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# Recent Developments in NAFTA Law-Spring Update 2010

Olivia Howe

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*Olivia Howe*

## I. INTRODUCTION

CHAPTER 19 of the North American Free Trade Agreement ("NAFTA") provides an alternative forum for parties seeking judicial review of antidumping and countervailing duty orders from the Court of International Trade.[1] Specifically, under article 1904(2) these parties have the option to bring appeals before an independent NAFTA Binational Panel instead of the national courts of the importing country.[2] The 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.[3] This article serves as a brief update of matters decided by the NAFTA Binational Panel from January 2010 through May 2010.

## II. IN THE MATTER OF STAINLESS STEEL SHEET AND STRIP COILS FROM MEXICO

In this case, Respondents ThyssenKrupp Mexinox S.A. de C.V. and Mexinox USA, Inc. ("Mexinox") requested that a Panel be convened to review the Final Administrative Review *Stainless Steel Sheet and Strip in Coils from Mexico* that was issued by the U.S. Department of Commerce ("Commerce") under section 751 of the Tariff Act.[4]

### A. STANDARD OF REVIEW

The Panel is to apply "the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents" to the same degree that the importing Party would if reviewing a final determination of the investigating authority.[5] The application involves implementing the standard of review and legal principles that a court of the United States would apply when reviewing a determination of its Department of Commerce.[6] This standard is set out in Section 516A(b)(1)(B) of the Tariff

1. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M 605, 683 [hereinafter NAFTA].
2. *Id.* art. 1904.2.
3. *Id.* art. 1904.1.
4. Tariff Act § 751, 19 U.S.C. § 1675 (1999).
5. NAFTA, art. 1904.2.
6. *Id.* art. 1904.3.

Act, and states that the reviewing authority must "hold unlawful any determination, finding, or conclusion found. . .to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[7]

The Panel must also look to the Congressional intent behind the statute when it was written. If the statute is ambiguous, the Panel must determine if the "agency's construction of the statute is reasonable given the express terms of the relevant statutory provision and the objectives of the scheme as a whole."[8]

### B. Issues Arising in the Review

#### 1. *Whether Commerce's Application of Zeroing is Not Supported by Substantial Evidence and/or is Not in Accordance with Law*

Mexinox claimed that Commerce's use of zeroing is against American law because no law exists "direct[ing] the DOC to apply zeroing in calculating dumping margins."[9] It additionally claimed that if the law were interpreted so that there was a question regarding zeroing, it should be interpreted consistently with international obligations according to the *Charming Betsy* doctrine where possible.[10]

Commerce, on the other hand, argued that the practice of zeroing is in accordance with American law and has been upheld by the courts.[11] It also argued that the *Charming Betsy* doctrine is inapplicable and that the reviewing body should defer on matters of statutory interpretation according to *Chevron*.[12] The Panel ultimately had to determine whether the Commerce's "interpretation of 19 U.S.C. § 1677(35) [wa]s permissible under American antidumping duty law."[13]

##### a. The Statute

The Panel determined that Commerce's interpretation of the statute excluded positive value sales in direct contradiction to the wording of the statute that specifically requires Commerce to employ a "methodology which analyzes all sales."[14] It also determined that the agency's interpretation goes against the purpose of the statute to "accurately determine dumping margins" by eliminating sales that should be counted and distorting the dumping averages.[15] The Panel also found several WTO deci-

7. Tariff Act § 516A(b)(1)(B), 19 U.S.C. § 1516a(b)(1) (2006).
8. NAFTA Binational Panel Report, *In the Matter of: Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of 2004/2005 Antidumping Review*, USA-MEX-2007-1904-01,2 (Apr. 14, 2010), *available at* http://registry.nafta-sec-alena.org/cmdocuments/edce701c-9720-424b-b232-1fd714d318ba.pdf.
9. *Id.* at 3.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 4.
14. NAFTA Binational Panel Report, *supra* note 8, at 6.
15. *Id.*

sions persuasive which "held that the use of zeroing is inconsistent with US obligations under the WTO Agreement."[16]

b. *Chevron* and *Charming Betsy* Are Not Mutually Exclusive

The Panel then determined that the U.S. Supreme Court cases *Charming Betsy* and *Chevron* did not conflict and that thus, they are not mutually exclusive. It first recalled that courts should examine Congressional intent and compare this with the way the agency interpreted the law, giving deference to agency interpretations.[17] If the Congressional intent is not clear the court must determine whether the agency had a "permissible construction of the statute."[18] The Panel also recalled that under *Charming Betsy* a law should not be construed to "violate the laws of nations if any other construction remains."[19] Therefore, an interpretation that is permissible under *Chevron* may violate U.S. international legal obligations and so be contrary to the law.[20]

