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I. INTRODUCTION

IN Chapter 19 of the North American Free Trade Agreement (NAFTA) a review is provided for parties challenging final antidumping or countervailing duty determinations.[1] Specifically, under Article 1904(2) these parties have the option of bringing appeals before an independent NAFTA Binational Panel (Panel) instead of the national courts of the importing country.[2] By applying the "statutes, legislative history, regulations, administrative practice and judicial precedents" of that country, the Panel decides whether the disputed determinations were made in accordance with the antidumping and countervailing duty laws of the determining country.[3] This article summarizes the Panel's review and decision with respect to a challenge that occurred between August 2008 and October 2008.

II. IN THE MATTER OF STAINLESS STEEL SHEET AND STRIP COILS FROM MEXICO:

The Panel's decision is derived from a dumping determination by the United States Commerce Department on June 8, 1991, regarding stainless steel sheet and strip ("SSSS").[4] Then in 1999, the United States International Trade Commission (Commission) made the determination that "revocation of the antidumping order on stainless steel sheet and strip . . . from Mexico would be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time."[5] This Binational Panel was then formed to review this determination after Thyssenn Krupp Mexinox S.A. de C.V. and Mexinox USA Inc. (collectively, Mexinox) asserted its right to request a Panel Re-

1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M 605, 683.
2. *Id.*
3. *Id.*
4. Article 1904 Binational Panel Review, *Stainless Steel Sheet and Strip in Coils from Mexico: U.S. International Trade Commission Final Affirmative Determination in the Five Year Review of the Antidumping Order*, Secretariat File No. USA-MEX-2005-2903-06 (Sept. 10, 2008), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=380 [hereinafter Panel Review].
5. *Id.* at 4.

view of this determination.[6] The Panel ultimately concluded that the various arguments set forth by Mexinox and the supporting evidence "[did] not directly contradict or undercut the specific elements of evidence cited by the Commission in support of its findings in the review" and upheld the conclusion of the Commission.[7]

A. Standard of Review Used by the Panel

The Panel conducted the review of the decision by the Commission under a substantial evidence standard of review, meaning that the determination must be affirmed unless it cannot be "supported by substantial evidence on the record."[8] The fact that two inconsistent conclusions could be drawn from the evidence does not mean that the conclusion is not supported by substantial evidence.[9] The Commission is supposed to scrutinize this conflicting evidence in order to determine that the imports are actually causing injury and not merely "'contributing to the injury in a tangential or minimal way.'"[10] Additionally, the Panel reviewed the Commission's decisions to determine whether they were "in accordance with [the] law."[11]

B. Issues Addressed by the Panel

The Panel's decision was based on a review of seven issues: (1) discernable adverse impact, (2) imports likely to compete-fungibility, (3) exercise of discretion to cumulate, (4) conditions of competition, (5) volume of imports, (6) price effects, and (7) impact of subject imports.[12]

1. Discernable Adverse Impact

The Panel determined that "the Commission's determination that subject imports from Mexico would not be likely to have no discernible adverse impact on the domestic SSSS industry within a reasonably foreseeable time" was supported under the substantial evidence standard and was in accordance with the law.[13] Mexinox argued (1) that the Commission did not correctly calculate the available capacity of the company; (2) there were limits on the ability to increase production; (3) there "was no link between its capacity utilization and its level of exports to the United States"; and (4) the increase in production attributed to its excess capacity would still only be a "small percentage of the [entire] U.S. do-

6. *Id.* This timely request for a Panel Review is provided for by Rule 34 of the North America Free Trade Agreement Rules of Procedure for Article 1904 Binational Panel Rules.
7. *Id.* at 46. The decision of the Commission was published on July 18, 2005, at 70 Fed. Reg. 41236.
8. Panel Review, *supra* note 4, at 10.
9. *Id.*
10. *Id.* at 11 (quoting Taiwan Semiconductor Indus. Ass'n v. U.S. Int'l Trade Comm'n, 266 F.3d 1339, 1345 (Fed. Cir. 2001)).
11. *Id.*
12. *Id.* at 12-14.
13. *Id.* at 12, 20.

mestic market."[14] The Commission argued against all of the assertions made by Mexinox.[15]

