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

IN THE MATTER OF:	)	
STAINLESS STEEL SHEET AND STRIP IN COILS FROM MEXICO: U.S. INTERNATIONAL TRADE COMMISSION FINAL AFFIRMATIVE DETERMINATION IN THE FIVE-YEAR REVIEW OF THE ANTIDUMPING ORDER	)	**Secretariat File No. USA-MEX-2005-1904-06** **PUBLIC DOCUMENT**

DECISION OF THE PANEL

September 10, 2008

Panelists: Mark R. Sandstrom, Chair
Mélida Hodgson
David Hurtado
Juan Carlos Partida
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I. INTRODUCTION

This Binational Panel was constituted under Article 1904(2) of the North American Free Trade Agreement ("NAFTA") and Section 516A(g) of the Tariff Act of 1930, as amended (the "Tariff Act").[1] The Panel was appointed to review the determination of the United States International Trade Commission ("Commission"), under Section 751c of the Tariff Act[2], that revocation of the antidumping order on stainless steel sheet and strip ("SSSS") from Mexico would be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time ("Sunset Determination").

Notice of the Commission's determination was published in the Federal Register on July 18, 2005 at 70 Fed. Reg. 41236. The public views of the Commission and the Staff Report are found in Stainless Steel Sheet and Strip from France, Germany, Italy, Japan, Korea, Mexico, Taiwan and the United Kingdom, Inv. Nos. 701-TA-381-382 and TA 731-TA-797-804 (Review, Final), USITC Pub. 3788 (July 2005). The confidential version of the Views of the Commission are found in Document 299 in the Index of List 2 of the Administrative Record ("CD" 299). The confidential version of the Staff Report is found in CD 265 (hereinafter referred to as "CR"). Citations in this opinion are to the confidential versions of the Views of the Commission and the Staff Report.

On August 17, 2005, ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA, Inc. (collectively "Mexinox") filed a timely Request for Panel Review of the Sunset Determination under Rule 34 of the North American Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Rules ("NAFTA Panel Rules"). On

[1] 19 U.S.C. § 1516a(g).

[2] 19 U.S.C. § 1675(c). This section governs five-year "Sunset" reviews.

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September 16, 2005, Mexinox filed its Complaint along with a Statement of the Precise Nature of the Complaint. Notices of appearances in the Panel Review were filed by the Investigating Authority, the Commission, and by Allegheny Ludlum Corporation and AK Steel Corporation ("Allegheny/AK Steel"), Interested Persons[3]. The Complainant, the Investigating Authority, and the Interested Persons are hereinafter referred to collectively as the "Participants" in the Panel Review.

On December 15, 2005, Mexinox filed its NAFTA Panel Rule 57(1) Brief in support of the Complaint. Briefs in response to the Complaint were filed by the Commission and Allegheny/AK Steel on March 17, 2006. A Reply Brief was filed by Mexinox on May 1, 2006. An oral hearing, conducted in camera, at which all the Participants testified was held on July 19, 2007.[4]

The Panel hereby renders its decision in accordance with Article 1904.8 of the NAFTA and Part VII of the NAFTA Panel Rules.

II. PROCEDURAL HISTORY

A. The Original Determination

On June 8, 1991, The Commerce Department made final affirmative dumping determinations with respect to SSSS from France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the United Kingdom and affirmative subsidy determinations with respect to SSSS from France, Italy and Korea. The Commission made its final affirmative injury

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[3] North American Steel and APOS also filed notices of appearances, but later withdrew from the panel proceeding.

[4] On June 27, 2007, a consent motion for an in-camera hearing was filed before the Panel. On June 28, 2007, the Panel issued an order granting the motion for an in-camera hearing.

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determinations on July 19, 1999 ("Original Determination").[5] The Commerce Department issued antidumping orders for France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the United Kingdom and countervailing duty orders for Italy and Korea on July 27, 1999 and August 6, 1999, respectively. The Commission's Original Determination is subject to a "sunset" review after five years.

B. The Commission's Sunset Review Determination

In making its Sunset Determination, the Commission first examined whether imports from the subject countries should be cumulated. For each of the eight subject countries, the Commission determined that the subject imports would not be likely to have no discernable adverse impact on the domestic industry, and that the cumulation of each of the eight countries was not precluded under the statute.[6]

The Commission next addressed the statutory prerequisite for cumulation, that is whether the subject imports and domestic stainless steel in sheet and strip in coils ("SSSS") would be likely to compete if the orders were revoked. The Commission focused this inquiry on whether there was likely to be a reasonable overlap of competition among the subject imports from the eight countries and domestic SSSS if the orders were to be revoked. The Commission considered four factors in making its assessment: fungibility, geographic overlap, simultaneous presence, and channels of distribution. The Commission determined that there was a reasonable overlap of competition based on its analysis of these four factors.

Having concluded that the statutory prerequisites for cumulation were satisfied, the Commission determined to exercise its discretion to cumulate subject imports from

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[5] 64 Fed. Reg. 40896.

[6] View of the Commission at 9-16.

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Germany, Italy, Japan, Korea, Mexico, and Taiwan. The Commission declined to exercise its discretion to cumulate subject imports from France and the United Kingdom. The Commission determined that the subject imports from the two latter countries were likely to compete under conditions of competition different from the other six subject countries.[7]

The Commission next considered all relevant economic factors within the context of the business cycle and conditions of competition distinctive to the affected industry. The Commission found that the conditions of competition, with a few notable exceptions, remained largely the same as during the period of the original investigation.[8]

Pursuant to the applicable statutory criteria, the Commission then determined whether the revocation of the orders on subject imports from Germany, Italy, Japan, Korea, Mexico, and Taiwan would likely lead to the continuation or recurrence of material injury within a reasonably foreseeable time. The Commission first reviewed whether the likely volume of imports would be significant if the orders were revoked. The Commission found that the foreign producers generally had continued to ship to the United States despite the orders and that the subject exporters had added to their capacity and had significant excess capacity. It also found that the U.S. market was relatively attractive and that there was potential for product-shifting in some subject countries. Based on these factors, the Commission determined that the likely volume of cumulated subject imports would be significant if the orders were revoked.[9]

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[7] *Id.* at 19.

[8] *Id* at 25.

[9] *Id.* at 29-33.

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The Commission then examined the record evidence regarding likely price effects. The Commission noted that in the original investigation underselling occurred in almost two-thirds of the price comparisons. In addition, the subject imports had increased over the last several years, and undersold SSSS in 41 percent of the price comparisons, even with the orders in place. The Commission concluded that the increasing volumes of subject imports would likely undersell domestic SSSS to a significant degree to increase their share of the U.S. market, as occurred during the original investigations. It found that this significant underselling would likely suppress price increases and depress domestic prices to a significant degree.[10]

Finally, the Commission considered the likely impact of the cumulated subject imports on the domestic industry if the orders were revoked. The Commission noted that domestic consumption of SSSS was forecasted only to grow modestly in the foreseeable future. Market conditions had also returned to normal in 2005, following the supply disruptions in 2004. Accordingly, the Commission concluded that the likely modest growth in domestic consumption would not be able to absorb the likely significant increase in subject imports if the orders were to be revoked. Based upon the likely significant volume and price effects of the subject imports from the six countries, the Commission concluded that material injury to the domestic industry would continue or recur with the foreseeable future if the orders were revoked.[11]

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[10] *Id.* at 33-35.

