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Recent Developments in NAFTA Law

John C. Adolph

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RECENT DEVELOPMENTS IN NAFTA LAW

John C. Adolph*

I. INTRODUCTION

CHAPTER 19 of the North American Free Trade Agreement (NAFTA) allows the signatories to choose an alternative forum for judicial review of antidumping and countervailing duty cases that might arise.¹ The articles of chapter 19 grant each country the right to appeal its cases to a NAFTA Binational Panel rather than to the Court of International Trade.² The independent binational panel, which consists of five citizens from the United States, Mexico, and Canada, decides whether a previous determination conforms to the antidumping or countervailing duty laws of the determining country.³ This article serves as a brief update of matters decided by the NAFTA Binational Panel from November 2006 to February 2007.

II. OIL COUNTRY TUBULAR GOODS FROM MEXICO: FINAL RESULTS OF ANTIDUMPING DUTY, ADMINISTRATIVE REVIEW, AND DETERMINATION NOT TO REVOKE REDETERMINATION ON REMAND (JANUARY 16, 2007)

On January 16, 2006, a NAFTA Binational Panel issued the final stage in the *Oil Country Tubular Goods from Mexico* dispute that had initially started in 1994.⁴ In 1995, respondent Hylsa, S.A. De C.V. (Hylsa) was subject to an antidumping order of the U.S. Department of Commerce (Commerce Department).⁵ In 1999, Hylsa, “asserting [that] it engaged in three years of sales in commercial quantities without dumping,” tried to have the antidumping order revoked.⁶ The Commerce Department decided after the first two remands by the Binational Panel that Hylsa was not eligible for revocation of the antidumping order because Hylsa had

* John Adolph graduated from SMU Dedman School of Law in May 2007. After taking the bar exam, he will join the Dallas office of Bracewell and Giuliani LLP., to work in energy and real estate.

1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, (Chapter 19: Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) [hereinafter NAFTA].

2. *Id.*

3. *Id.*

4. Oil Country Tubular Goods from Mexico: Final Results of Antidumping Duty, Administrative Review and Determination on Remand, File No. US-MEX-01-1904-05 (Jan. 16, 2007), http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute%5Cenglish%5CNAFTA_Chapter_19%5CUSA%5Cua01052e.pdf.

5. *Id.*

6. *Id.*

failed to ship in commercial quantities during one of the three years.⁷ In its third decision regarding Hylsa, the Binational Panel determined that the Commerce Department's decision to deny the request for revocation was within its discretion and supported by substantial evidence.⁸

After the Binational Panel's second decision, the Commerce Department issued its Redetermination on Remand, again determining that Hylsa did not sell its merchandise in commercial quantities during each of the three years Hylsa used to support its revocation request.⁹ Hylsa responded on October 30, 2006, objecting "to the amount of time the [Commerce] Department gave Hylsa to respond to its draft determination," while reiterating its objection to the Commerce Department's determination.¹⁰ The Commerce Department responded shortly after Hylsa's objection.¹¹

The Binational Panel found that the Commerce Department did not abuse its discretion when calculating commercial quantities in its remand determination.¹² In making its calculation, the Commerce Department determined that Hylsa did not ship in commercial quantities "because its volume of sales was significantly lower than its sales during the initial period of investigation . . . that established the basis for the antidumping order."¹³

In addition, the Binational Panel refused Hylsa's argument that it had been denied the opportunity to participate meaningfully in the Commerce Department's remand determination.¹⁴ Although the circumstances of the notice were unclear, the Binational Panel was unconvinced because the issues were well known to both Hylsa and the Commerce Department after years of proceedings.¹⁵

III. OIL COUNTRY TUBULAR GOODS FROM MEXICO: FINAL RESULTS OF SUNSET REVIEW OF ANTIDUMPING DUTY ORDER (JANUARY 17, 2007)

For the fourth time since 2001, the Binational Panel was asked to reconsider the sunset review by the Commerce Department of the antidumping duty order on Oil Country Tubular Goods from Mexico.¹⁶ The Commerce Department had found in this review that "revocation of the antidumping order would likely lead to continuation or recurrence of

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Oil Country Tubular Goods from Mexico: Final Results of Sunset Review of Antidumping Duty Order, File No. USA-MEX-2001-1904-03 (Jan. 17, 2007), http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute%5Cenglish%5CNAFTA_Chapter_19%5CUSA%5Cua01033e.pdf.

dumping.”¹⁷ Tubos de Acero de Mexico, S.A. (TAMSA) contested this determination, claiming that the Commerce Department had failed to consider the factors of Mexican peso devaluation and TAMSA debt that would overcome the presumption in favor of likelihood of dumping.¹⁸

After being ordered to consider the relevance of these factors, the Commerce Department failed in its first redetermination “to provide a reasoned analysis in support of its interpretation of the role played by the pre- and post-order levels of TAMSA’s hard currency debt.”¹⁹ The Binational Panel then ordered the Commerce Department to determine if the decrease in TAMSA’s foreign currency denominated debt outweighed the likelihood presumption, specifically requiring the Commerce Department to explain its reasoning in case it found the likelihood presumption was not outweighed.²⁰

The Commerce Department’s second redetermination avoided the comparison requested “by creating and considering a hypothetical financial expense ratio instead of the uncontested financial expense ratio established in the record.”²¹ The Binational Panel considered this hypothetical to be unreasonable and again ordered the Commerce Department to reconsider its likelihood determination.²² The Commerce Department again refused to consider the effect of other factors on its determination and found that the recurrence of dumping was likely by supporting its determination with new arguments and another hypothetical expense ratio.²³

In its Fourth Decision, the Binational Panel denied TAMSA’s request to order the Commerce Department to enter a negative likelihood determination because it was “not prepared to find that remand ‘would be an idle and useless formality.’”²⁴ Instead, the Binational Panel directed the Commerce Department to reconsider its likelihood determination and to give a reasoned analysis if it determines that dumping is likely to continue or recur.²⁵ Furthermore, the Commerce Department, if it reaches a likelihood determination again, must explain why the elimination of TAMSA’s foreign debt does not outweigh the likelihood presumption, utilize the actual financial expense ratio instead of any hypothetical ratios, and “provide an explanation . . . indicating why TAMSA’s zero margin calculations have no predictive value.”²⁶

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

Documentation

