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NAFTA BINATIONAL PANEL SYSTEM: SECOND CONSTITUTIONAL SUIT DISMISSED

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Abstract. Chapter 19 of the NAFTA allows parties to antidumping and countervailing duty proceedings to seek binational panel review of final agency determinations in lieu of judicial review in the country in which the determination was made. Some have argued that the process violates the Appointments Clause of the U.S. Constitution and possesses other constitutional defects.

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Summary

Chapter 19 of the NAFTA allows parties to antidumping and countervailing duty proceedings to seek binational panel review of final agency determinations in lieu of judicial review in the country in which the determination was made. Some have argued that the process violates the Appointments Clause of the U.S. Constitution and possesses other constitutional defects. Federal law allows suits challenging the constitutionality of Chapter 19 panels, but these may only be brought by parties to a panel proceeding. The U.S. Court of Appeals for the District of Columbia Circuit recently dismissed a Chapter 19 constitutional challenge, holding that the plaintiff had failed to meet Article III standing requirements (American Coalition for Competitive Trade v. Clinton, 129 F.3d 761 (decided Nov. 14, 1997)). Separately, the plaintiff had conceded its failure to meet the statutory exhaustion requirement for filing such a suit, a requirement the court found to be constitutional as well as typical of agency adjudication schemes.

Background

Chapter 19 of the North American Free Trade Agreement (NAFTA) provides for the establishment of 5-member *ad hoc* binational panels to review final antidumping (AD) and countervailing duty (CVD) determinations made in NAFTA countries,[1] carrying forward a mechanism pioneered in the U.S.-Canada Free Trade Agreement (CFTA). The CFTA provided that the panel system would be in effect for up to 7 years pending the development of new rules to deal with subsidies and unfair pricing practices in the two countries.[2] The bilateral rules never materialized and in time the Chapter 19 process was

[1] North American Free Trade Agreement (NAFTA), entered into force January 1, 1994, Art. 1904, Annexes l901.2, 1904.13, 1904.15, 1911.

[2] *See generally* House Judiciary Committee Report on H.R. 5090, United States-Canada Free-Trade Agreement Implementation Act of 1988, H.R. Rep. No. 100-816, Part 4, 100th Cong., 2d Sess. 4 (1988) [hereinafter cited as *House Report*]; Holmer & Bello, "Midterm Report on (continued...)

extended to Mexico and made permanent in the NAFTA.[3] Chapter 19 provides for possible suspension of the panel process between two NAFTA Parties, however, in the event a Party has acted inconsistently with its Chapter 19 obligations (*see* Art. 1905).

In any AD or CVD case involving two NAFTA Parties in which a final determination has been rendered, either Party (known in the NAFTA as an "involved Party") may request that a binational panel be established to review whether the determination was made in accordance with the AD or CVD law of the importing country.[4] Once a request is made, a binational panel will be established and the final agency determination may no longer be judicially reviewed in the importing country. Panelists, who are citizens of Canada, Mexico or the United States, are chosen by the Party countries (two by each disputing Party, with the fifth chosen by agreement of the two Parties, or if this fails, by the Party chosen by lot). The panel applies the standards of review of the importing country and the general legal principles that a domestic court would otherwise apply in reviewing the agency determination at issue. Decisions are by majority vote and based on the votes of all panel members; the panel may either uphold a final determination or remand it for action "not inconsistent with" its decision. Panel decisions are binding on the Parties involved with respect to the particular matter before the panel and may not be appealed to domestic courts. A panel may make one or more remands if it finds that the agency has not acted consistently with the panel's decision.

Panel decisions may be appealed to a three-member Extraordinary Challenge Committee (ECC), if an involved Party alleges that a panel member was ethically unfit, the panel "seriously departed from a fundamental rule of procedure," or the panel "manifestly exceeded its powers, authority or jurisdiction ... for example by failing to apply the appropriate standard of review," *and* any of these actions has "materially affected the panel's decision and threatens the integrity of the binational panel review process" (NAFTA, Art. 1904:13). ECC decisions are also binding on the Parties.

The United States implements its Chapter 19 obligations by requiring the International Trade Commission (ITC) and the Department of Commerce (DOC), in the event of a remand by a binational panel or ECC, to "take action not inconsistent with the decision of the panel or committee" (19 U.S.C. § 1516a(g)(7)(A)). Except as discussed

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[2](...continued)
Binational Dispute Settlement Under the United States-Canada Free Trade Agreement," 25 Int'l Law. 489, 490, 493-95 (1991).