The relevant international obligation in this case was determined to be "the obligation of the U.S. under the Antidumping Agreement to make 'fair comparisons' in determining dumping margins."[21] Specifically, the Panel found that WTO Agreements are considered international legal obligations and presumed that Congress intended statutes to comply with these Agreements.[22]

c. U.S. Legislation Does Not Prevent the Application of *Charming Betsy*

The Panel then determined that U.S. Legislation allows for the application of *Charming Betsy*. Contrary to the view of Commerce, the Panel found that the Uruguay Round Agreements Act is partially inapplicable because 19 U.S.C. § 3512(a) is limited to statutes, and the legislation does not prevent the Panel from applying the *Charming Betsy* doctrine.[23] Instead, the doctrine requires the panel "to assess agency actions, in light of American international obligations."[24] The Panel pointed out that sections 123 and 129 of the URAA "establish a statutory scheme for dealing with WTO determinations."[25] But, it held that neither was applicable in this case because zeroing is not a regulation or practice and the U.S. has consistently shown its commitment to upholding international obligations.[26]

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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 7 (quoting Murray v. Charming Betsy, 6 U.S. 64, 118 (1804)).
20. NAFTA Binational Panel Report, *supra* note 8, at 7.
21. *Id.* at 8.
22. *Id.*
23. *Id.* at 9.
24. *Id.*
25. *Id.*
26. NAFTA Binational Panel Report, *supra* note 8, at 9.

d. *Timken* and *Corus* Do Not Preclude a Remand

The Panel then noted the existence of two competing liens of jurisprudence at the Court of International Trade and the Federal Circuit relating to "the relevance of WTO jurisprudence to judicial review."[27] The Panel determined that it was free to follow either line of authorities as the issue had not been resolved at the Federal Circuit level; thus, the Panel could examine international jurisprudence for guidance.[28] It decided that both the *Timken* and *Corus* cases were distinguishable from the case at hand and that because of this, the available jurisprudence did not preclude a remand.[29] Ultimately, the Panel remanded back to Commerce on this issue to calculate the dumping margins of Mexinox without zeroing.[30]

2. *Whether Commerce's Adjustments to the U.S. Indirect Selling Expense Ratio are Not in Accordance with Law*

The Panel next examined the calculation of service fees by both Mexinox and Commerce. It determined that Mexinox failed to carry its burden of showing "how the service fee amounts were calculated and why these amounts accurately reflect the indirect selling expenses."[31] It concluded that Commerce erred by "reject[ing] the fee revenue as an offset to the selling expenses, yet [using] the same rejected fee amounts as an allocation factor," effectively double-counting selling expenses.[32] Therefore, the Panel rejected both Mexinox original calculation and Commerce's recalculation of service fees.[33] The Panel also remanded to Commerce on this issue with instructions "to recalculate the indirect selling expense ratio" according to the alternative method of calculation proposed by Mexinox.[34]

3. *Whether Commerce's Adjustments to the Net Financial Expenses Ratio are Not Supported by Substantial Evidence and/or are Not in Accordance with Law*

The Panel then examined three adjustments that Commerce made to the financial expense ratio calculations.

a. Commerce Rejected Mexinox's Claimed Reduction to Interest Expenses for "Other Interest Income"

First, the Panel agreed with Commerce that Mexinox failed to produce the information necessary to show that its "income consisted of short-term interest from the investment of working capital" as required by the

27. *Id.* at 11.
28. *Id.*
29. *Id.* at 12-13.
30. *Id.* at 13.
31. *Id.* at 14.
32. NAFTA Binational Panel Report, *supra* note 8, at 15.
33. *Id.*
34. *Id.*

Department of Commerce's regulations.[35] By only providing "a short excerpt from an accounting manual," Mexinox failed to meet its burden.[36] Therefore, Commerce's decision to reject the offset for interest income requested by Mexinox was affirmed by the Panel.[37]

b. Commerce Included Expenses Described as "Miscellaneous Net Financial Expenses" in the Calculation of the Financial Expense Ratio

The Panel also agreed with Commerce's decision to include gains and losses in its financial expense calculation.[38] It found Mexinox's arguments about factoring receivables to be irrelevant.[39] The Panel determined that according to relevant legislation, the normal administrative practice of Commerce, and substantial evidence, it was proper for Commerce to include "miscellaneous net financial expenses" in its Financial Expense Calculation.[40]

c. Commerce used Packing Costs and Cost of Sales Data to Estimate the Amount of Packing Expenses Included in the Cost of Sales Denominator in Order to Calculate the Financial Expense Ratio

Though Mexinox agreed that Commerce should exclude packing expenses when calculating the financial expense rate, it disagreed as to how Commerce should make this calculation.[41] Because Mexinox did not give Commerce the actual packing costs, and Commerce used a reasonable and "accepted common methodology" to make the calculation, the Panel deferred to Commerce's calculation.[42] Therefore, the Panel also upheld the adjustments Commerce made to the Net Financial Expenses Ratio.[43]

*4. Whether Commerce's Level of Trade ("LOT") Analysis Was Supported by Substantial Evidence and Was in Accordance with Law.*

a. Commerce's Level of Trade Analysis is Consistent with the Antidumping Statute.

