

**ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE UNITED STATES-CANADA FREE TRADE AGREEMENT**

IN THE MATTER OF:)
)
)
FINAL DETERMINATION OF DUMPING)
REGARDING CERTAIN COLD-ROLLED) **CDA-93-1904-08**
STEEL SHEET ORIGINATING IN OR)
EXPORTED FROM THE UNITED STATES)
OF AMERICA)

Before: Kathleen F. Patterson, Chair
Henri C. Alvarez
Howard N. Fenton, III
Lauren D. Rachlin
Leon E. Trakman

MEMORANDUM OPINION AND ORDER
January 31, 1995

C. J. Michael Flavell, Q.C., Geoffrey C. Kubrick and Paul M. Lalonde of Flavell Kubrick & Associates for U.S. Steel, a division of USX Corporation and LTV Steel Company.

Riyaz Dattu and Colin Baxter of McCarthy Tetrault for Stelco, Inc.

Ronald Cheng and Gregory Somers of Osler, Hoskin & Harcourt for Sidbec-Dosco, Inc.

John T. Morin, Q.C. of Fasken Campbell Godfrey for Dofasco Inc.

Michael Ciavaglia of the Department of Justice for the Deputy Minister of National Revenue, Customs, Excise and Taxation.

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1. Introduction

On June 14, 1994, this Binational Panel remanded certain aspects of the final determination made by the Deputy Minister of National Revenue for Customs and Excise ("Revenue Canada") of dumping of certain cold-rolled steel sheet products from the United States of America.¹ ("Final Determination"). A redetermination was filed by Revenue Canada on September 12, 1994, ("Determination on Remand") and was subsequently challenged by U.S. Complainants, U.S. Steel (a Division of USX Corporation) ("USS") and LTV Steel Company ("LTV"). Upon consideration of all papers and proceedings herein, the Panel affirms the Determination on Remand as permitted under Rule 75(5) of the Rules of Procedure for Article 1904 Binational Panel Reviews under the Canada-United States Free Trade Agreement.

2. Procedural Background

In its June 14, 1994, Opinion and Order, the Panel remanded three issues to Revenue Canada: the inclusion of the Coal Retiree Act charge as a cost of LTV's subject goods under §§16(2)(b) and 19(b) of the Special Import Measures Act ("SIMA"); the decision not to consider pension assets in calculating pension costs for USS and income from the Voluntary Employees' Beneficiary Association ("VEBA") Trust in the calculation of LTV's "other postemployment benefit" ("OPEB") costs; and the decision not to consider interest income on LTV's short-term investments and on USS's investments as being related to financing or interest costs associated with steel production. The Panel further affirmed "all other aspects of Revenue Canada's determination at issue before this Panel".

In its September 12, 1994, Determination on Remand, Revenue Canada took the following action:

¹ Certain Cold-Rolled Steel Sheet Originating In Or Exported From The Federal Republic of Germany, France, Italy, The United Kingdom And The United States of America, June 29, 1993, Canadian Gazette, Part 1, Vol. 127, No. 28, at 2200 (July 10, 1993).

1. The Coal Retiree Act charge was removed from the calculation of LTV's cost and amount for profits under §§ 16(2)(b) and 19(b) of SIMA.

2. USS's pension plan cost was offset against the company's pension plan income and the cost of LTV's OPEBs was reduced by interest income earned on the VEBA Trust.

3. Certain interest income of USS was not deemed related to steel production and not considered in calculating USS's costs. Interest income earned by LTV on certain short-term investments and on operating cash accounts was deemed related to steel production and used to offset interest expenses.

4. Based on the decisions listed above, Revenue Canada recalculated the dumping margins for both USS and LTV.

On September 16, 1994, Revenue Canada filed a Supplementary Remand Record and Index with the Secretariat. A Challenge to the Determination on Remand was filed by U.S. Complainants on September 30, 1994. Responses to the Challenge were filed by Revenue Canada on October 19, 1994, by Dofasco Inc. and Sidbec-Dosco Inc. on October 26, 1994, and by Stelco Inc. on October 31, 1994.

