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

IN THE MATTER OF CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA: FINAL AFFIRMATIVE THREAT OF INJURY DETERMINATION	:	**Secretariat File No. USA-CDA-2002-1904-07**

SECOND REMAND DECISION OF THE PANEL

August 31, 2004

Panelists: Donald S. Affleck, Q.C.
Mark R. Joelson
Louis S. Mastriani
M. Martha Ries
Wilhelmina K. Tyler (Chair)[1]

[1] The panelists wish to express their appreciation for the excellent support received from Panelist Assistants Mark Leventhal, Esq. and Nick Ranieri, Esq.

I. INTRODUCTION

This NAFTA Binational Panel is reviewing the International Trade Commission's ("Commission") second remand determination regarding *Certain Softwood Lumber Products from Canada,* issued on June 10, 2004.[2] ("*Second Remand Determination*"). In its Second Remand Determination, the Commission found that an industry in the United States was threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value. *Second Remand Determination* at 1.

On June 30, 2004, pursuant to Rule 73(3)(a) of the North American Free Trade Agreement ("NAFTA") Article 1904 Panel Rules, challenges to the Commission's *Second Remand Determination* were filed by the following parties: (1) the Canadian Lumber Trade Alliance and its constituent associations;[3] (2) the Government of Canada, the Governments of Alberta, British Columbia, Manitoba, Ontario, and Saskatchewan, the Gouvernment du Quebec, and the Governments of the Northwest Territories and the Yukon Territory; and (3) the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, and Tembec, Inc.

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[2] The Commission issued its first remand determination on December 15, 2003. This Panel ruled on this December 15, 2003, determination on April 19, 2004 ("*First Panel Remand Decision*").

[3] The Alberta Forest Products Association, the British Columbia Lumber Trade Council. the Free Trade Lumber Council, the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association and the Quebec Lumber Manufacturers Association (collectively, "CLTA").

On July 20, 2004, pursuant to Rule 73(3)(a) of the NAFTA Article 1904 Panel Rules, the Commission and the Coalition for Fair Lumber Imports Executive Committee ("Coalition") submitted their response to the June 30, 2004 filings challenging the Commission's *Second Remand Determination*. In their July 20, 2004 response, both the Commission and the Coalition requested a hearing.

On July 29, 2004, this Panel issued an Order denying the Commission's and the Coalition's request for an oral hearing.

II. ANALYSIS

In its Second Remand Determination, the Commission has refused to follow the instructions in the First Panel Remand Decision. The Commission relies on the same record evidence that this Panel not once, but twice before, held insufficient as a matter of law to support the Commission's affirmative threat finding.[4] By the Commission's so doing, this Panel can reasonably conclude that there is no other record evidence to support the Commission's affirmative threat determination. The Commission has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel's review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process.

[4] *See* September 5, 2003, Original Panel Decision, and April 19, 2004, First Panel Remand Decision.

The Panel has articulated the appropriate standard of review in its previous decisions and incorporates these decisions by reference into this opinion. The Panel has applied this standard of review in its review of this *Second Remand Determination*. The Panel has thoroughly analyzed the Commission's views in the *Second Remand Determination*, and concluded that the Commission's decision has added nothing to its views expressed in its first remand determination. In light of the fact that there is no other record evidence to support the Commission's affirmative threat determination, this Panel further concludes that it would be an exercise in futility to remand the case to the Commission to, yet again, consider and undertake an analysis of the substantive issues. This is unfortunately the case because the Commission has made it clear that it refuses to make a negative threat finding based on the record evidence.

Accordingly, in the face of the Commission's regrettable position, this Panel specifically precludes the Commission on remand from undertaking yet another analysis of the substantive issues. As noted by the United States Supreme Court in *Florida Power & Light Co. v. United States Nuclear Regulatory Commission*, 470 U.S. 729, 744 (1985), there may the "rare circumstance" in which no remand for additional investigation or explanation is warranted. Additionally, in *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969), the Supreme Court refused to remand a case when it determined that a remand would be an "idle and useless formality."

Upon analyzing the Commission's Second Remand Determination, this Panel determines that a remand on the substantive issues would be an "idle and useless formality," as it would not result in anything but another insupportable affirmative threat of material injury finding. Hence, this case is one of those "rare circumstances" in which a remand is not warranted. The Court of International Trade ("CIT") has on occasion refused to remand where a remand would have no effect on the result of the case. For example, in *Ad Hoc Committee of Domestic Uranium Producers v. United States*, 162 F. Supp.2d 649, 655 (Ct. Int'l Trade 2001), the CIT, citing Supreme Court precedent, refused to remand a case, holding:

> . . . . [R]emand is unnecessary because the court does not find that the ITC would have arrived at a different conclusion regarding the impact of subject import volumes. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n. 6, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) (refusing to remand despite agency error of law where remand would be an "idle and useless formality"); *Illinois v. ICC*, 722 F.2d 1341, 1348-49 (7th Cir. 1983) (refusing to remand despite agency error of law because agency would not have arrived at a different conclusion); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (same).

