ARTICLE 1904
BINATIONAL PANEL REVIEW
UNDER THE
CANADA-UNITED STATES FREE TRADE AGREEMENT

IN THE MATTER OF

AN INQUIRY MADE BY THE CANADIAN INTERNATIONAL TRADE TRIBUNAL PURSUANT TO SECTION 42 OF THE SPECIAL IMPORTS MEASURES ACT RESPECTING MACHINE TUFTED CARPETING ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA	:	Secretariat File No. CDA-92-1904-02

Panel: John D. Richard, Q.C., Chairperson
Jean-Gabriel Castel, Q.C.
James Chalker, Q.C.
Michael D. Sandler, Esq.
Martin J. Ward, Esq.

PANEL DECISION AND ORDER FOLLOWING REVIEW OF A DETERMINATION ON REMAND

April 21, 1994

Brian Barr, Maclaren Corlett, counsel for the Canadian Carpet Institute
Peter A. Magnus, Smith, Lyons, Torrance, Stevenson & Mayer, counsel for the Carpet and Rug Institute
Hugh J. Cheetham, counsel for the Canadian International Trade Tribunal

By Motion pursuant to Rule 75(3)(a), the Canadian Carpet Institute, on March 3, 1994, challenged the Determination on Remand issued by the Canadian International Trade Tribunal on February 11, 1994 (sometimes referred to as DOR-2). This Determination on Remand was issued by the Tribunal in response to the Panel's decision issued on January 21, 1994 following the review of an earlier Determination on Remand dated May 25, 1993 (sometimes referred to as DOR-1).

In its decision issued on January 21, 1994, the Panel affirmed the Tribunal's determination that dumping is likely to cause material injury. In its reasons, the Panel stated:

> Following its review of the administrative record, the Panel concludes that there was evidence in the administrative record on which the Tribunal could make a finding of soft demand conditions in the United States, large U.S. carpet manufacturing over-capacity, as well as a production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. The Panel is also satisfied that there is evidence on the record to support the finding of a surge of imports of the subject goods into Canada from the United States.
>
> The Panel is of the opinion that there was evidence on the administrative record to support the Tribunal's finding of future injury and that its finding of future injury was not patently unreasonable or clearly irrational in the circumstances. The Panel therefore affirms the Tribunal's finding of future injury in this case.

The panel remanded the Tribunal's determination that dumping has caused past and present material injury and directed the Tribunal on remand as follows:

(1) to explain why it failed to use the corrected figures submitted by Shaw;

(2) to conduct another price analysis using the corrected figures submitted by Shaw;

(3) the Tribunal may also prepare price analysis in which it deals separately with Shaw and Queen.

In its Determination on Remand, issued on February 11, 1994, the Tribunal stated:

> "The Canadian International Trade Tribunal, under s.77.16 of the *Special Import Measures Act*, hereby finds, as a result of the binational Panel's specific direction on remand, that the dumping of certain machine tufted carpeting originating in or exported from the United States of America, has not caused and is not causing material injury to the production in Canada of like goods."

The Tribunal responded to each of three directions made by the Panel.

(1) With respect to the use of Shaw's original figures the Tribunal stated that the analysis in the 1993 price study was based on the information in the staff reports. Neither the figures in these sections of the staff report nor Shaw's amended figures were tested during the Tribunal's inquiry, because the parties and the Tribunal did not focus on aggregate pricing data.

(2) With respect to the pricing analysis based on Shaw's amended figures, the Tribunal stated that when Shaw's amended figures are combined with Queen's average Canadian selling prices, the result is that Canadian producers enjoy a substantial price advantage of some 22 to 23 percent

over Shaw and Queen's combined prices, even when the effects of dumping are taken into account.

(3) With respect to the separate analysis of Shaw's and Queen's pricing information, the Tribunal was of the view that a price analysis based on a comparison of the average selling prices of the four Canadian producers used in the 1993 price study to Shaw by itself, or to Queen by itself would not provide, in this case, a sample for U.S. imports of a sufficient size for the Tribunal to rely on the results of such an analysis. Further, the Tribunal also had concerns with respect to the amended figures submitted by Shaw. Therefore, the Tribunal chose not to prepare a separate price analysis of Shaw's and Queen's pricing information.

