

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

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

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

NON-PROPRIETARY VERSION

**DECISION OF THE PANEL
REVIEWING THE DETERMINATION
OF THE INTERNATIONAL TRADE COMMISSION
ON REMAND**

August 29, 2011

PANEL MEMBERS:¹

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For Tubacero S.A. de C.V., Tuberias Procarsa S.A. de C.V., and Tuberia Laguna S.A. de C.V.: Jeffrey M. Winton of Cassidy, Levy & Winton LLP.

¹ The Panelists wish to express their appreciation to Panel Assistants Kristen Smith, Mariana Ruiz Linares, Paola A. Chavarro, Jean Pierre Espinoza, Claudia Lelo de Larrea, and Judah J. Ariel.

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I. INTRODUCTION

On October 2, 2007 the International Trade Commission (“Commission or ITC”) determined that revocation of the antidumping duty order on Certain Large Diameter Line Pipe (“CWLDLP”) from Mexico would not likely result in the continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. On November 21, 2007 U.S. Steel requested a binational panel review of the Commission’s determination.

On January 18, 2011 the Panel issued its decision affirming in part and remanding in part the Commission’s determination. The Panel remanded the determination so that the Commission could consider an amended response to the foreign producers’ questionnaire that the Mexican producer Procarsa, S.A. de C.V. (“Procarsa”) attempted to file well after the Commission issued its determination. The Commission had refused to consider the revised questionnaire response because it was untimely.

On remand, the Commission placed the revised Procarsa questionnaire response on the record and invited comments from the parties. After considering the information in the revised questionnaire response and the parties’ comments, the Commission reaffirmed its determination not to cumulate imports from Mexico and Japan, and its determination that revocation of the order regarding imports from Mexico would not result in continuation or recurrence of material injury to the domestic industry.²

The Panel decided to take judicial notice of the revised Procarsa questionnaire response because certain information in the response could have led the Commission to reach a different conclusion regarding cumulation and injury if the Commission had been aware of this

² Commissioner Pinkert, who made a negative determination for Mexico in the Commission’s original determination, voted in the affirmative in the Remand Determination.

information during the investigation. The Panel concluded that the revised information could have affected the Commission’s evaluation of the following issues:

1. Export versus home market-orientation

Procarsa reported that it [] and that it is in the process of [] The Panel found that this assertion suggests that Procarsa expects to [] its exports to the United States [] in the near future. This statement, together with the fact that prior to the imposition of the antidumping duty order the United States market was the principal export market for the Mexican industry, indicated to the Panel that this corrected information might have influenced the Commission if the information had been available prior to its decision.³

2. Presence in the U.S. Market

Procarsa’s [] 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, and thus could have changed the Commission’s decision had it known of the corrected data at the time of its determination.⁴

3. Capacity Trends

The [] has a direct bearing on the issues of cumulation and material injury. The Panel found that “the new data are indeed potentially outcome determinative” with respect to three of “the Commission’s four findings in support of its

³Panel Decision at 34.

⁴*Id.* at 35-36.

determination not to cumulate the reviews of Mexico and Japan based on the differences in the conditions of competition between them . . . {and} its likely injury analysis” for Mexico, including its findings on the Mexican industry’s “{e}xport versus home market orientation”. “{p}resence in the U.S. market,” and {c}apacity trends.”⁵

On remand the Commission evaluated these factors in light of the revised information and affirmed its previous negative determination regarding Mexico.

II. STANDARD OF REVIEW

Pursuant to NAFTA Article 1904(3), this Panel must apply the standard of review and general legal principles that a U.S. court would apply in review of the Commission’s determination. The applicable standard of review is found in Section 516a(b)(1)(B) of the Tariff Act of 1930, as amended, which requires us to hold unlawful any “determination, finding, or conclusion found . . . to be unsupported by substantial evidence or otherwise not in accordance with law.”⁶

In the initial Panel proceeding U.S. Steel argued that the Commission acted contrary to law when it decided not to cumulate because of differences in the conditions of competition between imports from Japan and Mexico and between these imports and the domestic like product. The legal issue was resolved when the Panel held that the Commission has the discretion to consider differences in conditions of competition when considering whether to cumulate subject imports in a sunset review, based on the decision of the Court of Appeals for

⁵ *Id.* 33, 35, 36.

⁶ 19 U.S.C. § 1516a(b)(1).

the Federal Circuit in *Nucor Corp. v. United States* Court Nos. 2009-1234,-1235 (Fed. Cir. Apr. 7, 2010).⁷

The remaining issue is whether the Commission's decision is supported by substantial evidence. Here we are faced with a choice between two conflicting interpretations of the evidence.