Following Stelco's filing, it became clear that there had been confusion among the participants as to the correct filing deadlines. This confusion stemmed from the fact that some participants apparently did not know that, or did not know when, Revenue Canada had filed a Supplementary Remand Record. Under the FTA rules of procedure, filing deadlines are different depending upon whether or not a supplementary record is filed.² U.S. Complainants stated they had filed their Challenge on the assumption that no supplementary record had been filed, and Stelco's October 31 submission was actually due on October 26, 1994. Stelco filed a motion with the Panel for leave to file its response late. U.S. Complainants opposed the motion, in part claiming prejudice since the effect of the confusion over filing was to accord Stelco more time and U.S. Complainants less time for their respective submissions than if the deadlines had been observed correctly.

² Compare FTA Rule 75(2) with Rule 75(3).

In a November 15, 1994 order, the Panel granted Stelco's motion and accepted its October 31 response; the Panel indicated it would accept further submissions from U.S. Complainants by November 25, 1994 and from participants in opposition by December 5, 1994. The Panel also extended the deadline for its Final Decision from December 12, 1994 to a date later set for January 31, 1995.

On November 25, 1994, U.S. Complainants filed a revised Challenge to the Determination on Remand. Revenue Canada's revised response was filed on November 30, 1994, and Stelco's on December 5, 1994.

3. Summary of Issues

U.S. Complainants raise three issues:

-- Did Revenue Canada correctly calculate "an amount for [LTV's] profits" under §19(b) of SIMA by applying a profit percentage that included profits from sales rejected for use under §15 SIMA by reason of §16(2) SIMA?

-- Did Revenue Canada correctly calculate "an amount for [USS's] profits" under §19(b) SIMA where cash discounts to customers in the domestic market were not deducted from profits?

-- Did Revenue Canada misinterpret the Panel's remand on the issue of interest income and therefore, fail to offset all of USS head office's "interest and other income" against those interest and financial expenses deemed by Revenue Canada to be costs of steel production?

In their responses, Revenue Canada and participants in support of the Determination on Remand raise a jurisdictional issue:

-- Does the Panel have the authority to consider LTV's and USS's "amount for profits" issues where the Panel did not review and remand the issues to Revenue Canada for reconsideration?

4. Standard of Review

The Panel adopts and has applied in this decision the standard of review as set forth at pages 8 - 16 of this Panel's June 14, 1994 Memorandum Opinion and Order.

5. "Amount for profits" issues

(a) Issues Raised

U.S. Complainants argue that Revenue Canada erred in its calculation of the "amount for profits" under §19(b) of SIMA for both LTV and USS.

LTV

In determining the percentage under §19(b) of SIMA to use for LTV's profits, Revenue Canada applied the percentage of profit from certain LTV sales that had been rejected for use under §15 of SIMA. Section 13(a) of the Special Import Measures regulations ("SIMA regulations") provides that in determining "an amount for profits," Revenue Canada should refer to "sales of like goods and sales of goods of the same general category that are such as to permit a proper comparison . . . other than sales referred to in paragraphs 16(2)(a) or (b) of the Act. . ." (emphasis added). Since Revenue Canada had already determined that the sales in question could not be used under §15 of SIMA for reasons found in §§ 16(2)(a) or (b) of SIMA, U.S. Complainants argue that it was incorrect to apply the profit from those rejected sales to determining the profits of other products under §19(b) of SIMA.

Revenue Canada admits that it was an "oversight" to use the profits from the rejected sales. However, it argues that, since the calculation of profits was not an issue raised before and remanded by the Panel, Revenue Canada could not correct the methodology and continued to use the same method as in the Final Determination. Stelco argues that inclusion of the rejected sales as a measure of profit was a proper interpretation of SIMA by Revenue Canada.

USS

In the Final Determination, Revenue Canada adjusted USS's amount for profits upward by the amount of certain cash discounts conferred on sales in the United States. U.S. Complainants

allege this upward adjustment was in error because §§13(b) and 6 of the SIMA Regulations require the deduction of the cash discounts. Revenue Canada states that a deduction of the cash discounts under Regulation 6 was not required due to certain uncontested confidential evidence on the record.³ Stelco also alleges that USS never submitted evidence to contravene Revenue Canada's finding on the cash discounts. On remand, Revenue Canada merely followed the same methodology used in the Final Determination.

