

THE NORTH AMERICAN FREE TRADE AGREEMENT
ARTICLE 1904 BINATIONAL PANEL REVIEW

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In the Matter of Light-Walled)	
Rectangular Pipe and Tube)	Secretariat File No.:
from Mexico: Final Determination)	
of Material Injury to a U.S. Industry)	USA-MEX-2008-1904-04
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MEMORANDUM OPINION AND ORDER OF THE PANEL

PANEL MEMBERS:

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I. INTRODUCTION

This Binational Panel (“Panel”) has been established pursuant to Article 1904.2 of the North American Free Trade Agreement (“NAFTA”). The panel was constituted to review the July 28, 2008, final determination rendered by the United States International Trade Commission (“the Commission,” “ITC,” or “investigating authority”) in *Light-Walled Rectangular Pipe and Tube from Republic of Korea, Mexico, Turkey, and the People’s Republic of China: Investigation Nos. 701–TA–449 and 731–TA–1118–1120 (Final)*, 73 Fed. Reg. 45,244-45 (August 4, 2008) (“Commission’s Final Determination” or “Final Determination”).

On August 29, 2008, Nacional de Acero S.A. de C.V. (“Nacional” or “Complainant”) filed a First Request for Panel Review with the United States Section of the NAFTA Secretariat. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review*, 73 Fed. Reg. 52,024 (Sept. 8, 2008). On September 25, 2008, Complainant, a respondent Mexican manufacturer, filed a complaint contesting the Commission’s Final Determination, which found that the domestic industry producing light-walled rectangular pipe and tube (“LWR pipe and tube” or “subject imports”) was materially injured by imports from Mexico of LWR pipe and tube sold at less than fair value (“LTFV”). The Commission and twelve domestic producers (“U.S. Producers”)¹ filed notices of appearance in opposition to Nacional’s appeal on October 8, 2008, and September 26, 2008, respectively. This Panel convened a hearing in Washington, DC on July 28, 2010, at which counsel for Nacional, the

¹ The twelve U.S. producers consisted of: Allied Tube and Conduit; Atlas Tube; California Steel and Tube; EXLTUBE; Hannibal Industries; Leavitt Tube Company LLC; Maruichi American Corporation; Searing Industries; Southland Tube; Vest Inc.; Welded Tube; and Western Tube and Conduit.

Commission, and the U.S. Producers appeared and participated in oral argument. For reasons more fully set out below, and on the basis of the evidence in the administrative record, the applicable law, the written submissions of the participants and oral argument at the Panel's hearing, the Panel remands the investigating authority's Final Determination in this matter.

II. BACKGROUND

On June 27, 2007, twelve U.S. producers filed a petition with the Commission and the Department alleging that LWR pipe and tube from China were being subsidized within the meaning of Section 703(b) of the Tariff Act of 1930, as amended, 19 U.S.C. §1671b(b) ("Act") and that imports of LWR pipe and tube from China, Korea, Turkey and Mexico were being sold at less than fair value within the meaning of Section 733(b) of the Act. *Initiation of Antidumping Duty Investigations: Light-Walled Rectangular Pipe and Tube from Republic of Korea, Mexico, Turkey, and the People's Republic of China*, 72 Fed. Reg. 40,274-80 (July 24, 2007). On July 24, 2007, the U.S. Department of Commerce ("the Department" or "Commerce") initiated its investigations to determine whether LWR pipe and tube from Mexico, Turkey, and the Republic of Korea were being sold in the U.S. below fair market value. *Id.*

On August 28, 2007, the Commission issued its preliminary determination. The Commission found that there was "a reasonable indication that an industry in the United States is materially injured or threatened with material injury" by reason of imports from Mexico of LWR pipe and tube alleged to be to be sold in the United States at less than fair value. *Light-Walled Rectangular Pipe and Tube From China, Korea, Mexico, and Turkey: Investigation Nos. 701-TA-449 and 731-TA-1118-1121 (Preliminary)*, 72 Fed. Reg. 49,310-11 (August 28, 2007).

The Department, upon timely request from the U.S. Producers, postponed its preliminary determinations with respect to China, Korea, and Mexico by 50 days to January 23, 2008.

Postponement of Preliminary Determination of Antidumping Duty Investigations: Light-Walled Rectangular Pipe and Tube from Mexico, Turkey, and the Republic of Korea: 72 Fed. Reg. 64,044 (November 14, 2007). Because the deadline for the final determination was set at 75 days after the preliminary determination, the consequence of postponing the preliminary determination was to postpone the final determination by 50 days as well. *Id.* Commerce published its preliminary affirmative determination on January 30, 2008. *Notice of Preliminary Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube From Mexico, 73 Fed. Reg. 5,515-25 (January 30, 2008).*

The Commission thereupon issued a notice of schedule for its final injury investigation. *Light-Walled Rectangular Pipe and Tube From China, Korea, Mexico, and Turkey: Investigation Nos. 701-TA-449 and 731-TA-1118-1121 (Final), 73 Fed. Reg. 6,740-41 (February 5, 2008).* The scheduling notice, *inter alia*, provided the following timetable: On March 28, 2008, the pre-hearing staff report would be placed in the nonpublic record (with the public version to be issued thereafter); the deadline for pre-hearing briefs would be April 4, 2008; the hearing would take place on April 11, 2008; post-hearing briefs would be due on April 18, 2008; on May 6, 2008, the Commission would make available to the parties all information on which they had not had opportunity to comment; and the deadline for filing final comments would be May 8, 2008. *Id.* In accordance with the schedule, the Commission staff and the parties met each deadline. *Light-Walled Rectangular Pipe and Tube from Republic of Korea, Mexico, Turkey, and the People's Republic of China: Investigation Nos. 701-TA-449 and 731-TA-1118-1120 (Final),*

Administrative Record (“Admin. Rec.”), List 1, Doc. Nos. 106, 113, 114, 126, 130-132, 150, 151-154, and 159-161; List 2, Doc Nos. 297-299, 313, 314, and 317-328.

On June 24, 2008, the Department published its final determination that LWR pipe and tube from Mexico were being sold at less-than-fair-value. *Final Determination of Sales at Less Than Fair Value: Light-Walled Rectangular Pipe and Tube from Mexico*, 73 Fed. Reg. 35,649-52 (June 24, 2008).² The Commission issued its Final Determination on July 17, 2008, finding that the domestic industry producing LWR pipe and tube was materially injured by reason of imports from Mexico sold in the United States at less than fair value. *Final Determination*, 73 Fed. Reg. at 45,244-45.

III. STATEMENT OF ISSUES

Complainant asserts the following errors on appeal:³

1. The Commission erred in excluding the 2008 pricing evidence submitted by Nacional with its final comments on May 6, 2008. Nacional maintains that the proffered evidence would have demonstrated that, at the time closest to vote day, the U.S. industry was profitable and not suffering material injury by reason of subject imports at LTV from Mexico.
2. The Commission’s final determination was contrary to substantial evidence and not in accordance with law when it overlooked and/or discounted the 2008 evidence on the record and, instead, made its determination primarily relying on the evidence on the record regarding the domestic industry conditions during the period between 2005 and 2007. Nacional maintains that, had the Commission properly weighed the 2008 evidence on the record, it would not have found that the U.S. industry

² The Department subsequently issued an amended final determination in which, *inter alia*, it adjusted the final determination dumping margin assessed against certain importers from Mexico. *Notice of Amended Final Determination of Sales at Less Than Fair Value: Antidumping Duty Orders; Light-Walled Rectangular Pipe and Tube from Mexico, the People’s Republic of China, and the Republic of Korea: Light-Walled Rectangular Pipe and Tube from the Republic of Korea*, 73 Fed. Reg. 45,403-405 (August 5, 2008).

³ In its Complaint, Nacional identified thirteen issues but progressively narrowed and refined its allegations of error in its briefs and at oral argument.

producing LWR pipe and tube was materially injured by reason of subject imports at LTV from Mexico.

IV. STANDARD OF REVIEW

Pursuant to NAFTA Article 1904.3, “the Panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing party otherwise would apply to a review of a determination of the competent investigating authority.” NAFTA Art. 1904.3. In reviewing the determination of the investigating authority, in this case the ITC,⁴ a panel applies the same standard of review and general legal principles as would the U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit. *Id.* As a result, NAFTA Annex 1911 mandates application of the standard of review set out in Section 516A(b)(1)(B) of the Act, which establishes that “the court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. §1516a(b)(1)(B)(i); *see also* NAFTA Annex 1911.