The Panel examined 19 U.S.C. § 1677a and determined that Commerce correctly "beg[an] its analysis with the starting price to the first unaffiliated purchaser and deduct[ed] the expenses incurred between importation and resale."[44] The Panel also approved of Commerce's second step

35. *Id.* at 16.
36. *Id.*
37. *Id.*
38. NAFTA Binational Panel Report, *supra* note 8, at 17.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 18.
43. *Id.*
44. NAFTA Binational Panel Report, *supra* note 8, at 20.

of examining "selling functions remaining in the CEP transaction data after deduction of subsection (d) expenses and examin[ing] the data on the NV side for evidence of similar selling functions" as set forth in *Torrington*.[45] Finally, the Panel determined that Commerce correctly granted a CEP offset in accordance with 19 U.S.C. § 1677 b(a)(7)(A), 19 C.F.R. § 351.412 (b) and (d), and 19 C.F.R. § 351.412(d) and (f).[46] Thus, the Panel found that Commerce's analysis and subsequent CEP offset were correctly made using methodology that was based on legislation and the administrative practice of Commerce.[47]

b. The Department's Administrative Practice and Substantial Evidence of Commerce's Level of Trade Analysis

When conducting its trade analysis, Commerce's "beg[an] with the starting price to the first unaffiliated purchaser and then deduct[ed] from it the expenses incurred between importation and resale;" it subsequently codified this practice.[48] Commerce pointed out that this practice is supported by the Court of International Trade in *Torrington*.[49] It then "examine[d] selling functions and determine[d] if the functions performed in the CEP transaction are similar to the data on the Normal Value side."[50]

The Panel found that Commerce put its practice into law and applied it in several cases.[51] It additionally concluded that Commerce's conclusion was in line with other administrative reviews of this case.[52] Based on this practice and the data submitted by Mexinox, Commerce had concluded that there was one LOT in the home market.[53] The Panel affirmed Commerce's determination on the Level of Trade after determining that Commerce's analysis was consistent with both legislation and substantial evidence and was in line with its typical administrative practice.[54]

5. *Whether Commerce's Treatment of Mexinox's Inventory Carrying Costs for Certain of its U.S. Inventory (Channel 3) as Indirect Selling Expenses Is Not Supported by Substantial Evidence*

Mexinox's sales to unaffiliated customers, or Channel 3 sales, involved inventory carrying costs that Commerce determined were indirect selling expenses.[55] The Domestic Industry felt these sales should be treated as direct U.S. selling expenses because they relate to sales to U.S. customers

45. *Id.*
46. *Id.*
47. *Id.* at 21.
48. *Id.*
49. *Id.*
50. NAFTA Binational Panel Report, *supra* note 8, at 21.
51. *Id.* at 22
52. *Id.*
53. *Id.*
54. *Id.* at 23.
55. *Id.*

and are consignment inventories.[56] Commerce, on the other hand, argued that it had discretion in deciding how to classify indirect selling expenses.[57] Mexinox agreed with Commerce that there was substantial evidence in support of Commerce's findings and argued that the Domestic Industry failed to recognize the fact that Commerce typically treats carrying costs as indirect selling expenses.[58]

The Panel first agreed that Commerce has discretion when making a decision on how to treat indirect selling expenses and does not have to consider the geographical location of the sales in making its classification.[59] Thus, it found Commerce was correct to abide by its typical procedures and classify pre-sale expenses as indirect selling expenses.[60] The Panel then found substantial evidence to support Commerce's determination that the inventory carrying expenses were incurred pre-sale.[61] Therefore, the Panel found it reasonable for Commerce to treat the inventory carrying costs as indirect selling expenses and upheld Commerce's treatment of the inventory carrying costs of Mexinox.[62]

*6. Dissent*

The dissenting opinion began by reviewing the arguments of both Mexinox and Commerce, including the debate regarding the application of the *Chevron* test and the *Charming Betsy* canon of statutory interpretation.[63] The dissent also applied *Chevron* but contrary to the majority Panel decision, found that 19 U.S.C. § 1677(35) is ambiguous, a fact which gives rise to the deference that is to be shown to the agency determination.[64] It found this point further exemplified by decisions of the U.S. Court of Appeals for the Federal Circuit and lower court decisions that found 19 U.S.C. § 1677(35) to be ambiguous.[65]