(b) Participants' Arguments Regarding Panel Authority Over Issues

U.S. Complainants argue the Panel has the authority to decide the amount for profits issues following remand even though the alleged errors occurred in the Final Determination and were not briefed or argued before the Panel. Since the Complaint alleged that excessive amounts for profits were used, U.S. Complainants argue that they may raise the issues now; under FTA rules, a panel may hear allegations set out in the Complaint. U.S. Complainants state that although they disagreed with the profit methodologies used in the Final Determination, they did not argue the issues before the Panel because the distortions caused by the methods were not significant at that time. The recalculation of profits on remand, however, resulted in significantly higher "amounts for profits" than in the Final Determination. Thus, although the methodologies for LTV and USS remained the same on remand, the effects were different because other numbers in the §19 SIMA calculations had changed in accordance with Panel instructions on remand.

U.S. Complainants also rely upon §77.15(4) of SIMA as the basis for the Panel's jurisdiction to review the alleged errors. They argue that, pursuant to §77.15(4) of SIMA, review on remand is a separate step in the panel review process which effectively creates "a separate cause of action" and which forecloses application of the doctrines of *functus officio* and *estoppel*. U.S. Complainants also maintain that all participants have had an adequate opportunity to present their arguments regarding the profits issues as part of the challenge proceedings of the action on remand.

³ See, Administrative Record, vol. 80, Tab 1, pages 9 and 11 .

Revenue Canada responds that it calculated LTV's and USS's "amount for profits" under §19(b) of SIMA using the same methodologies as in the Final Determination. Since U.S. Complainants did not challenge these in the earlier Panel proceedings, and since the Panel did not remand the profit methodologies, Revenue Canada argues that it was without jurisdiction to reconsider the issues, and so is the Panel. To accept the U.S. Complainants' position that each successive determination on remand "sets up a new cause of action and gives rise to a challenge" could have the effect of indefinitely continuing panel reviews. Sidbec-Dosco and Dofasco both agree with Revenue Canada's position.

Stelco, supporting Revenue Canada's position, adds that the Panel remanded three issues only and "in all other aspects the Panel affirmed the final determination." The issues concerning an amount for profits were not briefed or argued by U.S. Complainants and were only referenced in passing in the Complaint. Stelco argues that Revenue Canada was without jurisdiction to make any changes other than those mandated by the remand on two grounds: (1) Because of the principle favoring finality of proceedings, this Panel is *functus officio* regarding the amount for profits issues. (2) Alternatively, if the Panel has jurisdiction to consider the amount for profits issues, U.S. Complainants are nonetheless estopped from raising the issues at this late stage of the proceedings when they could have been raised before and all parties could have filed briefs and presented oral arguments on the matters. In response to U.S. Complainants' argument regarding the effect of §77.15(4) of SIMA, Stelco argues that this section limits a panel's review to action taken by the appropriate authority pursuant to a remand order under §77.15(3). The alleged errors in amount for profits raised by the U.S. Complainants do not arise from action taken by Revenue Canada upon remand but, rather, amount to an attempt to have the Panel decide issues that were not briefed or argued by the Complainants at the original hearing.

(c) Panel Discussion

The basis for the objections to the Panel's jurisdiction to deal with the alleged errors in amount for profits is the principle favoring finality of proceedings which underlies both the *functus officio* and the estoppel arguments.

With respect to the argument relating to *functus officio*, U.S. Complainants, Revenue Canada and Stelco all rely upon the Supreme Court of Canada's decision in Chandler v. Alberta Association of Architects, [1989] 2 S.C.R. 848. At pages 861 and 862 of that decision, the majority of the Supreme Court of Canada holds as follows:

I do not understand Martland J. to go so far as to hold that *functus officio* has no application to administrative tribunals. Apart from the English practice which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in P a p e r Machinery Ltd. v. J. O. Ross En9ineering Corp., *supra*.

To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgements of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect of the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principles should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation....

The court went on to hold that the doctrine of *functus officio* did not apply because the administrative tribunal in that case had not disposed of the matter before it, as its disposition was a nullity.

