

**UNITED STATES – CANADA FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL**

IN THE MATTER OF:)
)
CERTAIN CORROSION-RESISTANT) **USA-93-1904-03**
CARBON STEEL PRODUCTS)
FROM CANADA)

OPINION AND ORDER OF THE PANEL

May 1, 1995

**STELCO, INC., CONTINUOUS COLOUR COAT, LTD., DOFASCO, INC.,
AND CERTAIN UNITED STATES STEEL PRODUCERS**

Complainants

v.

**INTERNATIONAL TRADE ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE**

Respondent

Before:

**Brian E. McGill, Chairman
Harry B. Endsley
Maureen Irish
Ross Stinson
Steven S. Weiser**

Appearances:

For Stelco, Inc.: Willkie, Farr, & Gallagher (Christopher Dunn and Edmund Sim).

For IPSCO, Inc.: Paul, Weiss, Rifkin, Wharton & Garrison (George Kleinfeld and Michael Velthoen); Brian Kelly, Inc. (Brian Kelly).

For National Steel Corporation, Inc.: Skadden, Arps, Slate, Meagher & Flom (Robert G. Lighthizer and John J. Mangan); Dewey Ballantine (Alan Wm. Wolff and Michael H. Stein).

For Bethlehem Steel Corporation, Inland Steel Industries, Inc., and U.S. Steel Group (a unit of USX Corporation): Skadden, Arps, Slate, Meagher & Flom (Robert E. Lighthizer, John J. Mangan, Ellen J. Schneider, and James C. Hecht); Dewey Ballantine (Alan Wm. Wolff and Michael H. Stein).

For the U.S. Department of Commerce: Office of Chief Counsel for Import Administration (Stephen J. Powell, Elizabeth C. Seastrum, and Thomas H. Fine).

OPINION AND ORDER OF THE PANEL

I. BACKGROUND

The antidumping duty order in the underlying investigation "collapsed" Stelco and its related party, Continuous Colour Coat, Ltd. (hereinafter "CCC"). Upon challenge and review, the panel directed that: "This issue is remanded to the Department with the instruction not to collapse Stelco and CCC."¹ In its determination upon remand Commerce asserted that it "fully complied with the Panel's instructions to "un-collapse" CCC and Stelco."² Regarding Stelco, the Department recalculated Stelco's estimated antidumping duty margin without regard to CCC's sales.³ With respect to CCC, Commerce noted that "the Panel specifically upheld the Department's application of BIA to CCC's sales." Thus, "noting that CCC was cooperative in the investigation, the Department has applied total cooperative BIA to CCC as an uncollapsed respondent."⁴

¹ Certain Corrosion-Resistant Carbon Steel Products From Canada, USA-03-1904-03 (October 31, 1994) at 21.

² Response of the Investigating Authority to Comments of Continuous Colour Coat, Ltd. In Opposition to the Determination on Remand (hereinafter "Commerce Remand Response"), March 20, 1995 at 7. Commerce employs the term "uncollapse" in its remand determination. This is not a term used by the panel.

³ Results of Redetermination Pursuant to Panel Remand (hereinafter "Remand Determination"), January 30, 1995, at 6-7.

⁴ Id. cited in Commerce Remand Response at 7.

Commerce submitted its remand determination to the Panel on January 30, 1995. CCC challenged Commerce's interpretation of the Panel's opinion and urged that this panel direct Commerce to apply the "all others" rate to CCC shipments.⁵

Commerce responded that because its investigation of CCC was premised on its decision to collapse Stelco and CCC,⁶ its investigation of CCC was a thorough one.

When Commerce collapses two companies, it does not decrease the intensity of its investigation of either of the two companies. The very purpose of collapsing companies is to combine their sales information in order to calculate a single antidumping margin. Therefore, just as an independent respondent must report all information for all of its divisions, two collapsed respondents must report all information for each of them. The procedure for investigating a collapsed respondent is precisely the same as the procedure for investigating an independent respondent. Only the calculation of the final margin differs.⁷

The Domestic Producers and the Department also assert that failure to assign a specific rate to CCC would make that portion of the Panel's opinion which upheld application of total BIA for CCC shipments investigated nonsensical.

II. ANALYSIS AND DECISION

The Department has only been able to identify one similar situation where Commerce's decision to collapse related companies has been reversed -- Nihon Cement Co. Ltd v. United States.⁸ In the underlying investigation in the Nihon case, Commerce assigned BIA rates to two companies related to Nihon and collapsed those rates with Nihon's to produce a consolidated

⁵ Comments on Behalf of Continuous Colour Coat Ltd. In Opposition to the Determination on Remand by the U.S. Department of Commerce, February 27, 1995, at 10.