Under Section 516A(b)(2)(A), the review performed by courts, and in this case by this binational panel, must be confined to “the [administrative] record,” which means that the panel is limited to “information presented to or obtained by [the Commission]...during the course of the administrative proceeding,...a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.” 19 U.S.C. §1516a (b)(2)(A). In addition, in determining whether the administrative record adequately supports the agency’s

⁴ Pursuant to the NAFTA Agreement, the competent investigating authorities in the United States are the International Trade Administration of the United States Department of Commerce and/or the United States International Trade Commission. NAFTA, Annex 1911.

decision, the ITC must be adjudged only on the grounds and findings actually stated in its determination, not on the basis of *post hoc* argumentation of counsel. *Bowen v. Georgetown University Hospital*, 488 US 204, 212-13 (1988) (consideration of “what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate”); *Florida Manufactured Housing Assn. v. Cisneros*, 53 F3d 1565, 1574 (11th Cir. 1995) (no consideration when the new interpretation is a mere litigation position); *USX Corp v. Office of Workers’ Compensation Programs*, 978 F2d 656, 658 (11th Cir. 1992) (no deference to agency’s litigating position absent prior interpretation).

The U.S. Supreme Court in *Universal Camera* stated that the substantial evidence standard requires “more than a scintilla...such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *see also, Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). In assessing such “substantiality,” courts and binational panels must consider “the record in its entirety, including the body of evidence opposed to the [agency’s] view.” *Universal Camera*, 370 U.S. at 477.

This, however, does not enable courts or binational panels to “reweigh” the evidence or substitute their judgment for that of the original finder of fact. *Id.* at 488 (reviewing authority may not “displace the [agency’s] choice between two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it *de novo*.”) The U.S. Court of Appeals for the Federal Circuit has explained that “even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent [the Commission’s] determination from being supported by substantial evidence.” *Am. Silicon Techs.*

v. United States, 261 F.3d 1371, 1376 (Fed. Cir. 2001). As recently stated by the Federal Circuit in *Nippon Steel Corp. v. United States*:

A party challenging the Commission's determination under the substantial evidence standard has chosen a course with a high barrier to reversal. *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed.Cir.2001). We have explained that “even if it is possible to draw two inconsistent conclusions from evidence in the record, such a possibility does not prevent determination from being supported by substantial evidence.” *Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir.2001). Accordingly, the question for [a reviewing court] is “not whether we agree with the Commission's decision, nor whether we would have reached the same result as the Commission had the matter come before us for decision in the first instance.” ...[*United States Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed.Cir.1996)] Rather, “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. *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed.Cir.2004) (internal quotation marks omitted). In short, we do not make the determination; we merely vet the determination.”

Nippon Steel Corp. v. United States, 458 F. 3d 1345, 1352 (Fed. Cir. 2006). Thus, as a general rule, the courts and binational panels, in their capacity of reviewing authorities, accord deference to an agency's factual findings, its statutory interpretations, and its methodologies when applying the substantial evidence standard. *Id.*

However, an agency's decision must have a reasoned basis. The reviewing authority may not defer to an agency determination premised on inadequate analysis or reasoning. The extent of deference to be accorded agency determinations is dependent on “the thoroughness evident in [its] consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements....” *Ceramica Regiomontana, S.A. v. United States*, 636 F.Supp. 961, 966

(1986), *aff'd*, 810 F.2d 1137 (Fed.Cir. 1987), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

For the Panel to determine whether the ITC's determination is supported by substantial evidence, the Panel must consider the ITC's reasons for its conclusions and determine whether there is a rational connection between the facts found and the choice made by the ITC. *See Bando Chem. Indus. v. United States*, 787 F. Supp. 224, 227 (Ct. Int'l Trade 1992) (citing *Bowman Transportation v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974)). A reviewing panel may not, "even as to matters not requiring expertise ... displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488.⁵

Regarding the second part of the standard of review, whether the agency acted "in accordance with law", the panel must follow the standard of review and general legal principles as would the Court of International Trade and the Federal Circuit. NAFTA Art. 1904.3. In reviewing an agency's interpretation of a statute, in this case the relevant statutory provisions of the Act, U.S. courts (and therefore the panel) apply *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, which addresses judicial review of administrative interpretations of statutes. *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Under *Chevron*, in the absence of a clear intent of Congress, federal courts must defer to any reasonable

⁵ *See also National R.R. Passenger Corp. v. Boston & Marine Corp.*, 503 U.S. 407, 417 (1992) (when considering whether or not a decision is "in accordance with law," the panel must defer "to reasonable interpretations by an agency of a statute that it administers. . ."); *Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992) (the panel may not substitute its own judgment for that of the agency when there are two legitimate alternative views); *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 619-620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.")

interpretation by the agency charged with administration of a statute. *Id.* If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's determination is based on a permissible construction of the statute. *Id.*

On this point, the Court in *Chevron* states:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-43.⁶

Thus, as expressed by the Court of International Trade, "as long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A., supra*, at 966.⁷ In sum, the applicable standard

⁶ See also *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997) (the CIT and Federal Circuit must enforce the clear Congressional intent or, where the applicable statute is ambiguous or otherwise undefined, "accord substantial deference to [the Commission's] construction of pertinent statutes").

⁷ See also *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed.Cir.1995) (the Federal Circuit will "accord substantial deference to Commerce's statutory interpretation, as the International Trade Administration is the 'master' of the antidumping laws"); *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed.Cir.1992) (courts will recognize that the Department of

of review for this matter requires the Panel to uphold the ITC's determination if it is supported by substantial evidence on the record and is not contrary to law, even if the Panel would have made a different determination had it been the initial trier of fact or interpreter of the statute.

V. DISCUSSION

A. **The Commission's Rejection of Nacional's May 6, 2008, Submission is Supported by Substantial Evidence and Otherwise in Accordance with Law.**

1. **Arguments**

On May 6, 2008, Nacional made two submissions to the Commission attaching price increase announcements issued in 2008. *See* Nacional de Acero S.A. de C.V. Letters to the Commission Requesting to Supplement the Record, May 6, 2008, Rule 60 Appendix to *Light-Walled Rectangular Pipe and Tube from Republic of Korea, Mexico, Turkey, and the People's Republic of China*: Investigation Nos. 701-TA-449 and 731-TA-1118-1120 (Final), ("Nacional's May 6, 2008 Letters, Rule 60 Appendix"). The Commission refused to accept these submissions. Nacional contends that the rejection of the submissions was arbitrary and in violation of law.

In support of its argument, Nacional contends:

1. The May 6, 2008, submissions responded to requests from two Commissioners made during the April 12, 2008, hearing.

Commerce is afforded broad discretion with regard to the conduct of investigations and that it has "the discretionary authority to determine the extent of investigation and information it needs.") Accordingly, the Commission's "statutory interpretations articulated in the course of antidumping proceedings [shall] draw *Chevron* deference." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376 (Fed. Cir. 2001).

2. Pursuant to the relevant statute, 19 U.S.C. §1677m(g), the relevant regulation, 19 U.S.C. §207.30 (2008), and the Commission's Antidumping and Countervailing Duty Handbook, ("The Handbook") the record remained open until: (a) May 6, 2008, the date upon which the Commission made available to the parties information obtained by the Commission upon which the parties had not previously had an opportunity to comment; (b) May 8, 2008, the due date for comments on material disclosed by the Commission upon which the parties had not previously had an opportunity to comment; or, (c) May 7, 2008, four business days after the filing of the final staff report on May 1, 2008. Because Nacional made its submissions on May 6, 2008, the submissions were made while the record was open under any of these three dates.

3. Finally, Nacional relies upon *Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden and Thailand*, USITC Pub. No.3536, Inv. No. 731-TA-965, 971-972, and 981 (Final) (September 2002), to contend that the Commission's practice is to accept information regarding price increases after post-hearing briefs are filed.

Nacional also points to Article 1904 Binational Review Panel, *Carbon and Certain Alloy Steel Wire Rod From Canada: Final Injury Determination*, Secretariat File No. USA-CDA-2002-1904-09 (Aug. 12 2004), for its discussion of the Commission's acceptance of new information after the filing of post-hearing briefs in the underlying case.

In opposition to Nacional's contentions, the Commission offers several arguments:

1. During the hearing, two Commissioners specifically requested evidence concerning price and cost increases from respondents, not Nacional. The Chairman, who possesses the authority to establish deadlines for the filing of responses to questions or requests made by

the Commission (19 C.F.R. 207.25), established April 18, 2008, as the deadline for the submission of answers to the two Commissioners' requests.

In its May 6, 2008, submissions to the Commission, Nacional did not contend that the submissions were made in response to requests from the Commission and, in any event, Nacional did not attempt to submit its information regarding price increase announcements until May 6, 2008, after the April 18, 2008, deadline established by the Chairman for responses to requests from the Commission.

2. All scheduling orders, including the one issued in this case on February 5, 2008, provide that a submission in addition to post-hearing briefs and final comments may be submitted only upon a showing that it is submitted in response to a specific request of the Commission or the Commission staff or upon a showing of good cause. Here, as noted, Nacional's submissions were not provided in response to a request or, if so, were untimely, and Nacional failed to demonstrate good cause for the acceptance of its submissions because, in its submissions, Nacional merely stated that the information Nacional wished to submit was "relevant and probative" to the issue before the Commission.

