

**ARTICLE 1904 EXTRAORDINARY CHALLENGE
PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT**

<p>IN THE MATTER OF</p> <p>CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA</p>

**Secretariat File No.
ECC-2004-1904-01USA**

**OPINION AND ORDER OF THE
EXTRAORDINARY CHALLENGE COMMITTEE**

A. INTRODUCTION

[1] This Extraordinary Challenge Committee (“ECC”) was convened pursuant to a Request filed on November 24, 2004 by the Office of the United States Trade Representative under Article 1904.13 and Annex 1904.13 of the North American Free Trade Agreement (“NAFTA”).

[2] The Request asked for an ECC to review the decisions and final order of the binational panel (“Panel”) in the softwood lumber dispute. The Panel had held that there was no substantial evidence to support the finding by the International Trade Commission (“Commission”), an administrative agency of the United States, that the importation of certain softwood lumber from Canada in the period under investigation posed a threat of material injury to an industry in the United States. After two remands to the Commission for reconsideration, the Panel remanded the matter for a third time, directing the Commission to render a decision not inconsistent with the

Panel's conclusion, namely that the evidence on the record did not support a finding of a threat of material injury.

[3] At the ECC hearing held in Washington D.C. on June 2 and 3, 2005, submissions in support of the challenge were made on behalf of the Office of the United States Trade Representative, the Commission, and the Coalition for Fair Lumber Imports ("Coalition") (collectively, "the United States Parties"). Oral submissions opposing the challenge were made on behalf of the Government of Canada and the Canadian Lumber Trade Alliance ("CLTA") (collectively, "the Canadian Parties"). In addition, oral representations were made on behalf of Mr. Louis Mastriani, whose conduct, while a member of the Panel, the United States Parties impugned, on the ground that it gave rise to an appearance of impropriety and an apprehension of bias that vitiated the Panel's decision. Written submissions were made on behalf of the above and of others, including the Government of Mexico.

[4] Having considered all of these submissions and reviewed the documentary material filed in this proceeding, the ECC has decided for the reasons that follow to deny this challenge and to affirm the order of the Panel of October 12, 2004.

B. HISTORY OF THE PROCEEDINGS

[5] The dispute over the importation of Canadian softwood lumber into the United States has a long history and its resolution is of great importance to the parties. For present purposes, however, the chronology starts with the final determination of the Commission, dated May 16,

2002 (*“Final Determination”*), holding that, from 1999 through 2001 (or, possibly, the first quarter of 2002), the importation of softwood lumber had not been shown to have caused present material injury to domestic producers, but had been shown to pose a threat of future material injury.

[6] The Commission’s positive threat determination was referred by the Canadian Parties to a binational panel. In its decision of September 5, 2003 (*“Panel Decision I”*), the Panel concluded that the Commission’s conclusion with respect to the threat of future material injury was not supported by substantial evidence. The Panel remanded the matter to the Commission to reconsider on the basis of the existing record, and gave the Commission 100 days in which to issue its redetermination. On December 15, 2003, the Commission issued its decision (*“Commission Remand Determination I”*).

[7] On April 19, 2004, the Panel rendered its second decision (*“Panel Decision II”*). The Panel was satisfied by the further analysis and explanation provided in *Commission Remand Determination I* in connection with several of the issues that it had remanded to the Commission for reconsideration. However, it also identified issues on which, in its view, substantial evidence was still lacking. It gave the Commission 21 days, or not later than May 10, 2004, to complete its review and render its redetermination. The Panel’s decision was signed on April 19, 2004, but its release was delayed until April 29, because of the complaint of bias against Panelist Mastriani.

[8] After it realized that the 21-day period for responding to the remand ran from April 19, not April 29, the Commission filed a motion on May 10, requesting the Panel to grant an extension of 73 days and permission to reopen the record to enable the Commission to seek additional information from the parties. On May 18, the Panel denied the motion, granting an extension of 9 days until May 27, 2004, and ordering the Commission not to reopen the record.

[9] On May 27, the Commission requested the Panel to reconsider *Panel Decision II* or, in the alternative, its denial of the Commission's motion. On June 2, the Panel denied the motion on procedural grounds, but extended until June 10 the time within which the Commission was required to file its response to the remand. The Commission rendered its second remand determination on June 10, 2004 ("*Commission Remand Determination II*").

[10] In a decision of August 31, 2004 ("*Panel Decision III*"), the Panel held that *Commission Remand Determination II* had provided neither new evidence from the record nor further analysis to support the Commission's findings on the issues remanded to it. Accordingly, the Panel remanded the matter to the Commission for redetermination in a manner not inconsistent with its reasons, namely, that there was no substantial evidence supporting the Commission's finding that the importation of softwood lumber was a material threat to producers in the United States.

[11] Accordingly, on September 10, 2004, the Commission entered a negative threat determination (“*Commission Remand Determination III*”) as directed by *Panel Decision III*. On October 12, 2004, the Panel affirmed *Commission Remand Determination III*.

C. THE BASES OF THE EXTRAORDINARY CHALLENGE

[12] The United States bases its challenge, and asks the Committee to vacate the Panel’s decisions and its order of October 12, 2004, on the following grounds:

- (i) the Panel’s refusal to permit the Commission to reopen the record when the case was remanded to it for the second time;
- (ii) the Panel’s failure to provide adequate time for the Commission to respond to the issues raised in *Panel Decision II*;
- (iii) the Panel’s failure to apply the substantial evidence standard when reviewing the Commission’s determinations that the importation of softwood lumber presented a threat of material injury to domestic producers;
- (iv) the Panel’s direction to the Commission in *Panel Decision III* to enter a negative threat determination; and
- (v) *Panel Decisions II* and *III*, as well as the order of the Panel, dated October 12, 2004, were vitiated by the participation of Panel member Mastriani, who had created an appearance of impropriety and a reasonable apprehension of bias by representing a client in another proceeding involving an issue that was also raised in the softwood lumber dispute, and by responding intemperately to the complaint of bias.

[13] The United States alleges that, in committing errors (i) to (iv), the Panel “manifestly exceeded its powers, authority or jurisdiction” in contravention of NAFTA Article 1904.13(a)(iii). It also alleges that, by participating in the deliberations of the Panel when a reasonable person would think that he would not be impartial, Mr. Mastriani “was guilty of bias or materially violated the rules of conduct” contrary to NAFTA Article 1904.13(a)(i). Further,

the United States asserts that each of the above alleged errors “has materially affected the Panel’s decision and threatens the integrity of the binational panel review process”, contrary to NAFTA Article 1904.13(b).

D. THE RELEVANT NAFTA PROVISIONS AND THE ROLE OF THE ECC

[14] The following provisions of the NAFTA are relevant to the functions and powers of both the binational Panel and this ECC.

North American Free Trade Agreement

Article 1904: Review of Final Antidumping and Countervailing Duty Determinations

...

2. An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.

3. The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

...

8. The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation.

...

13. Where, within a reasonable time after the panel decision is issued, an involved Party alleges that:

- (a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
- (ii) the panel seriously departed from a fundamental rule of procedure, or
- (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, and

(b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,

that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

Annex 1904.13 - Extraordinary Challenge Procedure

...

3. Committee decisions shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel. After examination of the legal and factual analysis underlying the findings and conclusions of the panel's decision in order to determine whether one of the grounds set out in Article 1904(13) has been established, and on finding that one of those grounds has been established, the committee shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee's decision; if the grounds are not established, it shall deny the challenge and, therefore, the original panel decision shall stand affirmed. If the original decision is vacated, a new panel shall be established pursuant to Annex 1901.2.

...

[15] It is agreed that, in order to succeed in their challenge, the United States Parties must satisfy each of the following three conditions.

[16] First, they must establish that the Panel committed one or more of the errors described in Article 1904.13(a). In the context of the allegations made in this case, the United States Parties must show that the Panel “manifestly exceeded its powers, authority or jurisdiction set out in”

Article 1904 or, in the case of the allegations against Mr. Mastriani, that he “was guilty of bias” or “materially violated the rules of procedure”.

[17] The ECC must determine these issues in light of Article 1904.3, the effect of which is to require the Panel to conduct its review of the Commission’s determinations in accordance with “the general legal principles” that the United States Court of International Trade (“CIT”) would apply when reviewing a decision of the Commission.

[18] Second, if an error reviewable by the ECC has been committed, and the first condition is thus satisfied, the United States Parties must establish that the error “has materially affected the decision” of the Panel. Third, if the error was material, the United States Parties must show that it also “threatens the integrity of the binational panel review process”.

[19] Together, these three limitations on the ECC’s jurisdiction give effect to the intention of the NAFTA Parties that, in the interests of the timely resolution of disputes, the ECC should apply a less intrusive level of scrutiny of panels than that applied by a domestic appellate court when deciding an appeal from a court that had reviewed a decision of an administrative agency. Rather, the ECC has the more modest, but crucially important role of correcting aberrant panel decisions and aberrant conduct by panelists. See *Live Swine from Canada*, No. ECC-93-1904-01 USA (April 8, 1993) at 7-8.

[20] Binational panels and ECCs are intended to perform different functions. This is indicated by their composition. Members of panels are, for the most part, lawyers (including judges and former judges); qualifications include a general familiarity with international trade law: Annex 1901.2(1). Members of ECCs, on the other hand, are drawn from a roster of senior judges and former judges (Annex 1904.13(1)); familiarity with international trade law is not stated to be a qualification for appointment to an ECC.

[21] While ECCs do not perform a traditional appellate court role, they are a significant element of the NAFTA dispute resolution process as a substitute for a domestic appeal court. We agree with the following description in paragraph 13 of the ECC decision in *In the Matter of Pure Magnesium from Canada*, No. ECC-2003-1904-01USA (October 7, 2004):

The extraordinary challenge procedure is not an appeal procedure. The purpose is not to correct errors of law or fact by the panel as the use of words such as “gross misconduct” and “seriously departed” and “manifestly exceeded” make clear. Rather it is a safety net to deal with mistakes that are so egregious as to undermine the functioning and acceptance of the entire Chapter 19 of NAFTA. As pointed out by the extraordinary challenge committee in *Gray Portland Cement and Clinker from Mexico*, the extraordinary challenge process is reserved for extraordinary situations. However, the bar set by NAFTA Article 1904.13 cannot be set so high that an extraordinary challenge can never succeed. Where truly egregious situations arise, the extraordinary challenge procedure must spring into action to serve its purpose of safeguarding the integrity of the binational panel review process.

[22] Since an ECC is not an appeal court, it will not necessarily substitute its view for that of a panel when deciding if the panel had committed an error described in Article 1904.13(a). To an extent, the precise scope of an ECC’s inquiry will depend on the particular grounds on which a panel’s decision is challenged.