[11] *Id.* at 35-37.

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III. THE STANDARD OF REVIEW

A. The Panel Stands in the Place of a Court of the Importing Party

This Panel's authority derives from Chapter 19 of NAFTA. Article 1904(1) provides the "each Party shall replace judicial review of the final antidumping and countervailing duty determinations with binational panel review." Pursuant to Annex 1911 of the NAFTA, the final results of sunset reviews of antidumping and countervailing duty orders are "determinations" that are reviewable pursuant to Article 1904. Article 1904(2) requires that the panel determine whether such determinations were:

> . . . in accordance with the antidumping and 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 the final determination of the competent investigating authority.

Article 1904(3) states that the panel shall apply ". . . 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." If this appeal were not before this Panel, it would be before the United States Court of International Trade ("CIT"). This Panel stands in the same position that the CIT would occupy but for Article 1904. The standard of review that would be applied by the CIT, and must therefore be applied by this Panel, is set forth in §516a(b)(1)(B)(i) of the Tariff Act, codified at 19 U.S. Code §1516a(b)(1)(B)(i). This provision requires that the panel "hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record or otherwise not in accordance with law…"

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B. The Substantial Evidence Standard of Review

NAFTA Article 1904(2) requires that the Panel make its review based on the administrative record in the underlying sunset review. The Panel may not undertake a *de novo* review of the Commission's determination.[12] The Panel must affirm the Commission's Review Determination unless it concludes that the determination is not supported by substantial evidence on the record. The United States Supreme Court has defined "substantial evidence" as " more than a mere scintilla . . . 'It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . .'"[13]

The United States Court of Appeals for the Federal Circuit ("CAFC") has applied the same interpretation of "substantial evidence" in reviewing administrative agency determinations in international trade investigations. As noted by the CAFC, "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."[14]

To this rule, the CIT 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."[15] Neither a Chapter 19 panel nor a reviewing court "may . . . substitute its judgment for that of the [agency]

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[12] See Cabot Corp. v. United States, 694 F.Supp. 949, 952-52, (Ct. Int'l Trade 1988); Ceramica Regiomontana, S.A. v. United States, 636 F.Supp. 961, 966 (Ct. Int'l Trade 1986), aff'd, 810 F.2d 1137 (Fed. Cir. 1987).

[13] NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)(quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938).

[14] Matsushita Electric Industrial Co. v. United States, 750 F. 2d 927, 933 (1984) (quoting [14] Consolo v. Federal Maritime Comm'n, 382 U.S. at 619-20.

[15] Koyo Seiko Co., Ltd. v. United States, 810 F. Supp. 1287, 12 (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)).

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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.'"[16]

Nevertheless, as the CAFC stressed in Gerald Metals, Inc. v. United States[17], the substantial 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 Commission must examine contradictory evidence and alternative causes of injury "to ensure that the subject imports are causing injury, not simply contributing to the injury in a tangential or minimal way."[18]

C. The "Otherwise Not in Accordance with Law" Standard of Review

In determining whether the Commission's interpretation of the governing statute is "in accordance with law," the Panel follows the two-stage approach adopted by the Supreme Court in Chevron, U.S.A., Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984) ("Chevron"). First, if the intent of Congress is unambiguous, the judiciary (i.e., the Panel) would be the final authority to determine whether an administrative interpretation is consistent with clear congressional intent. If the statute is silent or ambiguous, the "question for the court is whether the agency's answer is based

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[16] 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. 348).

[17] 132 F.3d 716, 720 (1977).

[18] Taiwan Semiconductor Indus. Ass'n v. U.S. Int'l Trade Comm'n, 266 F.3d 1339, 1345 (Fed. Cir. 2001). Note that this decision involved a review of a material injury determination in an antidumping investigation. The threshold of injury required for an affirmative finding in an antidumping or countervailing duty investigation is higher than the injury standard applied in a sunset review.

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on a permissible construction of the statute.[19] The "agency's interpretation need not be the only reasonable construction or the one the court would adopt had the question initially arisen in a judicial proceeding."[20] As long as the agency's interpretation is reasonable, that is sufficient under the Chevron ruling.

It is a 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.[21] The agency's decisional path must be reasonably discernible from its determination. Within the four corners of its determination, the agency must articulate a rational connection between the facts found and the choice made.[22]

IV. STATEMENT OF THE ISSUES

A. Discernible Adverse Impact:

Whether the Commission's determination that subject imports from Mexico would not be likely to have no discernible adverse impact on the domestic SSSS industry within a reasonably foreseeable time if the antidumping order were revoked is supported by substantial evidence on the record or otherwise in accordance with the law.

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[19] Chevron, at 842-843.

[20] *Id.*

[21] *See* Securities & Exchange Comm'n v. Chenery Corp, 332 U.S. 194, 196-97 (1947): Burlington Truck Lines v. United States, 371 U.S. 156-168-69 (1962).

[22] *See* Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974); Wheatland Tube Co. v. United States, 161 F.3d 1365, 1369 (Fed. Cir. 1988).

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B. Imports Likely to Compete - Fungibility:

Whether the Commission's determination that subject imports from Mexico would be likely to compete with other subject imports and with domestic SSSS if the antidumping and countervailing duty orders were revoked is supported by substantial evidence on the record or otherwise in accordance with the law.

C. Exercise of Discretion to Cumulate:

Whether the Commission's exercise of discretion in cumulating subject imports from Mexico is supported by substantial evidence on the record or otherwise in accordance with the law.

D. Conditions of Competition:

Whether the Commission's analysis of the likely conditions of competition in the United States SSSS market is supported by substantial evidence on the record or otherwise in accordance with the law.

E. Volume of Imports:

Whether the Commission's determination that the likely volume of cumulated subject imports would be significant if the antidumping and countervailing duties were revoked is supported by substantial evidence on the record or otherwise in accordance with the law.

F. Price Effects:

Whether the Commission's determination that the likely price effects of the cumulated subject imports would be significant if the antidumping and countervailing duties were revoked is supported by substantial evidence on the record or otherwise in accordance with the law.

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G. Impact of Subject Imports:

Whether the Commission's determination that the likely impact of the cumulated subject imports would lead to continuation or recurrence of material injury if the antidumping and countervailing duty orders were revoked is supported by substantial evidence on the record or otherwise in accordance with the law.

V. DISCUSSION AND ANALYSIS

A. Discernible Adverse Impact

Under Section 752(a)(7) of the Tariff Act of 1930, the Commission may exercise discretion to "cumulatively assess the volume and effects of imports of the subject merchandise from all countries "if (1) the sunset reviews are initiated on the same day and (2) the subject imports "would be likely to compete with each other and with domestic like products in the United States market.[23] However, the Commission is precluded from cumulatively assessing "the volume and effects of subject merchandise" if it determines that imports of the subject merchandise from a particular country are likely to have "no discernible adverse impact on the domestic industry"[24] Mexinox, in its Brief in Support of the Complaint ("Mexinox Brief"), alleges that the Commission's findings in support of its determination that subjects imports from Mexico would not have no discernible adverse impact are not supported by substantial evidence in the

[23] 19 U.S.C. § 1765a(a)(7) (2000).

