

BINATIONAL PANEL REVIEW
Pursuant to Article 1904 of the
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:
CERTAIN WELDED LARGE
DIAMETER PIPE FROM MEXICO

Secretariat File No.
USA-MEX-2007-1904-03

DECISION OF THE PANEL

January 18, 2011

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DECISION OF THE PANEL

I. INTRODUCTION

This case arises from a Request for Panel Review by United States Steel Corporation (“U.S. Steel”),² under Article 1904 of the North American Free Trade Agreement (“NAFTA”),³ of the negative final determination by the United States International Trade Commission (the “Commission” or “ITC”) in its five-year review (“sunset review”)⁴ of antidumping duties on Certain Welded Large Diameter Line Pipe (“CWLDLP”) from Mexico.⁵

CWLDLP is primarily used in oil and gas pipelines. There are three types of WLDLP subject to the order under review, distinguishable based on the method by which they are produced: (i) electric resistance welding (“ERW”) line pipe, (ii) helical submerged-arc welding (“helical SAW” or “HSAW”) line pipe, and (iii) longitudinally-welded SAW (“LSAW”) line pipe. Additionally, along with wall thickness and outside diameter, CWLDLP is differentiated by grade, reflecting the chemical composition and strength of the steel from which the pipe is made. Higher grades, such as X-80, provide greater pressure resistance and strength than lower grades, such as X-42.⁶

² U.S. Steel’s Req. for Panel Review, Doc. No. 1. Citations to documents on the panel docket refer to the non-propriety version unless otherwise specified. *See also Notice of First Request for Panel Review*, 72 Fed. Reg. 68,860 (Dec. 6, 2007).

³ North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993) {hereinafter NAFTA}.

⁴ *See* Tariff Act of 1930 § 751(c), 19 U.S.C. § 1675(c) (2006) (providing for five-year reviews).

⁵ Certain Welded Large Diameter Line Pipe from Japan and Mexico, USITC Pub. No. 395, Inv. Nos. 731-TA-919 and 920 (Review) (Oct. 2007) (the Commission’s public Determination, Views, and Staff Report) {hereinafter *Determination, Views, and SR*}.

⁶ For a more in-depth background discussion of CWLDLP, see *Views* at 3-4; *SR* at I-12 to 26.

U.S. Steel's complaint challenges the Commission's determination that revocation of the antidumping duty order on CWLDLP from Mexico would not likely lead to the continuation or recurrence of material injury to the U.S. welded large diameter line pipe industry within a reasonably foreseeable time.⁷ U.S. Steel takes issue with the Commission's decision not to cumulate subject imports from Mexico with subject imports from Japan.⁸ U.S. Steel further objects to the factual findings upon which the Commission based its negative determination, particularly those regarding the likely volume of imports and the production capacity of the Mexican industry.⁹ Additionally, U.S. Steel challenges the Commission's reliance on information submitted by a Mexican producer in response to a Commission questionnaire, which the producer later acknowledged was inaccurate and unsuccessfully sought to file a corrected questionnaire response after the Commission's final determination.¹⁰

The Panel, having had the benefit of extensive briefing and oral argument, now finds that the Commission's decision not to cumulate subject imports from Mexico and Japan was within the scope of its discretion and that U.S. Steel is barred from raising the issue of apparent discrepancies in the Mexican producers' reported capacity trends, having failed to exhaust its administrative remedies before the Commission.

However, the Panel takes judicial notice of the proffer of the revised questionnaire response and finds it appropriate that the Commission have an opportunity to reconsider its

⁷ See 19 U.S.C. § 1675a(a)(1) (establishing the legal standard applicable in sunset reviews); Compl., Doc. No. 4, at 5.

⁸ *Id.* at 3-4.

⁹ *Id.*

¹⁰ U.S. Steel's Br., Doc. No. 17, at 46-52.

findings and determination in light of this new evidence. Therefore, the Panel remands this case to the Commission for further consideration consistent with this opinion.

II. JURISDICTION

This Panel's jurisdiction derives from Article 1904 of NAFTA, which provides for review of final antidumping duty determinations by a binational panel in lieu of judicial review in domestic courts.¹¹ The scope of our jurisdiction, however, is limited to the question of whether the determination was made in accordance with United States antidumping law, defined as "the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the {United States} would rely on such materials."¹²

Under U.S. law, a challenge to the Commission's determination in this case could have also been brought in the U.S. Court of International Trade ("CIT").¹³ Recognizing that "[i]t is not the function of panels to make law or evolve law but to apply domestic law as they find it,"¹⁴ this Panel is required to apply U.S. law in the same manner as would the CIT.

III. PROCEDURAL HISTORY

On February 19, 2002, the Commission unanimously determined that an industry in the United States industry was materially injured by reason of CWLDLP imported from Mexico at less than fair value.¹⁵ On February 27, 2002, the U.S. Department of Commerce imposed an

¹¹ NAFTA art. 1904; *accord* 19 U.S.C. 1516a(g). *See also* NAFTA Annex. 1911 (defining the scope of Article 1904's application to include, as in this case, determinations by the Commission under Section 751 of the Tariff Act of 1930, as amended).

¹² *See* NAFTA art. 1904(2).

¹³ 19 U.S.C. § 1516a(a)(2).

¹⁴ *In the Matter of Pure Magnesium from Canada*, Secretariat File No. ECC-2003-1904-01USA, Decision of the Extraordinary Challenge Committee, (Oct. 5, 2004).

¹⁵ *See Certain Welded Large Diameter Line Pipe From Mexico*, 67 Fed. Reg. 8,556 (Feb. 25, 2002).

antidumping duty order on the subject imports.¹⁶ An antidumping duty order was also imposed on CWLDLP imports from Japan on December 6, 2001.¹⁷

On November 1, 2006, the Commission instituted sunset reviews of the antidumping duty orders on CWLDLP from Japan and Mexico¹⁸ and, based on the response of interested parties, determined on February 13, 2007 to conduct full reviews with respect to imports from both Japan and Mexico.¹⁹

On July 25, 2007, the Commission conducted a public hearing at which all persons who requested the opportunity to appear were allowed to do so.²⁰ Briefs and testimony were provided by seven interested U.S. parties and three interested Mexican parties.²¹ On October 16, 2007, the Commission issued its negative determination with regards to Mexico,²² triggering the mandatory revocation of the antidumping duty order on CWLDLP from Mexico.²³

¹⁶ *Antidumping Duty Order: Welded Large Diameter Line Pipe from Mexico*, 67 Fed. Reg. 8,937 (Feb. 27, 2002).

¹⁷ See *Certain Welded Large Diameter Line Pipe from Japan*, 66 Fed. Reg. 55,204 (Nov. 1, 2001); *Antidumping Duty Order: Welded Large Diameter Line Pipe from Japan*, 66 Fed. Reg. 63,368 (Dec. 6, 2001).

¹⁸ *Welded Large Diameter Line Pipe from Japan and Mexico*, 71 Fed. Reg. 64,294 (Nov. 1, 2006).

¹⁹ *Welded Large Diameter Line Pipe from Japan and Mexico*, 72 Fed. Reg. 6,746 (Feb. 13, 2007)

²⁰ *Determination*. A transcript of the hearing is available at [http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2007/welded_large_diameter_line_pipe_from_japan_and_mexico/PDF/Welded%20Large%20Diameter%20Pipe%20\(review\)%20Hearing.pdf](http://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations/2007/welded_large_diameter_line_pipe_from_japan_and_mexico/PDF/Welded%20Large%20Diameter%20Pipe%20(review)%20Hearing.pdf).

²¹ The domestic interested parties were the American Steel Pipe Division of ACIPCO, Berg Steel Pipe Corporation, Dura-Bond Pipe LLC, Evraz Oregon Steel Mills, Stupp Corp., U.S. Steel, and Camp-Hill Corporation. The Mexican interested parties were Tubacero S.A. de C.V. (“Tubacero”), Tuberias Procarsa S.A. de C.V. (“Procarsa”), and Tuberia Laguna S.A. de C.V. (“Tuberia Laguna”). Briefs and testimony were also provided by the Interstate Natural Gas Association of America, a trade organization representing purchasers of CWLDLP. See *Views* at 4-5.

