

Binational Panels Faulted by Congressional Committees

By John R. Magnus

Several recent binational panel decisions were rebuked in reports by the key Congressional committees that recommended ratification of the North American Free Trade Agreement (NAFTA).

Congress passed the North American Free Trade

Agreement Implementation Act ("the Act") in mid-November. Title IV of the Act ("Dispute Settlement in Antidumping and Countervailing Duty Cases") implements Chapter 19 of NAFTA (same title), which institutionalizes and slightly modifies the U.S./Canada FTA's temporary regime under which binational panels are vested with appellate review of antidumping duty ("AD") and countervailing duty ("CVD") determinations for affected goods traded within the free trade area.

Both the House Ways & Means Committee and the Senate Finance Committee, in the sections of their committee reports dealing with Chapter 19 of NAFTA (and Title IV of the bill), took the opportunity to clarify certain aspects of the U.S. CVD law that, in their view, had been misinterpreted by panels established under the FTA. As the Finance report explained, these clarifications sought to ensure that future decisions by panels -- which henceforth will be reviewing CVD determinations on goods from Mexico as well as Canada -- do not contain similar legal errors.

Specificity. The committees made clear that the U.S. Commerce Department, in determining whether a subsidy program is specific (i.e., benefits a specific industry or company or group thereof), can base an affirmative finding of specificity on any one of four standard criteria normally considered in connection with decisions of this kind. The Finance report was quite explicit, noting that "several recent binational panels (e.g., *Certain Soft-*

wood Lumber from Canada, USA-92-190--01, Decision of the Panel (May 6, 1993); *Live Swine from Canada*, USA-91-190--01, Decision of the Panel (Aug. 26, 1992)) have misinterpreted U.S. law and practice to require the Department to consider and weigh all relevant factors."

The Finance report further noted that where "de facto specificity exists, the cause of the de facto specificity (e.g., the inherent characteristics of the subsidy) is irrelevant." The Ways & Means report "raised the question of whether the panels have correctly applied the standard of review" and referred to *Swine* and *Lumber* as simply "two recent decisions" on specificity and noted that "in these circumstances, the United States could seek recourse to the extraordinary challenge procedure."

"Effects Test." The committees also took exception to another aspect of the *Lumber* decision in which, according to the Finance report, "the binational panel misinterpreted U.S. law to require that, even after the Department of Commerce has determined that a subsidy has been provided, the Department must further demonstrate that the subsidy has the effect of lowering the price or increasing the output of a good before a duty can be imposed."

The Finance report cited numerous policy considerations cutting against requiring a demonstration of a subsidy's effect and clarified Congressional intent that no such demonstration need be made. The Ways & Means report discussed this case

(albeit without actually naming it) as one which "raised the question of whether the panels have correctly applied the standard of review," and cited favorably the Administration's argument before the panel that effects need not be shown.

The Clinton Administration has commented on these "specificity" and "effects" rulings in terms identical to those used in the Ways & Means report.

The committees and Administration have emphasized that the Extraordinary Challenge Committee ("ECC") procedure would be available to remedy these and other similarly serious legal misinterpretations by panels and was expected to be invoked if the misinterpretations were not otherwise cured. In addition, it was made clear in all three documents that corrective legislation would be sought if the ECC procedure did not satisfactorily resolve the situation.

Impact. The effect of these Congressional and Administrative pronouncements on the particular panel decisions singled out for criticisms is not clear. In the *Lumber* case, at least, the pronouncements appeared to have little effect. The panel on Dec. 17 rejected the Commerce Department's remand determination and directed the Department to find against the U.S. industry on both key issues (specificity and "economic effects").

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