ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF	:	
CERTAIN SOFTWOOD LUMBER	:	**Secretariat File No.**
PRODUCTS FROM CANADA: FINAL	:	**USA-CDA-2002-1904-02**
AFFIRMATIVE ANTIDUMPING	:	
DETERMINATION	:	

DECISION OF THE PANEL FOLLOWING REMAND

June 9, 2005

Panelists: Jeffery Atik, Ivan R. Feltham, W. Roy Hines, John M. Peterson (Chairman), Leon Trakman[1]

Appearances:

Weil, Gotshal & Manges, LLP (M. Jean Anderson) for the Government of Canada

United States Department of Commerce (Anne Talbot, Mark Barnett) for the United States Department of Commerce International Trade Administration

Gibson, Dunn & Crutcher, LLP (Gracia Berg) for West Fraser Mills Ltd.

Baker & Hostetler, LLP (Elliot J. Feldman) for Ontario Forest Industries Association, Ontario Lumber Manufacturers Association and Tembec Inc.

Dewey Ballantine, LLP (Harry Clark, Bradford Ward) for the Coalition for Fair Lumber Imports Executive Committee

[1] The panelists wish to express their appreciation for the excellent support received from Panelist Assistants Jacqueline Weisman, Esq. and Ramnarayan Aiyer.

INTRODUCTION

On March 5, 2004, the Panel remanded this case to the United States Department of Commerce, International Trade Administration ("Commerce"), directing the agency to recalculate the final less than fair value (LTFV) margin for respondent West Fraser Mills Ltd. ("West Fraser"). Commerce's response to that remand decision raised significant issues concerning the authority of the Panel and the reach of its decisions. To address these issues, the Panel sought supplemental briefing from the parties and conducted additional oral arguments.

In addition, certain Complainants sought reconsideration of the Panel's decision regarding the Commerce Department's use of "zeroing" – that is, of recognizing only positive margins of dumping (less than fair value sales), and assigning nondumped sales a margin of zero when determining weighted average LTFV margins. While the Panel was conducting its reconsideration, a Panel of the World Trade Organization's Dispute Settlement Body ("DSB"), considering the same final LTFV determination which is the subject of this proceeding, ruled that Commerce's practice of "zeroing" violates the requirements of the WTO Antidumping Agreement ("ADA"). The DSB Panel's decision was affirmed by the WTO Appellate Body August 11, 2004, and the Panel and Appellate Body reports were adopted by the DSB August 31, 2004.

Upon consideration of the arguments of the Parties, the Panel has determined that this case must be remanded to Commerce, with instructions (1) to revoke the antidumping duty order on *Softwood Lumber from Canada* with respect to exports by West Fraser Mills, and (2) recalculate the final LTFV margins for all other respondents without "zeroing".

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DECISION OF THE PANEL

I. The Antidumping Order Must Be Revoked With Respect to Sales by West Fraser Mills Ltd.

On March 5, 2004, the Panel remanded this case to Commerce once again, with directions for the agency to recalculate the final LTFV margin for respondent West Fraser. Specifically, the Panel directed Commerce to recalculate West Fraser's "wood chip offset" to that company's production costs using information supplied by that company with respect to relevant market prices.[2]

In accordance with these instructions, Commerce on April 13, 2004 issued a draft remand determination which reflected the Panel's decision, and sought comments thereon. Under the heading "Final Redetermination", the draft stated:

> We note that as a result of the revised calculations the margin for West Fraser is *de minimis.* Therefore, if this remand redetermination becomes final, subject merchandise produced and exported by West Fraser will be excluded from the amended [antidumping] order.[3]

On April 16, 2004, respondent West Fraser submitted comments, requesting that Commerce's remand determination make clear "that its amended final determination in this case will have retroactive as well as prospective effect". In addition, West Fraser requested that Commerce issue a determination releasing and refunding all estimated antidumping duties deposited pursuant to the final antidumping duty order dated May

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2 Decision of the Panel, March 5, 2004, at pp. 27-29.

3 Draft Remand Determination, April 13, 2004, at p. 4.

22, 2002, plus interest.[4]

Commerce published its final Remand Redetermination on April 21, 2004. The agency noted West Fraser's comments, but asserted that the agency's revised determination would be effective only for West Fraser's imports of softwood lumber products made after publication of the Panel's final decision on the Remand Redetermination. Commerce, relying on the provisions of 19 U.S.C. §1516a(g)(5)(B), denied West Fraser's request, stating:

> West Fraser is mistaken. Neither the Tariff Act of 1930, as amended (the Act) nor the NAFTA rules provide for the retroactive effect of a Panel decision, and the decisions cited by West Fraser are inapposite. Under 19 U.S.C. §1516a(g)(5)(B), entries of subject merchandise are to be liquidated in accordance with the determination subject to NAFTA Panel review if they are entered on or before the date of publication of the notice of the panel's decision. This statutory provision contrasts with the next subparagraph, at §1516a(g)(5)(C), which provides for a special administrative suspension of liquidation during the pendency of a NAFTA Panel review, of an administrative review proceeding (or class or kind determination), as opposed to a the review of an original investigation, at issue here. Congress' specific intent not to provide for the suspension of liquidation, either by the agency or the Panel, during a NAFTA Panel review of an investigation, is further apparent in light of subparagraphs 1516a(c)(1) and (2). Under these provisions, Congress provided for the liquidation of entries in accordance with an agency determination even though that determination is being challenged in a federal court proceeding, unless those entries are enjoined by a court order. In addition, neither the NAFTA rules, nor the NAFTA itself provide a mechanism for the suspension of liquidation of entries during the pendency of a panel review of an investigation . . . [footnote omitted].
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> Since there is no provision for the suspension of liquidation in a NAFTA proceeding concerning an investigation, the liquidation of entries made prior to the notice of the amended decision will occur pursuant to the challenged administrative determination. It is clear that the final NAFTA panel decision does not affect those entries. That some of West Fraser's entries may be suspended pursuant to the first administrative review is of no consequence. The non-liquidation of entries subject to an

[4] See Remand Redetermination, April 21, 2004, at 4-6.

> administrative review is a statutory suspension, not made pursuant to the binational panel review process under §1516a(g)(5)(C) Consequently, the Panel's final decision, and the Department's final amended determination based thereon can apply prospectively only, as the statute permits applicability only to future entries.[5]

Consequently, Commerce's position is that even if West Fraser is assigned a *de minimis* (negative) LTFV margin as a result of the Panel's remand, and is thereby excluded from the antidumping duty order on *Softwood Lumber Products from Canada*, the antidumping duty order remains in effect with respect to West Fraser's merchandise until after the Panel's final determination is published. It follows, in Commerce's view, that estimated antidumping duties collected in respect of West Fraser's merchandise entered before publication of this Panel's final determination – even if collected as the result of a flawed LTFV determination – are to be retained by the government.

The Government of Canada and other respondents oppose Commerce's position on several grounds. They assert that Commerce's focus on 19 U.S.C. §1516a(g)(5)(B) is misplaced, and that the statute is a procedural provision which does not apply in the instant circumstances[6]. In addition, they note the fundamental rule that antidumping duties are to be collected only when there have been predicate findings of LTFV sales and injury or threat thereof to a domestic industry, citing 19 U.S.C. §1673d(c)(2). They note, also, that entries are not liquidated according to LTFV rates determined during an antidumping investigation; rather, actual duty assessments are made pursuant to Commerce Department 19 U.S.C. §1675 annual reviews of the antidumping order.[7]

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5 Remand Redetermination, April 21, 2004, at pp 5-6.

6 Brief of the Government of Canada, May 14, 2004, at p. 5.

7 *Id.* at 7.

