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CAFC Upholds Commerce Department on Subsidy Tying Issue

Inland Steel Industries, Inc. v. United States, Nos. 98–1268, –1269, –1286, 188 F.3d 1367 (Fed. Cir. 1999).

The Court of Appeals for the Federal Circuit (CAFC) has issued its decision in the appeals arising out of the Commerce Department's 1993 countervailing duty (CVD) determination on *Certain Carbon Steel Products from France*. The CAFC upheld Commerce's 1993 determination in all respects and left intact a large (15.13 percent *ad valorem*) countervailing duty on shipments of corrosion-resistant steel from France. The decision represents a significant victory for Commerce and for the domestic steel industry, which helped the U.S. government defend several important CVD methodologies that had been challenged by Usinor (the French respondent).

The CAFC affirmed Commerce's decision that debt-to-equity conversions in 1986 and 1988 totaling over FF 35 billion were countervailable. The French government had loaned money to Usinor in exchange for instruments bearing a clear repayment obligation but only minimal interest rates and fuzzy repayment schedules linked to improvements in Usinor's profitability.

Usinor argued that the cancellation of these instruments in exchange for common stock in 1986 and 1988 conferred no benefit, as the loans were at that point unlikely to be repaid and in any event bore minimal interest rates. In effect, Usinor argued, these were not loans at all but infusions from the outset. If this position had prevailed, either at the agency or on appeal, it would have dramatically reduced, if not eliminated, the countervailing duty. Commerce, however, concluded that the instruments in question were indeed loans and that the write-off of a government loan—even a contingent one—confers a benefit in the face amount of the debt forgiven. (This approach has since been codified in Commerce's *Final Rules*.) The Court of International Trade (CIT) upheld Commerce's approach as being supported by substantial evidence in the record and otherwise in accordance with the law, and the CAFC affirmed.

The CAFC also affirmed Commerce's decision to "tie" the benefits of the French government subsidies to French steel (rather than spreading them over Usinor's worldwide production and thereby significantly diluting the subsidy margins). This "sales denominator" issue had been an extraordinarily contentious one during the agency proceedings and on appeal. Usinor had argued that the large financial infusions in question automatically benefited the recipient's worldwide operations, and that in any event there was evidence in the record showing that the benefit flowed equally throughout the multinational Usinor group without regard to national borders. Petitioners countered that (1) it was wholly implausible that a government would subsidize production in a foreign country to protect jobs of foreign workers; (2) any benefits allocated to production in a third country would have to be considered countervailable in a case filed with respect to that country; (3) Commerce's unwillingness to countervail third-government subsidies necessarily forced it to tie domestic subsidies to domestic production, lest it fail to offset the "net subsidy" as required by the statute; and (4) the record evidence (including the Mitterrand government's "Steel Plan" under which the subsidies were bestowed) plainly showed a tie to French production in any event.

Commerce ultimately held—first during the investigation, then in a remand investigation ordered by CIT—that (1) domestic subsidies should as a general matter be rebuttably presumed to be tied to domestic production; and (2) Usinor had failed, in the evidence it placed on the record, to rebut the presumption. After the CIT upheld Commerce's remand determination, Usinor appealed the issue (along with the loan forgiveness issue described above) to the CAFC. The CAFC's decision vindicating Commerce not only preserved the subsidy margin on French steel but also cemented a domestic tying approach—now codified in Commerce's *Final Rules*—which will affect subsidy margins in all CVD cases involving respondent companies with multinational production. (In a related case arising out of 1993 CVD determination on *Certain Lead and Bismuth Carbon Steel Products from France*, the CAFC reversed a judgment by a different CIT judge who had forced Commerce to spread these same subsidies over Usinor's worldwide production. *Usinor v. United States*, Nos. 98–1230, 1259.)

The domestic steel producers' appeals, through which they had sought to increase the CVD rate, involved a specificity determination by Commerce and Commerce's choice of benchmark and discount rates.

The appellate proceedings arising out of this 1993 countervailing duty order concluded just in time for the initiation of the first five-year "sunset" review of that order. In the interim, successful CVD cases have been filed against Usinor's U.S.-bound exports of *Stainless Steel Sheet and Strip in Coils* and *Certain Cut-to-Length Carbon Quality Steel Plate.*

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District Court Affirms NAFTA's Constitutionality

Made in the USA Foundation v. United States, 56 F. Supp. 2d 1226 (N.D. Ala. 1999)

This note briefly summarizes a district court's recent order upholding the constitutionality of the North American Free Trade Agreement (NAFTA). The plaintiffs, both individuals and membership organizations, argued that NAFTA was unconstitutional because it was not ratified by the Senate, as required by Article II. In brief, the court held that only the institutional—but not the individual—plaintiffs had standing to sue. Further, the court held that the political question doctrine does not bar the judiciary from considering the constitutionality of NAFTA and its implementing legislation. The court further held that the Article II process is not the exclusive means through which a treaty can be adopted when the treaty implicates Congress' Article I commercial power.

First, the court addressed the standing issues raised by the government. The court denied the individual plaintiffs standing, concluding that their claimed injury, vote dilution, was neither sufficiently personal nor concrete. According to the court, the claimed vote dilution was an injury suffered by every U.S. citizen and thus was too abstract.

The court upheld the standing of the institutional plaintiffs. In doing so, the court focused on the issue of redressability: whether the plaintiffs' alleged injury (e.g., loss of jobs) could be remedied by a favorable decision. The court rejected the government's argument that any relief the court could offer the plaintiffs was speculative and noted that NAFTA was clearly one cause of the alleged injuries and thus any repudiation of NAFTA would likely result in benefits for the plaintiffs.

Second, the court addressed the applicability of the political question doctrine, using the three-part inquiry outlined in *Goldwater v. Carter*, 444 U.S. 996, 998 (1979): "(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?" The court answered "no" to each of these questions. In doing so, the court noted that, while the Constitution commits the power over foreign relations to the executive and legislative branches, it also delineates a process for entering into international agreements—a process which is subject to judicial review. Further, the court held that the fact that an issue of constitutional interpretation has political overtones does not automatically eliminate the judiciary's authority: if there is legitimate controversy as to the constitutionality of government action, then the courts have the power and expertise to step in. Finally, the court rejected the government's arguments that NAFTA's repudiation could embarrass the U.S. government and jeopardize U.S. trade relationships around the globe.

Third, the court turned to the constitutionality of NAFTA itself, assuming, for purposes of its discussion, that NAFTA is an Article II treaty. The court then held that the Article II process was *not* the exclusive means of implementing NAFTA into U.S. law. In reaching this conclusion, the court stressed that Congress has plenary power over foreign commerce under Article I and that this power is so extensive that it is arguable that no international agreement involving commerce could be valid unless adopted by Congress as a whole. Thus, the court found that the foreign commerce power of Congress is at least concurrent with the Treaty Clause when the agreement in question is dominated, as is NAFTA, by commercial provisions. The court further noted that, in negotiating NAFTA, the president was operating at the pinnacle of his power because he was acting both pursuant to his constitutional responsibility for conducting foreign affairs and pursuant to a specific grant of commercial authority from Congress (i.e., the fast track legislation).

The plaintiffs have appealed this decision to the U.S. Court of Appeals for the Eleventh Circuit. In this appeal, the government would presumably cross-appeal on the issues decided by the lower court in the plaintiffs' favor. Pending the appeal, this decision leaves NAFTA and its U.S. implementing legislation intact.

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