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Update

The Effect of the Softwood Lumber Agreement 2006 on the NAFTA Chapter Nineteen Binational Panel Process[1]

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The Softwood Lumber Agreement between the Governments of Canada and the United States entered into on September 12, 2006 ("SLA 2006") ended the most recent round of softwood trade actions that commenced on April 2, 2001 when the U.S. industry filed subsidy and dumping petitions with the U.S. Department of Commerce ("Commerce"). While several attempts were made to settle these trade actions before the SLA 2006, the Canadian Government and the Canadian softwood lumber producers (collectively the "Canadian Parties") fully exercised their rights under the binational panel process provided for in Chapter Nineteen of the *North American Free Trade Agreement* ("NAFTA"). The Canadian Government also initiated complaints under the WTO dispute settlement process.

The NAFTA binational panel process functioned in the manner that it was intended and, in the end, resulted in two victories for the Canadian Parties that should have terminated these trade actions and resulted in a full refund of all deposits to the Canadian softwood lumber producers. First, the binational panel reviewing the threat of injury determination made by the U.S. International Trade Commission ("ITC") concluded that the determination was not supported by substantial evidence. As antidumping and countervailing duties cannot be legally collected unless supported by a valid injury or threat of injury determination, all deposits collected on account of duties should have been refunded. Second, the binational panel considering Commerce's subsidy determination concluded that the subsidy rate was below the *de minimis* threshold of one percent. Countervailing duties below the *de minimis* threshold rate cannot be legally collected and deposits collected should have been refunded.

The U.S. Government refused to comply with the binational panel decisions and set out positions in their briefs in a lawsuit brought by the Canadian Parties in the U.S. Court of International Trade to enforce the binational panel decision respecting the ITC threat of injury determination that seriously undermine the U.S. legislation implementing Chapter Nineteen and that threaten the integrity of the entire process. At the time that negotiations of SLA 2006 commenced in April 2006, the Court had conducted a hearing but had not rendered a decision.

The SLA 2006 does not address the problems for the Chapter Nineteen process created by the positions taken by the U.S. Government in justifying its refusal to comply with the decisions of the binational panels. Instead, the SLA 2006 expressly provides that that the SLA 2006 is without prejudice to the position of each of Canada and the United States to maintain the positions that each had taken in the course of the current dispute. In short, the U.S. Government remains free under the SLA 2006 to maintain the positions as regards the interpretation of its own legislation upon which it based its refusal to comply with the results of the binational panel process.

The Court of International Trade has now issued two decisions that completely vindicate the positions taken by the Canadian Parties and wholly reject the positions taken by the U.S. Government. However, given the requirements in SLA 2006 that Canada and the United States seek the dismissal of this action, the status of these decisions is not clear and there is no assurance that the U.S. Government will abide by them in future cases.

This paper will set out the background to the softwood lumber dispute and will describe why the positions taken by the U.S. Government threaten the future viability of the Chapter Nineteen process. The paper will then describe why the SLA 2006 exacerbates this situation by failing to remedy it.

[1] This paper is based on a Submission made by the author to the Canadian Senate Standing Senate Committee on Foreign Affairs on November 7, 2006.

Background To The Softwood Lumber Dispute

The softwood lumber dispute centres on the application by the United States of trade remedies against the imports of softwood lumber from Canada. International trade law permits retaliatory action in the form of trade remedies against two trading practices considered to be unfair.

The first is dumping, which is selling goods in an export market for less than the price in the home market or, if home market prices are unprofitable, for less than cost plus a reasonable profit. If dumping is causing or threatening material injury to domestic producers of like goods, the government of the importing country may offset the dumping by imposing an antidumping duty equal to the amount by which the "normal value" (the home market price or cost plus a reasonable profit) exceeds the "export price" (the selling price in the export market).

The second is subsidization. Subsidies to producers can take the form of grants, preferential loans or loan guarantees, special tax breaks or the government supplying goods or services for less than adequate remuneration. If the subsidies are available only to certain producers and if imports of subsidized goods are causing or threatening material injury to domestic producers of like goods, the government of the importing country may impose a countervailing duty to offset the subsidy.

The crux of the softwood lumber dispute lies in the fact that Canada is a major exporter of softwood lumber to the United States and that timberlands in all Canadian provinces except for the Atlantic provinces are almost exclusively owned by the provincial governments as opposed to private landowners. Lumber companies pay "stumpage fees" to provincial governments for the right to cut timber on provincially owned land. While market based factors are taken into account in determining the level of stumpage fees, stumpage fees are not determined exclusively by market forces. U.S. lumber producers maintain that provincial governments provide timber (goods) for stumpage fees that are too low and that imports of softwood lumber from Canada are "subsidized" and are causing injury to U.S. producers.

The U.S. lumber producers and its lobby group, the Coalition for Fair Trade in Lumber have been aggressively pursuing trade remedies against imports of Canadian softwood lumber for the past 25 years. The Coalition and the U.S. Government maintain that Canadian softwood lumber is unfairly traded, while the Canadian producers and the Canadian governments (both the federal government and the provincial governments) maintain that U.S. trade remedies have been wrongfully applied under both U.S. domestic standards and international standards.