In its conclusion, the Tribunal noted that the Panel, at page 5 of its decision issued on January 21, 1994, had stated that the Tribunal's finding of past and present injury "will be acceptable only if its 1993 price study establishes the critical nexus between injury and dumping." The Tribunal went on to state that it did not believe that Shaw's amended figures were reliable. It stated that it was difficult for the Tribunal to believe that the rapid and dramatic gains in the market share by U.S. carpets, from 6 percent in 1988 to 39 percent in 1991, could have occurred if U.S. carpets were not aggressively priced against Canadian carpets.

The Tribunal went on to state that as neither set of figures submitted by Shaw was tested by cross-examination or any other means during the Tribunal's inquiry, the Tribunal did not consider, in light of the Panel's direction, that either set of figures was sufficiently reliable to support a determination of past and present injury. In light of the Tribunal's concerns expressed above, the Tribunal was of the view that there was insufficient evidence before it in this Determination on Remand to allow it to conclude that the 1993 Price Study using Shaw's amended figures establishes the critical nexus between injury and dumping as directed by the Panel.

The Tribunal went on to conclude:

> Therefore, as the Tribunal has been directed by the Panel to rely solely on the 1993 Price Study, the Tribunal has no option but to find in this Determination on Remand, that dumping, in and of itself, has not caused and is not causing material injury to the production in Canada of like goods.

The statement of relief claimed by the Canadian Carpet Institute in its challenge to the Tribunal's Determination on Remand reads as follows:

> An Order pursuant to Rule 75(5) remanding the Determination on Remand of February 11, 1994 for reconsideration by the Tribunal of the Panel's remand of January 21, 1994 with the instructions that the "price analysis" which the Tribunal is directed to perform by remands 2 and 3 thereof is not limited to the "1993 Price Study" referred to at line 3 of page 4 of the Tribunal's Determination on Remand of February 11, 1994.

The Canadian Carpet Institute claims that in limiting itself in the Determination on Remand of February 11, 1994 to the 1993 Price Study, the Tribunal committed an error of jurisdiction or in the alternative, the Tribunal's interpretation of the Panel's January 21, 1994 remand decision as an instruction which limited it to the 1993 Price Study was patently unreasonable. Accordingly, the Canadian Carpet Institute submits that the Determination on Remand ought to be returned to the Tribunal with the instructions that the Tribunal reconsider the January 21, 1994 remands without being restricted to the 1993 Price Study.

The Tribunal did not file a response to the challenge to its Determination on Remand. By letter dated March 23, 1994, counsel for the Tribunal indicated that it would not be filing a response

to the challenge made by the Canadian Carpet Institute on March 3, 1994.

The Carpet and Rug Institute filed a response to the Notice of Motion challenging the Determination on Remand. The document states that it is a response to a Notice of Motion pursuant to Rule 75(3)(b), in support of the Tribunal's Determination on Remand that the dumping has not caused and is not causing material injury, and seeking remand of the question of future injury as a consequence thereof.

The relief requested by the Carpet and Rug Institute is as follows:

> **5.1** An Order of the Panel that:
>
> (a) the Tribunal's determination that dumping has not caused and is not causing material injury is affirmed;
>
> (b) the case be further remanded to the Tribunal with the direction to dispose of the matter in a manner consistent with the failure of the evidence to support a finding that dumping is likely to cause material injury.

It is to be noted that the Panel in its decision of January 21, 1994 remanded to the Tribunal only the question of past and present injury. It specifically affirmed the Tribunal's determination of future injury.

Prior to filing its response, the Carpet and Rug Institute filed a motion pursuant to Rule 63 requesting inter alia an Order granting leave, pursuant to Rule 20(3), to file out of time a challenge to the Tribunal's Determination on Remand of February 11, 1994 and further requesting that the Panel re-examine its decision of January 21, 1994 for the purpose of correcting an accidental oversight, namely its decision to affirm the Tribunal's decision of future injury. It requested that the Tribunal substitute its affirmation of future injury by a decision that the issue of future injury be remanded to the Tribunal. The Panel issued an Order on March 22, 1994 dismissing the Motion brought by the

Carpet and Rug Institute.

On March 21, the Panel also dismissed a motion brought by the Canadian Carpet Institute pursuant to Rule 63 for an Order confirming that the Panel's decision of January 21, 1994 was a final decision insofar as the Panel thereby affirmed the Tribunal's determination that dumping was likely to cause future material injury and directing the Canadian Secretary to forthwith issue a Notice of Completion of Panel Review pursuant to Rule 80. It is to be noted that the Completion of Panel Review is dealt with in Rule 79A of the Article 1904 Panel Rules which took effect on February 12, 1994 and which govern all ongoing panel reviews that are being conducted pursuant to Article 1904.

