields per acre and farm prices. The path of the ITC’s reasoning is not at all clear on this point. On the face of the Commission’s determination, the Panel is unable to discern how the ITC’s finding of material adverse impact is objectively supported. A five-cent-per-bushel change in price may lack significance in the face of changing yields and conditions of competition that serve as equally good explanations for changes in the health of the domestic industry. Furthermore, the Commission does not show a causal relationship between the subject imports and the prices farmers receive, a necessary component of the material adverse impact finding.

⁹⁵ The Commission lists several in its determination: output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. See id. at 43.

⁹⁶ Id. at 46.

⁹⁷ Id. at 47.

D. Conclusion

For all the foregoing reasons, the Panel remands the Commission's material adverse impact finding for further determination not inconsistent with this decision.

VII. CAUSATION: LEVEL OF TRADE AND THIRD-COUNTRY MARKETS

A. Background

The ITC found that the domestic industry is materially injured by reason of the imported product. The domestic industry consists of the growers of HRS wheat, but the CWB does not compete directly with farmers who grow wheat. Rather, the Commission has found, the CWB “competes on the level of large-scale grain traders for sales both in the United States and third-country export markets.”⁹⁸ Farmers typically truck their wheat to grain elevators, although some deliver directly to an export terminal.⁹⁹ The grain elevators sell the wheat to large, generally multinational, firms who either mill it themselves or sell it, often to export markets.¹⁰⁰ The subject imports “[i]n general, . . . do not compete with domestic producers for sales to local grain elevators.”¹⁰¹ Instead, the “imported wheat is sold downstream to milling firms.”¹⁰²

⁹⁸ Id. at 20.

⁹⁹ Id. at 10.

¹⁰⁰ Id. at 14. Many of the large trading and milling firms also have ownership interests in grain elevators.
Id.

¹⁰¹ Id.

¹⁰² Id.

For its price comparisons, the ITC chose sales to downstream purchasers as the comparable sales. These downstream purchasers are identified by the ITC as the “grain-trading and milling firms.”¹⁰³ Occasionally, the Commission refers specifically to the millers as the downstream consumers, purchasers, or customers.¹⁰⁴

There was disagreement before the ITC over whether exports should be included in the measurement of U.S. consumption. The Commission decided to consider the calculations done in both ways. If exports are excluded, apparent U.S. consumption was 324 million bushels in 2000/01, 290 million bushels in 2001/02, and 182 million bushels in 2002/03. If exports of domestic wheat by the downstream purchasers are included, apparent U.S. consumption was 551 million bushels in 2000/01, 506 million bushels in 2001/02, and 436 million bushels in 2002/03.¹⁰⁵ A significant portion of domestically produced wheat was exported. Exports accounted for 44.6 percent of domestic shipments in 2000/01, 47.0 percent of domestic shipments in 2001/02, and 59.8 percent of domestic shipments in 2002/03.¹⁰⁶ By volume, imports of subject wheat were 41 million bushels in 2000/01, 46 million bushels in 2001/02, and 11 million bushels in 2002/03.¹⁰⁷

B. Contentions of the Parties

¹⁰³ Id. at 14 n.106. See also id. at 9 n.60, 22.

¹⁰⁴ Id. at 8, 11.

¹⁰⁵ Id. at 16.

¹⁰⁶ Id. at 18.

¹⁰⁷ Id. at 37. Inventories were also an important component of supply as well. In 2000/01 inventories were 194 million bushels, 210 million bushels in 2001/02, and 141 million bushels in 2002/03. Id. at 19. The huge draw down in inventories that supplied the domestic market in 2002/03 was not analyzed as to price effects, if any, but only as a minor enumerated factor in the analysis of impact on the domestic market. Id. at 44-45.

1. Contentions of the Complainants

The CWB criticizes the ITC's use of prices in downstream transactions, which the CWB identifies as "comparisons between prices charged to mills by U.S. grain trading companies and prices charged to mills by the CWB."¹⁰⁸ The CWB argues that the Commission's analysis is fatally flawed because it relates solely to sales made by parties other than the domestic industry. According to the CWB, the ITC focused on sales occurring not at the level of the domestic industry (i.e., U.S. farmers), but in a downstream market between U.S. grain trading companies and U.S. mills, contrary to the ITC's own observations of the limited value of price comparisons made at different levels of trade. The CWB contends that the ITC failed to provide a reasoned explanation, supported by substantial evidence, of the manner in which downstream selling affected U.S. producers' prices upstream.¹⁰⁹ As well, the CWB argues that the Commission ignores the effect of the MGE price, as discussed below in Part VIII. According to the CWB, the price trends for HRS wheat "were the result of factors unrelated to subject imports including, most importantly, changes in global supply and demand conditions."¹¹⁰ The CWB reasons that the ITC's underselling analysis at a downstream level of trade is inappropriate because it was not probative or meaningful and resulted in the failure to articulate a rational connection between the facts found and the choices made, thereby requiring the Panel to remand the ITC's determination. NAMA also argues

¹⁰⁸ CWB Brief at 40-41. *See id.* at 53-55. *See also* CWB Reply Brief at 49 n.71 (Commission using "prices received by independent grain traders in separate downstream transactions with flour mills . . .").

¹⁰⁹ CWB Brief at 53-55; CWB Reply Brief at 47-51.

¹¹⁰ CWB Brief at 84.

that the Commission's treatment of the MGE price is not supported by substantial evidence.¹¹¹

2. Contentions of the Investigating Authority and Respondent

The Investigating Authority and the North Dakota Wheat Commission argue that the CWB and NAMA have misunderstood the effect of the MGE price¹¹² and that the Commission's injury determination is supported by substantial evidence, as summarized above in Parts IV, V and VI. Like the CWB, the NDWC assumes that the comparison made by the ITC is between prices at the mill level and prices at the farm level.¹¹³

C. Analysis

There is ambiguity in the ITC's determination over which domestic sales were used for the price comparisons. The ITC appears to say that the comparisons included sales to the grain traders, as well as sales to the domestic mills. At the Panel hearing, counsel for the Commission confirmed that the intent behind the questionnaires was to capture all domestic sales from grain elevators, including all sales to grain traders, whether or not the grain was thereafter exported from the United States.¹¹⁴ The sales to

¹¹¹ See NAMA Brief at 20.

¹¹² ITC Brief at 69-74; NDWC Brief at 46-51, 65-73. See Part VIII below.

¹¹³ NDWC Brief at 47-50. See NDWC Brief at 47 ("The Commission's finding of significant underselling also properly considered the chain of causation from underselling at the mill level to prices at the farm level and determined that underselling at the mill level had a price depressing effect.").

¹¹⁴ Hearing Transcript at 58, 61.

these traders raise two issues – the first involving the appropriate comparisons and the second involving causation, including the treatment of exports.

The sales chosen for analysis must involve comparable conditions or must be adjusted to reflect appropriate comparisons. Keyes Fibre Co. v. United States, 682 F. Supp. 583 (Ct. Int’l Trade 1988); Keyes Fibre Co. v. United States, 691 F. Supp. 376 (Ct. Int’l Trade 1988). To be meaningful, a material injury analysis must compare imports and the domestic like product at the same level of trade.¹¹⁵ As the ITC has found that the subject imports are sold to milling firms, sales by the grain elevators to mills take place at the same level of trade. However, as the ITC has found that the CWB competes with large-scale grain traders for sales in the United States,¹¹⁶ any sales of the domestic product by grain elevators to such traders do not take place at the same level of trade but instead would need to be adjusted to reflect a subsequent resale that involved competition with the subject imports.¹¹⁷ In order to use for its comparisons the sales by the elevators to the large grain traders, the Commission must explain how the CWB competes with the elevators for those sales.

The information on prices collected by the ITC during the investigation may not, in fact, contain a great deal of information on sales to the large trading operations or on wheat that is exported rather than being processed for the market in the United States. The CWB and the NDWC, presenting opposing arguments, both assumed that the questionnaires from the Commission attempted to gather information on prices at the mill

¹¹⁵ See CD at 40 n.339.

¹¹⁶ Id. at 20.