International Rules for Antidumping and Countervailing Duties

Canada and the United States are both members of the World Trade Organization ("WTO") and are bound by the *Agreement Establishing the World Trade Organization* ("WTO Agreement") that became effective on January 1, 1995. The WTO Agreement sets out requirements that must be observed by member countries when imposing antidumping or countervailing duties[2]. The WTO Agreement also contains a dispute settlement process for resolving disputes between member countries as to whether WTO requirements have been complied with.[3] The process begins with a request for consultations. If the dispute remains unresolved, the disputing members argue their case before a panel that issues a report with findings as to whether the measures at issue comply. The report may be appealed to the WTO Appellate Body on findings of law. Once a panel report is adopted by the WTO Dispute Settlement Body, a compliance procedure commences under which the non-complying member must bring its measures into conformity with the recommendations of the panel or face retaliation in the form of the withdrawal of WTO benefits by the complaining member.

The U.S. Antidumping and Countervailing Duty Regime

The U.S. antidumping and countervailing duty regime, like its Canadian counterpart, is based on the principles prescribed by the WTO Agreement. Determinations of dumping and subsidization are made by Commerce and determinations as whether dumping or subsidization is causing or threatening material injury are made by the ITC. Commerce first makes a preliminary determination of dumping or subsidy and if it is affirmative provisional duties are imposed for prescribed periods of time. The ITC commences its injury inquiry[4] and Commerce continues its investigation and ultimately makes a final

[2] Article VI of the *General Agreement on Tariffs and Trade 1994* which appears in Annex 1A of the WTO Agreement sets out basic requirements respecting the imposition of both antidumping and countervailing duties. These requirements are elaborated upon for antidumping duties in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement") and for countervailing duties in the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). Both these agreements are set out in Annex 1A of the WTO Agreement.

[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") set out in Annex 2 of the WTO Agreement.

[4] There is also a preliminary injury inquiry by the ITC that occurs very early in a U.S. antidumping or countervailing duty case.

determination of dumping or subsidization. If the final determination of dumping or subsidization by Commerce is affirmative, the ITC completes its injury inquiry. If the ITC finds actual injury or threat of injury, U.S. Customs collects deposits on account of antidumping or countervailing duties. U.S. law provides for annual administrative reviews in which the actual amounts of duties for each one-year period are determined and the importer receives a partial refund of deposits or pays the difference between the amount deposited and the actual duties, depending on the outcome of the review.

Judicial and NAFTA Binational Panel Review

Under U.S. law, determinations of Commerce and the ITC are subject to judicial review by the Court of International Trade, and decisions of the Court of International Trade can be appealed as of right to the Court of Appeals Federal Circuit. The Court of International Trade must decide whether the determination of Commerce or the ITC under review is supported by substantial evidence.

NAFTA Chapter Nineteen, which carries forward Chapter Nineteen of the original *Canada-U.S. Free Trade Agreement*, provides that a party affected by certain final determinations in antidumping and countervailing duty cases can, through its government,[5] choose NAFTA binational panel review as a substitute for domestic judicial review. Final determinations by Commerce of dumping and subsidization as well as final determinations of injury or threat of injury by the ITC are subject to binational panel review. Binational panels are comprised of five panellists, with two Canadians, two Americans and the fifth being Canadian or American.[6] Binational panels have the power to "remand" a determination back to Commerce or the ITC. On remand, Commerce or the ITC must make a new determination consistent with the panel's decision. The panel must apply U.S. law and the U.S. substantial evidence standard of review. Unlike decisions of the Court of International Trade, binational panel decisions cannot be appealed, but are subject to extraordinary challenge judged by an extraordinary challenge committee comprised of three judges or retired judges, one being Canadian and one being American and the third being determined by lot. The threshold for success in an extraordinary challenge is very high and none has succeeded.

Chapter Nineteen was the *sine qua non* of the *Canada-U.S. Free Trade Agreement*. Canada wanted protection from the arbitrary application of U.S. trade remedy laws. Negotiations on this issue broke down and the Chapter Nineteen process emerged as a compromise. While the substance of U.S. antidumping and countervailing duty law did not change, the U.S. domestic process for review of Commerce and ITC determinations could, at the option of either the Canadian or U.S. Governments, be substituted with review by a Chapter Nineteen binational panel. If this compromise had not been accepted by the United States and had the U.S. Government not amended its own antidumping and countervailing duty law to give legal force and effect to the decisions of binational panels, the *Canada-U.S. Free Trade Agreement* would never have come into effect.

Aggressive Pursuit of Trade Remedy Actions and Managed Trade

The history of the trade in softwood lumber from 1982 to 2006 is one of aggressively pursued U.S. trade remedy actions interspersed with two managed trade regimes.