The Rules which apply to this challenge to this Tribunal's Determination on Remand are those which took effect on February 12, 1994. Accordingly, the Panel's review of the Tribunal's action on remand is governed by Rule 75 and in particular in the instant case by subrule 75(3), which reads as follows:

> **75(3)** If, on remand, the investigating authority has not supplemented the record,
>
> (a) any participant who intends to challenge the Determination on Remand shall file a written submission within 20 days after the date on which the investigating authority filed the Determination on Remand with the panel; and
>
> (b) any response to the written submissions referred to in subrule (a) shall be filed by the investigating authority, and by any participant filing in support of the investigating authority, within 20 days after the last day on which such written submissions may be filed.

The investigating authority (the Tribunal) did not supplement the record in its Determination on Remand. Accordingly, any participant who intended to challenge the Determination on Remand issued on February 11, 1994 was required by the Rules to do so no later than March 3, 1994 and any person who wished to file a response to the challenge was required to do so by the Rules no later than March 23, 1994. Subrule 75(3)(b) provides that any response to a challenge shall be filed by the investigating authority and by any participant <u>filing in support</u> of the investigating authority. (Emphasis added)

The only action taken on remand by the investigating authority in the Determination on Remand issued by it on February 11, 1994 dealt with the issue of past and present injury. It did not deal with the question of future injury which had not been remanded to it by the Panel, and had been affirmed by the Panel in its decision issued on January 21, 1994.

In the response to the Notice of Motion made by the Canadian Carpet Institute challenging the Tribunal's Determination on Remand, counsel for the Carpet and Rug Institute stated "As a practical matter, CRI initially made a commercial decision not to take this matter further. CRI's position was that it supports the Tribunal's reversal with respect to past and present injury. CRI's decision was predicated upon an assumption that the Tribunal's decision in DOR-2 would be the final chapter in this chain of proceedings." Counsel also stated "Following DOR-2, CRI had elected, in the absence of any challenge to DOR-2, to take no further steps in these proceedings." Counsel raises the fact that on March 3, 1994, the last date it was possible to do so under the Rules, the Canadian Carpet Institute filed a written submission to challenge DOR-2 before the Panel. It is apparent from the above statements of counsel that the CRI had decided to accept the Tribunal's Determination on Remand and that it was fully aware of its right to challenge the Determination on Remand within the time limits specified in Rule 75. In effect, what the CRI is seeking to do is to reverse the Panel's affirmation of future injury made in its decision issued on January 21, 1994. It is not seeking to challenge the action taken by the Tribunal in DOR-2 wherein it concluded that there was no past or present injury. On the contrary, the CRI supports this action on remand. In CRI's response to CCI's Notice of Motion it takes the position that the Tribunal's recision of past and present injury in DOR-2 should be affirmed by the Panel.

Counsel for the CRI states "By seeking to raise, in conjunction with its response to the CCI Challenge, what amounts to a collateral challenge of DOR-2, CRI is, in effect, attempting the equivalent of a cross-appeal in civil proceedings." However, Rule 75 is limited to a review of the action taken by the investigation authority pursuant to a remand of the panel. The Tribunal's finding of future injury was affirmed by the Panel in its decision of January 21, 1994. The Panel did not

remand the question of future injury to the Tribunal. The only matter remanded to the Tribunal in this Panel's decision of January 21, 1994 was the issue of past and present injury and not future injury. The Tribunal's action on remand was limited to a determination of the issue of past and present injury. It is that action of the Tribunal that this panel is called upon to review under Rule 75.

Further, the CRI did not challenge the Determination on Remand issued by the Tribunal on February 11, 1994. Accordingly, pursuant to Rule 75(3)(b), the CRI is limited to filing a response in support of the investigating authority. It cannot under the guise of supporting the action on remand by the investigating authority also seek to challenge the decision of the panel by having it withdraw its affirmation of future injury and remand the question of future injury to the Tribunal with a direction to dispose of the matter in a manner consistent with the failure of the evidence to support a finding of future injury.

Subrule 75(5) provides that where a Remand Determination is challenged, the panel shall issue a written decision within ninety (90) days of the Determination on Remand being filed either affirming the Determination on Remand or remanding it to the investigating authority. This Panel is of the opinion that the Carpet and Rug Institute cannot now challenge before this Panel under Rule 75 the affirmation of future injury which this Panel made in its decision of January 21, 1994.

In any event, this Panel's affirmation of future injury was based on the following finding of the Tribunal in its first Determination on Remand issued on May 25, 1993 (DOR-1).