[3] By October 1993, 48 binational panels had been established, including two Extraordinary Challenge Committees, 30 of these to review U.S. agency determinations. These resulted in 36 panel decisions, 23 involving U.S. determinations. As of October 1997, there were 33 NAFTA binational panel reviews. Fifteen of these involved the United States; 8, Mexico; and 10, Canada. Of the 15 panel reports issued, 7 involved the U.S.; 2, Mexico; and 6, Canada. Statistical data provided by the U.S. Section of the CFTA Binational Secretariat and the U.S. Section of the NAFTA Binational Secretariat. *See generally* Lopez, "Dispute Resolution Under NAFTA: Lessons from the Early Experience," 32 Tex. Int'l L. J. 163, 173-184 (1997).

[4] While the NAFTA allows an involved country to initiate a request either on its own behalf, or on behalf of a person who would otherwise be entitled to domestic judicial review, U.S. law precludes the U.S. Government from self-initiating a binational panel request in the absence of a request from a private party. 19 U.S.C. § 1516a(g)(8)(C).

below, federal law precludes judicial review of a final determination that is subject to a panel request and of ITC or DOC actions taken in response to a panel or ECC decision.[5]

Constitutional Questions Regarding Chapter 19 Panels

When first proposed under the CFTA, the panel system was viewed by some as problematic under the Appointments Clause, Article III, and the Due Process Clause of the U.S. Constitution.[6] The Appointments Clause, Art. II, sec. 2, cl. 2, requires that officers be appointed by the President with the advice and consent of the Senate, but allows Congress to vest the appointment of "inferior officers" in the President, the courts, or heads of departments. It was argued that panelists should be considered federal officers within the *Buckley v. Valeo* definition, that is, individuals "exercising significant authority pursuant to the laws of the United States" (424 U.S. 1, 126 (1976)), and as such must be appointed pursuant to the Clause.[7] The Clause would arguably be violated because neither U.S. panelists (argued to be principal officers) nor Canadian panelists would be appointed by the President. With respect to Article III, which vests "the judicial power of the United States ... in one Supreme Court and in such inferior courts as the Congress may from time to time establish," it was argued that since matters that would come before the panel were then heard before the Court of International Trade, an Article III court, Congress could not direct that they be heard before a lesser tribunal. Moreover, separation of powers principles arguably prevented Congress from eliminating all judicial review for the cases involved. Even if judicial review could be limited, however, it was contended that due process mandated that a party have a meaningful hearing at minimum and the right to assert at least a facial constitutional challenge to the panel system.

Most constitutional scholars who had examined the proposed CFTA panel system agreed, however, that the process appeared to be constitutionally sound. It was argued, *inter alia*, that panelists would be applying federal law as incorporated in an international agreement and thus would not be officers exercising authority pursuant to the "law of the United States"; that the binational panel system possessed features similar to those of

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[5] 19 U.S.C. § 1516a(g)(2)(final agency determinations); 19 U.S.C. § 1516a(g)(7)(A) (agency actions in compliance with panel decisions).

[6] *See House Report, supra* note 2, at 8-16, and Statement of Customs and International Trade Bar Association at 19-21, *as reprinted in United States-Canada Free Trade Agreement: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 573, 591-93 (1988)[hereinafter cited as *House Hearings*]. Additional discussions may be found in, *inter alia*, Metropoulos, "Constitutional Dimensions of the North American Free Trade Agreement," 27 Cornell Int'l L. J. 141 (1994) (Article III violated); Morrison, "Appointments Clause Problems in the Dispute Resolution Provisions of the United States-Canada Free Trade Agreement," 49 Wash. & Lee L. Rev. 1299 (1992); Chen, "Appointments with Disaster: The Unconstitutionality of Binational Arbitral Panel Review under the United States-Canada Free Trade Agreement," 49 Wash. & Lee L. Rev. 1455 (1992); Comment, "Chapter 19 of the Canada-United States Free Trade Agreement: An Unconstitutional Preclusion of Article III Review," 5 Conn. Int'l L. J. 317 (1989).

[7] The Supreme Court recently clarified that the exercise of significant authority pursuant to federal law is not a factor that determines whether an individual is a principal or inferior officer for Appointments Clause purposes, but instead "marks ... the line between officer and non-officer." Edmond v. United States, 117 S.Ct. 1573, 1580 (1997).

other international arrangements entered into by the United States (*e.g.,* arbitral and claims agreements), which have not raised constitutional concerns; and that, as seemingly recognized in such cases as *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), and *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), Congress has permissibly limited federal court jurisdiction in the past and may use this power to place review of a statutory right or benefit (a category that would include the availability of AD and CVD duties) in a non-Article III forum. It was also argued that as the CFTA implementing legislation could be viewed as an expression of combined executive and legislative foreign affairs powers, it would thus be granted considerable judicial deference.[8]