From the foregoing Canada and the respondents reason that Congress, in enacting 19 U.S.C. §1516a(g), intended to allow antidumping duty deposits to be refunded as the result of determinations made by NAFTA Article 1904 binational panels. This result is mandated, they insist, by Article 1904:15 of the NAFTA, as explained in the *Statement of Administrative Action* accompanying the *North American Free Trade Agreement Implementation Act.*

In response, Commerce and the Coalition for Fair Lumber Imports Executive Committee ("Coalition") raise threshold questions about jurisdiction and ripeness, arguing that the Panel does not have jurisdiction to consider the complaint by Canada, West Fraser, et al. The Coalition argues that the issue is, in any event, not ripe for adjudication.

A. Jurisdiction and Ripeness

The Panel's jurisdiction is to determine whether Commerce has fulfilled its obligation "to take action not inconsistent with the decision of the panel . . . ." 19 U.S.C. §1516a(g)(7)(A). That jurisdiction arises out of the Panel's unchallenged mandate to review the Final Determination. That Determination includes not only the finding of West Fraser sales at LTFV but also the concomitant antidumping order. The Panel's jurisdiction therefore extends to the order and to the requirements of deposit of estimated antidumping duties arising from the order.

As to ripeness, the argument of the Coalition is misplaced because, as noted herein, the Panel is not dealing with particular import entries. Rather, the Panel is asked to consider questions of statutory interpretation and to determine whether Commerce

has taken action not inconsistent with the remand decision of the Panel respecting a matter that is clearly within the Panel's jurisdiction. These questions arise from Commerce's Final Determination, the Panel's remand, and Commerce's response to the remand.

B. Commerce's Reliance on 19 U.S.C. §1516a(g)(5)(B)

On the substantive issue, Commerce relies for its position upon 19 U.S.C. §1516a(g)(5)(B), which provides:

> **1516a. Judicial review in countervailing duty and antidumping duty proceedings**
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> * * *
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> **(g) Review of countervailing duty and antidumping duty determinations involving free trade area country merchandise**
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> * * *
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> (5) Liquidation of entries
>
> (A) Application
> In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the rules provided in this paragraph shall apply, notwithstanding the provisions of subsection (C) of this section.
>
> (B) General rule
> In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, entries of merchandise covered by such determination shall be liquidated in accordance with the determination of the administering authority or the Commission, if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the administering authority of notice of a final decision of a binational panel, or of an extraordinary challenge committee, not in harmony with that determination. Such notice of a decision shall be published within 10 days of the date of the issuance of the panel or committee decision.
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> (C) Suspension of liquidation

(i) In general

Notwithstanding the provisions of subparagraph (B), in the case of a determination described in clause (iii) or (vi) of subsection (a)(2)(B) of this section for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the administering authority, upon request of an interested party who was a party to the proceeding in connection with which the matter arises and who is a participant in the binational panel review, shall order the continued suspension of liquidation of those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review.

(ii) Notice

At the same time as the interested party makes its request to the administering authority under clause (i), that party shall serve a copy of its request on the United States Secretary, the relevant FTA Secretary, and all interested parties who were parties to the proceeding in connection with which the matter arises.

(iii) Application of suspension

If the interested party requesting continued suspension of liquidation under clause (i) is a foreign manufacturer, producer, or exporter, or a United States importer, the continued suspension of liquidation shall apply only to entries of merchandise manufactured, produced, exported, or imported by that particular manufacturer, producer, exporter, or importer. If the interested party requesting the continued suspension of liquidation under clause (i) is an interested party described in subparagraph (C), (D), (E), or (F) of section 1677(9) of this title, the continued suspension of liquidation shall apply only to entries which could be affected by a decision of the binational panel convened under chapter 19 of the NAFTA or of the Agreement.

(iv) Judicial review

Any action taken by the administering authority or the United States Customs Service under this subparagraph shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise.

The Panel initially notes that, although Commerce's position rests upon its analysis of 19 U.S.C. §1516a(g)(5)(B), that statute, dealing with "Liquidation of entries", is not applicable to the instant proceeding. This proceeding involves challenges to the Commerce Department's final determination of LTFV sales, issued in connection with its antidumping investigation of *Softwood Lumber from Canada*. An affirmative final LTFV determination is one of the predicate findings necessary to support the issuance of an antidumping duty order, and the LTFV margins determined therein serve as the basis for determining the estimated antidumping duties to be collected at entry by United States Customs and Border Protection, but the LTFV determination, by itself, never serves as the basis for the final assessment of antidumping duties on any import entries. Accordingly, the instant determination is not concerned with the disposition or liquidation of specific import entries.[9] Rather, antidumping duties are assessed on specific Customs entries of merchandise pursuant to separate and subsequent annual reviews of the antidumping duty order which Commerce conducts pursuant to 19 U.S.C. §1675. In cases involving goods imported from NAFTA countries, the publication of the antidumping duty order continues in force a statutory suspension of liquidation of affected entries pending the final administrative determination.

However, the instant proceeding involves a challenge of a Commerce

[9] Indeed, the administrative record forming the basis of Commerce's final LTFV determination, and the basis for this Panel's review, consists of information which the agency has gathered concerning respondents' production costs, sales prices, and related information during a period of investigation (POI) which precedes the dates of entry of shipments of merchandise potentially subject to the assessment of antidumping duties. Even where "critical circumstances" are found to exist, and a preliminary LTFV determination is made applicable to entries made prior to the publication thereof, the final assessment of antidumping duties on such entries is not made in connection with the antidumping investigation, but instead in connection with 19 U.S.C. §1675 annual reviews of the antidumping duty order.

Department final determination of LTFV sales; there are no "entries of merchandise covered by such determination". An LTFV investigation does not involve a consideration of specific entries of merchandise; rather, it concerns a review of home market and export sales (or offers for sale) made during a period of investigation which precedes the filing of a petition for the imposition of antidumping duties. On the basis of this review, Commerce will make either an affirmative or negative LTFV determination. To the extent the LTFV determination is affirmative, United States Customs and Border Protection is directed to suspend liquidation of import entries made on or after the effective date of such determination; these entries become potentially subject to the assessment of antidumping duties.

The actual assessment of antidumping duties on particular entries of imported merchandise is made subsequent to the investigation, in Commerce Department 19 U.S.C. §1675 annual reviews of the antidumping order. Final determinations in such proceedings are separately reviewable by United States courts or, in the case of a determination involving goods imported from NAFTA countries, by Article 1904 binational panels. Where binational panel review of a 19 U.S.C. §1675 determination is requested, an interested party may request that the administrative suspension of liquidation remain in force pending completion of the Panel review. Specifically, 19 U.S.C. §1516a(g)(5)(C)(i) provides that the "administering authority, upon request of an interested party who was a party to the proceeding in connection with which the matter arises and who is a participant in the binational panel review, shall order the continued suspension of liquidation of those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review." The

reviewable determinations covered by this procedure are limited to those arising under "clause (iii) or (vi) of subsection (a)(2)(B) of this section", specifically, determinations rendered in 19 U.S.C. §1675 annual reviews[10], and scope ruling determinations.[11]

The availability of continued suspension of liquidation pursuant to statute in proceedings involving potential duty assessments on actual entries of merchandise makes it irrelevant that binational panels lack powers at equity, and hence, the ability to order suspension of liquidation of entries subject to a decision reviewable under 19 U.S.C. §1516a(a)(2)(B)(iii) or (vi). Administrative suspension of liquidation is available in such cases and, as Commerce concedes, where suspension is available, a party in interest may receive refunds of antidumping duty collections with respect to specific entries, if the Panel rules such collections to be excessive.

