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Recent Developments in NAFTA Law

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Under chapter 19 of the North American Free Trade Agreement ("NAFTA"), the signatory countries are allowed to select an alternative forum for any antidumping and countervailing duty cases which may arise. Parties are permitted to present their appeals to a NAFTA Binational Panel ("Panel") under Article 1904 of NAFTA. This Panel uses the "statutes, legislative history, regulations, administrative practice, and judicial precedents" of the importing country to decide if the country applied these antidumping and countervailing duty laws appropriately in that situation. This article serves as a brief update of matters decided by the NAFTA Binational Panel from May 2008 to July 2008.

II. CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA

On June 25, 2008, the Panel issued a decision on a motion to dismiss the challenge by Wynndel Box & Lumber Co. ("Wynndel") and Gorman Bros. Lumber, Ltd. ("Gorman") that the U.S. Department of Commerce's ("Commerce") determination on March 3, 2006 that "certain end-matched lumber products entering the United States under Harmonized Tariff Schedule of the United States ("HTSUS") Subheading 4409.10.05 were within the scope of the Softwood Lumber Orders." Commerce argued that the matter was moot because all of the issues that arose in connection with the Softwood Lumber Orders were resolved in October 2006 when those Orders were revoked without the possibility of reinstatement according to the Softwood Lumber Agreement of 2006 ("SLA 2006"). Wynndel and Gorman contended that the "matter [was] not moot because the terms of the SLA 2006 subject their end-matched lumber products to Canadian export taxes" which brought their claims.

2. Id.
3. Id. at art. 1902.
5. Id. at 2.
within the "'ongoing collateral consequences’ exception to the mootness doctrine." They argued that Commerce had erred in placing their products within the scope of determination, and they should not have been included within the scope of the SLA 2006.

In March 2006, Commerce made the controversial determination that "end-matched lumber products were covered by the Softwood Lumber Orders." Then, in April, Wynndel requested a panel review of Commerce’s Final Scope Ruling and in May 2006, Gorman also entered a challenge. On October 2, 2006, the Softwood Lumber Orders were revoked pursuant to Article III(1)(a) of the SLA 2006, effective retroactively to May 22, 2002. Over “14 months after the SLA 2006 was signed and the Softwood Lumber Orders were revoked,” on December 7, 2007, this Panel was appointed.

“The scope of the SLA 2006 is defined by Annex 1A of the Agreement,” which explicitly includes “end matched lumber products classifiable under HTSUS subheading 4409.10.05” as part of the SLA 2006. The Panel concluded that there was nothing in either the language of the SLA 2006 itself or the Annex which would indicate that the scope of the SLA 2006 is to be “governed by any determinations concerning the scope of the Softwood Lumber Orders.” In fact, the SLA 2006 provides that only by agreement between Canada and the United States can any products be added or removed.

Commerce moved to dismiss the complaints on the grounds that the revocation of the Softwood Lumber Orders in October 2006 and the refund of all antidumping and countervailing duty deposits rendered the claims of Wynndel and Gorman moot. In response, Wynndel and Gorman argued that “their claims are not moot because they continue to suffer adverse collateral consequences from Commerce’s allegedly unlawful scope determination in the form of Canadian export taxes imposed pursuant to the SLA 2006.”

NAFTA Article 1904.3 explains the jurisdiction of the Panel. When read with NAFTA Annex 1911, one can see that the Panel’s jurisdiction parallels the jurisdiction of the U.S. Court of International Trade
Since the CIT is only given jurisdiction over actions commenced under 19 U.S.C. § 1516a, the Panel determined it was only given the authority under 19 U.S.C. § 1516a(a)(2)(B) to review specific determinations made by Commerce which fall under § 1516a(a)(2)(B). The CIT and Panel are given the specific jurisdiction to review a scope determination by Commerce "as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order."19