U.S. Steel contends that the revised Procarsa data negates the basis for the Commission's findings on cumulation and likelihood of injury. In the sunset review the Commission found that there is a fundamental difference in the conditions of competition between Japanese and Mexican imports because the Mexican industry's ability to compete in the U.S. market was substantially reduced when Productora Mexicana de Tuberia (PMT), the most aggressive Mexican producer, went out of business. PMT's liquidation reduced total Mexican capacity by [] short tons, and the Commission believed that no other Mexican producer had added any new capacity. The Commission was not aware that [

] U.S. Steel argues that the new information required the Commission to cumulate imports from Mexico and Japan because the information demonstrates that the Mexican industry will compete directly with Japanese and U.S. production in the event of revocation. It also argues that the new information demonstrates that imports from Mexico, when considered alone, will injure the domestic industry if the antidumping duty order is revoked. The Commission, however, discounted the significance of the [

] and reaffirmed its decisions on cumulation and likely injury.

⁷ Panel Decision at 19-20.

U.S. Steel presents a plausible interpretation of the evidence, which, if accepted by the Panel, could warrant reversal of the ITC's decision. The Commission also presents a plausible interpretation of the same evidence that justifies affirmation of its initial decision.

U.S. Steel is essentially asking the Panel to re-weigh the evidence and to substitute our judgment for that of the Commission, which we cannot do. In the words of the Court of Appeals for the Federal Circuit: "We must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion."⁸ The Federal Circuit made clear that when there is substantial evidence to support both sides of an issue, the courts must defer to the Commission. "Substantial evidence exists on both sides of the issues. The Commission opted for one interpretation and the Court of International Trade for another. In such a situation, however, the statutory substantial evidence standard compels deference to the Commission."⁹ This standard governs Panel reviews of ITC determinations and our decision in this case. For the reasons set forth below, the Panel finds that the Commission's decision on remand is supported by substantial evidence, and therefore must be affirmed.

III. CUMULATION

The Commission exercised its discretion not to cumulate subject imports from Japan and Mexico because it found that producers in Japan and Mexico would not be likely to compete under similar conditions in the U.S. market. The Panel directed the Commission to reconsider this finding in light of the revised Procarsa data because the [

⁸ *Nippon Steel Corp. v. United States*, 458 F. 3d 1345, 1352 (Fed. Cir. 2006) (quoting *U.S Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

⁹ *Id.* at 1354.

] could result in increased competition between Mexican and Japanese CWLDLP in the U.S. market.¹⁰ In the sunset review the Commission found that the liquidation of PMT diminished the likelihood of competition between Japan and Mexico because it substantially reduced the total capacity of the Mexican industry since no other Mexican producer had reported plans to increase its capacity.¹¹ The Commission was not aware at that time that [] In addition, Procarsa reported in its revised questionnaire response that it intends to resume exports to the United States if the order is revoked, and that it is in the process of []

After considering the revised questionnaire response and the comments of petitioners and respondents, the Commission again determined not to cumulate imports from Mexico and Japan because it found that the Mexican and Japanese producers would not be likely to compete under similar conditions in the U.S. market.¹² The Commission cited a number of factors to support that decision.

A. Product Range

The Commission noted that Mexican producers generally produce and sell a different range of CWLDLP products than U.S. and Japanese producers. Since 2003 the Mexican industry has produced negligible quantities of CWLDLP of grades X-70 and above while these grades accounted for a substantial percentage of sales by U.S. and Japanese producers. The

¹⁰ Panel Decision at 45.

¹¹ *Certain Welded Large Diameter Line Pipe from Japan and Mexico*, Inv. Nos. 731-TA-919 and 920 (Review), USITC Pub. 3953, Oct. 2007, at 34. As discussed below, the Commission also pointed out that PMT's liquidation eliminated the Mexican company that was the most aggressive competitor in the U.S. market.

¹² Remand Determination at 10.

Commission found that “[T]he Mexican producers’ apparent lack of interest in supplying significant quantities of CWLDLP in grades X-70 and above makes it unlikely that they would compete aggressively with domestic and Japanese producers in the U.S. market, given the increased importance of high-grade products in the U.S. market.”¹³

In its original questionnaire response, Procarsa reported that [] Procarsa did not change this statement in its revised questionnaire response nor did it report that its new production line [] Therefore, the Panel concluded that the Commission’s finding regarding product range would not be affected by Procarsa’s revised questionnaire.¹⁴

U.S. Steel argues that the Commission should have collected additional information on whether Procarsa’s new production line is capable of producing grades CWLDLP in grades X-70 and above.¹⁵ The Panel did not require the Commission to collect additional information on this issue because it was not affected by the revised questionnaire. Moreover, when Procarsa submitted the revised questionnaire for the record of the remand proceeding, it did not indicate that it anticipated any changes in its product range.