None of the parties pointed to any specific statutory provision which dealt with Revenue Canada's authority to correct errors in a final determination in the absence of a remand by a panel

pursuant to SIMA and the Rules of Procedure for Article 1904 Binational Panel Review. In the Panel's view, Revenue Canada did reach a final decision when it rendered its Final Determination and it was not free to revisit issues or correct errors in the absence of authority conferred upon it by statute. The alleged errors in question cannot be characterized as slips or clerical errors which Revenue Canada might have had authority to correct. In this regard, the Panel notes that even as to the method of calculating LTV's profits, which Revenue Canada itself states was in error, the matter cannot be considered as a slip or clerical error. One of the parties, Stelco, argues that, in fact, Revenue Canada did not err in calculating LTV's profits and was correct both at the time of the Final Determination and at the time of the action on remand. Therefore, the issue to be determined is whether this Panel has the authority to direct Revenue Canada to correct the alleged errors which were present in the Final Determination and, if so, whether it is appropriate to do so at this stage.

This Panel is not *functus officio* in the usual sense of the term. Its function is not yet complete in that it is still in the course of exercising duties specifically provided for under SIMA and the FTA rules of procedure. The Panel's authority to consider issues on remand, however, is limited by SIMA and the Panel Rules. If the Panel has rendered a final decision on a matter before it in a review proceeding, it cannot revisit that issue unless authorized to do so by SIMA or the Panel Rules. Otherwise, the principles of procedural fairness and finality of proceedings could be seriously compromised.

The Panel reviewed SIMA and the Panel Rules to determine whether they enable the Panel to revisit its June 14 determination in which it affirmed Revenue Canada's Final Determination in all aspects except for those three matters which were specifically remanded. Neither §76 nor §77 of the Panel Rules provides any such authority. The errors alleged by the U.S. Complainants cannot be described as clerical errors, accidental oversight, inaccuracy or omission in the implementation of the Panel's decision.

The question then arises as to whether §77.14(4) of SIMA authorizes the Panel to consider an alleged error not briefed nor argued at the panel review stage or, in the terms of the Chandler decision, whether "there are indications in the enabling statute that a decision can be reopened in

order to enable the tribunal to discharge the function committed to it by its enabling legislation."

Subsection 77.15(4) of SIMA reads as follows:

The panel may, on its own initiative or on a request made in accordance with the Rules, review the action by the appropriate authority pursuant to an order under subsection (3) and make a further order as described in that subsection within 90 days after the day on which the Canadian Secretary receives notice of the action.

This subsection permits the Panel, on its own or following a request, to review the action taken by Revenue Canada pursuant to a remand under §77.15(3). It does not constitute a whole new "cause of action", as argued by the U.S. Complainants, so as to enable the Panel to reconsider any aspect of its earlier decision or Revenue Canada's final determination as amended on remand.

In the Panel's view, a review pursuant to §77.15(4) of SIMA must relate to an action taken by Revenue Canada pursuant to a remand under §77.15(3). However, this does not necessarily preclude review of an error made by Revenue Canada as part of its determination on remand which was not previously considered by the Panel, including errors which could not and should not have been reasonably anticipated by the relevant party and included as part of its submissions and arguments upon the original review. In other words, if Revenue Canada commits a new error which was not part of the original panel review, that error may be the subject of a review on remand provided it falls within the Panel's general scope of review. It may also be that, in the appropriate case, a panel may review on remand an issue or error which at the time of the original panel review could not reasonably have been foreseen or anticipated by the complaining party, or which arises because a panel's decision has operated in an entirely unexpected and unforeseeable fashion. However, those are not the facts in this case.

In this case, U.S. Complainants did raise the issue of calculation of an amount for profits in the complaint, albeit in a general manner only. Nevertheless, they chose not to brief the issue for either LTV or USS as part of their written submissions in chief or in reply and did not raise the issue at the oral hearing even though, as a result of questions by one of the Panel members, the opportunity to do so did arise. The methodologies used to calculate an amount for profit for both LTV and USS were apparent on the record and U.S. Complainants were aware that, in their view,

they were in error. The issues which have now arisen with respect to the amount for profit methodologies applied by Revenue Canada, both initially and on remand, could reasonably have been foreseen and should have been included as part of U.S. Complainants' submissions and arguments. In these circumstances, the Panel does not find it appropriate to review the alleged errors pursuant to §77.15(4).