3. The Commission contends that it routinely rejects submissions that are not filed pursuant to the Commission's rules or the scheduling notice and cites a number of decisions, including *Acciai Speciali Terni S.p.A. v. United States*, 19 CIT 1051 (1995), which it alleges support this contention.

With respect to *Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden and Thailand*, USITC Pub. No.3536, Inv. No. 731-TA-965, 971-972, and 981 (Final) (September 2002), upon which Nacional relies, the Commission contends that that was an

unusual case involving the President's imposition of tariffs based upon a safeguards investigation on the bulk of the imports subject to the Commission's investigation.

With respect to Article 1904 Binational Review Panel *Carbon and Certain Alloy Steel Wire Rod From Canada: Final Injury Determination*, Secretariat File No. USA-CDA-2002-1904-09 (Aug. 12, 2004), upon which Nacional also relies, the Commission notes that the facts in that case were different in that the Commission there, unlike here, had accepted new information from some parties but not others and had rejected the submissions as "untimely", not, as here, because the information had not been requested or because the party submitting the information had failed to show good cause. The Commission also notes that, in any event, one NAFTA Panel's decision is not binding upon another NAFTA Panel.

In opposition to Nacional, the U.S. producers offer several arguments in support of the Commission's decision.

1. The U.S. producers contend that the plain language of the Commission's rules, such as 19 C.F.R. 207.30, and the Commission's scheduling notice makes it clear that new evidence cannot be submitted simply because the record remains open.
2. Nacional recognized that it was not entitled, as a matter of right, to submit new information. Its submissions asked the Commission to grant leave to submit the information pursuant to Commission Rule 201.12, which permits a party to an investigation to request the Commission to take particular action with respect to the investigation.

Nacional recognized that it was not submitting the information pursuant to a request from the Commission or the Commission's staff, according to the U.S. producers, because

Nacional's letters of submission did not state that the information was being submitted in response to a request from the Commission or the Commission's staff.

Nacional, according to the U.S. producers, failed to demonstrate good cause for acceptance of the new information because it merely stated that the information had recently come to counsel's attention.

3. The U.S. producers contend that Nacional's reliance upon the Handbook was misplaced because the Handbook specifically provides that the Commission's Rules of Practice and Procedure, the Commission's interpretations of the statute, and rules and relevant judicial precedent all take precedence over the Handbook.

4. According to the U. S. producers, Nacional's reliance upon *Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden and Thailand*, USITC Pub. No.3536, Inv. No. 731-TA-965, 971-972, and 981 (Final) (September 2002), is misplaced because, there is no evidence that new information was presented to the Commission that the Commission cited in that determination.

The U.S. producers also contend that Nacional incorrectly relies upon Article 1904 Binational Review Panel, *Carbon and Certain Alloy Steel Wire Rod From Canada: Final Injury Determination*, Secretariat File No. USA-CDA-2002-1904-09 (Aug. 12, 2004). One NAFTA Panel's decision is not binding upon another NAFTA Panel. Moreover, the circumstances presented in that case are not presented here. In that case, the Commission, without explanation, treated the parties in an inconsistent manner, rejecting the information submitted by one but accepting information submitted by another. Moreover, it was difficult to discern the reasoning of the Commission in that case.

In reply, Nacional offers several arguments.

1. No statute or regulation prohibits the submission of new information after the filing of post-hearing briefs. Indeed, between the date of the submission of post-hearing briefs on April 18, 2008, and May 6, 2008, the Commission itself placed additional information, including information from the U.S. producers, on the record.

2. Nacional contends that any prohibition against the submission of new information after the filing of post-hearing briefs did not apply here because the information that it submitted was not previously available to the Commission and Nacional explained both why the information could not have been submitted earlier and why the new information was sufficiently significant to warrant adding it to the factual record so late in the proceeding.

Nacional alleges that the May 6, 2008, submissions were made late in the proceeding because the domestic industry deliberately timed the issuance of the announcements of the price increases so that those announcements would become known to Nacional only at a late date in the proceedings. In any event, in Nacional's view, the fact that the submissions were made late in the proceedings was not determinative because the Commission's vote in this investigation did not occur for over two months after Nacional's May 6, 2008, submissions.

3. Nacional contends that the Commission's reliance upon the Court of International Trade's decision in *Acciai Speciali Terni S.p.A. v. United States*, 19 CIT 1051 (1995), is misplaced. In that case, the Commission rejected a submission made by the plaintiff, after the filing of post-hearing briefs, in response to four submissions filed by the opposing parties. Nacional

contends that the decision stands only for the proposition that the plaintiff had not been harmed by the Commission's rejection of the plaintiff's submission.

With respect to *Certain Cold-Rolled Steel Products from Australia, India, Japan, Sweden and Thailand*, USITC Pub. No.3536, Inv. No. 731-TA-965, 971-972, and 981 (Final) (September 2002), Nacional contends that, contrary to the Commission's brief in this case, the Commission, in that proceeding, accepted, reviewed and relied upon unsolicited information that was submitted after post-hearing briefs and before final comments.

With respect to Binational Review Panel, *Carbon and Certain Alloy Steel Wire Rod From Canada: Final Injury Determination*, Secretariat File No. USA-CDA-2002-1904-09 (Aug. 12, 2004). Nacional contends that, even if the decision is not binding on the present Panel, the decision is instructive.

2. Background

Pursuant to the regulations governing the Commission's procedure, the Commission is to publish a Final Phase Notice of Scheduling Order upon publication by Commerce of a preliminary determination of sales at less than fair value. 19 C.F.R. §207.21(b). Accordingly, in this case, on February 5, 2008, after publication of Commerce's preliminary determinations of sales at less than fair value with respect to imports from China, Mexico, Turkey and Korea, the Commission published a scheduling notice in the Federal Register. 73 Fed. Reg. 6,740-41 (Feb. 5, 2008). Pursuant to this notice, pre-hearing briefs were to be submitted on April 4, 2008, a public hearing was to be held on April 11, 2008, and post-hearing briefs were to be submitted on April 18, 2008. *Id.* In addition, the notice provided:

On May 6, 2008, the Commission will make available to parties all information on which they have not had an opportunity to

comment. Parties may submit final comments on this information on or before May 8, 2008, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules.

Id. Finally, the scheduling notice stated:

Additional written submissions to the Commission, including requests pursuant to 201.12 of the Commission's rules, shall not be accepted unless good cause is shown for accepting such submissions, or unless the submission is pursuant to a specific request by a Commissioner or Commission staff.

Id. (emphasis added).

Pre-hearing briefs were submitted and a hearing was in fact conducted on April 11, 2008. During that hearing, two Commissioners requested the petitioners to furnish information regarding increases in prices and costs for 2008. At the conclusion of the hearing, Chairman Pearson stated that (1) "post-hearing briefs, [and] statements responsive to questions and requests of the Commission" were to be filed by April 18, 2008; (2) the record would close and the final release of data to the parties would occur on May 6, 2008; and, (3) final comments by the parties were to be submitted on May 8, 2008.⁸ Transcript of Hearing Before the Commission, April 11, 2008, Admin. Rec., List 1, Doc. 126, at 222.

In their April 18, 2008, post-hearing brief, the petitioners submitted some information regarding 2008 announcements of price increases and increased costs pursuant to the request of the two Commissioners at the April 11, 2008, hearing. *See* Post-Hearing Submissions of U.S. Producers, April 18, 2008, Admin. Rec., List 2, Doc. 314. Nacional, although a respondent, also attached fifty-nine 2007 and 2008 price increase announcements that had not been previously

⁸ The Commission's rules provide that final comments are to be submitted two days after the factual record closes. 19 C.F.R. §207.30. By statute, the Commission must disregard any new factual information contained in these final comments. 19 U.S.C. §1677m(g).

disclosed to its post-hearing brief submitted on April 18, 2008. *See* Post-Hearing Submissions of Nacional de Acero S.A. de C.V., April 18, 2008, Admin. Rec., List 2, Doc. 313.

On May 6, 2008, Nacional submitted two letters to the Commission in which it stated:

[I]n accordance with section 201.12 of the International Trade Commission's...regulations, we respectfully request that the attached documents be included in the record. These documents came to our attention after the submission of our post-hearing brief and are relevant and probative to the issue of whether the domestic industry is currently injured or threatened with injury by reason of subject imports.