In 1982, the Coalition filed a countervailing duty petition on behalf of the U.S. producers against imports of softwood lumber from Canada alleging that stumpage fees constituted a subsidy. Commerce dismissed the petition on the grounds that the subsidy was not specific to a particular industry. The Coalition filed a second petition in 1986 and Commerce made a preliminary determination that Canadian imports were subsidized. Rather than fighting this decision, Canada entered into the first managed trade regime with a Memorandum of Understanding ("MOU") with the United States and agreed to impose a 15% export charge on softwood lumber exports to the United States.

In 1991, Canada unilaterally terminated the MOU and Commerce self-initiated a new countervailing action which resulted in countervailing duties being imposed on imports of softwood lumber. However, the Canadian producers were successful in having the Commerce decision reversed by a Chapter Nineteen binational panel. The U.S. Government refunded duty deposits on the condition that the Canadian Government enter into negotiations that ultimately resulted in the second managed trade regime through a softwood lumber agreement between Canada and the United States that entered into effect for a five-year term, commencing April 1, 1996. This agreement imposed export quotas through export charges over certain annual volumes. Like all quota schemes, the five-year span of the agreement was replete with quota allocation issues and caused distortion in lumber pricing throughout the United States and Canada. When it expired on March 31, 2001, there was no desire on either side to renew it.

[5] See NAFTA Article 1904(2).

[6] The binational panel process also can be invoked against determinations by Canadian and Mexican authorities.

On April 2, 2001, the Coalition recommenced the pursuit of trade remedies by filing a subsidy petition as well as a petition alleging dumping.[7] Commerce initiated subsidy and dumping investigations on April 23, 2001 and made final determinations of subsidy and dumping on April 2, 2002. The ITC made final threat of injury determination on May 16, 2002, and collection of deposits on account of antidumping and countervailing duties commenced on May 22, 2002.[8]

Canada's Two-Track Litigation Strategy

While the Canadian Government entered into settlement negotiations with the U.S. Government at several times since permanent duties began being imposed in May 2002, the Canadian Parties relied primarily on litigation to solve the problems created by the U.S. trade action. Both the Canadian Government and the Canadian industry had considerable faith in the NAFTA binational panel process that proved successful in securing a positive outcome in the 1991 softwood case. Canadian Government international trade lawyers had also accumulated experience under the WTO dispute settlement mechanism.

The Canadian Government and the Canadian industry pursued a two-track litigation strategy against the U.S. duties. The Canadian Government requested NAFTA binational panel review of Commerce's subsidy and dumping determination and of the ITC's threat of injury determination. The Canadian Government also launched parallel challenges of each of these determinations under the WTO dispute settlement process.

The two track approach was perfectly justifiable from a legal perspective because NAFTA binational panels and WTO panels apply different bodies of law. The NAFTA binational panels invoked by Canada in this case considered whether the Commerce and ITC correctly applied U.S. law, while WTO panels consider whether the determinations made by Commerce and the ITC were consistent with U.S. obligations under the WTO Agreement. A determination consistent with U.S. law cannot be overturned by a NAFTA binational panel, even thought the determination is inconsistent with U.S. WTO obligations. The problem that Canada ultimately encountered with the two track approach is that, as will be described below, the United States misapplied its own legislation for implementing adverse WTO panel decisions in order to subvert the NAFTA binational panel process.

Binational Panel Review of the ITC Threat of Injury Challenge

The outcome of the binational panel review of the ITC's threat of injury determination has particular significance for the future viability of the NAFTA Chapter Nineteen process because the United States Government refused to honour the decision of the binational panel and took positions in the ensuing litigation that undermine the U.S. legislation implementing NAFTA Chapter Nineteen.

The binational panel reviewing the ITC threat of injury determination concluded in its initial decision that the determination was not supported by substantial evidence. The panel remanded the determination back to the ITC on September 5, 2003 and again on April 19, 2004, and each time the ITC issued a new affirmative threat determination. The panel finally remanded the determination back to the ITC on August 31, 2004 on terms that left the ITC no option but to issue a negative threat determination, which the ITC did on September 10, 2004 and which was affirmed by the panel on October 12, 2004. Without the affirmative threat of injury determination, the legal basis for both the antidumping and the countervailing duties under U.S. law ceased to exist. At the urging of the Coalition, the U.S. Government requested the formation of an Extraordinary Challenge Committee on November 24, 2004 as provided for in NAFTA Article 1904(13). The Extraordinary Challenge Committee issued an Opinion and Order on August 10, 2005 denying the extraordinary challenge and the NAFTA Secretariat published notice of completion of panel review on August 17, 2005. This should have been the end of the matter, with the collection of deposits ceasing and deposits previously collected being refunded.

The United States refused to abide by the binational panel decision. The Canadian Government and the Canadian Parties initiated a lawsuit[9] (hereafter the "Tembec Case")

[7] Dumping was not alleged in the earlier petitions.

[8] Provisional duties were collected as soon as Commerce made its preliminary affirmative determinations of subsidization and dumping. However, because the ITC found threat of injury only and not actual injury, the amounts paid on account of provisional duties were refunded as is required under U.S. law. Commerce originally set a countrywide countervailing duty rate of 18.79% and an all-others antidumping duty deposit rate of 8.18%. These rates were reduced in subsequent administrative reviews, with the countervailing duty and antidumping duties being 16.37% and 3.78% respectively after the first administrative review and 8.18% and 2.11% respectively after the second administrative review.