Despite this general consensus, differences of opinion as to whether the Due Process Clause allowed eliminating all judicial review led Congress to provide for challenges to AD and CVD determinations on the ground that the panel system or the underlying AD and CVD statute or proceeding is unconstitutional.[9] As for challenges involving the panel system, § 516A(g)(4)(A) of the Tariff Act of 1930 provides for expedited review, with exclusive original jurisdiction granted to the U.S. Court of Appeals for the District of Columbia Circuit; an exhaustion requirement at § 516a(g)(4)(C) provides that only "an interested party" who participated in a binational panel proceeding may file such a suit.[10] Any final appeals court judgment may be reviewed by appeal directly to the U.S. Supreme Court within 10 days of the lower court order.

Constitutional Challenges to the Chapter 19 Process

A suit challenging the constitutionality of the panel under the CFTA was brought in the U.S. District Court for the District of Columbia in 1992 and dismissed in May 1993 for lack of subject-matter jurisdiction. Plaintiffs, who had not participated in the binational panel process, chose to bring their suit in the district court in order to challenge the constitutionality of the exhaustion requirement. The court held, however, that the exclusive forum for the challenge was the U.S. Court of Appeals for the District of Columbia, as provided in the Tariff Act.[11] A constitutional suit was filed the following

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[8] Constitutional issues are discussed in *House Report, supra* note 2, at 2-18, and Congressional Research Service, "Possible Constitutional Objections to the Canada-United States Free Trade Agreement" (memorandum by Johnny H. Killian, American Law Division, December 16, 1987). This memorandum and the written comments of other constitutional scholars concluding that the process is constitutional are reprinted in *House Hearings, supra* note 6. Other analyses favoring constitutionality may be found in, *inter alia*, Boyer, "Article III, the Foreign Relations Power, and the Binational System of NAFTA," 13 Int'l Tax & Bus. Law. 101 (1996); Bruff, "Can *Buckley* Clear Customs?" 49 Wash. & Lee L. Rev. 1309 (1992); Davey, "The Appointments Clause and International Dispute Settlement Mechanisms: A False Conflict," 49 Wash. & Lee L. Rev. 1315 (1992); Christenson & Gambrel, "Constitutionality of Binational Panel Review in the Canada-U.S. Free Trade Agreement, 23 Int'l Law. 401 (1989); Note, "The Constitutionality of Chapter Nineteen of the United States-Canada Free Trade Agreement: Article III and the Minimum Scope of Judicial Review," 89 Colum. L. Rev. 897 (1989).

[9] 19 U.S.C. § 1516a(g)(4). *See House Report, supra* note 2, at 11-13.

[10] 19 U.S.C. § 1516a(g)(4)(A),(C).

[11] National Council for Industrial Defense Inc. v. United States, 827 F.Supp. 794 (D.D.C.

(continued...)

year by the Coalition for Fair Lumber Imports, a party in a binational panel proceeding, after a binational panel twice remanded DOC action and an extraordinary challenge committee later upheld the panel's decisions. The underlying agency ruling was an affirmative subsidy determination in a CVD proceeding involving Canadian timber. The suit was withdrawn after the U.S. and Canada entered into negotiations on the issue and before the court had issued an opinion on the merits.[12]

The constitutionality of the system was most recently challenged in *American Coalition for Competitive Trade (ACCT) v. Clinton*, filed in the U.S. Court of Appeals for the District of Columbia Circuit in January 1997.[13] Plaintiff, a non-profit association of organizations and corporations, also challenged the constitutionality of the statutory exhaustion provision. ACCT conceded that it had not fulfilled the requirement, but maintained that it had standing to bring the suit under Article III of the U.S. Constitution. The Court of Appeals dismissed the suit November 14, 1997, holding that the plaintiff did not meet constitutional standing requirements and had failed to meet statutory jurisdictional requirements, whose constitutionality it also upheld.[14]

In the court's view, the plaintiff had failed to meet a required element of Article III standing set forth by the Supreme Court in *Defenders of Wildlife v. Lujan,* namely, establishing a causal connection between the injury and the complained-of conduct.[15] The plaintiff also fell short of the standing test for organizations, which allows an entity to sue on behalf of its members only if the latter are eligible to do so in their own right.[16] The court noted that ACCT had not participated in a panel proceeding, nor had it identified specific instances in which either a panel proceeding or the system itself had injured an ACCT member. The court found that plaintiff's generalized statement that ACCT members had suffered NAFTA-related job losses was inadequate for these purposes.