The fallacy of Commerce's position here is its contention that "[s]ince there is no provision for the suspension of liquidation in a NAFTA proceeding concerning an investigation, the liquidation of entries made prior to the notice of the amended decision *will occur pursuant to the challenged administrative determination.*"[12] This is incorrect. The liquidation of entries made prior to the notice of the amended decision will occur pursuant to Commerce's 19 U.S.C. §1675 annual review determinations of the antidumping duty order. The availability of a statutory suspension of liquidation in

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[10] 19 U.S.C. §1516a(2)(B)(iii) provides for review of "A final determination, other than a determination reviewable under paragraph (1), by the administering authority or the Commission under section 1675 of this title."

[11] 19 U.S.C. §1516a(2)(B)(vi) provides for review of "A determination by the administering authority 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."

[12] Commerce Remand Determination, April 21, 2004, at p. 5-6.

connection with Panel reviews of such proceedings means that those entries will likely liquidate in accordance with the final decision of reviewing Panels[13], which may or may not uphold Commerce's annual review determination. The only instance in which the entries will liquidate in accordance with Commerce's annual review determination is where no request for suspension of liquidation pending review is submitted pursuant to 19 U.S.C. §1516a(g)(5)(C)(ii).

C. Effect of the *De Minimis* Calculation

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[13] The legislative history of 19 U.S.C. Â§1516a(g)(5)(C) supports the view that Congress intended, consistent with its obligations under NAFTA, which replicates the provisions of the United States - Canada Free Trade Agreement (CFTA), to provide for review of antidumping determinations for NAFTA country goods which is coextensive with that provided for goods from non-NAFTA countries. The CFTA Statement of Administrative Action explained:

> Article 1904(15)(d) of the agreement requires that the United States and Canada amend their respective laws in order to ensure that existing procedures concerning the refund, with interest, of duties operate to give effect to a final binational panel decision . . . . Absent an amendment to current law, the ITA might be compelled to order liquidation of entries prior to the completion of the panel review, thereby risking a violation of Article 1904(15)(d). Because panels will not have equity powers, the injunctive remedy provided by section 516A(c)(2) will not be available to prevent liquidation. Therefore, paragraph (5) of the new section 516A(g) sets forth rules authorizing the ITA to continue to suspend liquidation of entries subject to a binational panel review. These rules parallel current practice in AD/CVD litigation, and will allow duties to be refunded, when necessary, as required by the Agreement.

United States - Canada Free Trade Agreement, *Statement of Administrative Action* H.R. Doc. No. 100-216, at 265-266 (1988)

The NAFTA Statement of Administrative Action states (in pertinent part): " . . . the Statement of Administrative Action accompanying the CFTA Implementing Act, H. Doc. 100-216, 100 Cong., 2d Sess. 258-89 (1988), fully describes the panel system that will be established under the NAFTA." North American Free Trade Agreement *Statement of Administrative Action* H. Doc. 103-159 at 194 (1993)

The next issue presented is what is the specific effect of the Panel's decision which results in Commerce's Determination holding the final LTFV margins for West Fraser to be *de minimis*. The treatment of respondents assigned a *de minimis* final LTFV margin during an antidumping investigation is dictated by statute, 19 U.S.C. §1673d(a)(4):

> De minimis dumping margin
>
> In making a determination under this subsection, the administering authority shall disregard any weighted average dumping margin that is de minimis as defined in section 1673b(b)(3) of this title[14].

Under Commerce's own regulations [19 C.F.R. §353.204(b)][15] and long-standing

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[14] 19 U.S.C. §1677b(b)(3), in turn, provides as follows:

> (3) De minimis dumping margin
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> In making a determination under this subsection, the administering authority shall disregard any weighted average dumping margin that is de minimis. For purposes of the preceding sentence, a weighted average dumping margin is de minimis if the administering authority determines that it is less than 2 percent ad valorem or the equivalent specific rate for the subject merchandise.

[15] 19 C.F.R. §351.204(b) states:

> (e) Exclusions.
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> (1) In general. The Secretary will **exclude from an affirmative final determination** under section 705(a) or section 735(a) of the Act or an order under section 706(a) or section 736(a) of the Act, **any exporter or producer for which the Secretary determines an individual weighted-average dumping margin or individual net countervailable subsidy rate of zero or de minimis.** [Emphasis added].

practice, where a respondent is determined to have a zero or *de minimis* final LTFV margin, the Secretary has entered a negative final LTFV margin with respect to that respondent, and excluded that respondent from the scope of any antidumping duty order which might subsequently issue in the investigation. See, e.g., *Polyethylene Terephthalate Film, Sheet, and Strip From India*, 67 Fed. Reg. 34,899 (May 16, 2002); see also *Certain Polyethylene Retail Carrier Bags from the People's Republic of China: Amended Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 42419 (July 15, 2004); *Fresh Atlantic Salmon from Chile*, 63 Fed. Reg. 31,411, 31,412 (June 9, 1998). Had Commerce correctly calculated LTFV margins for West Fraser, that company would have been excluded from the final affirmative LTFV determination issued by the agency, and, by extension, from the antidumping duty order subsequently published. Now, upon this Panel's affirmance of Commerce's Remand Redetermination with respect to West Fraser, it follows that West Fraser must be excluded from the antidumping duty order, in accordance with Commerce's own regulations. As described below, to the extent West Fraser has taken appropriate action to prevent its entries from being finally liquidated with an assessment of antidumping duties, it should be able to secure liquidation of those entries without the assessment of antidumping duties, and to receive refunds of cash deposits, upon making application therefor in the appropriate fora.

While Commerce has stressed that its position before this Panel is based on the fact that the Panel lacks powers in equity, we note, as a matter of fact, that Commerce raised a substantially identical claim with respect to dispositions of actions by the United States Court of International Trade, which does wield equitable powers, and the court

rejected that claim. See *Jilin Henghe Pharmaceutical Co. v. United States*, 342 F. Supp. 2d 1301, (Ct. Int'l Tr. 2004), *judgment vacated on appeal*, 2005 U.S. App. LEXIS 4344 (February 22, 2005)[16].

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[16] The circumstances under which the government's appeal of the decision in *Jilin Henghe* was abandoned are somewhat mysterious. The Federal Circuit's nonprecedential Order of February 22, 2005 indicates that Jilin Henghe, which had prevailed before the CIT, moved to dismiss the government's appeal as moot, notifying the Federal Circuit that it "seeks to withdraw its challenges to the liquidation instructions that gave rise to this case and relinquish any claims to the antidumping duty cash deposits and interest related to this action." The appellate court does not indicate whether the appeal was mooted by reason of happenstance, or by virtue of an agreed settlement between the parties. Finding the appeal moot, the Federal Circuit vacated the judgment, stating that "because we vacate the judgment, and because the United States Court of International Trade's opinion is merely an explanation for the now-vacated judgment, there is no need to separately vacate the opinion."

The Federal Circuit's *vacatur* makes it clear that the CIT's judgment in *Jilin Henghe* is no longer *res judicata*, but does not indicate whether the CIT's accompanying opinion, which was not vacated, has any *stare decisis* effect. Vacatur rests on the doctrine of mootness; it is appropriate when the issues presented are no longer "live" or the parties lack legally cognizable interests in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). It is also appropriate because Federal courts have no Constitutional power to render advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96 (1968).