²² *Certain Welded Large Diameter Line Pipe From Japan and Mexico*, 72 Fed. Reg. 59,551 (October 22, 2007). Commissioner Charlotte R. Lane dissented from the determination with respect to Mexico. *Determination* at n.3.

²³ 19 U.S.C. 1675(d)(2).

On November 21, 2007, U.S. Steel filed its request for review by a NAFTA Article 1904 Binational Panel and on December 18, 2007 filed its complaint in a timely manner.²⁴ Notices of appearance were filed by the Commission, as the Investigating Authority, and by Mexican producers Tubacero, Procarsa, and Tuberia Laguna (collectively, the “Mexican Respondents”).²⁵

On April 21, 2008, while the Panel was being established, counsel to the Mexican Respondents notified the Commission that Procarsa had submitted inaccurate information to the Commission in its May 30, 2007 response to the Foreign Producers Questionnaire regarding (i) its plans for future expansion or reduction in production levels or capacity, (ii) anticipated changes to its production, capacity, exports, or inventory if the antidumping duties were revoked, and (iii) its projections of capacity, inventories, production, or shipments for calendar years 2007 and 2008, if the duties remained in effect.²⁶ The Commission Secretary informed Procarsa’s counsel that the Commission could not accept the revised data because the record was closed.²⁷

On June 17, 2008, the NAFTA Secretariat announced the initial selection of Panel members.²⁸ U.S. Steel, the Commission, and the Mexican Respondents, and U.S. Steel filed

²⁴ See NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews § 39 (establishing rules for the filing of complaints).

²⁵ Notices of Appearance, Docs. No. 6, 7. The other U.S. interested parties from the underlying proceedings before the Committee declined to participate in the panel review. See Letter from Roger Schagrin, Schagrin & Associates, to NAFTA Secretariat, Doc. No. 10 (Jan. 15, 2008).

²⁶ See Letter from Jeffrey M. Winton to Marilyn R. Abbott, Secretary, U.S. Int’l Trade Comm’n (Apr. 21, 2008) (available as App. B to Comm’n’s Br., Doc. Nos. 22 (proprietary version), 23 (public version)). The letter explained that the inaccuracies were the result of Procarsa’s non-native English speaking employees incorrectly interpreting the relevant questions. See *id.* at 2 n.1.

²⁷ See Letter from Marilyn R. Abbott to Jeffrey M. Winton (Apr. 24, 2008) (available as App. A to Comm’n’s Br.).

²⁸ Notice of Panel Selection, Doc. No. 18.

initial briefs, and U.S. Steel filed a reply brief.²⁹ The Interstate Natural Gas Association of America, with permission of the Panel, also filed a brief as an *amicus curiae*.³⁰

After delays due to changes in Panel membership, a full Panel was reconstituted on December 12, 2009 and the review resumed.³¹ On July 22, 2010 a hearing was held before the Panel in Washington, DC, at which argument was heard on behalf of all participant parties, both in public session and, when required for the protection of confidential information, *in camera*.³² The Panel, after extensive deliberation and discussion, issued this decision on January 18, 2011.³³

IV. STANDARD OF REVIEW

The standard of review to be applied by the Panel finds its source in both NAFTA and relevant U.S. law. As described in Part II, *supra*, under NAFTA, we are obligated to determine whether the Commission's final determination was in accordance with U.S. antidumping law.³⁴ For the purpose of panel review, U.S. antidumping statutes, as amended from time to time, are explicitly incorporated into NAFTA.³⁵ As provided in NAFTA Article 1904(2), this Panel must determine if the Commission's determination

[W]as in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law

²⁹ See Docs. No. 13-17, 19, 22-29.

³⁰ See Br. of *Amicus Curiae*, Doc. No. 21.

³¹ Notice of Resumption of Panel Review, Doc. No. 41.

³² See Docs. No. 64 (public transcript), 65 (proprietary/closed transcript).

³³ As a result of the complex nature of the dispute and the need to translate its opinion into Spanish, the Panel issued three orders allowing itself additional time beyond what would otherwise have been an October 18, 2010 deadline for issuing its decision.

³⁴ See NAFTA art. 1904(2).

³⁵ *Id.*

consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

Further, pursuant to NAFTA Article 1904(3), this Panel is required to apply the standard of review and general legal principles that a U.S. court would apply in review of the Commission's determination. NAFTA Annex 1911 states that such legal principles include "standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies." This Panel must, therefore, apply the standard of review found in Section 516a(b)(1)(B) of the Tariff Act of 1930, requiring us to hold unlawful any "determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."³⁶

³⁶ 19 U.S.C. § 1516a(b)(1); *see* NAFTA Annex 1911 (defining "standard of review").

A. Substantial Evidence

The Commission's decision, as well as the findings upon which it is based, must be supported by substantial evidence.³⁷ The Supreme Court has defined substantial evidence as "more than a mere scintilla."³⁸ According to the Court, "[i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."³⁹ A plaintiff's ability to point to evidence "which detracts from the evidence that supports the Commission's decision" or the "possibility of drawing two inconsistent conclusions from the evidence" does not prevent a court from finding that the Commission's decision was supported by substantial evidence.⁴⁰ However, "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight."⁴¹

At the same time, it is not the role of a reviewing court to substitute its judgment for that of the Commission, nor to reweigh the evidence.⁴² Instead, we must uphold a decision supported by substantial evidence even if we "would have justifiably made a different choice had the matter been before [us]" *de novo*.⁴³ "Ours," explained the Court of Appeals for the Federal Circuit, "is only to review those decisions for reasonableness."⁴⁴ Finally, even if a subsidiary

³⁷ *Id.*

³⁸ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

³⁹ *Id.*

⁴⁰ *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933, 936 (Fed. Cir. 1984).

⁴¹ *Universal Camera*, 340 U.S. at 488.

⁴² *Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381.

⁴³ *Universal Camera*, 340 U.S. at 488.

⁴⁴ *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1995).

finding fails to meet the substantive evidence test, a Panel may still find the Commission's decision to be supported by substantial evidence on the record as a whole.⁴⁵

B. Otherwise in Accordance With Law

To be upheld by the Panel, the Commission's decision must meet both prongs of the standard of review; *i.e.*, it must be both supported by substantial evidence and otherwise in accordance with law.⁴⁶ In determining whether the Commission's interpretation of the governing statute is "in accordance with law", this Panel follows the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Chevron* mandates that where the statute is clear and unambiguous on its face, and the Commission interprets it accordingly, this Panel must defer to the Commission's interpretation. However, where the statute is silent or ambiguous with respect to the specific issue before it, this Panel must then determine whether the Commission reasonably construed the statute.⁴⁷ Moreover, this Panel must defer to the Commission's reasonable interpretation of the statute even if the Panel would have preferred another, as the "agency's interpretation need not be the only reasonable construction or the one that the court would adopt had the question initially arisen in a judicial proceeding."⁴⁸

The statutory provision for sunset reviews of antidumping duty orders requires the Commission to "determine whether revocation of an order... would be likely to lead to continuation or recurrence of material injury {to the domestic industry} within a reasonably

⁴⁵ *See id.* at 1364-65.

⁴⁶ *See* 19 U.S.C. § 1516a(b)(1) (establishing the two-prong standard of review).

⁴⁷ *Chevron*, 467 U.S. at 842-843.

⁴⁸ *Id.*

foreseeable time.”⁴⁹ The law recognizes that the effects of revocation “may not be imminent, but may manifest themselves only over a longer period of time.”⁵⁰

As part of its determination, the Commission is required to evaluate the likely volume, price effects, and impact of imports of the subject product if the antidumping duty order were revoked.⁵¹ In evaluating volume, the Commission must consider all relevant economic factors, including, *inter alia*, any likely increase in production capacity in the exporting country, existing unused capacity, or the possibility of facilities shifting production from other products.⁵² In evaluating price effects and impact on the industry, the statute requires the Commission to consider specific enumerated factors as well, though it also states that the presence or absence of any of these factors is not necessarily determinative.⁵³

V. STATEMENT OF THE ISSUES

U.S. Steel raises the following issues in its appeal of the Commission’s determination:

⁴⁹ § 1675a(a)(1).

⁵⁰ § 1675a(a)(5).

⁵¹ § 1675a(a)(1).

⁵² § 1675a(a)(2).