Applying the estoppel argument raised by Stelco, the Panel arrives at the same conclusion. The issues which the U.S. Complainants seek to raise following remand ought to have been raised at the time of the initial review. While dumping determinations do raise a number of complex factual matters which may make it difficult to anticipate the effect of the decision of a review panel, that is not the situation in this case. The Complainants were aware of the alleged errors in methodology at the time they filed the complaint and chose not to deal with them as part of their submissions or in argument. These issues could, and should, reasonably have been foreseen. This is not a case of requiring Complainants to brief every contingency arising from every possible decision of a review panel.

In the Panel's view, the alleged errors should have been put to the Panel at the time of the original review so that full written submissions and oral argument could have been heard on the determinations of fact and law which would be required to determine the issues in question. It is now very late in the day to raise the alleged errors and it would seriously prejudice the principle of finality to reopen the proceedings and receive full submissions and oral argument on these points. Moreover, Rule 2 of the FTA Panel Rules provides that the "purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904." To reopen arguments, or to order another remand in the present circumstances, would not promote a speedy and inexpensive review. Nor is it unjust to expect

Complainants to put forward as complete a case as possible at the outset of the review.⁴ Certainly it would not have been burdensome for U.S. Complainants to raise the profits issues earlier.

The Panel has reviewed the decisions relied upon by U.S. Complainants with respect to their argument that the alleged errors in the method of calculating an amount for profits constitute "separate causes of action." Those decisions are distinguishable. The decisions in Angle v. Ministry of National Revenue (1975) 2 S.C.R. 248 and Hall v. Hall (1958) 15 D.L.R. (2d) 638, both deal with quite different causes of action being considered by separate Courts. The decision in Salinas v. Canada (1992) 93 D.L.R. (4th) 631, dealt with a situation in which the administrative tribunal in question had not made any decision, let alone a final decision. In the circumstances of this challenge, a decision was made by the Panel, and no new cause of action to reopen that decision arises. The amount for profit issues were precisely the same, both at the time of Revenue Canada's final determination and upon its action on remand. While §77.15(4) of SIMA may allow a review panel, in certain circumstances, to review errors made on remand which are incidental to the specific grounds of remand, it would not be appropriate to do so in the circumstances of this case. Accordingly, for the reasons identified above, the Panel finds that U.S. Complainants are estopped from raising the amount for profits issues at this late date.

As a result, for the reasons stated, the Panel declines to review the challenge by the U.S. Complainants on the basis of alleged errors by Revenue Canada with respect to the calculation of an amount for profits for both LTV and USS.

6. Interest income - USS

In their original Complainants' Brief, U.S. Complainants argued that Revenue Canada should offset certain head office interest and financial expenses which had been determined to be costs of

⁴ The Panel is mindful that Revenue Canada, interpreting its own statute, has stated that it erred in the method of calculating LTV's profits. Stelco disagrees and states no error was made. If there is an administrative review of LTV's dumping order, the Panel anticipates that, if, in fact, an error was made, it can be addressed at that point.

steel production with interest and "other" income that also were reported in the books of USS's parent corporation. In its remand order dated June 14, 1994 at 48-49, the Panel instructed Revenue Canada as follows:

If any of the above-mentioned interest income is related to financing or other interest costs deemed to be related to steel production, Revenue Canada should include such income as an offset against such financing or interest costs...

On remand, Revenue Canada found "no information on the record to support attribution of this interest income to steel production." Complainants now argue that Revenue Canada misunderstood the Panel's remand. According to U.S. Complainants, the Panel ruled that, if the interest charges and other financial expenses from the head office are deemed to be costs of steel production, then Revenue Canada must find the income items, interest and other, which come from the same part of the company's books, to be related to steel production as well.

Revenue Canada defends its Determination on Remand, stating it found no evidence on the record linking head office interest income to the interest expenses or steel production. With respect to "other income", Revenue Canada states it was not instructed to consider these items. Had it done so, however, the record shows that the "other income" items either were not related to steel production, or there is no evidence linking them to the interest or other financial expenses or steel production.

The Panel is in agreement with Revenue Canada. The Panel did not make the sweeping decision requested by U.S. Complainants, to the effect that every item of income, interest or otherwise, that appears in a company's books in the same place as expense items should be offset against those expense items. Rather, the Panel asked Revenue Canada to look at the evidence and determine whether the interest income referred to by USS was linked to the expense items that had been found related to steel production. Revenue Canada found that there was no such evidence, and the Panel affirms this finding.