[23] Thus, it is agreed that it is not the function of this ECC to decide if there was substantial evidence to support the Commission's finding that the importation of the goods in dispute posed a threat of material injury to domestic producers. In determining whether the Panel exceeded its authority by failing to apply the appropriate standard of review, this ECC is limited to ensuring that the Panel selected the appropriate standard of review *and* followed the review methodology that the CIT would apply in reviewing a decision of the Commission for lack of substantial evidence.

[24] As for the allegation that the Panel erred in ordering the Commission to conduct the remand reconsideration without reopening its record and to enter a negative threat determination, the ECC must decide if the Panel thereby acted manifestly in excess of its authority. On these issues, the ECC must consider whether the Panel manifestly exceeded its authority, because the law clearly forbids panels from making such orders, or, if it does not, whether the orders made in this case are so egregious as to constitute an abuse of the Panel's discretion. As for the allegation that the Panel manifestly exceeded its authority by giving the Commission insufficient time to respond to the remand in *Panel Decision II*, the ECC must decide if, in all the circumstances, the time permitted was so egregiously short as to constitute a manifest excess of authority, because the Panel could not have given any weight to one or more of the criteria governing the exercise of its discretion. On the bias issue, the ECC must determine *de novo* whether Mr. Mastriani's conduct gave rise to a reasonable apprehension of bias and vitiated the Panel's decision.

[25] If the United States Parties establish that the Panel erred in any of the ways described above, the ECC must then consider whether the error materially affected the Panel's decision and threatens the integrity of the binational review process.

E. ISSUES AND ANALYSIS

Issue 1: Did the Panel manifestly exceed its authority by denying the Commission's motion for leave to reopen the record?

[26] This issue did not arise in respect of *Panel Decision I*, even though the Panel instructed the Commission to redetermine the matter on the basis of the original record. This is because, having stated that the record was "reliable, comprehensive and complete", the Commission did not ask to reopen. The issue did arise, however, when, following the Panel's second remand for reconsideration in *Panel Decision II*, the Commission requested an extension of 73 days and permission to reopen, requests which the Panel denied.

[27] Counsel for the Commission submits that, under the general principles of federal administrative law in the United States, the CIT has no power to remand for reconsideration on the basis of the record and thus deny the Commission the opportunity to seek more information on the issues remanded to it. The decision to reopen the record is exclusively that of the Commission, the administrative agency under review. Consequently, she argued, in making an order which the CIT would have had no jurisdiction to make, the Panel manifestly exceeded its authority.

[28] In oral argument, the United States Parties relied heavily on the decision of the United States Court of Appeals for the Federal Circuit in *Nippon Steel Corp. v. ITC* (“*Nippon III*”), 345 F.3d 1379 (Fed. Cir. 2003), as authority for the proposition that, in a case like the present, the CIT would have no authority on a remand to preclude the Commission from reopening the record when making its redetermination. In particular, they referred to the last sentence in the Court’s reasons (at 1382), which states:

Whether on remand the Commission reopens the evidentiary record, while clearly within its authority, is of course solely for the Commission itself to determine.

[29] In order to evaluate the relevance of this statement to the present case, it must be read in context. Reversing a decision of the CIT, the Court held in *Nippon III* that, instead of confining itself to determining whether there was substantial evidence to support the Commission’s findings of fact, the CIT re-found facts by determining the credibility of witnesses, and by substituting its own view on issues of causation and material injury. The Court said (at 1382) that, having thus exceeded its authority as a reviewing court, the CIT

should have remanded once again for further proceedings rather than instructing entry by the Commission of a negative injury determination.

[30] *Nippon III* was therefore not a case where the Commission was instructed to reconsider and redetermine on the original record. Rather, the CIT had remanded solely for the purpose of the Commission’s entering a negative determination, without *any* further substantive reconsideration of the matter by the Commission. In contrast, in the present case the Panel instructed the Commission to respond to the remand in *Panel Decision II* by reconsidering its

determination, on the basis of the record that it had compiled, and without reopening it in order to obtain more evidence.

[31] Hence, in stating in *Nippon III* that only the Commission could decide whether to reopen the record, the Circuit Court cannot clearly be said to have had in mind a situation such as here, where the Panel remanded for reconsideration but prevented the Commission from reopening the record. The question of reopening the record was apparently not fully argued in *Nippon III*. Accordingly, the sentence from the reasons of the Federal Circuit in *Nippon III* (set out in paragraph 28 of these reasons), on which the United States Parties largely rest their case on this issue, must be regarded as *obiter dicta*, and not as controlling authority on the present facts. *Nippon III* is more relevant to Issue 4 in the present case, namely, whether the Panel manifestly exceeded its authority in *Panel Decision III* when it remanded to the Commission for the sole purpose of directing the entry of a negative threat determination.

[32] In order to establish that the Panel manifestly exceeded its authority in *Panel Decision II* when it refused to permit the Commission to reopen its record, counsel for the United States Parties also relied on *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), and *Fly v. Heitmeyer*, *supra* at 146. In these cases, the Court held that, after vacating a refusal by the FCC to issue a broadcasting licence to an applicant, the reviewing court could not preclude the FCC, on the remand, from evaluating that applicant's qualifications by comparing them with the qualifications of those who subsequently filed licence applications. Thus, in *Fly*, the Court said (at 148):

If in the Commission's judgment new evidence was necessary to discharge its duty, the fact of a previously erroneous denial should not, according to the principles enunciated in the *Pottsville* case, *ante*, bar it from access to the necessary evidence for correct judgment.

[33] Despite the apparent generality of this ruling, on closer examination of these and subsequent cases, the law cannot be said so clearly to preclude the Panel from ordering the Commission to conduct its reconsideration on the basis of the existing record that its order manifestly exceeded its jurisdiction. This may explain why, in her oral argument, counsel for the Commission identified *Nippon III* as “the controlling authority”, and gave relatively little prominence to *Pottsville* and *Fly*, and why counsel for the Coalition conceded that, in the unusual case, a binational panel may remand for reconsideration on the record.

[34] The decision in *Pottsville* may not be of universal application, since it depended, in part, on the statutory requirement that, in order to determine whether to grant a licence on grounds of “public convenience, interest or necessity”, the FCC was statutorily obliged to compare the qualifications of all applicants for a licence. Indeed, we note that the *Pottsville* ruling itself was reversed when Congress subsequently amended the legislation and required the FCC, following a reversal and remand, to reconsider the matter on the basis of the record that had been before the reviewing court, unless the court ordered otherwise: see *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971).

[35] Further, *Pottsville* and *Fly* were decided more than 60 years ago and must be considered in the light of more recent jurisprudence. We were referred to no case decided after *Pottsville* in

which it was held that, when remanding for reconsideration, a court could never order an agency not to reopen the record. As explained above, *Nippon III* was not such a case.

[36] However, it is well established that “in rare circumstances” a reviewing court may remand and direct an administrative agency to enter a particular decision: see *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) and, in the context of international trade disputes, *Independent Radionic Workers of America v. United States*, 862 F. Supp. 422 (CIT 1994), and *FAG Italia S.p.A. v. The Torrington Company*, 24 CIT 1311 (CIT 2000). If, in appropriate circumstances, a court may make such an order, *a fortiori* it would seem that it could order reconsideration on the record, a less intrusive order than a remand that precludes an agency from reconsidering at all. Further, there are cases where the CIT has stated that the Commerce Department may reopen the record unless specifically precluded from so doing, statements which appear to assume that the Court could refuse to permit reopening: see, for instance, *TNN Bearing Corp. of Am. v. United States*, 132 F. Supp. 2d 1102 (CIT 2001); *World Finer Foods, Inc. v. United States*, 120 F. Supp. 2d 1131 (CIT 2000).

[37] As further evidence that the law cannot clearly be said to preclude a binational panel from remanding for reconsideration on the record, the Canadian Parties rely on the decision by the CIT in *Nippon Steel Corp. v. ITC*, 350 F.Supp.2d 1186 (“*Nippon IV*”) (CIT 2004). They submit that this case shows that the CIT claims a discretion to order reconsideration on the record and that, consequently, in ordering the Commission not to reopen the record, the Panel in the present case cannot be said manifestly to have exceeded its legal authority. Having found

that the evidence in the Commission's record was insufficient to support its findings of fact, the CIT in *Nippon IV* remanded to the Commission for a determination of whether there was a threat of material injury, but directed (at 1222) the Commission not to reopen the record.

The court has considered whether to leave to the Commission's discretion, as it ordinarily would, the issue of reopening the record for further investigation, particularly because non-subject imports were not fully studied, but such information would not change the result. The agency has had three opportunities to investigate this matter and its attempts to obtain new supportive information on price effects have not been successful. Further, it is not fair to the Plaintiffs to delay this matter when lack of adequate investigation is not the primary problem. Accordingly, the court concludes that because the Commission is unable to obtain new evidence to significantly supplement the record, due to the passage of time and other reasons, further investigation or reconsideration in this matter is futile.

[38] However, it is not altogether clear whether these observations relate only to the Commission's present injury determination, which the CIT remanded with instructions to enter a negative determination, or whether they are also applicable to the threat determination, which, in light of *Nippon III*, the CIT decided to remand for reconsideration.

[39] In its reasons for denying the Commission's motion for an extension of 73 days and permission to reopen the record, the Panel in the present case relied on considerations similar to those referred to in *Nippon IV* to justify the CIT's decision to depart from the general practice of leaving the question of reopening to the Commission's discretion. Thus, the Panel noted that: the Commission had already had three opportunities to support its conclusion (including an initial investigation that lasted a year); there were no new issues in the remand for the Commission to address; and the Commission had not explained what information it wished to obtain on a reopening of the record. Indeed, the Commission had previously declared itself satisfied with the

reliability and completeness of its record. The Commission only specified its reasons for reopening in a subsequent motion which the Panel rejected as procedurally improper.

[40] As for the impact on the parties of the further delay that would result from a reopening of the record, the Panel noted the importance of the speedy resolution of trade disputes arising under NAFTA. It referred, in particular, to NAFTA Article 1904.8, which emphasises the importance of limiting the time permitted for a remand, a provision with no exact counterpart in the law governing proceedings before the CIT. In addition, the Panel referred to Rule 2 of the *Rules of Procedure for Article 1904 Binational Panel Reviews*, which states that panels' mandate is to secure a "just, speedy and inexpensive review". As long as the dispute in this case remains unresolved, Canadian softwood lumber exporters must deposit US\$4 million a day in estimated countervailing duties.

