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RECENT DEVELOPMENTS IN NAFTA
LAW-WINTER UPDATE 2009/2010

Olivia Howe

I. INTRODUCTION

UNDER Chapter 19 of the North American Free Trade Agreement ("NAFTA"), parties to the agreement can seek judicial review from the Court of International Trade for cases involving antidumping and countervailing duty orders. The parties are also provided the option of appealing to a NAFTA Binational Panel under article 1904(2). This panel acts "in the place of national courts" to decide whether a previous determination regarding antidumping or countervailing duty orders was made in accordance with the laws of the determining country. This article serves as a brief update of the matters decided by the NAFTA Binational Panel from September 2009 and February 2010.

II. IN THE MATTER OF CERTAIN RED DELICIOUS APPLES AND GOLDEN DELICIOUS APPLES FROM THE UNITED STATES OF AMERICA

The Panel's decision is derived from the Initial Determination of the Mexican Investigating Authority ("IA") issued on May 26, 2005. A Mexican Circuit Court ordered the IA to nullify its final determination from the date that Mexican law was broken by a government official who issued a notification of the initial determination without proper authority. Thus, the IA was required to "carry out again all acts from the date that the violation occurred, that is, AFTER THE INITIATION DETERMINATION WAS ISSUED." This Binational Panel was then formed to review the determination. It ultimately remanded back to the IA with instructions to issue a new Final Determination that is based on the period of review.

2. Id.
3. Id.
5. Id. p. 17.
6. Id. (emphasis in original).
established in the preliminary determination.7

A. Standard of Review used by the Panel

The Panel conducted the review Commission's decision according to the Mexican standard of review.8 As set forth in Article 1904(3) of NAFTA, the binational panel is required to apply the "general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority."9 Therefore, "in a Mexican antidumping case, panels must apply the standard of review and the general legal principles that the Mexican Fiscal Court would have applied when reviewing a final determination by the SE."10 Additionally, the Panel is required to restrict its review to the facts from the administrative record.11

B. Procedural Claim: Legal Representation of the Mexican Producers

The Regional Union of Fruit Producers of the State of Chihuahua ("UNIFRUT") initiated the administrative investigation of unfair international trade practices, specifically an antidumping investigation into the import of apples.12 To request an investigation, the legal authority of the domestic producers must be credited appropriately. The Northwest Fruit Exporter ("NFE") participants disagreed as to whether UNIFRUT properly granted the power of attorney to its representative, and if not, whether this error could be corrected at a later point during the proceedings.13 The Panel determined that NFE had already raised this claim in a previous proceeding and the Mexican Court upheld the legal authority of UNIFRUT's representative.14 It found this decision persuasive and upheld the IA's determination relating to this claim.15

C. Period of Review used by the IA

The Panel determined that it must first examine the period of review in order to make a determination on the claims of the parties. It examined: (1) the periods of review that were used by the IA in its investigation; (2) the applicable standard that would apply to reviewing information; (3) if the IA could have updated the information; (4) and whether the IA made an attempt to update the information.16

7. Id. at 31.
8. Id. at 5.
9. Id.
10. Id.
11. Id.
12. Id. at 6.
13. Id. at 8.
14. Id. at 10.
15. Id.
16. Id.
1. Periods of Review Used by the IA in its Investigation

In the Initiation and Preliminary determinations, the IA used data from January to June of 1996 for its dumping analysis and from January 1994 to June 1996 for its injury analysis as determined from the original investigation ("original period").\(^{17}\) For the Final Determination, the IA created a new Period of Review ("POR") based on updated information from the parties.\(^{18}\) The new POR was from January 1, 2004 to June 30, 2005 for the dumping analysis and from January 2004 to June 2006 for the injury analysis was.\(^{19}\)

2. Applicable Standard for Reviewing Information

All of the parties agreed that the judicial ruling of the Mexican Court required the IA to reevaluate the correct POR. But, the NFE claimed that the new POR created by the IA was illegally determined because the IA used information that was not contemporary.\(^{20}\) The Panel considered a report by the WTO Appellate body which examined the POR in a similar Mexican antidumping investigation.\(^{21}\) It found that the time period between the initial investigation and the imposition of anti-dumping duties "may raise real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and current injury."\(^{22}\) In light of this report, the Panel determined that it must examine whether the IA could have updated the information it used or whether this was restricted by the Court ruling to a specific POR.\(^{23}\) Also of importance to the Panel was whether the IA attempted to update the information.\(^{24}\)