¹¹⁷ Similarly, concerning exports, the ITC has found that subject imports enter the U.S. market not at the level of sales to the grain traders, but at the same level of trade as the export sales by the traders. CD at 24 n.227.

level. At the hearing, counsel for NAMA stated that if the purchaser was an integrated company with both milling and trading affiliates, responses to the questionnaires were from the milling operations rather than the grain trading operations.¹¹⁸ The questionnaires elicited information on the nature of operations of the responding purchaser and may not have gathered information on purchases by grain traders that sell all their wheat without further processing.¹¹⁹ It is for the Commission to determine within its expertise whether prices have been used that are not prices at the level of sales to domestic milling operations. If such other prices have been used, the ITC must explain how they show sales in competition with sales of imports at the same level of trade, or how they have been adjusted to reflect sales at the same trade level as imports.

Once comparison sales are identified and analyzed at a downstream level, the CWB argues that the Commission must still explain how any underselling has affected the economic conditions of upstream producers. The CWB argues that the ITC's analysis is not probative as it fails to articulate a rational connection between the facts found and the determination made. The Panel agrees. In order to find causation, the ITC must determine, with the support of substantial evidence, that the effect of the imports reaches the level of the domestic industry, through the distribution chain. See Iwatsu Electric Co., Ltd. v. United States, 758 F. Supp. 1506, 1516 (Ct. Int'l Trade 1991). The Commission has noted that farmers are "price-takers,"¹²⁰ but has not examined the conditions of the grain elevators or the grain trading companies to explain how the effect of the imports

¹¹⁸ Hearing Transcript at 42. See, e.g., Proprietary Questionnaires, Confidential Documents 4 and 36.

¹¹⁹ See Proprietary Questionnaires for preliminary determination; Proprietary Questionnaires for final determination, General Questions, Part I at 2.

¹²⁰ CD at 21.

was passed upstream to the farmers, rather than being absorbed at one of the intervening levels. The ITC must address the situation of the other participants in the supply chain between the downstream sales and the farmers, to consider whether the effect of the imports is passed upstream to the domestic industry.

The Panel notes that a large percentage of domestically-produced HRS wheat is exported¹²¹ and the ITC has found that it competes in third-country markets with wheat from the CWB. Just as downstream competition in the U.S. domestic market might be linked to upstream injury to U.S. farmers, so too could downstream competition in third-country markets be linked to the same upstream injury. The ITC is required to determine whether there has been injury “by reason of imports.”¹²² Pursuant to the substantial evidence standard, the ITC must address any contradictory evidence or evidence of alternative causes of injury in order to ensure that imports are causing injury, not simply contributing in a tangential or minimal way. See Gerald Metals, Inc. v. United States, 132 F.3d at 720; Taiwan Semiconductor Indus. Ass’n v. Int’l Trade Comm’n, 266 F.3d at 1345. Given the importance of the export market, it constitutes a condition of competition that must be addressed by the ITC. This is not a factor that can be excluded from the analysis because the decision to export or sell in the domestic market is made by grain traders rather than farmers, as the Commission claims.¹²³ The ITC must examine the exports of domestically-produced HRS wheat, to ensure that injury due to competition in third-country markets is not improperly attributed to the downstream sales of imports.

¹²¹ See id. at 18 (“Export sales are an important market for domestically produced . . . HRS wheat.”).

¹²² 19 U.S.C. §§ 1671(a)(2), 1673d(b)(1).

D. Conclusion

The Panel remands to the ITC to determine whether prices have been used that are not at the level of sales to domestic milling operations. If such other prices have been used, the Commission must explain how they show sales in competition with sales of imports at the same level of trade, or how they have been adjusted to reflect sales at the same trade level as imports. If some prices chosen do not involve comparisons at the same level of trade and cannot be adjusted, the Commission is instructed to reject them and to reconsider its analysis of price underselling.

Further, the ITC must examine the economic conditions of the grain trading companies and elevators to explain how the effect of imports was passed upstream to domestic farmers. As well, the ITC must examine the exports of domestically-produced HRS wheat and explain how it has found injury by reason of imports, rather than by reason of competition in third-country markets.

VIII. CAUSATION: MGE PRICES

A. Background

Under a Title VII injury analysis, the governing statute requires that the Commission consider the conditions of competition affecting the domestic industry. See 19 U.S.C. § 1677(7)(C)(iii). In the Commission's analysis of the conditions of competition, it noted the existence of global markets for HRS wheat and that HRS wheat prices are rapidly disseminated throughout these markets, impacting the price at which domestic producers – U.S. farmers – sell HRS wheat. While durum wheat prices are found on the Minneapolis Grain Exchange and the USDA's Agricultural Marketing

¹²³ CD at 48 n.396.

Service, the Commission concluded that “[t]he MGE is the primary source of information regarding prices of HRS wheat.”¹²⁴

Under the statute and related case law it is necessary to ensure that it is the subject imports, not unknown factors, causing injury to the domestic industry. The Commission “must not attribute the harmful effects from other sources of injury to the subject imports and must adequately explain how it ensured not doing so.” Taiwan Semiconductor v. United States, 59 F. Supp. 2d at 1336. See also SAA at 851-52 (the Commission must “examine other factors to ensure that it is not attributing injury from other sources to the subject imports.”). Without a proper analysis of causation, the Commission is unable to demonstrate on the record that changes in prices that farmers received were not due to other factors affecting price.

B. Contentions of the Parties

1. Contentions of the Complainants

The Complainants allege that a key condition of competition was ignored, leading to a gap in the causal nexus between the subject imports and the domestic like product and resulting in a conclusion unsupported by substantial evidence. The alleged missing element of the analysis is that average farm prices for HRS wheat are determined by the price that HRS wheat is traded on the MGE, not by prices at which HRS wheat is sold in downstream transactions. The Complainants further allege that if imports were to have any price effects on the domestic industry, either underselling or price depression/suppression, it can only be through the subject imports impacting the price at which HRS wheat is traded on the MGE. The Complainants allege that this was

¹²⁴ CD at 21.

impossible, since it was an undisputed fact that the subject imports are too small to affect the MGE price; therefore, it was impossible that the subject imports could have materially injured the domestic industry.¹²⁵

Regarding the extent to which the MGE price is actually used as a benchmark for farmers, NAMA argues that in the U.S. market the “Commission agreed that the Minneapolis Grain Exchange (MGE) price for HRS wheat is the bellwether, benchmark or barometer of pricing in the HRS market.”¹²⁶ Prices offered to HRS wheat farmers are based on the price grain elevators observe HRS wheat is traded on the MGE, with adjustments for transportation costs, protein content, and other quality characteristics of HRS wheat.¹²⁷

NAMA further contends that the Commission’s determination ignored record evidence that subject imports have no appreciable impact on MGE prices. NAMA argues that the ITC mistakenly questioned the validity of this record evidence even though it explicitly recognized the importance of the MGE as a primary source of price information. NAMA urges this Panel to review the rationale on which the ITC acted, rather than counsel’s post hoc rationalizations.¹²⁸

Likewise, the CWB asserts that at all levels of trade in the United States, HRS wheat prices are a function of MGE prices and transportation costs.¹²⁹ The CWB points to the Commission’s finding that farmers are price takers and prices received are

¹²⁵ CWB Brief at 57.

¹²⁶ NAMA Brief at 19.

¹²⁷ Id. at 19.

¹²⁸ NAMA Reply Brief at 6-7.

¹²⁹ CWB Brief at 36.

determined by reference to the MGE price.¹³⁰ According to the CWB, the ITC's arguments refuting the significance of the fact that farm prices are derivative of MGE prices is post hoc and without any basis in the record. The CWB argues that there is no substantial evidence to suggest that farm prices are based on anything other than MGE prices. There are no local prices for wheat in that farmers receive a price that is based on the futures market price with the necessary adjustments in the form of transportation costs and grain elevator's margin. The CWB argues that farmers must sell the entire amount of their production and that there is a direct correlation between the MGE price and the elevator price. By the time the downstream transaction occurs, the farmer has already been paid in relation to the prevailing MGE price¹³¹.