⁶ Commerce Response Brief at 8 and Hearing Transcript at 31, 35 (Fine).

⁷ Commerce Response Brief at 8.

⁸ Nihon Cement Co., Ltd. v. United States, ___ F. Supp. ___, Slip Op. 93-80 (CIT May 25, 1993)

margin.⁹ The final LTFV notice listed the margins for the two respondent companies (Nihon and Onoda) and an "all others" rate.¹⁰ Under Nihon's listing, in parentheses, the names of the two related companies appeared, each assigned a margin equal to the Nihon margin.¹¹

As stated by the court in Nihon, "Commerce based its decision to collapse the entities and use BIA for purposes of determining sales quantities and value for [the related companies] upon Nihon's failure to submit a consolidated response with the information concerning [the related companies]. Commerce also contend[ed] that it was unable to verify the information that was submitted."¹² The court found "that the record does not establish that there is substantial evidence to support collapsing Nihon and its related companies."¹³ Commerce's determination was remanded with the instruction "to recalculate the margin for Nihon without including [the related companies.]"¹⁴ No instruction was given as to treatment of the related companies.

The Department's Redetermination on Remand complied with the court order and "recalculated Nihon's dumping margins exclusive of any amounts for these related entities."¹⁵ In the final remand results, Commerce did not list the two companies which previously appeared in

⁹ Supplemental Authority Pursuant to Request by Binational Panel During Oral Argument, April 14, 1995 providing Final Remand Results filed with CIT in Court No. 91-06-00425 on September 10, 1993) (hereinafter "Commerce Supplemental Submission"), April 14, 1995, at 1-2.

¹⁰ 56 Fed. Reg. 21658, 21659 (May 10, 1991).

¹¹ Id.

¹² Nihon at 49.

¹³ Id. at 54.

¹⁴ Id.

¹⁵ Commerce Supplemental Submission, Department Memorandum in Inv. 588-815.

the original LTFV determination.¹⁶ To determine the "all others" rate, Commerce weight-averaged the Nihon and Onoda margins.

In its Supplemental Submission to the panel, Commerce distinguishes its treatment of CCC here and that of the Nihon related parties by stating that "because neither of the [Nihon] subsidiary companies had challenged Commerce's determination, and because, even if they had been involved in the litigation, Commerce had no information about those companies, Commerce did not calculate a separate rate for those companies."¹⁷

In the context of this issue, the panel cannot accept the notion that whether a company was party to subsequent litigation should control its treatment on remand. By this logic, if Stelco, rather than CCC, had challenged the Department's decision to collapse the two companies, CCC would have received the "all others" rate.

Commerce's second distinction, that it "had no information about those companies," directly contradicts its assertion that collapsed companies are always thoroughly investigated.¹⁸ Moreover, Commerce's characterization contradicts the Nihon court's recitation of the fact that the Department did receive some information from the Nihon related parties, but that Commerce was unable to verify the submitted information.

It is apparently true that CCC was more thoroughly investigated than the related parties in Nihon. Nevertheless, in both instances the information supplied by the related parties was found

¹⁶ Department Memorandum in A-588-815 (Feb. 16, 1995).

¹⁷ Commerce Supplemental Submission citing Final Remand Results filed with CIT in Court No. 91-06-00425 on September 10, 1993.

¹⁸ The Department's assertion is also contradicted by its treatment of Sorevco, a party related to another respondent, which was collapsed but was not thoroughly investigated. Tr. 37 (Fine).

to be incomplete and what was submitted could not be verified. In both cases BIA was applied to calculate the margins for the related parties before they were collapsed with a respondent's margin. Thus, Commerce's efforts to distinguish the Nihon case are unpersuasive.

Moreover, Commerce's assertion that the investigation of CCC was premised on the decision to collapse Stelco and CCC contains a fundamental defect. The panel reversed Commerce's decision to collapse the two companies. Thus, any rate resulting from an invalidated investigation cannot stand.

The panel is also concerned, both generally and within the peculiar facts of this case, about the formality and intensity of investigations of companies in the position of CCC. Commerce formally names respondents in each investigation. The panel believes that if Commerce does not designate a company as a respondent, but nevertheless determines to investigate the company as though it were a respondent, clear notification must be given to that company. Early in the investigation here, Commerce sent the opposite message to CCC by rejecting CCC's offer of a voluntary response.¹⁹ The situation was exacerbated by Commerce's failure to make a decision to collapse Stelco and CCC until "toward the end of the investigation."²⁰ In the panel's view, notwithstanding that CCC was represented by counsel and participated in the proceedings, Commerce's approach to investigating CCC here raises fairness concerns.