[9] Tembec Inc., Plaintiff and Government of Canada, Gouvernement Du Quebec, Government of Ontario, Government of Alberta, Government of British Columbia, Canadian Lumber Trade Alliance, and Abitibi Consolidated, Inc., Plaintiff–Intervenors, v. United States, Defendant, and Coalition for Fair Lumber Imports Executive Committee, Defendant-Intervenor. Consol. Court No. 05-00028, United States Court of International Trade.

against the U.S. Government in the Court of International Trade requesting an order that the antidumping and countervailing duty orders be revoked and that all deposits be fully refunded. In defending this suit, the U.S. Government took the position that a new affirmative threat of injury determination that resulted from the application of Section 129 of the *Uruguay Round Agreements Act* ("URAA"), the U.S. legislation for implementing WTO panel findings, superseded the binational panel's decision.[10] Furthermore, the U.S. Government maintained in its briefs that, unlike the decisions of domestic courts reviewing Commerce and ITC determinations, decisions of binational panels had prospective effect only, with the result that deposits up to the effective date of the decision would not be refunded. If either of these positions had been accepted by the U.S. Courts as correct under U.S. law, the U.S. legislation that implements Chapter Nineteen would be fatally undermined.[11] The U.S. Government also took the position in its briefs in the Tembec Case that no Court in the United States had the authority to enforce the decision of a Chapter Nineteen binational panel.

1. The URAA Section 129 Issue

URAA Section 129 establishes a procedure for the implementation by the United States of adverse WTO panel or Appellate Body reports respecting Commerce or ITC determinations in antidumping or countervailing duty cases. The determination in question is referred back to Commerce or the ITC for a new determination not inconsistent with the report.

As part of its two track strategy, Canada initiated a WTO challenge against the ITC's threat of injury determination with a request for consultations on December 20, 2002. This process ran parallel to the binational panel process described above. The WTO panel issued a decision on March 22, 2004 that found that the ITC's threat of injury determination was not in compliance with WTO requirements.

Rather than appealing to the WTO Appellate Body, the U.S. Government invoked URAA Section 129, and sent the matter back to the ITC for a new determination. The ITC issued new affirmative threat determination on November 24, 2004 that Commerce implemented in December 2004. According to the U.S. Government, the new affirmative threat determination made by the ITC under Section 129 superseded the negative determination resulting from the NAFTA process and provided a new legal basis for imposing duties. According to this position, as the new ITC affirmative determination (issued November 24, 2004) predated the completion of binational panel review (August 17, 2005), there was no obligation to refund duties and duties could be legally collected on a going forward basis.

Canada exercised its arbitration rights under the WTO to challenge the U.S. actions on the basis that the ITC's new determination under URAA Section 129 did not constitute compliance with the WTO panel's decision. The WTO arbitration panel hearing the case disagreed with Canada and found that the ITC's new determination did comply with the panel's decision. Canada appealed this decision to the Appellate Body. The Appellate Body reversed the panel's decision that the ITC's constituted compliance with WTO requirements, which means that the U.S. Government and the Coalition ceased to have any basis for maintaining that the ITC's URAA Section 129 determination constituted compliance with WTO requirements.[12]

If the U.S. Government were correct that URAA Section 129 affirmative determinations can supersede negative determinations resulting from the NAFTA binational panel decisions as the U.S. Government alleges, the United States would clearly have breached the NAFTA requirement that binational panel decisions be binding.[13] The U.S. Government position was particularly ludicrous given that the U.S. Government had the opportunity to utilize URAA Section 129 in the manner described above only because Canada won its WTO challenge of the ITC threat of injury determination. If Canada had lost its WTO challenge, there would not have been a new ITC determination under URAA Section 129 because URAA Section 129 only applies to WTO challenges that the United States loses.

[10] URAA Section 129 is codified in 19 U.S.C.§3538.

[11] The Court of International Trade was the court of first instance in the Tembec Case. As noted above, decisions of the Court of International Trade can be appealed to the Court of Appeals Federal Circuit. The appeal process takes about a year and possibly longer.

[12] See *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* WT/DS277/AB/RW 13 April 2006. For technical reasons related to the mandate of the Appellate Body under the WTO dispute settlement process, the Appellate Body did not complete the analysis of the ITC's Section 129 determination. This does not alter the fact that the panel's affirmative finding that the Section 129 determination constituted compliance with WTO requirements has unequivocally been reversed.

[13] NAFTA Article 1904(9).

The Canadian Parties challenged the U.S. position in the Tembec Case and maintained that URAA Section 129 only authorizes the implementation of negative and not affirmative ITC determinations.[14] The Court of International Trade agreed with the Canadian Parties and categorically rejected the position of the U.S. Government in a decision issued on July 21, 2006.[15] However, by the time that the decision was issued, the settlement discussions that led to SLA 2006 were well underway.