Nacional's May 6, 2008 Letters, Rule 60 Appendix. A total of fourteen 2008 price increase announcements were attached to the letters. *Id.*

On May 8, 2008, the Commission rejected the two letters. According to the Commission:

[T]he Commission's rules (19 CFR 207.23, 207.24, 207.25, and 207.30) and notice of scheduling (73 FR 6738 (February 5, 2008) [sic; 73 Fed. Reg. 6740]) in this final proceeding provide for parties to submit prehearing briefs, hearing testimony, post hearing briefs, and final comments. Your submission was not filed pursuant to the above-referenced rules or notice of scheduling. Nor was it requested by the Commission or its staff.

Commission's May 8, 2008 Letters to Nacional and Hylsa, Admin. Rec., List 1, Doc. No. 159, 162.

In this proceeding, Nacional challenges the Commission's May 8, 2010, rejection of Nacional's letters of May 6, 2008. The Panel holds that the Commission did not err in rejecting Nacional's two May 6, 2008, letters.

The regulations of the Commission, as cited in the Commission's May 8, 2008, letter of rejection, provide for a pre-hearing brief, testimony and argument at the hearing, post-hearing brief and final comments. *Id.* These are the only materials the parties may submit to the

Commission.⁹ The scheduling order made it clear that if a party wished to submit additional material, it was required to demonstrate good cause or to show that the material was submitted in response to a request from a Commissioner or a member of the Commission's staff. *See Light-Walled Rectangular Pipe and Tube from Republic of Korea, Mexico, Turkey, and the People's Republic of China*, Notice, 73 Fed. Red. 6,741 (Feb. 5, 2008).

3. Analysis

- a. Nacional failed to establish that there was good cause for the acceptance of its May 6, 2008, letters or that the acceptance of its letters could be justified as responses to requests from a Commissioner or a member of the Commission's staff.**

The Commission's scheduling order made it clear that a request pursuant to 19 C.F.R. §201.12 could not be submitted by a party after the April 18, 2008, submission of post-hearing briefs in the absence of a demonstration of good cause or a showing that the request was submitted in response to a request from the Commission or its staff. Nacional was aware of this requirement. *Id.* In its May 6, 2008, letters to the Commission, Nacional specifically stated that the letters constituted "requests" pursuant to 19 C.F.R. §201.12 that certain information be included in the record. Nacional's May 6, 2008 Letters, Rule 60 Appendix. The use of the term "request" implies the existence of discretion on the part of the Commission and the scheduling notice specifically provided that the Commission would not exercise its discretion to accept requests pursuant to 19 C.F.R. §201.12 in the absence of a showing of good cause or a showing that the material had been requested by the Commission or the Commission's staff.

⁹ The regulations also provide that parties may submit written comments on draft questionnaires (19 C.F.R. §207.20); responses to questionnaires, and corrections to the hearing transcript (19 C.F.R. §207.24(c)(2)).

In support of its requests, Nacional merely asserted that the documents attached to its letters were “relevant and probative to the issue of whether the domestic industry is currently injured or threatened with injury by reason of subject imports.” *Id.* This mere assertion did not demonstrate that the information was so significant that it warranted a finding by the Commission that good cause existed for the acceptance of documents after the submission of post-hearing briefs (other than final comments).

Nacional was or should have been aware that it faced a heavy burden in an attempt to establish good cause because of the Commission’s long-standing practice to the effect that the inclusion in a document of new factual information did not, by itself, constitute good cause for the acceptance by the Commission of documents after the submission of post-hearing briefs. The Commission has accepted this type of material only in very rare circumstances.

In 2004, the Commission published a notice in the Federal Register in 2004 entitled “Public Input on Improving Agency Procedures” regarding comments it received on specific ways it could improve its procedures in antidumping and countervailing duty proceedings. 69 Fed. Reg. 64,589 (Nov. 5, 2004). There, the Commission stated:

The Commission wishes to restate its current practice and to clarify that normally no new factual information volunteered by a party after the filing of its post hearing brief will be considered by the Commission unless the information is in response to a specific request for that information by a Commissioner or a member of the Commission staff. If a party comes into possession of some highly relevant fact that was not available for submission to the Commission earlier, it must seek leave to file new factual information, justifying both why the “new” factual information could not have been submitted at an earlier date (normally because it would represent such a recent occurrence that it could not have been provided earlier) and why the new information is sufficiently significant to warrant adding to the factual record of the case this late.

Id. at 64590. The Commission added, “such requests for leave will not be routinely granted.” *Id.*

In the same 2004 notice, the Commission stated its reasons for its policy not to routinely accept new factual information after the submission of post-hearing briefs. The Commission noted that it had been suggested that the Commission permit a party to file new information to rebut information presented for the first time by a party in its post-hearing brief. The Commission stated:

The suggestion that has been made would effectively require the Commission to allow an additional submission, between the time of the post hearing briefs and the submission of these final comments, for the parties to provide factual information to rebut new information contained in other parties post hearing briefs. This would in turn require that this time come at the expense of other activities in the already crowded period late in the investigation. [69 Fed. Reg. 64, 589-90 (Nov. 5, 2004)] [I]n light of the statutory deadlines in these investigatory proceedings which the Commission cannot extend, adding another brief or opportunity for more factual submissions late in the investigative process would create problems in light of the need for the Commission and staff to evaluate, summarize, and consider the information and argument provided. The Commission also needs to allot sufficient time before the impending statutory deadline to write an opinion that explains its determination(s).

Id.

The Commission concluded that the suggestion that new factual information be submitted as a matter of right after post-hearing briefs had been submitted “would not add a sufficient benefit to the Commission’s investigation to justify shortening the time allotted to other events late in the investigation process.” *Id.*

This reasoning is applicable to requests that the Commission exercise its discretion to permit a party to submit new information after the submission of post-hearing briefs. The

Commission must render a decision within a time specified by statute. At a late stage in the proceeding, the Commission is faced with myriad tasks which must be completed before a decision can be rendered. The submission of new information after the submission of post-hearing briefs would detract from the time and resources the Commission may devote to these other tasks. Thus, the parties are on notice that they bear a heavy burden if they wish to persuade the Commission to exercise its discretion to permit the submission of new information after the submission of post-hearing briefs.

Nacional contends the reasons for the Commission's policy do not apply here. According to Nacional, acceptance of the new factual information it submitted on May 6, 2008, would not have delayed the Commission because, in this case, the Commission's vote did not occur until July, several months after the May 6, 2008, letters. However, Nacional did not advance this argument before the Commission and, thus, the Panel need not consider it. In any event the contention is incorrect because, by statute, the Commission was prohibited from considering new information during the period extending from May through the decision in July. 19 U.S.C. §1677(7)(G)(iii).¹⁰

¹⁰ Section 771(7)(G)(iii) of the Act provides:

In each final determination in which it cumulatively assesses the volume and effect of imports under clause (i), the Commission shall make its determinations based on the record compiled in the first investigation in which it makes a final determination, except that when the administering authority issues its final determination in a subsequently completed investigation, the Commission shall permit the parties in the subsequent investigation to submit comments concerning the significance of the administering authority's final determination, and shall include such comments and the administering authority's final determination in the record for the subsequent investigation.

In light of the explicit terms of the Commission's scheduling order and the Commission's long-standing policy, the Panel holds that the Commission did not err in finding, in effect, that a mere assertion that information is relevant and probative, as well as newly available, such as the assertion contained in Nacional's May 6, 2008, letters, is not sufficient to establish that the new information was "sufficiently significant" to warrant inclusion in the record at such a late stage in the proceeding.

In the briefs it submitted to the Panel, and in oral argument, Nacional now advances some new reasons in support of its view that the new factual information was "sufficiently significant", such as the contention that the Commission could have verified the information it sought to submit on May 6, 2008, and that petitioners had or could have been afforded an opportunity to comment on that information. However, since these reasons were not submitted to the Commission in the first instance, the Panel need not consider whether these new reasons constituted good cause for acceptance of Nacional's request.

19 U.S.C. §1677(7)(G)(iii). Here, the first investigation in which the Commission made a final determination was the determination regarding Turkey issued on May 30, 2008. 73 Fed. Reg. 31,144 (May 30, 2008). Accordingly, the Commission was required to make its material injury determinations in this case on the same record as that of the determination regarding imports from Turkey, except that the record in these investigations also included the Department of Commerce's final determinations in the investigations of the relevant products from China, Korea, and Mexico and the parties' final comments on those determinations.

Thus, the Commission could not consider new evidence submitted between the close of the factual record in this case on May 6, 2008 and the date of the Commission's vote on July 17, 2008.

- b. Nacional did not contend in its requests that the material attached to its requests was submitted in response to requests from Commissioners or members of the Commission staff or that the requests should be accepted despite the expiration of the date established by the Chairman for submission of responses to the questions posed by two Commissioners at the hearing.**

Nacional now contends that the new factual information attached to its letters was submitted in response to the request of two Commissioners made during the April 11, 2008, hearing. Nacional did not contend in its May 6, 2008, letters to the Commission that the material was being submitted in response to requests from the Commissioners or Commission staff. Thus, the Panel need not now consider whether the Commission erred in refusing to accept the documents on this ground.

