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Softwood Lumber Imports from Canada: Issues and Events

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December 15, 2006

Abstract. Concerns among U.S. lumber producers about softwood lumber imports from Canada have been raised for decades; the current dispute has persisted for 25 years. U.S. producers argue that they have been harmed by unfair competition, which they assert results from subsidies to Canadian producers, primarily in the form of low provincial stumpage fees (fees for the right to harvest trees from province-owned timberlands) and Canadian restrictions on log exports. Canadians defend their system, and U.S. homebuilders and other lumber users advocate unrestricted lumber imports. This report provides a concise historical account of the dispute, summarizes the subsidy and injury evidence, and discusses current issues and events.

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CRS Report for Congress

Softwood Lumber Imports from Canada: Issues and Events

December 15, 2006

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**Prepared for Members and
Committees of Congress**

Softwood Lumber Imports from Canada: Issues and Events

Summary

U.S. lumber producers have long raised concerns about softwood imports from Canada. They argue that Canada subsidizes its lumber producers with low provincial *stumpage fees* (for the right to harvest trees). In Canada, the provinces own 90% of the timberlands, which contrasts with the United States, where 42% of timberlands are publicly owned and where government timber is often sold competitively; these differences in land tenure make comparisons difficult. U.S. producers also argue that Canadian log export restrictions subsidize producers by preventing others from getting access to Canadian timber; U.S. log exports from federal and state lands are also restricted, but logs are exported from U.S. private lands. Finally, U.S. producers argue that they have been injured by imports of Canadian lumber. They point to the growth in Canadian exports and market share, from less than 3 billion board feet (BBF) and 7% of the U.S. market in 1952 to more than 18 BBF per year and a market share of more than 33% since the late 1990s. Canadians counter these arguments, asserting that their stumpage fees are based on markets, that the WTO prohibits treating export restrictions as subsidies, and that the U.S. industry has been unable to satisfy the growth in U.S. lumber demand for homebuilding and other uses.

The United States initiated investigations of Canadian subsidies — a prerequisite for establishing countervailing duties (CVDs) — in 1982, 1986, and 1991. Subsidy findings led to a 15% Canadian tax on lumber exports in 1986 and a 6.51% CVD in 1992. Canada challenged the CVD, which was revoked in 1994. A 1996 Softwood Lumber Agreement restricted Canadian exports until March 31, 2001. U.S. producers filed antidumping (AD) and CVD petitions immediately after the 1996 agreement expired. U.S. agencies determined that Canadian lumber was subsidized and was being dumped and that the imports threatened to injure U.S. industry. Final AD and CV duties of 27% were imposed in May 2002, although lumber duties were later lowered as a result of annual Commerce Department reviews. Canada filed NAFTA and WTO cases and, with Canadian producers, suits in U.S. federal court challenging U.S. agency actions in the AD and CVD investigations. Canadian companies also filed claims against the United States under the NAFTA investment chapter.

On July 1, 2006, the United States and Canada signed a Softwood Lumber Agreement (2006 SLA) to end the dispute. A finalized version was signed September 12, 2006, and, with subsequent amendments, entered into force October 12, 2006. Among other things, the seven-year agreement provides for the settlement of pending litigation and establishes Canadian export charges, varying by weighted average lumber prices and lower if the Canadian exporting region also accepts volume restraints. The United States has revoked the AD and CVD orders, with at least 80% of the duty deposits being returned to the importers of record. The remaining 20% is being used to fund lumber-related entities and initiatives provided for in the agreement.

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Softwood Lumber Imports from Canada: Issues and Events

On April 27, 2006, the United States and Canada announced a seven-year framework agreement to resolve their longstanding dispute over U.S. imports of Canadian softwood lumber. The United States-Canada Softwood Lumber Agreement (2006 SLA), which entered into force with amendments on October 12, 2006, establishes Canadian export charges, with the level generally depending on average lumber prices, except for lumber from logs harvested in the Yukon, Northwest Territories, Nunavut, and Atlantic Provinces. As required under the 2006 SLA, the United States has revoked its antidumping (AD) and countervailing duty (CVD) orders on softwood lumber, and 80% of the estimated duties collected are being returned to importers of record. The SLA also provides for the termination of pending litigation, the most recent phase of the dispute having been notable for the volume of domestic and international legal proceedings initiated by Canada and Canadian producers challenging U.S. trade remedy actions.