In *United States v. Munsingwear*, 340 U.S. 36 (1950), the Supreme Court held that vacatur of a judgment is the appropriate remedy when the case becomes moot by happenstance pending appellate review. However, there is a widely-recognized exception to the *Munsingwear* rule for cases in which the losing party "fearful of having its loss confirmed by the appellate court, abandons the appeal and then moves to have the trial court's judgment vacated as moot, thus "retiring to licks its wounds, fully intending to come out fighting again'". See *CFTC v. Board of Trade*, 701 F.2d 653, 656 (7th Cir. 1983); see also *Karcher v.* May, 484 U.S. 72 (1987); Harris *v. Board of Governors of the Federal Reserve System*, 938 F.2d 720 (7th Cir. 1991). The *Munsingwear* rule also does not apply where the parties settle the case "so that neither party has been thwarted in his desire to appeal". See, e.g., *In re Memorial Hospital*, 862 F.2d 1299, 1301 (7th Cir. 1988); see also *Ringsby Truck Lines v. Western Conference of Teamsters*, 686 F.2d 720 (9th Cir. 1982); *Harrison Western Corp. v. United States*, 792 F.2d 1391 (9th Cir. 1986).

The unusual circumstances appearing in the *Jilin Henghe* appeal – a motion by the *prevailing* party to dismiss the losing party's appeal, while simultaneously relinquishing the relief it has been awarded in the lower court's judgment – makes it unclear whether the mootness resulted from happenstance or a negotiated settlement between the parties. In any event, the

Federal Circuit granted the motion to vacate the judgment. While the CIT's opinion was not expressly vacated – and such opinions may have some *stare decisis* effect which has been described as "modest – negligible, really" [*Harris v. Bd. of Governors, supra;* see also *United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1002)], the Panel wishes to make clear that, while it finds aspects of the CIT's reasoning in *Jilin Henghe* to be persuasive, it does not accord that opinion any *stare decisis* effect in this decision.

We are aware of no precedent – and the administering authority has brought none to our attention – which holds than an antidumping duty order may be issued or enforced absent valid affirmative findings of both LTFV sales and material injury, or threat thereof, to a domestic industry. To the extent a reviewing court or Panel renders a decision which finds an LTFV determination to be unlawful or unsupported by substantial evidence, in whole or in part, the proper remedy is for the court to remand the case to the agency with instructions to revoke the antidumping duty order on which such unlawful or unsupported decision was based. Any presumption of correctness which might have attached to Commerce's initial determination evaporated once the decision was held by the Panel to be unlawful or unsupported by substantial evidence. The invalidity of the LTFV determination, in respect of sales by West Fraser, also invalidates Commerce's ability to order liquidation in accordance with its overturned determination. We note also that NAFTA Article 1904:15(a) requires the refund of estimated antidumping duty deposits, with interest, when sales have been found not to be at LTFV.

In *Timken Co. v. United States*, 893 F.2d 337, 341 (Fed. Cir. 1990), the Court of Appeals for the Federal Circuit ruled that when a reviewing court reaches a decision contrary to Commerce's determination, "liquidation should no longer take place in accordance with Commerce's determination." The policy against liquidation of entries pursuant to invalidated agency determinations is sufficiently strong that reviewing courts have liberally exercised their equitable powers to enjoin the liquidation of entries contrary to judicial determinations [see, e.g., *Laclede Steel Co. v. United States*, 20 CIT 712, 928 F.Supp. 1182 (1996), *aff'd*, 92 F.3d 1206 (Fed. Cir. 1996)], or to set aside

liquidations which have already occurred. See *Shinyei Corp. Of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004).

Similarly, there is no reason why, in the instant case, West Fraser's entries should be liquidated pursuant to a now-discredited final affirmative LTFV determination. To the extent West Fraser's entries remain unliquidated, and West Fraser has taken or takes the necessary steps to block liquidation of the entries (such as seeking a statutory suspension of liquidation for entries subject to 19 U.S.C. §1675 annual reviews, when the final results of such reviews are being considered by Article 1904 panels), those entries should be disposed of in accordance with the corrected final LTFV determination reflected in Commerce's Remand Redetermination. Specifically, that determination provides that West Fraser's LTFV margins were *de minimis*, and that company is thereby excluded from the antidumping duty order against *Softwood Lumber from Canada*. It follows that no estimated antidumping duties should have been collected with respect to the company's imports and, to the extent deposits were taken, they are subject to refund upon proper application by West Fraser.

Commerce's suggestion that entries should, or must, be liquidated in accordance with a discredited final administrative determination would render review by a court of competent jurisdiction or a binational panel meaningless. If in fact an incorrect administrative determination could serve as the basis for an assessment of duties on all entries made before publication of notice of an adverse decision, then agencies would have little incentive to perform their tasks correctly, or might even be inclined to err on the side of imposing higher dumping margins, or imposing dumping margins where none should exist. Agencies whose decisions are challenged before the courts or

binational panels (and litigants supporting the agency determination) would have little incentive to expedite the process of judicial and panel review, while parties against whom an adverse decision has been rendered would seek to have reviews conducted on the most expedited basis possible. The existence of injunctive remedies (in the courts) and statutory suspensions of liquidation (for agency determinations subject to binational panel review) preserves the rights of all parties to the review, allows review of complex and important issues to be conducted with due deliberation and thoroughness, and ensures that judicial and panel reviews will have coercive, and not merely advisory, effect.

In assigning West Fraser a *de minimis* LTFV margin, Commerce acted "not inconsistently" with the Panel's remand instruction. However, Commerce's failure to revoke the antidumping duty order as to West Fraser falls short of the requirement that Commerce "*take action* not inconsistent with the decision of the panel . . . ." 19 U.S.C. §1516a(g)(7)(A). A determination that sales during the period of investigation were at LTFV being a prerequisite for the issuance of an antidumping order, the Order was never valid as to West Fraser. The only action consistent, i.e., "not inconsistent", with the Panel's remand and the recalculation of West Fraser's margin is the revocation of the antidumping order as to West Fraser. Accordingly, Commerce must revoke the antidumping order as to West Fraser as though a negative LTFV margin for that respondent had been entered *ab initio*. Any administrative actions taken from this point on must recognize and apply that finding and Commerce's revocation in all of their implications.

West Fraser has asked this Panel to enter an order compelling Commerce to

direct United States Customs and Border Protection to liquidate West Fraser's entries without antidumping duty assessments and to restore to West Fraser cash deposits of estimated antidumping duties, with interest. Respect for the statutory scheme, however, requires that West Fraser request this relief directly from Commerce, or from any court or panel reviewing a Commerce final determination respecting its entries. Armed with Commerce's Remand Redetermination in this proceeding, and the revocation of the antidumping order as to its shipments (which this Panel orders below), West Fraser can make the appropriate applications for the refund of its estimated antidumping duty deposits.

An invalid administrative determination has force until such time that it is overturned or set aside by a reviewing forum having appropriate jurisdiction. Had West Fraser's entries been liquidated and made final prior to the entry of the final determination in this review, it is possible that West Fraser might be without means to set aside such assessments[17]. However, if West Fraser takes, or has taken, the necessary steps to prevent its entries from being liquidated and made final, it should be able to secure refunds of its antidumping duty deposits.

[17]But see *Shinyei Corp. of America Inc. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), in which a court accepted jurisdiction over an action seeking to overturn the liquidation of entries subjected to the assessment of antidumping duties. Binational Panels, of course, lack equitable power to set aside liquidations; in the event West Fraser or a similarly-situated party were required to seek such relief, it would need to turn to the courts.

2. Commerce's Use of "Zeroing" in Calculating the Final LTFV Margins Was Contrary to Law

Complainants argue once again that the Department's act of zeroing negative-margin transactions in this investigation is contrary to law. In our prior decisions, we determined zeroing to be a permissible application of the statute. Panel Decision of July 17, 2003 at 56-61; Panel Decision of March 5, 2004 at 33-34; Panel Decision of July 21, 2004.