In any event, pursuant to the Commission's regulations, the Chairman possesses the authority to establish deadlines for the submission of answers to questions or requests made by the Commission. 19 C.F.R. §207.25. Here, the Chairman exercised this authority by establishing April 18, 2008, as the date for the submission of responses to the requests of the two Commissioners for pricing and cost information. Again, Nacional failed to establish "good cause" to support an exception to the requirement established by the Chairman to the effect that responses to the requests of the two Commissioners were to be submitted by April 18, 2008.

- c. Nacional did not possess a statutory or regulatory right to submit additional documents on May 6, 2008.**

In support of its contention that it possessed a statutory or regulatory right to submit new information on May 6, 2008. Nacional refers to: (1) the statute, 19 U.S.C. §1677m(g), which requires the Commission to cease collecting information and to provide the parties with a final opportunity to comment on information obtained by the Commission upon which the parties had not had an opportunity to comment ("final comments"); (2) a Commission regulation which

provides that the Commission will specify a date, after the date for submission of post-hearing briefs, upon which the Commission will disclose to the parties all information it had obtained upon which the parties had not had an opportunity to comment, a date upon which the parties may submit comments limited to the information disclosed by the Commission, and a statement that “the record shall close on the date such comments are due,” 19 C.F.R. §207.30 (2008); and (3) the Commission’s Antidumping and Countervailing Duty Handbook, which Nacional alleges provides that the record will close four business days after the inclusion in the record of the Commission’s staff report Handbook, U.S. Int’l Trade Comm’n, Thirteenth Edition (December 2008).

These successive references are confusing because, in this case, they actually refer to three different dates: (a) May 6, 2008, the date upon which the Chairman stated the record would close and upon which the scheduling notice stated all information about which the parties had not had an opportunity to comment would be disclosed to the parties, giving them the opportunity to comment on this material; (b) May 7, 2008, the fourth business day after the submission of the staff report on May 1, 2008, which Nacional alleges the Handbook provides is the day the record would close; and, (c) May 8, 2008, the date upon which final comments were due to be submitted by the parties to the Commission. Nacional contends that it was entitled to submit new information until one of these three dates. It is not clear which date Nacional believes is the correct date. In fact, at one point, it adopts the non-binding position of the Panel in *Carbon and Certain Alloy Steel Wire Rod From Canada: Final Injury Determination*¹¹ and

¹¹ Article 1904 Binational Review Panel, *Carbon and Certain Alloy Steel Wire Rod From Canada: Final Injury Determination*, Secretariat File No. USA-CDA-2002-1904-09 (Aug. 12, 2004).

simply states that the statutory scheme “contemplates the continued gathering of information until a point after the filing of post-hearing briefs [April 18, 2008] and prior to the provision of the opportunity to make final comments [May 6, 2008, or, possibly, May 8, 2008].”

In any event, it is not necessary to determine which of these three dates represents the date the record was closed. The Commission did not refuse to accept Nacional’s May 6, 2008, letters because the factual record was closed. The Commission rejected the letters because the Commission’s rules did not permit the filing of documents by a party after the submission of post-hearing briefs (other than final comments) in the absence of a showing of good cause or a showing that the documents had been requested by the Commission or a member of the Commission’s staff. As discussed above, the Commission did not err in finding, in effect, that Nacional failed to demonstrate good cause for the acceptance of the documents it submitted after the submission of post-hearing briefs and Nacional did not contend before the Commission that the documents it attempted to submit had been requested by the Commission or a member of the Commission’s staff. Even if Nacional can be viewed as having contended before the Commission that the materials it wished to include in the record had been requested by two Commissioners at the hearing, the Chairman, at the April 11, 2008, hearing, established April 18, 2008, as the date for submission of responses to the two requests of the two Commissioners and Nacional failed to demonstrate good cause for the fact that it was requesting the Commission to accept responses to the questions posed by two Commissioners at the hearing after the expiration of the April 18, 2008, deadline established by the Chairman for the submission of responses to those questions. For these reasons, the Panel concludes that Nacional did not possess a statutory

or regulatory right to submit new factual information after the submission of its post-hearing brief.

Nacional also contends that the Commission's Handbook provides that "the Commission closes the factual record (*i.e.*, ceases to accept new factual information) approximately four business days after the [Commission's] staff report is issued." Handbook, at 11-21. According to Nacional, the staff report in this case was issued on Thursday, May 1, 2008. In Nacional's view, the Handbook provides that the Commission would not cease receiving new factual information until May 7, 2008, four business days after this date. Since May 6, 2008, was less than four business days after May 1, 2008, Nacional contends that its submission of documents containing new factual information on May 6, 2008, was timely.

The focus of Nacional's contention is incorrect. Again, the Commission did not refuse to accept Nacional's letters because the factual record was closed. The Commission rejected the letters because Nacional did not demonstrate good cause for an exception to the Commission's rule that the parties may not submit documents (other than final comments) after post-hearing briefs have been filed. The question whether, pursuant to the Handbook, the factual record remained open on May 6, 2008, is not probative of that question.

Moreover, Nacional's position regarding the authoritative nature of the Handbook is undermined by an inconsistency between Nacional's position on the Handbook and the facts in this case. According to Nacional, the Handbook provides that the record remains open for four business days after the submission of the staff report. Because the staff report in this case was submitted on May 1, 2008, application of the Handbook provision upon which Nacional relies would mean that the record remained open until May 7, 2008, four business days after the

submission of the staff report. But the Chairman in this case stated that the record would close on May 6, 2008, and Nacional does not challenge this date.

In any event, even if Nacional's interpretation of the Handbook is correct, the Handbook cannot override the regulation, the scheduling notice, and the Chairman's statement at the close of the hearing. The Handbook states that it was prepared by the Commission's Director of Investigations, not by the Commission or a Commissioner. Thus, the Handbook cannot be viewed as expressing the binding views of the Commission or even an individual Commissioner. Indeed, the Preface to the Handbook specifically notes that it was:

designed to be an informal summary to be used in conjunction with the relevant statutethe Commission's Rules of Practice and Procedure, the Commission's interpretation of the statute and rules, and relevant judicial precedent, all of which take precedence over this document.

Id. at Preface (emphasis added).

Given this express disclaimer, the Handbook does not support Nacional's contention that the Commission erred in denying Nacional's request, made after the submission of post-hearing briefs, to include new documents in the record.

d. Nacional's additional contentions are without merit.

Nacional contends that the statute, 19 U.S.C. §1677m(f), requires the Commission to provide a "written explanation" for its rejection of information to the extent practicable. However, Nacional fails to explain why the Commission's May 8, 2008, letter¹² to Nacional

¹² The Commission's May 8, 2008 letter contained different and far more detailed reasoning than the Commission's letter in *Carbon and Certain Alloy Steel Wire Rod From Canada: Final Injury Determination*, which simply stated that it rejected new information submitted after post-hearing briefs had been filed as "untimely."

failed to fulfill this requirement and we find no reason to hold that the Commission did not meet this requirement.

Nacional also contends that the Commission placed material received from petitioners and other material on the record on the same date, May 6, 2008, that it rejected Nacional's submission. This other material, according to Nacional, included a Customs Net Import File, the 2006 Steel Statistical Yearbook, a report of data removed from import statistics, Customs Net Import File data showing relationships, information regarding the world's top exporters of the product under investigation, and Statistics Unit Sheets. Because the Commission placed this other information on the record after the submission of post-hearing briefs, Nacional contends that the Commission should have included the material submitted by Nacional on May 6, 2008, on the record. However, this contention misconstrues the principal issue. The principal issue presented is whether the Commission erred in refusing to accept a written request, other than a final comment, after the submission of post-hearing briefs. In fact, the Commission rules provided that no requests, other than final comments, would be accepted by the Commission after the submission of post-hearing briefs in the absence of a showing of good cause for the submission or a showing that the submission had been requested by the Commission or the Commission's staff. Nacional failed to show that cause existed for acceptance of its submissions and did not contend before the Commission that its submissions had been requested by the Commission or the Commission's staff or that there was good cause for the submission despite the expiration of the deadline established by the Chairman for the submission of responses to the questions posed by Commissioners.

The fact that Nacional can point to examples of materials that were placed on the record after the submission of the post-hearing briefs does not aid Nacional. Nacional does not contend that a party had submitted this material after the submission of the post-hearing briefs. Thus, the inclusion of this material on the record – material upon which Nacional was entitled to comment in its final comments – does not support its requests as a party to submit additional documents after the submission of post-hearing briefs.

e. The arbitration decisions upon which Nacional relies do not support its position.