⁵³ § 1675a(a)(3)-(5).

1. The Commission acted contrary to law when it declined to cumulate subject imports from Mexico with subject imports from Japan even though it found that the statutory requirements for cumulation had been met—*i. e.*, that imports from Mexico were likely to have a discernible adverse impact on the U.S. industry in the event that the antidumping duty order on subject imports from Mexico was revoked, and that the subject imports from Mexico were likely to compete with the subject imports from Japan. The Commission did not cumulate the subject imports from Mexico with the subject imports from Japan because it found that the likely conditions of competition faced by imports from Mexico would differ from the likely conditions of competition faced by imports from Japan. That finding was unsupported by substantial evidence in the record and was otherwise not in accordance with law.⁵⁴
2. The Commission's reliance on the behavior of the Mexican producers when constrained by the antidumping duty order was unsupported by substantial evidence in the record and was otherwise not in accordance with law.⁵⁵

⁵⁴ U.S. Steel Complaint, PR 4, at 3.

⁵⁵ *Id.*

3. The Commission's decision to discount the weight to be given to the capacity data submitted by the Mexican producers, and its disbelief that these producers could ever achieve the capacity that they reported was unsupported by substantial evidence in the record and was otherwise not in accordance with law.⁵⁶
4. In finding that the likely price effects of the subject imports from Mexico would not be significant, the Commission relied heavily on its finding that the likely volume of imports would not be significant. This finding was unsupported by substantial evidence in the record and was otherwise not in accordance with law.⁵⁷
5. The Commission's finding that revocation of the order would not be likely to have a significant adverse impact on the U.S. industry was based on its erroneous findings with respect to the likely volume and price effect of imports from Mexico and its finding that the U.S. industry is not vulnerable to the recurrence of material injury. This finding was unsupported by substantial evidence and was otherwise not in accordance with law.⁵⁸
6. The Panel should take judicial notice of Procarsa's revised data submission and should require the Commission on remand to reconsider the earlier, incorrect data.⁵⁹

⁵⁶ *Id.* at 4.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ U.S. Steel Brief at 46-52.

In response, the Commission argues that:

1. The Commission has broad discretion regarding the decision whether to cumulate imports from different countries in sunset reviews.⁶⁰
2. U.S. Steel's arguments regarding the Commission's conditions of competition analysis are merely an alternate interpretation of the data and an invitation for the Panel to engage in an impermissible reweighing of the evidence.⁶¹
3. U.S. Steel failed to exhaust its administrative remedies before the Commission and therefore cannot raise the issue of alleged discrepancies in the Mexican producers' reported capacity trends before the Panel.⁶²
4. The other findings upon which the Commission based its conclusions regarding the volume of imports were supported by substantial evidence on the record.⁶³
5. The Commission's conclusion on volume was not the sole basis for its conclusions regarding price effects and impact on the domestic industry, which are supported by substantial evidence on the record as a whole.⁶⁴

⁶⁰ ITC Brief at 40-59.

⁶¹ *Id.* at 50.

⁶² *Id.* at 70-74.

⁶³ *Id.* at 75-89.

⁶⁴ *Id.* at 90-96.

6. Procarsa’s revised data submission is not part of the administrative record⁶⁵ nor does it meet the criteria for judicial notice to be taken.⁶⁶ Even if the Panel took judicial notice of the revised data, it is not sufficiently probative to warrant remand.⁶⁷

VI. DISCUSSION AND ANALYSIS

A. The Commission Properly Exercised its Discretion not to Cumulate Subject Imports from Mexico and Japan

The ITC conducted the proceeding at issue in this case under the “sunset review” provisions of the antidumping law. In a sunset review, the ITC is required to “determine whether revocation of an {antidumping duty} order would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time.”⁶⁸ In making that determination, the ITC “shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the {domestic} industry if the order is revoked . . .”⁶⁹ The ITC’s review in this case covered subject imports from Japan and Mexico. The statute provides that in such cases the ITC may cumulatively assess the subject imports from all of the countries under review if certain conditions are met:

[T]he Commission may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to which reviews under section 1675(b) or (c) of this title were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in

⁶⁵ *Id.* at 98-102.

⁶⁶ *Id.* at 102-106.

⁶⁷ *Id.* at 106-118.

⁶⁸ 19 U.S.C. §1675a(a)(1).

⁶⁹ *Id.*

the United States market. The Commission may not cumulatively assess the volume and effects of imports of the subject merchandise in a case in which it determines that such imports are likely to have no discernible adverse impact on the domestic industry.⁷⁰

The Commission did not cumulate subject imports from Japan and Mexico, but instead made separate determinations with respect to imports from each country. It determined that revocation of the order on CWLDP from Japan would be likely to lead to a continuation or recurrence of injury to the domestic industry, but issued a negative determination regarding imports from Mexico by a 5-1 vote.⁷¹ As a result, the order on CWLDP from Japan remained in effect and the order on CWLDP Mexico was revoked.

U.S. Steel contests the ITC's refusal to cumulate. It argues that the Commission acted contrary to law when it refused to cumulate the subject imports even though the Commission majority⁷² specifically found that the statutory factors for cumulation were met—*i.e.*, (i) there would likely be a reasonable overlap of competition between subject imports from Japan and Mexico and between these subject imports and the domestic like product if the orders were revoked; and (ii) revocation of either order would have a discernible adverse effect on the domestic industry. The majority refused to cumulate because it found that there were differences in the condition of competition of the two countries (*i.e.*, differences in product range, export-

⁷⁰ 19 U.S.C. § 1675a(a)(7).

⁷¹ See *Certain Welded Large Diameter Line Pipe from Japan and Mexico*, USITC Pub. 3953, Inv. No. 731-TA-919 and 920 (Oct. 2007).

⁷² The majority consisted of Commissioners Williamson, Lane, and Aranoff. Chairman Pearson and Commissioner Okun did not consider either of the statutory factors but based their determination not to cumulate solely on the differences in the conditions of competition between imports from Mexico and Japan.

versus home market-orientation, capacity trends, and presence in the U.S. market during the period of review.)⁷³

U.S. Steel argues that the Commission acted contrary to law when it based its decision on the conditions of competition because the statute does not permit the Commission to consider this factor in deciding on cumulation. While acknowledging that the Commission has “some discretion” in deciding whether imports should be cumulated in sunset reviews, it contends that if the Commission considers “extraneous matters” such as conditions of competition, it must explain how such factors are relevant to the purpose of cumulation—*i.e.*, to ensure that the Commission’s causation analysis captures the “hammering effect” on the domestic industry of imports from multiple sources.⁷⁴ It contends that Commissioners Pearson and Okun did not even consider the statutory factors that are designed to ensure that this hammering effect is captured, and that none of the commissioners explained how this type of analysis is relevant to the purpose of cumulation.⁷⁵

The Commission and the Mexican respondents argued that cumulation is not mandatory in sunset reviews, and the Commission has discretion to consider factors other than the factors specified in the statute when deciding whether to cumulate subject imports from multiple countries in sunset reviews.⁷⁶ The Commission cited several decisions of the CIT holding that cumulation is not mandatory in sunset reviews even if imports from different countries compete

⁷³ USITC Pub. 3953 at 13-14.

⁷⁴ U.S. Steel Brief at 14-15.

⁷⁵ *Id.*

⁷⁶ ITC Brief at 40-45; Brief of Tuberias Procarsa, S.A. de C.V., Tubacero, S.A. de C.V., and Tuberia Laguna, S.A. de C.V. at 13-19.

with each other and with the domestic industry.⁷⁷ In its reply brief, U.S. Steel noted that a week after the ITC filed its brief, the CIT adopted the ITC's reasoning in an appeal of another sunset review.⁷⁸ U.S. Steel urged the panel to reject the CIT's reasoning in that case, and it pointed out that the issue of the ITC's discretion was pending before the Court of Appeals for the Federal Circuit in *Nucor Corp. v. United States*, Court No. 07-00071, and *Nucor Corp. v. United States*, Consol. Court No. 07-00454.⁷⁹

On May 12, 2010, the Commission requested that the Panel take note of several court decisions that were issued after the July 28, 2008 filing of the Commission's responsive brief. Included was the decision of the Court of Appeals for the Federal Circuit in *Nucor Corp. v. United States*, Court Nos. 2009-1234,-1235 (Fed. Cir. Apr. 7, 2010.) The Commission pointed out that in *Nucor* the Federal Circuit rejected arguments similar to those raised by U.S. Steel in this case. The Federal Circuit held that the statute gives the Commission the discretion not to cumulate imports in sunset reviews because of differences in conditions of competition even when the imports compete with each other and with domestic like products in the United States market. The Court concluded that "the ITC's consideration of the likely different conditions of competition in deciding whether to cumulate the subject imports as part of the sunset review determination was a reasonable and permissible interpretation of the discretion conferred by section 1675a(a)(7)." *Id.* at 10.

