

70 FR 77378, December 30, 2005

A-403-801
Sunset Review
POR: 2000-2005
Public Document

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum

RE: Final Results of the Full Sunset Review of the Antidumping Duty
Order on Fresh and Chilled Atlantic Salmon from Norway

Summary:

We have analyzed the case brief and the rebuttal comments of interested parties in the full sunset review of the antidumping duty order on Fresh and Chilled Atlantic Salmon from Norway ("Salmon from Norway") and recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues upon which we received a case brief and rebuttal comments from interested parties:

1. Good Cause to Consider Other Factors
2. Likelihood of the Continuation of Dumping
3. Magnitude of the Margin Likely to Prevail
4. The Department's Import Volume Analysis
5. Whether the Department's Likelihood Determination was Inconsistent with the United States' WTO Obligations

History of the Order:

In the February 25, 1991, final determination of the antidumping duty investigation, covering the period September 1, 1989, through February 28, 1990, the Department of Commerce ("the Department") determined the following weighted-average dumping margins for respondent companies (56 FR 7661):

Salmonor A/S	18.39 percent
Sea Star International A/S	24.61 percent
Skaarfish Mowi A/S	15.65 percent
Fremstad Group A/S	21.51 percent
Domstein and Co.	31.81 percent
Saga A/S	26.55 percent
Chr. Bjelland Seafood A/S	19.96 percent
Hallvard Leroy A/S	31.81 percent
All Others	23.80 percent

Since the April 12, 1991, issuance of the antidumping duty order, the Department has completed four administrative reviews, one new shipper review, and one sunset review on imports of Salmon from Norway. A detailed history of those reviews may be found in the final results of the first sunset review, in which the Department found that revocation of the antidumping duty order would be likely to lead to the continuation of dumping. See Final Results of Expedited Sunset Review: Fresh and Chilled Atlantic Salmon From Norway, 65 FR 5584 (February 4, 2000). Subsequent to the completion of that first sunset review, there have been no administrative reviews or further proceedings with respect to the antidumping duty order on Salmon from Norway.

Background:

On February 2, 2005, the Department published its notice of initiation of the second sunset review of the antidumping duty order and countervailing duty order on Salmon from Norway. See Notice of Initiation of Five-Year (“Sunset”) Reviews, 70 FR 5415 (February 2, 2005). The Department received a Notice of Intent to Participate from Heritage Salmon Company, Inc., and Atlantic Salmon of Maine (collectively "domestic interested parties") on February 17, 2005, within the deadline specified in section 351.218(d)(1)(i) of the Department’s Regulations.

The Department received a complete and timely substantive response from the domestic interested parties on March 4, 2005. The Department also received a complete substantive response on behalf of The Norwegian Seafood Federation and The Norwegian Seafood Association (collectively “respondents”) on March 4, 2005. Respondents claimed interested party status under 19 U.S.C. 1677(9)(A) as trade or business associations. On April 13, 2005, the Department determined that respondents’ submission constituted an adequate response to the notice of initiation. As a result, the Department determined, in accordance with 19 CFR 351.218(e)(2), to conduct a full (240 day) review. On March 9, 2005, the Department received rebuttal comments from the domestic interested parties and respondents.

On June 13, 2005, in accordance with section 751(c)(5)(C)(v) of the Tariff Act of 1930, as amended (“the Act”), the Department determined that the sunset review of the antidumping duty order on Salmon from Norway, a transition order, was extraordinarily complicated, and extended the time limit for completion of the preliminary results of this review until not later than

August 21, 2005, in accordance with section 751(c)(5)(B) of the Act.

On August 29, 2005, the Department published a notice of preliminary results of the full sunset review of the antidumping duty order on Salmon from Norway pursuant to section 751(c) of the Act. See Fresh and Chilled Atlantic Salmon From Norway: Preliminary Results of the Full Sunset Review of Antidumping Duty Order, 70 FR 51012 (August 29, 2005) (“Preliminary Results”). In those Preliminary Results, we provided interested parties an opportunity to comment on our preliminary results. The Department received a case brief from respondents and a rebuttal brief from the domestic interested parties. A hearing, requested by respondents, was held on October 26, 2005, at the Department. As a result of this review, the Department finds that revocation of this order would be likely to lead to continuation or recurrence of dumping.