[41] In light of the case law referred to above (including *Nippon IV* which, admittedly, was decided after the Panel's final decision, and is currently being appealed to the Federal Circuit), and of the importance of expeditiousness in the resolution of international trade disputes arising under NAFTA, we are not persuaded that the applicable law of the United States is so clearly settled that the Panel manifestly exceeded its authority when it refused to permit the Commission to reopen the record in formulating its response. We tend to agree with the submission advanced at the hearing by counsel for the Coalition that binational NAFTA panels have a residual discretion to remand to the Commission for reconsideration on the record. However, we do not

agree that the Panel exercised its discretion on the facts before it in a manner that can be characterized as manifestly in excess of its authority.

Issue 2: Did the Panel manifestly exceed its authority by giving the Commission insufficient time to respond to *Panel Decision II*?

[42] To a large extent, the Commission bases its argument on this issue on the assumption that the Panel had no authority to preclude a reopening of the record and that the time permitted for it to respond to the remand was insufficient to enable the Commission to obtain more information. Nonetheless, even if, contrary to counsel's submission, the Panel did not exceed its authority by directing a reconsideration on the record, counsel maintained that the Panel had not given the Commission enough time to reply to *Panel Decision II*.

[43] In our view, once the possibility of the Commission's reopening its record is removed, it cannot seriously be contended that the time set by the Panel, in the exercise of its discretion, for the Commission to reconsider its decision in response to *Panel Decision II* was so egregiously short as to render the Panel's order manifestly in excess of its authority.

[44] Since the Panel gave the Commission three separate periods of time for filing its response to *Panel Decision II*, calculating the length of the remand proved controversial. Thus, counsel for the Commission submits that, although *Panel Decision II* was released on April 29, 2004, and the Commission was ultimately given until June 10 to respond, the Commission was given a total of only 28 days to respond to the remand, which, in view of the complexity of the issues, was inadequate to enable it properly to prepare its response.

[45] The Government of Canada, on the other hand, calculates that the Commission had a total of 42 days for its response (that is, the entirety of the period between April 29 and June 10) and that this was sufficient, given that the Commission's reconsideration was on the record, there were no new issues for the Commission to consider, and the Commission had had 100 days to respond to *Panel Decision I*.

[46] For present purposes, it is not necessary for the ECC to determine the precise number of days made available to the Commission to make its response. Suffice it to say that it would no doubt have been helpful to the Commission to have known from the outset the total amount of time available to it. However, the Commission's figure of 28 days is totally implausible because it is based on the fallacious assumption that the Commission could not effectively work on its response after a time limit had expired, and while its requests to the Panel for extensions were pending.

[47] In reviewing the Panel's exercise of its discretion to prescribe the time within which the Commission had to respond to *Panel Decision II*, the ECC cannot substitute its view for that of the Panel. The Panel was uniquely qualified to determine how much time the Commission should have by balancing the factors set out in Article 1904.8 in the context of the facts. In order to establish that the Panel manifestly exceeded its authority in setting the time limits, it is not enough that the ECC might have weighed those factors differently. Rather, the Commission must establish that the Panel's decision was manifestly in excess of its authority, because, for

example, it had failed to take into account a factor that it was legally bound to consider, such as the complexity of the issues involved.

[48] The factors that the Panel had to consider in exercising its discretion are contained in NAFTA Article 1904.8, which provides:

... Where a Panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the factual and legal issues involved and the nature of the panel's decision. ...

Article 1904.8 further emphasises the importance attached by NAFTA to the expeditious resolution of disputes by providing a maximum length of time that may be granted to the Commission for its response.

[49] Given the length of time already taken by the Commission in making the investigation prior to the *Final Determination* and in rendering *Commission Remand Determination I*, the relatively narrow issues to be reconsidered on the basis of the record, and panels' control of their process, the Panel cannot be said to have given so much weight to the need for expeditiousness, and so little, or no, weight to the other considerations (including the complexity of the issues), as to render its exercise of discretion manifestly in excess of its authority.

Issue 3: Did the Panel exceed its jurisdiction by failing to apply the substantial evidence standard when reviewing the Commission's findings of fact?

[50] The United States Parties argue that the Panel failed to apply the proper standard in reviewing the Commission's decision. They say the Panel incorrectly re-weighted the evidence before the Commission and substituted its view of the evidence for that of the Commission.

The Standard of Review

[51] The standard of review to be applied by the Panel is the standard of review applied by the Court of International Trade (CIT) when it reviews decisions of the Commission. See NAFTA Article 1904.3, NAFTA Annex 1911 - Country-Specific Definitions “Standard of Review” (b). That standard of review asks whether the Commission’s conclusions were supported by substantial evidence and were in accordance with law (19 U.S.C. 1516a(b)(1)(B)(i)).

[52] In applying this standard of review, United States jurisprudence establishes that a reviewing court must examine the whole record to determine whether there is relevant evidence that a reasonable mind would accept to support the decision being reviewed. In *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978 (Fed. Cir. 1994), the United States Court of Appeal for the Federal Circuit reiterated the Supreme Court’s statement in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488 (1951), and summarized the scope of the CIT’s review powers (at 985):

Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Furthermore, the Court of International Trade and this court cannot evaluate the substantiality of evidence supporting an ITC determination “merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences can be drawn. Instead, “the substantiality of evidence must take into account whatever in the record fairly detracts from its weight”. [internal citations omitted]

[53] Having regard to contradictory evidence does not mean that the conclusion under review can be rejected simply because another, inconsistent conclusion could also reasonably be drawn from the evidence. However, the conclusion under review must be supported by substantial evidence in light of the record as a whole. When reviewing for substantial evidence, a reviewing

court must also consider whether there is a rational connection between the facts found and the conclusion reached. See *Mitsubishi Materials Corp. v. U.S.*, 17 CIT 301, 315 citing *Burlington Truck Lines Inc. v. U.S.* 371 U.S. 156, 168 (1962).

[54] Having outlined the standard of review to be applied by the Panel in a review of the Commission's decision, we turn to the role of the ECC in a review of the Panel's decision. NAFTA Article 1904.13(a)(iii) provides that the ECC is to review Panel decisions to determine whether the Panel manifestly exceeded its jurisdiction by failing to apply the appropriate standard of review. Where there has been a failure to apply the appropriate standard of review amounting to a manifest excess of jurisdiction, NAFTA Article 1904.13(b) provides that the ECC must consider whether that failure has materially affected the Panel's decision and threatens the integrity of the binational panel review process.

[55] It is important to repeat that in reviewing the Panel's decision, greater deference is required of the ECC than of an appellate court. As previously noted, while the bar cannot be set so high that an Extraordinary Challenge can never succeed, it is reserved for truly egregious situations. See *Magnesium, supra*.

Panel's Finding of Inconsistency in Commission's Reasoning

[56] In its *Final Determination*, the Commission held that while subject imports from Canada had not caused a present material injury to the United States industry, they did threaten it with material injury in the future. In its present injury analysis, the Commission explained that there

was a significant volume of subject imports from Canada which were partly responsible for the oversupply that had caused prices in the United States to fall. Despite this finding, the Commission declined to make a present injury determination because the oversupply in the market was caused by both the subject imports and the domestic industry, and because Canadian market share had remained relatively stable. Therefore, it could not be said that the subject imports had a significant price effect. In particular, the Commission concluded (*Commission Final Determination* at 39):

The evidence indicates that both subject imports and domestic producers contributed to the excess supply, and thus the declining prices. We conclude that subject imports had *some* effect on prices for the domestic like products during the period of investigation, in particular due to their large share of the market. However, particularly in light of relatively stable market share maintained by subject imports over the period of investigation, we cannot conclude from this record that the subject imports had a *significant* price effect during the period of investigation. [Emphasis in original.]

[57] Turning to the threat of future material injury to the United States industry, the Commission explained that any discussion of future injury must be viewed in the context of the already significant import levels and the vulnerable state of the United States industry. The Commission noted (*Commission Final Determination* at 44) that a number of factors indicated there was likely to be a substantial increase in subject imports. These included:

Canadian producers' excess capacity and projected increases in capacity, capacity utilization and production; the export orientation of Canadian producers to the U.S. market; the increase in subject imports over the period of investigation; the effects of expiration of the SLA; subject import trends during periods when there were no import restraints; and forecasts of strong and improving demand in the U.S. market.

[58] The Commission concluded that the combination of vulnerability of the industry in the United States and the factors indicating a likely substantial increase in subject imports created a threat of future material injury to the U.S. industry. The Commission stated (*Commission Final Determination* at 47):

As discussed earlier, this substantial volume of subject imports has had some effect on prices, but the record does not lead us to find significant *present* effects. However, additional subject imports will increase the excess supply in the market, putting further downward pressure on prices. Given our finding of likely significant increases in subject import volumes, and our findings of at least moderate substitutability between subject imports and domestic product, we conclude that subject imports are likely to have a significant price depressing effect in the future.

[59] In *Panel Decision I*, the Panel rejected the Commission's threat of future injury determination for lack of substantial evidence. Among other things, the Panel noted (at 71) that the Commission was required to assess "whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices". See 19 U.S.C. Section 1677(7)(F)(i)(IV).

[60] The Panel stated that the words "are entering at prices" required the Commission to assess the available evidence regarding current prices and, on the basis of those prices, to make a reasoned prediction about the likely future effect of imports on domestic prices. However, the Panel found that the Commission had explicitly acknowledged that it lacked sufficient evidence regarding the current prices at which subject imports were entering from which it could draw conclusions regarding any likely current effect on domestic prices, much less any likely future effect on domestic prices. The Commission appears to have based its future threat determination

on volume and substitutability of imports, not on current prices. As a result, the Panel found that the Commission's finding in respect of the Price Threat Factor was not supported by substantial evidence.

[61] The Panel went on to say that, even if volume was the focus of the future threat, there was no basis in the evidence to find that increased imports from Canada would outstrip the "strong and improving demand" that the Commission found in the United States market. Moreover, unless the market share held by imports from Canada increased significantly, the future significant price depressing effect predicted by the Commission would not be attributable to Canadian imports. Because there was no significant present price effect that could be attributed solely to Canadian imports, there would be no likely future significant price effects, even if imports were to increase in absolute terms, provided that the Canadian market share continued at the same level.

[62] In *Commission Remand Determination I*, the Commission responded to the Panel's concerns by explaining that Canadian imports would be responsible for depressing prices, as the United States producers had curbed softwood lumber production, but Canadian producers had not.

[63] In *Panel Decision II*, the Panel examined the evidence relied upon by the Commission for its conclusion regarding future oversupply – a November 2001 Bank of America Forest Products Industry Research Publication. It found that this publication did not provide substantial

evidence for the Commission's inference that overproduction of softwood lumber had been curbed in the United States but would continue in Canada. The Panel observed that, when read in context, the Bank of America publication addressed only overproduction in Canada in order to secure wood chips for the production of pulp and paper. This limited reference shed little light on the relevant question of softwood lumber production for purposes of competition with the United States industry.