The panel concluded that the "record indicate[d] that Mexinox was a dominant supplier of SSSS to the U.S. market and that the domestic market accounted for a substantial portion of the company's sales and revenues."[16] Additionally, the Panel determined that Mexinox would be able to increase exports into the United States by utilizing its current unused capacity.[17] Among other things, the Panel also agreed with the assertion that "Mexinox carried on significant price underselling during the period of review" and that this underselling continued after the order.[18] The Panel believes the events that took place during the period of the review should also be considered, and even if the circumstances did not change during this time period, there was still substantial evidence to sustain the determinations of the Commission.[19] Because of its findings, "[t]he Panel conclude[d] that the Commission's determination that subject imports from Mexico would not be likely to have no discernible adverse impact if the order [was] revoked is supported by substantial evidence . . .and . . .in accordance with law."[20]

2. *Imports Likely to Compete-Fungibility*

"The Tariff Act [of 1930 (Tariff Act)] provides that 'the Commission may cumulatively assess the volume and effect of imports . . .if such imports would be likely to compete with each other and with the [U.S. domestic products].'"[21] While there are four sub-factors that the Commission normally considers to determine whether imports are likely to compete with each other, the only one Mexinox challenged was the Commission's decision regarding "the degree of fungibility between the imports from different countries and between imports and the domestic like product" sub-factor.[22]

Generally, Mexinox asserted that the "Commission focused on grade alone, rather than differentiating factors."[23] For example, Mexinox argued that the Commission did not give due consideration to other factors it deemed significant, which "differentiated the Mexican product from that produced by other foreign suppliers and domestic producers."[24] It also argued that responses to questionnaires from different purchasers in the United States indicated that the products were not always interchangeable, but rather, the majority indicated the "imports from Mexico

14. Panel Review, *supra* note 4, at 15.
15. *Id.* at 16-19.
16. *Id.* at 19.
17. *Id.* at 20.
18. *Id.*
19. *Id.*
20. *Id.*
21. Panel Review, *supra* note 4, at 20-21 (quoting 19 U.S.C. § 1516a(a)(7) (2008)).
22. *Id.* at 21.
23. *Id.* at 22.
24. *Id.*

were only sometimes or never interchangeable."[25]

The Commission ultimately decided that the domestic and import products were generally substitutable and that a majority of the purchasers actually reported in the questionnaires that the "imports from Mexico were always or frequently interchangeable with subject imports from the other seven subject countries."[26] Also, quarterly price comparisons indicated that the SSSS was competing with the imports from Mexico.[27] Finally, the Commission asserted that it did not need to investigate Mexinox's specialized products because "the record demonstrated that the company competed with a wide range of SSSS in the domestic market."[28]

Ultimately, the Panel concluded that there was a "fungibility of the subject merchandise and domestic SSSS," which was proved by both the questionnaire responses and "sales comparisons of commodity products."[29] The conclusion "that the subject imports would be likely to compete with each other and with the domestic like product [was] supported by substantial evidence on the record and is otherwise in accordance with law."[30]

3. *Exercise of Discretion to Cumulate*

Under the Tariff Act, the Commission is permitted to decide whether or not to "cumulatively assess the volume and effect of subject imports from all countries . . . . [Even if] "there is a likelihood of discernible adverse effect and [if] the subject imports would be likely to compete with each other and with domestic [products]."[31] Mexinox argued that the Commission exercised its discretion to accumulate the imports based on the premise that these imports from Mexico and the subject imports from other countries would compete, which was incorrect.[32] In addition to stressing the difference in Mexinox's distribution system from the other producers, Mexinox asserted that its pricing policies were based on formulas from U.S. producers, unlike the other countries who were not North American producers.[33] Finally, Mexinox argued that ThyssenKrup had its subsidiaries serve the regional markets, which meant "Mexinox [was to] focus on the North American market [while] the European subsidiaries would focus on [serving the] European market."[34]

First, the Commission reiterated the fact that the decision whether to cumulate is discretionary and this discretion is not limited under the

25. *Id.*
26. Panel Review, *supra* note 4, at 23-24.
27. *Id.* at 24.
28. *Id.*
29. *Id.* at 25.
30. *Id.*
31. *Id.* at 25-26.
32. Panel Review, *supra* note 4, at 26.
33. *Id.*
34. *Id.* at 27.