In our prior decisions, we had not been prepared to find zeroing to be inconsistent with the Antidumping Agreement. We did however signal the possibility that our view might well change were the WTO's Dispute Settlement Body (DSB) to establish that zeroing violates the Antidumping Agreement. We had been aware that Canada had brought a challenge to the Department's use of zeroing before the DSB under the WTO Dispute Settlement Understanding and that the DSB would likely address the compatibility of zeroing with the United States' WTO Antidumping Agreement obligations.

In our July 17, 2003 decision, we noted:

> A clear finding of inconsistency of the Department's practice of zeroing with the United States' WTO Antidumping Agreement obligations would, however, implicate the *Charming Betsy* doctrine. *Charming Betsy* is a federal common law principle of statutory interpretation. In the case of statutory ambiguity, *Charming Betsy* requires the rejection of an otherwise permissible interpretation if that interpretation conflicts with an international treaty obligation of the United States. Were the Department's practice of zeroing . . . found to be inconsistent with the WTO Antidumping Agreement, application of the *Charming Betsy* doctrine might well constrain this panel to find the Department's practice unreasonable and therefore contrary to law [citations omitted].

The DSB has adopted the report of the Appellate Body in *United States – Final Dumping Determination on Softwood Lumber from Canada,* ¶ 183(a), WT/DS264/AB/R (Aug. 11, 2004) [hereinafter,"the WTO *Softwood Lumber* Decision"], finding that the application of zeroing in this investigation indeed does violate the United States' obligations under the Antidumping Agreement. This development then motivates our reassessment of the zeroing issue.

A. Appropriateness of Reconsideration

Complainants raised the zeroing issue for our reconsideration on August 2, 2004, under a styled "Notice of Joint Motion For Re-examination of the Panel's July 21, 2004 Decision." This Notice of Motion purported to bring to the attention of the Panel the imminent adoption by the WTO Dispute Settlement Body of the report of the Appellate Body in the WTO *Softwood Lumber* Decision.

Commerce and the Coalition objected to this Notice of Motion on the grounds that it did not comply with Rule 76. *See* Response of the United States Department of Commerce to Notice of Joint Motion For Re-examination of the Panel's July 21, 2004 Decision (Aug. 10, 2004) and Response of the Coalition for Fair Lumber Imports Executive Committee to the Notice of Joint Motion For Re-examination of the Panel's July 21, 2004 Decision (Aug. 12, 2004).

Rule 76 provides for participant-initiated requests for re-examination by the Panel of its decision "for the purpose of correcting an accidental oversight, inaccuracy or omission." In its response, Commerce contends that the adoption of the WTO *Softwood Lumber* Decision subsequent to this Panel's decision of July 21, 2004 does not

constitute an instance of "accidental oversight, inaccuracy or omission" with respect to the zeroing question and as such the Notice of Motion should have been rejected.

This Panel did not reject the Notice of Motion. Rather, the Panel scheduled oral argument by the participants for purposes of ascertaining the effect, if any, of the adoption of the WTO *Softwood Lumber* Decision. Even had the Panel ruled the Notice of Motion out-of-order (accepting arguendo Commerce's contention that the Motion did not raise an "accidental oversight, inaccuracy or omission"), the Panel could properly consider *sua sponte* under Rule 2 the effect of the adoption of the WTO *Softwood Lumber* Decision on its ultimate definitive ruling.

Rule 2 creates a residual ability for each panel established under Chapter 19 to determine appropriate procedures. Even were Rule 76 to be read to limit this Panel's reconsideration of the zeroing issue upon a party's motion, the Panel remains able to hold further oral argument, accept written submissions and reconsider its prior decision under this authority. Rule 2 provides (in part):

> Where a procedural question arises that is not covered by these rules, a panel may adopt the procedure to be followed in the particular case before it by analogy to these rules or may refer for guidance to rules of procedure of a court that would otherwise have had jurisdiction in the importing country.

We have not issued a Notice of Final Panel Action in this matter. We note that NAFTA rules do not expressly provide for reconsideration in the instance of the issuance of relevant (and perhaps controlling) subsequent authority during the pendency of panel review. Rule 2 permits a panel to engage in appropriate reconsideration in this instance. The Court of International Trade would have been able to accept further written submissions and hold oral arguments in an analogous situation. See, e.g., *Borlem S.A.*

- *Empreedimentos Industrias v. United States*, 913 F.2d 933, 939 (Fed. Cir. 1990)[reviewing Court has discretion to remand case to agency for reconsideration when intervening events make remand appropriate].

Further, NAFTA Article 1904(2) charges this Panel "to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party." Disregarding consideration of the effect of the supervening adoption of the WTO *Softwood Lumber* Decision would cause this Panel to fail its mandate. Our overriding purpose is to review the Department's action according to the antidumping law of the United States as we see it – our prior decisions notwithstanding.

We note Commerce and the Coalition did participate in written submissions and oral argument. Their positions and arguments are fully considered herein.

B. On the Lawfulness of Zeroing in this Investigation

Our prior holdings are consistent with the determination of the Court of Appeals for the Federal Circuit in *Timken* and *Corus Staal*, which also deal with challenges to the Department's zeroing negative-margin transactions. *Timken Company v. United States*, 354 F.3d 1334 (Fed. Cir. 2004), *cert. den. sub nom. Koyo Seiko Co. v. United States*, 2004 U.S. LEXIS 7382 (2004); see also *Corus Staal B.V. v. United States*, 395 F.3d 1345 (Fed. Cir. 2005). .

In *Timken*, the CAFC followed "the familiar two-part inquiry to determine whether to sustain an agency's interpretation of the statutory scheme it is charged with administering" (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc,* 467 U.S.

837, 842-43 (1984)). First, the CAFC found that the statute "does not unambiguously require that dumping margins be positive numbers," notwithstanding the dictionary definition of the term "exceeds." *Timken,* 354 F.3d at 1342 (construing the term "exceeds" in 19 U.S.C. §1677(35)(A)).18

Having determined that the statute is ambiguous, the CAFC then reviewed the Department's use of zeroing under *Chevron* and found it to be a permissible construction of the statute ("[W]hile the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction.") *Id.*

However, *Chevron* is not the only test a court or panel applies in reviewing a challenged agency interpretation of an ambiguous statute. The *Charming Betsy* doctrine requires courts to interpret U.S. law, whenever possible, in a manner consistent with the international legal obligations of the United States. *The Charming Betsy*, 6 U.S. (Cranch) 64, 118 (1804). An otherwise permissible agency interpretation (i.e. one that passes *Chevron*) which conflicts with a U.S. international obligation is, absent a clear legislative command, contrary to law. See *DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 US 568, 574-75, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988).

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18 The Department has accepted that zeroing is not mandated by statute. See the arguments presented by the United States before the WTO in *Executive Summary of the First Written Submission of the United States dated February 10, 2005* in *United States – Laws, Regulations and Methodologies for Calculating Dumping Margins (Zeroing)*, WT/DS294 .

C. On the Preclusive Effect of the URAA

While the Panel was considering its decision in this action, the CAFC issued its opinion in *Corus Staal B.V. v. United States*, 395 F.3d 1343 (Fed. Cir. 2005), in which that court considered the legality of Commerce's practice of "zeroing" in light of, *inter alia*, the WTO *Softwood Lumber* Decision. The CAFC determined that "[b]ecause zeroing is in fact permissible in administrative investigations and because Commerce is not obligated to incorporate WTO procedures into its interpretation of U.S. law", it would not disturb the agency's use of zeroing in a final LTFV determination. Acknowledging various WTO decisions which held the practice of zeroing to be inconsistent with the WTO Antidumping Agreement, the *Corus* court ruled that WTO decisions are "not binding on the United States much less this court, " citing *Timken*, 354 F.3d at 1344.