[64] The Panel also noted (at 49) that the Bank of America publication was subject to a broad disclaimer as to its accuracy and completeness: "[t]he information contained herein is based upon sources believed reliable, but is not guaranteed as to accuracy and does not purport to be complete and should not be relied upon as such". Given the significant qualifications on the information contained in the publication, the Panel concluded that the publication was of limited probative value to the issues in dispute.

[65] In our opinion, the Panel's analysis demonstrates that it reviewed the Commission's decision on a substantial evidence standard. The Panel set out the legal test for a finding of future threat and assessed whether the Commission's findings were rationally connected to its conclusion. In its *Final Determination*, the Commission had made no finding as to future market share and the Panel's concern with that omission was appropriate.

[66] In reviewing *Commission Remand Determination I* under the substantial evidence standard of review, the Panel was entitled to have regard for the probative value of the Bank of

America publication relied upon by the Commission. The Panel provided a reasonable explanation as to why the publication was not substantial evidence to support a finding of curbing of production in the United States but not in Canada. In the absence of substantial evidence, the record in respect of price effects and market share was the same for present injury and future threat. Since there was no substantial evidence supporting a change as to the source of oversupply or market share, it was open to the Panel to find that there was no basis for the Commission's change of view from present to future threat of material injury.

[67] Identifying a lack of rational connection between the Commission's findings and its ultimate conclusion is an application of the substantial evidence standard. This is sufficient for us to conclude that the Panel did not fail to apply the substantial evidence standard in finding that there was no substantial evidence to support a conclusion of future threat of material injury to the U.S. industry. In the absence of substantial evidence supporting the Commission's change of view, the Panel's finding of inconsistency between the Commission's finding of no present injury and its conclusion of future threat of injury would seem to be fatal to the Commission's future injury conclusion. Nonetheless, since it was strenuously argued by the United States Parties that the Panel had failed to apply the correct standard of review with respect to subsidiary findings, we will address these arguments.

United States Parties' Arguments on the Panel's Failure to Apply the Substantial Evidence Standard

Increased Import Trends

[68] Counsel for the Commission focussed on four specific examples that, in her opinion, most clearly demonstrated the failure of the Panel to apply the substantial evidence standard. First, it was argued that the Panel failed to apply the substantial evidence standard in reviewing the Commission's finding of likely increased imports based on import data from April to August 2001, a period when no import restraints were in place. Although the Panel acknowledged that the Commission's finding of likely future import trends was supported by substantial evidence, it concluded that this finding was of little significance to the Commission's ultimate conclusions. Commission counsel argues that, having found that there was substantial evidence to support the Commission's finding, the Panel was not authorized to itself weigh the significance of the evidence to its ultimate conclusions, a function reserved to the Commission.

[69] In evaluating whether the Commission has reached a rational conclusion, the Panel must have the authority to determine whether the Commission's subsidiary findings provide a reasonable basis for the Commission's ultimate conclusion, in this case, that there is a threat of future material injury. Determining whether a conclusion is rational involves assessing whether subsidiary findings logically support that conclusion. If the Panel is required to accept subsidiary findings without looking at whether they logically support the ultimate conclusion, the Panel is stripped of its ability to assess the rationality of the ultimate conclusion. We cannot agree that the Panel is so constrained.

Impact of the Softwood Lumber Agreement

[70] Counsel for the Commission argues that the Panel erred by substituting its judgment for the Commission's when the Panel determined that the Commission's finding of the Softwood Lumber Agreement's ("SLA") restraining effect on subject imports was supported by substantial evidence, but that it failed to significantly advance the Commission's findings. Commission counsel submits that, in concluding that the Commission's finding on this issue was not significant, the Panel had manifestly exceeded its jurisdiction because it had re-weighed the evidence and substituted its judgment for that of the Commission.

[71] In its *Final Determination*, the Commission found (at 45) that "the SLA appears to have restrained the volume of subject imports from Canada at least to some extent. ..." Given this restraining effect, the Commission determined that the SLA's expiry would likely lead to increases in future levels of subject imports.

[72] In *Panel Decision I*, the Panel found that the Commission did not explain how the removal of a restraint that only "appears" to have restrained the subject imports, "at least to some extent", would be likely to result in a substantial increase in subject imports. Without such explanation, the Panel found that the Commission's finding that subject imports are likely to increase substantially was unsupported by substantial evidence.

[73] In *Commission Remand Determination I*, the Commission removed the word “appears” and cited additional evidence to support a less qualified conclusion that the SLA had some restraining effect on subject imports.

[74] In *Panel Decision II*, the Panel accepted the Commission’s finding that the SLA had some restraining effect. However, the Panel observed (at 26) that “the difficulty remains that it is not possible to appraise the magnitude or impact of that effect”. The Panel concluded that, without an indication of the magnitude of the SLA’s restraining effect, the Commission’s finding on the effect of the expiry of the SLA failed to significantly advance its finding that there is a likelihood of substantial increases in the subject imports.

[75] In *Commission Remand Determination II*, the Commission stated that it was for the Commission and not the Panel to weigh the evidence as to the effect of the removal of the SLA.

[76] We agree with the Commission that the weighing of evidence is for the Commission and not the Panel. However, as we have already noted, it is open to the Panel, when applying the substantial evidence standard, to determine whether the subsidiary findings of the Commission rationally support its ultimate conclusion.

[77] To satisfy the statutory Volume Threat Factor in U.S.C. 1677(7)(F)(i)(III), the Commission’s finding must support a conclusion of a “likelihood of substantially increased imports”. It was open to the Panel to assess whether the Commission’s findings met that legal

test. The adverb “substantially” in the legal test implies a consideration of magnitude. Because the Commission originally found that the SLA appeared to have restrained imports and because it subsequently found that the SLA only had some effect without any indication of magnitude, it was not impermissible for the Panel to determine that the Commission’s finding did not support its conclusion that the SLA had a substantial effect on imports or that its removal would likely cause imports to increase substantially.

Was a 2.8% increase in volume significant?

[78] Commission counsel argues that the Panel manifestly exceeded its powers by reweighing the evidence when it refused to accept the Commission’s conclusion that 2.8% represented a significant increase in the volume of subject imports.

[79] U.S.C. Section 1677(7)(F)(i)(III) requires the Commission to consider whether there is:

a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports.

[80] In its *Final Determination*, the Commission found that the volume of subject imports from Canada increased by 2.8% from 1999 to 2001. In *Panel Decision I*, the Panel acknowledged that the Commission had found a 2.8% increase. However, it concluded (at 68) that the Commission’s findings that volume had increased by 2.8% and that “relatively stable market share [was] maintained by subject imports over the period of investigation” did not equate to the Commission’s finding of “a significant rate of increase of the volume or market

share ...” that the section requires to indicate “the likelihood of substantially increased imports”. The Panel concluded that the Commission’s finding that the Volume Threat Factor indicated threat of material injury was not, without further explanation, supported by substantial evidence.

[81] In *Commission Remand Determination I*, the Commission took issue with the Panel’s statement that it was not satisfied that a 2.8% increase was a significant rate of increase. The Commission also objected to the Panel’s reliance on the negligibility provisions in 19 U.S.C. 1677(24)(A)(i) as a guideline to evaluate whether the 2.8% increase was significant. The Commission reiterated that it considered the 2.8% increase significant.

[82] In *Panel Decision II*, the Panel observed that the Commission provided no explanation and cited no new record evidence to justify its significant rate of increase finding. As the evidence relied upon by the Commission was the same evidence as that in its *Final Determination*, the Panel concluded that the Commission had again failed to satisfy the statutory Volume Threat Factor that there is a “significant rate of increase” that indicated “a likelihood of substantially increased imports”.

[83] In *Commission Remand Determination II*, the Commission reiterated its criticism of the Panel for the Panel’s use of a guideline contained in another legislative provision to question whether 2.8% was significant. However, the Commission provided nothing further to explain why it considered that 2.8% was a significant rate of increase.

[84] In determining whether there was a likelihood of a substantial increase in imports, U.S.C.1677(7)(F)(i)(III) requires the Commission to determine whether there has been a significant rate of increase in the volume or market penetration of the subject imports to support that finding. This is a legal test. The Commission had made a bare statement that a 2.8% increase was significant. The Panel queried whether the Commission's 2.8% finding met that legal test, especially in light of the Commission's determination of a relatively stable market share for the subject imports in the same period. The Panel gave the Commission the opportunity to explain why it considered 2.8% to be significant. Rather than providing an explanation, the Commission challenged the Panel's basis for questioning its finding of significance.

[85] The Panel expressed a valid concern. Regardless of whether the Commission agreed with the guideline used by the Panel, it was still obligated to point to substantial evidence in the record and provide an explanation that supported its conclusion that 2.8% was a significant rate of increase. Given the Commission's failure to do so, the Panel did not fail to apply the appropriate standard of review.

Export Orientation

[86] Commission counsel argues that the Panel improperly substituted its judgment for that of the Commission when dealing with the Commission's finding that Canadian producers had an export orientation towards the United States.

[87] In *Panel Decision I*, the Panel held that the evidence relied upon by the Commission in its *Final Determination* regarding the export orientation of Canadian producers towards the United States did not support its conclusion of a likely substantial increase in subject imports. The Panel pointed out that Canadian producer projections cited by the Commission indicated only a minimal increase in subject imports to the United States and also projected decreases in the percentage of total Canadian exports to the United States market. Taken together, according to the Panel, these findings did not support the conclusion of substantial increases in subject imports.

[88] In *Commission Remand Determination I*, the Commission stated that it had considered the Panel's observations respecting producer projections and now discounted them because they were inconsistent with other evidence on the record. In particular, the Commission noted that, since the producer projections were inconsistent with historical evidence of export orientation, their validity was questionable.

[89] In *Panel Decision II*, the Panel rejected the Commission's explanation for discounting the producer projections. The historical evidence which now caused the Commission to discount the producer projection evidence was available when the Commission had relied on producer projections in its *Final Determination*. Thus, the Commission was required to explain why it had changed its view of the underlying facts between its *Final Determination* and *Commission Remand Determination I*, given that it was assessing the same evidence in both instances.

[90] When a Panel points out that evidence relied upon by the Commission does not support the conclusion which the Commission reaches, the usual result would be a revision of the conclusion to conform with the evidence that had been relied upon. However, there is no rule of law that in all circumstances precludes the Commission, on remand, from reassessing its consideration of the evidence and from reaffirming its original conclusion based on that reassessment. That is what has occurred here.