[24] *Id.*

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record or, to the extent they are, such findings do not rationally support the Commissions determination.[25]

1. Arguments of Mexinox

In support of its position, Mexinox argues that the Commission miscalculated the company's available capacity. While it was not operating at full capacity, Mexinox argues that there were practical limits on its ability to increase production, including limited cold annealing and pickling capacity.[26] Mexinox further argues that there was no link between its capacity utilization and its level of exports to the United States. Mexinox also argues that the additional increment of production accounted for by its excess capacity amounted to only a small percentage of the U.S. domestic market.[27]

In addition, Mexinox alleges that, given its significant presence in the U.S. market, "the company is unlikely to take any action in response to revocation of the order that would undermine U.S. prices."[28] Mexinox cites to various briefs submitted by the parties in another ITC investigation, but not to a determination of the agency itself.[29] The substantial presence in the U.S. market is reflected in the fact that Mexinox is a dominant foreign supplier to that market and that it dedicates a significant amount of its production to sales in the United States. Mexinox also refers to an earlier sunset determination of the Commission in which the agency concluded that where the volume of subject exports

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[25] Mexinox Brief at 16.

[26] *Id*. at 17.

[27] *Id*. at 18.

[28] *Id*. at 26.

[29] See Petitioners Post Hearing Brief at Exhibit 1, p.43, n.16 and TK Respondent's Pre-Hearing Brief at 52, in Stainless Steel Plate in Coils from Belgium, Canada, Italy, Korea, South Korea an Taiwan, Inv. Nos. 701-TA-376, 377, and 379, and 731-TA-788-93 (review).

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increased, notwithstanding the order, "the volume of [such] imports was not likely to change to a significant degree as a result of the revocation of the [order]." [30]

Mexinox also argues that the Commission, with respect to Mexinox's pricing data, erred by resorting to speculation and failing to consider adequately the record evidence.[31] Mexinox states that the Commission ignored the fact that it oversold domestic producers in 77 of 93 quarterly comparisons. Mexinox further alleges that the Commission did not explain why it gave more weight to the pricing practices of the company during the period of the investigation than during the period of review.[32] Mexinox increased its sales during the review period despite its overselling of domestic prices, and it shifted its product mix toward higher value products. Mexinox reiterates that it exports to the United States represented a significant and increasing percentage of its total production as well as its annual sales revenue.[33] Accordingly, Mexinox argues that it would not undersell domestic prices since its "own financial health relies on strong prices in the U.S. market.[34]

2. Response of the Commission

In its Brief in opposition to the Mexinox Brief ("Commission Brief"), the Commission raises a number of arguments in support of its determination that the subject imports would not be likely to have no discernible effect in the order was revoked. The

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[30] Iron Metal Castings from India, Investigation Nos. 303-TA-13 (Review), 701-TA-249 (Review), and 731-TA-262, 263 and 265 (Review), USITC Pub. 3247 (Oct. 1999), at 12-13 (hereinafter referred to as Iron Metal Castings.).

[31] Mexinox Brief at 20.

[32] Mexinox Brief at 21.

[33] *Id*. at 23-24.

[34] *Id*. at 25.

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Commission points out that the United States Court of International Trade ("CIT") has ruled that "the standard for no discernible adverse impact presents a relatively low threshold."[35]

The Commission agrees with Mexinox that its exports have a substantial presence in the U.S. market. Both before the order and during the period of investigation, imports from Mexico increased while the domestic industry's share of the market decreased. Contrary to the assertions of Mexinox that there was no link between its production level and capacity utilization and its exports to the United States, the Commission points out that the record indicated that during each of the years 2002, 2003, and 2004, the company's production increased and its exports to the United States increased as well.[36] Furthermore, the Commission argues that Mexinox increased its production, leading to increasing subject imports from Mexico. The Commission cites the decision of the CIT that export orientation along with the ability to shift exports are sufficient to sustain a finding of discernible adverse impact.[37]

In response to Mexinox's argument that production restraints limited the company's ability to increase it utilization of capacity, the Commission states that its determinations on capacity utilization were based upon Mexinox's questionnaire response.[38] The questionnaire specifically stated that the respondent should indicate the average production capacity based upon the level or production that its establishments could reasonably have expected to attain during the specified periods. The Commission

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[35] Usinor Industeel, S.A. v. United States, slip op 03-118 at 7 (Ct. Int'l Trade 2003) ("[A]n adverse impact, or harm, can be discernible but not rise to a level sufficient to cause material injury."

[36] Commission Brief at 33, citing Table IV-12 of the CR

[37] Indorama Chemicals v. Int'l Trade Comm., slip op 02-115 at 15 (Ct. Int'l Trade 2002).

[38] Commission Brief at 36.

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argues that no where in that response did the company suggest that the percentage capacity utilization figures were not accurate.[39] The Commission also pointed out that Mexinox had increased its capacity over the review period.[40]

In response to Mexinox's argument that imports are not likely to increase following the revocation of an order where there is already a significant volume of imports, the Commission argues that the CIT has upheld its consideration of all likely subject imports, not just the increase that is likely to occur.[41] With respect to the reference made by Mexinox to language in the Irons Metal Castings investigation to the effect that where imports have increased under the order, they are unlikely to increase significantly upon its revocation, the Commission pointed that determinations of the Commission are *sui generis* with limited precedential value, given the unique set of variables considered in different cases. Furthermore, the Commissioners composing the majority in this SSSS case explained why they disagree with the earlier Iron Metal Castings approach and why they believed that the correct approach was to consider all subject imports rather than just the potential increase in subject imports.[42]

As regards the pricing policies of Mexinox during the period of investigation, the Commission points out that Congress directed the agency, in making its sunset determination, to take into account the pre-order pricing policy of the foreign

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[39] *Id.* at 37.

[40] Views of the Commission at 15.

[41] Cogne Acciai Speciali S.P.A., slip op. 05-122, at 9 (2005 WL 2217426): NMB Singapore V. United States, 288 F. Supp. 2d 1306, 1335 (Ct. Int'l Trade 2003); Indorama Chemicals, slip op. 02-105 at 15 (2003 WL 1338983 at *6)(Ct. Int'l Trade 2002).

[42] Commission Brief at 43-44.

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manufacturers.[43] The decrease in the level of price underselling during the period of review may actually be a result of the order. In the first year after the order was issued, Mexinox oversold in 100 percent of the sales comparisons, as compared with underselling in a substantial majority of sales during the years preceding the order.[44] The Commission also references testimony by the CEO of ThyssenKrupp GmbH, Mexinox's parent, that it had to change its "philosophy, realize that to stay within the dumping laws, we had to adjust."[45] Nevertheless despite the order, Mexinox did continue to undersell during the period of review.[46]

Finally, argues the Commission, Mexinox's argument that it would not jeopardize its primary foreign market through aggressive price underselling is belied by the fact that it conducted such pricing practices during the period of investigation, with a concomitant gain in market share, a period when the United States was also its primary foreign market.[47]

3. Panel Conclusion

As pointed out in the Commission Brief, as well as in the Briefs submitted by Allegheny/AK Steel, the record indicates that Mexinox was a dominant supplier of SSSS to the U.S. market and that the domestic market accounted for a substantial portion of the company's sales and revenues. In addition, Mexinox increased its production and sales

[43] Statement of Administrative Action at 884, H.R. Rep. No. 103-316, vol. I (1994). ("hereinafter referred to as the "SAA").

[44] Commission Brief at 46-47.

[45] Hearing Transcript at 268 (PD 259)
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[46] *See* Table V-11, CR at V-30.