For these reasons, the panel directs the Department not to issue a company-specific rate to CCC and to apply the "all others" rate to CCC shipments which would otherwise carry this rate.

¹⁹ See Fiche 17, Frame 011 (CCC offer of voluntary response); Fiche 10, Frame 013 (Commerce rejection); Fiche 21, Frame 42 (CCC request that Commerce reconsider).

²⁰ Tr. 30-31 (Fine).

The Department is also directed to recalculate the "all others" rate to exclude the effect of previously including the company-specific margin of CCC.

The panel cannot leave this issue without addressing the concern that its ruling here makes its decision upholding application of BIA for CCC sales in the underlying investigation nonsensical. This case differs from Nihon in that no instruction was given by the panel as to the implications of not collapsing Stelco and CCC. The panel opinion did not foreclose the possibility that the investigation of CCC sales and application of BIA data to Stelco for CCC sales could be premised solely on the authority to investigate related parties.²¹ Indeed, the basis for investigation of CCC was the Department's questionnaire which requested information from Stelco related parties. At the hearing, the Commerce counsel admitted that the decision memorandum to collapse the companies was not issued until "near the end of the investigation," many months after the questionnaires had been issued.²² Thus, it appeared to the panel at least possible that the decision to apply partial BIA to Stelco for the CCC sales was not exclusively premised on the decision to collapse the two companies, but was premised on the authority to investigate related parties.

Nevertheless, the panel upholds the Department's remand results wherein it recalculated Stelco's margin without reference to CCC BIA sales. First, the panel notes that the Department's action follows the explicit command issued by the court in Nihon to effect its order not to collapse

²¹ One panel member cautioned in the opinion that the panel finding should not be read to imply that the Department may in all situations require a respondent to report all sales of subject merchandise by all related parties. Certain Corrosion-Resistant Carbon Steel Products From Canada, USA-03-1904-03 (October 31, 1994) at 30, n.102.

²² Tr. 30-31 (Fine).

companies. Second, Commerce's refusal to apply BIA rates to the respondent for which related party reporting was required, absent a decision to collapse the related parties, is reasonable on policy grounds. Commerce recognizes that it cannot simply sanction a respondent for failure to report related party information absent some other test, such as the collapsing standard. At the hearing Commerce counsel stated that "there is some discussion whether Commerce can, in fact, require reporting of sales by distantly related parties, whether Commerce could simply ask a Respondent, 'report any of your sales by any company you owned a five percent interest in.'"²³ Commerce counsel went on to conclude: "In fact, Commerce recognizes that there is a point at which it simply can't ask for -- the lines cross, the information is not available, and Commerce cannot ask the Respondent to report sales by such a distantly related company."²⁴ Accordingly, the panel finds that the Department's policy of not applying BIA to a respondent for failure of a related party to fully report unless the related parties are collapsed is reasonable.

²³ Tr. 36 (Fine). The panel notes that this issue will become even more critical in the future. The implementing legislation for the Uruguay Round antidumping agreement provides that the term "affiliated party" will replace the term "related party" and encompass more relationships. Under the new law, affiliated persons include "any person who controls any other person and such other person." Section 771(33). "A person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." *Id.* Thus, a firm may be in a position to exercise restraint or direction, in the absence of an equity relationship, "through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other." *See* Statement of Administrative Action explanation of Uruguay Round implementing legislation at 838.

²⁴ Tr. 36 (Fine). If the implication of not collapsing is that the respondent (or related party) gets a BIA sanction based on the failure of reporting by the related party, the companies more distant in relationship would have the greatest exposure to a high BIA rate. The more distant the relationship between the respondent and the related party, the more inequitable it is to assign a BIA based margin for failure to fulfill a Department data request for related party information.

For these reasons, we affirm the Department's remand determination to recalculate Stelco's margin without reference to CCC's BIA rate. Thus, the panel relieves that portion of the panel's opinion upholding application of BIA for CCC data of its force and effect.

In all other aspects, the Department's remand determination is affirmed.

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| CERTAIN CORROSION-RESISTANT |) | SECRETARIAT FILE NO. |
| CARBON STEEL PRODUCTS |) | USA-93-1904-03 |
| FROM CANADA |) | |

REMAND ORDER

The Panel orders the Department of Commerce to make a determination on remand consistent with the instructions and findings of this opinion. The remand determination shall be made within 30 days.

ISSUED ON MAY 1, 1995

SIGNED IN THE ORIGINAL BY:

Brian E. McGill, Chairman
Brian E. McGill, Chairman

Harry B. Endsley
Harry B. Endsley

Maureen Irish
Maureen Irish

Ross Stinson
Ross Stinson

Steven S. Weiser
Steven S. Weiser