B. Export versus home market-orientation

Procarsa stated in its revised questionnaire that it is in the process of [] , which suggests that Procarsa expects to [] its exports to the United States once it []

¹³ *Id.* at 10.

¹⁴ Panel Report at 33.

¹⁵ U.S. Steel Comments at 7-8.

].¹⁶ This statement, together with the fact that prior to the antidumping duty order the United States was the principal export market for the Mexican industry, indicated to the Panel that this corrected information might have influenced the Commission if it had been available prior to its decision.¹⁷

The Commission considered the information in Procarsa's revised questionnaire on remand but again concluded that the Mexican industry would not become more export-oriented if the order is revoked.

U.S. Steel argues that the Commission acted contrary to law when it denied U.S. Steel's request to collect additional information on Procarsa's efforts to qualify CWLDLP produced on its new production line with U.S. purchasers.¹⁸ The Commission declined to collect this information because it would not alter the Commission's analysis. The revised questionnaire response indicates that Procarsa [

] and

that CWLDLP produced on the new line was [

]¹⁹ In addition, the revised questionnaire response did not change Procarsa's projection that [] percent of the total shipments of CWLDLP produced on the new line in 2008 would be sold to Mexican customers and that Procarsa will export only [] short tons to the United States in 2008. In view of the fact that Procarsa will only export [] short tons to the United States in 2008 and that [

¹⁶ Procarsa Revised Questionnaire at 7.

¹⁷ Panel Report at 34.

¹⁸ U.S. Steel Comments at 6-7.

¹⁹ Remand Determination at 13.

] the Commission concluded that Procarsa is unlikely to reach this level within a reasonably foreseeable time after revocation.²⁰

U.S. Steel argues that the Commission should have extended the scope of its review beyond 2008 to consider Procarsa's and the Mexican industry's capacity in 2009 and 2010. The Commission explained in its remand determination that it focused on Mexican industry data for 2008 and 2009 because that was consistent with its practice of collecting and analyzing projected data for the two full years following the last year of the period examined in the sunset review.²¹ U.S. Steel asserts that the Commission collected information on capacity additions more than two years beyond the period of review in the *Hot-Rolled Steel Products* and *Carbon and Alloy Steel Wire Rod* cases.²² The Commission disputes U.S. Steel's characterization of those decisions and points out that the facts are distinguishable from the facts of the instant case.²³

U.S. Steel's citations to previous ITC determinations are not persuasive. The Federal Circuit held that in view of the highly fact-intensive nature of ITC investigations, "each injury investigation is *sui generis*, involving a unique combination of many economic variables, and consequently, a particular circumstance in a prior investigation cannot be regarded by the{Commission} as dispositive of the determination in a later investigation."²⁴ Moreover, the

²⁰ *Id.* at 13-14.

²¹ *Id.* at 14, n. 62.

²² U.S. Steel Comments at 5.

²³ ITC Response to U.S. Steel Comments, at 17-20.

²⁴ *Nucor Corp. v. United States*, 414 F.3d 1331, 1340 (Fed. Cir. 2005)

Federal Circuit has held that “the Commission has broad discretion with respect to the period of investigation that it selects for purposes of making a material injury determination.”²⁵

Nevertheless, the Commission did consider capacity trends beyond the standard two-year period into 2009 and 2010. It concluded that even if Procarsa could increase its exports to [] short tons in 2009, and assuming that the Mexican industry’s home market shipments in 2009 will be the same as in 2008, Mexican producers would export at most [] percent of their total shipments in 2009 in contrast to the Japanese industry’s projected exportation of 98.8 percent of total shipments in 2008.²⁶

The Commission found a pronounced divergence in capacity trends between the Japanese and Mexican industries. While there were no reported changes in Japanese capacity over the period of investigation, the capacity of the Mexican industry dropped substantially when PMT, Mexico’s [] producer and exporter to the United States over the original period, ceased production and shipped its equipment to Saudi Arabia, eliminating [] short tons of Mexican capacity. The other Mexican producers did not expand capacity during the period examined, and Procarsa is the only producer that predicted it would [] in the future. However, Procarsa’s [] falls far short of offsetting the sharp drop in overall Mexican capacity resulting from PMT’s liquidation. The new Procarsa line will increase Mexican CWLDLP capacity by [] short tons in 2008, leaving the Mexican industry’s capacity [] short tons lower than in the period of the original investigation.²⁷

²⁵ *Id.* at 1337.