This statement of the CAFC is unexceptional, as none of the Uruguay Round Agreements (including the Antidumping Agreement and the Dispute Settlement Understanding) are self-executing. Decisions of the WTO Dispute Settlement Body do not directly affect the internal law of the United States. This Panel clearly lacks the power to directly implement the WTO *Softwood Lumber* Decision or any other decision of the DSB. The Uruguay Round Agreements Act ("URAA") indeed provides that no person:

> may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States . . . on the ground that such action or inaction is inconsistent with [a WTO] agreement. 19 U.S.C. §3512(c)(1)(b).

But the question before this Panel concerns the scope and applicability of the *Charming*

Betsy doctrine, which is a canon of U.S. law. While Section 3512(c)(1)(b) does deprive a "person" from directly pleading the inconsistency of a U.S. "action or inaction" with a WTO obligation in a U.S. court, it does not strip away from a court (or from a binational panel) the ability – indeed the responsibility – to consider WTO obligations in assessing the legality of agency action under *Charming Betsy*. See *Timken,* 354 F.3d at 1343-33. U.S. agencies are bound to interpret statutes consistently with U.S. international obligations.

One of the predicates for the invocation of the *Charming Betsy* doctrine is that U.S. agency action be in conflict with an international legal obligation of the United States. The relevant international legal obligation in this matter is the obligation of the United States under the Antidumping Agreement to make "fair comparisons" in determining dumping margins. This obligation is sourced in a treaty, and not in any decision of the DSB, and exists before, during, and after completion of the dispute settlement process in the WTO *Softwood Lumber* Decision.19 The WTO *Softwood Lumber* Decision does not itself cause the challenged United States measure (zeroing) to be in conflict with the Antidumping Agreement or any other international legal obligation of the United States for purposes of *Charming Betsy*. Rather, it establishes with considerable authority that the measure is so in conflict, which makes application of *Charming Betsy* more assuredly correct.

The *Corus Staal* court did not dispose of the *Charming Betsy* issue occasioned by the WTO *Softwood Lumber* Decision, which issue had been argued before it. The

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19 See 70 Fed. Reg. 22636 (May 2, 2005)[noting the United States' acceptance of the WTO DSB decision in *Softwood Lumber from Canada*]. Canada's Government has challenged this implementation before the WTO.

CAFC did not reach the *Charming Betsy* arguments present in *Corus Staal* because of the preclusive effect it found in various features of the URAA, most particularly Section 123 and Section 129 (19 U.S.C. §3533; §3538, hereafter "Section 123" and "Section 129") The *Corus Staal* court noted that "The conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government . . . ." 395 F.3d at 1349, citing *United States v. Pink*, 315 U.S. 203, 222-23 (1942). Moreover, those political branches of government have agreed upon, and Congress has enacted, specific statutory procedures for determining whether the United States will implement WTO DSB decisions. The *Corus Staal* court declined to apply the WTO *Softwood Lumber* Decision "because the finding therein was not adopted as per Congress's statutory scheme". 395 F.3d at 1349.

The CAFC cites various provisions of the URAA to explain its non-disturbance of Commerce's use of zeroing in *Corus Staal*, notwithstanding the finding of the DSB in the WTO *Softwood Lumber* Decision that zeroing was inconsistent with the United States' WTO obligations. The court begins with a reference to 19 U.S.C. §3512(a):

> Further, "[no] provision of any of the Uruguay Round Agreements [e.g., the ADA] nor the application of any such provisions to any person or circumstance, that is inconsistent with any law of the United States, shall have effect." 19 U.S.C. §3512(a) (2000). Neither the GATT nor any enabling international agreement outlining compliance therewith (e.g., the ADA) trumps domestic legislation: if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress.

395 F.3d at 1348.

The challenge here, however, as was the case in *Corus Staal*, does not involve the application of any "law of the United States." Section 3512(a) deals with statutes, and as

such is not directly relevant to this proceeding. As the CAFC itself has held in *Timken*, zeroing is not mandated by any U.S. statute. Zeroing is a discretionary agency determination which must be consistent with United States international legal obligations in order to be lawful as a matter of United States law, unless there is a statutory override of those obligations.

The Federal Circuit found such an override in the provisions of Section 123 and Section 129. The Federal Circuit in *Corus* noted that:

> Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representation, an arm of the Executive Branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations and, if so, implemented, the extent of implementation. See [Sections 123(f), 129] (2000); see also [Section 123(g)] (defining a statutory scheme that Commerce must observe in order to change its policy to conform to a WTO ruling).

395 F.3d at 1349. *Corus Staal* holds that the exclusive process for determining the U.S. response to an adverse determination by the WTO DSB is through the consultation and implementation scheme anticipated by Sections 123 and 129 of the URAA. When U.S. response to an adverse DSB ruling is under consideration or contest, it would be an intrusion on the decisional authority that Sections 123 and 129 accord to the USTR (in consultation with relevant congressional committees) for a court or a NAFTA Chapter 19 binational panel to find an agency measure unlawful under *Charming Betsy*.

Thus, Section 123(f) (19 U.S.C. §3533 (f)) provides that:

> (f) Actions upon circulation of reports
>
> Promptly after the circulation of a report of a panel or of the Appellate Body to WTO members in a proceeding described

in subsection (d) of this section, the Trade Representative shall –

> (1) notify the appropriate congressional committees of the report;
>
> (2) in the case of a report of a panel, consult with the appropriate congressional committees concerning the nature of any appeal that may be taken of the report; and
>
> (3) if the report is adverse to the United States, consult with the appropriate congressional committees concerning whether to implement the report's recommendation and, if so, the manner of such implementation and the period of time needed for such implementation.

Further procedures are specified in Section 129(b) and (c) (19 U.S.C. §3538(b) and (c)), which require that:

> **Sec. 3538. Administrative action following WTO panel reports**
>
> * * *
>
> (b) Action by administering authority
>
> (1) Consultations with administering authority and congressional committees
>
> Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.
>
> (A)Determination by administering

authority

Notwithstanding any provision of the Tariff Act of 1930 (19 U.S.C. 1202 et seq.), the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(1) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(2) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.) that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act (19 U.S.C. 1677)) that are entered, or withdrawn from warehouse, for consumption on or after –

* * *

(B) in the case of a determination by the administering authority under subsection (b)(2)

> of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.
>
> (2) Notice of implementation
>
> > (A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930 (19 U.S.C. 1671 et seq.).implementation.

The preclusive effect of the statutory scheme established by Sections 123 and 129 is not, however, without limits. By their terms, Section 123 and 129 anticipate that the process ends, in the case of a decision to implement, with an implementation direction by USTR and by publication of a notice of implementation in the Federal Register.

In *Softwood Lumber*, the Section 123/Section 129 process has run its course. On November 5, 2004, the USTR requested "that the Department issue a determination that would render the Department's actions in the [*Softwood Lumber*] investigation not inconsistent with the findings of the DSB."20 On January 31, 2005, the Department issued its Preliminary Section 129 Determination. Commerce received a joint brief from the Canadian parties on February 22, 2005 and a brief from the Coalition on March 7, 2005. On April 15, 2005, the Department issued its final Section 129 Determination. On April 19, 2005, the Department forwarded its Final Section 129 Determination to USTR. USTR held consultations with the appropriate congressional committees on April 25,

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20 Notice of Determination Under Section 129, 70 Fed. Reg. 22636 (May 2, 2005).

2005, and on April 27, 2005 the USTR directed Commerce to implement the Final Section 129 Determination.21 Notice of implementation appeared in the Federal Register on May 2, 2005. 70 Fed. Reg. 22636. Thus, the elaborate process provided by the URAA for responding to an adverse WTO DSB decision is complete.

