**ARTICLE 1904 BINATIONAL PANEL REVIEW PURSUANT TO THE NORTH AMERICAN FREE TRADE AGREEMENT**

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| **IN THE MATTER OF** | : | |
| **CERTAIN SOFTWOOD LUMBER** | : | |
| **PRODUCT FROM CANADA:** | : | **Secretariat File No.** |
| **FINAL AFFIRMATIVE LESS THAN** | : | **USA-CDA-2002-1904-02** |
| **FAIR VALUE SALES DETERMINATION** | : | |

# DECISION OF THE PANEL RESPECTING MOTIONS TO DISMISS

## I. INTRODUCTION

Following investigation of a petition received from the Coalition for Fair Lumber Imports, Executive Committee, and other domestic interests, the United States Department of Commerce, International Trade Administration (ITA) published an antidumping duty order covering *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36068 (May 22, 2002). This Panel was subsequently appointed pursuant to Article 1904 of the North American Free Trade Agreement (NAFTA) to consider various challenges to ITA's affirmative determination of less than fair value (LTFV) sales, one of the predicate findings upon which the antidumping duty order was based. This Panel has issued previous opinions, upholding ITA's determination in part, and remanding aspects of the determination to ITA, the administering authority, for further proceedings.

On September 12, 2006, the U.S. Trade Representative and Canada's Minister for International Trade signed the Softwood Lumber Agreement (SLA 2006), which entered into force as amended on October 12, 2006. On October 19, 2006, ITA published in the *Federal Register* a

Notice of Revocation of the antidumping duty order against *Certain Softwood Lumber Products from Canada* [71 Fed. Reg. 61714], effective October 12, 2006. Stating that it was acting "[p]ursuant to the settlement of litigation which is a precondition for the entry into force of the SLA 2006", ITA noted that it was not only revoking the antidumping order, but also "rescinding all ongoing proceedings related to that order."

On October 12, 2006, ITA filed with the Panel a Motion to Dismiss this appeal on the ground that the revocation of the antidumping order had rendered this proceeding moot. On October 13, 2006, the Government of Canada filed a separate motion to dismiss on the same ground. Neither motion was filed with the consent of other parties to this proceeding.

On October 23, 2006, two Canadian trade associations, the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association (hereinafter "the Ontario Associations") opposed the motions to dismiss, asserting that the revocation of the antidumping order did not render this proceeding moot, and urged the Panel to decide pending motions before it, including motions seeking reconsideration of ITA's most recent remand determination.

Because the Panel concludes that the October 12, 2006 revocation of the antidumping order rendered moot this proceeding and all motions pending at the time of revocation, the Panel grants the motions to dismiss.

## II. DISCUSSION

This Panel sits in place of the United States Court of International Trade (CIT), and is bound to apply the laws of the United States in resolving this matter, pursuant to NAFTA Art.

1904.3.

Article III of the U.S. Constitution requires Federal courts to adjudicate only "actual Cases and Controversies." *Utah v. Evans*, 536 U.S. 452, 459 (2002) (quotations omitted); U.S. Const. art. III, 2. To show an actual case or controversy, litigants must "[1] allege personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted)). A trade association which has not itself suffered direct injury may assert "[associational] standing solely as the representative of its members." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975). The issue for the Panel, therefore, is whether following the revocation of the antidumping order against Canadian softwood lumber products, any justiciable case or controversy remains.

Absent certain unusual circumstances not present here, a court cannot entertain a case in which "the controversy between the parties has . . . clearly ceased to be 'definite and concrete' and no longer touches the legal relations of parties having adverse legal interests". *Defunis v. Odegaard*, 416 U.S. 312, 317 (1974) (quoting *Aetna Life Insurance Co. v Haworth* 300 U.S. 227, 240-41 (1937)). The test is whether "a present controversy exists as to which effective relief may be granted." *Associacao Dos Industriais de Cordoaria e Redes v. United States* 17 CIT 754, 759, 828 F. Supp. 978, 984 (1993). A case is moot when a reviewing court or panel no longer has the authority to offer meaningful relief to the parties, or to impose any relief which would change the parties' legal relations.

In the instant case, the revocation of the antidumping duty order against *Certain*

*Softwood Lumber Products from Canada* terminates the present controversy. Any further proceedings before this Panel which result in the complete or partial revocation of the antidumping order will not be effective, as the order will already have been revoked. The same is true to the extent that any further proceedings before this Panel might affirm that the LTFV determination was supported by substantial evidence on the record, or that the final LTFV margins determined by Commerce should be adjusted. The antidumping duty order having been revoked, there is no longer any determination or legal circumstance which this Panel's future determinations might affect.

Motions to dismiss are dispositive motions, and parties have a fixed time to respond thereto. The sole opposition to the instant motions to dismiss was filed on October 23, 2006 by counsel on behalf of Ontario Associations. The Ontario Associations do not apparently contest the revocation of the antidumping order; they do not seek from this Panel an order barring implementation of the SLA 2006, or continuing the softwood lumber antidumping order in force. Rather, they ask that this Panel continue to operate and to issue opinions and orders relating to motions that were pending before the Panel at the time the antidumping order was revoked. This we have no power to do.