[91] Upon reconsidering the evidence in the *Final Determination*, the Commission decided in *Commission Remand Determination I* to give more weight to historical data than to the Canadian producers' projections. The Commission provided the following detailed explanation for its reweighing of the evidence (*Commission Remand Determination I* at 62-63):

On the other hand, the home market, which accounted for about 24% of production, and non-U.S. export markets, which accounted for about 8-9% of Canadian production, were supposed to receive substantially higher shares of projected production increases, shares wholly inconsistent with historic trends. This aspect of producers' projections reasonably caused the Commission to question their validity. Moreover, even though Canadian demand, which had declined by almost 20% from 2000 to 2001, was not forecast to return to 2000 levels, somehow home market shipments were projected to increase beyond 2000 levels. This cast producers' projections in further doubt. Their projections posited that the U.S. market would suddenly not continue to account for at least 65% of additional Canadian production, consistent with historical levels, but rather only 20% in the Canadian producers' export projections.

It is reasonable, given the evidence as a whole, for the Commission to discount the Canadian producers' unsupported expectations regarding export projections and conclude that projected increases in production would likely be distributed among the U.S. market, Canadian home market, and non-U.S. export markets in shares similar to those prevailing during the prior five years. The Parties offered no positive evidence to refute our reasonable conclusion, discounting export projections, that production increases would be distributed according to historic proportions; that is, no positive evidence, such as a new supplier contract, which would show a large share of the increased production was to shift to markets other than the U.S. market.

[92] In *Panel Decision II*, the Panel found that the Commission's rejection of Canadian exporters' projections in *Commission Remand Determination I* to be unwarranted as there was no explanation of the Commission's change in position.

[93] We do not understand what additional explanation could have been given by the Commission that would have satisfied the Panel. In this instance, the Commission provided a detailed analysis of why it preferred one piece of evidence over another. As the Commission is entitled to consider the matter afresh on remand, it was not open to the Panel to reject that detailed explanation without addressing the merits of the Commission's reasoning.

[94] In our respectful view, the substantial evidence standard did not permit the Panel to reject, without explanation, the Commission's detailed and rational explanation of its changed opinion.

Substitutability

[95] The Coalition argues that there were several examples where the Panel had exceeded its jurisdiction in failing to apply the substantial evidence standard of review. In oral argument, the Coalition focussed on two examples, which we take to be those that it considers the most egregious.

[96] The first pertains to the substitutability between production of the United States and Canadian industries. Products that are close substitutes are likely in competition, which could

lead to an affirmative injury determination. Where products are not close substitutes, competition is attenuated, likely precluding an affirmative injury determination. See *Altx, Inc. v. United States*, 211 F. Supp. 2d 1378, 2002 Ct. Int'l Trade lexis 66 at **16.

[97] On this issue, the Coalition submits that the Panel substituted its view of the evidence for that of the Commission and made credibility determinations in preferring the evidence of a witness who stated that United States and Canadian lumber was not interchangeable, over other evidence upon which the Commission relied. Accordingly, it is argued, the Panel failed to accord deference to the Commission's findings and thus failed to apply the substantial evidence standard of review.

[98] This argument fails to come to grips with the substitutability issue. In its *Final Determination*, the Commission found that on balance, subject imports of softwood lumber from Canada are at least moderately substitutable for domestically produced softwood lumber. The term "at least moderate level of substitutability" was considered by the CIT in *Altx* at 16. It was held that the word "moderate" includes the concept of "attenuated", although the reference to "at least" likely indicates that competition is only slightly attenuated rather than so attenuated as to preclude an affirmative injury determination.

[99] In *Panel Decision I*, the Panel noted the Commission's determination of "at least moderate substitutability". It also referred to evidence indicating that at least some purchasers did not consider Canadian and U.S. lumber to be close substitutes. It determined that the

Commission's conclusion that "subject imports from Canada would enter at prices likely to have a significant depressing or suppressing effect on domestic prices" was unsupported by substantial evidence, as the Commission had not considered whether and to what extent Canadian imports would serve segments of the United States market where purchasers did not consider Canadian and U.S. lumber to be close substitutes.

[100] *Commission Remand Decision I* referred to evidence supporting interchangeability between Canadian and U.S. production. However, it reaffirmed its determination of "at least moderate substitutability".

[101] In *Panel Decision II*, the Panel observed that on remand the Commission did not consider whether and to what extent its predicted increase in imports from Canada would likely serve segments of the U.S. market where purchasers do not consider Canadian and U.S. lumber to be close substitutes.

[102] The issue of whether the Panel re-weighed evidence does not arise. The question posed in the *Panel Decision I* was whether, to the extent Canadian and U.S. lumber was not considered by some purchasers to be closely substitutable – as the Commission's finding of at least moderate substitutability implied – increased imports of Canadian lumber would serve those segments of the United States market and thus limit the price impact of additional subject imports. The Commission failed to address the question that its finding implied.

[103] It was not a re-weighing of evidence for the Panel to have queried the Commission on this issue and to have pointed out that the Commission did not address it in its Remand Determinations. The Panel did not fail to apply the substantial evidence standard of review.

Demand

[104] The Coalition argues that the Panel failed to apply the substantial evidence standard of review when it refused to accept the Commission's findings regarding demand for softwood lumber products.

[105] In its *Final Determination*, the Commission cited (at 25) two industry reports, both of which indicated that demand within the United States would increase from 2001 to 2002, and again from 2002 to 2003. It was on this basis that the Commission found (at 44) demand to be "strong and improving". The Commission also relied on these reports and the increases in demand that they projected to support its finding that "subject imports are likely to increase substantially".

[106] In *Panel Decision I*, the Panel said that the Commission failed to explain how "strong and improving" demand advanced the Commission's finding that "subject imports are likely to increase substantially". The Panel found that the Commission's finding was unsupported by substantial evidence.

[107] As discussed above, the Panel also found that there was no basis in the evidence that increases in subject imports would outstrip the “strong and improving” demand in the U.S. market. Therefore, there was no basis for the Commission’s finding of threat of material injury to the U.S. industry.

[108] In *Commission Remand Determination I*, the Commission changed its assessment of demand evidence from “strong and improving” to “strong (but relatively flat) (at 77)” or “strong but relatively stable”(at 79). In so doing, it incorporated its findings on demand from its *Final Determination* but cited no other record evidence.

[109] In *Panel Decision II*, the Panel observed that the record evidence relied on by the Commission had caused the Commission to find that demand was strong and improving in its *Final Determination*. Without an explanation, it was not clear to the Panel how that same evidence could support a different finding – strong but relatively flat or stable. The Panel therefore found that the Commission’s changed finding of “strong but relatively stable” was unsupported by substantial evidence.

[110] In *Commission Remand Determination II*, the Commission said (at 36): “We did not change our findings regarding the demand forecasts on remand as the Panel contends”. It explained that, in its view, demand was projected to remain relatively unchanged in 2002, but to increase in 2003. It concluded (at 39): “subject imports would continue to play an important role in the U.S. market, and conditions in the market indicate there would likely continue to be

increases in such imports”. The Commission still did not explain how its forecast of demand supported its view that “subject imports are likely to increase substantially”.

[111] In *Panel Decision III*, the Panel stated (at 3): “In its second Remand Determination, the Commission has refused to follow the instructions in the first Panel Remand Decision”.

[112] The Commission’s *Final Determination* finding that a strong and improving demand in the United States would be a cause for the subject imports to increase substantially was simply an unsupported assertion. The Panel was entitled, on the substantial evidence standard, to remit the matter to the Commission for an explanation.

[113] The words used in *Commission Remand Determination I*, “strong (but relatively flat)” or “strong but relatively stable”, are indeed different from “strong and improving”. The Commission on remand is entitled to change its view of the evidence. However, it did not explain why it did so in *Commission Remand Determination I*. Instead it simply referred to the same evidence upon which it based its “strong but improving” finding in its *Final Determination*. When reviewing *Commission Remand Determination I* on the substantial evidence standard, the Panel was entitled to find that, in the absence of an explanation, the Commission’s change of view from “strong and improving” to “strong (but relatively flat)” or “strong but relatively stable” was unsupported by substantial evidence. Moreover, nothing in *Commission Remand Determination I* responded to the Panel’s request for an explanation as to

how demand, whether it was “strong and improving” or “strong but relatively stable” supported a conclusion that either would cause subject imports to increase substantially.

[114] Whether or not the Commission, as it asserted in *Commission Remand Determination II*, had changed its view of demand has turned into an exercise in semantics. Clearly, a finding of improving is different from a finding of relatively flat or relatively stable. However, *Commission Remand Determination II* appears to be saying both – relatively flat or stable in 2002 and improving in 2003. If, as the Commission has found, demand will improve in 2003, the Panel cannot be said to be substituting its view for that of the Commission when it said that the record evidence indicated demand would be strong and improving.

[115] Be that as it may, the fundamental question asked by the Panel was how strong and improving demand (or even strong but stable demand) in the United States would cause subject imports to increase substantially, which is a consideration that goes to the conclusion of whether there is a material threat to the United States industry. Neither the Commission’s forecast of demand nor anything else in *Commission Remand Determination II* provides such an explanation. In our view, the Panel was justified in *Panel Decision III* to find that the Commission had refused to follow the Panel’s instructions in *Panel Decision I*. As a result, the finding in *Panel Decision I*, that there was no substantial evidence for the Commission’s finding in its *Final Determination* that strong and improving demand in the United States would be a cause for “subject imports to increase substantially” remains justified. There has been no failure to apply the correct standard of review by the Panel on this issue.

Conclusion

[116] We have found that the Panel failed to apply the substantial evidence standard of review in respect of the issue of export orientation. We need not decide whether the Panel manifestly exceeded its authority when, in a complex case, it failed to apply the appropriate standard to one, subsidiary finding. This is because the Panel's error did not materially affect its decision.

[117] An error is material if it might reasonably be thought to have changed the Panel's ultimate decision. In *Magnesium, supra*, the ECC based its conclusion that the Panel's failure in that case to apply the correct standard of review affected its decision because of the "frequency and extent of the various speculations, extrapolations, assumptions and assumption-based conclusions in its decision.(at 8)"

[118] That is not the case here. The Panel's error applies to only one component of the Commission's subsidiary finding of a substantial increase in subject imports. Even if this constituted substantial evidence of a likely substantial increase in subject imports, this finding alone, absent valid price effect and market share determinations, does not lead to the Commission's ultimate conclusion of threat of material injury to the United States industry. Hence, it is not an error that goes to the fundamental determination necessary to be made.