There can be no question but that, in the past, the Commission has rejected submissions of documents after the filing of post-hearing briefs as not in accord with the Commission's rules or scheduling notices. *See e.g., Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, USCIT Pub. No.3923, Inv. Nos. 731-TA-711 and 731-TA-713-716 (Second Review) (June 2007); *Ammonium Nitrate from Russia*, USCIT Pub. No.3844, Inv. No. 731-TA-856 (Review) (March 2006); *Fresh and Chilled Atlantic Salmon from Norway*, Inv. Nos., USCIT Pub. No.3835, 701-TA-302 and 731-TA-454 (Second Review) (January 2006).

Nacional relies upon the Commission's decision in *Certain Cold -Rolled Steel Products from Australia, India, Japan, Sweden and Thailand*, USITC Pub. No. 3536, Inv. Nos. 731-TA-965, 971-972, 979 & 981 (Final) (Sept. 2002), to contend that, notwithstanding this pattern of refusing to accept new documents after the submission of post-hearing briefs, the Commission should have accepted Nacional's submissions in this case. In *Cold-Rolled*, Nacional contends, the Commission accepted the same type of information at issue here after the submission of post-hearing briefs. Nacional contends that to be consistent, the Commission should have accepted the new factual information offered by Nacional in this case.

In fact, no one doubts that the Commission possesses discretion to allow new factual information to be submitted after the filing of post-hearing briefs when it deems it appropriate to do so. Unlike this case, *Cold-Rolled* presented rare¹³ circumstances in which the Commission deemed it appropriate to exercise its discretion to permit the submission of new factual information. While the investigation in *Cold-Rolled* was pending, the President imposed tariffs, based upon a safeguards investigation, on the bulk of the imports subject to the cold-rolled antidumping investigation. In light of the magnitude of the effect of the President's action upon the investigation, the Commission deemed it necessary to issue new questionnaires. The responses to these questionnaires were not due until after the submission of post-hearing briefs. In light of this fact, the Chairman of the Commission notified the parties that she was expanding the opportunities for the parties to file comments on information disclosed to them after they had filed their post-hearing briefs. This action of the Chairman, effectively requesting the submission of new information, was clearly appropriate given the magnitude of the effect the President's action had upon the investigation.

The situation presented here is entirely different. There was no action equivalent to the imposition of new tariffs on the bulk of the imports subject to the investigation and, although two Commissioners did request additional information, the Chairman exercised his authority to establish the date for the submission of post-hearing briefs as the date for the submission of responses to those questions. Nacional did not challenge this deadline before the Commission and does not challenge it here.

¹³ In its 2004 Federal Register notice entitled "Public Input on Improving Agency Procedures, the Commission described the circumstances such as those presented in presented in *Cold-Rolled*, as "rare". *Public Input on Improving Agency Procedures*, 69 Fed. Reg. 64,589-90 (Nov. 5, 2004).

Nacional does not even attempt to rebut these distinctions between this case and *Cold-Rolled* but simply states that because the Commission accepted new factual information after the submission of post-hearing briefs in *Cold-Rolled*, it must accept that type of information in this case. That logic is not sufficient to overcome the very real distinctions between *Cold-Rolled* and this case. As the Court of International Trade has noted, the question presented is not whether, under the circumstances presented in another case, the Commission decided that good cause had been demonstrated justifying the submission of material after the submission of post-hearing briefs. Rather, the question is whether under the circumstances presented in the case before the Panel, the Commission's decision was reasonable. *Naveet Publications (India) Ltd. v. United States*, No.06-00401, 2008 WL 743836 (Ct. Int'l Trade, Feb. 26, 2008). The Panel concludes that, in this case, the Commission's decision met this standard.

B. The Commission's Treatment of Record Data for the First Quarter of 2008 is not Clearly Supported by Substantial Evidence or Otherwise in Accordance with Law.

1. Background

During the Commission's April 11, 2008 hearing, two Commissioners, prompted by Mexican respondents' allegations, requested that the petitioners provide information on prices and raw material costs for the first quarter of 2008. Transcript of Hearing Before the Commission, *supra*, at 79, 105. Petitioners' witnesses gave some testimony about their current costs at the hearing, one of whom referenced his current prices. *Id.* at 79, 104. At the conclusion of the hearing, the Chairman instructed that post-hearing briefs and responses to the Commission's questions and requests were to be filed by April 18, 2008. *Id.* at 222. Accordingly, the petitioners and a Mexican respondent provided letters from various US producers announcing price increases in late 2007 and the first three months of 2008. In

addition, the petitioners provided certain raw material cost evidence, while Mexican respondent Hylsa, S.A. de C.V. (“Hylsa”) provided published raw material cost data for the same period.

All of these documents were filed in the administrative record of the proceeding.

In its final affirmative injury determination, the Commission discusses and then discounts this evidence:

Mexican Respondents also argue that the domestic industry has recently announced massive price increases that far outstripped the increases in their raw material costs, leading to much higher profits in the first quarter of 2008, and therefore the Commission may not find that the domestic industry is currently experiencing injury. We note that, unlike the pricing and cost data gathered for the period of investigation (2005-2007) through questionnaire responses, we do not have questionnaire data for 2008 to place any evidence on price or raw material cost increases in 2008 in its proper context. Nevertheless, information on the record from 2007 shows that announced price increases by the domestic industry were ultimately not accepted, as reported prices declined throughout 2007. Record evidence provided by Petitioners shows that [* * *]. Moreover, while there is some information on the record regarding announced price increases, there is also information on the record showing that costs, particularly for hot-rolled steel, have also increased dramatically in 2008. As a representative from Petitioner Southland Tube testified at the hearing:

[S]ince the fourth quarter of last year I have paid over \$380 a ton increase for my flat-rolled steel, and my increase announcements to the trade for tubing have amounted to \$280, so I’m \$100 a ton behind the eight ball. I have not recovered all my costs yet.

Finally, any announced price increases in 2008 occurred not only after the petitions in these investigations were filed, but also after Commerce announced its affirmative preliminary antidumping and countervailing duty determinations. For these reasons, we are not persuaded that price increase announcements made by the domestic industry in 2008 are entitled to much weight in our material injury determination.

Light-Walled Rectangular Pipe and Tube from China, Korea, and Mexico, Inv. Nos. 701-TA-449 and 731-TA-1118-1120 (Final), USITC Pub. No. 4024 (July 2008), (“Light-Walled Rectangular Pipe and Tube”), at 14, n. 75. This footnote is the target of Nacional’s challenge in this issue.

2. Arguments

Nacional challenges the Commission’s determination that information the Mexican respondents had submitted with their post-hearing briefs was entitled to less weight than evidence gathered during the period of investigation, 2005-2007. Nacional argues that the Commission disregarded pricing information showing lack of injury during the first quarter of 2008, while selectively relying on other 2008 information provided by the petitioners to support the final determination of injury. According to the Complainant, the Commission is statutorily required to use the most current information possible to determine whether the domestic industry is presently experiencing injury. Nacional states that Hylsa, the other Mexican respondent, demonstrated that the US industry was highly profitable during the first quarter of 2008. Nacional argues that the Commission’s position that there were no questionnaire data for 2008 to put their evidence “into proper context” is not an acceptable reason for rejecting the Mexican respondents’ information because there is no requirement that data be collected through questionnaires. In its last point, Complainant contends that the Commission improperly dismissed price increase announcements in 2008 based on a presumption that the filing of a petition and the impact of affirmative preliminary antidumping and countervailing duty determinations affected pricing, without finding any evidence that the pendency of the

investigation had an influence on pricing, and also without considering evidence rebutting any such presumption.

The Commission responds that it did not reject the evidence submitted in the Mexican respondents' post-hearing briefs. That evidence was filed in the administrative record and the Commission considered it yet nonetheless determined that it was entitled to less weight than the 2005-2007 evidence gathered through questionnaires. The Commission disputes the Mexican respondents' contention that the domestic industry was "very profitable" by the first quarter of 2008, relying on hearing testimony and other contradictory evidence furnished by the petitioners, as well as confirmed 2007 pricing data that tend to cast doubt on the respondents' assumption that 100% of the price announcements in 2008 were realized. The Commission also maintains that the statute and Statement of Administrative Action ("SAA") permit it to presume that any purported price increases were due to the pendency of the antidumping and countervailing duty investigations. The Commission argues that the burden was on the Mexican respondents to rebut the presumption, which, in its view, they did not do.

The U.S. producers argue that, in making its final injury determination, the Commission weighed all the 2008 pricing information, that which the respondents submitted as well as information from the Commission's own staff report, petitioners' post-hearing brief, and hearing testimony. According to the U.S. producers, the Commission thoroughly analyzed all information properly in the administrative record. Because there is substantial evidence in support of the final determination of material injury, and because the Panel may not reweigh the evidence, assert the U.S. producers, the panel must uphold the final determination.

