

**NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW
USA-97-1904-3**

IN THE MATTER OF:

CORROSION-RESISTANT CARBON
STEEL FLAT PRODUCTS
FROM CANADA

BEFORE:

Howard N. Fenton, III
(Chair)
William E. Code, Q.C.
Lisa B. Koteen
Shawna Vogel
Gilbert R. Winham

**DECISION OF THE PANEL ON
THE SECOND DETERMINATION ON REMAND**

Appearances:

For Stelco, Inc.: Willkie Farr & Gallagher (Christopher Dunn, Daniel L. Porter and David M. Waters).

For the U.S. Department of Commerce: Office of Chief Counsel for Import Administration (Myles S. Getlan).

For Certain United States Steel Producers: Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer and John J. Mangan).

OPINION OF THE PANEL

In issuing its final remand determination, the Department of Commerce has reiterated its interpretation of the law as applied to the facts of this case. The Department's position is inconsistent with the clear and unanimous interpretation of law set forth by this Panel in its initial opinion and in its decision on the Department's first remand determination. However, in its final remand determination the Department complied with the Panel's instructions and the Panel therefore unanimously affirms the Department's determination on remand.¹

¹The Panel notes that attorneys for Stelco appear to have failed to timely serve their response taking issue with the Department's discussion in its Final Remand Determination on the Domestic Producers, who are a party to this matter. Because the response by Stelco did not raise a substantive issue for consideration by the Panel, it is not necessary for the Panel to address this matter.

CONCURRING OPINION

by Panelists Howard N. Fenton, III, William E. Code and Shawna K. Vogel

The Department of Commerce has issued its remand determination in this matter consistent with the instructions of the Panel, but has taken the opportunity to state rather categorically its disagreement with the position the Panel took on the law. We are not affronted by this disagreement, nevertheless, we are troubled by the manner of the statements and what we believe it communicates about the Department's view of the Chapter 19 Panel process. We recognize that this Panel's authority is limited to affirming the specific position taken by the Department in its final remand determination in this matter, but nonetheless believe some comment on the Department's statements about our interpretation of the law is merited.

The question of law implicated in this matter is central to the determination of the dumping margin by the Department. The Panel took note of the fact that in this second administrative review the Department changed its position and adopted the transfer price approach to determining Stelco's cost of production using the face value of invoices issued by Baycoat to Stelco. Future administrative reviews lie ahead for Stelco and the Department where this issue will continue to arise. The Panel's role is limited to reviewing the Department's action in this second review. Once that task is completed, this Panel ceases to exist. The Department on the other hand is continuing to consider this issue in its obligation to perform administrative reviews of the antidumping order against Stelco. The Department's statement in its final remand determination almost surely represents the approach the Department intends to take to this issue once outside the purview of this Panel.

The Department is indicating its intention to take advantage of the unusual character of the NAFTA Chapter 19 dispute process. For while panels exercise the authority of courts in resolving individual cases, their transient nature and their decisions' lack of formal precedent, even on identical issues, render them less authoritative in matters of statutory interpretation. Were the Court of International Trade to reach the decision this Panel has issued, and were it to be upheld by the Court of Appeals for the Federal Circuit, the Department would be bound by the interpretation. In this instant, the Department is not seeking to challenge the Panel's decision through the Chapter 19 Extraordinary Challenge Committee procedure. Rather by its final remand determination, it is acceding to the Panel's position on the law for purposes of recalculating one year's antidumping duties, and indicating its intention to revert to its own view henceforth. This disregard for the Panel's position is permissible under the Chapter 19 scheme, and indeed were the next panel considering this question to resolve it consistent with our view, the Department would still be free to continue to adhere to its view in each following instance. That is the nature of the Chapter 19 process. What is disturbing about this particular situation is the Department's adherence to its position without any reasoned discussion of the problems raised by this Panel. Repetitive reciting of a position does not lend it any greater legitimacy. The Department has reiterated its disagreement in its final remand in terms that offer no more support than its initial decision in this matter.

The Panel was unanimous in its rejection of the view of the Department. While we recognize that our job is complete once the Department accedes to our decision in this case, we regret that Commerce has seen fit to announce its intention to disregard it, both substantively and analytically, in this manner. We believe it communicates a disregard for the Panel process in general in a fashion that may erode its credibility for the future.

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

IN THE MATTER OF:)	
CERTAIN CORROSION-RESISTANT)	SECRETARIAT FILE NO.
CARBON STEEL FLAT PRODUCTS)	USA-97-1904-03
FROM CANADA)	

ORDER

The Panel affirms the Commerce Department's determination on remand. The U.S. Secretary is hereby directed to issue a Notice of Final Panel Action on the 11th day following the issuance of this Decision.

ISSUED ON: September 13, 1999

SIGNED IN THE ORIGINAL BY:

HOWARD N. FENTON, III, CHAIR
Howard N. Fenton, III, Chair

WILLIAM E. CODE
William E. Code

LISA B. KOTEEN
Lisa B. Koteen

SHAWNA K. VOGEL
Shawna K. Vogel

GILBERT R. WINHAM
Gilbert R. Winham