3. Whether it was Possible for the IA to Update the Information

The Panel determined that the IA generally has the ability to modify a POR, and that in this case, the IA recognized the need for updated information to make its determination.\(^{25}\) The Panel also determined that the IA was not restricted in its determination of the POR by the Court Ruling,

\[\text{[t]hus, it could have been the case that the IA could have modified the POR at any time after the initiation of the investigation and it also could have ended the investigation by issuing a negative preliminary determination if it did not found sufficient data or information that would support an affirmative dumping and/or injury determina-}\]
tation or causal link among them.\textsuperscript{26}

4. \textit{Whether there was any Attempt to Update the Information}

The Panel noted that the IA used various periods of review in its analysis. It incorporated data from the original period in some areas of its analysis, data from the “new” POR when there was no updated information available, and information from an approximately eight year period in other areas of its analysis.\textsuperscript{27} The Panel determined that the eight year gap between the information and the IA’s Final Determination could not provide a “sufficiently relevant nexus” between data relating to the period of investigation and current dumping, injury and causal link.”\textsuperscript{28} Thus, the Panel decided that a proper assessment could not be undertaken until the data was updated with the new POR.\textsuperscript{29} The Panel deferred its ruling until such time.\textsuperscript{30}

a. Initiation Determination

The NFE claimed that the IA failed to include the fact that some of the importers were also domestic producers in its analysis, thus violating Articles 40 of the Mexican Foreign Trade Law (“FTL”), 62 of the Mexican Foreign Trade Law Regulations (“FTLR”) and 5.3 of the WTO Antidumping Agreement (“AA”).\textsuperscript{31} The NFE also claimed that the IA used incomplete information in its analysis and thus erred in initiating its determination without sufficient evidence of injury.\textsuperscript{32}

As discussed, a Mexican Circuit Court required the IA to nullify its Final Determination from the date that the government official violated Mexican law by issuing notification of the initial determination. The IA was thus required to carry out again all acts that occurred after the issuance of the initiation determination. The Panel determined that compliance with the Circuit Court ruling did not include the initiation determination itself, but that all subsequent acts were required to comply with Mexican antidumping law.\textsuperscript{33} Therefore, it upheld the initiation determination.\textsuperscript{34}

b. Preliminary Determination

According to Northwest Fruit Exporters (“NFE”), the IA violated Article VI of GATT, Article 3 of the AA, and Article 76 of the FTLR by issuing a determination that contained information that at least eight years old, using only six months of 1994, 1995, and 1996 to make its preliminary

\textsuperscript{26} Id. at 15.
\textsuperscript{27} Id. at 15-16.
\textsuperscript{28} Id. at 16.
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 17.
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
determination, and by using both the new POR and the original POR in its determinations.\textsuperscript{35} The Panel agreed that the preliminary determination was invalid as eight-year-old data could not justify a positive injury determination.\textsuperscript{36} It also reiterated its earlier discussion of the issues created by the IA using both the original POR and new POR together in its analysis.\textsuperscript{37}

c. Claims Relating to the Final Determination

i. Timing

NFE and UNCEPA both claim that the IA exceeded the 260 day time limit given under the FT in issuing its final determination.\textsuperscript{38} In coming to this conclusion, the Panel examined a decision by the Mexican Supreme Court stating that the IA can exceed the FTL 260 day limit.\textsuperscript{39} The Panel determined that it was bound by this jurisprudence as it is required to review a final determination "in accordance with 'the antidumping law of the importing Party'...[including] 'judicial precedents to the extent that a court of the importing Party would rely on such precedents in reviewing a Final Determination of the competent investigating authority.'"\textsuperscript{40}

ii. Substantive Claims

The Panel was unable to make a determination regarding the substantive claims of NFE as it was primarily based on the information used by the IA.\textsuperscript{41} The Panel deferred on making a determination until the information is updated and the IA responds to its remand.\textsuperscript{42}

d. Other Claims

i. Request of Cost of Production from Exporters

The Panel determined that, contrary to the claims of NFE, the IA has the authority to request cost data from exporters and typically does so in every case.\textsuperscript{43} Additionally, Articles 54 and 82 of the FTLR give the IA a general authority to request relevant information.\textsuperscript{44} Thus, the Panel upheld the final determination against NFE's claim.\textsuperscript{45}

ii. Access to Confidential Information

The Panel determined that the IA violated Articles 6.2 and 80 of the FTL by refusing to give NFE access to certain information from its inves-