> The Tribunal confirms its finding that dumping is likely to cause material injury. In addition to the reasons provided in the finding, the Tribunal adds that, given the competitive nature of U.S. and Canadian carpet prices, it is clear that anti-dumping duties are necessary to help offset the advantage conferred by dumping. This advantage has helped U.S. carpet imports to surge into Canada in unprecedented

volumes, despite ongoing weak market conditions in Canada, especially in 1990 and 1991.

This surge northward by U.S. producers at dumped prices reflects, among other things, soft demand conditions in the United States, large U.S. carpet manufacturing overcapacity, as well as the production imperative dictated by the need to keep huge U.S. plants, such as those owned by Shaw and Queen, operating round-the-clock to achieve maximum operational efficiencies. In the judgment of the Tribunal, these conditions are likely to persist for some time and to create the basic conditions that will lead to continued dumping in the future, in the absence of the price discipline imposed by anti-dumping duties.

The Tribunal further notes that CUSFTA provided for a 10-year transition period, beginning in 1989, during which the Canadian industry could gradually adjust to lower tariffs. In the opinion of the Tribunal, the effect of continued dumping at the levels established by the Deputy Minister would be to virtually eliminate the remaining portion of this transition period. As the Tribunal observed in its statement of reasons, [d]umping has further reduced the time required by the Canadian industry to make the necessary adjustments to compete effectively in a North-American free-trade environment.

> For greater certainty having regards to the specific direction in the remand, the Tribunal considers that this determination does not depend solely on the existence of dumping as a cause of past injury, for the reasons given above.

Turning now to the challenge by the Canadian Carpet Institute to the Tribunal's Determination on Remand with respect to past and present injury, it is to be noted that this is the second Determination on Remand issued by the Tribunal as a result of Panel action. In the first remand issued on April 7, 1993 the Panel remanded, in part, the finding of the CITT dated May 6, 1992 in Inquiry NQ-91-006. It remanded the Tribunal's determination that dumping has "caused" past and present material injury, and directed the Tribunal on remand to determine whether dumping in and of itself caused material injury and to demonstrate the rational basis for such determination by detailed analysis including but not limited to each of the following:

(a) An analysis in detail of the 30 to 32 accounts involving lost sales allegations referred to in the post-hearing briefs of the CITT and the Canadian Carpet Institute ("CCI") before the Panel, including an analysis of whether they are quantitatively (by volume) or qualitatively significant, and how (if at all) they reasonably support a determination of causation;

(b) An analysis in detail of the staff's price study in CST Vol. 4, Public Staff Report at 1.46 to 1.48 and CST Vol. 6, Confidential Staff Report at 66 to 77, and how (if at all) it reasonably supports a determination of causation. In this regard, the Tribunal should analyze (1) how dumping margins and volumes found by the Deputy Minister relate to price movements identified in the staff's study and (2) how other non-dumping factors (both price and non-price) relate cumulatively to those price movements and/or lost sales or market share shifts;

(c) An analysis in detail of the staff finding of a 13 cent decline in the domestic average price per square meter over the course of 1991 referred to in CST Vol. 4, Public Staff Report at 1.214.82, and how (if at all) it reasonably supports a determination of causation.

On May 25, 1993, the Tribunal issued a Determination on Remand (DOR-1) confirming its finding of past and present injury. In its action on remand, the Tribunal did not perform any of the analysis called for by the Panel, but did a new analysis of its data identified as the 1993 Price Study which was based on the CST Vol. 6, Confidential Staff Report at 66 to 77. The 1993 Price Study compared the average Canadian selling prices of the two principal U.S. exporters, Shaw Industries, Inc. (Shaw) and Queen Carpet (Queen), with the average selling prices of four of the most stable and efficient Canadian producers. The results of the 1993 Price Study, and the conclusions that the Tribunal drew from it, were outlined in detail in the Tribunal's Determination on Remand.