The CWB adds that there is no substantial evidence to support the conclusion that subject imports have a material effect on MGE prices. Contrary to the substantial evidence submitted by the President and CEO of the MGE, the CWB contends that the ITC erroneously found that MGE prices are influenced by the level of subject imports. In this case, the MGE is a financial market where there is no necessary correspondence between the volume of trading on the MGE and the volume of domestic production and where the price received by farmers is not determined by national or regional supply and demand, but by the outcome of global trading in futures contracts.¹³²

Even if the volume of subject imports had some effect on MGE future prices, the CWB adds that the ITC failed to establish that the prices were significant because the

¹³⁰ Id. at 55.

¹³¹ CWB Reply Brief at 11-16

¹³² Id. at 16-19.

MGE is a global commodities market that is influenced by the volume of wheat produced and sold by all major wheat growing nations, regardless of what is exported or sold in the United States. Consequently, according to the CWB, the ITC's price effects determination rests on unsupported inferences.¹³³

With respect to average farm prices being based in part on downstream transactions, the CWB points out that the "Final Determination is devoid"¹³⁴ of such a discussion. In summary, the Complainants argue that there was undisputed evidence that average farm prices are determined by reference to the MGE price, and the Commission's determination is devoid of the effect of downstream transactions on average farm prices.

Regarding the effect, if any, that imports have on the MGE reference price, the Complainants assert that the subject imports have an insignificant effect on the MGE price and, therefore, have no effect on the domestic industry. The Complainants allege that the Commission ignored evidence on the record that imports have no effect on the MGE price. The President of the MGE, Kent Horsager, explained before the Commission that the effect of Canadian exports to the United States on MGE prices is "insignificant."¹³⁵ Also, there was record evidence of a list of price determinants of MGE prices, and absent from the list is any reference of the effect of Canadian exports of HRS wheat on the MGE price.¹³⁶ According to the Complainants, by failing to consider key record evidence, the Commission has failed to meet the substantial evidence standard.¹³⁷

¹³³ Id. at 21-22.

¹³⁴ Id. at 55.

¹³⁵ CWB Brief at 56 (quoting NAMA Post-Hearing Brief, Exhibit 1, ¶ 7 (Affidavit of Kent Horsager)).

¹³⁶ Id.

¹³⁷ NAMA Brief at 20.

Besides key record evidence that was ignored, according to the CWB, between marketing years 2000/01 and 2001/02 imports increased 11 percent, while the MGE price remained flat for the period. This serves as further evidence that “import volumes and MGE prices are completely unrelated.”¹³⁸ This stands in contrast to the Commission’s finding of price depression where average farm prices received for HRS wheat decreased five cents per bushel between marketing years 2000/01 and 2001/02.¹³⁹ The CWB attributes the difference in price between MGE prices and average farm prices to crop conditions, and there is no record evidence that imports affect crop conditions.¹⁴⁰ By failing to consider the effects of crop quality, the CWB alleges that the Commission has attributed the harmful effects from other sources of injury to the subject imports and has not adequately explained how it ensured not doing so.¹⁴¹

2. Contentions of the Investigating Authority and Respondent

The Commission, along with the NDWC, disputes the Complainants’ contention that average farm prices are entirely based on the MGE price. The Commission argues that “[i]t is not true, therefore, that farm prices move lockstep with MGE prices, or that farm prices can only be affected by the MGE.”¹⁴² The Commission also responds that while the MGE is the primary source of information for HRS wheat prices, there are

¹³⁸ CWB Brief at 68.

¹³⁹ CD at 41-42.

¹⁴⁰ CWB Brief at 69.

¹⁴¹ Id. (citing Taiwan Semiconductor Indus. Ass’n v. United States, 59 F. Supp. 2d 1324, 1336 (Ct. Int’l Trade 1999)).

¹⁴² ITC Brief at 73.

other sources for HRS wheat prices.¹⁴³ To refute the fact that average farm prices are a derivative of MGE prices, the Commission points to evidence on the record that “if a milling firm or grain trading firm satisfies its need for HRS wheat from the CWB at a lower price, that will influence the price it is willing to pay for domestic production through the local grain elevator.”¹⁴⁴ The Commission adds that prices agreed upon deviate from the MGE price as a result of negotiations between buyers and sellers.¹⁴⁵ The NDWC adds that there is record evidence establishing the existence of multiple HRS wheat prices noted in the U.S. market, along with evidence that Canadian HRS wheat imports directly affect prices received by U.S. producers, without the intervention of the MGE.¹⁴⁶

Regarding the effect, if any, that imports have on the MGE reference price, both the Commission and the NDWC respond that the subject imports do have an effect on the price at which HRS wheat is traded on the MGE. Specifically, the Commission argues that based on the “Commission’s undisputed finding that the volume of subject imports is significant relative to consumption in the United States, subject imports are large enough in volume to effect [sic] commodity prices, which are in turn linked to futures markets.”¹⁴⁷ With respect to the Complainants’ assertion that record evidence was

¹⁴³ Id. at 74.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ NDWC Brief at 47. The NDWC argues that the underselling finding took full account of the conditions of competition. It contends that while the ITC recognized the MGE’s role as a source of price information, this does not preclude underselling by subject imports. It notes that the ITC considered and explicitly rejected the CWB’s one world price argument. Id. at 47.

¹⁴⁷ ITC Brief at 71.

ignored, both the Commission and NDWC attempt to discredit that evidence. They argue that the witness's volume comparison is misleading because "it compared the volume of subject imports, on the one hand, and the volume of HRS wheat futures traded on the MGE."¹⁴⁸ The Commission considers it to be a useless comparison because the "volume of wheat futures traded on the MGE is not directly comparable to the volume sold in the U.S. market."¹⁴⁹

With respect to the CWB's contention that the Commission failed to consider the "determinants of MGE prices,"¹⁵⁰ both the Commission and NDWC disagree. The Commission attempts to discredit the record evidence, because it is only a "short list of primary factors"¹⁵¹ and non-exhaustive. In fact, the Commission contends, the list includes determinants that support "the Commission's finding that supply and demand in the local (national) markets affect MGE prices."¹⁵² The NDWC further asserts that the list of determinants is not probative because it originates from a publication, Hard Red Spring Futures and Options, and the market in question is the cash market, not the futures market.¹⁵³ As for the CWB's argument that crop quality accounts for the difference between MGE prices and average farm prices, the NDWC responds that there is no evidence on the record.¹⁵⁴ In response to the CWB's contention that MGE prices

¹⁴⁸ Id. at 69-70.

¹⁴⁹ Id.

¹⁵⁰ CWB Brief at 56.

¹⁵¹ ITC Brief at 71.

¹⁵² Id. at 72.

¹⁵³ NDWC Brief at 55.

¹⁵⁴ Id. at 57-59.

remained flat during the first two years of the POI, this was only one series of wheat pricing¹⁵⁵ and the monthly comparisons show a decline in the MGE prices.

C. Analysis

The Complainants allege that the ITC's determination ignored a condition of competition: average farm prices are based on the price HRS wheat is traded on the MGE. The courts have spoken to the issue of conditions of competition in a Title VII injury analysis:

Determining the accurate causation of a disrupted market expectation, however, requires careful economic evidence and analysis. The anti-dumping statute requires that the Commission consider all relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."

Gerald Metals, Inc. v. United States, 132 F.3d at 721-22 (quoting 19 U.S.C. § 1677(7)(C)(iii)). The Commission, along with the NDWC, submits that average farm prices are not entirely determined by the MGE price. The Commission's main argument is that the record establishes that average farm prices for HRS wheat are a derivative of downstream transactions; therefore, the MGE price is not the sole determinant.¹⁵⁶ In that part of the Commission's determination that discusses conditions of competition, there are at least three findings with respect to the MGE: (1) there are global markets for "HRS wheat and price information is rapidly disseminated through these markets;" (2)

¹⁵⁵ The grade of HRS wheat cited by the CWB is 1 DNS 14%.

¹⁵⁶ ITC Brief at 74.