[47] Commission Brief at 51

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to the United States during the period of review, as well as during the period of the original investigation. Mexinox also had unused capacity which would enable it to further increase exports to the U.S., in as much as its capacity of utilization during the period of review was less than that in 2004. Furthermore, Mexinox carried on significant price underselling during the period of review and, while the amount of underselling declined following the order (and likely as a result of it), price underselling did continue.

The Panel notes that in its Brief in Reply to the briefs of the Commission and Allegheny/AK Steel ("Mexinox Reply Brief") Mexinox again argues that the Commission placed too much emphasis on the circumstances existing during the period of review in light of alleged changes in circumstances during the period of sunset review.[48] The Panel is of the opinion that the Tariff Act requires the Commission to consider events occurring during the period of investigation. Furthermore, whether or not circumstances changed during the period of sunset review, the Panel concludes that there remains substantial evidence on the record to sustain the Commission's conclusions regarding conditions existing during that period as well.

The Panel concludes that the Commission's determination that subject imports from Mexico would not be likely to have no discernible adverse impact if the order were to be revoked is supported by substantial evidence on the record and is otherwise in accordance with law.

B. Imports Likely To Compete - Fungibility

The Tariff Act provides that "[T]he Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect

[48] Mexinox Reply Brief at 9-11.

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to which sunset reviews were initiated on the same day, if such imports would be likely to compete with each other and with the domestic like products in the United States market."[49] In determining whether the subject imports would be likely to compete with each other, the Commission traditionally considers four subfactors:

(1) the degree of fungibility between the imports from different countries and between imports and the domestic like product;

(2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

(4) whether the imports are simultaneously present in the market.

In examining these factors, the Commission bears in mind that only a "reasonable overlap" of competition is required.[50] "Cumulation does not require two products to be highly fungible."[51] Likewise, "completely overlapping markets are not required."[52]

1. Arguments of Mexinox

Mexinox does not challenge the Commission's affirmative findings with respect to geographic overlap, channels of distribution, or simultaneous presence in the market. Mexinox disputes the Commissions findings with respect to fungibility and with respect to certain other considerations relied upon by the agency.[53]

[49] 19 U.S.C. § 1675a(a)(7).

[50] Review Determination at 11 n.33 (citing, *e.g.* Wieland Werke, AG v. United States (718 F.Supp. at 52).

[51] Goss Graphics System, Inc. v. United States, 33 F. Supp. 2d at 1087, *aff'd* 216 F.3d 1357 (Fed.. Cir. 2000).

[52] Wieland Werke, n 30.

[53] Mexinox Brief at 30.

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While the subject imports from Mexico and the other respondent countries as well as the domestic SSSS did conform with common AISI grades, Mexinox argues that the Commission failed to consider other significant factors, such as surface finishes, widths and gauges, and coatings, that differentiated the Mexican product from that produced by other foreign suppliers and domestic producers.[54] In addition, the Commission failed to consider the fact that producers in the various foreign countries concentrated on different segments of the market, including value-added products, specialized polish finishes, aluminized grades, etc. Mexinox cited questionnaire responses from various U.S. purchasers indicating that product from different sources was not always interchangeable.[55] In general, alleges Mexinox, the Commission focused on grade alone, rather than differentiating factors.

Mexinox alleges that, in the case of France and the United Kingdom, the Commission declined to cumulate their exports based upon differences in physical characteristics, even though the products were produced to common AISI grades.[56] Mexinox also argues that the questionnaire responses submitted by a majority of importers and purchasers indicated that the subject imports from Mexico were only sometimes or never interchangeable with the domestic like product.[57]

[54] *Id*. at 32.

[55] CR at II-24-II-25.

[56] Mexinox Brief at 35.

[57] *Id*. at 36.

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2. Response by the Commission

The Commission first states that Mexinox is precluded from raising the issue of overlap of competition because it never argued that issue in the underlying sunset investigation.[58] The Commission points out that the courts have recognized that "[a] litigant may not raise an issue for the first time on appeal."[59]

The Commission also argues that there is no requirement that a finding of overlap of competition be based upon all four of the criteria listed above. These factors are neither exclusive nor determinative.[60] Accordingly, the Commission argues that the Panel could affirm the agency's finding on overlap of competition on the basis of the three factors that Mexinox does not contest.

With respect to the merits of Mexinox's arguments on overlap of competition, the Commission states that only a reasonable overlap of competition is required to meet the cumulation requirement.[61] The Commission found that the domestic like product and subject imports were generally substitutable. Both domestic and imported products were produced to AISI and ASTM specifications and common grades of SSSS were sold by both domestic and subject producers.[62] According to its Brief, SSSS products were sold to service centers which generally handle fungible goods. In addition, most purchasers reported that the subject imports and domestic SSSS were frequently or sometimes

[58] Commission Brief at 54.

[59] Cemex S.A. v. United States, 790 F. Supp. 290,296 (Ct. Int'l Trade 1992). *See also* Wieland Werke, 718 F. Supp. at 55.

[60] Indorama Chemicals, slip op. 02-105 at 17 (2003 WL 1338983 at *8) (Ct. Int'l Trade 2002) (citing Goss Graphics Sus., Inc. v. United States, 33 F. Supp. 2nd 1082, 1086 (Ct. Int'l Trade 1998). aff'd, 216 F.3rd 1357 (Fed. Cir. 2000).

[61] *See* Mukand Ltd., 937 F. Supp. at 916 (Ct. Int'l Trade 1996); Wieland Werke, AG, 718 F. Supp. at 52 ("Completely overlapping markets are not required."); United States Steel Group, 873 F. Supp. at 685.

[62] Commission Brief at 58-59.

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interchangeable.[63] In particular, a majority of purchasers reported that the subject imports from Mexico were always or frequently interchangeable with subject imports from the other seven subject countries.[64] In addition, the majority of importers, who are generally more biased than purchasers, reported that Mexican subject imports were always frequently or sometimes interchangeable with the domestic SSSS.[65]

The Commission also argues that the pricing data collected from the questionnaire responses indicated that Mexinox had sales in the majority of the commodity products selected for the acquisition of the pricing information. In addition, a significant percentage of quarterly price comparisons indicated that there was competition between the subject imports from Mexico and domestic SSSS.[66] Witnesses form Mexinox had also testified at the Commission Hearing that the company produced products produced by domestic companies.[67] The Commission further argues that it had no reason to investigate Mexinox's more specialized products since the record demonstrated that the company competed with a wide range of SSSS in the domestic market.[68]

With respect to the decision not to cumulate subject imports from the France and the United Kingdom, the Commission alleges that it differentiated imports from these countries on factors other than differences in physical characteristics. In the case of France, the primary factor for differentiating of subject imports from that country was

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[63] *Id*. at 59.

[64] *See* CR Table at II-9.

[65] *Id*.

[66] *See* CR Table V-3 at V-13 - V-23.

[67] Sunset Hearing Transcript at 230 (PD 259).

[68] Commission Brief at 67.

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pricing behavior that differed from the prices of other subject imports.[69] With respect to the United Kingdom, the primary basis for differentiating subject imports from that country was the declines in volumes of shipments to the United States, both during the period of investigation and during the sunset investigation period of review. Imports from the United Kingdom were also primarily concentrated in a specialty product and the UK producer did not increase its production capacity. These factors, rather than differences in grade and physical characteristics, differentiated the UK imports from imports from the other subject countries.[70]

3. Panel Conclusion

The Panel determines that the record confirms a fungibility of the subject merchandise and domestic SSSS as confirmed by sales comparisons of commodity products as well as questionnaire responses of both purchasers and importers, among other factors. The Panel concludes that the Commission's determination that the subject imports would be likely to compete with each other and with the domestic like product is supported by substantial evidence on the record and is otherwise in accordance with law.