Discussion of the Issues:

In accordance with section 751(c)(1) of the Act, the Department is conducting this sunset review to determine whether revocation of the antidumping duty order would likely lead to continuation or recurrence of dumping. In this case, the Department considered the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of Salmon from Norway for the period before, and the period after, the issuance of the antidumping duty order. In making these considerations, the Department finds the following indicative of the likely continuation or recurrence of dumping: whether dumping continued at any level above de minimis after the issuance of the antidumping duty order; whether the imports ceased after the issuance of the order; and whether dumping was eliminated and import volumes declined significantly after the issuance of the order. In addition, pursuant to section 752(c)(2) of the Act, the Department considered whether good cause to consider other price, cost, market or other economic factors was shown in this case.

The Department found that dumping of the subject merchandise continued at levels above de minimis after the issuance of the order, including throughout the five years preceding this sunset review. The Department also found that imports of the subject merchandise declined significantly after the issuance of the order, and have remained at depressed levels throughout the pendency of the order, including throughout the five years preceding this sunset review. Finally, the Department notes that for these final results, respondents reiterated the same good cause factors previously addressed by the Department in the Preliminary Results. Consequently, as in the Preliminary Results, we have not found good cause to examine other price, cost, market, or economic factors in this review. We address the comments of the interested parties below.

1. Good Cause to Consider Other Factors

Respondents’ Comments:

Respondents state that in the Preliminary Results, the Department erred in not considering other economic factors in making its determination of the likelihood of continued dumping because it

was contrary to the record evidence and contrary to law. Respondents assert that substantial evidence on the record demonstrates good cause exists. Specifically, respondents argue that the record evidence demonstrates that the salmon industry is unique in nature and that, given this unique nature, the Department must address all relevant record evidence directly addressing the distinct facts existing in this proceeding. Respondents cite the antidumping statute, and the Statement of the Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 316, 103d Cong., 2d Sess., Vol. 1 (1994) (the “SAA”), for the proposition that the Department will consider other economic factors if good cause is shown, and that such consideration in this case is required to satisfy the Department’s mandate to issue fair and accurate determinations as reflected in Rubberflex SDN. BHD v. United States, 59 F. Supp. 2d 1338 (CIT 1999).

In response to the Department’s determination in the Preliminary Results, that respondents had failed to demonstrate the relevance of the purported other economic factors, respondents assert that the record evidence demonstrates this itself. Specifically, respondents reiterate their observations and predictions (addressed by the Department in the Preliminary Results) concerning the market for the subject merchandise and argue that the Department’s decision in the Final Results of Full Sunset Review: Brass Sheet and Strip from the Netherlands, 65 FR 735 (January 6, 2000) (“Brass Sheet and Strip”) supports their claim that good cause exists to consider other factors in this review. As to Brass Sheet and Strip, respondents argue that the acquisition of a domestic producer in that case is no more compelling a factor than those proffered in this case. Furthermore, respondents argue that the evidence on the record of this review establishes that respondents: (1) have found new markets for their goods; (2) have no U.S customers they need to supply; and (3) have no reason to return to the U.S. market. Respondents assert that these factors are just as compelling as the respondent’s acquisition of a domestic production facility in Brass Sheet and Strip, and account equally for the decline in import volumes after the order was issued, and the unlikelihood of the presumption of imports after revocation. Finally, respondents reiterate that the Department’s precedent, as well as its statutory mandate, dictate that the Department should find good cause to consider these other factors in the final results of this review.