“domestic producers are price takers in these markets;” and (3) the “MGE is the primary source of information regarding prices of HRS wheat.”¹⁵⁷

Nowhere in the discussion of conditions of competition is there mention of downstream transactions having an effect on average farm prices. The question as to whether downstream transactions have an effect on average farm prices is not a decision for the Panel or an argument that appellate counsel may bring. As stated by the Court of International Trade, “[t]he Court may not substitute its judgment for that of an agency.” Usinor Industeel, S.A. v. United States, Slip Op. 02-39, 2002 WL 818240, at 31 (Ct. Int’l Trade April 29, 2002). See also Acciai Speciali Terni, S.p.A. v. United States, 19 CIT 1051, 1054 (1995). This is a case where the Commission failed to respond to record evidence regarding average farm prices and downstream transactions. In such a case, “[w]here an explanation is lacking on the record, post hoc rationalization for the [Commission’s] action is insufficient.” Usinor Industeel, S.A. v. United States, 2002 WL 818240, at 31 (quoting Timken Co. v. United States, 937 F. Supp. 953, 955 (Ct. Int’l Trade 1996)).

Based on the Commission’s finding with respect to pricing and the MGE, average farm prices are a derivative of the MGE HRS wheat price.¹⁵⁸ However, the Commission’s determination is devoid of substantial evidence to support a conclusion that Canadian

¹⁵⁷ CD at 21.

¹⁵⁸ Panelist Irish dissents from this conclusion and would not remand on the Commission's treatment of the MGE price. In her view, the Commission's findings do not lead to the conclusion that the MGE price has this effect. The Commission had found that prices are also affected by local supply and demand (CD at 39-40 n.338). As well, the Commission analyzed data for other factors such as dockage, protein content and vitreous kernel content (Id. at 41 n.350). Like many other commodities, HRS wheat has a well-known reference price that influences actual prices, but the Commission's findings do not demonstrate that this is the sole factor influencing prices. Panelist Irish is of the view that the Commission is not required to find that imports affect the MGE price in order to support a finding of injury. She would affirm the Commission's determination on the issue of the treatment of the MGE price.

HRS wheat can have an impact on prices traded on the MGE. The substantial evidence standard is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938). In particular, substantial evidence requires more than a mere assertion of evidence that justifies the Commission’s determination. It requires the Commission to take into account contradictory evidence or evidence from which conflicting inferences can be drawn. Gerald Metals, Inc. v. United States, 132 F.3d at 720. In its determination, the Commission neglected to consider contradictory evidence and, therefore, failed to meet the substantial evidence standard. In particular, the Commission failed to take into account contradictory evidence from a knowledgeable witness, both at the hearing and by affidavit,¹⁵⁹ that Canadian HRS wheat exports to the United States have an insignificant effect on MGE prices.¹⁶⁰ The Panel instructs the Commission on remand to take into account the other proprietary information found at page 56 of the CWB’s Brief.

In an attempt to discredit the assertion that average farm prices are based on the MGE price, the Commission and the NDWC make several arguments.¹⁶¹ These arguments on the face of the record are post hoc rationalizations. As the courts have stated, “where an explanation is lacking on record, post hoc rationalization for the [Commission’s] actions is insufficient.” Timken Co. v. United States, 937 F. Supp. 953, 955 (Ct. Int’l Trade 1996). For instance, the Commission has argued that it was undisputed that the “volume of subject imports is significant relative to both to

¹⁵⁹ CWB Brief at 56.

¹⁶⁰ Id. at 56.

¹⁶¹ These arguments are found above in Part VIII.B.2.

production and consumption in the United States,” and based on this finding subject imports are large enough to impact the futures market.¹⁶² The Commission’s conclusion that subject imports are large enough to impact the futures market is not evident from its determination. The Panel is not in a position to “accept appellate counsel’s post hoc rationalization.” Ashland Oil, Inc. v. Federal Trade Comm’n, 548 F.2d 977, 981-82 (D.C. Cir. 1976) (citing Burlington Truck Lines v. United States, 371 U.S. 156, 169 (1962)). In such a situation the only appropriate remedy is a remand to the Investigating Authority for further explanation. On remand, the Commission should address both the NDWC and ITC counsels’ arguments that (1) average farm prices for HRS wheat are based on the outcome of downstream transactions, and (2) subject imports are large enough to impact HRS wheat prices on the futures market of the MGE.

D. Conclusion

In summary, the Commission failed to consider the condition of competition that average farm prices are based on the MGE price and ignored record evidence that Canadian HRS wheat imports have no effect on the MGE price. This amounts to a failure to support with substantial evidence the conclusion that the domestic industry producing HRS wheat is materially injured by reason of subject imports from Canada. In essence, the Commission has failed to prove causation. The courts have emphasized with respect to the “by reason of” standard that “a showing that economic harm to the domestic industry occurred when LTFV imports are also on the market is not enough to show that imports caused a material injury.” Usinor Industeel, S.A. v. United States, 2002 WL

¹⁶² ITC Brief at 71.

818240, at 31. Because the Commission's determination is unsupported by substantial evidence on this issue, it must be remanded to the Commission.

IX. ORDER AND INSTRUCTIONS ON REMAND

For the forgoing reasons, the Panel hereby remands the Commission's determination for further action within 90 days of the date of issuance of this decision and with the following instructions:

1. Explain why record evidence regarding pre- and post-petition prices is not sufficient to rebut the statutory presumption of 19 U.S.C. § 1677(7)(I), insofar as post-petition price data is concerned. If the Commission finds that such information is sufficient to rebut the presumption, then it must make a new determination on all factors that gives full weight to the evidence previously discounted.
2. Explain how post-petition volume and price data were factored into the Commission's final determination and provide analysis that gives such data some weight, rather than no weight, in its determination. If the Commission finds that either category of evidence is not discounted, then it must make a new determination that gives such undiscounted evidence full weight in its analysis of the relevant factor.

3. Explain how instances of underselling caused adverse trends in price or industry performance in the domestic industry.
4. Analyze how increased volumes of the subject imports caused the domestic industry to suffer depressed prices taking into account all contradictory evidence and render a new determination based on the analysis.
5. Provide a new analysis of the impact of subject imports on the domestic industry, explaining and analyzing (a) how fluctuating yields may leave the domestic industry vulnerable as a result of price depression of the subject imports, (b) how yield fluctuations were accounted for, and (c) why yields per acre and farm prices are the most relevant factors in determining the financial state of the domestic industry.
6. Provide detail as to which prices have been used by the Commission in its analysis and whether prices have been used that are not at the level of sales to domestic milling operations. Having regard to the substantial evidence requirements discussed above, if prices that are not at the level of sales to domestic milling operations have been used, the Commission must explain how such prices show sales in competition with sales of imports at the same level of trade, or how they have been adjusted to reflect the same trade level as imports. If price comparisons could not be made at the same level of trade, the Commission must explain what link exists between prices at the different levels that supports the conclusions of the Commission. If some prices chosen do not involve comparisons at the same level of trade and cannot be adjusted, the Commission is instructed to reject them and reconsider its analysis of price underselling.

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

Date of Issuance: June 7, 2005

Signed in the original by:

Serge Anissimoff
Serge Anissimoff

James R. Holbein
James R. Holbein

Maureen Irish
Maureen Irish (dissenting in part)

Kevin C. Kennedy, Chairperson
Kevin C. Kennedy, Chairperson

Paul C. LaBarge _____

Paul C. LaBarge

APPENDIX A

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

IN THE MATTER OF)
Hard Red Spring Wheat from Canada)
)
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)
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)
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)
)

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

PANEL MEMBERS:

Serge Anissimoff
James R. Holbein
Maureen Irish
Kevin C. Kennedy, Chairperson
Paul C. LaBarge

COUNSEL:

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

For the Government of Canada: Hughes, Hubbard & Reed, LLP (Catherine Curtiss, Esq., Alan Kashdan, Esq., and Laura Fraedrich, Esq.)

DECISION ON MOTION TO STRIKE NOTICE OF APPEARANCE

I. INTRODUCTION

This Panel has been constituted pursuant to Article 1904.2 of the North American Free Trade Agreement and appointed to review the final injury determination of the U.S. International Trade Commission in Hard Red Spring Wheat from Canada.¹ The Government of Canada filed a Notice of Appearance in connection with this NAFTA

¹ Durum and Hard Red Spring Wheat from Canada, Inv. Nos. 701-TA-430A and 430B, 731-TA-1019A and 1019B (Final), USITC Pub. 3639 (Oct. 2003). Notice of the Commission's determination was published in the Federal Register on October 23, 2003. 68 Fed. Reg. 60707, 60708.