C. Exercise of Discretion to Cumulate

The Tariff Act provides that the Commission may cumulatively assess the volume and effect of subject imports from all countries in sunset reviews provided that the other statutory requirements are met.[71] In other words, even if the Commission determines that there is a likelihood of discernible adverse effect and that the subject imports would be

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[69] Views of the Commission at 19.

[70] *Id*. at 19-20.

[71] 19 U.S.C. § 1675a(a)(7) (2000)

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likely to compete with each other and with domestic SSSS, the agency may still choose to cumulate or not to cumulate at its discretion.

1. Arguments of Mexinox

Mexinox argues that the Commission determined to exercise its discretion to cumulate Mexican imports with other subject imports based "on the erroneous premise that Mexican imports and subject imports from other countries would compete under similar conditions of competition.[72] Mexinox alleges that the Commission failed to consider the "overselling" price policy of the company during the sunset period of review.[73] Mexinox argues that the Commission was not consistent in its consideration of the pricing behavior of the United Kingdom, whose imports were not cumulated, with that of Mexico.[74] Mexinox stresses that its is a North American producer in an integrated market and that, unlike other subject countries, it bases its pricing policies upon formulas developed by U.S. producers. Furthermore, its distribution system mirrors that of U.S. producers and differs from that of other subject producers.[75] Mexinox points out again that the majority of its sales and revenues are in and from the U.S. market, unlike other subject producers.[76]

[72] Mexinox Brief at 40. The Panel notes that many of the arguments raised by Mexinox in opposition to the Commission's decision to cumulate are, in large part, the same arguments raised by the company in opposition to the Commissions conclusions on overlap of competition (*supra*).

[73] Mexinox Brief at 40-41.

[74] *Id*. at 42.

[75] *Id*. at 43-44.

[76] *Id*. at 45-46.

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Mexinox states that its steady increase in imports through the period of review stands in contrast to the imports from other subject countries.[77] The company reiterated that its shipments accounted for a significant portion of total subject imports. Mexinox cites a previous Commission determination in which it did not cumulate imports from France in light of the country's "solid presence" in the U.S. market and that it remained in the market after the order in contrast to other countries whose shipments decreased.[78] Mexinox cites other Commission determinations wherein the agency did not cumulate subject imports on the basis of differences in market share and volume trends.[79]

Mexinox further argues that the Commission failed to consider that the policy of the parent ThyssenKrupp companies was to have their subsidiaries serve regional markets. Thus, Mexinox would focus on the North American market and the European subsidiaries would focus on European markets.[80] Mexinox argues that this policy is a factor against cumulation. Mexinox notes that the Commission referenced its sunset determination in Electrolytic Manganese Dioxide from Greece and Japan[81] in support of its assertion that common ownership was a factor in favor of cumulation. Mexinox argues that the sales policies of the parent corporation and its various subsidiaries was different than that of ThyssenKrupp. Furthermore, the company notes that dissenting Commissioner Askey pointed out that "it is more reasonable to assume that a corporate

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[77] *Id*. at 47.

[78] Stainless Steel Wire Rod from Brazil, France, India and Spain, USITC Inv. Nos. 701-TA-178 and 731-TA-636-638, USITC Pub. 3323 (July 2000) at 11.

[79] Mexinox Brief at 48-49.

[80] Mexinox Brief at 50-54.

[81] Views of the Commission at 20, n. 147 (Prop. Doc. #299)(citing Electronic Manganese Dioxide from Greece and Japan, Inv. Nos. 731-TA-406 and 408 (Review), USITC Pub. 3296 (May 2000).

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parent would establish a facility in a country for the purpose of making sales to that country and its neighboring countries" and that they would attempt to minimize their level of competitive overlap.[82]

2. Response of the Commission

The Commission points out that the agency's decision whether or not to cumulate is discretionary and that "the statute places no limitation on that discretion."[83] The CIT has upheld the Commission's exercise of discretion even when the only explanation provided for the exercise of discretion was that the statutory prerequisites were met.[84] The Commission states that it exercised its discretion to cumulate subject imports from Mexico with five other countries because, as the record demonstrates, in the original investigation the subject imports from the subject countries other than France and the United Kingdom:

> (1) increased either from 1997 to 1998 or from 1996 to 1998 (or both) and (2) undersold prices of the domestic product in approximately one-half or more of price comparisons. The industry in each of the six countries had also increased capacity during the period of review. The Commission noted moreover, with respect to subject imports from Mexico, Italy and Germany, that the record indicated that exporters in these three countries, who are under joint ownership and control of the ThyssenKrupp Group, coordinate their production and exports.[85]

The Commission notes that Mexinox points to other factors, such as examples of overselling and large share of the market, that do not support the conclusion to cumulate. The Commission argues that it does not need to rely on any particular factors in

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[82] *Id*. at 9, n.41 (dissenting Views of Commissioner Askey).

[83] 19 U.S.C. § 1675a(a)(7) (2000).

[84] Ugine-Savoie Imphy, 248 F. Supp. 2d at 1223.

[85] Commission Brief at 71.

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determining whether to exercise its discretion to cumulate. The Commission further argues that the cases cited by Mexinox as precedent requiring that the Commission engage in a particular analysis actually manifest that the Commission has a wide latitude in determining how and where to exercise its discretion to cumulate. The Commission's exercise of discretion was upheld in every case cited by Mexinox.[86]

With respect to the pricing of French subject imports, the Commission points out that, unlike Mexico and the other subject countries, France was overselling in the U.S. market prior to the imposition of the orders.[87] Mexinox increased its overselling after the orders were issued. With respect to the United Kingdom, subject imports from that country could be distinguished from those from Mexico and the other countries on the bases of volume, focus on limited products, and capacity.[88]

As regards Mexinox's allegation that it produced and sold in an integrated North American market, the Commission argues that that fact is irrelevant to the statutory inquiry underlying a sunset review. The Commission cited an earlier NAFTA panel sunset determination in which it held "[w]hile Complainant's description of the integration of the North American industry may be accurate, it does not deal with the question of whether the lifting of the dumping order would have a discernible adverse impact on the U.S. industry.[89]

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[86] *Id*. at 72.

[87] *Id*. at 74.

[88] *Id*. at 75.

[89] In the Matter of Corrosion-Resistant Carbon Steel Flat Products from Canada, Full Sunset Review, USA-CDA-00-1904-11 (Oct. 19, 2004) at 23.