Domestic Interested Parties’ Rebuttal Comments:

The domestic interested parties argue that the record evidence does not demonstrate that the salmon industry is unique. Rather, they argue the seven industry developments noted by respondents exist in many industries. In addition, the domestic interested parties assert that respondents failed to meet their burden of demonstrating the relevance of these factors to the determination of the likelihood of continued dumping, and that such a showing was not made because the factors are, in fact, irrelevant to such a determination. In addition, the domestic interested parties argue that the respondents’ reliance on Brass Sheet and Strip is misplaced, noting that in the final results of that review, the Department deferred consideration of the proffered other factors to the International Trade Commission (“ITC”), and argue that the Department should do likewise here. Finally, the domestic interested parties argue the

respondents' reliance on Brass Sheet and Strip is further misplaced because the conditions noted by the respondents in this review are not equally compelling on the issue of likelihood of continued dumping as those raised in Brass Sheet and Strip.

Department's Position:

With respect to the issue of whether there is good cause to consider "other factors," the "burden" is on an interested party to provide information or evidence that would warrant consideration of the other factors in question. Thus, it is clear that parties must present information in support of their claim that the factor at issue is relevant. It is then the Department's responsibility to analyze the information provided, request more information if necessary, and determine if the information and/or evidence affects the Department's likelihood determination.

The Department finds, in light of the relationship between dumping margins and import volumes, that the arguments and claims respondents assert to establish that there is good cause to consider other factors in this case are not relevant to the likelihood of continued dumping. For example, respondents' observations concerning the period of time since the investigation, and the period of time since the last administrative review was requested are not relevant to the issue of whether continued dumping is likely. Thus, we have not considered these factors.

The other factors addressed by respondents were intended to be those that serve to establish one of two things: (1) an independent element, aside from margins or volumes, that the Department should consider in its sunset review analysis; or, more typically, (2) why the margin and volume data primarily relied upon by the Department are not necessarily indicative of the likelihood of dumping.¹ For example, such factors purport to explain why a persistent margin above de minimis or depressed or declining import volumes (which would otherwise militate in favor of continuation of an order) are not necessarily indicative of the likely continuation or recurrence of dumping. Indeed, domestic interested parties may also wish to point out other factors that they believe explain why low margins or increasing import volumes of a respondent are not indicative that revocation would not lead to continuation or recurrence of dumping. In either case, the party asserting "good cause" to consider other factors must first establish the relevance of those other factors to the Department's analysis.

In this case, the respondents have not demonstrated in their substantive response the relevance of

¹The SAA at 890, states that "{s}uch 'other factors' might include, the market share of foreign producers subject to the antidumping proceeding; changes in exchange rates, inventory levels, production capacity, and capacity utilization; any history of sales below cost of production; changes in manufacturing technology of the industry; and prevailing prices in relevant markets." The SAA also notes that: "In practice, this will permit interested parties to provide information indicating that observed patterns regarding dumping margins and import volumes are not necessarily indicative of the likelihood of dumping...the list of factors is illustrative, and the Administration will analyze such information on a case-by-case basis." Id.

the other factors they have cited, nor have they demonstrated why dumping margins and import volumes are not necessarily indicative of the likelihood of continued dumping. A claim as to changes in the market for the subject merchandise cannot be analyzed without a demonstration of its relevance to the Department's statutorily mandated consideration of: 1) the weighted average dumping margins determined in the investigation and subsequent reviews; 2) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order; or 3) the magnitude of the margin of dumping likely to prevail if the order is revoked. We find that none of the purported good cause factors proffered by respondents are relevant to the Department's likelihood determination.

As part of their claim for an analysis of other factors (contained in their substantive response and the case brief), respondents cite Brass Sheet and Strip as Department precedent that concerned the consideration of other factors in a sunset review. That precedent, however, serves only to highlight the type of relevance demonstration lacking in the present case. In Brass Sheet and Strip, the respondent claimed and provided evidence to support its claim that the unique circumstances of that case necessitated the Department's consideration of other factors. Specifically, subsequent to the issuance of the order, the respondent had acquired a U.S. producer of the subject merchandise, through which it could maintain its U.S. market share without dumping. The existence of a U.S. subsidiary was highly indicative of why the respondent's import volumes could have declined so significantly for reasons other than an inability to sell at its original volumes without dumping.²

In this case, respondents have not demonstrated the relevance of the other factors they have cited. Instead, they appear to reiterate arguments presented to the ITC to address the likelihood that injury would recur in the concurrent sunset review being conducted at that agency. Where an interested party fails to provide information sufficient to demonstrate the relevance to the Department's likelihood analysis, the Department has no statutory obligation to consider such a factor in its likelihood determination.