2. The Duty Refund Issue

The U.S. Government also adopted a position in defending the Tembec Case that poses an even greater threat to the NAFTA binational panel review process. NAFTA Article 1904(15) unequivocally requires that the same refund procedures that apply to domestic proceedings also apply to binational panel decisions. Under U.S. domestic judicial review procedures, all deposits on account of duties that have been found to have been illegally collected are refunded. However, the U.S. Government maintained in its briefs in the Tembec Case that under the U.S. law implementing Chapter Nineteen, the decisions of NAFTA binational panels operate prospectively only and that deposits collected before the date of the binational panel decision are not affected by the decision. This would mean that the billions of dollars in deposits collected between May 22, 2002 and November 4, 2004 would not be refunded.[16] If the Canadian parties had pursued their rights to judicial review under U.S. law and had achieved the same result, there is no question but that the deposits collected during this time period would have been refunded.

If the U.S. Government insists in the future that decisions of NAFTA binational panels have prospective effect only with no refund up to the date of the decision, the binational panel review process will have been rendered largely useless.[17]

In their briefs, the Canadian Parties responded that the U.S. legislation implementing NAFTA Article 1904(15) does what the U.S. Government promised at the time of implementation, namely to provide full refunds as Article 1904(15) requires.[18]

On October 13, 2006 the Court of International Trade issued a decision that unequivocally accepted the position of the Canadian Parties and rejected the position advanced by the U.S. Parties.[19] However, this decision was issued after SLA 2006 came into effect.

3. U.S. Courts Lack Jurisdiction to Enforce Binational Panel Decisions

In its briefs in the Tembec Case, the U.S. Government argued that no U.S. Court had the authority to enforce the decision of a NAFTA Chapter Nineteen binational panel. These arguments were based on provisions of the U.S. law implementing the NAFTA binational panel process are designed to prevent a U.S. party from going to the U.S. courts to seek judicial review of an action taken by Commerce or the ITC pursuant to a decision of a binational panel review or an extraordinary challenge committee.[20] These legislative provisions were necessary to maintain the principle established by the *Canada-U.S. Free Trade Agreement* and NAFTA that the binational panel procedure, once requested, was to be exclusive. The U.S. implementing legislation also provided no person would have a cause of action based solely on the fact that the U. S. Government gave its approval of NAFTA through enacting the implementing legislation.[21] The U.S.

[14] See 19 U.S.C. §3538 (a)(6).

[15] LEX 441 F SUPP 2D 1302.

[16] November 4, 2004 was the effective date of the "Timken notice" published by Commerce. The Timken notice is a notice issued by Commerce that a final panel decision of binational panel is "not in harmony" with the original determination. See the October 13, 2006 decision in the Tembec Case referred to below, which explains why the U.S. Government considered that the allegedly prospective effect of binational panel decisions commenced on the effective date of the Timken notice.

[17] This outcome would not apply to binational panel review of determinations arising from the U.S. administrative review process. However, this is a technical detail and the fact remains that the U.S. position on duty refund constitutes a major problem for the future viability of the binational panel process.

[18] The Statement of Administrative Action issued by the U.S. Government at the time of the implementation of the *Canada-U.S. Free Trade Agreement* is very clear that this was the intention of the legislation in question.

[19] *Tembec Inc. v. United States*, No. 05-00028, slip op. 06-152 (Ct. Int'l Trade October 13, 2006).

[20] See 19 U.S.C. 1516a(5)(iv) and 1516a (7)(A).

[21] See 19 U.S.C. § 3312(c)(1)(A).

Government twisted these provisions of its law implementing NAFTA into an argument that no U.S. court has a right to enforce any aspect of a binational panel decision. In its decision of July 21, 2006 in the Tembec Case, the Court of International Trade wholly rejected these positions.[22]

Binational Panel Review of the Commerce Subsidy Determination

The binational panel review of Commerce's subsidy determination also resulted in a significant victory for the Canadian parties. This process entailed an unprecedented five panel decisions and four remand decisions by Commerce. In its most recent panel decision of October 5, 2005, the panel effectively directed Commerce to issue a *de minimis* subsidy determination, which Commerce did on November 22, 2005 with a subsidy rate of 0.80%. Consistent with WTO requirements, U.S. law provides that any subsidy investigation that results in a subsidy rate of less than one percent must be discontinued. The U.S. Government initiated an extraordinary challenge that was terminated only because of the initiation of the negotiations leading to the SLA 2006.

As the NAFTA process had not been completed at the time that the SLA 2006 negotiations commenced, as had been the case with the binational review of the ITC threat of injury determination, the U.S. Government did not formally refuse to honour the decision of binational panel. While there had been a Commerce determination under URAA Section 129 that resulted from certain negative findings made by the WTO panel and Appellate Body reviewing the Commerce subsidy determination, the determination covered specific issues and did not lend itself to being used to supersede the binational panel decision. However, on the issue of refund of duties, the U.S. Government made it very clear that it would be taking the position that NAFTA binational panel decisions have prospective effect only and that deposits collected up to the date that the binational panel decision became final would not be refunded.