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According to the Commission, the purpose of cumulation is to address the concern that a domestic industry could be injured by the "hammering effect" of unfairly traded imports from multiple countries, an effect that could be obscured if subject import levels were reviewed on a country-by-country basis.[90] The fact that Mexinox's sales to the United States are significant is not a reason for determining not to cumulate subject imports from that country.[91]

With respect to other arguments raised by Mexinox, the Commission counters that the volume of the subject imports that were cumulated were similar, with an upward trend prior to the orders and a relative decline during the period of review. In addition, Mexinox has not established that there is any agency practice of not cumulating where there is some disparity in the level of imports from subject countries. The CIT has held with regard to the agency's determination in Stainless Steel Wire Rod that "[i]t is difficult to establish agency practice in sunset reviews since the presence of a specific factor in a prior sunset review is not dispositive of how a factor is interpreted in the current sunset review…."[92]

With regard to the issue of common ownership, the Commission notes that the chief executive of ThyssenKrupp Stainless GmbH testified that sales and marketing for the three companies is closely coordinated.[93] Because they act as a unit, the Commission treated the three exporters as a unit.[94] In addition, the Commission states that the pricing

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[90] Cogne Acciai Speciali S.P.A., slip op. 05-122 at 7 (2005 WL 2217426 at *3).

[91] Commission Brief at 77.

[92] Ugine-Savoie Imphy, 248 F. Supp. 2d at 1220.

[93] Sunset Hearing Transcript at 226 (PD 259).

[94] Commission Brief at 80.

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data in the record indicates that imports from Germany, Italy and Mexico did compete amongst themselves.[95]

3. Panel Conclusion

Given the latitude provided the agency in the Tariff Act to exercise discretion in determining whether or not to cumulate and given the evidence in the record in support of the agency's findings, the Panel concludes that the Commission's determination to exercise its discretion to cumulate is supported by substantial evidence on the record and is otherwise in accordance with law.

D. Conditions of Competition

In determining whether material injury is likely to continue or recur, the Commission is directed under the Tariff Act to consider relevant economic factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[96] It should be noted that, having determined that Mexican imports should be cumulated with other subject imports, the determination of the Commission with respect to conditions of competition and all other factors considered in determining whether revocation of the orders would be likely to lead to a continuation or recurrence of material injury, is based upon an analysis of all subject imports from the six cumulated countries combined.

The Commission found that the conditions of competition during the original period of investigation remained largely the same as during the period of review. Demand increased during both periods (although demand in 2004 was below that in

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[95] *Id.* at 81.

[96] 19 U.S.C. § 1675a(a)(4) (2000).

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1999), price was among the most important factors in purchasing decisions, and there was general substitutability among the subject imports and domestic SSSS.[97]

1. Arguments of Mexinox

Mexinox argues that the Commission's determination on the fungibility and overlap of competition was in error, reiterating arguments raised by it in connection with its discussion on cumulation.[98] Mexinox also states that the Commission's finding that global SSSS capacity is likely to grow at a faster pace than global consumption is not supported by substantial evidence in the record.[99] The company argues that the Commission's conclusion was based upon information regarding capacity and consumption in China from only one source and that it failed to consider other contrary data on the record. Furthermore, the Commission considered a time frame that was imminent enough.[100]

2. Response of the Commission

With regard to the allegations of Mexinox regarding substitutability of subject imports with domestic SSSS, the Commission bases its conclusion upon the fact that commodity grade SSSS accounted for a significant portion of domestic production as well as the majority of subject imports.[101] The Commission again referenced evidence on the record regarding price comparisons, Mexinox's executives testimony, and the

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[97] View of the Commission at 25.

[98] Mexinox Brief at 55-56.

[99] *Id*. at 57-58.

[100] *Id*. at 59.

[101] Commission Brief at 86.

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Commission's Staff estimates on substitutability that it had raised in its discussion of cumulation.[102]

As regards global capacity and consumption, the Commission points out that the information relied upon by the Commission in its finding that global capacity was likely to increase more rapidly than global consumption was deemed to be an "appropriate data source" by Mexinox itself.[103] Mexinox also refers to the views of dissenting Commissioners. While their opinions may be a reasonable view of the evidence, states the Commission, that does not detract from the reasonableness of the Commission's majority opinion nor that the conclusion is not supported by substantial evidence on the record. Finally, with respect to the time frame, the Commission argues that a "reasonably foreseeable time" will vary from case to case and will normally exceed the "imminent" time frame applicable to a threat of injury analysis.[104]

3. Panel Conclusion

The Panel determines that the record indicates evidence of substitutability, the likelihood that the global capacity would increase at a greater rate than global consumption, and that the Commission's choice of a reasonable time frame was sufficiently imminent. The Panel concludes that the Commission's determination regarding the conditions of competition is supported by substantial evidence on the record and is otherwise in accordance with law.

[102] *Id*. at 87.

[103] Mexinox's Prehearing Brief at 8 n.10 (CD 214).

[104] Commission Brief at 92.

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E. Volume of Imports

In making its sunset review determination, the Commission is directed by the statute to consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked. [105] The Commission determined in the affirmative.

1. Arguments of Mexinox

Mexinox argues that the Commission erred in finding that there was excess capacity in Japan and Taiwan. No producers in either country had responded to the agency's questionnaires. The Commission based its conclusion on the fact that there was excess capacity during the period of the original investigation, but that there was no evidence of such excess during the period of review.[106] Mexinox states that since Korea was a neighbor of China and its companies were operating at a high level of capacity, the Commission should have found producers in Japan and Taiwan were also operating at high levels of capacity since they were also neighbors of China.[107]

Mexinox also argues that the Commission's conclusion that subject producers have an incentive to increase exports to the United States is unsupported by substantial evidence in the record.[108] Mexinox states that the Commission based this conclusion on three factors: (1) relative global prices render the United States a relatively attractive market, (2) growth in global SSSS capacity is likely to outpace growth in global production, and (3) subject producers have the capacity to shift production from cut-to-

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[105] 19 U.S.C. § 1675a(a)(2) (2000).

[106] Mexinox Brief at 60.

[107] *Id*. at 61 .

[108] Mexinox Brief at 62.

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length (“CTL”) SSSS to coiled SSSS. With respect to relative prices, Mexinox points out that the Commission itself acknowledged that “the record on relative U.S. and third market prices is mixed.”[109] Prices in Europe and certain Asian markets were generally higher than in the United States.[110] Furthermore, the Commission also noted that “existing customer relationships and business strategies would prevent a wholesale shift of focus by subject producers to the U. S. market regardless of relative pricing in different markets.”[111] Finally, Mexinox argues that the Commission’s analysis of price was based upon one limited product (Grade 304) and upon only one quarter of sales during the period of review.[112]

With respect to global capacity and consumption, Mexinox argues that the Commission’s determination is flawed and amounts to unwarranted speculation. In addition, the company states that the Commission’s finding that subject produces will have to shift exports to China’s to other markets because of growing production in that country is not supported by substantial evidence on the record.[113]

In its attack on the Commission’s determination on product shifting from coiled to CTL SSSS as a result of the orders, Mexinox points out that such a shift toward CTL was already occurring before the AD/CVD petitions were filed. In addition, Mexinox argues that the shift to CTL was due to the abandonment of that product section by the U.S.

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[109] View of the Commission at 32.

[110] Mexinox Brief at 63.

[111] Views of the Commission at 32.

[112] Mexinox Brief at 64-65.

[113] *Id*. at 67-69.

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domestic industry.[114] In addition, the smaller service centers and end users preferred to purchase CTL in any case. Mexinox prefers to sell CTL SSSS, a value added-product, and the relative ease of shipping coiled SSSS is not a factor for the company given its proximity to the United States.