[119] For these reasons, we are not satisfied that the Panel's error materially affected its review of the Commission's Determinations. It is therefore unnecessary for us to deal with whether the error threatens the integrity of the binational panel review process.

Issue 4: Did the Panel exceed its authority in *Panel Decision III* by directing the Commission to enter a negative threat determination?

[120] In *Panel Decision III*, the Panel remanded the case and directed (at 7) the Commission to make, within 10 days, “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”.

[121] The United States Parties initially took the position that, because fact-finding was exclusively within the jurisdiction of the Commission, the Panel had no power to direct the Commission to enter a particular determination after a remand for lack of substantial evidence when there were still live issues to be decided. However, an obvious difficulty with this argument is that it allows for the possibility of never-ending remands for reconsideration. In the absence of any satisfactory legal answer to this problem, counsel for the Office of the United States Trade Representative ultimately modified his position by submitting that a panel could cut short the process by directing a particular determination, if the Commission were intransigent by unreasonably insisting that a resolved issue was still alive. However, this was not, he said, our case.

[122] NAFTA Article 1904.8 confers on panels the power to “uphold the final determination or remand it for action not inconsistent with a panel decision”. Despite the lack of express restrictions on the remand power (see *In the Matter of Fresh, Chilled or Frozen Pork from Canada*, (“Pork”) No. ECC-91-1904-01USA, (June 14, 1991) at 15), it is agreed that a panel’s power is similar to that of the CIT, which, like other courts performing judicial review functions, is *normally* limited to remanding an administrative agency’s decision for reconsideration in a

manner not inconsistent with the court's decision, and does not authorize the court to, in effect, reverse the agency's decision: see *SEC v. Chenery Corp.* 318 U.S. 80 (1943).

[123] However, it is also clear that a court need not remand when to do so “would be an idle and useless formality”, and that “*Chenery* does not require that we convert judicial review of agency action into a ping-pong game”: *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 767 note 6 (1969), *per* Brennan J.. Hence, it is common ground that, “in rare circumstances”, a court may direct the agency under review to enter a particular decision: *Florida Power and Light Co.*, *supra* at 744. None of the cases cited to us excludes from the category of “rare circumstances” situations in which the reviewing court has remanded for lack of substantial evidence. Consequently, in the absence of clear case law on this point, *Panel Decision III* cannot be characterized as manifestly in excess of the Panel's authority.

[124] The United States Parties rely on *Nippon III*, *supra*, to support their contention that, in the present case, the Panel exceeded its authority by directing the Commission to enter a negative threat determination. However, in *Nippon III* the Federal Circuit stated (at 1381) that the CIT had to remand to the Commission for reconsideration because the CIT had exceeded its authority as a reviewing court by “refinding the facts ... or interposing its own determinations on causation and material injury itself”.

[125] In the present case, in contrast, we have decided that, with the single exception of export orientation, the Panel did not fail to apply the substantial evidence standard to the Commission's

findings of fact, and thus did not manifestly exceed its authority. Whether or not the Panel's failure to apply the substantial evidence standard to the Commission's finding on export orientation constitutes a manifest exceeding of authority (a question we need not decide), it did not materially affect the Panel's decision.

[126] *Nippon IV, supra*, would seem closer to the facts of the present case, in that the CIT remanded a case to the Commission with instructions to issue a negative injury determination after the Commission had failed to satisfy the CIT that its findings were supported by substantial evidence, despite having had three opportunities to do so. Having concluded (at 1222) that "further ... reconsideration in this matter is futile", the CIT said that its statutory remedial powers should not be interpreted so narrowly as to give rise to "endlessly futile remands", a situation, it reasoned, that could have been intended by neither Congress nor the Federal Circuit. However, having had the benefit of the Federal Circuit's decision in *Nippon III*, the CIT in *Nippon IV* decided, in light of that decision, to remand for reconsideration the Commission's threat determination, while reiterating its view (at 1222, note 80) that "a remand with specific instructions would appear consistent with case law and statute".

[127] Although the Panel issued *Panel Decision III* before *Nippon IV* was decided, it also defined (at 4) its discretion as limited to "rare circumstances" and based its decision to remand with instructions to enter a negative threat determination on factors similar to those relied on by the CIT in *Nippon IV* to explain its refusal to remand for reconsideration the Commission's injury determination. Thus, the Panel based its finding that a further remand for reconsideration

would be futile on the ground that, having had three opportunities to go through the record, the Commission was unlikely to come up with additional evidence or analysis, and that the Commission appeared unwilling to accept the Panel's review authority. In unusually blunt language, the Panel concluded (at 3):

The Commission had 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, and severely undermines the entire Chapter 19 panel review process.

Finally, the Panel stated (at 7) that, in these circumstances, a directed determination was the only remedy that was consistent with its mandate under Rule 2 of the NAFTA Panel Rules of Procedure to secure "the just, speedy and inexpensive review" of trade disputes.

[128] In concurring reasons, Panelist Mark R. Joelson carefully detailed what he saw as the shortcomings of *Commission Remand Determination II* and added (at 12) that, to remand the case again to the Commission for reconsideration, would "be to allow the Chapter 19 process to become a mockery and an exercise in futility".

[129] Since the ECC's function is confined to deciding whether the Panel manifestly exceeded its authority, we may not second guess its conclusion that remanding to the Commission for another reconsideration was futile. In our view, it is sufficient for us to find that it was open to the Panel on the law and the facts before it to reach the conclusion that it did. We conclude that, since the Commission's review was confined to the record and that it had the benefit of submissions of the parties, it was not unreasonable for the Panel to conclude that the Commission was unlikely to be able to make good the deficiencies that the Panel had identified

in the Commission's reasons, even though the Commission had satisfied the Panel that some of the findings identified in *Panel Decision I* were in fact supported by substantial evidence.

[130] The Panel's conclusion in *Panel Decision III* that the Commission refused to accept its review authority is supported by the Commission's insistence in its reasons in *Commission Remand Determination II* that the Panel had overstepped its authority by finding the facts for itself and by substituting its view of the facts for that of the Commission. If a finding of "intransigence" were required before a panel could direct the Commission to enter a particular decision, such a finding could reasonably be made on the facts before the Panel in this case. That the Circuit Court in *Nippon III, supra*, concluded (at 1382) that, unlike the CIT, it was satisfied that the Commission could and would respond, does not render irrational the Panel's opposite conclusion in the present case. Each case is fact-specific.

[131] Lastly, this is not the first time that this issue has arisen before an ECC. The ECC in *Pork, supra*, held (at 15-16) that the Panel had not manifestly exceeded its authority on the facts of that case by remanding for action by the Commission that was consistent with the Panel's finding that the Commission's decision was not supported by substantial evidence.

[132] In brief, we conclude that, in view of the discretion of reviewing courts in the United States, including the CIT, to remand with specific instructions "in rare circumstances", and the importance attached by NAFTA to the expeditious resolution of disputes, the Panel cannot be said in *Panel Decision III* manifestly to have exceeded its authority on the facts before it when it

remanded to the Commission with instructions to enter a decision consistent with its decision that the evidence on the record does not support a threat of material injury.

Issue 5: Did Panelist Mastriani Materially Violate the NAFTA Code of Conduct?

[133] The United States Parties allege that Panelist Louis Mastriani violated the *NAFTA Code of Conduct for Dispute Settlement Procedures under Chapters 19 and 20*. It is argued that Mr. Mastriani's conduct created an appearance of impropriety or an apprehension of bias and that he failed to disclose a conflict to the NAFTA Secretariat.

Article 1904.13(a)(i) and (b) states:

13. Where, within a reasonable time after the panel decision is issued, an involved Party alleges that:

(a) (i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise **materially violated the rules of conduct**,

...

(b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,

that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13. [Emphasis added.]

[134] The rules of conduct referred to in Article 1904.13(a)(i) are the rules outlined in the NAFTA Code of Conduct. Article I of the Code of Conduct defines binational panel members' essential responsibilities in the dispute resolution process: "to avoid impropriety and the appearance of impropriety and [to] observe high standards of conduct so that the integrity and impartiality of the process is preserved".

[135] The Introductory Note to Article II highlights the governing principle of the Code of

Conduct:

... a candidate or member must disclose the existence of any interest, relationship or matter that is likely to affect the candidate's or member's independence or impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias. An appearance of impropriety or an apprehension of bias is created where a reasonable person, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, would conclude that a candidate's or member's ability to carry out the duties with integrity, impartiality and competence is impaired.

[136] Allegations of the violation of the Code of Conduct by a Panel member are considered by the Extraordinary Challenge Committee *de novo*. Unlike the ECC's review function, in which the laws of the importing country are to apply (see NAFTA Article 1904.3), with respect to this issue, the jurisprudence of both the United States and Canada are to be considered in determining whether there has been compliance with the Code of Conduct. In this case, there is no conflict.

[137] The United States rule – appearance of impropriety – is similar to the Canadian standard – reasonable apprehension of bias. The NAFTA Code of Conduct closely parallels the words of Canon 2A of the United States Judiciary Policies and Procedures: Code of Conduct, which states in relevant part:

The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities where integrity, impartiality, and competence is impaired.

[138] Similar words are used in Canadian jurisprudence. In *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, de Grandpré J. (dissenting) stated (at 394):

The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?” Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?

Although de Grandpré J. wrote in dissent, this passage has become the accepted test for apprehension of bias in Canada. See, for example, *Weywaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paras. 60 and 76. The NAFTA Code of Conduct reflects the test for apprehension of bias used in both Canada and the United States.

[139] Both in the United States and Canada, allegations of bias against an adjudicator are most serious. Therefore, the ECC must examine them in detail. See *Weywaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at para. 2 and *Aetna Life Insurance Co. v. Lavoie et al.*, 475 U.S. 813, 826-827 (1986).

Facts

[140] On May 16, 2002, the Commission issued its *Final Determination* in this case (*Lumber*). Several parties sought review of this determination. On January 7, 2003, a five-member Binational Review Panel was established. Mr. Mastriani was one of three U.S.-appointed panelists. On September 5, 2003, the Panel issued *Panel Decision I*, remanding certain issues to the Commission.

[141] On November 26, 2003, Mr. Mastriani, as counsel, entered an appearance on behalf of a client in the Commission's *Hand Trucks from China* (Inv. No. 731-TA-1059) investigation. On December 10, 2003, he filed a brief in *Hand Trucks*.

[142] On December 15, 2003, the Commission issued *Commission Remand Determination I in Lumber*, review of which was immediately requested by several parties. On February 25, 2004, the Panel held an oral hearing with regard to the *Commission Remand Determination I*.

