

ARTICLE 1904 BINATIONAL PANEL REVIEW

pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

In the Matter of:)
)
)
) Secretariat File No.
Certain Softwood Lumber Products) USA-CDA-2005-1904-01
From Canada; Final Results of) Public Document
Countervailing Duty Administrative)
Review and Rescission of Certain)
Company-Specific Reviews (the “Final Results”))

REASONS FOR ORDER

We are concerned with a motion dated December 10, 2007 brought by the Investigating Authority, the Department of Commerce Import Administration [*hereinafter* “Commerce”] to dismiss this proceeding by reason of mootness. The Motion to Dismiss is brought in accordance with Rule 61 of the NAFTA Rules of Procedure for Article 1904 Binational Panel Reviews.

The motion is opposed by Gorman Bros. Ltd. [*hereinafter* “Gorman”]. All other parties, save Gorman, have either consented to the termination of this proceeding or do not oppose the motion, having duly received notice thereof. In particular, the Government of Canada concurs with Commerce’s request that the Panel dismiss this proceeding for the reason that there is no longer any case or controversy concerning the Final Results.

PROCEDURAL HISTORY

On May 22, 2002, Commerce published the countervailing duty order [*hereinafter* “CVD Order”] on certain softwood lumber from Canada. *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products From Canada*, as corrected, 67 FR 36,070 (Dep’t. of Commerce, May 22, 2002). The Department subsequently completed the first and second administrative reviews. *Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 69 FR 75,917

(Dep't. of Commerce, December 20, 2004)¹, and *Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 73,448 (Dep't. of Commerce, December 12, 2005). (A third and fourth administrative review were also commenced as well as a number of company-specific "expedited reviews".)

On January 19, 2005, *Requests for Panel Review* in this matter were filed by the Government of Canada and several Canadian provinces as well as numerous Canadian lumber enterprises and industry associations.

On September 12, 2006, the U.S. Trade Representative and Canada's Minister for International Trade signed the Softwood Lumber Agreement 2006 [*hereinafter* "SLA 2006"]. One of the stated conditions for SLA 2006 to take effect was the settlement of any litigation relating to the CVD Order. Accordingly, Commerce revoked the CVD Order, effective May 22, 2002, without the possibility of reinstatement. *Notice of Rescission of Countervailing Duty Reviews and Revocation of Countervailing Duty Order: Certain Softwood Lumber Products From Canada*; 71 FR 61714, 61715 (Dept't. of Commerce, October 19, 2006). And as a result of the revocation of that order, which was effective for the periods being reviewed, Commerce also rescinded all ongoing administrative proceedings related to the CVD Order including any outstanding expedited reviews. *Id.*

The Motion to Dismiss was fully briefed and by Order of the Panel dated August 8, 2008, came on for hearing on October 10, 2008. For reasons which follow, the Panel is of the view to grant Commerce's *Motion to Dismiss*.

COMMERCE'S MOTION TO DISMISS

Commerce submits that by reason of the SLA 2006 between the Governments of Canada and the United States, Commerce revoked on October 12, 2006 retroactively and without the possibility of reinstatement the underlying CVD Order on softwood lumber from Canada. *Certain Softwood Lumber Products from Canada*, 71 Fed. Reg. 61, 714-15 (Dep't. of Commerce, October 19, 2006) (Notice of Rescission of Countervailing Duty Order).

By way of way of implementation, Commerce instructed Customs and Border Protection to liquidate all entries that were subject to the CVD Orders. The Panel is informed that liquidation of all such entries has occurred and any CVD cash deposits made for such entries have been refunded to the importers of record or their designees, with interest. By reason of the above facts, Commerce submits that there is no longer any case or controversy concerning the Final Results which are the subject of Panel review and the Panel is, accordingly, without jurisdiction.

¹ See, also, *Notice of Amended Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada*, 70 FR 9,046 (Dep't. of Commerce, February 24, 2005).

Commerce submits that pursuant to Article III of the Constitution of the United States, courts, and likewise this Panel², possess jurisdiction to entertain only actual cases and controversies. *See Sec. & Exch. Comm'n v. Med. Comm. for Human Rights*, 404 U.S. 403, 407 (1972) (“lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy”). A “case is moot when the issues presented are not longer ‘live’ or the parties lack ‘a legally cognizable interest in the outcome.’” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); and *Powell v. McCormack*, 395 U.S. 486, 489 (1969)).