The Constitutional Challenge

As part of its "take no prisoners" approach to softwood, the Coalition brought an action against the U.S. Government has challenged the constitutionality of the NAFTA Chapter Nineteen binational panel process under the U.S. Constitution in an action brought in the federal Court of Appeals District of Columbia (the "Constitutional Case").[23] The basis for the challenge was that the U.S. legislation implementing Chapter Nineteen deprived U.S. citizens of the right to have their cases heard in a U.S. Court as is provided in Article III of the U. S. Constitution. For once the U.S. Government, as defendant, was opposing the Coalition and the U.S. Government brief filed with the Court set out a creditable defence. At the time that the SLA 2006 negotiations commenced, the briefing process had been completed but there had not been a hearing.

If the federal Court of Appeals District of Columbia and the Supreme Court of the United States accepted the Coalition's position, the U.S. Government would be constitutionally barred from applying its legislation implementing Chapter Nineteen and all Canada would be left with is retaliation rights under NAFTA's dispute settlement provisions.[24]

The SLA 2006

The negotiations that led to the SLA 2006 commenced in late April 2006, and litigation activities came to a halt. The SLA 2006 was signed on September 12, 2006 and was amended by way of an amending agreement dated October 12, 2006 (the "SLA 2006 Amendment").[25] While the legislation implementing has not yet been enacted, the SLA 2006 is currently being treated as being in effect.[26]

The SLA 2006 establishes a complex managed trade regime based on export taxes and export quotas. The details of this regime need not be described here. However, there are two provisions of the SLA 2006 that are particularly

[22] For example, the Court had no difficulty in distinguishing between legislation approving a treaty and legislation that enacted the changes to domestic law that were required to implement the terms of the treaty. See LEX 441 F SUPP 2D 1302 at page 12 for the Court's distinction between the "approval" and "implementation" of a treaty.

[23] Coalition for Fair Trade Imports Executive Committee v. United States of America, et al., United States Court of Appeals for the District of Columbia, No. 05-1366. See 19 U.S.C. § 1516a(g)(4)(A) that specifies that a constitutional challenge of the U.S. legislation implementing Chapter Nineteen must be brought in this court. The decision of the court in this case would have been appealable to the Supreme Court of the United States.

[24] On December 13, 2006 the National Post reported that the Court of Appeals had dismissed the action on technical grounds relating to the settlement of the softwood lumber dispute. See "U.S. Court rejects NAFTA challenge" on page FP22.

[25] For the text of the agreement, see http://www.international.gc.ca/trade/eicb/softwood/SLA-main-en.asp#legal

26 See Bill C-24, An Act to impose a charge on the export of certain softwood lumber products to the United States and a charge on refunds of certain duty deposits paid to the United States, to authorize certain payments, to amend the Export and Import Permits Act and to amend other Acts as a consequence. Bill C-24 has received second reading in both the House and the Senate and is now in committee.

relevant to the question of the effect of the SLA 2006 on the future viability of the NAFTA Chapter Nineteen process.

1. Settlement of Claims Agreement

The first provision is Article II(1)(a) of the SLA 2006 that requires that the exchange of letters bringing the SLA 2006 into effect confirm that "the Settlement of Claims Agreement in Annex 2A has been signed by counsel on behalf of the parties".[27] The Settlement of Claims Agreement provides, *inter alia*, that various legal proceedings be dismissed, and that Canada and the United States "seek to dismiss" certain other actions.

The original SLA 2006 provided that Canada and the United States "irrevocably consent" to the termination of certain "Covered Actions", which included the Tembec Case and the Constitutional Case.[28] The SLA 2006 Amendment replaced this provision with the requirement that "Canada and the United States shall seek to dismiss" certain actions that include the Tembec Case and the Constitutional Case.[29]

The effect of these provisions on the decisions of July 21, 2006 and October 13, 2006 in the Tembec Case is at present unclear.

2. Without Prejudice to Positions of Parties

The second provision is Article XI(1) which reads as follows:

> "The SLA 2006 is without prejudice to the position of either Party as to:
>
> (a) the validity of the AD Order or the CVD Order or any determinations underlying those Orders;
>
> (b) the merits of, and any possible remedies arising from, any litigation related to those Orders; and
>
> (c) the legal effect of any decision of any court or other dispute settlement body regarding those Orders".

Under Article XI(1), the U.S. Government remains free to maintain its positions that binational panel decisions have prospective effect only, cannot be enforced by U.S. Courts and can be superseded by new ITC determinations made pursuant to URAA Section 129.

Unresolved Issues

At the time that the SLA 2006 negotiations commenced, the three major legal issues that extend far beyond technical softwood issues and threaten the future viability of the NAFTA Chapter Nineteen binational panel process were outstanding. The first two, namely the duty refund issue and the issue as to whether an affirmative URAA Section 129 decision can supersede a negative binational panel decision, arose as a direct result of the positions taken by the U.S. Government to justify its refusal to implement the decision of a binational panel. The third issue, namely the constitutional issue, was entirely a creation of the Coalition.