Likewise, in *NTN Bearing Corp. of America v. United States*, 132 F. Supp.2d 1102, 1105 (Ct. Int'l Trade 2001), the CIT, again citing Supreme Court precedent, refused to remand a case, reasoning:

> Since the Court has already declared Commerce's interpretation of the law is improper, and there is no additional fact-finding to be done nor any discretionary action to be taken by Commerce, granting Torrington's request to remand the case and instruct Commerce to take action consistent with the Court's opinion would

> be "an idle and useless formality." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766-67 n. 6, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969) . . . . Accordingly, Commerce's action . . . is affirmed.

See also Ammex, Inc. v. United States, 2004 WL 1630514, at *5, n. 12 (Ct. Int'l Trade July 20, 2004) (denying a request to remand stating, "[T]he court need not remand if the remand would be 'futile' by virtue of having no effect on the result of the case."); *Former Employees of Pittsburgh Logistics Sys., Inc. v. United States Secretary of Labor*, 2003 WL 22020510, at *7 (Ct. Int'l Trade August 28, 2003) ("[T]he administrative record is adequate for a determination, and additional remand to Labor for the purpose of further reasoning on the precise question is unnecessary and would not promote the interest of efficient and speedy justice. . . . [T]he motion for remand is denied."); *PPG Industries, Inc. v. United States*, 660 F. Supp. 665, 670 (Ct. Int'l Trade 1987) ("In the instant case, any remand directing the ITA to alter the amount of deposit rates determined in the final affirmative countervailing duty order, after the 751 review has already been published establishing the countervailing duties to be assessed or deposited on future entries, would be futile since the remand could never affect the amount of the actual countervailing duty assessments nor the deposits of estimated duties."); *accord Kos Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700, 725 (3d Cir. 2004) ("Because the record could not support a contrary holding, a remand for reweighing would waste judicial resources and unnecessarily delay the proceedings further."); *Fisher v. Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) (Posner, J.) ("No principle of administrative law or common sense requires us to remand a case in quest of a

perfect opinion unless there is reason to believe that the remand might lead to a different result.").

As this Panel specifically precludes the Commission on remand to undertake yet another analysis of the substantive issues, the only remedy that is consistent with the mandate of Rule 2 of the NAFTA Article 1904 Panel Rules to secure the just, speedy review of final determinations is for this Panel to issue an Order explicitly instructing the Commission to make a determination consistent with the decision of this Panel.

III. CONCLUSION

This Panel remands this case to the Commission for the Commission to make a determination consistent with the decision of this Panel that the evidence on the record does not support a finding of threat of material injury and to make that determination within ten (10) days from the date of this Panel decision.

IV. SEPARATE VIEWS OF PANELIST MARK R. JOELSON, CONCURRING

In connection with this Panel's Remand Decision of April 19, 2004, I filed a separate concurring opinion, in which I concluded, on somewhat narrower grounds than the rest of the Panel, that the Commission's remand finding of threat of injury was not based on substantial evidence. I subsequently joined in the Panel's procedural rulings denying the Commission's requests to reopen the administrative record. We reasoned that the agency had already had ample opportunity to try to fashion an appropriate record and that the Panel had here both an obligation and a justification for imposing reasonable limitations on the prolongation of this proceeding.

This occasion, accordingly, marks the third time that the Panel finds itself reviewing an analysis by the Commission of the original evidentiary record, with the agency having each time reached the identical conclusion, based on the same evidence. In our deliberative process, the Panel has conducted two full oral hearings and considered (without page limits) numerous pages of written materials submitted to us by all concerned. For anyone to argue that the Panel's proceedings have lacked due process, as to either the parties or the agency, is untenable. Due process is not endless process.

Although the Commission's latest determination includes a lengthy admonition to the effect that the Panel is not permitted to substitute its judgment for that of the Commission (Second Remand Determ. at 9), as the Commission recognizes (id. at 8 and Response of the Investigating Authority, filed July 20, 2004,

at 20-21), the real issue in this proceeding is whether the administrative record (as cited to the Panel by the Commission) contains substantial evidence to support the agency's conclusion. For the third time, the Panel must reject the Commission's threat of injury conclusion as unsupported in this regard.