The question then for this Panel is whether the preclusive effect of Sections 123 and 129 on judicial and panel review found in *Corus Staal* continues when the United States determines to implement an adverse DSB decision and the Section 123/Section 129 process is completed. *Corus Staal* does not address this point; the Section 123/Section 129 process was in course at the time of the *Corus Staal* decision. There is language in *Corus Staal,*, however, that indicates that the preclusive effect of the URAA continues "unless and until such ruling has been adopted pursuant to the specified statutory scheme." 395 F.3d at 1349. The "unless and until" limitation found in *Corus Staal* (itself an echo of the "unless and until" limitation in Section 123(g)(1) with respect to unilateral abandonment of an inconsistent agency regulation or "practice" pending consultations) suggests that the preclusion created by the URAA may terminate.

It is thus a matter of first impression for this Panel to determine whether the statutory mechanism for responding to an adverse DSB decision has been completed, and its preclusive effect has terminated. In other words, we must determine whether the statutory scheme designed by Congress in the URAA continues to preclude review of zeroing when (1) the United States has acknowledged in its Section 129 Determination that its measure is inconsistent with its Antidumping Agreement

21 The Final Section 129 Determination provides that ". . . the Department is precluded in this instance from not offsetting non-dumped sales in making weighted average-to-weighted average comparisons . . ." 70 Fed. Reg 22636 at 22639.

obligations; (2) the United States has determined that the Department should render its actions in the relevant investigation to be not inconsistent with the findings of the DSB; and (3) the Section 129 process is complete.

D. On the Non-Retroactivity of the Section 129 Determination

The new rates established in the Department's Final Section 129 Determination unambiguously apply to "unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after April 27, 2005." The Final Section 129 Determination is not before this Panel. But as the Final Section 129 Determination applies "on or after April 27, 2005," the LTFV Determination that is the subject of this review remains effective with respect to entries entered prior to April 27, 2005. This Panel will thus continue to review the original LTFV Determination under NAFTA Article 1904. The Final Section 129 Determination does not affect, and thus does not eliminate, the Department's use of zeroing in the original LTFV Determination.

We note (1) the use of the April 27, 2005 effective date for the Final Section 129 Determination and (2) the continuing effectiveness of the original LTFV determination jointly operate to make the United States' renunciation of zeroing in response to the decision of the DSB non-retroactive. We decline, however, to read into this non-retroactive outcome the presence of a deliberate Executive/Congressional decision under the Section 123/Section 129 design that would insulate the original LTFV determination from our review. In our view, such an inference would produce an

outcome that was neither expressly intended by the executive nor reasonably inferred from these provisions in the instant case.

The WTO Dispute Resolution Understanding, as did prior GATT practice, requires only prospective relief in response to a finding of an inconsistent measure. In concert, Section 129(c) expressly provides that Section 129 determinations implementing a DSU decision are prospective only:

> (c) Effects of determinations; notice of implementation
>
> (1) Effects of determinations
>
> Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. 1677]) that are entered, or withdrawn from warehouse, for consumption on or after—
>
> **(A)** in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and
>
> **(B)** in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

USTR does not have the power, under Section 129(b)(4) or any other statute, to direct the Department to implement an adverse DSB decision retroactively. As the DSU does not require retroactive implementation, there are no WTO considerations that attach to the question of retroactive implementation. In response to the WTO *Softwood Lumber* Decision, the political branches have determined to bring the United States into

compliance with the DSB's decision prospectively: this is all the DSU requires and is the only implementation that Section 129 contemplates.

The Statement of Administrative Action supports this reading of Section 129:

> [. . .] subsection 129(c)(1) provides that where determinations by . . . Commerce are implemented under subsection . . .(b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where depending on the circumstances of the case, retroactive relief may be available. SAA at 1026.

Further, we take note that the United States argued before the WTO, in *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* (WT/DS221/R), that while Section 129 provides for prospective effect in the event of implementation, it does not foreclose the possibility of retroactive effect of such implementation. In Paragraph 3.73, the United States states that it is "not aware of a scenario . . . in which Section 129(c)(1) would mandate WTO-inconsistent action [by foreclosing retrospective relief] or preclude the United States from acting in a WTO-consistent manner." Indeed, the United States cites the applicability of the *Charming Betsy* doctrine to prior determinations that continue in force in order to demonstrate that the non-retroactive character of Section 129(c)(1) does not foreclose the possibility that these prior determinations be brought into compliance with U.S. WTO obligations:

> 3.74 The meaning of section 129(c)(1) as a matter of US law is a factual question that must be answered by applying US principles of statutory construction. In this regard, US courts and agencies must recognize the longstanding and elementary principle of US statutory construction that an "act of Congress ought never to be construed to violate the law of nations if any other possible construction remains" [citation to *Charming Betsy*].

As the adoption of prospective implementation under Section 129 does not foreclose the reasonable applicability of retrospective relief, a determination by Commerce which continues in force following Section 129 implementation is, as the United States has argued before the WTO, subject to the *Charming Betsy* doctrine.

The analysis presented here might well have differed had USTR determined, after appropriate consultation, to *not* direct implementation of the DSB's ruling (by paying compensation or accepting the imposition of sanctions). In this scenario, which differs from the circumstances before us, it may well be that the Section 123/Section 129 process would then continue to preclude resort to judicial review of the determination.

By its terms, Section 123(g) limits the ability of a U.S. agency to unilaterally amend or modify a "regulation or practice" in the instance of an adverse ruling by the DSB. Section 123(g) provides:

> In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until
>
> **(A)** the appropriate congressional committees have been consulted under subsection (f) of this section;
>
> **(B)** the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;
>
> **(C)** the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

> **(D)** the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;
>
> **(E)** the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and
>
> **(F)** the final rule or other modification has been published in the Federal Register.

We note, however, that zeroing is not established by regulation. Nor is zeroing a "practice" within the sense of Section 123(g). The Statement of Administrative Action gives a special meaning to the term "practice" as used in Section 123(g). There, "practice" is defined as an "administrative practice consisting of written policy guidance of general application." SAA, p. 352. As Commerce conceded in oral argument, there is no "written policy guidance of general application" with respect to zeroing. At best, the Department applies zeroing on an ad hoc, informal basis (even though it may have done so consistently). Thus, even were we to notice that Commerce often – or even always – zeroes, this would not constitute the existence of a "practice" that would be governed by Section 123(g). There is no "final rule or other modification" required for the Department to abandon zeroing.

Rather here, the original LTFV determination (and Commerce's use of zeroing) continues to stand solely because Commerce has not determined to withdraw it. But equally, Commerce has the power to adopt a WTO-consistent interpretation. *United States – Section 129(c)(1) of the Uruguay Round Agreements Act* (WT/DS221/R) at 3.77-3.79.

In continuing to zero in this circumstance, Commerce does not enjoy the preclusive shield of Section 123/Section 129 from judicial or panel review found to exist by the CAFC in *Corus Staal*. Commerce's continued use of zeroing in this investigation (which results simply from the continuing applicability of the original determination to pre-April 27, 2005 entries) is subject to this Panel's review for lawfulness – which includes review of the determination's consistency with the demands of *Charming Betsy*.

We recognize the preclusive effect of the "statutory scheme" described by *Corus Staal,* but find that it does not operate with respect to WTO-inconsistent discretionary agency action taken prior to the effectiveness of Section 129 implementation. Once the United States has determined to implement the DSB decision and the Section 129 process is concluded, the decision by Commerce to maintain a retrospective determination that is inconsistent with the DSB decision is not shielded from the application of the *Charming Betsy* doctrine. The WTO *Softwood Lumber* Decision, which motivates our consideration of *Charming Betsy*, can no longer be described as "not adopted as per Congress's statutory scheme." Section 129 has run its course. Our resort to *Charming Betsy*, as an ordinary instance of statutory construction no way in conflicts with Section 102 [19 U.S.C. § 3512], or with Section 123 and Section 129 of the URAA [19 U.S.C. §§ 3533, 3538].