The Panel concluded that because the Softwood Lumber Orders were revoked in October 2006 and the revocation was retroactive, the Softwood Lumber Orders no longer existed.20 Therefore, the Final Scope Ruling which Wyndel and Gorman sought review of did not fall under the jurisdictional limitation placed on the Panel by 19 U.S.C. § 1516a(a)(2)(B)(iv) because there was "not a determination . . . [to be made] . . . in an existing . . . antidumping or countervailing duty order."21 Because the Panel concluded that it lacked jurisdiction under 19 U.S.C. §1516a(a)(2)(B)(vi), it dismissed the Complaints.22 Furthermore, the Panel found that the "express terms of the SLA 2006 preclude any review by this Panel" because executive agreements like the SLA 2006 are not matters the Panel has jurisdiction over.23

Additionally, the Panel rejected the argument by Gorman that "administrative determinations interpreting antidumping or countervailing duty orders survive revocation of the orders they interpret."24 The Panel explained that Gorman "incorrectly equates an administrative practice with an administrative determination."25 The Panel clarified that "[a]dministrative practices survive the revocation of orders . . . because such practices may be followed in reviewable administrative determinations made pursuant to other orders."26 But administrative determinations cannot "survive revocation of the orders they interpret because they manifest the application of an administrative practice only in the circumstances of the revoked order."27

In support of this decision, the Panel pointed to the Federal Court of Appeals for the D.C. Circuit which made a similar conclusion that an administrative determination does not survive a revocation.28 In that case, the D.C. Circuit concluded that after the permanent revocation of

17. Id.; see also 28 U.S.C. § 1581(c) (2006) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A").
18. Decision of the Panel, supra note 4, at 7.
20. Decision of the Panel, supra note 4, at 8.
21. Id.
22. Id.
23. Id.
24. Id. at 9.
25. Id.
26. Id.
27. Id.
orders, "the SLA render[ed] the underlying . . . determination void."29
For further support, the Panel looked to the U.S. Court of Appeals for
the Federal Circuit30 and another NAFTA panel which both reached this
same conclusion.31
The Panel then explained that even if it did have jurisdiction over the
matter, it would have dismissed the Complaints as moot.32 Because the
Panel was sitting "in the stead of a federal court," it was "limited to the
review of live cases or controversies" which the Panel could affect a rem-
edy.33 While the Panel believed that it may have had the authority at one
point in time to remand the Final Scope Ruling, "the revocation of the
Softwood Lumber Orders nullified that authority and rendered the Com-
plainants' claims moot" and the Panel could not give relief.34
Finally, the Panel addressed the Complainants' argument that the con-
tinuing collateral consequences warranted that the dismissal of the moot
case be avoided.35 The Panel determined that a ruling would still not
relieve the Complainants of these collateral consequences because a deci-
sion by the Panel would only be advisory and prohibited.36 This is be-
cause the SLA 2006 provides for specific mechanisms by which its scope
can be challenged. Even if the Panel were to remand the case because it
determined that the lumber products were indeed outside the scope of
the Softwood Lumber Orders, this determination would not alter the
scope of the SLA 2006 and the ruling would be advisory.37

III. CONCLUSION

Ultimately, the Panel concluded that the Final Scope Ruling was not
properly before the Panel and it lacked jurisdiction to decide the issue.
Additionally, the Panel further clarified that even if it did in fact have
jurisdiction over this complaint, the prohibitive scope of the SLA 2006
would render any decision made by the Panel advisory and therefore pro-
hibited under Article III of the U.S. Constitution. The Panel granted
Commerce's motion to dismiss the complaints.38

29. Id. at 1333.
Cir. 2008).
31. Decision of the Panel, supra note 4, at 11.
32. Id. at 12.
33. Id.; see U.S. Const. art. III, § 2, cl. 1.
34. Decision of the Panel, supra note 4, at 13.
35. Id.
36. Id. at 15.
37. Id. at 14-15.
38. Id. at 16.