The Federal Circuit's decision is binding on the Panel. Article 1904.2 of NAFTA requires panels to apply "the relevant statutes, legislative history, regulations, administrative

⁷⁷ *Id.* at 42.

⁷⁸ U.S. Steel Reply Brief, at 33-35, citing the CIT's decision in *United States Steel Corp. v. United States*, Slip Op. 08-82, at 6 n.4

⁷⁹ *Id.* at 34 n. 99.

practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.” The decision of the Federal Circuit in *Nucor* is the controlling judicial precedent on the issue of the ITC’s discretion regarding cumulation in sunset reviews.⁸⁰ The Panel therefore holds that the ITC acted within its legal authority when it determined not to cumulate subject imports from Japan and Mexico because of differences in conditions of competition.

B. U.S. Steel Cannot Raise the Apparent Discrepancies in the Mexican Producers’ Asserted Capacity Trends, Having Failed to Exhaust its Administrative Remedies

The Mexican producers reported higher capacity figures in the sunset review than they did in the original investigation.⁸¹ However, the Commission found that the capacity “only appears {to be} a different methodology to calculate capacity in the review.”⁸² The Commission decided not to give “authoritative weight” to the reported capacity data because “it is unlikely the Mexican industry could ever achieve full utilization of the nameplate capacity it has reported.”⁸³ Thus, the Commission disregarded the capacity reported by the Mexican producers because the reported capacity information did not constitute a realistic assessment of actual, useable capacity.⁸⁴

⁸⁰ During the oral argument U.S. Steel’s counsel stated that U.S. Steel does not intend to address the issue of the Commission’s discretion further now that the issue has been decided by the Federal Circuit. Transcript of Oral Argument at 9.

⁸¹ In this section the Panel will only address the claim regarding the information on capacity that was provided by the Mexican CWLDLP producers during the course of the investigation. The new capacity data submitted by Procarsa after the investigation concluded will be addressed in the section regarding whether the Panel should take judicial notice of such data.

⁸² ITC Determination at 34, n. 258.

⁸³ *Id.* at 35.

⁸⁴ U.S. Steel Brief at 34.

U.S. Steel contends that this finding is unsupported by substantial evidence because the questionnaire responses demonstrate that each Mexican producer reported its actual operating capacity in accordance with the instructions in the questionnaires, and did not report theoretical or nameplate capacity.⁸⁵ The Commission argues that U.S. Steel is barred from raising this issue before the Panel because it failed to exhaust its administrative remedies.

The ITC claims that U.S. Steel failed to exhaust its administrative remedies with respect to the issue of Mexico's CWLDLP capacity because U.S. Steel raises these arguments for the first time on appeal. According to the ITC, the appropriate time for U.S. Steel to raise these arguments would have been: a) at the Commission's hearing, b) in its post hearing briefs, or c) in its final comments.⁸⁶ The ITC argues that if U.S. Steel had raised its arguments in a timely fashion, it would have promoted judicial efficiency by enabling the Commission to address concerns in the review.⁸⁷

U.S. Steel states that it repeatedly argued before the Commission that the Mexican industry had excess capacity. This issue was addressed in pre-hearing briefs, at the hearing, in post hearing briefs and in final comments.⁸⁸ U.S. Steel argues there is no absolute requirement of exhaustion in trade cases, especially where a party did not have the practical ability to

⁸⁵ *Id.* at 38-40

⁸⁶ ITC brief at 71, 72.

⁸⁷ ITC brief at 73.

⁸⁸ U.S. Steel reply brief at 47.

challenge the disputed finding at the agency because the finding is not articulated until the agency issues its decision. It claims that it is the case here.⁸⁹

U.S. Steel argues it had no reason to raise its arguments about the Mexican capacity data because it could not anticipate that the Commission would reject the reported capacity data on the ground that they constituted “nameplate” capacity.⁹⁰

Exhaustion of administrative remedies is generally required before a litigant will be allowed to raise a claim or issue in proceedings to review agency action. It is one of the general legal principles binding upon the Panel.⁹¹ The governing statute of the CIT provides that “[t]he Court of International Trade shall *where appropriate* require exhaustion of administrative remedies.”⁹² This provision gives the CIT, and by analogy the Panel, the discretion to determine whether to require exhaustion of administrative remedies. Thus, unless it considers exhaustion “appropriate,” the CIT will allow a party to raise an issue not previously raised with the agency.

There are several exceptions to the exhaustion requirement including the lack of opportunity to raise the issue before the agency.⁹³ However, “the Supreme Court has cautioned that a remand requires a showing that the failure to raise an issue was not the result of a lack of due diligence on the part of the claimant.”⁹⁴ The issue in this case is whether, prior to the issuance of the decision, U.S. Steel had reason to believe that the Commission might disregard

⁸⁹ U.S. Steel reply brief at 47, 48.

⁹⁰ U.S. Steel reply brief at 51.

⁹¹ See NAFTA Article 1911 (“general legal principles includes ...exhaustion of administrative remedies”)

⁹² 28 U.S.C. §2634(d) (emphasis added).

⁹³ See, e.g., *Al Tech Specialty Steel Corp. v. United States*, 661 F. Supp. 1206, 1210 (Ct. Int’l Trade 1987)

⁹⁴ *Bethlehem Steel Corp. v. United States*, 27 F. Supp. 2d, 201, 206 (Ct. Int’l Trade 1988) (citations omitted)

the reported capacity data because it did not reflect actual operating capacity, and whether it should have raised the issue during the ITC proceeding.

The Commission disregarded the Mexican producers' reported capacity data because it was based in what the Commission referred to as "nameplate" capacity, as opposed to normal production capacity:

We have not given authoritative weight to the capacity data reported by the Mexican CWLDLP industry. The current producers of subject merchandise in Mexico produced more CWLDLP in 2006 than in any other year since at least 1998. Notwithstanding this, reported 2006 capacity utilization was only *** percent. **Based on the historical data in the record, we believe it is unlikely the Mexican industry could ever achieve full utilization of the nameplate capacity it has reported.** The fact that Mexican CWLDLP production *** in 2006, coupled with the industry's significantly diminished capacity since the original period of investigation, indicates that it is unlikely Mexican producers would be able to increase their CWLDLP production significantly from current levels, so as to be able to compete effectively in the project market in the United States⁹⁵

The ITC argues that U.S. Steel failed to exhaust its administrative remedies on the issue of theoretical vs. actual capacity because the Final Staff Report put U.S. Steel on notice that the staff believed that there was no actual increase in capacity despite the questionnaire responses because the increase only reflected a change in reporting methodology—not an actual addition to equipment or machinery.⁹⁶

The Final Staff Report states:

[T]he companies responding in these reviews **calculated capacity differently from the preliminary investigations.** Therefore, despite the fact that installed capacity has not increased since the early 1980s, and the closure of one

⁹⁵ *Certain Welded Large Diameter Line Pipe From Japan and Mexico*. USITC Pub. 3953, Investigation Nos. 731-TA-919 and 920 (Review), Oct. 2007, at 35. (Emphasis added).