Chapter 19 binational panel review on January 8, 2004, stating as its basis for entitlement to file a Notice of Appearance that “[a]s a Party within the meaning of Rule 3 of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews, Canada has a right pursuant to Rule 35(1)(c)(ii) to file this Notice of Appearance and to participate in this review.” Notice of Appearance of the Government of Canada, at 2. On March 18, 2004, the U.S. International Trade Commission (the “ITC” or “Commission”) filed a Motion to Strike the Notice of Appearance of the Government of Canada, to which the Government of Canada (“GOC”) responded on March 29, 2004.

Neither the ITC nor the GOC requested oral argument on the Motion to Strike. Nevertheless, given the importance of the question presented – whether or not an involved NAFTA Party² has an unconditional right to participate in a NAFTA Chapter 19 panel review – the Panel sua sponte directed the Commission and the GOC to appear and present oral argument on this question at a pre-hearing conference held on January 10, 2005. On January 10, 2005, the Panel issued its order granting the Commission’s Motion to Strike.³ The Panel’s reasons for granting the Commission’s Motion follow.

II. CONTENTIONS OF THE ITC AND THE GOC

Turning first to the contentions of the Commission, the position of the ITC in support of its Motion to Strike can be summarized in a single sentence: Because the GOC did not enter an appearance or otherwise participate in the administrative proceeding that culminated in the ITC’s affirmative injury determination in this matter, the GOC lacks standing to appear and participate in the NAFTA Chapter 19 panel review of the Commission’s determination. In support of its position, the Commission makes the following argument. First, the Commission notes, NAFTA Article 1904.1 replaces

² An “involved Party” is either the “importing Party” or the Party “whose goods are the subject of the final determination.” NAFTA Article 1911.

³ Panelist Maureen Irish dissents from the Panel’s order. Her dissenting views appear below.

judicial review of investigating authorities' determinations with binational panel review. Second, NAFTA Article 1904.2 in turn directs that the governing law in Chapter 19 panel reviews is the antidumping ("AD") and countervailing duty ("CVD") law of the importing Party. Third, Article 1904.2, together with Article 1904.3, Article 1911, and NAFTA Annex 1911, states further that the following laws are incorporated into and made a part of NAFTA: (1) the AD and CVD statutes of the NAFTA Parties, (2) statutory provisions on judicial review of investigating authorities' final determinations, and (3) the general legal principles that a court of the importing Party would apply when reviewing an investigating authority's final determination, including principles of standing and exhaustion of administrative remedies.

Having laid the foregoing legal foundation, the Commission next addresses the U.S. statutory provisions on judicial review, specifically 19 U.S.C. § 1516a and its standing requirements. Here, the aphorism "old wine in a new bottle" captures the essence of the Commission's argument (the "old wine" being the rules on standing, the "new bottle" being Chapter 19 panel review). The Commission points out that under 19 U.S.C. § 1516a(d),⁴ only an interested party⁵ who was a party to the administrative proceeding has the right to appear and be heard before the U.S. Court of International Trade in any judicial review proceeding challenging a final agency determination. In a

⁴ Section 516A(a)(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(d), provides in full as follows:

(d) Standing

Any interested party who was a party to the proceeding under section 1303 of this title or subtitle IV of this chapter shall have the right to appear and be heard as a party in interest before the United States Court of International Trade. The party filing the action shall notify all such interested parties of the filing of an action under this section, in the form, manner, style, and within the time prescribed by rules of the court.

⁵ The statutory definition of an "interested party" for purposes of both judicial and panel review includes the "government of a country . . . from which such merchandise is exported." 19 U.S.C. § 1677(9)(B). See 19 U.S.C. § 1516a(f)(3) ("The term 'interested party' means any person described in section 771(9) of this Act [19 U.S.C. § 1677(9)].").

parallel provision governing Chapter 19 panel review, 19 U.S.C. § 1516a(g)(9),⁶ the Commission contends that the same holds true, i.e., unless an interested party was a party to the administrative proceeding, it has no right to appear and be heard before a Chapter 19 panel in any panel review proceeding that challenges the investigating authority's determination. Accordingly, the Commission concludes, because the GOC was not a party to the ITC proceeding, it may not file a notice of appearance in this Chapter 19 panel review challenging the ITC's affirmative injury determination.

Turning next to the contentions of the Government of Canada, the position of the GOC can also be summarized in a single sentence: Involved NAFTA Parties have an unqualified right to initiate a NAFTA Chapter 19 binational panel review proceeding, which necessarily includes the unconditional right to appear and participate in such a proceeding. The GOC finds support for its position in both the NAFTA Rules of Procedure and in the Agreement itself. Moreover, the GOC contends, there is nothing in U.S. domestic law precluding the GOC from participating in this Chapter 19 panel review.

First, under Rule 35(1)(c)(ii) of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews,⁷ the GOC notes that "a Party, an investigating authority or

⁶ Section 516A(a)(g)(9) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g)(9), provides in full as follows:

(9) Representation in panel proceedings

In the case of binational panel proceedings convened under chapter 19 of the NAFTA or of the Agreement, the administering authority and the Commission shall be represented by attorneys who are employees of the administering authority or the Commission, respectively. Interested parties who were parties to the proceeding in connection with which the matter arises shall have the right to appear and be represented by counsel before the binational panel.

⁷ Rule 35 provides in pertinent part as follows:

- (1) On receipt of a first Request for Panel Review, the responsible Secretary shall
 - (a) forthwith forward a copy of the Request to the other involved Secretary;
 - (b) forthwith inform the other involved Secretary of the Secretariat file number; and

other interested person who does not file a Complaint but who intends to participate in the panel review shall file a Notice of Appearance in accordance with rule 40” It is uncontested that the GOC filed a timely Notice of Appearance. In response to the ITC’s argument that Rule 35(1)(c)(ii) only authorizes the filing of a Notice of Appearance if the person so filing first qualifies as an “interested person,” i.e., someone who would be entitled to appear and be represented in a judicial review proceeding in the country of importation, the GOC contends that the ITC misconstrues the Rule. According to the GOC, the reference in Rule 35(1)(c)(ii) to “other interested party” has to be read in conjunction with Rule 35(1)(c)(i) which states that a “Party or interested person” may file a Complaint. Thus, the GOC contends, a NAFTA Party need not be an interested person in order to file a Complaint in a Chapter 19 panel review. What is more, the GOC adds, the reference in Rule 35(1)(c)(ii) to “other interested party” (emphasis added) must mean that an interested person who did not file a Complaint may file a Notice of Appearance. In other words, the GOC argues, the use of the adjective “other” does not limit the right of a NAFTA Party to file a Notice of Appearance. Finally, to the extent that the ITC relies on Rule 40⁸ to support its contention that the GOC is precluded from filing a Notice

(c) serve a copy of the first Request for Panel Review on the persons listed on the service list together with a statement setting out the date on which the Request was filed and stating that

(i) a Party or interested person may challenge the final determination in whole or in part by filing a Complaint in accordance with rule 39 within 30 days after the filing of the first Request for Panel Review,

(ii) a Party, an investigating authority or other interested person who does not file a Complaint but who intends to participate in the panel review shall file a Notice of Appearance in accordance with rule 40 within 45 days after the filing of the first Request for Panel Review, and

(iii) the panel review will be limited to the allegations of error of fact or law, including challenges to the jurisdiction of the investigating authority, that are set out in the Complaints filed in the panel review and to the procedural and substantive defenses raised in the panel review.

⁸ Rule 40 of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews, entitled “Notice of Appearance,” provides in pertinent part as follows:

of Appearance, the GOC counters that, on the contrary, Rule 40 is silent on the question of whether a NAFTA Party may file a Notice of Appearance in a Chapter 19 panel review.

Turning next to the Agreement itself, the GOC contends that NAFTA Articles 1904.2⁹ and 1904.5¹⁰ are clear that an “involved Party” may initiate, and by necessary implication, participate in a Chapter 19 panel review, regardless of whether it participated in the challenged administrative proceeding.