Respondents' claim that the Atlantic salmon industry is unique in nature is not supported by the record. Contrary to respondents' claims, the changes in the market for salmon, such as the growth and emergence of third-country markets and the alleged decline in U.S. consumption are circumstances that apply to many industries and are not particularly "unique" to the salmon industry. Thus, none of the factors raised in respondents' substantive response, or in their case brief, establish good cause to consider other factors in this case. Additionally, the Department agrees with the domestic interested parties that the purported other factors in this case are not equally compelling as the acquisition of a U.S. production facility in Brass Sheet and Strip.

²As stated in the Final Results: "(the Department) preliminarily determined that, despite the significant decline in import volumes of subject merchandise after the issuance of the order, the two most recent reviews were probative of the behavior of the company absent the discipline of the order." Brass Sheet and Strip, 65 FR at 736.

2. Likelihood of the Continuation of Dumping

Respondents' Comments:

Arguing that in prior decisions, the U.S. Court of International Trade (“CIT”) has defined “likely” to mean “probable” for purposes of sunset review proceedings, respondents assert that the Department erred in finding that revocation of the order on Salmon from Norway would likely lead to a continuation of dumping.³ In addition, respondents argue that the evidence on the record of this review demonstrates that import levels and margins are not indicative of the continuation of dumping, and reiterate that changes in the salmon market bear this out. Specifically, the respondents note Norwegian producers’ sales in other markets around the world; the strength of the Kroner vis-a-vis the U.S. Dollar; the prosperity of Norwegian producers; the perception among consumers that Norwegian salmon is a premium product; and the limited supply of that salmon, as factors which establish that Salmon from Norway will not be dumped into the U.S. market if the order is revoked.

Domestic Interested Parties' Rebuttal Comments:

The domestic interested parties counter that the Department’s Preliminary Results are supported by the statute, the Department’s policy and the administrative record. Citing the statute, the Department’s Policies Regarding the Conduct of Five-Year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18, 871, et seq. (April 16, 1998) (the “Policy Bulletin”), and the SAA, the domestic interested parties note that in sunset reviews, the Department examines whether, and to what extent import volumes and the margins have changed since the issuance of the order. Additionally, the domestic interested parties argue that the record evidence of this review establishes that dumping has continued throughout the history of the order and that import volumes declined significantly following the issuance of the order.

Department's Position:

As part of its determination of whether revocation of an antidumping order is likely to lead to the continuation or recurrence of dumping, the Department will examine whether: a) dumping continued at any level above de minimis after the issuance of the order or the suspension agreement, as applicable; b) imports of the subject merchandise ceased after issuance of the order or the suspension agreement, as applicable; or c) dumping was eliminated after the issuance of the order and import volumes for the subject merchandise declined.

While the Department is not taking a position on the semantic differences between the words “likely” and “probable” here, the Department determines that revocation of the order on Salmon from Norway is likely to lead to the continuation of dumping. First, the Department examined

³See Unisor Industeed v. United States, 26 CIT 474 (2002); et. al., (where, according to respondents, “likely” means “probable”).