⁹⁶ ITC Brief at 72.

producer with 2000 capacity of [[]] tons, capacity in 2006 is reportedly higher. **This represents differences in reporting methodology, rather than in equipment or machinery.**

The production capacity of CWLDLP producers in Mexico reportedly **has not changed since the original investigations but the basis on which the capacity was reported has changed.** According to Mexican respondent interested parties, they reported different capacities in these reviews **because of changes in their reading of the questionnaire instructions.** They read the instructions in the original investigations to require production capacity that could be reasonably expected under normal operating conditions and the instructions in these reviews to require theoretical machine capacity. Staff telephone interview with [[]] and [[]].⁹⁷

The Commission cited this statement to support its finding that the Mexican capacity only appears higher in the reviews than it was during the original investigations because the producers utilized a different methodology to calculate capacity in the reviews.⁹⁸

The issue of excess capacity was raised throughout the administrative proceeding. The text and footnote on page IV-40 of the Final Staff Report put U.S. Steel on notice that the staff questioned the reliability of the capacity increases that were reported in the questionnaire responses because they did not reflect actual operating capacity. The questionnaire responses were released to U.S. Steel under the administrative protective order during the proceeding. U.S. Steel was aware that the respondents reported increases in capacity and was aware of the basis for the reported increases. U.S. Steel argues in its brief to the Panel that the Mexican producers reported actual, not theoretical, capacity in accordance with the instructions in the questionnaires, and it quotes from each of the questionnaire responses to support that argument.

⁹⁷ Final Staff Report issued on September 14, 2007 at IV-40. (Emphasis added).

⁹⁸ ITC Decision at 34, n. 258.

That information was available to U.S. Steel during the proceeding, and it should have pointed out the discrepancy in its final comments on the Staff Report.

U.S. Steel argues that it did not know that the Commissioners would disregard the reported capacity information until it read the Commission's decision. But that is true regarding any issue in an ITC investigation. Unlike Commerce Department proceedings, the ITC does not issue preliminary decisions in final sunset reviews, and the parties do not know how the Commission intends to rule on any issue until the decision is issued. That, however, does not eliminate the responsibility of parties to ITC proceedings to exhaust their administrative remedies before challenging an ITC determination before the CIT or a NAFTA panel.

The ITC gives parties an opportunity to review and comment upon all of the information and argument that is presented to the Commission before a decision is issued. Section 207.64 of the ITC Rules provides that the staff will issue a final report after the hearing to "supplement and correct" the information in the prehearing staff report. Section 207.68 of the ITC rules gives parties an opportunity to comment on any information disclosed to them after they have filed their post hearing briefs, including information in the Final Staff Report. That was the time for U.S. Steel to offer arguments regarding the asserted discrepancy between the questionnaire responses and the staff's finding that the Mexican producers reported theoretical capacity. U.S. Steel failed to do so, and it cannot raise the issue now.

C. Judicial Notice

The Commission closed its record in the sunset review on September 28, 2007. On April 21, 2008, while the case was under review by this Panel, Mexican producer Procarsa submitted to the Commission a cover letter to a corrected questionnaire response stating that it had

previously failed to report []. The revised response revealed that Procarsa []. There was no mention of this [] in Procarsa's original questionnaire response.

NAFTA Articles 1904.2 and 1911 provide that a NAFTA panel's review is "based on the administrative record" before the Commission, and define the term as "all documentary or other information presented to or obtained by the Commission in the course of the administrative proceeding." In turn, the implementing legislation, 19 U.S.C. § 1516a(b)(2)(A)(I), provides that the administrative record consists of "a copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by section 1677f(a)(3) of this title."

The statute assists in delimiting the administrative record by providing further that the Commission must "cease collecting information" "before making a final determination" in order to give interested parties one last opportunity to comment on information upon which they have not had a prior opportunity to give input. In exercising the discretion accorded by this provision, the Commission's regulations provide that in five-year reviews, "the record shall close on the day [] comments are due...." The ITC's brief interprets the regulation as meaning what its straightforward language suggests, that is, that no additional factual information may be added by any party to the record for review by a court or panel after that date.⁹⁹

Addressing this new data, Procarsa asserted that the revised data should not affect the Commission's determination or the outcome of the panel review in light of the relatively limited

⁹⁹ 19 C.F.R. § 207.68(b). See ITC Brief of July 28, 2008, at 96, note 364.

impact of the correction on the period for which the Commission requested information or projections from the parties.¹⁰⁰ U.S. Steel argues that the Commission's negative sunset determination with respect to Mexico was based upon incorrect information and, therefore, asks the Panel to take judicial notice of the revised questionnaire submitted by Procarsa pursuant to cited court cases and Federal Rule of Evidence 201(b). Complainant asks that this Panel remand the case so that the Commission may consider the revised data.¹⁰¹ According to the brief of the Commission's General Counsel, the revision did not affect any data for the Commission's period of review (POR), or for 2007 and 2008, the first years of projected capacity and production data sought by the Commission.¹⁰²

As a general rule, appellate review of a Commission's determination must be made on the basis of the administrative record before the Commission. A court or binational panel may take judicial notice of extra-record information only in "certain limited circumstances." Rule 201(b) of the Federal Rules of Evidence provides that a court may only take judicial notice of an adjudicative fact that is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned".¹⁰³ These considerations are alternatives.

In most Rule 201(b) cases, judicial notice arises in the context of paragraph (1), facts "generally known," such as that the Bureau of Land Management acts under the direction of the

¹⁰⁰ Procarsa's cover letter to corrected questionnaire response of April 21, 2008, at 2-3

¹⁰¹ U.S Steel Brief, at 46-50.

¹⁰² ITC Brief, at 111.

¹⁰³ Federal Rules of Evidence Rule 201, 28 U.S.C.A. (2010).

Secretary of the Interior¹⁰⁴ or that banks send monthly statements to customers.¹⁰⁵ Although courts have not always been careful in distinguishing between the two bases in the Rule, taking notice of verifiable facts under paragraph (2) has more recently come before courts as an upshot of the Uniform Rules of Evidence.¹⁰⁶ A relevant example is the Third Circuit's decision in *Werner v. Werner*. Plaintiffs in a securities fraud case sought judicial notice of corporate minutes filed by defendants during discovery in a separate action. Writing for the Court, Judge Rosenn observed that

The determination of whether the Werner Company produced the meeting minutes during discovery in the New York action is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned by the Werner Company itself, or by any of the management defendants. In short, the Board meeting minutes exist, certainly were produced by the Company in the New York Supreme Court, and amply justify the late effort by appellants to amend their complaint. We can and will judicially notice the existence of these minutes under Fed.R.Evid. 201(b).¹⁰⁷

Similarly, the submission of the questionnaires by Procarsa is capable of accurate and ready determination.

The tenets of Rule 201(b) were the only ones that bore upon whether the court in *Werner* could take judicial notice of the filing of the New York corporate minutes. For that reason, the Court did not have occasion to inquire into the substance of those minutes. In the present situation, to the contrary, the Federal Circuit has crafted an important additional standard onto those of the federal evidence rule that must be met before notice may be taken of the substance

¹⁰⁴ *National Audubon Soc. v. Dept. of Water & Power*, 496 F.Supp. 499, 503 (E.D. Calif. 1980).

¹⁰⁵ *Kagan v. I.R.S.*, 71 F.3d 1018, 1020 (2d Cir. 1995).

¹⁰⁶ Weinstein's Evid. Man. § 4.02 (Matthew Bender 2010).

¹⁰⁷ 267 F.3d 288, 295-96 (2001). Judge Nygaard dissented to this ruling, confusing the basis for the majority's ruling as 201(b)(1), rather than the correct basis, 201(b)(2). *Id.* at 301.

of the data and remand to the agency of the noticed data may be authorized. That rule is whether the new information is "potentially determinative" of the outcome of the commission's action.

In *Borlem v. United States*, the Federal Circuit held that courts may remand an agency determination based upon information from outside the agency record only in limited circumstances. Specifically, the Federal Circuit (CAFC) held that the CIT may remand a case to the Commission in an appeal where "an incorrect fact determination, corrected by the governmental agency that issued it {here, Commerce}, while the appeal was pending, which determination when properly considered {by the ITC}, may lead to a different result."¹⁰⁸ As the CIT subsequently explained, the remand of the Commission's determination in *Borlem* "was based upon the fact that the foreign producer's dumping with *de minimis* margins [] of such substantial significance that the ITC might well have changed its determination" (emphasis supplied).¹⁰⁹ Elsewhere in its opinion, the Court made even clearer the high threshold for remanding extra-record data:

Hence it seems clear that had the ITC known at the time it made its affirmative threat of injury determination that FNV, the major manufacturer of Tubeless Steel Disc Wheels imported from Brazil, was not dumping or had *de minimis* dumping margins, there is a very strong possibility the ITC would have found no injury. In other words, it would appear the ITC made its finding of injury based upon material and significant inaccurate facts"¹¹⁰ (emphasis supplied).