²⁶ Remand Determination at 15.

²⁷ *Id.* at 16.

The Commission also considered Procarsa's projection for 2009 and beyond. Procarsa projected that its new production line will have the capacity to produce [] The Commission found that if Procarsa [] it would still leave the Mexican industry capacity [] short tons lower than during the original investigation period, before PMT's liquidation. The Commission discounted the significance of Procarsa's projection that it would eventually have a capacity of [] short tons because this number represents only maximum theoretical capacity based on operating three shifts a day, and Procarsa reported that []²⁸

U.S. Steel does not cite any evidence that contradicts the Commission's analysis of the capacity data in Procarsa's revised questionnaire response. We therefore hold that the Commission's finding of divergent capacity trends between the Mexican and Japanese industries is supported by substantial evidence.

The Commission's decision not to cumulate imports from Japan and Mexico is based on other factors in addition to the divergence in capacity trends.

The Commission found that the Japanese industry is highly export-oriented, with a relatively low level of home market shipments. In 2006 Japanese producers exported 98.4 percent of their shipments and made only 1.5 percent of their shipments within Japan. Mexican producers, on the other hand, made [] percent of their total shipments within Mexico and exported only [] percent.²⁹

²⁸ Remand Determination at 16, n.74.

²⁹ *Id.* at 11.

It is understandable that the Mexican producers would prefer to concentrate on their home market because they receive preferential treatment from PEMEX, the state-owned energy company that controls most Mexican purchases of CWLDLP, prices are relatively higher in Mexico due to import barriers, and the Mexican home market demand has steadily increased.³⁰

Moreover, the Japanese producers continued to export CWLDLP to the United States in significant quantities after the antidumping duty order was issued while exports from Mexico dwindled to zero.³¹

U.S. Steel argues that the Commission erred in relying on trends during the period of review because “a reduction in imports following the imposition of an order is to be expected and is *not* evidence that imports will be at low levels if the order were revoked.”³² However, the fact that the Japanese producers maintained a significant presence in the U.S. market despite the imposition of antidumping duties while the Mexican producers reduced their exports to zero over the period of review demonstrates a clear difference in export orientation between the two industries. Moreover, as noted in the Commission’s response to U.S. Steel’s comments, the statute directs the Commission to consider conditions during the period of an antidumping duty order in evaluating the likely effect of revocation of the order, and the Federal Circuit has affirmed the Commission’s reliance on trends during the period of review in analyzing the likely differences of competition between producers in different countries for cumulation purposes.³³

³⁰ *Id.* at 12.

³¹ *Id.* at 17.

³² U.S. Steel Comments at 14 (emphasis in original).

³³ *See* ITC Response to U.S. Steel Comments at 31-32

In view of the foregoing, we hold that the Commission's decision not to cumulate imports from Mexico and Japan is supported by substantial evidence.

IV. LIKELIHOOD OF INJURY FROM MEXICO

Having determined not to cumulate imports from Mexico and Japan, the Commission next determined whether revocation of the antidumping duty order with respect to Mexico alone would be likely to result in continuation or recurrence of material injury to the domestic industry. In this connection the Commission considered the likely volume and price effects of revocation.

A. Volume effects

In deciding the issue of likely volume effects the Commission made the same factual findings that it made regarding cumulation.

The Commission stated that it would be difficult for Mexican producers to rapidly increase their exports to the United States because they virtually abandoned the U.S. market after the antidumping duty order was issued in 2003, and they would have to seek out and re-establish relationships with U.S. importers and purchasers after revocation in order to reenter the market.³⁴

The Mexican producers reported that they would resume exports to the United States in the event of revocation. Nevertheless, the Commission found that the Mexican producers would likely remain focused on their home market where they are protected from foreign competition, receive preferential treatment from PEMEX, and enjoy much higher prices and growing demand.³⁵ Moreover, the closure and liquidation of PMT substantially reduces the likelihood that CWLDLP exports from Mexico would increase significantly after revocation. The

³⁴ Remand Determination at 23.

³⁵ *Id.* at 12.

Commission found that the closure of PMT substantially reduced the total capacity of the Mexican industry even after accounting for [] U.S.