On June 9, 1993, the Carpet and Rug Institute, on behalf of U.S. carpet producers, filed a challenge to the Tribunal's Determination on Remand. The CRI alleged that the result of the Tribunal's new analysis was fundamentally flawed as it was based on erroneous data and therefore the results could not support a finding of causation of material injury (past or present). Also, the Tribunal did not explain why it did not rely on revised data submitted by Shaw during the course of the Tribunal's original inquiry. Since the Tribunal in DOR-1 did not perform any of the analysis called for by the Panel in its decision of April 7, 1993, the Panel in its decision issued on January 21, 1994 stated that the Tribunal's DOR would be acceptable only if the new analysis of the Tribunal's data (its 1993 Price Study) established the critical nexus between injury and dumping. Accordingly, the Panel remanded the Tribunal's determination that dumping has caused past and present material injury and directed the Tribunal on remand as follows:

(1) to explain why it failed to use the corrected figures submitted by Shaw;

(2) to conduct another price analysis using the corrected figures submitted by Shaw;

(3) the Tribunal may also prepare price analysis in which it deals separately with Shaw and Queen.

In its action on remand dated February 11, 1994, the Tribunal stated that it was of the view that as neither set of figures submitted by Shaw was tested by cross-examination or any other means during the Tribunal's inquiry, the Tribunal did not consider, in light of the Panel's direction, that either set of figures was sufficiently reliable to support a determination of past and present injury and that there was insufficient evidence before it to allow it to conclude that the 1993 Price Study using Shaw's amended figures established the critical nexus between injury and dumping as directed by the Panel. In these circumstances, the Tribunal made a finding that there was no past or present injury.

This Panel is of the opinion that the Tribunal in so deciding did not commit any error which amounted to an error of jurisdiction or any other reviewable error.

At the hearing to review the DOR-1 held on December 20, 1993, counsel for each of the participants agreed that the appropriate standard of review was that set out by the panel in the Beer (Injury) case (CDA-91-1904-02) decided on February 8, 1993. This standard was recited in this panel's decision of January 21, 1994 as follows:

> As was stated by the Panel *In the Matter of Certain Beer Originating in or Exported from the United States of America by G. Heilman Brewing Company, Inc., Pabst Brewing Company, and the Stroh Brewing Company for Use or Consumption in the Province of British Columbia (Injury),* CDA-91-1094-02, decided on February 8, 1993, the scope of a Panel's inquiry in a review of a DOR is much narrower than the scope of its review of the Tribunal's original Determination. It is not open to the Panel to revisit the original Determination with respect to any issue not covered by the Remand. "The Panel's inquiry

> in reviewing the DOR is thus limited to deciding whether the Tribunal addressed the question[s] that the Panel directed to it, followed the Panel's instructions, and in so doing reached a result that is not patently unreasonable and is supported by at least some evidence in the Tribunal's investigative record".

It has now been urged on this Panel by counsel for the CRI that since January 1, 1994, the applicable standard of review is now the less onerous one of "correctness" or "reasonableness", depending on the context, rather than "patent unreasonableness". Counsel for the CCI referred to the Tribunal's interpretation of its remanded instructions as "clearly wrong" and thereby patently unreasonable. This Panel finds that the Tribunal addressed the questions that the panel directed to it and in so doing reached a result that is neither patently unreasonable or unreasonable.

Therefore, this Panel affirms the Tribunal's action on remand that the dumping of certain machine tufted carpeting originating in or exported from the United States of America, has not caused and is not causing material injury to the production in Canada of like goods.

This Order constitutes an Order under subrule 75(5) and is the final action in the Panel review. Accordingly, the Panel directs the Canadian Secretary to issue a Notice of Final Panel Action pursuant to Rule 79A of the Article 1904 Panel Rules.

SIGNED IN THE ORIGINAL BY:

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JOHN D. RICHARD, Chairperson

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JEAN GABRIEL CASTEL

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JAMES CHALKER

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MICHAEL D. SANDLER

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MARTIN J. WARD

Issued on this 21st day of April, 1994

ARTICLE 1904 BINATIONAL PANEL REVIEW
pursuant to the
UNITED STATES-CANADA FREE TRADE AGREEMENT

IN THE MATTER OF:	)	
	)	
The finding of material injury	)	
made by the Canadian International	)	Secretariat File No.
Trade Tribunal respecting machine	)	CDA-92-1904-02
tufted carpeting originating in or	)	
exported from the United States	)	

ORDER

Upon consideration of the motion pursuant to Rule 75(3)(a) challenging the Determination on Remand issued by the Canadian International Trade Tribunal on February 11, 1994, filed on behalf of the Canadian Carpet Institute, and upon all other papers and proceedings herein, it is hereby

ORDERED that the motion is dismissed.

SIGNED IN THE ORIGINAL BY:

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JOHN D. RICHARD, Chairperson

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JEAN GABRIEL CASTEL

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JAMES CHALKER

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MICHAEL D. SANDLER

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MARTIN J. WARD

Issued on this 21st day of April, 1994