[143] The Coalition says that some time in March 2004, it became aware of Mr. Mastriani's involvement in the *Hand Trucks* investigation. In both *Lumber* and *Hand Trucks*, the question of export orientation as a factor to consider in determining threat to the U.S. industry arose. In *Lumber*, an issue was whether evidence of historic data or Canadian producers' projections which were inconsistent should be the basis of a finding in respect of export orientation.

[144] In *Hand Trucks*, Mr. Mastriani's submission to the Commission was that China's producers' projections demonstrated that Chinese exports were increasingly being sold to other export markets. Therefore, the Commission should find that increased production capacity in China did not pose an imminent threat of substantially increased imports into the United States. Because of the position he was advocating in *Hand Trucks*, the Coalition submits that it apprehended that Mr. Mastriani may have been motivated to find that Canadian producer projections, rather than historic data, should be the basis of the export orientation finding in *Lumber*. He could then rely upon that finding as a precedent or at least as being of persuasive

effect in *Hand Trucks*. In the view of the Coalition, this gave rise to an appearance of impropriety or a reasonable apprehension of bias.

[145] The Coalition raised this concern with the office of the United States Trade Representative. On April 8, 2004, a senior official in the office of the U.S. Trade Representative raised with his Canadian counterpart the concern over Mr. Mastriani's involvement in *Hand Trucks*. Canada advised the U.S. that any such concerns should be advanced under Rule 43 of the NAFTA *Rules of Procedure for Article 1904 Binational Panel Reviews* and the accompanying *Procedures under Rule 43 of the Rules of Procedure for Article 1904 Binational Panel Reviews and the Handling of Supplementary Disclosure Statements and Supplementary Disclosures Made under Subparagraphs B and C Respectively of Article II of the NAFTA Code of Conduct* ("Rule 43 Guidelines").

[146] Rule 43 and its Guidelines require involved Parties to first consult on Code of Conduct concerns and to remove panelists only by agreement. While the U.S. Government was of the view that Mr. Mastriani's involvement in *Hand Trucks* suggested an appearance of impropriety or an apprehension of bias, the Government of Canada was not. Consequently, there was no agreement that Mr. Mastriani should be removed as a member of the Panel.

[147] On April 19, 2004, the Coalition filed a Notification with the U.S. NAFTA Secretariat under Rule 43, asking that Mr. Mastriani be recused. In its Notification, the Coalition asserted that Mr. Mastriani's involvement in *Hand Trucks* created an appearance of impropriety because,

as a *Lumber* panelist, Mr. Mastriani was in a position to create a favourable precedent concerning the evidentiary value of producers' export projections. According to the Coalition, such a precedent would benefit Mr. Mastriani's client in the *Hand Trucks* proceeding.

[148] The Coalition made similar allegations concerning Mr. Mastriani's representation of a party in the Commission's *Outboard Engines from Japan* (Inv. No. 731-TA-1069) investigation. The Coalition also alleged that, after being named a panelist in *Lumber*, Mr. Mastriani "acquired a 'financial interest that is likely to affect [his] impartiality or that might reasonably create an appearance of impropriety or an apprehension of bias'". The allegations respecting *Outboard Engines* and financial interest were not pursued, initially, or before this ECC, by the U.S. Government.

[149] Also on April 19, 2004, the Panel transmitted *Panel Decision II* to the U.S. NAFTA Secretariat. The Parties asked that the Secretariat refrain from publicly releasing the decision during the process dealing with the allegations against Mr. Mastriani.

[150] On April 26, 2004, at the request of the United States and Canadian Governments, the U.S. NAFTA Secretary wrote to Mr. Mastriani seeking his response to the Rule 43 Notification. The letter assured Mr. Mastriani that the matter was "being treated in the strictest confidence". He was given until the end of business on April 28 to respond.

[151] On April 27, 2004, Steven Chase, a reporter for a Canadian newspaper, *The Globe and Mail*, contacted Mr. Mastriani, seeking his comments on the Rule 43 Notification. It is not known how the Rule 43 Notification came to the attention of Mr. Chase. Both the U.S. and Canada agree that it is likely that during their discussions, Mr. Chase informed Mr. Mastriani that the Coalition was the source of the allegations.

[152] On April 28, 2004, Mr. Chase's article appeared in *The Globe and Mail*. The article described the Coalition's Rule 43 Notification and identified Mr. Mastriani as the target of the Notification and the Coalition as the source of the allegation of apprehension of bias. On the same day, Mr. Mastriani submitted his response to the Rule 43 Notification, vigorously denying the accusation of impropriety. Although he marked the letter "Public Document", he addressed it only to the U.S. NAFTA Secretary and copied it to the other four Panel members.

[153] On April 29, 2004, the U.S. NAFTA Secretary released *Panel Decision II* (dated April 19, 2004) to all participants and the Commission. By telephone on April 29 and by confirming letter dated April 30, the U.S. NAFTA Secretary informed the Coalition that removal of a Panelist may only occur where the Parties agree, which they did not in this case. Therefore, the Canadian and U.S. Governments would be taking no further action before the Panel on the Coalition's Rule 43 Notification.

[154] The allegations of the impropriety and apprehension of bias now come before this ECC for determination *de novo*.

The Issues

[155] There are two bases for the United States Parties' allegations of appearance of impropriety or apprehension of bias arguments: first, Mr. Mastriani's involvement as counsel in *Hand Trucks*; second, Mr. Mastriani's April 28, 2004 response to the Rule 43 Notification, asking that he be recused.

Hand Trucks

[156] In anti-dumping or countervailing duty cases in which a threat of material injury to a United States industry is at issue, the export orientation of the foreign producers must be considered by the Commission (see U.S.C. 1977(7) F(i)(II)). In both this case and *Hand Trucks*, the question was whether, when historical data from government sources and projections of future imports coming from producers' questionnaires are in conflict, which is the more reliable predictor of a threat of material injury to the United States industry. As counsel in *Hand Trucks*, Mr. Mastriani advocated that Chinese producer projections should be relied upon. The United States Parties say that, since a similar issue arose in *Lumber*, there is a reasonable apprehension that Mr. Mastriani would form a view that would support the position he was advocating in *Hand Trucks*. Put another way, there was a reasonable apprehension that Mr. Mastriani would reject reliance on historical data in this case because that would undermine the position he was advocating in *Hand Trucks*.

[157] Unlike the ECC, which is to be composed of judges or retired judges, panels may be composed not only of judges but also of persons in the legal or business community. NAFTA

Annex 1901.2 provides that, among other things, candidates for panels shall be chosen by each country on the basis of their “general familiarity with international trade law”. On the U.S. roster of 72 individuals for binational panels, 50 are private practitioners and 15 are professors. Only one is a retired judge. It is therefore expected that practising trade lawyers will be selected as members of panels because of their particular expertise.

[158] It is also a reasonable expectation that, at the broadest level, there may be an overlap between issues when a lawyer is acting as a member of a panel and, at the same time, is acting as counsel in another case. However, simply because both are anti-dumping or countervailing duty cases does not give rise to an appearance of impropriety or a reasonable apprehension of bias. It is necessary to look carefully at the facts of each case to determine whether such appearance or apprehension arises.

[159] Having regard to the circumstances here, the concern expressed by the United States Parties is unfounded. Whether historical data or producer projections are more reliable predictors of threat of material injury to the relevant United States industry will depend on the evidence in each case. Unless the facts are very close, whether historical evidence is relied upon by the Commission in one case or producer projections are relied upon in another, does not create a precedent or even persuasive authority for another case.

[160] Obviously, we do not say that an appearance of impropriety or a reasonable apprehension of bias could never arise where a lawyer acts as a panelist in one case and as an advocate in

another. We will not speculate as to all the circumstances that could give rise to such a reasonable apprehension. For the purposes of this case, it is only necessary to observe that, as between this case and *Hand Trucks*, the products are entirely different, the sources of the imports are different and the time periods in question are different. These differences underscore why a finding on the choice of historical data or producer projections in *Lumber* could have no bearing on *Hand Trucks*.

[161] The United States Parties submit that an appearance of impropriety or apprehension of bias arises from the fact that Mr. Mastriani asked no questions on the issue of export orientation in the Panel's first hearing in June 2003, but dominated the questioning on this issue in the February 25, 2004 hearing, after he had taken on the representation as counsel in *Hand Trucks*. The inference we are asked to draw is that Mr. Mastriani's position as counsel in *Hand Trucks* motivated his questioning at the February 25, 2004 hearing.

[162] This argument is also without merit. We have found that nothing in this case in respect of export orientation could have any bearing on *Hand Trucks*. Whatever may have caused Mr. Mastriani to ask questions about export orientation at the February 25, 2004 hearing, it could not have any relation to the position he was advocating in *Hand Trucks*. Further, we do not read the questions that he asked as evidencing a preconceived or unfounded view of the export orientation issue.

[163] The United States Parties argue that Mr. Mastriani failed to comply with the NAFTA Panelists' Code of Conduct requirements for disclosure. Because we have found nothing that might reasonably create an appearance of impropriety or apprehension of bias and no conflict between Mr. Mastriani's participation in the Panel in *Lumber* and his role as counsel in *Hand Trucks* that was likely to affect his independence or impartiality in *Lumber*, there is no basis for the suggestion that he failed to comply with the disclosure requirements of the Code of Conduct.

The April 28, 2004 Letter

[164] We turn to Mr. Mastriani's April 28, 2004 response to the Rule 43 Notification of the Coalition. The United States parties assert that this response itself gives rise to a reasonable apprehension of bias. Five arguments are made:

1. Mr. Mastriani attributed the Rule 43 Notification to the Coalition without any evidence to support that assumption;
2. Mr. Mastriani accused the Coalition of attempting to delay the issuance of the Panel's second decision without evidence to support that assumption;
3. Mr. Mastriani assumed, without evidentiary foundation, that someone in the United States released the confidential Rule 43 Notification to the press;
4. Mr. Mastriani released his response publicly, contrary to the Code of Conduct; and
5. Mr. Mastriani used intemperate language in the letter.

[165] To determine whether the letter gives rise to an appearance of impropriety or an apprehension of bias requires a consideration of the circumstances in which it was written. It was not an unsolicited response and was not written voluntarily. Mr. Mastriani was informed of the Rule 43 Notification by the April 26, 2004, U.S. NAFTA Secretary's letter at the close of

business on April 26. It is some eleven single-spaced pages including annexes. The letter summarized the views of the Governments of Canada and the United States and the annexes contained excerpts from the Rule 43 Notification. The name of the complainant was not included. The letter requested Mr. Mastriani's response by the close of business on April 28, 2004.