1. The Duty Refund Issue

The duty refund issue goes to the very heart of the Chapter Nineteen process. The Chapter Nineteen process was intended to be expeditious but the both Commerce and the ITC have regularly forced binational panels to issue multiple decisions on remand. Several years elapse between the time that the collection of deposits on antidumping and countervailing duties commences and the time that a final panel decision is rendered. In a large case, the deposits collected while the binational panel review process is progressing to a final decision can amount to tens or hundreds of millions, and in the case of softwood, billions of dollars.

Parties to future U.S. antidumping and countervailing duty actions will have to seriously weigh the benefits of the Chapter Nineteen panel process against the risk of not receiving a refund of deposits collected up to the date of the panel decision, given that a refund will be forthcoming should they be successful utilizing the domestic U.S. judicial review procedures. In an even more bizarre twist, the U.S. domestic parties could prevent a Canadian party from pursuing U.S. domestic judicial review by asking the U.S. Government to request binational panel review, thereby casting the refundability of deposits into doubt and forcing the Canadian party into protracted litigation to get a full refund.[30]

[27] SLA 2006 Amendment Article I.

[28] SLA 2006 Annex 2A, entitled "Termination of Litigation Agreement", section 1.

[29] SLA 2006 Amendment Annex 2A, entitled "Settlement of Litigation Agreement", section 2. The Settlement of Litigation Agreement in Annex 2A of the SLA 2006 Amendment replaced the Termination of Litigation Agreement in the SLA 2006.

[30] Under NAFTA Article 1904(2), the request for panel review is made by an "involved Party", which means the Government of either the importing NAFTA country or the NAFTA country whose goods are subject to the determination respecting which review is sought. In a U.S. trade action against imports from Canada, the United States as an "involved Party" can request binational panel review of a determination by its own agency. One might argue that the Court of International Trade is a much less deferential body now than it was when the *Canada-U.S. Free Trade Agreement* was negotiated. However, domestic U.S. parties could frustrate an election by Canadian parties of domestic judicial review by the Court of International Trade.

The decision of the Court of International Trade that categorically rejects the U.S. position on duty refund is extremely helpful. However, it is not clear what effect this decision has under U.S. law, given that under the terms of the Settlement of Claims Agreement, Canada and the United States must seek dismissal of the Tembec Case.

The logical time for the Governments of Canada and the United States to have addressed the duty refund issue was during the negotiations of the SLA 2006 because this issue has nothing to do with the specifics of the softwood lumber dispute but goes to the very heart of the binational panel process. However, as is evident from SLA 2006 Article XI(1), under which the United States continues to be free to maintain the position that binational panel decisions only have prospective effect and that duty deposits collected before the binational panel decision are not refundable, the duty refund issue was not addressed.

2. URAA Section 129

The issue concerning whether a determination by the ITC (or Commerce) under URAA Section 129 can supersede a contrary decision of a binational panel is relevant only if Canada has chosen to pursue a parallel WTO challenge and if the URAA Section 129 is sufficiently broad in its scope to negate the effect of the contrary binational panel decision. However, the circumstances under which the U.S. adopted this position are not unique to the softwood lumber dispute but could arise in any U.S. antidumping or countervailing duty action in which Canada has chosen to exercise its WTO rights.[31] The possibility that the U.S. Government would use URAA Section 129 to turn a Canadian victory into an instrument for frustrating the implementation of a decision, whether through the binational panel process or the U.S. domestic judicial review process, places a real chill on future Canadian WTO challenges of the application by the United States of its antidumping and countervailing duty laws.

As with duty refund, and for the same reasons as discussed above, the logical time for the Governments of Canada and the United States to have addressed the URAA Section 129 issue was during the negotiations of the SLA 2006.

3. Constitutional Challenge

The constitutional issue is different from the duty refund issue and the URAA Section 129 issue because the constitutional issue cannot be resolved by action taken by the U.S. Government. The constitutional issue has been raised before, and progressed in this case to the stage that the U.S. Government had filed a brief setting out a forceful and creditable defence. Hopefully the U.S. Government will continue to strongly uphold the position that its legislation implementing NAFTA Chapter Nineteen is constitutional. The Canadian Government must continue to actively support the U.S. position against the Coalition or any other U.S. party that seeks to challenge the constitutionality of the Chapter Nineteen process.

Is Binational Panel Review Obsolete?

Some have suggested that Chapter Nineteen has outlived its usefulness and that Canada and Mexico should rely on the WTO dispute settlement process to resolve disputes flowing from the improper application by the United States of antidumping and countervailing duty laws. The experience in softwood lumber has demonstrated that this is patently not the case. While the binational panels in the current round of softwood litigation were applying U.S. law and not the more objective standards set out in the WTO agreements, Canada won several clear victories under the binational panel review process while the results flowing from the WTO dispute settlement process were mixed and enforcement problems have been formidable.