Commerce submits that Gorman has no legally cognizable interest in the outcome of this case since the underlying CVD Order was retroactively revoked and all entries of Canada softwood lumber were liquidated. As a result, the Panel cannot provide any relief or issue any order that will change the legal relationship of the parties and the proceeding is accordingly moot.

In support of the *Motion to Dismiss*, the Coalition for Fair Lumber Imports Executive Committee [*hereinafter* “the Coalition”] further submits that this Panel has no jurisdiction at all to continue with its review since there is no longer any final CVD determination before us. This Panel is limited to reviewing only final CVD or antidumping determinations.³

SUBMISSIONS ON BEHALF OF GORMAN

Gorman opposes the motion essentially on the ground that Commerce allegedly failed to conduct Gorman’s expedited review. Gorman argues that, if Commerce had timely conducted the expedited review and applied the proper methodology, Gorman would have received and ultimately benefited from a zero or *de minimis* CVD margin determination.

Gorman argues that a zero or *de minimis* CVD margin determination would have entitled Gorman to be placed on Annex 10 of the SLA 2006. Annex 10 comprises a list of some thirty-two (32) companies whose products are expressly excluded under Article X.1.c of the SLA 2006 from the Export Measures thereunder.

Gorman submits that six (6) companies that were granted expedited reviews and found to have zero or *de minimis* rates are all now listed in Annex 10 and accordingly excluded from the SLA 2006 Export Measures. Gorman compares itself to these six (6) companies and states that it was likewise entitled to the same result.

² NAFTA Art. 1904(3).

³ *Coalition Response to Motion to Dismiss of United State Department of Commerce Dated December 10, 2007* at 2 (citing NAFTA Art. 1904(1) and 19 USC §1516a(g)(1)).

Gorman asserts that the Panel should retain jurisdiction to be in a position to review Commerce's administrative practices in not completing expedited reviews and using allegedly unlawful methodologies. Not doing so, it contends, would dissuade companies, like Gorman, from exercising their legal rights to expedited reviews and Commerce would be licensed to persist in denying companies their legal rights.

Gorman argues that this proceeding is not moot. It claims that a request to Commerce for an expedited review now would be an exercise in futility. Moreover, it claims that, absent a decision from the Panel on the conduct of the expedited reviews, uncertainty about the legality of Commerce's practice will remain and companies like Gorman will be denied their rights because they will reasonably adjudge that Commerce will deny them legal process. Hence, because of the alleged likelihood of recurrence and the implication of recurring unlawful practice, Gorman submits that this proceeding is not moot.

Gorman also invokes the legal doctrine of collateral consequences as grounds for this proceeding not being moot. It claims that, therefore, the Panel has both jurisdiction and an ability to give an effective remedy to Gorman for Commerce's allegedly unlawfully denial of an expedited review.

Gorman relies, *inter alia*, on the United States Court of Appeals for the Federal Circuit decisions in *Gerdau Ameristeel Corp. v. United States*, 519 F.3d 1336 (Fed. Cir. 2008) and *Ad Hoc Shrimp Trade Action Committee v. United States*, 515 F.3d 1372 (Fed. Cir. 2008). Gorman argues that an appeal of an administrative review is not moot, notwithstanding the liquidation of all entries subject to that review, when adverse collateral consequences of the determination remain even though subsequent action may be required to give full effect to the decision.

Gorman therefore seeks Panel review of Commerce's allegedly unlawful determination not to complete the expedited review and not to correct its allegedly unlawful methodology. Gorman requests that it be given the final results of its expedited review, using the benchmarks that Commerce adopted in its remand determinations (before another Panel) for British Columbia, the province in which Gorman resides. Gorman asserts that those results would necessarily have resulted in a zero rate determination with the consequence of Gorman's exclusion from the revoked CVD Order and ultimate placement on the Annex 10 list as a matter of course.

