Law and Business Review of the Americas

Volume 13 | Number 4 Article 16

2007

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I. INTRODUCTION

CHAPTER 19 of the North American Free Trade Agreement (NAFTA) established an alternative method of review for parties challenging final antidumping or countervailing duty determinations.[1] Pursuant to article 1904(2), such parties may present their appeals to an independent NAFTA Binational Panel (Panel) rather than the national courts of the importing country.[2] The Panel then decides whether the challenged determination was made in accordance with the antidumping and countervailing duty laws of the determining country.[3] This article serves as a brief overview of the Panel's review of such matters and its subsequent decision occurring between February 2007 and April 2007.

II. *OIL COUNTRY TUBULAR GOODS FROM MEXICO*: DECISION OF THE PANEL

On March 22, 2007, the Panel rendered a decision on an appeal initiated by Tubos de Acero de Mexico, S.A. (TAMSA) concerning a final review determination by the United States International Trade Commission (Commission) to uphold the antidumping and countervailing duty orders on oil country tubular goods (OCTG) from Argentina, Italy, Japan, Korea, and Mexico.[4] TAMSA's appeal centered on three issues: (1) whether the Commission misinterpreted and thus incorrectly applied the term "likely" when determining that Mexican imports would likely lead to material injury and likely compete with other imported OCTG and domestic production of the product; (2) whether the Commission had substantial evidence supporting its decision to cumulate the effects of imported OCTG from Mexico and the other subject countries; and (3) whether substantial evidence supported the Commission's determination that revoking the antidumping and countervailing duty orders on im-

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M 605, 683 (1993).
2. *Id.*
3. *Id.*
4. Article 1904 Binational Panel Review, *In re Oil Country Tubular Goods from Mex. (U.S. v. Mex.)*, Secretariat File No. USA-MEX-2001-1904 06, (Mar. 22, 2007), *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76 (search terms "NAFTA Chapter 19," "USA," & "2007") [hereinafter *Tubular Goods*].

ported OCTG from the subject countries would likely lead to recurrence or continuation of material injury.[5]

TAMSA argued on appeal that the Commission should have interpreted "likely" in accordance with its ordinary meaning of "probable or more probable than not."[6] The Commission did not, however, explicitly justify the standard of "likely" it applied in making its determinations but simply countered that the Panel should give deference to its interpretation and therefore accept a more broad interpretation of the term. The Commission had, however, stated that it applied the correct standard in another appeal before the United States Court of International Trade (CIT) concerning the same review determination being appealed before the Panel.[7] Rather than remanding the case to the Commission so that it could simply "restate its prior position" concerning what standard it applied in the review determination, the Panel chose to accept the prior statement.[8] As such, the Panel then moved to the question of whether the Commission properly applied the "likely" standard when it decided to cumulate OCTG imports from Mexico with those from the other subject countries.

The Commission may cumulate "the volume and effect of imports" if the imports are "likely to compete with each other and with the domestic like products in the United States market."[9] Typically, the Commission considers four sub-factors when determining whether the imports are likely to compete against each other, including: (1) the fungibility of the imports, (2) the possibility of sales within the same geographic markets, (3) whether there are "common or similar channels of distribution," and (4) whether the imports will be in the market simultaneously.[10]

The Panel rejected TAMSA's argument that welded and seamless OCTG were not fungible because of price differentials on the basis that over 76 percent of the purchasers questioned indicated that they could be substituted in some situations and that Mexican exporters produced both types of OCTG.[11] The Panel also held that the Commission demonstrated that sales of imported OCTG and the domestic like product were generally concentrated in the Gulf of Mexico.[12] Furthermore, TAMSA failed to point to any evidence refuting the Commission's evidence that imports from all of the subject countries were in the U.S. market for the eight years prior to the time TAMSA filed its appeal.[13] Consequently, the Panel concluded that substantial evidence supported the Commission's determination to cumulate Mexican imports of OCTG with imported

5. *Id.*
6. *Id.*
7. *See* Siderca, S.A.I.C v. United States, 350 F. Supp. 2d 1223, 1223 (Ct. Int'l Trade 2004).
8. *Id.*
9. *Id.* (quoting Tariff Act of 1930, 19 U.S.C. §1675(a) (7)).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*

OCTG from the other subject countries given that the four sub-factors indicated that "it is probable and more likely than not that imports of the subject merchandise as a whole will compete with other subject imports and with the domestic like product in the United States market."[14]

The Panel then moved to the issue of whether substantial evidence in the record supported the Commission's determination that imported OCTG from Mexico was likely to lead to the continuation or recurrence of material injury to the U.S. industry. In doing so, the Panel first outlined the requirements for determining material injury under the Tariff Act.[15] The Act requires that the Commission "consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry" when determining whether to revoke antidumping or countervailing duty orders.[16] Based on its decision that the Commission's determination to cumulate the imports from the subject countries was proper, the Panel held that appropriate inquiry as to material injury had to be based upon analysis "of all imports of the subject merchandise, not just imports of TAMSA or Mexican product.[17]

As such, TAMSA inadequately briefed the issue of whether the volume of OCTG imports would be significant if the Commission revoked the orders given that its brief only addressed volume with respect to imports from TAMSA or all of Mexico.[18] The Commission's brief, on the other hand, pointed to evidence that the orders had served to restrain the volume of the imports, foreign producers had the ability to further increase their production of OCTG, the relative capacity of foreign producers to produce OCTG, and the fact that all of the subject countries relied heavily upon exports for the majority of their sales.[19] These factors, in addition to the fact that the United States represented the largest and possibly most profitable market in the world, provided substantial evidence to support the Commission's determination that the volume of OCTG would likely be substantial if the countervailing and antidumping orders were revoked.[20]

Likewise, the Panel found substantial evidence to support the Commission's determination that revoking the orders would likely lead to significant price underselling and suppression, pointing to (1) the volume of imports, (2) the fungibility of domestic and imported OCTG, (3) the affect of price on purchasing decisions, and (4) evidence of prior underselling.[21] The probability of increased volume, price underselling, and suppression, combined with a history of aggressive market share tactics served as substantial evidence supporting the Commission's determina-

14. *Id.*
15. *Id.*
16. *Id.* (quoting 19 U.S.C. § 1675a(a)).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

tion that revoking the antidumping and countervailing duty orders on OCTG imports from Mexico, Argentina, Italy, Korea, and Japan would likely lead to the recurrence or continuation of material injury.[22] As a result, the Panel affirmed the Commission's review determination.[23]

22. *Id.*
23. *Id.*