7. Conclusion and Order

The Panel AFFIRMS all aspects of Revenue Canada's determination on remand and in accordance with FTA Rule 79A hereby directs the Secretary to issue a Notice of Final Panel Action on the eleventh day following the date of this decision.

SIGNED IN THE ORIGINAL BY:

Kathleen F. Patterson
Kathleen F. Patterson, Chair

Henri C. Alvarez
Henri C. Alvarez

Howard N. Fenton
Howard N. Fenton, III

Leon E. Trakman
Leon E. Trakman

Issued on the 31st of January, 1995.

DISSENTING OPINION

I dissent from that part of the majority opinion which declined to review the challenge by the U.S. complainants on the basis of an admitted (not merely alleged) error by Revenue Canada with respect to the calculation of an amount for profits for LTV. In all other respects I agree with the opinion of the majority.

In calculating the amounts for profit at the final determination, the investigating agency admits that it erred by failing to follow the specific guidelines of section 13 of the Special Import Measures Regulations.¹ The investigating agency also acknowledges that it did not correct the error after the Panel remanded.² Thus, an issue of first impression now arises: Does a Chapter 19 panel have jurisdiction to issue a further remand in order to allow for correction of an admitted error by the investigating agency when the specific matter giving rise to the error was not addressed by the Panel in its original remand decision?

The threshold question is whether the issue of improper calculation was raised initially in the complaint. "A panel review shall be limited to (a) the allegations of error of fact or law ... that are set out in the Complaints filed in the panel review"³ Although the issue of improper calculation was neither briefed in detail nor argued before the Panel, the allegations set forth in the Complainants' brief were sufficient to satisfy SIMA Rule 7.⁴ Therefore, the issue of improper calculation was preserved for review by the Panel.

The Panel did not specifically remand this issue. The Investigating Authority contends that it "had no jurisdiction to reconsider any matters other than those specifically addressed by the Panel in its remand decision," and therefore did not correct the error.⁵ The Investigating Authority and Stelco argue that the Panel is functus officio following its initial remand as to all issues except those specifically set forth in the remand.⁶ In addition, Stelco argues for an issue estoppel.⁷ I disagree with these contentions.

The legislative history of the dispute resolution process contained in Chapter 19 has an important bearing upon this issue. Canada and the United States were unable to come to an agreement on the matters of subsidies and antidumping and countervailing duties. As a result, Chapter 19 was created for the purpose of dealing with these problems in a manner which both parties considered could ensure a correct application of the antidumping and countervailing duty laws of the importing country to the particular issue before it.⁸

The importance which was placed upon the binational review process was repeatedly emphasized by then Prime Minister Mr. Mulroney in the Parliamentary debates:

“Most fundamentally and most importantly, the agreement will replace the politics of trade with the rule of law....”⁹

“Binational review will assure greater fairness, greater objectivity...”¹⁰

“Most significant of all are the dispute settlement provisions which ensure that Canadian exporters are less vulnerable to arbitrary interpretations or capricious applications of U.S. trade law.”¹¹

Obviously the same observations apply to U.S. importers into Canada.

This concept is fundamental to Chapter 19 of the Canada-U.S. Free Trade Agreement from which this Panel derives its authority. The obligation of the Panel pursuant to that Agreement is to determine whether the determination of the Investigating Authority is in accordance with the antidumping and countervailing duty laws of the importing party.¹² If the law of Canada, which is the importing party in the case before us, is such that an Appellate Court would be bound in this instance by this admitted erroneous decision of the tribunal, then the obligation of this Panel would be less clear. We have, however, been cited to no such authority.

The case of Chandler v. Alberta Association of Architects (1989) 2 S.C.R. 848, has been cited by both the Complainant and the Investigating Authority in support of their respective

Procedure for Article 1904 Binational Panel Reviews. In the absence of a further remand by this Panel, Revenue Canada lacks authority to correct this error.

In my view, review of the alleged error is appropriate. As the majority points out, “a review pursuant to §77.15(4) must relate to an action taken by Revenue Canada pursuant to a remand under §77.15(3).”¹⁷ The majority acknowledges, however, that “this does not necessarily preclude review of an error made by Revenue Canada as part of its determination on remand which was not previously considered by the Panel ...”¹⁸

Although the majority gives some examples of when this might be done, it does not contend that such examples are all inclusive. In my opinion an admitted error by the Investigating Authority would be another such example.