The court also rejected plaintiff's strategy of asserting Article III standing to challenge the constitutionality of the panels and the exhaustion requirement itself:

> Article III sets the maximum boundaries of permissible standing, but does not preclude Congress from creating additional statutory exhaustion requirements. To be sure, a statute that totally precluded judicial review for constitutional claims would certainly raise serious due process concerns. ... Along the same lines, there may well be limits to how severely Congress can restrict the route to judicial review of constitutional challenges when it keeps

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[11](...continued)
1993). Section 516A(g)(4)(A) was amended in the NAFTA Implementation Act to codify the district court's holding. *See* H.R. Doc. No. 159, v. 1, 103d Cong., 1st Sess. 655 (1993).

[12] Coalition for Fair Lumber Imports v. United States, No. 94-1627 (D.C.Cir. filed Sept. 14, 1994, withdrawn by voluntary motion to dismiss January 5, 1995); "U.S. to Repay Canadian Lumber Levies; Bilateral Consultations to Begin," 11 Int'l Trade Rep. 1981 (BNA 1994).

[13] *See generally* "Coalition Files Constitutional Challenge to NAFTA, FTA Binational Panel System," 14 Int'l Trade Rep. 126 (BNA 1997).

[14] American Coalition for Competitive Trade v. Clinton, 128 F.3d 761 (D.C.Cir. 1997).

[15] *Id.* at 764, *citing Defenders of Wildlife v. Lujan,* 504 U.S. 555, 560-61 (1992).

[16] 128 F.3d at 764, *citing, inter alia, Pennel v. City of San Jose*, 485 U.S. 1, 7 (1988).

that route partially open. This, however, is not such a case. Section 1516a(g)(4)(C) merely establishes reasonable requirements that ensure that plaintiffs have a concrete stake in the proceedings and have exhausted their administrative remedies before they may challenge the constitutionality of the binational panel review system.

Indeed, section 1516a(g)(4)(C)'s exhaustion requirement is so typical that striking it down as unconstitutional could render a substantial portion of the United States Code open to constitutional attack. Many agency adjudication schemes require petitioners to exhaust their administrative remedies before bringing their constitutional claims to Article III courts.[17]

Conclusion

The court of appeals noted that the plaintiff may still locate a party who has constitutional standing and thus pursue its constitutional concerns in the future.[18] Even were a case to be successful, however, a court decision may have only limited effect for the particular plaintiff involved. Were a court to hold the process to be unconstitutional, the President may use statutory authority to accept the binational panel or ECC decision at issue.[19] Assuming that this fallback provision were not also struck down, the DOC or the ITC (as the case may be) would be required to implement the decision, and, further, neither the President's nor the agency's action could be judicially reviewed.[20]

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[17] 128 F.3d at 765-66 (citations omitted). The court also found that plaintiffs had failed to present evidence supporting their allegation that Congress had enacted the review provisions because of severe doubts over the constitutionality of the panel process. "To the contrary," the court said, "the statutory scheme itself, which vests original jurisdiction ... in this appellate court, illustrates Congress' desire to expedite judicial review of the binational panel scheme, while limiting the petitioner class to people who have exhausted their administrative remedies and clearly have constitutional standing." *Id.* at 766.

[18] *Id.* at 765. There has been no Supreme Court appeal filed in this case. In the 105th Cong., 1st Sess., amendments submitted in connection with S. 1269, the proposed Reciprocal Trade Agreements Act of 1997, would have prohibited the U.S. or the President from entering into treaties or international agreements that, under one formulation, "would have the purpose or effect of transferring the jurisdiction or authority of a Federal court to decide cases under United States law" and would have made fast-track approval procedures inapplicable to agreements and bills having this purpose or effect. Amends. No. 1603 and 1605, 143 Cong. Rec. S12028-29 (daily ed. Nov. 7, 1997)(submitted by Sen. Craig) and Amend. No. 1545, 143 Cong. Rec. S11601 (daily ed. Nov. 3, 1997)(submitted by Sen. Grassley).

[19] 19 U.S.C. § 1516a(g)(7)(B). *See House Report, supra* note 2, at 17-18. In implementing the CFTA, the President "accept[ed], as a whole," all panel and ECC decisions in the event the process were held to be unconstitutional and the President's authority to accept panel decisions thereby took effect. E.O. 12662, § 3, 54 Fed. Reg. 785 (1989). This action appears not to have been rescinded.

[20] 19 U.S.C. § 1516a(g)(7)(B). A discussion of possible obstacles to constitutional challenges to the panel system may be found in *House Report, supra* note 2, at 17, n. 113, and Deyling, "Free Trade Agreements and the Federal Courts: Emerging Issues," 27 St. Mary's L.J. 353, 379-381 (1996), *available in* WESTLAW, JLR File.