Gorman concludes that a zero or *de minimis* CVD margin rate in the expedited review determination would have affirmatively required the Governments of Canada and the United States to place Gorman on the Annex 10 list and be excluded from the Export Measures of the SLA 2006 or at least provided Gorman with a legal basis on which to commence proceedings in the courts of either the United States or Canada to compel the respective governments to take that step. Gorman submits that, but for Commerce's allegedly unlawful decision not to complete the expedited review as the law requires and otherwise correct its allegedly unlawful methodology, Gorman would be free of the SLA 2006 Export Measures.

REPLY BY COMMERCE AND THE COALITION

Commerce submits that the collateral consequence doctrine is an extension of the “redressable injury” requirement for a finding of mootness, namely, that there can be no remaining injury that could be redressed by a favourable decision. The doctrine “applies where a petitioner would suffer collateral legal consequences if the actions were allowed to stand.” *Public Utilities Commission of the State of California v. United States*, 100 F.3d 1451, 1460 (9th Cir. 1996). For the doctrine to apply, the Supreme Court has stated that “throughout the litigation the plaintiff must show that he or she ‘suffered, or [was] threatened, with an actual injury traceable to the defendant and likely to be redressed by favourable judicial decision.’” *Spencer v. United States*, 523 U.S. 1, 7 (1998) (*citing Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78 (1990)).

Commerce submits that there is no injury traceable to the Final Results which could be corrected on review by the Panel. The alleged injury suffered by Gorman is not linked to any final CVD determination. It also asserts that its final CVD determination, the basis for the rescinded Order, had not included or superseded the expedited review sought by Gorman.

REASONS

The Panel agrees that it has no jurisdiction to grant Gorman any relief in this matter, including an order for completion of the expedited review. Commerce rescinded its review and revoked the CVD Order. No final CVD determination remained after the revocation and rescission. The jurisdiction of the Panel is limited solely to reviewing “final antidumping and countervailing determinations....” NAFTA Article 1904(1).⁴ Accordingly, this Panel is without power to decide the substantive matters raised by Gorman.

Gorman argues forcefully that it does, indeed, seek review of a final CVD determination, *viz.*, “Commerce’s final determination that the final results of the administrative review supersede the expedited reviews....”⁵ Gorman asserts that the expedited reviews were “subsumed within the final results of the administrative review”⁶

⁴ This Panel has the authority to review “determinations”, 19 U.S.C. §1516a(g)(2), including final results of CVD administrative reviews. 19 U.S.C. §1516a(a)(2)(B)(iii). Following the revocation of an Order, we are free only to review challenges to the revocation itself. There were no such challenges made by any Complainant in this Panel review.

⁵ Gorman’s *Reply to Coalition’s Response to U.S. Department of Commerce’s Motion to Dismiss 4*.

⁶ *Id.*

and that the final results of the administrative review in fact “constituted the final determination for the expedited reviews.”⁷

We agree with Commerce, however, that the pending expedited reviews were not subsumed or otherwise made part of the Final Results. Rather, only the existing cash deposit *rates* for *completed* expedited reviews were superseded by the Final Results’ rates. Gorman’s *pending* expedited review was not addressed by the Final Results. And even *completed* expedited reviews were only addressed by a statement in the agency record that “to the contrary, expedited review *rates*, like any other cash deposit rate, may be superseded by the final results of a subsequent administrative review.”⁸ This is the normal Commerce procedure for preliminary rates to be superseded by the rates set by the final results of an administrative review.

Moreover, even if the Panel had jurisdiction, the matter before us is not justiciable; it is moot. All the applicable entries have been liquidated and the cash deposits of duties refunded. After the SLA 2006, the CVD Order was revoked with no possibility of reinstatement. No party or participant, including Gorman, can be affected by, or is at risk from, the administrative review’s final determination which is no longer in effect.

A “case is moot when the issues presented are no longer ‘live’ or the parties lack ‘a legally cognizable interest in the outcome.’” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (quoting *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Powell v. McCormack*, 395 U.S. 486, 489 (1969)). The issues in the administrative review are no longer “live” under these circumstances. Since no party can be affected one way or the other by the final determination which Gorman asks us to review, no one has any interest in the outcome.⁹

Further, the Panel does not believe that its remand jurisdiction can in any way confer an effective remedy on Gorman in the circumstances pleaded. For example, this Panel is certainly not in a position to make any decision concerning Commerce’s policies or procedures in connection with the conduct of expedited reviews that are not the subject

⁷ *Id.* at 5. Gorman also relies upon two Commerce Department memoranda which comprise part of the agency record in this matter. See Gorman’s *Notice of Motion for Leave to File A Response to the September 10, 2008 Submissions from the Department of Commerce and the Coalition for Fair Lumber Imports* 8.