the dumping margins determined in the investigation and in subsequent administrative reviews of this order. In the original investigation, the Department found that Norwegian producers were selling at less than fair value in the United States at levels greater than de minimis, specifically between 15.65 and 31.81 percent. In all but one of the subsequent reviews, the Department similarly found dumping margins above de minimis levels and even determined that the margins of dumping increased in the second review when compared to those in the investigation. With respect to import volumes, the Department examined statistics compiled from its own trade data along with those from the ITC and found that total import volumes of Salmon from Norway have remained well below their pre-order levels. In addition, the Department notes that import volumes have fluctuated over the five years immediately preceding this sunset review (295,142 kgs in 2000; 483,782 kgs in 2001; 767,161 kgs in 2002; 823,964 kgs in 2003; and 212,892 kgs in 2004).⁴ The Department notes the level of these imports is significantly below those in the years prior to the issuance of the order. Based on the record evidence that dumping was not eliminated after the issuance of the order, the Department determines that revocation of the order on Salmon from Norway is likely to lead to the continuation of dumping.

As to respondents' arguments pertaining to the additional economic factors, we addressed these in the "Good Cause to Consider Other Factors" section above, and found them lacking relevancy.

Magnitude of the Margin Likely to Prevail

Respondents' Comments:

Respondents argue that the post-revocation dumping margin likely to prevail should be based on a more recently completed segment of this proceeding. Specifically, respondents argue that the Department should report to the ITC the zero percent margin calculated for a single producer in the most recently completed determination in this proceeding. To support this position, respondents note that the margins calculated in the reviews between 1990 and 1995 were at rates below those determined in the investigation, and that import volumes and values have significantly increased since the first sunset review. Citing the Stern and Kontali Reports, respondents argue that there is no incentive for Norwegian producers to sell salmon at anything other than premium prices, and assert that the zero dumping margin earned by a Norwegian producer in the most recently completed review should be the margin likely to prevail.

Domestic Interested Parties' Rebuttal Comments:

The domestic interested parties contend that the respondents' assertion that a more recently calculated margin should be reported to the ITC is not consistent with the Department's policy as expressed in the Policy Bulletin (see 63 FR 18,873). Noting that the record indicates dumping margins have remained unchanged or have increased since the issuance of the order, for all but one producer, and that the respondents' volume of imports analysis is flawed because it relied on

⁴Source: U.S. Department of Commerce, Bureau of the Census

the modest growth of import volumes since the last sunset review, rather than on a comparison of pre- and post-order volumes, the domestic interested parties argue that the use of a more recently calculated margin is not indicated.

Department's Position:

In a sunset review, the Department will normally provide to the ITC the margin that was determined in the final determination of the original investigation. For companies not specifically investigated, or for companies that did not begin shipping until after the order was issued, the Department normally will provide a margin based on the "all others" rate from the investigation because these rates are the only calculated rates that reflect the behavior of exporters without the discipline of the order in place. In certain instances, the Department may, in response to arguments from an interested party, provide the ITC a more recently calculated margin for a particular company.

Respondents' assertion that the zero dumping margin earned by a Norwegian producer in the most recently completed administrative review supports a post-revocation dumping margin likely to prevail of zero is unpersuasive. With the exception of the zero percent margin determined in that review, conducted in 1996, the margins have remained above de minimis throughout the history of the order. Respondents' argument for a zero margin, when margins have remained consistent, or increased from the original investigation, for all but two producers, is not persuasive. Accordingly, the Department finds that the zero margin found for a single producer in an administrative review does not reflect the likely behavior of exporters without the discipline of the order in place. Therefore, we will report to the ITC the company-specific and "all others" rates determined in the original investigation, as contained in the *Final Results of Review* section of this notice, because these rates best reflect the behavior of producers/exporters without the discipline of the order.

4. The Department's Import Volume Analysis

Respondents' Comments:

Respondents assert that the Department's import volume analysis was fundamentally flawed because it relied solely on U.S. import statistics and did not consider other factors on the record which explained the decline in import volumes after the issuance of the order. Specifically, respondents argue that the limited supply of Norwegian Salmon, consumer preferences for value-added forms of finfish and other sources of protein, as well as more attractive third country markets were factors, other than dumping margins, that limited imports of Salmon from Norway after the order and which should have been considered by the Department.

Domestic Interested Parties' Rebuttal Comments:

The domestic interested parties did not comment on the Department's import volume analysis.