Similarly, in *Union Camp Corp. v. United States*, the Court of International Trade found remand appropriate under the *Borlem* standard not simply because new information existed, but on the basis of "credible evidence from outside the record indicating a significant error in the

¹⁰⁸ *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 939, 8 Fed. Cir. 164 (1990).

¹⁰⁹ *Borlem S.A.-Empreedimentos Industriais v. United States*, 13 C.I.T. 535, 544, 718 F.Supp. 41, 48 (1989).

¹¹⁰ *Borlem*, at 541, 718 F. Supp at 46.

determination”¹¹¹ (emphasis supplied). As the ITC brief contends, the CAFC and the CIT have made clear that, under *Borlem*, a remand predicated on new information not on the administrative record for review is only appropriate when the new information may be “potentially determinative.”¹¹² Counsel for U.S. Steel indicated agreement with this summary of the test.¹¹³

The panel is thus placed in the position of treading lightly on the line separating proper resolution of the issue and the re-weighing of evidence prohibited by our standard of review. We need not establish here the truth of the newly submitted Procarsa data. On the other hand, we cannot gauge the potential impact on the Commission’s determination of the new data, and thus whether remand under *Borlem* is required, without examining these data in proper context.

Further to the verifiability of these data and, thus, their potential to determine the outcome of the ITC’s decision, we note that the questionnaire response which these data correct was submitted upon demand by a federal agency with statutory authority to require its submission. Moreover, the responses contained in its late submission are inherently credible as statements against interest in that they increase the likelihood that the anti-dumping order will not be revoked by the Commission, a result costly to Procarsa’s future export plans.¹¹⁴ Such statements are even exempt from the rule against hearsay (not at issue here) under Federal Rule of Evidence 804(b)(3) as “so far contrary to the declarant’s pecuniary or proprietary interest . . .

¹¹¹ *Union Camp Corp. v. United States*, 23 C.I.T. 264, 279, 53 F.Supp.2d 1310, 1324 (1999).

¹¹² ITC Brief, at 107-109.

¹¹³ Transcript of July 21, 2010, Panel hearing, at 24.

¹¹⁴ We note that, by definition, this holding would not be the case when a party makes a self-serving late filing.

that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true.”

Procarsa would also be aware that its questionnaire responses are subject to verification by the Commission under statutory authority.¹¹⁵ Moreover, no party has alleged that the data were filed late in the hopes that they would not be considered. Finally, in this proceeding no party has attempted to dispute the Procarsa evidence, despite substantial opportunity to rebut the facts alleged, as required by the Rule 201(b).¹¹⁶ We find that Procarsa’s amended questionnaire and its cover letter are not reasonably subject to dispute the accuracy of within the meaning of Federal Rule of Evidence 201(b).

In addition, for the reasons noted below, we find that the new data are indeed potentially outcome determinative. According to both Procarsa and the ITC’s Office of General Counsel, the data contained in the revised questionnaire would not have affected the Commission’s determination because the submission would not affect any aspect of the Commission’s analysis (capacity, production, or shipment data) relied on for the POR (from 2001 to 2006 and interim 2007). Although Procarsa’s revision reports [] the Mexican producer stated that [].

The ITC brief argues that the revision submitted by Procarsa would not have had a significant impact on the data underlying the Commission’s four findings in support of its determination not to cumulate the reviews of Mexico and Japan based on the differences in the

¹¹⁵ 19 U.S.C. 1677j , § 782 (a)(2)(b), Tariff Act of 1930: Certification of Submissions. Any person providing factual information to the administering authority or the Commission in connection with a proceeding under this title on behalf of the petitioner or any other interested party shall certify that such information is accurate and complete to the best of that person's knowledge. We note that Procarsa’s counsel would also be aware that intentional misrepresentation of information to a federal agency is a federal crime. 18 USC § 1001.

¹¹⁶ *Id* at 201(e).

conditions of competition between them (product range, export versus home market-orientation, presence in the United States market, and capacity trends) or on its likely injury analysis.

1. Product Range

The ITC brief states that the Commission’s decision relied on the facts that Mexican producers [] and that Procarsa’s belated submission “did not [] or change its statement in its original questionnaire that [].” As a result, it argues, the revised questionnaire would not have had impact on the Commission’s finding that the Mexican industry was not likely to produce the high grade CWLDLP that the U.S. market increasingly is demanding.¹¹⁷

On the other hand, U.S. Steel alleges that the record contains no evidence that Mexican producers are unable to supply significant quantities of the subject product in grades X-70 and above. According to U.S. Steel, the Final Staff Report shows that [] and that it []¹¹⁸ U.S. Steel argues that “the Commission improperly equated what the Mexican firms *did produce* during the POR with what they are *capable* of producing.” (emphasis in original).

Because the revised questionnaire did not specify whether [] or whether Procarsa is [], the Panel considers that this finding of product range by the ITC would not be affected by Procarsa’s revised questionnaire.

2. Export versus home market-orientation

According to the ITC brief, “Procarsa’s revisions would not affect the data underlying the Commission’s factual finding that the Japanese industry is highly export-oriented, with a relatively low level of home market shipments, whereas the Mexican industry is focused on its

¹¹⁷ ITC Brief, at 112.

¹¹⁸ U.S Steel Reply Brief, at 38

home market, with a relatively low level of export shipments.” The ITC alleges that Procarsa’s revised data for projected 2008 production would not affect this finding based on Mexico’s historical experience during the POR and the fact that Procarsa reported that []. If the projected information regarding 2008 were incorporated, according to the ITC brief, the increase in the Mexican industry’s home market shipments as a share of its total shipments would go from [] percent, as originally reported, to [] percent, which is not a significant change.¹¹⁹ However, as expressed in the ITC’s brief, the Commission limited the probative value of subject import trends prior to the order’s imposition based on the belief that Productora Mexicana de Tubería’s (PMT), liquidation in 2002 significantly reduced the Mexican industry’s export-orientation and capacity.¹²⁰

U.S. Steel, on the other hand, alleges that sunset reviews require a “counterfactual analysis” that takes into account the fact that revocation of an order changes the *status quo*. “In other words, the export orientation of Mexican producers with the order in place has little relevance to the issue of how Mexican producers will act once the order is revoked,” especially because the United States was the single most important export market for Mexican producers before the antidumping order went into effect.¹²¹

Procarsa’s belated submission asserts that [] and that it did not expect that any of the CWLDLP that might be produced on that line would be exported to the United States. However, Procarsa also states that it is in the process of [],¹²² a process that is []. This assertion suggests

¹¹⁹ ITC Brief, at 112-113.

¹²⁰ *Id.*, footnote 243 at 63

¹²¹ U.S Steel Reply Brief, at 39-40

¹²² Procarsa’s submission (corrected questionnaire) of April 21, 2008, at 7

that Procarsa expects to [] its exports to the United States once it [] in the near future. This statement, together with the fact that prior to the imposition of the antidumping order the United States market was the principal export market for the Mexican industry,¹²³ indicate to the Panel that this corrected information might have influenced the Commission if it had been available prior to its decision.

3. **Presence in the U. S. market**

According to the ITC brief, the ITC finding that “the Japanese producers maintained a presence in the U.S. market throughout the POR, while subject imports from Mexico declined to zero over the period”¹²⁴ would also not be affected by the revised questionnaire because it only affects data for projected 2008 “and not the data relied upon by the Commission in analyzing the relative market presence of Mexican and Japanese imports during the POR”¹²⁵. Furthermore, Procarsa’s revised questionnaire states that [] and that [].¹²⁶

In turn, U.S. Steel argues that the Commission’s analysis ignores the fact that a reduction in imports following the imposition of an order is expected and is not an indication that imports will be at low levels if the orders are revoked. Moreover, U.S Steel further alleges, the Commission also ignored its own finding that “the Mexican producers return to the U.S. market

¹²³ *Certain Welded Large Diameter Line Pipe from Japan*, USITC Pub. 3464, Inv. No. 731-TA-919 (Final) (Nov. 2001), 2001 WL 1560509 at 105-106. See also [].