[166] On April 27, Mr. Mastriani was contacted by the reporter Stephen Chase. Mr. Chase sought Mr. Mastriani's comments on the charges contained in the Rule 43 Notification. On April 28, an article appeared in *The Globe and Mail* identifying Mr. Mastriani as the subject of the Notification and indicating that the Notification had been filed by the "U.S. timber lobby". Mr. Mastriani saw the article on the morning of April 28 as he was preparing his response to the letter from the NAFTA Secretariat.

[167] Mr. Mastriani submitted a response of over seven single-spaced pages by the close of business on April 28, 2004.

[168] The sentences in the Response that are pertinent to the allegations are the following:

[t]hese allegations ... seem to be an attempt by the Coalition for Fair Lumber Imports Executive Committee ("Coalition") to prevent the release of the already signed NAFTA remand opinion.

...

To me, this exposes the underlying strategy of the Rule 43 allegations: a veiled, albeit clumsy attempt by the Coalition to prevent release of the NAFTA Panel remand opinion.

...

I find the allegations against me to be an improper and likely illegal attempt by the Coalition to prevent the release of the NAFTA remand opinion. This conduct

by a participant in a Chapter 19 NAFTA proceeding is disturbing and disgraceful.

(a) attributing the Rule 43 Notification to the Coalition

[169] In reading Mr. Mastriani's letter, there is no doubt that he inferred that the Coalition was the source of the Rule 43 complaint. However, it is apparent that Mr. Mastriani had information from which he could reasonably make that inference. The United States NAFTA Secretary's letter indicated that the Government of Canada was of the view that the allegations did not give rise to a conflict of interest or an appearance of impropriety or apprehension of bias. The United States Government believed that the circumstances strongly suggested a situation that might reasonably create an appearance of impropriety or an apprehension of bias. However, the NAFTA Secretary's letter advised Mr. Mastriani that the United States did not believe that the allegations contained in Annex 2 to the NAFTA letter (*Outboard Engines*) raised the same level of concern with the Code of Conduct as the allegations set out in Annex 1 and that it would not be necessary for Mr. Mastriani to respond to the allegations in Annex 2. It is therefore a reasonable inference that the Rule 43 Notification did not originate from either the Government of Canada or the Government of the United States.

[170] Annex 1 sets out the complaint in respect of *Hand Trucks* and addresses the issue of whether historical data or producer projections should be relied upon to predict injury to the United States industry. In this case, historical data was more favourable to the United States Parties than producer projections. The complaint was that Mr. Mastriani was advocating the use

of producer projections in *Hand Trucks*. Any person reading the Annex would readily conclude that the complaint had originated in the United States and not in Canada.

[171] In addition, as we have already noted, Mr. Mastriani had been contacted by *The Globe and Mail* reporter and had seen the article attributing the Notification to the “U.S. timber lobby”. There was some argument that it was inappropriate for Mr. Mastriani to rely on an extra-judicial hearsay source to infer that the Notification had been made by the Coalition. *The Globe and Mail* article was confirmatory of what was apparent from the material that had been sent to Mr. Mastriani. It is of little significance to the question of whether he had a basis for concluding that the source of the Rule 43 Notification was the Coalition. It was, and he had ample information on the record to reach that conclusion.

(b) attributing to the Coalition an intent to delay

[172] Mr. Mastriani stated that the Rule 43 Notification was an attempt by the Coalition to prevent release of the *Panel Decision II*. The Coalition argues that Mr. Mastriani’s allegation of an intent to delay by the Coalition was based on the fact that the *Panel Decision II* was transmitted to the U.S. NAFTA Secretariat on April 19, 2004, the same day as the Coalition’s Rule 43 Notification was filed. The Coalition submits that the allegation was unfounded because the Coalition could not have known that *Panel Decision II* had been transmitted to the Secretariat on April 19.

[173] We do not see that coincidence as the basis of Mr. Mastriani's allegation. On March 8, 2004, the Panel had issued an Order extending to April 30, 2004 its deadline for release of *Panel Decision II*. That deadline was publicly known. Mr. Mastriani was not advised of the Rule 43 Notification until he received the NAFTA letter of April 26, 2004.

[174] Mr. Mastriani was strongly of the opinion that the allegations of appearance of impropriety or apprehension of bias were improper and unfounded. When an allegation of appearance of impropriety or apprehension of bias is made against a Panel member, only a few days before the deadline for release of a decision, and the allegations are reasonably considered improper and unfounded, we do not think it is a baseless inference that the allegations were made for an ulterior purpose. In the circumstances, the view expressed by Mr. Mastriani does not give rise to an appearance of impropriety or apprehension of bias.

(c) leak of the Rule 43 Notification to the press

[175] It is not disputed that the confidential Rule 43 Notification was leaked to the press. The question is whether Mr. Mastriani blamed the Coalition for that action without any foundation.

[176] Mr. Mastriani's letter does not name the Coalition as the source of the leak. Nonetheless, the United States Parties say that the necessary implication from Mr. Mastriani's request that the United States Department of Justice investigate, rather than the Canadian Ministry of Justice, or both, is that Mr. Mastriani was attributing the leak to the Coalition or at least someone in the United States.

[177] The fact that Mr. Mastriani asked the United States Department of Justice to investigate the leak is too vague a basis for us to infer that Mr. Mastriani was blaming the Coalition or someone in the United States for the leak. As counsel for the Government of Canada argued, for a panelist who is a United States citizen and who was appointed by the United States Government to refer an unlawful disclosure of information to the United States Department of Justice for investigation does not suggest who the targets of the investigation should be. The purpose of an investigation is to find out the source of the leak. If the leak did not originate in the United States, the investigation would presumably reveal that conclusion. In our view, the letter does not suggest who the source of the leak might be and we take the letter at its face value.

(d) was the response made public?

[178] The United States Parties argue that Mr. Mastriani violated the Code of Conduct by releasing his April 28, 2004 response publicly. Article III.I of the Code of Conduct provides:

A candidate or a member shall not communicate matters concerning actual or potential violations of this Code of Conduct unless the communication is to the Secretariate or is necessary to ascertain whether that candidate or member has violated or may violate the Code.

Mr. Mastriani's letter was marked "Public Document". However, it was addressed only to the United States NAFTA Secretariat and copied to the members of the Panel. The Coalition says that "Panelist Mastriani released the Panelist response publicly" and that "Consequently the letter was widely circulated ...". The Coalition does not say that Mr. Mastriani publicly circulated the response. We infer that the Coalition rests its allegation that the letter was made public by Mr. Mastriani on his designation of the letter as a "Public Document". But no evidence

has been cited to show that Mr. Mastriani made his response public. Designating a document as a Public Document does not violate the Code of Conduct.

[179] We are by no means satisfied that the Code of Conduct prohibits disclosure of a response by a panel member to his fellow panelists. The normal course of hearing and deciding cases by a panel requires panel members to communicate with each other. However, even if communications to other Panel members constituted a violation of the Code of Conduct, it is obvious that the violation is not “material”, the test in NAFTA Article 13(a)(i).

[180] Nor are we satisfied that the prohibition against disclosure in the Code of Conduct is applicable to a response required of a panelist where the allegations against him have already been made public. Confidentiality is intended to protect Panel members from unfounded allegations of conflict or bias. When the matter has already been made public, it would be a perverse interpretation of the Code of Conduct to preclude the Panel member in question from making public the response required from him.

(e) tone of the letter

[181] We have carefully considered the tone of Mr. Mastriani’s April 28, 2004 letter and the circumstances in which it was written. Allegations of apprehension of bias or conflict of interest are serious matters. The allegations cannot be made lightly. They may call into question the character and integrity of the individual concerned, as well as his or her judgment as an adjudicator.

[182] We have found the allegations in respect of the *Hand Trucks* matter to be without merit. A companion allegation in respect of another matter in which Mr. Mastriani was involved – *Outboard Engines* – was contained in the Coalition’s Rule 43 Notification but not considered sufficiently serious by the United States Government to warrant a response from Mr. Mastriani.

[183] Mr. Mastriani was given less than forty-eight hours to respond to the allegations against him. His character and integrity were attacked without justification and the matter had been made public.

[184] While the letter reveals frustration and anger, that is not, in the circumstances here, sufficient to establish an appearance of impropriety or an apprehension of bias. In *Liteky v. United States* 510 U.S. 540, 555-556 (1994), Scalia J. stated:

Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display.

[185] Mr. Mastriani’s response was a ruling on an application that he recuse himself. The contents of the NAFTA letter and annexes were an ample basis upon which he based his views in the letter. Rulings on a recusal application almost never constitute a valid basis for a bias motion. See, *Liteky, supra*, at 555 citing *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). Mr. Mastriani’s letter does not constitute a valid basis for a bias motion in this case.

[186] The United States Parties cited a number of cases in which judges were disqualified (*United States v. Womack*, 454 F.2d 1337 (5th Cir. 1972); *United States v. Thompson*, 483 F.2d

427 (3rd Cir. 1973); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993); *In re Boston Children's First*, 244 F.3d 164 (1st Cir. 2001); and *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3rd Cir. 1993)). In all five cases, the judge made comments that exposed his or her views on the merits of the underlying dispute. Mr. Mastriani's letter responded only to the bias allegation. His letter was not written voluntarily. While the letter was worded in strong terms, it was commensurate with the circumstances. It was based on facts or reasonable inferences from the material to which Mr. Mastriani was responding. Having regard to *Liteky* and *Grinnell*, *supra*, in our opinion the letter does not demonstrate an appearance of impropriety on the part of Mr. Mastriani, or a reasonable apprehension that he was biased against the Coalition.

F. CONCLUSIONS

[187] For these reasons, the ECC concludes that,

(a) the Panel did not manifestly exceed its powers, authority or jurisdiction in refusing to permit the Commission to reopen the record in preparing its responses, in setting the time limits within which the Commission had to respond to *Panel Decision II*, or in ordering the Commission to enter a negative threat determination;

(b) except on the issue of export orientation, the Panel did not exceed its powers, authority or jurisdiction by failing to apply the appropriate standard of review;

(c) on the issue of export orientation, the Panel's failure to apply the appropriate standard of review was not material; and

(d) the conduct of Panelist Mastriani did not create a reasonable apprehension of bias.

[188] In light of these conclusions (except with regard to the Panel's finding of no substantial evidence on the finding on issue export orientation), it is not necessary for us to determine whether, if the Panel had committed any of the errors alleged, they would have been material to the Panel's decision or threatened the integrity of the binational panel review process.

[189] Accordingly, pursuant to NAFTA Annex 1904.13, this challenge is denied and the challenged decision of the Panel stands affirmed.

SIGNED IN THE ORIGINAL BY:

August 10, 2005

Edward D. Re
Honourable Edward D. Re

Marshall Rothstein
Honourable Marshall Rothstein

John M. Evans
Honourable John M. Evans