Finally, according to the GOC, U.S. domestic law likewise gives all involved Parties the unconditional right to participate in Chapter 19 panel reviews. The GOC argues that 19 U.S.C. § 1516a(d) is limited to the question of standing in proceedings brought in the Court of International Trade and does not address standing in the context of a NAFTA Chapter 19 panel review. The statutory provision that the ITC cites as the standing provision in Chapter 19 proceedings, 19 U.S.C. § 1516a(g)(9), is limited to the

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- (1) Within 45 days after the filing of a first Request for Panel Review of a final determination, the investigating authority and any other interested person who proposes to participate in the panel review and who has not filed a Complaint in the panel review shall file with the responsible Secretariat a Notice of Appearance containing the following information

⁹ NAFTA Article 1904.2 provides in full as follows:

An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination 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. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.

¹⁰ NAFTA Article 1904.5 provides in full as follows:

An involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

question of legal representation of NAFTA Parties in Chapter 19 panel reviews, the GOC contends, and does not address the right of a Party to participate in a Chapter 19 panel review. The GOC concludes by arguing that 19 U.S.C. § 1516a(g)(3)(A)(i)¹¹ – a provision that the ITC does not cite – reflects the unqualified right of involved Parties to seek Chapter 19 panel review.

III. OPINION

Statutory interpretation naturally begins with the language of the statute. See Williams v. Taylor, 529 U.S. 420, 431 (2000). A court derives the plain meaning of the statute from its text and structure. See Alexander v. Sandoval, 532 U.S. 275, 288 (2001). If the language is clear and fits the case, the plain meaning of the statute generally will be regarded as conclusive. See Sullivan v. Stroop, 496 U.S. 478, 482 (1990). See also VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574, 1579-80 (Fed. Cir. 1990) (noting that unambiguous statutory language controls, unless legislative intent is clearly contrary or when its application produces a result so unlikely that Congress could not have intended it). As the U.S. Supreme Court reminds us, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

The plain meaning rule is equally applicable to the interpretation of treaties and international agreements. It is axiomatic that a treaty's plain language must control absent

¹¹ Section 516A(a)(g)(3)(A)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g)(3)(A)(i), provides as follows:

Exception to exclusive binational panel review

(A) In general

A determination is reviewable under subsection (a) of this section [governing review by the Court of International Trade] if the determination sought to be reviewed is--

(i) a determination as to which neither the United States nor the relevant FTA country requested review by a binational panel pursuant to article 1904 of the NAFTA or of the [United States-Canada Free Trade] Agreement, . . .

“extraordinarily strong contrary evidence.” Sumitomo Shoji America, Inc. v. Avigliano, 457 U.S. 176, 185 (1982). The terms of a treaty are to be given their ordinary meaning in the context of the treaty, and are to be interpreted to best fulfill the purpose of the treaty. See United Technologies Corp. v. United States, 315 F.3d 1320, 1322 (Fed. Cir. 2003); Xerox Corp. v. United States, 41 F.3d 647, 652 (Fed. Cir. 1994).

The starting point for the Panel’s analysis is the text of NAFTA Article 1904. That Article in several places makes the conclusion inescapable that Chapter 19 panel review is to replicate what takes place in the Court of International Trade, including who has standing to challenge an investigating authority’s final determination. Beginning with Article 1904.1, that Article plainly states that judicial review of an investigating authority’s final determination is replaced with binational panel review. Next, Article 1904.2 provides that the governing law in Chapter 19 binational panel reviews is the AD and CVD law of the importing Party, which consists of the following body of law:

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.

Article 1904.2. Third, NAFTA Annex 1911 adds that the AD and CVD law that Chapter 19 panels is to apply includes “the provisions of any other statute that provides for judicial review of final determinations” Fourth, Article 1904.3 commands a panel to apply “the general legal principles that a court of the importing Party otherwise would apply” when reviewing an investigating authority determination, which Article 1911 in turn defines as including “principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies.” Finally, Article

1904.7¹² strongly suggests that only the investigating authority and parties who would be entitled to participate in a judicial review proceeding of an investigating authority's final determination are entitled to appear and be participate in a Chapter 19 panel review of such a determination. None of these NAFTA provisions give involved NAFTA Parties an unqualified right to appear and participate in Chapter 19 panel reviews.

Not only is NAFTA Chapter 19 silent on the question of whether an involved Party has an unqualified right to participate in a Chapter 19 panel review, but the applicable U.S. statutory provisions on standing fail to support the GOC's contention as well. Although the very NAFTA Article upon which the GOC is most reliant, Article 1904.2, does provide that involved Parties may request Chapter 19 panel review, that Article also states that “[s]olely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.” As the following analysis shows, the U.S. AD and CVD statutes that are incorporated into and made a part of NAFTA, which include statutory provisions on judicial review and standing, do not give involved NAFTA Parties automatic standing in Chapter 19 panel reviews.

Section 516A(a)(d) of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1516a(d), is clear that an interested party who was a party to the administrative proceeding has standing to file a complaint with the Court of International Trade. A parallel statutory

¹² Article 1904.7 provides:

The competent investigating authority that issued the final determination in question shall have the right to appear and be represented by counsel before the panel. Each Party shall provide that other persons who, pursuant to the law of the importing Party, otherwise would have had the right to appear and be represented in a domestic

provision that directly bears on the question of standing in Chapter 19 panel reviews, Section 516A(g)(9) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(g)(9), provides that “[i]nterested parties [which includes the GOC as the government of the country of exportation] who were parties to the proceeding in connection with which the matters arises shall have the right to appear and be represented by counsel before the [Chapter 19] binational panel.” (Emphasis added.) In short, the governing U.S. law on standing – which NAFTA Articles 1904.3 and 1911 incorporate by reference – is plain that a condition precedent to appearing and participating in either a judicial review proceeding or a binational panel review is participation in the underlying administrative proceeding.

The GOC attempts to circumscribe the scope of 19 U.S.C. § 1516a(g)(9) by describing it as a provision that deals with whom may represent interested parties in binational panel reviews. In support of its argument that 19 U.S.C. § 1516a(g)(9) is not a standing provision, the GOC points to the heading of this subsection, “Representation in panel proceedings.” However, it is a fundamental rule of statutory construction that titles and headings cannot limit the plain meaning of statutory language. As noted by the U.S. Supreme Court in Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519 (1947):

[A] heading is but a short-hand reference to the general subject matter involved. . . . [H]eadings and titles are not meant to take the place of the detailed provisions of the text. . . . Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the text which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the

judicial review proceeding concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel.

wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text.

Brotherhood of Railroad Trainmen, 331 U.S. at 528-29. Accord United States v. Blum, 858 F.2d 1566, 1569 n.4 (Fed. Cir. 1988); United States v. Murray, 561 F. Supp. 448, 456 (CIT 1983)(“For interpretative purposes, they [i.e., titles and headings] are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.”). The language of Section 516A(g)(9) is plain that it deals primarily with whom has standing in a Chapter 19 panel review, and only secondarily with whom may represent interested parties in such a review.

At oral argument on the Motion to Strike, counsel for the GOC drew the Panel’s attention to U.S. legislative history in support of its contention that it has an unconditional right to appear and participate in this panel review. Specifically, counsel for the GOC quoted the following paragraph from the Statement of Administrative Action (“SAA”) of the United States-Canada Free Trade Agreement:¹³

Under Article 1904(2) of the Agreement, only the United States and Canada may formally request binational panel review of an AD/CVD determination. In Article 1904(5), however, both countries agreed automatically to request review of an AD/CVD determination whenever any person who otherwise would have standing to commence judicial review of the determination timely requests either government to do so.

¹³ As represented to the panel at oral argument by counsel for the Government of Canada, the Statement of Administrative Action accompanying the North American Free Trade Agreement Implementation Act incorporates the Statement of Administrative Action of the United States-Canada Free Trade Agreement to the extent NAFTA makes no changes to the Chapter 19 panel review process. See Transcript of Oral Argument, at 50-51; North American Free Trade Agreement, Statement of Administrative Action, H.R. Doc. 159, vol. 1, 103d Cong., 1st Sess. 643 (1993)(“Except for certain innovations introduced in the NAFTA that are described below, the Statement of Administrative Action accompanying the CFTA Implementing Act, H.Doc. 100-216, 100th Cong., 2d Sess. 258-89 (1988), fully describes the panel system that will be established under the NAFTA.”).