Department's Position:

With respect to import volumes, the Department examined statistics compiled from its own trade data along with those from the ITC and found that total import volumes of Salmon from Norway have remained well below their pre-order levels. The respondents' criticism of the Department's use of such statistics, without considering other factors available on the record, is misplaced. The Department analyzes import statistics to gain an objective measure of the impact an order has had on imports of subject merchandise. It is the burden of parties to a proceeding to present evidence and argument as to why those import statistics may not be indicative of dumping, or may otherwise be unreliable indicators of the effect of the order. Therefore, the Department finds respondents' criticism unpersuasive.

5. Whether the Department's Likelihood Determination was inconsistent with the United States' obligations under the WTO

Respondents' Comments:

Respondents argue that the Department's likelihood determination in this case is based on an irrebuttable presumption, and is therefore inconsistent with the United States' obligations to the WTO. Specifically, respondents criticize the Department's reliance on an analysis of:

1) import volumes since the issuance of the order, and 2) the margins calculated in subsequent segments of this proceeding. Respondents further assert that reliance on those factors, without consideration of other evidence on the record demonstrating that dumping margins and import levels are not reliable indicators of continued dumping was inconsistent with the United States' WTO obligations.

Citing the Antidumping Agreement, the WTO Appellate Body's interpretations thereof, and the WTO panel report in United States-Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico, WT/DS282/R (June 20, 2005) ("OCTG from Mexico"), respondents argue that the Department should make its final determination in this review based on all the evidence on the record rather than limiting its analysis to import volumes and margins since the issuance of the order.

Domestic Interested Parties' Rebuttal Comments:

The domestic interested parties contend that the Department's determination in the Preliminary Results is distinguishable from that in OCTG from Mexico. Moreover, they argue that the WTO panel decision in that case is not binding on the Department. Instead, the domestic interested parties assert that pertinent statutory provisions foreclose the Department's implementation of WTO decisions in this proceeding, and that such provisions recognize that WTO rulings do not have the status of supreme law in the United States.

Department's Position:

As we stated in the Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004), and the accompanying Issues and Decision Memorandum, at Comment 8, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." SAA at 659. The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures." Id. at 1032; see also Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1348 (Fed. Cir. 2005) ("WTO decisions are 'not binding on the United States . . .'" (citing Timken Co. v. United States, 354 F.3d 1334, 1344)). To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of the WTO dispute-settlement reports. See Section 129 of the URAA. As is clear from the discretionary nature of that scheme, Congress did not intend for the WTO dispute-settlement reports to automatically trump the exercise of the Department's discretion in applying the statute.

Additionally, the WTO panel decision in OCTG from Mexico regarding the Department's likelihood determinations in sunset reviews was an "as applied" decision, it was not an "as such" decision. Accordingly, the determination in that case, concerning Department's finding of likelihood of the continuation or recurrence of dumping, applied only to the dispute therein and has no precedential effect on Department determinations in other proceedings. Moreover, as was stated in the Preliminary Results, the Department did consider the other factors proffered by respondents as establishing good cause, but found that respondents had failed to establish the relevance of those factors to the Department's determination. Accordingly, the Department's likelihood determination cannot fairly be said to have been based on an irrebuttable presumption.

Final Results of Review

After taking into consideration the circumstances of this case, including the history of margins and import volumes, as well as potentially relevant information presented by respondents, we determine that revocation of the antidumping duty order on Salmon from Norway is likely to lead to the continuation of dumping at the margins listed below:

Manufacturer/producer/exporter	Weighted-average margin (percent)
Salmonor A/S	18.39
Sea Star International A/S	24.61
Skaarfish Mowi A/S	15.65
Fremstad Group A/S	21.51
Domstein and Co.	31.81
Saga A/S	26.55
Chr. Bjelland Seafood A/S	19.96

Hallvard Leroy A/S 31.81

All Others 23.80

Based on our analysis and consideration of the case and rebuttal briefs received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of review in the Federal Register.

Agree X

Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

(Date)