⁸ *Memorandum to James J. Jochum from Barbara Tillman*, 36 (December 13, 2004)(emphasis added) and *Memorandum to Joseph A. Spetrini from Holly A. Kuga*, 2 (July 25, 2003)(“As the GOC points out, the country-wide rate will supersede all existing company specific rates calculated in the expedited reviews.”) These are the two memoranda relied upon by Gorman.

⁹ While not binding on this Panel, two other Panels have reached a similar conclusion. *In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Less Than Fair Value Sales Determination, Decision of the Panel*, Panel No. USA-CDA-2002-1904-02 at 4-5 (January 5, 2007) and *In the Matter of Certain Softwood Lumber from Canada: Final Scope Ruling Regarding Entries Made under HTSUS 4409.10.05, Decision of the Panel*, Panel No. USA-CDA-2006-1904-05 at 11-12 (June 25, 2008).

of a “final determination”. Even then, the only remedy that is available is by way of remand and not by way of an advisory or mandatory order directing Commerce to do certain things, or refrain from doing certain things.

Gorman invokes the legal doctrine of collateral consequences and relies, *inter alia*, on the Federal Circuit’s decisions in *Gerdau Ameristeel Corp. v. United States* and *Ad Hoc Shrimp Trade Action Committee v. United States*. Gorman argues that an appeal of an administrative review is not moot, notwithstanding the liquidation of all entries subject to that review, when collateral consequences of the determination remain. The alleged collateral consequences here are the export taxes Gorman is required to pay under the SLA. Had Gorman received its expedited review, along with a zero or *de minimis* rate, it would have expected to be included in Annex 10 of the SLA 2006.

Upon a close reading, however, these decisions are distinguishable from the instant case.

In *Gerdau*, following the sixth annual administrative review, the domestic industry sought to challenge *de minimis* dumping margins on entries that had already been liquidated. It was not seeking the re-liquidation of the entries, but merely a recalculation of the *de minimis* margins to avoid revocation of the dumping order.¹⁰ The Federal Circuit found that the case was not moot in light of the “consequences of the dumping margin review apart from the duties imposed on the liquidated goods.” *Gerdau* at 1340.

The adverse collateral consequences of the dumping margin review there, however, stemmed directly from the final determination in question: the results of the sixth determination could enable a potential revocation in the future. (In fact, during the *Gerdau* appeal, Commerce *did* decide to revoke the Order based on the results of the seventh review.) And, unlike here, in *Gerdau* the final determination was still in place on appeal.

Here, the collateral consequences do not stem from the final determination at all. Commerce’s failure to have completed Gorman’s expedited review was not part of the final determination in this matter. The Panel finds that the alleged injury to Gorman is not traceable to the Final Results but rather to the application of the SLA 2006. The Panel is, therefore, unable to provide an effective remedy.

This Panel has no jurisdiction to review the SLA 2006, which is an agreement between two sovereign countries and is not a determination reviewable by a Panel under the applicable statute. Gorman’s alleged collateral consequences derive entirely from the SLA 2006 by reason of Gorman’s non-inclusion in Annex 10. It is clear that the Governments of Canada and the United States and their representatives exercised their sovereign discretion, which we are not at liberty to judge or change, in determining those

¹⁰ After three consecutive *de minimis* dumping margins, an exporter or importer can apply for revocation of an antidumping order. 19 C.F.R. §351.222(b)(2)(i).

companies that would populate the SLA's Annex 10 list. There is nothing this Panel can do to place Gorman on the Annex 10 list since that list was settled by agreement between two sovereign countries. There, accordingly, is no clear effective remedy which the Panel can provide in this regard.¹¹

The Panel refers to the Supreme Court's finding in *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992), quoting *Mills v. Green*, 159 U.S. 651, 653 (1895): "[I]f an event occurs [pending review] that makes it impossible for the court to grant 'any effective relief whatever' to a prevailing party", a case must be dismissed as moot. A "court must be able to grant effective relief, or it lacks jurisdiction and must dismiss the appeal". *Public Utilities Commission of the State of California v. United States*, 100 F.3d 1451, 1458 (9th Cir. 1996). We see no clear option for this Panel to provide any "effective relief" to Gorman.