United States-Canada Free Trade Agreement, Statement of Administrative Action, H.R. Doc. No. 216, 100th Cong., 2d Sess. 268 (1988). However, insofar as the GOC's contention that this legislative history to Articles 1904.2 and 1904.5 gives it the unconditional right to appear and participate in this binational panel review, the paragraph that precedes the one quoted by counsel for the GOC seriously undercuts the GOC's contention. That paragraph states:

Under current law, any interested party that is a party to the AD/CVD proceeding has "standing" to challenge an AD/CVD determination. The term "interested party" is defined in section 771(9) of the Tariff Act of 1930, 19 U.S.C. 1677(9), and the term "party to the proceeding" has been construed to mean an interested party that actually participated in the underlying AD/CVD proceeding.

SAA at 268. The SAA thus confirms the plain language of NAFTA Chapter 19 and the U.S. statutory provisions on standing, i.e., that in order to have standing to appear and participate in a Chapter 19 binational panel review, one must be an interested party who also was a party to the administrative proceeding. Clearly, the GOC is not such an interested party.

Undaunted by these NAFTA Articles, U.S. statutory provisions, and U.S. legislative history – all of which fail to lend any express support for the GOC's contention that it has an unconditional right to appear and participate in this panel review – the GOC nevertheless insists that the language of Article 1904.2 (“[a]n involved Party may request that a panel review . . . a final antidumping or countervailing duty determination”) and that of Article 1904.5 (“[a]n involved Party on its own initiative may request review of a final determination by a panel”) give it that right. As noted above, the GOC maintains that because these two Articles give the GOC the right to initiate a Chapter 19 panel review, by necessary implication these two Articles give the GOC, in its

capacity as an involved NAFTA Party, the right to appear and participate in such panel review as well.

The ITC does not dispute that the GOC's right to request binational panel review is unqualified and not conditional upon its participation vel non in the underlying administrative proceeding. For example, if the Complainants in this panel review had elected to forego binational panel review, but rather had filed their complaint with the Court of International Trade, the GOC would have had the right to cut off resort to the U.S. courts and could have instead forced the Complainants to seek binational panel review. Conversely, had the ITC reached a negative injury determination in this case, and had the aggrieved U.S. parties decided to seek review of that determination in the Court of International Trade, the GOC also would have had the right to request binational panel review and once again cut off resort to U.S. courts. Thus, an involved NAFTA Party's right to request panel review is a potentially formidable one, giving involved Parties a veto-proof, unilateral choice of binational panel review in lieu of judicial review. Nevertheless, there is no legal reason why such right, in the absence of clear language to that effect, necessarily includes the right to appear and participate in a panel review, given that the plain reading of the Agreement and related rules and domestic legislation do not support such an interpretation. There is no mischief in the interpretation advanced by the ITC, insofar as a NAFTA Party is not precluded from participation but must do so within established parameters. The GOC is asking the Panel to deviate from the plain reading without having established a mischief needing to be cured that would support such a deviation. In short, NAFTA Article 1904.2 and 1904.5 by their plain terms

give involved Parties the right to initiate a Chapter 19 panel review, but nothing more than that.

Finally, to the extent that the GOC attempts to glean from the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews an unconditional right to appear and participate in this panel review, the Panel finds such reliance misplaced. While the Rules governing the filing of a Request for Panel Review, a Complaint, and a Notice of Appearance may not be the model of perfect clarity, they are nonetheless capable of interpretation in accordance with their plain language and congruently with the relevant associated statutory provisions. More importantly, regardless of what the Rules might state, they cannot trump the plain language of the Agreement or of U.S. law that is incorporated by reference into the Agreement. See Rule 2 of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews (“In the event of any inconsistency between the provisions of these rules and the Agreement, the Agreement shall prevail.”).

IV. CONCLUSION

Because it is clear that the GOC would lack standing to participate in a judicial review proceeding brought to challenge the ITC’s affirmative injury determination in this case, it likewise lacks standing to challenge that determination in this Chapter 19 panel review. The NAFTA provisions and U.S. statutes at issue in the ITC’s Motion to Strike are clear and unambiguous: The GOC does not have an express, unconditional right to appear and participate in this panel review. Legislative intent, as reflected in the SAA, is not to the contrary. Finally, the Panel’s interpretation of the relevant NAFTA Articles and U.S. statutes does not produce a result so unlikely that Congress could not have intended

it. Accordingly, the Panel's inquiry must end here. See VE Holdings, 917 F.2d at 1580.

For the foregoing reasons, the ITC's Motion to Strike was granted.

Date of Issuance: June 7, 2005

Signed in the original by:

Serge Anissimoff _____
Serge Anissimoff

James R. Holbein _____
James R. Holbein

Maureen Irish _____
Maureen Irish (dissenting in part)

Kevin C. Kennedy, Chairperson
Kevin C. Kennedy, Chairperson

Paul C. LaBarge _____
Paul C. LaBarge

DISSENTING OPINION

This dissenting opinion addresses first the approach to interpretation of international agreements and then the provisions of NAFTA Chapter 19 and the Rules of Procedure for Article 1904 Binational Panel Reviews.

As an international agreement, the North American Free Trade Agreement must be interpreted in accordance with the approaches to interpretation applied in public international law. The relevant rules are set out in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*.¹ These rules reflect customary international law and are accepted as such by non-parties to the *Vienna Convention*, including the United States.

Pursuant to Article 31, a treaty is interpreted in accordance with the ordinary meaning of its terms in context and in light of the purpose of the agreement. Article 31(2) provides that the context includes:

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Article 31(3) provides for further sources that “shall be taken into account together with the context”:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

If interpretation moves beyond the text of the international agreement, it is apparent that the additional sources of assistance listed in Articles 31(2) and 31(3) involve mutual assent or involvement by the parties, not the views of only one party. The Rules of Procedure for Article 1904 Binational Panel Reviews may be used to assist with

¹ *Vienna Convention on the Law of Treaties*, done 21 May 1969, in force 27 January 1980, 1980 Can. T.S. No. 37.

interpretation of NAFTA Chapter 19 as part of the context pursuant to Article 31(2). As well, the Rules govern panel review and thus form part of the instructions to the panel (NAFTA Article 1904(14)).

In this opinion, I have not used the U.S. Statement of Administrative Action of the United States-Canada Free Trade Agreement as a source of assistance for interpretation of NAFTA. As mentioned by the majority, the Statement of Administrative Action was presented in argument by counsel for the Government of Canada. No submission was made that the Statement of Administrative Action was a unilateral declaration as understood in international law,² and I do not think such a submission would be successful. I see no other way in which a statement by only one party can be used as an interpretive source in customary international law. Article 1904(2) incorporates into NAFTA the relevant antidumping and countervailing duty law of the importing Party, including legislative history. In Article 1904(3), the panel is instructed to apply the domestic standard of review and the general legal principles of a court of the importing Party. Pursuant to Article 1911, those general legal principles include “principles such as standing, due process, rules of statutory construction, mootness and exhaustion of administrative remedies.” The Statement of Administrative Action would be relevant for interpretation of the incorporated antidumping and countervailing duty law, either as legislative history or pursuant to a domestic rule of statutory construction. I do not view Article 1904(3), however, as applying the domestic rules of statutory construction of the importing Party to the text of Chapter 19 itself or as withdrawing NAFTA from the interpretive rules of customary international law.

² *Legal Status of Eastern Greenland* (1933), P.C.I.J., Ser. A/B, No. 53; *Nuclear Tests Case (Australia v. France)*, [1974] I.C.J. Rep. 253.

The argument of the Investigating Authority is that the law of the importing Party incorporated pursuant to Article 1904(2) governs standing and thus participation in panel review by the other involved Party.³ Section 516A(d) of the U.S. Tariff Act of 1930, 19 U.S.C. § 1516a(d), provides that an interested party⁴ must have been party to the proceeding before the International Trade Commission in order to have standing to appear and be heard on review before the Court of International Trade. Since the Government of Canada was not a party in the proceeding before the International Trade Commission, the Investigating Authority argues that the Government of Canada does not have standing to appear or participate in the panel review.