Mexinox concludes its argument on volume by asserting that evidence of a mere incentive to ship the subject product is speculation on a potential outcome and not substantial evidence that the likely volume of imports would be significant if the orders were revoked.[115]

2. Response of the Commission

With respect to the level of capacity utilization in Japan and Taiwan, the Commission points out that the Tariff Act permits the agency to use "facts otherwise available" where respondents refuse to provide information. The Commission need not prove that the facts available are the best alternative information, only that they are information or inferences that are reasonable to use under the circumstances.[116] Moreover the Commission, consistent with the Tariff Act, routinely uses information from the original investigation.

During the original investigation period, Japanese and Taiwanese producers were not operating at the highest capacity, even in light of strong demand in China. In addition, the Commission had available information from other sources that indicated that

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[114] *Id*. at 68.

[115] Mexinox Brief at 71-72, citing another Commission determination that "the likelihood standard is not intended to predict whether a producer has an incentive to do something, but whether it will probably do it." Gray Portland Cement and Cement Clinker from Mexico, No. USA-MEX-2000-1904-10 (June 24, 2005) (" Cement from Mexico"), at 39.

[116] Commission Brief at 96.

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production had increased substantially in Japan.[117] The Commission argues that it was free to base its determination on this information, rather than attempt to draw analogies with respect to conditions in Korea. It is established law that the Commission has discretion in choosing its methodology for its analysis.[118]

With respect to relative prices in the United States and abroad, the Commission characterized the relative prices as mixed. Based on the mixed price comparisons, the Commission did find that there was an incentive for subject producers to shift some sales to the United States.[119]

Although customer relationships would prevent a wholesale shift of focus to the U.S. market, they would not prevent a significant shift of focus. In addition, there were a number of other factors relied upon by the Commission to support its conclusion of an incentive to shift sales to the United States, including the fact that there was a 45 percent increase in subject imports over the final three years of the period of review.[120]

The projected growth in capacity in China, and the concomitant decrease in the market available to subject exporters from other countries, was, in the view of the Commission, demonstrated by ample evidence in the record. Such evidence indicated a significant increase in capacity as compared with overall consumption in China.[121] Furthermore, the Commission states that Mexinox failed to offer definitive evidence that the existence of investments and joint ventures maintained in China by subject exporters

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[117] *Id*. at 98, fn. 314 and 316.

[118] See United States Steel Group v. United States, 96 F. 3rd 1352, 1361 (Fed. Cir. 1996).

[119] Commission Brief at 100.

[120] *Id*. at 101.

[121] *Id.*

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outside of the country would serve as a disincentive to shift production for sales to the United States where prices were higher.[122]

With respect to the potential for product shifting, from CTL to coiled SSSS if the orders were revoked, the Commission notes that the Tariff Act directs the agency to consider that potential in undertaking its sunset review.[123] Coiled SSSS is easier to produce and ship than CTL, which must be further processed. A significant portion of SSSS exports to the United States was in coiled form before the orders were issued. From 1998 to 2004, exports of CTL to this country tripled while subject exports of coiled SSSS declined.[124] Even though such a shift began before the orders were issued, the Commission argues that the significant shift following the orders, the ease of switching to coiled SSSS, and the desirability of the U.S. market, supports the agency's finding. Furthermore, the Commission notes that there was not a corresponding shift to CTL SSSS on the part of non-subject exporters.[125] With regard to Mexinox's argument that domestic producers abandoned the CTL market, the Commission notes that this was based upon assertions in the company's posthearing brief and not any cited data. Furthermore, a decrease in domestic production of CTL, if occurring, would be caused, at least in part, by the growth in cutting operations being undertaken by service centers.[126]

[122] *Id*. at 104.

[123] 19 U.S.C. § 1765a(a)(2)(D) (2000).

[124] Commission Brief at 105-106.

[125] *Id*. at 107.

[126] *Id*.

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3. Panel Conclusion

The Panel finds that there is evidence on the record manifesting increased production in several subject countries, price incentives to shift sales to the United States, growth of capacity in China, and potential for product shifting from CTL to coiled SSSS. The Panel concludes that the Commission's determination that the likely volume of cumulated subject imports would be significant if the antidumping and countervailing duties were revoked is supported by substantial evidence on the record and is otherwise in accordance with law.

F. Price Effects

In making its sunset review determination, the Commission is directed by the statute to consider whether the likely price effects of the cumulated subject merchandise would be significant if the order is revoked.[127] The Commission determined this issue in the affirmative.

1. Arguments of Mexinox

Mexinox first argues that the Commission erred in making its pricing finding because of lack of evidence to support the conclusion that Mexinox would be likely to undersell or otherwise adversely affect U.S. prices if the orders were revoked.[128] The company argues that the testimony of its officers relied upon by the Commission does not demonstrate an intention to alter pricing policy as a result of the issuance of the antidumping order. Mexinox also reiterates the argument that it raised with respect to the

[127] 19 U.S.C. § 1675a(a)(3) (2000).

[128] The Panel notes that the price analysis undertaken by the Commission would include the pricing of importers in all six of the subject countries.

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cumulation analysis to the effect that it oversold U.S. prices in the majority of quarters during the period of review.[129]

Mexinox argues that domestic prices increased in 2004 despite increases in the volume and market share of subject imports. The company noted that Commissioner Hillman, in her dissenting opinion, cited this factor as a reason for her negative injury finding in the investigation.[130] The company also argues that the subject exporters would not attempt to regain market share to the point where subject imports would place downward pressure on U.S. markets since they have outstanding commitments to their own home markers. In addition, Mexinox argues that the record demonstrates that increased imports would not adversely impact domestic prices because of growing demand in the U.S. market, which would permit domestic producers to pass increased raw materials costs through to purchasers.[131]

2. Response of the Commission

The Commission initially argues that conditions of competition make it more likely that the price effects of the cumulated subject imports would be significant in the reasonably foreseeable future if the orders were revoked. The SSSS from different sources are at least moderately substitutable and price continues to be one of the most important considerations in purchasing decisions.[132] The Commission further states that underselling occurred in almost two-thirds of the price comparisons during the original investigation and in the case of 41 percent of the comparisons made with the orders in

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[129] Mexinox Brief at 73-77.

[130] *Id*. at 77-78.

[131] *Id*. at 80.

[132] Views of the Commission at 34.

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place during the period of review.[133] While Mexinox's incidence of underselling declined after the antidumping order was issued, as referenced in the discussion on cumulation and volume effects, the record demonstrates that Mexinox adjusted its prices as a result of the issuance of the order.

Furthermore, since the cost of raw materials was increasing, the significant volume of imports found by the Commission to be likely would, through a combination of higher material cost and price depression, make it more difficult for the domestic industry to recover its costs even if demand grew only moderately, as forecast.[134]

Notwithstanding the fact that Mexinox oversold in the majority of its price comparisons during the period of review, the Commission noted that subject imports from the other five cumulated countries continued to undersell in the U.S. market in the majority of comparisons during the period of review. With respect to Mexinox's reaction to the antidumping order, despite its claim to the contrary, the Commission points out that the Chief Executive of the company stated that following receipt of the antidumping claim …"We had then to change our philosophy, realize that to stay within the dumping laws, we had to adjust."[135]

The Commission states that, contrary to the allegations of Mexinox, the agency did take into consideration the fact that demand in 2004 was increasing even as subject imports increased. The Commission noted these conditions but concluded that they were unlikely to continue.[136] The Commission explained that domestic consumption after

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[133] Commission Brief at 112-113.

[134] *Id.* at 113.

[135] Tr. at 268 (PD).

[136] Commission Brief at 119.