\textsuperscript{35} Id. at 18.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} Id. at 19.
\textsuperscript{39} Id.
\textsuperscript{40} Id. p. 20; NAFTA Article 1904, paragraph 2.
\textsuperscript{41} Id. at 21.
\textsuperscript{42} Id.
\textsuperscript{43} Id. p. 22.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
tigation, particularly the confidential information that was submitted by other members of NFE.46 Articles 6.2 and 80 of the FTL establish that a party in a proceeding has the right to access information in order to defend its interests during an investigation.47 The Panel found that NFE properly justified its need to access confidential information “in order to review the methodology and information used by the IA in its dumping margin determination based on Best Information Available.”48 Thus, the Panel rejected the IA’s argument that as exporters, NFE should already have access to this information from parties pursuing the same objectives in the antidumping investigation. It reasoned that companies may not choose to share this kind of information due to competitive concerns, and that regardless this was not an appropriate justification for denying NFE access to the information.49

iii. Verification Visit

The Panel determined that under Article 6.6 of the AA, the IA is not required to perform a verification visit in all cases.50 Additionally, the NFE failed to provide a specific rationale as to why the domestic industry information should have been verified.51 Thus, the Panel upheld the final determination as to this claim.52

iv. Margin of Dumping

The Panel determined that the IA was in violation of Article 7.4 for failing to justify maintaining preliminary duties for over a year.53 However, NFE’s claim focused on the theory that the margin of dumping should be lower due to the delay instead of the violation itself. The Panel did not see the legal connection between the delay and an automatic lower margin of dumping and thus upheld the final determination as to this claim.54

v. Previous Administrative Practice

The Panel examined Article 1902.1 of the NAFTA and determined that contrary to UNCIEPA’s claim, the IA did not have an obligation to follow previous administrative practice.55 It refused to issue a decision on this claim and specified that this “should not be interpreted to establish any precedent with respect to claims related to administrative practice or whether authorities should follow or be bound by such practice in a par-

46. Id. at 25.
47. Id. at 24.
48. Id.
49. Id. at 24-25.
50. Id. at 26.
51. Id.
52. Id.
53. Id. at 26.
54. Id. at 27.
55. Id.
vi. Calculation and Payment of Dumping Duties

The Panel determined that the method of calculating duties owed under Mexican Customs Law was outside of the scope of its review as these kinds of laws do not come under Article 1904, paragraph 2 of NAFTA. Thus, it did not have jurisdiction to rule on whether the amount of duty that importers paid exceeded the amount of duty the IA calculated in violation of Article 9.3 of the AA.

vii. Participation of UNCIEPA in the Proceeding

The IA prevented UNCIEPA from participating in the antidumping proceeding. It argued that UNCIEPA was not part of the underlying judicial proceeding, and thus it should not be permitted to participate in the proceeding related to compliance with that judicial ruling. The Panel found that the IA could not exclude importers from the antidumping proceedings, regardless of the involvement of a court ruling. It found that excluding “interested parties” from taking part in the antidumping proceedings was a violation of Articles 51 and 53 of the FTL, 164 of the FTLR and 6.1 of the AA.

III. CONCLUSION

On the issues raised by UNCIEPA, UNIFRUT and NFE the Panel remanded the matter back to the IA. It required the IA “to issue a new dumping, injury and causal link Final Determination based exclusively on information and data from the period of review established by the IA in paragraph 386 of its preliminary determination.” On remand, the Panel required the IA to (1) make its new determination based solely on information from the record; (2) give justification if it excludes data from the time period set out in the preliminary determination; (3) give justification if it includes produces that are also importers in its determination; and (4) if it finds an injury, give the percentage of the domestic industry of the subject merchandise considered in its analysis.

56. Id. at 27-28.
57. Id. at 28.
58. Id.
59. Id. at 29.
60. Id. at 30.
61. Id.
62. Id. at 31.
63. Id.
64. Id. at 31.