¹²⁴ ITC Brief, at 113

¹²⁵ *Id.*, at 113

¹²⁶ *Id.*, at 113-114.

would be facilitated by their proximity to the United States, and the presence of a major U.S. producer in Mexico.”¹²⁷

Despite the fact that the statements made by Procarsa and the information contained in its revised questionnaire would not suggest a significant change in the home-market orientation of its production or a plan to increase its presence in the U.S. market for the POR and projected 2007 and 2008, this Panel recognizes that the Commission might have considered that Procarsa’s [] and [], along with the geographical proximity between the United States and Mexico could have had a considerable impact on the presence of Mexican imports in the U.S. market within a reasonably foreseeable time, and thus, had the Commission known the corrected data at the time of its determination, it might have changed its decision.

4. Capacity trends

According to the ITC brief, the revised data submitted by Procarsa would not affect the finding reached by the Commission that “the Mexican industry’s capacity contracted significantly over the period of review” because “it relates only to the contraction of Mexican capacity during the POR, that is, from 2000 through interim 2007 and Procarsa’s revised data would only affect the Mexican industry’s capacity trends for projected 2008” (emphasis in original).¹²⁸

The ITC brief also argues that even if the Commission had included Procarsa’s [] short tons projected for 2008, Mexican CWLDLP capacity in 2008 would still remain [] short tons lower than it was before PMT, the largest exporter during the POR and the primary focus of the

¹²⁷ U.S Steel Reply Brief, at 42-43

¹²⁸ ITC Brief, at 114.

ITC's original finding of material injury, exited the Mexican industry in 2002.¹²⁹ Therefore, according to the ITC brief, Procarsa's revised data would not significantly affect even the capacity trends projected for 2008.

The ITC brief further argues that Procarsa's revised data "would not affect the reported capacity data for the Mexican industry throughout the six full years of the POR, for interim 2007, or the projected year 2007." The ITC brief states that "even in projected 2008, the revised data would only result in [] in the Mexican industry's projected capacity of [] short tons, which is [] in capacity of only [] percent."¹³⁰ According to the ITC brief, the projected increase for 2008 would not [] the reduction in Mexican capacity of [] short tons that occurred when PMT exited the Mexican industry in 2002.¹³¹

The ITC brief also contends that the fact that Procarsa's revised questionnaire did not report that its new production line [] nor did it change its original statement [] together with its assertions that [] makes it unlikely that the revised data would have changed the Commission's determination not to cumulate. In its brief dated July 28, 2008, the ITC/GC concluded that "although the data underlying the Commission's analysis of Mexican CWLDLP capacity projections would change somewhat, the change is far from a sufficient magnitude that it could even remotely detract from the Commission's conclusions for the period examined."¹³²

¹²⁹ *Id.* at 115.

¹³⁰ *Id.* at 117.

¹³¹ *Id.*

¹³² *Id.* at 118.

On the other hand, U.S. Steel contends that although Procarsa stated at the time [].¹³³
Procarsa estimated []. Procarsa also estimated that [] [].¹³⁴

According to Procarsa's revised answer to question II-4,

“Procarsa []”¹³⁵

U.S. Steel states that Procarsa's assertions suggest that [].¹³⁶ U.S. Steel notes that Procarsa reported incorrect information regarding [] and thus, the corrected information has a [].¹³⁷ “[] [] Notably, U.S. Steel alleges, this [] due to the 2002 closure of PMT.”¹³⁸

U.S. Steel further argues that “given that the Commission expressly found the decrease of [] NT to be “significant” there can be no question that Procarsa's corrected data [] is even more significant.”¹³⁹ Because the Mexican industry's [], U.S. Steel argues, the corrected data are highly significant, as they fundamentally alter the information that was repeatedly relied upon by the Commission to reach its decision.¹⁴⁰

¹³³ U.S Steel Reply Brief of August 28, 2008, at 6.

¹³⁴ *Id.*, at 6.

¹³⁵ Procarsa's submission (corrected questionnaire) of April 21, 2008, at 5-6

¹³⁶ *Id.*, at 6.

¹³⁷ *Id.*, at 7.

¹³⁸ *Id.*

¹³⁹ *Id.*, at 8.

¹⁴⁰ *Id.*, at 8-10

According to U.S. Steel, the ITC brief's claim that the corrected data are not "significant" (emphasis in original) focuses solely on the [] and ignores the fact that []. The ITC brief argues that the corrected data are not material because they do not change any of the information submitted by Procarsa for the POR, which was from 2001 through interim 2007, and because they amount to only "small revisions" (emphasis in original) to Procarsa's projected data for 2008.¹⁴¹ U.S. Steel contends that Procarsa's corrected information shows that []¹⁴²

Furthermore, U.S. Steel argues that in a five year review, the Commission is specifically *required* (emphasis in original) []¹⁴³. U.S. Steel states:

"While what constitutes a [] may vary from case to case... the [] is a factor that the Commission *must* consider (emphasis in original). It would be disingenuous for the Commission's counsel to contend that [] or otherwise not relevant."¹⁴⁴

For the panel, this factor (capacity trends) is the one bearing greatest weight in our decision. As argued by U.S. Steel, capacity seems to have been one of the most important factors in the Commission's determination as it was considered and analyzed throughout the Commission's decision. Given the fact that changes in capacity within the foreseeable future is a fundamental factor for a determination of future harm and that it was precisely this factor corrected by Procarsa's revised questionnaire, this panel finds that the Commission should evaluate the significance of these corrected data.

¹⁴¹ *Id.*, at 11

¹⁴² *Id.*, at 12

¹⁴³ *Id.*

¹⁴⁴ *Id.*, at 12-13

The Panel recognizes that it has no warrant to review the record *de novo*. The “substantial evidence” standard of review implicates the common law doctrine of primary jurisdiction, whose purpose the Circuit Court in *Borlem* described as “permitt(ing) courts to give effect to legislative intent underlying the established regulatory scheme by referring matters involving agency expertise back to the agency so that it may, in the first instance, pass upon the issue from its unique administrative perspective.”¹⁴⁵ Nonetheless, as expressed by the Court in *Borlem*, “a reviewing court is not precluded under this standard from considering events which have occurred between the date of an agency (or trial court) decision and the date of decision on appeal. Where such intervening events are properly brought to the attention of the reviewing court, that court may rely on that occurrence and typically will remand for consideration by the decision-maker.”¹⁴⁶

In deciding the judicial notice question, the Panel is asked to determine whether the extra-record evidence “may be determinative” at the same time it is reminded that it must not reassess the evidence that was before the Commission. Thus, there is tension between the Panel’s standard of review and the necessity that the Panel adjudge whether new evidence is of such significant moment that it might have resulted in a different ITC determination.

Our task is to balance the statute’s interest in the expedition and finality of investigations with its interest in the accuracy of antidumping determinations.¹⁴⁷ In order to serve both these interests, the Panel must determine whether the new capacity data submitted by Procarsa might

¹⁴⁵ *Borlem*, at 234, 710 F. Supp. at 800.

¹⁴⁶ *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 939, 8 Fed. Cir. 164 (1990).

¹⁴⁷ *Borlem*, at 939, 8 Fed Cir. at 170.

have been significant enough to have changed the Commission's decision, had it known this information when it performed both the cumulation and the injury analysis.

As to the importance of finality in the agency decision process, we find most cogent the discussion in *Home Products Intern. v. United States*:

The Supreme Court acknowledged in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 554-555, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978), the obvious problem of never-ending administrative proceedings and subsequent judicial review caused by extra-record evidence: "administrative consideration of evidence ... always creates a gap between the time the record is closed and the time the administrative decision is promulgated [...].... If upon the coming down of the order litigants might demand rehearings as a matter of law because some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening." *Vermont Yankee*, 435 U.S. at 554-555, 98 S.Ct. 1197 (1978)(quoting *ICC v. Jersey City*, 322 U.S. 503, 514, 64 S.Ct. 1129, 88 L.Ed. 1420 (1944)) (emphasis added); see also *Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1316-17 (Fed.Cir.2004); but see *Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1734 n. 3, 358 F.Supp.2d 1236, 1241 n. 3 (2004) (taking judicial notice of extra-record evidence to invalidate Commerce finding); *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed.Cir. 1990) (upholding court order that International Trade Commission consider extra-record evidence on remand in antidumping injury investigation).