We analyze each of the arguments below. The Panel finds that there is insufficient evidence on the record to support the Commission's determination that there was a relationship between the announced price increases in 2008 and the pendency of the investigation, which in the Commission's view entitled it to accord less weight to the price announcement evidence that the Mexican respondents submitted with their post-hearing briefs. In addition, the Commission failed to respond to a rebuttal attempt by Complainant raised during the investigation. We cannot deduce from the Commission's final determination whether the other reasons it offered for giving less weight to the evidence of price increase announcements, specifically, additional record evidence concerning price increase announcements and raw material costs, were considered by the Commission to be independently or collectively sufficient grounds to support its final determination.

3. Analysis

a. The Commission Has Discretion in the Use of Current Information.

The Panel acknowledges that the Commission is charged with making a determination of present, not past, injury. The controlling statute, Title VII of the Tariff Act of 1930, as amended by the Uruguay Round Agreement Act (19 U.S.C. §3512(d)(2000)), requires the Commission to "make a final determination of whether...an industry in the United States...is materially injured..." 19 U.S.C. §1673d(b)(1). Nacional relies on the use of the present tense in the statute and on judicial precedent to the effect that "a finding of 'present' injury must reference a time period which is as nearly contemporaneous to vote day as possible and for which reliable record evidence is available." *Chr. Bjelland Seafoods A/S v. United States*, 19 C.I.T 35, 43 (1995). The court in *Bjelland Seafoods* further observes:

Within the time frame established by the ITC for its investigation, older information serves to provide a historical frame of reference against which a ‘present’ (i.e., as recent to vote day as possible, given the limitations of the collected data) material injury determination is to be made, and without which any assessment of the extent of changed circumstances would be impossible.

Id. Reliance on this concept, however, comes with two caveats.

First, the court in *Bjelland Seafoods* does not say that the Commission should always make its determination based on the most recent data. The words “reliable record evidence” and “given the limitations of the collected data” are key. The court observed that “it is of course well within the ITC’s discretion to discount or dismiss incomplete or unreliable data.” *Id.* For that reason, the Panel must examine the reliability or the completeness of the pricing data submitted in the hearing and post-hearing briefs.

Significantly, the holding in *Bjelland Seafoods* is of limited precedential value. In 2000 the statute was amended, adding section 771(7)(I) to the Tariff Act of 1930, which provides that the Commission may consider whether the filing of the petition, the announcement of a preliminary affirmative determination by the Department of Commerce, or the imposition of provisional duties (or some combination of these actions) may affect industry behavior, as well as the purchasing decisions of importers, distributors and ultimate buyers of the product.

19 U.S.C. §1677(7)(I). The Statement of Administrative Action specifically debunks the holding of *Bjelland Seafoods*:

[W]hen the Commission finds evidence on the record of a significant change in data concerning the imports or their effects subsequent to the filing of the petition or the imposition of provisional duties, the Commission may presume that such change is related to the pendency of the investigation. In the absence of sufficient evidence rebutting that presumption and establishing that such change is related to factors other than the pendency of the

investigation, the Commission may reduce the weight to be accorded to the affected data. To the extent that the decision of the Court of International Trade in *Chr. Bjelland Seafood/AS v. United States* could be interpreted as requiring the Commission to demonstrate that the change is not related to other factors, it is disapproved.

Uruguay Round Agreement Act, Statement of Administrative Action, accompanying H.R. Rep. No. 103-826(I) (“SAA”) at 854. Nevertheless, courts continue to rely on the reasoning of *Bjelland Seafoods*. See e.g., *Usinor v. United States*, 26 C.I.T. 767 (2002). We examine the application of 19 U.S.C. §1677(7) (I) in greater depth below.

More recent decisions clarify that the Commission has considerable discretion in choosing the data on which it relies for injury determinations because facts and conditions vary from investigation to investigation. There are numerous instances since the implementation of 19 U.S.C. §1677(7) (I) in which the Commission has relied upon post-petition information, finding the unique circumstances of each case to warrant such reliance, and the courts have upheld these determinations. See e.g., *Nucor Corp. v. United States*, 28 C.I.T. 188, 227-29 (Ct. Int’l Trade 2004), *aff’d* 414 F.3d 1331 (Fed. Cir. 2005) (the Commission found that the imposition of duties pursuant to a Section 201 investigation had a greater impact on imports than did the antidumping and countervailing duty investigations); *Nitrogen Solutions Fair Trade Comm. v. United States*, 29 C.I.T.86, 101-102 (Ct. Int’l Trade 2005) (the Commission concluded that factors other than the antidumping investigation, such as natural gas price effects, contributed to the decline in subject imports). In other cases, the court has found that Commission’s decision to accord less weight to information as a result of the pendency of the petition was based on substantial evidence. See e.g., *Nippon Steel Corp. v. United States*, 28 C.I.T 1738, 350 F.Supp.2d 1186, 1203-04 (Ct. Int’l Trade 2004), *rev’d on other grounds*, 458

F.3d 1345 (Fed. Cir. 2006) (the Commission found evidence indicating that the filing of the petition affected domestic pricing in 2000 and, therefore, the Commission reasonably decided to place less weight on 2000 data.

We therefore find that the Commission is neither required to use nor prohibited from using the most current information, that is, data from the period immediately preceding vote day. The Commission has discretion to determine which information is most reliable, probative, and indicative of the condition of the domestic industry when it makes its injury determinations. As to the application of this principle in the instant proceeding, the Panel will address that issue below.

b. The Commission Considered Record Evidence from the First Quarter of 2008.

Contrary to Nacional's allegation, the Commission did not reject the evidence it and co-respondent Hylsa submitted with their post-hearing briefs. The price announcement letters were accepted into the record and the Commission considered them in its final determination. The Commission adhered to the methods for gathering data described in 19 C.F.R. §201.9, including filings, questionnaires, and hearing testimony. The Commission, however, did not accord as much weight to the 2008 evidence as to the evidence from the period of investigation.

Nacional complains that the Commission relegated the analysis of its allegation to a footnote. While it may seem lamentable that the Commission dealt with an issue in such a manner, the footnote concisely addresses the Mexican respondents' contentions. First, the Commission describes the Mexican respondents' allegation "that the domestic industry has recently announced massive price increases that far outstripped the increases in their raw material costs, leading to much higher profits in the first quarter of 2008, and therefore the

Commission may not find that the domestic industry is currently experiencing injury.” *Light-Walled Rectangular Pipe and Tube, supra*, at 14 n. 75. The Commission proceeds to address each component of the allegation.

Initially, the Commission notes that it does not have questionnaire responses for 2008 “to place any evidence on price or raw material costs increases in 2008 in its proper context.” *Id.* The Commission contrasts this situation with the fact that it does have questionnaire data for the period of investigation, 2005 through 2007. *Id.* This is not a finding. Rather, it is a comment on the relative probative quality of the 2008 evidence in comparison to the evidence from the period of investigation.

Nacional contends that there is no requirement in the Commission’s regulations that evidence be put into “proper context.” While the Commission’s language may be imprecise, Nacional is misinterpreting the phrase, which is intended to convey the practical limitations of the data, not a statutory or regulatory standard. More important, however, is that Nacional overlooks the essential point: The Commission did not review the 2008 evidence and selectively adopt the U.S. producers’ information while rejecting the respondents’ information. On the contrary, the Commission examined all the 2008 price and cost information, that which Nacional and Hylsa submitted as well as that which the U.S. producers submitted, concluding that none of the data could provide as comprehensive an understanding of the condition of the domestic industry as the information the Commission staff had collected and evaluated for the period of investigation.

c. The Commission Considered Price Increase Announcements for 2008.

Both the Mexican respondents and the petitioners appended to their post-hearing briefs copies of letters from U.S. producers to their customers, announcing price increases. Some of the letters were dated in November and December 2007; the majority were dated January through March 2008. Complainant avers that these price increase announcements, compared to the raw material costs that comprise over three quarters of total production costs, indicate that the U.S. industry was profitable at the time the investigation ended.¹⁴ An announcement, however, is not necessarily probative of a price increase. Rather, an announcement is a proposal to raise prices. Customers do not necessarily accept the proposed increases. The Mexican respondents did not produce any evidence of realized price increases.

There is evidence on the record concerning actual 2008 price increases. Petitioners' post-hearing brief included a statement from the largest U.S. producer, Bull Moose, regarding the percentage of its 2008 price increase announcements that were realized. Post-Hearing Brief of U.S. Producers, *supra*, at Exh. 9. Leavitt, another of the petitioners, presented an analysis of its cost and price increases for the first quarter of 2008. *Id.* The only other evidence concerning actual price increases in 2008 is the statement made by an executive of Southland during the Commission's hearing that his company had achieved \$280 in price increases. These isolated pieces of evidence stand in contrast to the information the Commission obtained from 22 U.S. producers for the 2005-2007 period of investigation.