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2004 was forecast to grow “quite modestly” or “only slowly”, and that subject imports were substitutable for domestic SSSS, price was important in purchasing decisions, and that substantial underselling was still occurring despite the orders.[137]

With respect to Mexinox’s arguments relating to subject exporters commitments to their own home markets, the Commission responds that exporters in the five other subject countries continued to export significant percentages of their production. Furthermore, the record demonstrates that Mexinox increased its exports to the United States during the period of review by increasing its production and by shifting some exports from other foreign markets. It increased its share of the U.S. market despite the order and it was also expanding its product line by adding a bright-annealing line.[138]

3. Panel Conclusion

The Panel determines that there is evidence on the record indicating that SSSS from subject and domestic sources is substitutable, price underselling existed during the original investigation and the period of review, price is an important consideration in making purchasing decisions, domestic consumption was likely to decrease in 2005, and that exporters in subject countries continued to export significant percentage of their total production to the United States. The Panel concludes that the Commission’s determination that the likely price effects of cumulated subject imports would be significant if the antidumping and countervailing duties were revoked is supported by substantial evidence on the record and is otherwise in accordance with law.

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[137] *Id.*

[138] *Id.* at 120-121.

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G. Impact of Subject Imports

In making its sunset review determination, the Commission is directed by the statute to consider whether the likely impacts of the cumulated subject merchandise would lead to a continuation or recurrence of material injury if the antidumping and countervailing duty orders were revoked.[139] The Commission determined in the affirmative.

1. Arguments of Mexinox

Mexinox argues that the Commission erred in its finding on the impact of subject imports if the orders were revoked. Since the agency had determined that the domestic industry was not vulnerable to injury, Mexinox asserts that the Commission has a higher burden to fully articulate its reasons for reaching its impact finding. The company states that the Commission did not meet such burden.[140]

Mexinox further argues that since, in its view, the Commission's determinations on volume and price effects upon revocation are unsupported by substantial evidence on the record, the Commission's subsequent determination that volume and price effects would have a significant adverse impact on the industry is likewise unsupported by substantial evidence on the record.[141]

Focusing on the year 2004, Mexinox alleges that prices increased faster than the cost of goods, allowing domestic producers to pass on such costs to purchasers. Mexinox argues that the record indicates that prices can be expected to remain strong and that the Commission ignored such evidence in reaching its conclusions. Mexinox, citing the

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[139] 19 U.S.C. § 1675a(a)(1) (2000).

[140] Mexinox Brief at 81-82.

[141] *Id*. at 83.

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Cement from Mexico case, accuses the Commission of making its determination on the basis of an implicit assumption that an industry must be immune from injury before an order can be revoked.[142] The company concludes with the argument that the Commission failed to cite any evidence in support of its conclusion that the anticipated growth in consumption would not be sufficient to absorb the likely increase in future imports if the orders were revoked.[143]

2. Response of the Commission

The Commission states that, in determining whether continuance or recurrence of material injury is likely, the statute directs the agency to take into consideration a number of factors, including whether the industry is vulnerable to material injury. However, the statute provides that the presence or absence of any single factor shall not give decisive guidance with respect to the Commission's determination.[144]

In making its determination, the Commission first considered the impact of subject imports on the domestic industry during the original investigation. The Commission found that the domestic industry was forced to lower its prices when faced with increasing volumes of subject imports.[145] After the orders were issued in 1999, the industry was able to increase net sales values, operating margins, capacity utilization and market share during 1999 and 2000.[146] However, during the next several years, the domestic industry experienced negative trends in profits, market share and capacity

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[142] *Id*. at 83-84.

[143] *Id*. at 84.

[144] 19 U.S.C. § 1675a(a)(1) and (5) (2000).

[145] Commission Brief at 123.

[146] Views of the Commission at 35.

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utilization. Even in the strongest year of 2004, U.S. sales and shipments were below the levels of 1999.[147]

The positive performance of the industry in 2004 was the primary reason why the Commission determined that the industry was not vulnerable to material injury. However, the Commission also determined that the favorable conditions of 2004 were not likely to continue in 2005. In 2004, domestic consumption surged, but consumption was forecast to grow only modestly in the foreseeable future. Furthermore, a domestic supplier shut down operations in 2004, leading to temporary problems with domestic supply. In addition, material costs were expected to remain high. Finally, the modest growth in expected consumption was not likely to absorb the anticipated growth in the volume of imports.[148]

In the instant case, argues the Commission, the agency made no reference to immunity from injury and there is no basis in the Commissions views for concluding that the agency improperly weighed the condition of the industry or required that it be immune from injury in order for the orders to be revoked.[149] With regard to Mexinox's assertion that the Commission is required to quantify the magnitude of the likely growth in imports, the agency cited the finding of the CIT that "That level of precision is not required in sunset reviews, as the statute only requires the Commission to determine 'the likely impact of imports' on the domestic industry."[150] Despite the assertion of Mexinox to the contrary, the Commission points out that it cited directly to numerous forecasts and

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[147] *Id*. at 35-36.

[148] Commission Brief at 124-125 and 127-128.

[149] *Id*. at 130.

[150] Ugine-Savoie Imphy, 248 F. Supp. 2d at 1222.

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other evidence in the record in support of its findings, including forecasts provided by various parties, including Mexinox itself.[151]

3. Panel Conclusion

The Panel agrees with the Commission that evidence on the record demonstrates that the domestic industry was forced to lower prices in the face of growing volume of imports during the original investigation, the domestic industry was experiencing negative trends in profits, operating margins, market share, and capacity utilization in 1999 and 2000, and that domestic consumption was forecast to grow only modestly in the foreseeable future. The Panel concludes that the Commission's determination that the likely impact of the cumulated subject imports would lead to the continuation or recurrence of material injury if the antidumping and countervailing duties were revoked is supported by substantial evidence on the record and is otherwise in accordance with law.

H. General Conclusion

In general, the Panel finds that the arguments raised in Mexinox's Briefs and the evidence in the record cited in support of those arguments do not directly contradict or undercut the specific elements of evidence cited by the Commission in support of its findings in the review.

Rather, as a general matter, the record evidence cited by Mexinox could support different determinations in this case, as represented for example in the opinions of the dissenting Commissioners cited by the company. However, as indicated earlier: "The possibility of drawing two inconsistent conclusions from the evidence does not

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[151] Commission Brief at 131.

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prevent an administrative agency's finding from being supported by substantial evidence."[152] The CIT 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."[153] 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'"[154] Accordingly, this Panel is limited to determining whether the conclusions made by the Commission are supported by substantial evidence on the record, not whether there is evidence to sustain a difference conclusion.

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[152] Matsushita Electric Industrial Co. v. United States, 750 F. 2d 927, 933 (1984) (quoting [152] Consolo v. Federal Maritime Comm'n, 382 U.S. at 619-20.

[153] Koyo Seiko Co., Ltd. v. United States, 810 F. Supp. 1287, 12 (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)).

[154] 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. 348).

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VI. ORDER OF THE PANEL

For the foregoing reasons, the Commission's Review Determination is hereby AFFIRMED in all respects. The United States Secretary is ORDERED to issue a Notice of Final Panel Action at the appropriate time under the NAFTA Panel Rule 77(1).

ISSUE DATE: September 10, 2008

Signed in the original by:

Mark R. Sandstrom
Mark R. Sandstrom, Chairman

Mélida Hodgson
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