Recent Developments in NAFTA Law

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I. INTRODUCTION

CHAPTER 19 of the North American Free Trade Agreement (NAFTA) provides an alternative method of review to parties challenging final antidumping or countervailing duty determinations.1 Under article 1904(2), these parties have the option of presenting appeals to an independent NAFTA Binational Panel (Panel) instead of the national courts of the importing country.2 The Panel then decides whether the challenged determinations were made in accordance with the antidumping and countervailing duty laws of the determining country by applying that country’s “statutes, legislative history, regulations, administrative practice and judicial precedents.”3 This article highlights the Panel’s review and decision in one such matter that occurred between May 2007 and July 2007.

II. OIL COUNTRY TUBULAR GOODS FROM MEXICO FINAL RESULTS OF SUNSET REVIEW OF ANTIDUMPING DUTY ORDER: FIFTH DECISION OF THE PANEL

On June 1, 2007, the Panel issued a decision on Tubos de Acero de Mexico’s (TAMSA) challenge to the final results of the sunset review by the U.S. Department of Commerce (Department) concerning the antidumping duty order on Oil Country Tubular Goods (OCTG).4 Having issued four prior decisions concerning this matter, the Panel was once again called upon to review the final results of the Department’s sunset review, which determined that revoking the antidumping order on OCTG from Mexico would likely lead to the continuation or recurrence of

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2. Id.
3. Id.
dumping.\(^5\)

Before setting forth its decision, the Panel retraced the history of the case beginning with the Department's initial antidumping investigation that commenced in July of 1994 and eventually led to a finding of "sales at less than fair value."\(^6\) At the initial five-year, or sunset review, which was published March 9, 2001, the Department determined that revoking the antidumping order "would be likely to lead to the continuation or recurrence of dumping".\(^7\) This determination has been at issue in each of TAMSA's challenges before the Panel.

In its first challenge to that review, TAMSA alleged that the Department improperly refused to consider "other factors," such as the devaluation of the Mexican peso and TAMSA's hard-currency debt.\(^8\) These factors, according to TAMSA, were not likely to recur.\(^9\) As such, the company asserted that the Department's failure to consider these other factors incorrectly led to a finding of a continued likelihood of dumping.\(^10\) Since the Panel found that TAMSA properly alerted the Department of these factors, it ordered the Department to consider their relevance and effect on the Department's determination.\(^11\)

Since that decision on February 11, 2005, the Panel has ordered the Department to issue three other re-determinations to clarify the Department's reasoning and analysis for upholding the antidumping order.\(^12\) The Panel specifically charged the Department to explain "why TAMSA's zero margin calculations have no predictive value" after the third re-determination.\(^13\) The Department's fourth re-determination, that the likelihood of antidumping continuing or recurring still existed, was at issue before the current Panel.

In response to the fourth re-determination, TAMSA alleged to the Panel that there was "no rational connection between the facts and evidence and the Department's Redetermination."\(^14\) More specifically, TAMSA took issue with the Department's refusal to attribute probative value to its zero margins of dumping during the review period. The Panel, however, disagreed with TAMSA on this point and found that substantial evidence in the record supported the Department's determination.\(^15\)

TAMSA then alleged that the Department employed circular reasoning that was contrary to law and unsupported by the evidence in refusing to consider revoking the antidumping order simply because TAMSA's ex-

\(^5\) Id.
\(^6\) Id. at 2
\(^7\) Id. at 3.
\(^8\) Id.
\(^9\) Id.
\(^10\) Id. at 4.
\(^11\) Id.
\(^12\) Id. at 4-7.
\(^13\) Id. at 7.
\(^14\) Id. at 18.
\(^15\) Id. at 20.
ports did not reach a commercially meaningful level during the period when there were zero margins of dumping.\textsuperscript{16} Looking at the U.S. Congress' intended method by which the Department should undertake sunset reviews as set forth in 19 U.S.C. § 1675a(c), the Panel explained that the plain language of the statute did not authorize the Department to refuse to consider TAMSA's other factors solely because export volumes decreased.\textsuperscript{17} The Panel noted that the Department failed to examine relevant data and articulate a reasonable explanation for its determination.\textsuperscript{18} Consequently, the Panel agreed with TAMSA, holding that the Department, "for the fifth time, rendered a determination unsupported by substantial evidence on the record and not in accordance with the applicable law."\textsuperscript{19}

More notably, the Panel refused to simply remand the case to the Department with instructions to act in a manner consistent with the Panel's opinion. Only in "rare circumstances" may the Panel order an agency under review to enter a certain decision.\textsuperscript{20} Such rare cases have been found where it "would be an idle and useless formality" to remand to the agency.\textsuperscript{21} Given the Department's repeated failure to issue a determination supported by the substantial evidence in the record and the increased passage of time, the Panel deemed this case as one of the rare circumstances where an explicit order was necessary.\textsuperscript{22} As such, the Panel remanded the case to the Department with the express order to make a determination "that the evidence on the record does not support a finding of likelihood of recurrence or continuation of dumping upon revocation of the antidumping duty order."\textsuperscript{23}

\textsuperscript{16} Id. at 22.
\textsuperscript{17} Id.; see also Fifth Decision, supra note 4 at 8 (citing Chevron, U.S.A, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)).
\textsuperscript{18} Id. at 23.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 12 (quoting Fla. Power & Light Co. v. U.S. Regulatory Comm'n, 470 U.S. 729, 744 (1985)).
\textsuperscript{21} Id. at 12 (quoting NLRB v. Wymon-Gordon Co., 394 U.S. 759, 767 n.6 (1969)).
\textsuperscript{22} Id. at 26.
\textsuperscript{23} Id. at 27.