Tariff Act.[35] The Commission argued that it properly exercised its discretion because the record showed that imports from countries other than the United Kingdom and France increased between 1996-1998 or 1997-1998, and the domestic products were undersold by these countries in at least one half of the price comparisons.[36] Additionally, "[t]he Commission argues that it does not need to rely on any particular factors. . . .[It] has a wide latitude in determining how and where to exercise its discretion to cumulate."[37] In response to Mexinox's argument regarding common ownership by ThyssenKrupp, the Commission points to the testimony by the Chief Executive for ThyssenKrupp who said "the three companies [were] closely coordinated," and therefore the Commission treated them as one unit.[38] Because of this broad "latitude provided the agency in the Tariff Act to exercise discretion" when deciding whether to cumulate, the Panel determined that the decision to cumulate was "supported by substantial evidence on the record and [was] otherwise in accordance with law."[39]

4. Conditions of Competition

When the Commission is attempting to determine "whether [a] material injury is likely to continue", the Tariff Act requires the Commission to view the "economic factors 'within the context of the business cycle and conditions of competition that are distinctive to the affected industry.'"[40] The conditions of competition during the period of review remained mostly the same as during the original period of investigation.[41] There was an increase in demand during both periods, there was substitutability between the domestic SSSS and imports, and price was one of the "most important factors in purchasing decisions."[42]

Mexinox again asserted its contention that the determination by the Commission on "fungibility and overlap of competition was" incorrect.[43] Additionally, Mexinox disputed the Commission's determination that SSSS capacity will grow faster than its global consumption under the substantial evidence standard because this information came from only one source.[44] The Commission argued that its conclusion was founded on "the fact that commodity grade SSSS accounted for a significant portion of domestic production as well as the majority of subject imports."[45] Additionally, the Commission supported its findings on global capacity and consumption by asserting that the actual information that it used in mak-

35. *Id.* at 28.
36. Id. at 28.
37. *Id.* at 28-29.
38. Panel Review, *supra* note 4, at 30.
39. *Id.* at 31.
40. *Id. (quoting 19 U.S.C. § 1675a(a)(4) (2000)).*
41. *Id.* at 31.
42. *Id.* at 32.
43. *Id.*
44. Panel Review, *supra* note 4, at 32.
45. *Id.*

ing that determination was thought to be an "appropriate data source" by Mexinox.[46] Finally, the Commission pointed to the fact that a "reasonably foreseeable time" would not be the same in every situation and that this time frame would likely be longer than the injury analysis time frame.[47] Ultimately, the Panel concluded that the Commission's determination was supported by substantial evidence and in accordance with law because there was "evidence of substitutability, the likelihood that global capacity would increase at a greater rate than global consumption, and . . . [the] time frame was sufficiently imminent."[48]

5. Volume of Imports

The Commission determined that "the likely volume of imports of the subject merchandise would be significant if the order was revoked."[49] While Mexinox argued that the Commission was incorrect in its conclusion that there was excess capacity in Japan and Taiwan because of erroneous information, the Commission countered with the argument it was only required to use that the information it used was "reasonable to use under the circumstances."[50] This information did show that producers in Japan and Taiwan were not operating at full capacity and that production was increasing in Japan.[51]

Additionally, Mexinox disputed the Commission's determination "that subject producers have an incentive to increase exports to the United States," which was based on three reasons: (1) the United States was an attractive market because of "relative global prices," (2) the increase in global production of SSSS would be outpaced by the increased capacity, and (3) the producers could "shift production from cut-to-length ("CTL") SSSS to coiled SSS."[52] Mexinox argued that the Commission viewed the price analysis based on only one product, but the Commission asserted that it "characterized the relative prices as mixed" and based on these comparisons, there was an incentive to shift sales to the United States.[53] The Commission also rebutted Mexinox's claims that increased capacity for SSSS was based on speculation by pointing to "ample evidence in the record," which indicated an increase.[54] Finally, Mexinox argued that the shift towards CTL had already been occurring and that this shift was due to U.S. industry abandoning this product section.[55] Although the shift had begun before the orders, the Commission believed the agency's findings are supported because of the "ease of switching to coiled SSSS, and

46. *Id.* at 33.
47. *Id.*
48. *Id.*
49. *Id.* at 34.
50. Panel Review, *supra* note 4, at 34-36.
51. *Id.* at 36-37.
52. *Id.* at 34-35.
53. *Id.* at 37.
54. *Id.*
55. *Id.* at 35-36.

the desirability of the U.S. market."[56] The Commission also pointed out that Mexinox's assertions regarding the U.S. abandonment were not based on "any cited data."[57]