In the text of NAFTA, Article 1904(2) states that an involved Party may request panel review. Article 1904(4) states that the request shall be in writing and made within certain time limits. Article 1904(5) provides that the involved Party may make the request on its own initiative. There is nothing in these provisions requiring that the involved Party meet a standing rule of the importing Party in order to call a panel review into operation and the Investigating Authority does not argue that the standing rule applies to such a request. The argument of the Investigating Authority is that the standing rule would apply only should the involved Party wish to participate in the review, either by filing a brief in support of a complainant as is the case in this matter, or by arguing as the complainant on its own initiative. If such a qualification is accepted as flowing from the incorporation of a domestic standing rule, it would constitute a significant limit on the

³ Article 1911 of NAFTA defines “involved Party” as “(a) the importing Party; or (b) a Party whose goods are the subject of the final determination.”

⁴ The term “interested party” is defined as including the government of a country from which merchandise was exported (19 U.S.C. § 1516a(f)(3), 19 U.S.C. § 1677(9)(B)).

rights of Parties set out in Articles 1904(2) and 1904(5). The right to request panel review on its own initiative would be hollow if the involved Party were then unable to present its arguments. Panel review would, in effect, be futile if none of the various other parties in the proceeding below were willing to present argument. Even if they wished to make presentations, the views of such other parties could differ from the views of the involved Party.

The right of an involved Party to take a matter to panel review is not qualified expressly in NAFTA other than by Article 1904(4). The Investigating Authority argues that the right of an involved Party to become a complaining Party in a panel review is qualified implicitly by the domestic standing rule when it is incorporated into the NAFTA text. In this argument, Articles 1904(2) and 1904(5) must be read subject to the contents of the domestic standing rule, which will reflect the law of the importing Party regulating disputes of the sort involved in the review. The domestic standing rule could vary from dispute to dispute. In *Pure Magnesium from Canada*, USA-CDA-2000-1904-06, 27 March 2002, an Article 1904 panel dealt with a question of standing for the Government of Quebec to request panel review of a determination by the U.S. Department of Commerce. In that dispute, it was argued that the Government of Quebec did not have standing because, although it had appeared and filed an application for an administrative protective order below, it had not presented argument and was, therefore, not a party to the proceeding before the Department of Commerce. After analyzing relevant case law, the panel decided that the Government of Quebec had standing. The three Parties to NAFTA are the Governments of Canada, the United Mexican States and the United States of America. The Government of Quebec is not a Party and was not

claiming as an involved Party pursuant to Article 1904(2) or Article 1904(5). The decision illustrates questions that would arise over the rights of an involved Party to become a complaining Party in panel review if Articles 1904(2) and 1904(5) are qualified, as the Investigating Authority argues, by the domestic standing rule.

Other provisions in Chapter 19 make it clear that the Parties intended dispute settlement through Article 1904 panels to be effective. Article 1905, entitled “Safeguarding the Panel Review System,” provides for consultations, a special committee procedure and possible remedies to deal with certain allegations made by a Party. One of the listed allegations is that “the application of another Party’s domestic law ... has prevented the establishment of a panel requested by the complaining Party” (Article 1905(1)(a)). There is nothing in Article 1905(1)(a) to suggest that the right of an involved Party to become a complaining Party depends on anything other than a request being made within the terms of Article 1904(4). Article 1905(1)(a) sits awkwardly with the argument of the Investigating Authority that the Parties intended this right to be subject to the varying provisions of a domestic standing rule.

I now turn to the Rules of Procedure for Article 1904 Binational Panel Review. The Investigating Authority refers to Rule 35 which states that “a Party, an investigating authority or other interested person who does not file a Complaint but who intends to participate in the panel review shall file a Notice of Appearance in accordance with rule 40” (Rule 35(1)(c)(ii)). The Investigating Authority notes that Rule 40 provides for a notice of appearance only by “the investigating authority and any other interested person who proposes to participate in the panel review and who has not filed a Complaint” (Rule 40(1)). Since “person” is defined in Rule 3 as including a Party, the Investigating

Authority argues that a Party must be considered to be an “interested person” within these two rules, as otherwise Rule 40 would not contain a notice of appearance mechanism for a Party. Since “interested person” is defined in Rule 3 as “a person who, pursuant to the laws of the country in which a final determination was made, would be entitled to appear and be represented in a judicial review of the final determination,” the Investigating Authority submits that the Panel Rules confirm the application of the domestic standing rule to participation by an involved Party in panel review.

The Investigating Authority’s interpretation of the Panel Rules depends on the submission that the intention of the NAFTA Parties was to include an involved Party within the term “interested person.” If this were correct, it is difficult to see why Rule 35 or Rule 40 would contain a separate mention of a Party or, indeed, the investigating authority, since the term “person” is defined as also including “an investigating authority.” The fact that a Party and an investigating authority are both included in the definition of “person” does not entail that they are therefore within the definition of “interested person.” I note that Rule 35(1)(c)(i) uses the disjunctive “or” in distinguishing between a Party and an interested person when it provides that “a Party or interested person may challenge the final determination ... by filing a Complaint.” The listing of “a Party, an investigating authority or other interested person” immediately thereafter in Rule 35(1)(c)(ii) does not necessarily mean that “other interested person” must be taken as referring to a general residual category that covers both a Party and an investigating authority. The word “other” in Rule 35(1)(c)(ii) is more naturally interpreted as distinguishing the “interested person” who files a Complaint in Rule 35(1)(c)(i) from the “other interested person who does not file a Complaint” in Rule 35(1)(c)(ii).

The absence of a mention of a Party in Rule 40 may relate to the fundamental nature of Chapter 19 dispute settlement. Article 1904 panel review does not provide private parties with direct access to an international tribunal like the access to investor-state dispute settlement in Chapter 11 of NAFTA. It is the involved Party who requests panel review pursuant to Article 1904(5). An involved Party has an obligation to make such a request if asked to do so by a private party who would be entitled to take the matter to domestic judicial review, but the operative request is from the involved Party. Even though governments may decide to make the request automatically at the behest of any such private party, Article 1904 panel review remains government-to-government dispute settlement. An involved Party might decide to disregard Article 1904(5) and refuse to request a panel when asked to do so by the private party. The involved Party would very likely be in breach of its obligation, but there would be no Article 1904 panel. On this view of Article 1904, a notice of appearance procedure is not entirely suitable for an involved Party since the dispute is between the two governments and that Party is already participating.

I note, however, that the Panel Rules both in the definition of “participant” in Rule 3 and in Rule 35(1)(c)(ii) call for a Party to file a Notice of Appearance if it wishes to participate without filing a Complaint. The lack of mention of a “Party” in Rule 40 may be an oversight in that rule, which would not prevent an involved Party from filing a notice of appearance that follows the form set out more or less. The wording of Rule 40 is not a sufficient ground to persuade me that the Parties intended the term “interested person” to cover an involved Party throughout the Panel Rules. The definition of “participant” in Rule 3, in fact, lists separately a Party, an investigating authority and an

interested person. These three descriptions would not be mentioned separately if “interested person” were intended to have the wide meaning submitted by the Investigating Authority.

From my analysis of the text of NAFTA and the Rules of Procedure for Article 1904 Binational Panel Review, I conclude that the NAFTA Parties did not intend the domestic standing rule to have the effect of qualifying the right of an involved Party to participate in Article 1904 panel review. This does not mean that other parts of domestic law incorporated pursuant to Article 1904(2) or applicable as “general legal principles” pursuant to Article 1904(4) would fail to cover an involved Party. My conclusion is only that the reference to “standing” as part of “general legal principles” was not intended to qualify the right of an involved Party to participate.

In this dissenting opinion, I have not used Section 516A(g)(9) of the Tariff Act of 1930, 19 U.S.C. § 1516a(g)(9) as a source of assistance for interpretation. As noted by the majority, that section provides that interested parties who were parties to the proceeding below have the right to appear and be represented by counsel before a Chapter 19 panel. The section implements for the United States the obligation of Article 1904(7) to allow such parties to participate in panel review. In my view, that section is not incorporated into NAFTA by Article 1904(2) since domestic law is incorporated only “to the extent that a court of the importing Party would rely on such materials in reviewing a final determination” and the section does not meet that requirement. As well, the section does not qualify as an interpretive source to be used pursuant to customary international law reflected in the provisions of the *Vienna Convention on the Law of*

Treaties discussed earlier in this opinion, for the same reasons as those that apply to use of the Statement of Administrative Action.

For all the above reasons, I do not agree with the opinion of the majority. I would have denied the motion.

Maureen Irish (dissenting)