E. On *Charming Betsy*

At oral argument, the Department made the following four objections to our reconsideration of the zeroing issue:

> There are four basic points that Commerce would like to make with respect to [the zeroing] issue. First, reconsideration is not appropriate in this case. Second, Congress has adopted a comprehensive scheme for the Executive Branch in consultation with the legislative branch to determine whether and how to implement an adverse WTO report. Third, the *Charming Betsy* doctrine does not support reconsideration of [the zeroing] issue. Fourth, if despite these arguments, the panel nevertheless considers the WTO report, that report provides no persuasive guidance.

September 28, 2004 Transcript at 147.

We have dealt with the Department's first and second objections above. We now address its third and fourth arguments.

In oral argument, the Department asserted that the holding of the CAFC in *Timken* is controlling – and resort to *Charming Betsy* is foreclosed. In *Timken*, CAFC rejected a *Charming Betsy*-sourced challenge to zeroing based on the WTO DSB *EC – Bed Linen* decision.

The *EC – Bed Linen* decision did not involve a United States measure (the United States was not a party to that dispute) and dealt with an administrative review (and hence a different provision of the Antidumping Agreement), not an antidumping investigation. In contrast, the WTO *Softwood Lumber* Decision involves the use of zeroing by the United States in this very investigation and establishes its inconsistency with Article 2.4.2 of the Antidumping Agreement. Moreover, in the Final Section 129 Determination accepting and implementing the WTO *Softwood Lumber* Decision, the Department (and hence the United States) recognizes that zeroing is precluded. 70 Fed. Reg. at 22639 (May 2, 2005).

The CAFC in *Timken* did not exclude the possibility that a WTO DSB decision might conclusively establish that the Department's interpretation of the Tariff Act permitting zeroing is inconsistent with U.S. WTO obligations.22 Accordingly, there now being a definitive finding in regard to zeroing - a finding which the United States has determined to accept - and given the absence of judicial authority controlling precisely this instance, we conclude the issue of *Charming Betsy*'s applicability is open for determination by this Panel.

This usual presumption – that Congress intends its laws to comply with international obligations – is reinforced in the context of the WTO obligations. The Statement of Administrative Action accompanying the URAA (which in turn includes the statutory provision of concern here) makes clear Congress' intent that U.S. antidumping law be consistent with WTO demands "[The URAA was] "intended to bring U.S. law fully into compliance with U.S. obligations under the [WTO] agreements." SAA, H.R. Doc. No. 103-316 (1994) at 669]. And, according to 19 U.S.C. § 3512(d), the Statement of Administrative Action "is an authoritative expression of the United States concerning interpretation and application of [the WTO Agreements and the implementing statutes] in any judicial proceeding."

The Federal Circuit has found the WTO Agreements to be international legal obligations for purposes of *Charming Betsy*. *See Federall Mogul Corp. v United States*, 63 F. 3d 1572, 1581 (Fed. Cir. 1995); *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002). Although certain decisions of the Court of International

22 As noted above, the CAFC did not address the Charming Betsy argument in *Corus Staal BV v. United States* 395 F.3d 1343 (Fed. Cir. 2005).

Trade have demonstrated a reluctance to challenge agency action on *Charming Betsy* grounds involving WTO obligations, the courts were not faced with a situation in which a Department act was the very subject of a WTO DSB decision. While we note the caution expressed by the court in *SNR Roulements v. United States*, 118 F.Supp 2d 1333 (Ct. Int'l Tr. 2000), *aff'd,* 402 F.3d 1358 (Fed. Cir. 2005) , we see no statutory or other reason for disregarding *Charming Betsy*'s imperative that the relevant agencies conduct themselves consistently with the WTO Agreements absent a statutory countermand.

The United States has accepted, as a party to the WTO's Dispute Settlement Understanding, that the WTO dispute settlement process serves "to clarify the existing provisions of the [WTO] agreements . . ." Article 3(2), WTO Dispute Settlement Understanding. The WTO *Softwood Lumber* Decision has established that zeroing, as applied by the United States in this investigation, does violate the Antidumping Agreement.

Our decision does not purport to change U.S. antidumping law; rather it applies U.S. antidumping law (as appropriately interpreted through *Charming Betsy*) to agency action. DSB decisions are not directly binding on U.S. courts, nor - by implication - on NAFTA Chapter 19 binational panels. Indeed the URAA expressly provides that DSB rulings may not be grounds to set aside U.S. laws. 19 U.S.C. §3512. The limitation imposed by Section 3512, of course, only applies to statutes, not to agency action. The URAA does not render *Charming Betsy* unavailable as a rule of statutory construction. The obligations of the WTO Antidumping Agreement have been clarified in the WTO *Softwood Lumber* Decision, and that clarification was accepted by the United States in

the Final Section 129 Determination.

We continue to hold (consistent with the CAFC) that the Tariff Act is ambiguous as to zeroing. While agencies enjoy presumptions of correctness with respect to the interpretation of ambiguous statutes, their discretion is limited to reasonable interpretations by operation of *Chevron* and limited further to interpretations consistent with the international legal obligations of the United States by *Charming Betsy*. The *Charming Betsy* doctrine is clearly part of United States law which this panel is obligated (by NAFTA Article 1904) to apply. An otherwise permissible agency interpretation – in the case of an ambiguous statute - which conflicts with an international legal obligation of the United States is unlawful if there is an alternatively available interpretation that is consistent with that obligation.

The WTO DSU design anticipates that a WTO member may respond to an adverse ruling in various ways – of which renunciation of an offending measure is the preferred but not sole option. Articles 21 & 22, DSU. A WTO member wishing to maintain an inconsistent measure may effectively do so – upon negotiation of compensation or by suffering suspension of concessions. But we do not see the design of the DSU as diminishing to any extent the nature of the United States' WTO commitments as international legal obligations that – under *Charming Betsy* – restrict agency discretion.

F. Conclusion of the Panel With Respect to Zeroing

We find that the application of zeroing in this investigation is inconsistent with a

United States international obligation and, by application of the *Charming* Betsy doctrine, to be unreasonable and not in accordance with law. The DSB decision in *Softwood Lumber* establishes with authority that the resort to zeroing in this investigation is not permitted by the Antidumping Agreement. The United States effectively concedes this in its Final Section 129 Determination.

As such, the application of zeroing by the Department in this investigation conflicts with an international legal obligation of the United States. Zeroing is not mandated by the statute; rather it is discretionary agency action that is subject to the *Charming Betsy* doctrine.

CONCLUSION AND ORDER

For the reasons set forth herein, the Panel hereby concludes and orders as follows:

(1) This case is remanded to Commerce, with directions for that agency to render a negative less than fair value (LTFV) determination with respect to exports by respondent West Fraser Mills, and to revoke the antidumping duty order on *Softwood Lumber from Canada* with respect to exports by West Fraser Mills; and it is further ordered that

(2) the Panel remands this case to the Department, with instructions for the Department to recalculate the final LTFV margins for respondents other than West Fraser without regard to "zeroing. The Panel affirms Commerce's amended final LTFV determination with respect to all other issues.

The Department shall report the results of its remand determination within thirty (30) days from the date of this determination.

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Jeffery Atik

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Ivan R. Feltham

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W. Roy Hines

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John M. Peterson

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Leon Trakman