The Ontario Associations assert that the SLA recognizes "the possibility of a challenge to revocation by acknowledging that a court might enjoin the liquidation of softwood lumber entries in the future." [Ontario Associations' brief at 5]. They further argue that because Commerce did not revoke the antidumping order pursuant to a statutory determination reviewable under 28 U.S.C. § 1581(c), a legal challenge to revocation would fall within the United States Court of International Trade's 28 U.S.C.§ 1581(i) "residual" jurisdiction, and might be commenced up to two years after the revocation, i.e., until October 11, 2008. Thus, the Ontario Associations argue,

the revocation of the antidumping order cannot render the instant appeal moot until October 11, 2008 "at the earliest". [*Id. at 6*].

The problem with this argument is that no party to this proceeding, including the Ontario Associations, has made application *in this proceeding* to block or set aside the revocation of the antidumping order or the implementation, in whole or in part, of SLA 2006. Furthermore, the Ontario Associations have not invited the Panel's attention to any other proceeding in which such a challenge has been, or is likely to be brought, nor has it identified the party or parties who might bring such challenge. Obviously, if the person intending such challenge is not a party to this instant proceeding, it lacks standing to make any application to this Panel for relief. If the person intending such challenge *is* a party to this proceeding, then if it wished for this Panel to continue this proceeding, it was obligated to oppose the motions to dismiss within the time permitted in the Panel's rules.

The revocation of an antidumping duty order, if not timely challenged, will render moot judicial proceedings involving the revoked order. See e.g., *American Chain Assn v. United States*, 14 CIT 666, 746 F. Supp. 116 (1990). This is particularly true when the effect of revocation is to return all cash deposits of estimated antidumping duties to importers of the merchandise in question, and no interested party has timely contested such return. As the CIT noted, "In other words, the resolution of these pending challenges can have no force since there is no underlying antidumping duty order outstanding. Thus, the only relief the court could provide would be advisory and therefore violative of the Constitution." *Id.,* 14 CIT at 669.

Here, the Ontario Associations do not assert that they, or any of their members, have any intention of challenging the revocation of the antidumping order. They have instead raised purely

hypothetical and speculative arguments, contending, for example, that "were the order reinstated in the future, all future entries would be subject to its terms, which is predicated upon the same final affirmative antidumping determination that is the subject of this case." [Ontario Associations' Brief, at 6-7]. But this does nothing more than state a hypothetical possibility that may never come to pass. It does not demonstrate the current existence of an active case or controversy before this Panel.

The Ontario Associations assert an interest in having this Panel render a final determination with regard to the issue of "zeroing". The Associations maintain that "revocation of the antidumping order pursuant to the SLA did not render moot the Canadian parties' challenge to Commerce's policy of zeroing, nor their challenge to Commerce's policy that NAFTA litigants excluded from an order are not entitled to full, retroactive' relief." [Ontario Associations' Brief at 8]. However, any further action which this Panel might direct the ITA to take with respect to either of these issues would not produce any actual relief to any of the parties, nor change the legal relations of the parties of this case. Furthermore, should there be a new antidumping order in the future, or some resuscitation of the order revoked on October 12, 2006, interested parties would presumably have full rights to contest the practice of "zeroing" or any efforts to deny them full, retroactive relief.

The Ontario Associations also argue that, notwithstanding the SLA there will at some future time "be another round of trade actions against Canadian softwood lumber, and that Commerce will apply zeroing against Canadian Parties again". [Id. at 10]. This, however, is pure supposition, and does not frame a present case or controversy. It is possible that, should a new antidumping action against Canadian softwood lumber be initiated in the future, the governing law and regulations may be vastly different from those currently in force. If "zeroing" is used, and is inconsistent with applicable legal principles at the time such future proceeding may be brought, then

interested parties will have unfettered ability to raise challenges in the context of the law then controlling. Any further decisions by this Panel concerning "zeroing", or any other issue, might be completely archaic and irrelevant on the date some future trade action is commenced.

Finally, the Ontario Associations have argued that Commerce is "obligated to comply with the Panel's instructions", and particularly its instruction that the antidumping duty order be revoked as to West Fraser Mills. As the Ontario Associations accurately note, Commerce submitted to the Panel a remand determination which failed to carry out the Panel's instruction that the antidumping order be revoked as to West Fraser. However, this matter, too, is now moot. The order has been revoked as to all parties, including West Fraser. Had West Fraser wished to continue this action to pursue revocation, it was obligated to come forward and oppose the motions to dismiss within the time provided by the Court's rules. It did not.

Because courts of the United States are constitutionally barred from issuing advisory decisions, or from taking action absent a present "case or controversy", and because this Panel sits in place of the United States Court of International Trade, we conclude that the October 12, 2006 revocation of the antidumping order against *Certain Softwood Lumber from Canada* rendered moot any unresolved issues in this proceeding. As the Panel can no longer afford effective relief with respect to the unresolved issues remaining before it, we conclude that this proceeding has been rendered moot, and we grant the motions to dismiss it on that ground.

## IV. CONCLUSION

For the reasons noted herein, the Panel concludes that this matter has been rendered moot. We grant the Motions of the Administering Authority and the Government of Canada to dismiss this proceeding, and it is so ordered.

This is the Panel's Final Action in this proceeding. Accordingly, we direct the Secretary to issue a Notice of Final Panel Action

Jeffery C.Atik

Ivan Feltham

W. Roy Hines

John M. Peterson (Chair)

Leon Trakman