The Panel did not consider Revenue Canada’s acknowledged error. Had that error been brought to the Panel’s attention in Complainants’ brief or during argument (and I agree with the majority that it should have been done), the Panel would have addressed that error. Inasmuch as the error was not considered however, the Panel should not be estopped from considering so important an error at this time, nor should the U.S. Complainant be estopped from raising it. It is appropriate, therefore, that the Panel review the error that Revenue Canada admits it continued to make upon remand.

Estoppel and functus doctrines are doctrines of judicial economy whose purpose it is to bring finality to legal proceedings and which clearly have application to Chapter 19 proceedings. However, in determining the application of these doctrines, consideration must be given to the fundamental purpose for which the Chapter 19 process was created, namely, to assure that the antidumping and countervailing duty law of the importing country is fairly and correctly applied.¹⁹ It would be hard to find a more clear case than this for not applying these doctrines; where the Investigating Authority itself acknowledges that an error has been made and that the law of the importing party

therefore has been misapplied. If the Panel is powerless to correct such a mistake simply because this error has been brought to the attention of the Panel at a very late date in the proceeding, regardless of the reason, the effectiveness of the dispute resolution process to achieve the purposes for which it was created is substantially impaired. It is indeed important that there be a finality to these proceedings and it may well be appropriate for doctrines of judicial economy to be applied, but this is not such a case.

The majority relies upon Rule 2 of the FTA Panel Rules, stating, “Moreover, Rule 2 of the FTA Panel Rules provides that the purpose of these rules is to secure the just, speedy and inexpensive review of final determinations in accordance with the objectives and provisions of Article 1904”²⁰ (emphasis supplied) The decision of the majority accomplishes but one of these purposes — the result was speedily obtained. I cannot agree however that a Panel decision which permits an admittedly erroneous application of the law of the importing country to stand uncorrected is either just or in accordance with the objectives and provisions of Article 1904.

The majority’s suggestion that the error be addressed by Revenue Canada if and when there might be some future administrative review of the LTV dumping order²¹ falls far short of meeting this Panel’s obligation to assure that the determination of the Investigating Authority was made in accordance with the law of Canada, especially where the Investigating Authority itself has advised the Panel that it did not do so.

In view of the importance of this issue to the Dispute Resolution Process and the fact the Stelco has taken issue with the position of the Investigating Authority, I would order a further hearing on the issue so that it might be fully briefed and argued.

SIGNED IN THE ORIGINAL BY:

Lauren D. Rachlin
Lauren D. Rachlin

Issued on the 31st of January, 1995.

1 Response of the Investigating Authority to the U.S. Complainants' Challenge to the Determination
on Remand, para. 1.

2 Id. at para. 2.

3 Special Import Measures Act (SIMA), Rule 7.

4 U.S. Complainants' Challenge to the Determination on Remand of the Investigating Authority, 73,
143. The Majority acknowledges, "In this case, U.S. Complainants did raise the issue of calculation
of an amount for profits in the complaint, albeit in a general manner only." Memorandum Opinion
and Order, p. 10.

5 Response of the Investigating Authority, para 2.

6 Id. at para. 20; Submissions of Stelco Inc. in Support of Revenue Canada's Determination on
Remand, paras. 13-14.

7 Submissions of Stelco Inc., paras. 15-18.

8 Article 1904.2; see also Ferguson, Dispute Settlement Under the Canada-United States Free
Trade Agreement, 47 U. Toronto Fac. L. Rev. U. Toronto Fac. L. Rev. 317, 327-333 (1989).

9 Thirty Third Parliament, Second Session Volume 129 (30 September 1986 to 30 September 1988)
p. 19052.

10 Id. p. 19052.

11 Id. p. 19054.

12 Article 1904.2.

13 U.S. Complainants' Challenge, para. 33.

14 Memorandum Opinion and Order, 7-8.

15 Response of the Investigating Authority, para. 1.

16 Id., para. 2.

17 Memorandum Opinion and Order, 10.

18 Id.

19 See Ferguson, op. cit., supra note 8.

20 Memorandum Opinion and Order, 11.

21 Id., 11 n. 4.