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I. INTRODUCTION

PARTIES challenging final antidumping and countervailing duty determinations are afforded an alternative method of review under Chapter 19 of the North American Free Trade Agreement (NAFTA).[1] Article 1904(2) allows these parties to present such appeals to an independent NAFTA Binational Panel (Panel) instead of the national courts of the importing country.[2] Using the importing country's "statutes, legislative history, regulations, administrative practice and judicial precedents," the Panel then decides whether the determining country properly applied its antidumping and countervailing duty laws with respect to the challenged determinations.[3] This article briefly highlights the Panel's review of and decision in one such matter that occurred between August 2007 and November 2007.

II. CARBON AND CERTAIN ALLOY STEEL WIRE ROD FROM CANADA SECOND ADMINISTRATIVE REVIEW: DECISION OF THE PANEL

On November 28, 2007, the Panel issued a decision on an appeal brought by Mittal Canada, Inc. (Mittal) concerning a Final Administrative Review with regards to Carbon and Certain Alloy Steel Wire Rod from Canada issued by the U.S. Department of Commerce (Commerce).[4] Mittal raised four issues on appeal: (1) whether Commerce erred when it zeroed negative margins; (2) whether Commerce erred when it denied Mittal's request to allow a split cost of production; (3) whether the Constructed Export Price (CEP) profit was overstated; and (4) whether Commerce erred by using negative net prices on CEP sales in the margin calculations.[5]

Mittal first took issue with Commerce's use of a weighted average

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1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 605, 683.
2. *Id.*
3. *Id.*
4. *In re* Carbon and Certain Alloy Steel Wire Rod From Canada Second Administrative Review: Decision of the Panel, USA-CDA-2006-1904-04 (Nov. 28, 2007) [hereinafter *Decision of the Panel*], *available at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua06040e.pdf.
5. *Id.* at 2.

when it calculated the margin of dumping.[6] According to its normal procedure, Commerce set all dumping amounts at zero even when the Export Price (EP) of the goods was greater than the Canadian Normal Value or where there was a negative dumping value.[7] As calculated by Commerce, the average margin of dumping, therefore, exceeded what it would have been had Commerce included the negative values in its calculation.[8] Consequently, Mittal argued that this method of calculation was unfair to foreign importers who, according to Mittal, would be forced to sell "at or above the average Normal Value . . . in order to avoid dumping."[9]

Before squarely addressing this first issue, however, the Panel held that it first had to determine whether "a NAFTA binational panel is bound by the decisions of the [U.S.] Federal Circuit."[10] This became such an important sub-issue given that Mittal based its appeal of the first issue on its assertion that a Panel was equivalent to the U.S. Court of Appeals for the Federal Circuit and therefore, was not bound by the Federal Circuit's decisions.[11] Commerce, on the other hand, argued that because Panels are bound by the decisions of the Federal Circuit, the Panel lacked authority to "independently consider Mittal's challenge to zeroing on the merits."[12]

Looking to the language of article 1904(1), which states that the parties "shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review,"[13] a majority[14] of the Panel likened a binational Panel to a "generic court or virtual court [that] is not situated within the regime of, or bound by, decisions of the CIT [Court of International Trade] or the Federal Circuit."[15] Even though the majority concluded that such decisions were merely persuasive and not binding authority upon the Panel, it clarified that Panels "should and would give full, thoughtful and respectful consideration to the decisions of the CIT and Federal Circuit."[16]

After agreeing with Mittal that it did have the authority to review Commerce's use of zeroing on the merits, the Panel went on to tackle the permissibility of zeroing. According to the Panel, *Timken Co. v. United States*, "[t]he leading case on zeroing," allowed zeroing as a means of counteracting masked dumping.[17] Therefore, zeroing was only impermissible or unreasonable if Commerce "placed too much significance on the

6. *Id.* at 8.
7. *Id.*
8. *Id.*
9. *Id.* at 9.
10. *Id.* at 11.
11. *Id.* at 9.
12. *Id.*
13. *Id.* at 21-22 (quoting 32 I.L.M. at 683).
14. *See id.* at 84. Panelist Liebman rejected this view in his dissent.
15. *Id.* at 21.
16. *Id.*
17. *Id.* at 23-24 (referring to *Timken Co. v. United States,* 354 F.3d 1334 (Fed. Cir. 2004)).

phenomenon of masked dumping."[18] Commerce, however, failed to prove or even argue that it used zeroing in response to masked dumping by Mittal.[19] Moreover, the Panel found that zeroing "seem[ed] inconsistent . . . with . . . the underlying principle of the *Charming Betsy* canon, to respect the law of nations wherever possible,"[20] given that a number of rulings by the Appellate Body (AB) of the World Trade Organization (WTO) hold that zeroing violates the Anti-Dumping Agreement (ADA).[21] Consequently, the majority held that Commerce's final determination was neither supported by substantial evidence nor in accordance with the law.[22] Ultimately, the Panel remanded the issue with instructions that Commerce determine the dumping margins without zeroing the values.[23]

The Panel then addressed Mittal's second issue, that Commerce erred by refusing to allow Mittal to bifurcate the Cost of Production (COP). Mittal asserted that it should have been allowed to provide two separate COPs because the costs of raw materials increased dramatically in 2004.[24] Mittal did not dispute that it was Commerce's normal practice to use a single, weighted-average COP for the period of review and that Commerce had discretion to decide whether or not to split the review period.[25] Instead, Mittal asserted that Commerce should have used its discretion to bifurcate the period in this case.[26]

The Panel analyzed the method by which Commerce applied its three pronged test to determine if Commerce's decision was supported by substantial evidence on the record. Under Commerce's test, a period of review may be split if the cost changes are: (1) significant; (2) consistent; and (3) passed directly to the customers.[27] Because Commerce only relied on its past usage of thresholds for significance without justifying how it determined these thresholds, the Panel remanded for Commerce to provide a reasoned justification as to the issue of significance, concluding that it did not have enough evidence to determine whether Commerce's methodology was reasonable.[28] The Panel also remanded for an explanation of the test Commerce used to determine whether Mittal's costs met the consistency test because Commerce failed to proffer a definition of consistency.[29] Likewise, the Panel remanded on the third prong with an order that Commerce also provide a reasoned explanation of its test link-

18. *Id.* at 24.
19. *Id.*
20. *Id.* at 38 (referring to the rule of statutory construction set forth in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)).
21. *Id.* at 36.
22. *Id.* at 30.
23. *Id.* at 40.
24. *Id.* at 41.
25. *Id.* at 43.
26. *Id.* at 44.
27. *Id.* at 43.
28. *Id.* at 50.
29. *Id.* at 51-52.

ing cost to price and the application of this test to Mittal.[30]

Although the Panel remanded the first two issues back to Commerce with an order to issue a Final Re-determination on Remand, it did reject Mittal's arguments concerning the two latter issues.[31] The Panel found that Commerce did not err in its calculation of CEP profit.[32] And, with respect to the final issue, the Panel concluded that Commerce did not abuse its discretion when it chose to use the negative net prices on CEP sales in calculating the margins.[33] As such, the Panel affirmed Commerce's determinations with respect to the two latter issues.

30. *Id.* at 54.
31. *Id.* at 69.
32. *Id.* at 66.
33. *Id.* at 68.