The dissent found the primary issue to be whether Commerce was reasonable in the use of its methodology as set out in *Charming Betsy*.[66] Further, it disagreed with the majority's use of cases finding that the majority applied distinguishable or completely irrelevant cases and selectively quoted *Charming Betsy* such that it applied an incomplete standard.[67] The dissent also determined that *Charming Betsy* was not applicable in the way that the majority used it, and that if it was not applicable, then "the *Timken* and *Corus Staal* lines of cases are controlling,

56. NAFTA Binational Panel Report, *supra* note 8, at 23-24.
57. *Id.* at 24.
58. *Id.* at 25.
59. *Id.*
60. *Id.* at 26.
61. *Id.*
62. NAFTA Binational Panel Report, *supra* note 8, at 26.
63. *Id.* at 27-28.
64. *Id.* at 28-29.
65. *Id.* at 29.
66. *Id.*
67. *Id.* at 29-30.

binding precedent and must be followed by the Panel here."[68] In the alternative, the dissent found that even if the precedents of the Federal Circuit are not binding, the cases should be more persuasive than those used by the majority to support its reasoning; thus, Commerce's decision to use zeroing should be upheld.[69] The dissent then went on to explain its view "that when there is a clear conflict between a treaty and Congress' implementation of that treaty. . .the contemporaneous or subsequent legislation rules."[70]

Section three of the majority opinion was then addressed. According to the dissent, the majority ignored the fact that it was to evaluate "the use by Commerce in a particular administrative review of its calculation of the anti-dumping duties during the period of the review applicable to imports from Mexinox by a particular zeroing methodology, no more and no less."[71] Thus, any arguments on the internal obligations of the United States in relation to WTO dispute resolution reports should have been subject to only section 129 of the URAA and not section 123.[72]

The dissent also took issue with the majority's treatment of WTO Panel and Appellate Body reports as binding.[73] It stated that the applicable law for "the United States' international obligations under the WTO Anti-Dumping Agreement is what United States law says are its obligations, not what a WTO Panel or the Appellate Body says are United States obligations."[74] If the international obligation is a non-self-executing treaty, however, the dissent found the obligations of the treaty are what Congresses states they are when passing the legislation.[75] In situations involving anti-dumping, the authority to interpret the statute has been delegated to the Department of Commerce.[76] Because 19 U.S.C. § 1677(35) does not permit or forbid zeroing, Commerce therefore gets to choose its methodology so long as it does not conflict with Congress's direction.[77] The dissent further explained that according to *Whitney*, U.S. courts ruling on non-self-executing treaties are to look to the statute incorporating the treaty into U.S. law and if the statute is unclear, and its interpretation has been delegated to an agency, the court must examine the agency's interpretation for its reasonableness.[78]

The dissent then analyzed the *Medellin* case to determine "what effect to give under domestic law to decisions of international decision makers making determinations in a dispute resolution system set up by a treaty to

68. NAFTA Binational Panel Report, *supra* note 8, at 30.
69. *Id.*
70. *Id.* at 31.
71. *Id.*
72. *Id.*
73. *Id.* at 32.
74. NAFTA Binational Panel Report, *supra* note 8, at 32.
75. *Id.* at 33.
76. *Id.*
77. *Id.*
78. *Id.* at 35.

which the U.S. has adhered."[79] Based on the reasoning in that case, the dissent found that "dispute resolution reports under the DSU interpreting the treaties do not have domestic legal effect and do not constitute international obligations subject to the *Charming Betsy* canon."[80] Instead, the reports should act as interpretative guides in domestic law when evaluating the actions of the agency.[81] Therefore, according to the dissent, the Panel is required to accept the interpretation of Commerce unless it is forbidden by the United States domestic statute.[82] It found that Commerce's interpretation is not patently forbidden by 19 U.S.C. § 1677(35).[83] Thus, the dissent found that,

> to attempt to use the *Charming Betsy* to assert that this Panel must remand to Commerce its determination in the administrative review under consideration for decision without zeroing because the Appellate Body of the DSU has declared zeroing to be illegal is simply a complete misunderstanding of the requirements of United States law, and upheld Commerce's use of zoning.[84]

The dissent also pointed out that many Federal judges have examined the statute and found it ambiguous.[85] Therefore, it found Commerce was justified in interpreting the statute in the way that it did and that there was "absolutely no justification for this Panel to start anew, as if those decisions did not exist, and make a *de novo* determination that the statute is clear and unambiguous."[86]

Ultimately the dissent felt that the majority chose its own vision of what the law was instead of following what was actually enacted by Congress.[87] It found this to be improper and stated that "the decision of Commerce to apply zeroing should be affirmed."[88]

79. *Id.* at 37.
80. NAFTA Binational Panel Report, *supra* note 8, at 38.
81. *Id.*
82. *Id.* at 40.
83. *Id.*
84. *Id.* at 41.
85. *Id.* at 42.
86. NAFTA Binational Panel Report, *supra* note 8, at 42.
87. *Id.* at 43.
88. *Id.* at 46.

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