The Panel upheld the Commission's determination after concluding that there was sufficient evidence indicating "increased production in several subject countries, price incentives to shift sales to the United States, growth of capacity in China, and potential for shifting from CTL to coiled SSSS."[58]

6. *Price Effects*

The Commission determined that the "likely price effects of the cumulated subject merchandise would be significant if the order is revoked."[59] Mexinox argued against this by claiming there was a lack of evidence showing that it could "undersell or otherwise adversely affect U.S. prices" because the testimony offered did not reveal an intention of the company to change its pricing policy.[60] Additionally, Mexinox claimed that even in light of the increases in volume and market share, domestic prices increased and that the record showed there was an increasing demand in the U.S. market, which would support the increased imports without affecting prices.[61]

The Commission disputed Mexinox's claims by reiterating the findings of the original investigation: that "underselling occurred in almost two-thirds of the price comparisons" and persisted for 41 percent of the comparisons completed during the review.[62] The Commission also noted that the Chief Executive of Mexinox stated that they had to alter their philosophy in order to comply with the antidumping laws.[63] Furthermore, the Commission took into account the increase in demand but determined that this would not continue in light of the fact that the forecast after 2004 suggested that growth would be modest or slow, imports could be substituted for domestic SSSS, price continued to be crucial in purchasing, and even after the antidumping orders, the practice of underselling continued.[64] The Panel agreed with these assertions by the Commission, therefore, it concluded that "the Commission's determination that the likely price effects of cumulated subject imports would be significant if the antidumping . . . [orders] were revoked [was again] supported by substantial evidence . . . and . . . in accordance with law."[65]

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56. Panel Review, *supra* note 4, at 38.
57. *Id.*
58. *Id.* at 39.
59. *Id.*
60. *Id.*
61. *Id.* at 40.
62. Panel Review, *supra* note 4, at 40-41.
63. *Id.* at 41.
64. *Id.* at 41-42.
65. *Id.* at 42.

7. Impact of Subject Imports

Finally, the Commission determined that the cumulated imports "would lead to a continuation or recurrence of material injury if the antidumping orders . . . were revoked."[66] Mexinox argues that the Commission needed to meet a "higher burden to fully articulate its reasons for reaching its finding," which it did not do.[67] It further asserts that the determinations regarding volume and price effects were not supported by "substantial evidence on the record."[68] Mexinox pointed to the year 2004 when the cost of goods was increasing at a slower rate than the prices, and "that prices [were] expected to remain strong."[69] Mexinox believed the Commission ignored this evidence and failed to support its assertion that the increase in consumption would not be great enough to support the increase in imports that would follow the revocation of the orders.[70]

The Commission points to the Tariff Act, which allows the agency to consider different factors, but does not require that all of the factors be met in order for the Commission to decide in the affirmative.[71] First, the Commission asserts that the increasing imports caused the domestic industry to reduce its prices.[72] While the Commission determined that there was "positive performance" in 2004, it also determined that this would not be the case in 2005.[73] Additionally, the Commission explained that it cited to "numerous forecasts and other evidence in the record in support of its findings."[74] Ultimately, the Panel agreed with the Commission's determination that, among other things, the domestic industry had to lower prices because of increasing exports, there were negative trends in 1999-2000, and the forecast only indicated modest growth.[75] Therefore, the "likely impact of the cumulated subject imports would lead to the continuation or recurrence of material injury" if the order was removed.[76]

III. CONCLUSION

Regarding the seven issues raised by Mexinox, the Panel determined that the evidence in the record "[did] not directly contradict or undercut the . . . evidence cited by the Commission."[77] The fact that two inconsistent conclusions could be drawn from the evidence presented by the two sides did not mean that a decision was not supported by substantial evi-

66. *Id.* at 43.
67. Panel Review, *supra* note 4, at 43.
68. *Id.*
69. *Id.*
70. *Id.* at 43-44.
71. *Id.*; 19 U.S.C. § 1675(a)(1)-(5).
72. Panel Review, *supra* note 4, at 44.
73. *Id.* at 45.
74. *Id.* at 45-46.
75. *Id.* at 46.
76. *Id.*
77. *Id.*

dence.[78] While the evidence presented by Mexinox does support a different outcome, the Panel found that the Commission's conclusion was "supported by substantial evidence on the record."[79]

78. *Id.* at 46-47.
79. *Id.* at 47.

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