In *Borlem*, which is also illustrative on this point, Commerce in its final determination found dumping margins of 15% for Borlem and 20% for FNV, the major producer in the investigation. Following the ITC's affirmative finding of injury, Commerce issued an antidumping order that corrected clerical errors, the result of which was exclusion of the major producer (FNV) from the investigation on the basis of *de minimis* margins.¹⁴⁸ Elimination of the majority of the import volume from the ITC's investigation through exclusion of the major importer would weigh heavily in the injury analysis, given that the volume of imports and the

¹⁴⁸ *Borlem*, at 537, 718 F. Supp at 42.

effect of such imports on domestic producers are the primary factors in its analysis.¹⁴⁹ The Circuit Court in this case upheld the CIT decision to take judicial notice of Commerce's amended determination stating:

what the trial court has now taken judicial notice of is not the new margin determinations themselves, but the fact that a new and different determination has been made based on the premise that the earlier one was incorrect. That action, by the same government agency that generated the first determination, certainly seems to us to be a fact of which judicial notice may be taken.¹⁵⁰

For the Panel, the capacity trends factor in the Commission's decision is the one bearing most weight in our decision. As argued by U.S. Steel, capacity was one of the most important factors in the Commission's determination as it was considered and analyzed throughout. Given the fact that changes in capacity in the reasonably foreseeable future is a fundamental factor for a determination of future harm and that it was precisely this factor that was corrected by Procarsa's revised questionnaire, the Panel finds that the Commission should evaluate the significance of these corrected data.

The interest in accuracy has great value. In fact, a court need not give deference to a determination that the agency based on data that the agency generating those data indicates are incorrect.¹⁵¹ The test for remanding is set substantially higher than "incorrect" data, we believe, in order to effectuate the balance between accuracy and finality. The Panel must find that Procarsa's data are "credible evidence from outside the record indicating a significant error in the determination." We must also note that, although the ITC General Counsel speaks with great

¹⁴⁹ See 16 U.S.C. § 1677(7)(B).

¹⁵⁰ *Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 939, 8 Fed. Cir. 164 (1990).

¹⁵¹ *Id.* at 169, 8 Fed. Cir. at 938..

authority, given its knowledge of ITC practice and determinations, it cannot, as U.S. Steel points out, tell us what the Commission actually would have done had this information been before it.

We find that we must serve the principle of accuracy in this instance. The information here bears directly and substantially on one of the four factors considered in the “different conditions of competition analysis,” namely, the capacity trend factor, considered by the Commission both when it decided not to cumulate the reviews of Japan and Mexico, and in its injury analysis. “[] Notably, this [] due to the 2002 closure PMT.” which the Commission considered significant. One of the Commission’s main findings was that “PMT’s liquidation would have reduced Mexican CWLDLP capacity by a significant [] short tons or [] percent (based on Mexican CWLDLP capacity of [] short tons in 2000), given that other Mexican producers reported no change to their capacity during the POR”¹⁵²

We believe these differences are potentially determinative. The Commission was relying on the PMT closure essentially to eliminate [] Adjudging the new data under this standard, which we find accurately summarizes the Federal Circuit’s *Borlem* standard, it is undeniable that the corrected information supplied by Procarsa has significance on its long term capacity and production which, if known at the time by the Commission would likely have been a considerable factor in reaching its determination. As U.S. Steel notes, the Commission repeatedly considered and relied on []¹⁵³. This is the case with respect to []¹⁵⁴

Moreover, as U.S. Steel alleges, in other cases involving the steel industry, the Commission has []. For example, in a recent five-year review involving imports of steel wire rod,

¹⁵² ITC Brief, at 12.

¹⁵³ U.S Steel Reply Brief, at 13

¹⁵⁴ *Id.*, at 13, note 34

the POR was 2002 to 2007, and the Commission expressly considered the fact that one of the subject countries was []. The Commission noted that there would be [] Thus, a period three years beyond the established POR was considered to be reasonably foreseeable.¹⁵⁵

U.S. Steel cites two specific cases in which the Commission has considered data [] the established POR and thus has considered a []¹⁵⁶. These two cases are *Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Indonesia, Mexico, Moldova, Trinidad y Tobago, and Ukraine* USITC Pub. 4014, Inv. Nos. 701-TA-953, 954, 957-959, 961, and 962 (Review) (June 2008) and *Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine* USITC Pub. 3956, Inv. Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (Review) (Oct. 2007).

In the first case, *Carbon and Certain Alloy Steel Wire Rod*, the POR was from 2002 to 2007. The Commission considered data regarding business plans, production, consumption, and price for the year 2008, and production and consumption projections for the period from 2008 through 2011. In the second case, *Hot-Rolled Steel*, the POR, as it is in the instant case, was from 2001 to 2006. The Commission considered data regarding capacity, production, shipments, inventories, and projections for the years 2007 and 2008, and even through 2011. It is clear that in these two cases the Commission considered and analyzed data at least three years beyond the POR, even though, according to the Commission, it gave greater weight to the data within the two years after the POR.¹⁵⁷

¹⁵⁵ *Id.*, at 14

¹⁵⁶ *Id.*

¹⁵⁷ "In view of the nature of this industry and market, for purposes of these reviews, and based on the facts on this record, we have given significantly greater weight to developments likely to occur in the next two years than to

Under 19 U.S.C. 1675) Sec. 752 (a)(5)

The presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked or the suspended investigation is terminated. In making that determination, the Commission shall consider that the effects of revocation or termination may not be imminent, but may manifest themselves only over a longer period of time.

Pursuant to this statute, the Commission must consider the effects that revocation of an order would have over a “longer period of time” and it is also the Commission’s task to determine a reasonable period of time in which those effects would manifest themselves.

It is the duty of the Panel to respect the primary jurisdiction of the Commission to determine both the weight that it gives to the statutory factors and the reasonably foreseeable period it considers in its determinations. We cannot, and should not, determine whether the Commission would have given greater weight to the data for 2008, despite the allegations of Commission’s counsel that the small revisions to Procarsa’s data for the projected year 2008 would not have a significant impact on the data underlying the Commission’s decision.¹⁵⁸ Nor can we decide whether the Commission would have considered the years 2009 and 2010 to be a reasonably foreseeable period, and thus, if it would have considered significant the data pertaining to 2009 and 2010 in its cumulation analysis or its likely injury analysis for Mexico. Therefore, the Panel finds it necessary to remand the case in order to provide the Commission the opportunity to evaluate the potentially determinative new data. Following *Borlem*, “rather

those pertaining to later dates, although we cite other information as appropriate. We recognize that certain domestic producers suggested a longer timeframe (three years) might be appropriate, but also indicated in the alternative that the Commission consider a two-year period through the end of 2009.” *Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine*, USITC Pub. 3956, Inv. Nos. 701-TA-404-408 and 731-TA-898-902 and 904-908 (Review) (Oct. 2007) at 25.

¹⁵⁸ ITC Brief, at 111

than this court or the trial court deciding on the accuracy or significance of these new data, all we are doing is recognizing that new data exist that the Commission should evaluate.”¹⁵⁹

D. Remaining Issues

Based on the reasoning of this decision, the Panel reserves judgment on the issues brought by U.S. Steel, in particular, with respect to the Commission’s finding on:

- Conditions of Competition analysis; and
- Reliance on other factors

The Panel considers that these issues might be directly or indirectly affected by the new Determination of the ITC on remand that shall take into account the data regarding Procarisa’s capacity. In addition, the Panel is aware that under Rule 73, participants have the right to file written submission with respect to the Determination on Remand and the Commission will consider the participants comments if any, and to the extent these issues are affected by the Commission’s Determination on Remand.

E. Remand Order

The Commission is directed to return a decision on this Remand on or before March 22, 2011.

¹⁵⁹ Borlem S.A.-Empreedimentos Industriais v. United States, 913 F.2d 933, 939, 8 Fed. Cir. 164 (1990).

IT IS SO ORDERED:

ISSUED ON JANUARY 18, 2011

SIGNED IN THE ORIGINAL BY

Peggy Chaplin Louie
Peggy Chaplin Louie, Chairperson

David Hurtado Badiola
David Hurtado Badiola

Stephen Joseph Powell
Stephen Joseph Powell

Ricardo Ramírez Hernández
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Lawrence R. Walders
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