The superiority of the binational panel review process over the WTO process is rooted in the fact that the binational panel process is incorporated into and has been made an integral part of the law of each NAFTA Party. This was the original intention of both Canada and the United States in the *Canada-U.S. Free Trade Agreement*, as well as that of the three NAFTA Parties when NAFTA was signed, and until the current softwood lumber case the United States has applied its law consistently with the principle that binational panel decisions are binding.[32] The WTO dispute settlement process is not incorporated into U.S. law as a binding domestic procedure, and implementation by the United States of adverse WTO findings is entirely discretionary.[33] Even when implementation does take

[31] Note that as mentioned above, according to the logic of the U.S. position on URAA Section 129, a URAA Section 129 ITC or Commerce determination could, if the USTR chose to implement it, supersede a contrary Court of International Trade decision arising from U.S. domestic judicial review as well as the decision of a binational panel.

[32] The U.S. Government did raise the issue of prospective application of binational panel decisions following the binational panel decision in the 1991 countervailing duty case and delayed refunding duties until, as noted above, Canada agreed to negotiations.

[33] Under 19 U.S.C. § 3538(a)(6), the United States Trade Representative may direct the revocation of an antidumping or countervailing duty order. Under § 3538(b)(4), the United States Trade Representative may direct the implementation of a new Commerce determination. In neither instance is the United States Trade Representative required to act.

place, the effect is unquestionably prospective only, meaning that illegally collected duties are not refunded.[34] Also, under URAA Section 129, the ITC and Commerce can simply issue new affirmative or confirming determinations that force complainants to go back to the WTO for further decisions that simply start the URAA Section 129 process over again.

Furthermore, binational panels have remand powers that permit binational panels to keep referring matters back to the ITC or Commerce until the ITC or Commerce issues a determination that the binational panel is satisfied complies with U.S. legal requirements. WTO panels have no remand powers. A WTO panel recommends that measures found to be non-conforming be brought into compliance with WTO requirements and then washes its hands of the matter.

The WTO dispute settlement process is clearly no substitute for the binational panel process. However, Canada must be free to challenge U.S. antidumping and countervailing duty laws and agency actions taken under those laws because the United States has an international legal obligation to accord to Canada the benefit of the standards prescribed by the WTO for antidumping and countervailing duty matters. Binational panels must apply U.S. law and practice. When U.S. law and agency practice do not conform to WTO norms, Canada must be able to challenge the non-conforming laws and practices through the WTO dispute settlement process without running the risk that the U.S. Government will use URAA Section 129 to supersede and frustrate the results of domestic judicial or binational panel decisions rendered in the same matter.

Conclusion

Canada entered the negotiations of SLA 2006 with two major threats to the continued viability of the binational panel process outstanding that were unrelated to any issues specific to softwood but were the direct result of the zealous defence by the U.S. Government of the interests of the Coalition and the desire of the U.S. Government to drive the Canadian Parties to a settlement. SLA 2006 did nothing to address either of these issues but explicitly permits each of the United States and Canada to maintain its respective positions.

The duty refund issue and the URAA Section 129 issue cannot be resolved through the NAFTA dispute settlement processes in Chapter Twenty and NAFTA Article 1905 based on the recent softwood trade actions because these matters have been settled. In any event, even if successful, these procedures only confer retaliation rights which are difficult to exercise against a major trading partner and cause a lot of collateral damage without solving the problem.

The one significant development since the negotiations of the SLA 2006 commenced in April 2006 are the two decisions of the Court of International Trade in the Tembec Case that categorically reject the positions of the U.S. Government both as regards duty refund and URAA Section 129. The Canadian Government should do whatever it can to preserve these victories. The Canadian Government should also request that the U.S. Government remove the uncertainty now surrounding the Chapter Nineteen binational panel review process by indicating in a manner that is legally binding that in future cases the U.S. Government will be bound by the duty refund and the URRA Section 129 decisions in the Tembec Case. The U.S. Government should accede to this request because under international law, the United States is obliged to perform its treaty obligations under NAFTA in good faith.[35] Article XI(1) of the SLA 2006 notwithstanding, the Government of Canada should advise the U.S. Government that maintaining these positions that undermine the U.S. Government's own implementing legislation and that have been categorically rejected by a well-respected U.S. Court is inconsistent with the obligation of the United States to perform its treaty obligations in good faith.

One cannot but help be struck by the stark contrast between the statements made by the U.S. Government in the Statement of Administrative Action that accompanied the *Canada-U.S. Free Trade Agreement* respecting the importance of giving effect to the decisions of binational panels and the positions taken by the U.S. Government in the briefs that it filed in the Tembec Case to justify its refusing to give effect to the decision of a binational panel.

The U.S. Administration and the new U.S. Congress should seriously consider whether it is in the best interests of the United States to secure a managed trade deal for the sole benefit of a domestic lobby group by refusing to honour a major treaty obligation to its most important trading partner and a friendly power.

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[34] See 19 U.S.C. § 3538(c)(1) which unequivocally provides only for prospective application.

[35] Article 26 of the *Vienna Convention on the Law of Treaties*.