The Commission was able to discern certain factors from its review of both price and cost information from the period of investigation and from 2008. The Commission reveals that "information on the record from 2007 shows that announced price increases by the domestic

¹⁴ As the Commission points out, respondent Hylsa's conclusion that the U.S. industry was highly profitable is premised on a 100% realization rate for the announced price increases.

industry were ultimately not accepted, as reported prices declined throughout 2007.” *Light-Walled Rectangular Pipe and Tube, supra*, at 14. n. 75. In its brief and at oral argument before this Panel, the Commission related that none of the 2007 price increase announcements were realized. As Nacional admits, there is some record evidence concerning the realization rate of the 2008 price increase announcements. Although the Commission does not explain its finding with regard to 2008 prices, it would be reasonable to conclude that the actual price data for that period are incomplete.

d. The Commission Also Considered Evidence That Raw Material Costs Increased in the First Quarter of 2008.

Prices do not exist in a vacuum. Rather, they must be compared to costs in order to determine whether a manufacturer is profitable. Nacional refers to published raw material costs that its co-respondent, Hylsa, submitted with its post-hearing brief, which do show that costs were rising but which, when compared with the price increase announcements, reflect a profitable industry. *See* Post-Hearing Brief of Hylsa S.A. de C.V., April 18, 2008, Admin. Rec., List 1, Doc. 130, at 6-8. The Commission first rejects Hylsa’s analysis because it depends on the assumption that all the price increases were implemented. The Commission wrote, “[T]here is also information on the record showing that costs, particularly for hot-rolled steel, have also increased dramatically in 2008.” *Light-Walled Rectangular Pipe and Tube, supra*, at 15, n. 75. The Commission then quotes the witness from Southland, who testified at the hearing that his cost increase for flat-rolled steel was \$380. *Id.* Additionally, the record contains other evidence regarding costs of individual U.S. producers.¹⁵

¹⁵ For example, Leavitt, in the petitioners’ post-hearing brief reveals, specific cost and price data. In the letters appended to the Complainant’s post-hearing brief, 34 of 46 ascribe their

e. Announced Price Increases in 2008 Occurred After the Preliminary Affirmative Antidumping and Countervailing Duty Determinations.

The ultimate factor in the Commission’s analysis of the 2008 evidence is this statement:

“Finally, any announced price increases in 2008 occurred not only after the petitions in these investigations were filed, but also after Commerce announced its affirmative preliminary antidumping and countervailing duty determinations.” *Light-Walled Rectangular Pipe and Tube, supra*, at 15, n. 75. The significance of this unamplified statement lies in §771(7) (I) of the Tariff Act of 1930, as amended, which is entitled, “Consideration of post-petition information:”

The Commission shall consider whether any change in the volume, price effects, or impact of imports of the subject merchandise since the filing of the petition in an investigation under part I or II of this subtitle is related to the pendency of the investigation and, if so, the Commission may reduce the weight accorded to the data for the period after the filing of the petition in making its determination of material injury....

19 U.S.C. §1677(7)(I).

The purpose of the Commission’s recitation of the fact that the Commerce Department had made preliminary affirmative determinations in this investigation prior to any price increases that the domestic industry announced in 2008 was to bring into question whether such price increase announcements—and, indeed, all changes to price and raw material costs—were “related to the pendency of the investigation.” Section 771(7) (I), as amended, provides the framework for the Commission’s treatment of such a situation.19 U.S.C. §1677(7)(I).

announced price increases to escalating raw material costs. Three letters, all issued by the same producer, also refer to increased demand. The others are silent as to the reason for announcing a price increase. *See* Post-Hearing Brief of Nacional de Acero S.A. de C.V., *supra*, at Exh. V.

The terms of Section 771(7)(I) grant discretion to the Commission to reduce the weight accorded to post-petition changes in certain data specified in the statute. *Id.* If the Commission purports to exercise this discretionary power, the principles of administrative law require it to establish that it was authorized to exercise that discretion. Pursuant to the statute, the Commission's authority to exercise the discretionary power to reduce the weight accorded to the specified data is contingent upon a conclusion that the changes are related to the investigation. Thus, the Commission may establish that it lawfully exercised the discretionary power granted to it by the statute to accord less weight to a change in data only if it first reaches a conclusion that the change in the data is related to the pendency of an investigation.

The principles of administrative law also provide that if the Commission reaches a conclusion, that conclusion must not be arbitrary or capricious and/or must be supported by substantial evidence. A reviewing body may determine whether an agency's conclusion is arbitrary or capricious only if the agency sets forth its reasoning in sufficient detail to enable the reviewing body to determine that it was reasonable for the agency to reach that conclusion.¹⁶

Here, the Commission exercised its discretionary authority to reduce the weight accorded to a post-petition change in price data. Accordingly, the Commission must have concluded that the change was related to the pendency of the investigation. It follows that the Commission was required to provide reasons for this conclusion in sufficient detail to enable the Panel to determine whether that conclusion was reasonable. If the Panel is unable to determine that the

¹⁶ See e.g., *Altx, Inc. v. United States*, 25 C.I.T. 1100, 167 F.Supp.2d 1353, 1360-61 (Ct. Int'l Trade 2001), where the Court of International Trade held that the Commission's determination that post-petition data was not affected by the pendency of the investigation was not supported by substantial evidence.

conclusion was reasonable, it is unable to determine whether the Commission was authorized to accord less weight to the changes in data.

Unfortunately, the Commission did not explain the reasons for its conclusion. The Commission simply stated that the price increase announcements followed the institution of the investigation and the Commerce Department's determinations. The Commission did not explain why the temporal relation between the institution of the investigation and the Commerce Department's determinations and the price increase announcements supported the conclusion that the price increase announcements were related to the initiation of the investigation and the Commerce Department's determinations. The failure of the Commission to set forth the reasons for its conclusion makes it impossible for the Panel to determine whether the conclusion that the price increase announcements were related to the pendency of the investigation was reasonable. Because the Panel cannot determine whether the conclusion was reasonable, and because the discretion to reduce the weight accorded to a change in data is contingent upon a lawful conclusion that the change is related to the pendency of the investigation, the Panel must remand this case to the Commission to explain the basis for its conclusion.

Moreover, before the Commission, Nacional contended that the price increase announcements were not related to the pendency of the investigation because the announcements did not mention the investigation. The Commission must have rejected this contention because it reduced the weight it accorded to the price increase announcements, an action it could take only if it first concluded that the changes were related to the pendency of the investigation. However, the Commission did not state its reasons for rejecting Nacional's argument. Because the Commission did not state its reasons for rejecting Nacional's argument, the Panel cannot

determine whether the rejection of the contention was reasonable. Accordingly, the Panel must also remand the case to the Commission so that it may explain the reasons supporting its rejection of Nacional's contention.¹⁷

VI. CONCLUSION

The Panel holds that the Commission's rejection of the Complainant's submissions dated May, 6, 2008, was supported by substantial evidence and was otherwise in accordance with law. The panel therefore upholds the Commission's final determination with respect to this issue.

The Panel further holds that the Commission failed to provide a sufficient explanation of the relationship between the 2008 announced price increases and the pendency of the investigation and, also, that the Commission did not address the Complainant's attempt to rebut the presumption that any market changes in 2008 were the result of the filing of the petition and Commerce preliminary affirmative determinations. We cannot determine from the Commission's final determination whether the other two reasons that the Commission cited independently suffice as grounds for according less weight to the 2008 price increase announcements. The Commission made reference to other evidence relating to price increase

¹⁷ Nacional presents four additional rebuttal points before the panel. The only contention it raised in the administrative proceeding below, however, is that the Commission cannot presume there was a relationship between the price increase announcements and the pendency of the investigation because the price increase announcement letters did not make any reference to the investigation as the basis for the announcements. Because the Complainant failed to raise the additional points before the Commission, we may apply the principle of failure to exhaust administrative remedies and dismiss them. Nevertheless, the Commission raised that defense only with respect to the last of Nacional's rebuttal arguments, which is that the petitions were not filed until after import volumes began to decline in response to mid-2007 drop in demand. None of the remaining three points is probative; nor are any of them based upon record evidence on which the Commission could have rendered a determination.

announcements in 2007 and in the first quarter of 2008. The Commission's second other reason is that there was evidence regarding raw material costs, as well.

We remand to the Commission to fulfill the requirements of Section 771(7) (I) of the Tariff Act of 1930, as amended, 19 U.S.C. §1677(7) (I), and therefore the Commission must address (i) the relationship between the 2008 announced price increases and the pendency of the investigation, and (ii) the Complainant's attempt to rebut the presumption that any market changes in 2008 were the result of the filing of the petition and Commerce' preliminary affirmative determinations. The Commission shall file its remand determination within sixty days.

IT IS SO ORDERED:

ISSUED ON NOVEMBER 26, 2010

SIGNED IN THE ORIGINAL BY

Lisa Koteen Gerchick
Lisa Koteen Gerchick

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