

2007

## Recent Developments in NAFTA Law

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### Recommended Citation

Jay K. Weiser, *Recent Developments in NAFTA Law*, 13 LAW & BUS. REV. AM. 493 (2007)  
<https://scholar.smu.edu/lbra/vol13/iss2/14>

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# RECENT DEVELOPMENTS IN NAFTA LAW

Jay K. Wieser\*

## I. INTRODUCTION

CHAPTER 19 of NAFTA provides an alternative forum for parties seeking judicial review of antidumping and countervailing duty orders in cases involving imports from Mexico and Canada.<sup>1</sup> In addition to seeking judicial review from the Court of International Trade, these cases may also be appealed to a NAFTA Binational Panel.<sup>2</sup> The Binational Panel is comprised of five citizens from the United States, Mexico, and Canada. The primary purpose of the binational panel review system is “to act in place of national courts” in deciding whether a previous decision regarding antidumping or countervailing duty orders is in conformance with the law of that particular country.<sup>3</sup> This article serves as a brief update on matters decided by the NAFTA Binational Panel from August 2006 through October 2006.

## II. OIL COUNTRY TUBULAR GOODS FROM MEXICO: FINAL RESULTS OF ANTIDUMPING DUTY, ADMINISTRATIVE REVIEW AND DETERMINATION NOT TO REVOKE REDETERMINATION ON REMAND (AUGUST 11, 2006)

On August 11, 2006, a NAFTA Binational Panel issued a decision concerning the validity of the method employed by the U.S. Department of Commerce (Department) to ascertain whether respondent Hylsa, S.A. De C.V. (Hylsa) had been shipping in commercial quantities.<sup>4</sup> In 1995, Hylsa was subjected to an antidumping order by the Department, despite never being found to have been engaged in dumping.<sup>5</sup> Four years after

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).
2. *Id.* at art. 1904.
3. North American Free Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review, 66 Fed. Reg. 22,215 (Dep't of Commerce May 3, 2001).
4. *In re* Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Redetermination on Remand, No. USA-MEX-01-1904-05 (NAFTA Binat'l Panel Aug. 11, 2006), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ua01051e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua01051e.pdf).
5. *Id.* at 2.

the antidumping order was imposed, Hylsa sought to have the order revoked.<sup>6</sup> Finally, in 2006, the Department refused Hylsa's request for revocation of the antidumping order based primarily on "the absence of sales of commercial quantities and the challenged occurrence of dumping in 2003-2004."<sup>7</sup> In addition, the Department also contended that since it had determined that dumping had occurred during the ninth administrative review, a request for a fourth review should not be granted.<sup>8</sup>

Furthermore, the Binational Panel's decision focused on whether the Department's method of calculating commercial quantities constituted an abuse of discretion. In support of its commercial quantities standard, the Department relied "upon the expressed need to determine if the company can participate in the market without the discipline of the antidumping order."<sup>9</sup> Thus, in situations "[w]here a company has previously engaged in dumping, and its sales under the antidumping order continue at a tiny percentage of its sales made while engaging in dumping, it is a perfectly rational standard for determining that the sales were not in commercial quantity."<sup>10</sup> But the standard does not appear to be legitimate when applied to a company who, like Hylsa, has not been found to have engaged in dumping. Imposing such a standard would lead to the irrational proposition that the commercial quantities standard is needed to prevent an exporter from resuming dumping activities when it has not been found to have been engaged in such unfair trade practices in the first place.<sup>11</sup>

In sum, the Binational Panel decided in favor of Hylsa, stating "that the Department's calculation of commercial quantities in its remand determination was an abuse of discretion and that the contested dumping determination in the 9th review is outside the scope of this proceeding and may not be taken into account."<sup>12</sup> As a result of their finding that the Department had "acted in an arbitrary and capricious fashion when it failed to adequately justify its determination that Hylsa did not ship the subject matter goods in commercial quantities during the periods of review in question," the Panel remanded the matter to the Department for further consideration.<sup>13</sup>

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6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 7-8.

10. *Id.* at 8.

11. *Id.*

12. *Id.* at 4.

13. *Id.* at 21.

### III. MAGNESIUM FROM CANADA: DECISION OF THE PANEL REVIEWING THE DETERMINATION OF THE INTERNATIONAL TRADE COMMISSION ON THE SECOND REMAND (OCTOBER 6, 2006)

On October 6, 2006, a NAFTA Binational Panel issued a decision resolving “whether revocation of the antidumping order covering pure magnesium . . . imported from Canada would likely lead to the continuation or recurrence of material injury to the U.S. industry.”<sup>14</sup> Earlier this year, the Binational Panel affirmed in part the U.S. International Trade Commission’s (Commission) decision to decline to revoke an antidumping order and countervailing duty order that banned the importation of magnesium from Canada.<sup>15</sup> Despite affirming part of the Commission’s decision, the Binational Panel remanded the matter back to the Commission on the basis that the Commission had failed to support its conclusion that revocation of the antidumping order would lead to a continuance or reoccurrence of material injury with substantial evidence.<sup>16</sup> Thus, the central issue facing the Panel in its October decision was whether the evidence supporting the Commission’s finding of price underselling was reasonable and supported by substantial evidence on the record.<sup>17</sup>

In struggling with whether the evidence proffered was sufficient, the Panel looked to the decision in *Altx, Inc. v. United States* where the Court of Appeals for the Federal Circuit stated that “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.’”<sup>18</sup> Similarly, the Panel should give the Commission’s decision such deference.<sup>19</sup> Therefore, after analyzing the evidence, the Panel determined that there was substantial evidence to support the Commission’s findings that if the antidumping order and countervailing duty order were revoked the revocation “would be likely [to] lead to continuation or recurrence of material injury to the domestic alloy magnesium industry within a reasonably foreseeable time” and affirmed the decision.<sup>20</sup>

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14. *In re Magnesium from Canada: Full Sunset Review of Antidumping Duty and Countervailing Duty Orders, Decision of the Panel Reviewing the Determination of the International Trade Commission on the Second Remand, No. USA-CDA-00-1904-09* (NAFTA Binat'l Panel Oct. 6, 2006), available at [http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA\\_Chapter\\_19/USA/ua00092e.pdf](http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua00092e.pdf) [hereinafter *Magnesium from Canada*].

15. *Id.*

16. *Id.*

17. *Id.*

18. *Altx, Inc. v. United States*, 370 F.3d 1108, 1121 (Fed. Cir. 2004) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562-64 (Fed. Cir. 1984)).

19. *Magnesium from Canada*, *supra* note 14.

20. *Id.* at 13.



# **Documentation**