In *Gerdau* the relief sought by the domestic industry – a recalculation of the dumping margin – was clearly within the jurisdiction and authority of the court. Because the court in *Gerdau* was able to provide meaningful relief to the appellant, the issue remained alive. Here, this Panel does not have the authority to grant the relief sought by Gorman: a remand ordering Commerce to complete the expedited review.¹² We disagree with Gorman's assertion that this Panel can remand a determination to Commerce once the determination is no longer in effect.

Nor does *Ad Hoc Shrimp Trade Action Committee* support Gorman's position. In *Ad Hoc Shrimp* the CIT had dismissed the plaintiff's appeal of a Commerce final determination excluding certain shrimp from the scope of the investigation. The CIT had held that a remand to Commerce was "futile" since the ITC would also have to act to modify its injury determination.¹³ The Federal Circuit reversed on this point since the plaintiff "has a right to have the final determination remanded to [Commerce] to correct the error, irrespective of the fact that ITC action will also be necessary before the antidumping order itself can be amended."¹⁴

¹¹ Gorman's counsel argued at the hearing that it has certain remedies it might pursue under Canadian and United States national law, but that a remand finding by Commerce of no subsidization may be necessary for at least some of the relief. *Transcript* 51-4. The Panel is in no position to consider that question or the various other factual possibilities posed by Gorman, including whether: (1) it would, in fact, receive a *de minimis* margin on remand; (2) as a result of a *de minimis* margin it would be added to Annex 10 of the SLA 2006; (3) it has viable procedural and substantive legal recourse in Canada or the United States to be added to Annex 10 and not have CVD's imposed, and (4) a Panel decision here would not have a "merely theoretical or speculative" effect. *Gerdau*, 519 F. 3d at 1341. Nor do we have the authority or jurisdiction to consider them.

¹² Gorman's *Notice of Motion for Leave to File A Response to the September 10, 2008 Submissions from the Department of Commerce and the Coalition for Fair Lumber Imports* 4-5, n. 3.

¹³ *Ad Hoc Shrimp Trade Action Committee*, 515 F.3d at 1379.

¹⁴ *Id.* at 1383.

Gorman cites that Federal Circuit decision for the proposition that this Panel can remand a final determination even where “further action . . . is required to give full effect to the decision.”¹⁵ But in *Ad Hoc Shrimp* the “further action” necessary would have been a subsequent ITC injury determination concerning the merchandise to be added on remand to the scope of the order. Such a remand to Commerce as well as the subsequent ITC action were both clearly available under the antidumping statute and the regulatory regime.

More to the point, though, *Ad Hoc Shrimp* did not involve mootness issues or the collateral consequences exception. Rather, the Federal Circuit simply held that “[a] federal court cannot avoid ruling on the legality of a government action when review of the action is otherwise properly before the court simply because there is no guarantee that fixing the error will change the ultimate result.”¹⁶ By contrast, this Panel is being asked to find an exception to the mootness doctrine by identifying the adverse collateral consequences to Gorman and taking action that must provide some “effective relief” for them. And, as we have already held, the review sought by Gorman is not even “properly before this [Panel]” unlike in *Ad Hoc Shrimp*.

CONCLUSION

Upon considering the Department of Commerce’s *Motion to Dismiss*, the responses of the Complainants thereto, and upon all other papers and proceedings before this Panel, we accordingly grant the *Motion to Dismiss*.

¹⁵ Gorman’s *Reply to Coalition’s Response to U.S. Department of Commerce’s Motion to Dismiss* 14.

¹⁶ 515 F.3d at 1382-83.

DATED: JANUARY 30, 2009

SIGNED IN THE ORIGINAL BY:

ROBERT E. RUGGERI, CHAIRMAN
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