Since the Commission's latest determination essentially tracks the same issues and portions of the record which I discussed in my earlier concurring opinion (Panel Decision of April 19, 2004 at 45-50), I incorporate that opinion in full in the present opinion. Once again, the Commission's reasoning begins with the uncontested premise that "subject import volumes were already at significant levels, i.e., accounting for about 34 percent of the U.S. market" (Second Remand Determ. at 14, a finding which the Commission previously found insufficient to establish present material injury.) Again, however, the Commission is unable to point to evidence sufficient to enable it to surmount the next hurdles and fairly reach its conclusion of threat of injury.

Continuing to give the agency's view on a number of the issues due deference, I accept the Commission's findings that the domestic industry was in a vulnerable condition, that there exists a substantial (but far from complete) degree of competition between the Canadian and domestic products, and that the Commission could reasonably expect that Canadian producers would continue their export orientation toward the United States market along historical patterns. But, beyond this point in the analysis, the evidence cited by the Commission is insufficient to

support its ultimate conclusion of threat of injury, particularly in light of the implications resulting from the Commission's earlier finding of no present injury.

The Commission found that there was a likelihood of substantially increased imports of softwood lumber from Canada. Second Remand Determ. at 18. The evidence cited to support this finding is inconclusive, showing at best that the Canadian subject exports to the United States were likely to stay along historical lines, which might well involve some increase in the imminent future to maintain market share, given the anticipated strong and stable, U.S. market demand. See Second Remand Determ. at 36. While the existence of unused Canadian production capacity was undoubtedly a proper statutory factor for the Commission to weigh in its analysis, the capacity utilization data relied on to determine anticipated production lacked probative value in light of the evidence that there had been a corresponding decline in actual Canadian production of softwood lumber.

In sum, given the lack of evidence to support a finding that the domestic industry was threatened simply by the prospect of significant imminent new Canadian volume, the Commission's ultimate conclusion of threat of injury must be seen as once again heavily premised on its finding of a likelihood of adverse price effects on the domestic industry stemming from a predicted oversupply of softwood lumber by the Canadian producers. While the Commission has consistently found that the subject imports had "some" effect on prices for the domestic like product, it has never concluded that this record demonstrates that the subject imports had a "significant" effect in this regard. See USITC Pub. 3509 at 33-35; USITC Pub. 3658

at 95; Second Remand Determ. at 33. In keeping with its previous rationale, the Commission again reaches its finding of future likely price effects attributable solely to subject Canadian imports by pinning this finding on its critical, but inadequately supported, underlying determination that "U.S. Overproduction Has Been Considerably Curbed , While Canadian Oversupply Has Not." Second Remand Determ. at 46. However, there is nothing new in the Commission's treatment of the issue of oversupply which the Panel and I have previously discussed in our opinions, except for a reduced degree of reliance on the Bank of America research report. Accordingly, I rely on my previous concurring opinion in this regard. Panel Decision of April 19, 2004 at 48-50.

In my view, the question of what form the Panel's remand to the Commission should take here poses an important test not only for this particular binational panel but also, more broadly, for the efficacy and integrity of the NAFTA binational panel process. Like my colleagues on the Panel, I am mindful that the Panel's review authority over the Commission's decisions normally calls for only an affirmance or a remand for further proceedings, and not a remand instructing the Commission to enter a specific determination. On the other hand, also like my colleagues, I am equally mindful of our obligation under Rule 2 of the Rules of Procedure to bring about "the just, speedy and inexpensive review of final determinations..." of these trade disputes. We have here a very unusual situation in which the Commission has three times presented the same record evidence to support its conclusion of threat of injury, and the Panel has each time found that

evidence to be inadequate to constitute substantial evidence to support the Commission's conclusion.

The Commission has made it plain by its actions and words that it is disinclined to accept the Panel's review authority under Chapter 19 in this case. Given this situation and the extended amount of time which has already been consumed by this proceeding, for the Panel to postpone finality by issuing yet another open-ended remand instruction to the Commission would be to allow the Chapter 19 process to become a mockery and an exercise in futility. This is not an acceptable approach. Accordingly, I join the Panel in its specific instruction to the agency here.

THEREFORE, it is hereby ORDERED THAT

This case is remanded to the Commission for the Commission to make a determination consistent with the decision of this Panel that the evidence on the record does not support a finding of threat of material injury and to make that determination within ten (10) days from the date of this Panel decision.

SIGNED IN THE ORIGINAL BY:

August 31, 2004
Issue Date

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