Steel argues that despite the closure of PMT, the capacity of the Mexican industry [

] ³⁶

The Commission discounted the significance of the [

] Procarsa projected an increase of [] short tons in 2008, which leaves total Mexican capacity [] short tons lower than during the original investigation period before PMT's liquidation.³⁷ Even after adding Procarsa's [] the total capacity of the Mexican industry would remain [] short tons lower than during the original investigation period.³⁸ U.S. Steel contends that in 2010 industry-wide capacity will far exceed the level of the original investigation period when [] short tons of capacity.³⁹

As noted by the Commission, neither Procarsa nor any other Mexican producer stated what its capacity would be in 2010.⁴⁰ Procarsa predicted that its maximum capacity to produce all types of "large diameter pipe" including subject and nonsubject products would reach [], but it did not state when it would reach the projected [] short tons level.

³⁶ Remand Determination at 25.

³⁷ *Id.*

³⁸ *Id.* at 26.

³⁹ U.S. Steel Comments at 4-5.

⁴⁰ Remand Determination at 26.

More important, the projected [] short ton capacity is a theoretical maximum capacity based on running three shifts a day, not an actual operating capacity. Procarsa’s revised questionnaire response states, [

] ⁴¹ The Commission therefore did not accept U.S. Steel’s argument that Procarsa’s new production line would increase Mexican industry capacity by [] short tons in 2010.⁴²

The Commission also chose not to give “authoritative weight” to the capacity reported by the Mexican industry because it doubted that the producers could ever achieve full utilization of the reported capacity. Mexican producers produced more CWLDLP in 2006 than in any other year since at least 1998, and yet utilized only [] percent of their reported capacity.⁴³

U.S. Steel argues that because of the reported [] revocation of the antidumping duty order would likely result in a substantial increase in the volume of Mexican exports to the United States. The Commission disagrees. The Commission complied with the Panel’s instructions by re-evaluating its decision in light of the revised Procarsa questionnaire response and it concluded that revocation of the order would not have significant volume effects. U.S. Steel disagrees with the Commission’s analysis and argues that the Commission should have given greater weight to the capacity data. However, the Panel may

⁴¹ Procarsa Revised Questionnaire Response at II-4.

⁴² Remand Determination at 26, n.116.

⁴³ *Id.* at 26.

not re-weigh the evidence or substitute its judgment for that of the Commission. We find that the Commission’s evaluation of the revised capacity data is supported by substantial evidence.

In addition, while expansion of capacity is a relevant factor in determining the likely effect of revocation, an increase in capacity alone does not necessarily result in a increase in imports. As the Mexican respondents pointed out, the capacity figures reported by the Mexican producers have always been far in excess of their actual production, and that reported capacity has not resulted in increased production and exports to the United States—even when there was no antidumping order.⁴⁴

The Commission found that other factors would likely limit the volume of Mexican exports to the United States. These include the difficulty of re-establishing relationships with U.S. importers and purchasers after the Mexican producers virtually abandoned the U.S. market, and the Mexican producers’ continued focus on the home market where they enjoy preferential treatment from PEMEX, protection from imports, high prices and growing demand. These factors have a direct bearing on the likely volume effects of revocation.

We therefore find that the Commission’s determination that revocation would not result in a significant increase in the volume of imports from Mexico is supported by substantial evidence.

B. Price effects and impact of subject imports

In its initial brief to the Panel, U.S. Steel contended that “the Commission’s improper determination with respect to likely volume tainted its conclusions with respect to likely price effect and impact on the domestic industry.”⁴⁵ On remand, the Commission adopted its Original

⁴⁴ Comments of Tubacero, S.A. de C.V., Tuberia Laguna, S.A. de C.V., and Tuberias Procarsa, S.A. de C.V., at 18.

⁴⁵ U.S. Steel Brief at 45.

Views regarding likely price effects and likely adverse impact on the domestic industry because it again found that the volume of imports from Mexico after revocation would not likely be significant.⁴⁶ Having found that the Commission's determination with respect to volume effects is supported by substantial evidence, the Panel sustains the Commission's finding regarding the likely effect of revocation on the price of Mexican CWLDLP in the U.S. market and the likely impact of subject imports on the domestic industry.

The Commission's Remand Determination is hereby affirmed.

⁴⁶ Remand Determination at 30.

IT IS SO ORDERED:

ISSUED ON AUGUST 29, 2011

SIGNED IN THE ORIGINAL BY

Peggy Chaplin Louie
Peggy Chaplin Louie, Chairperson

David Hurtado Badiola
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