Concerns among U.S. lumber producers about softwood lumber imports from Canada have been raised for decades; the current dispute has persisted for 25 years. U.S. producers argue that they have been harmed by unfair competition, which they assert results from subsidies to Canadian producers, primarily in the form of low provincial stumpage fees (fees for the right to harvest trees from province-owned timberlands) and Canadian restrictions on log exports. Canadians defend their system, and U.S. homebuilders and other lumber users advocate unrestricted lumber imports. This report provides a concise historical account of the dispute, summarizes the subsidy and injury evidence, and discusses current issues and events.¹

Historical Background

The current dispute began in 1981, when letters from Members of Congress and a petition from the U.S. lumber industry asked the U.S. Department of Commerce (DOC) and the U.S. International Trade Commission (ITC) to investigate lumber imports from Canada for a possible CVD.² The ITC found preliminary evidence of

¹ For more historical background and analysis, see CRS Report RL30826, *Softwood Lumber Imports From Canada: History and Analysis of the Dispute*, by Ross W. Gorte.

² U.S. trade law (19 U.S.C. §§1671-1671h) authorizes countervailing duties on imported goods, if the DOC determines that the imports are being subsidized (directly or indirectly) by a foreign country and if the ITC determines that the subsidized imports have materially injured, or threaten to materially injure, a U.S. industry. The duty is set at the calculated level of the subsidies.

injury to the U.S. industry, but in 1983, the DOC determined that the subsidies were de minimis (less than 0.5%), ending the CVD investigation.

In 1986, the U.S. lumber industry filed a petition for another CVD investigation. A 1985 court ruling on a DOC determination of countervailable benefits on certain imports from Mexico was seen as a favorable precedent for reversing the DOC finding on Canadian lumber subsidies.³ In addition, numerous Senators made it clear to the President that action on lumber imports was necessary for legislative approval of fast-track authority for a United States-Canada free trade agreement. The ITC again found preliminary evidence of injury to the U.S. industry, and the DOC reversed its 1983 determination, with a preliminary finding that Canadian producers received a subsidy of 15% ad valorem (i.e., 15% of lumber market prices). On December 30, 1986, the day before the final DOC subsidy determination was to be issued, the United States and Canada signed a memorandum of understanding (MOU) with Canada imposing a 15% tax on lumber exported to the United States, to be replaced by higher stumpage fees within five years.⁴ The U.S. industry then withdrew its petition.

In September 1991, the Canadian government announced that it would withdraw from the MOU because most of the provinces had increased their stumpage fees. The U.S. Trade Representative (USTR) responded by beginning a Section 301 investigation, pending completion of a new CVD investigation by the DOC and the ITC.⁵ In March 1992, the DOC issued a preliminary subsidy finding of 14.48% ad valorem, with a final determination in May establishing a 6.51% ad valorem subsidy leading to a 6.51% ad valorem duty. In July 1992, the ITC issued a final determination that the U.S. industry had been materially injured by Canadian lumber imports.

The Canadian federal government appealed both the DOC and the ITC final determinations to binational review panels established under Chapter 19 of the United States-Canada Free Trade Agreement (FTA), which had entered into force on

³ The case primarily involved whether Mexico's provision of carbon black feedstock and natural gas to firms at prices below world market prices constituted a countervailable subsidy. Under U.S. law, a subsidy was not countervailable if it was generally available. The court remanded the Commerce Department's negative subsidy finding on the ground that the Department had used an improper test to determine whether the subsidy was generally available and directed it to use the test set out by the court. *Cabot Corp. v. United States*, 620 F.Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986).

⁴ See "Determination Under Section 301 of the Trade Act of 1974, Memorandum of December 30, 1986, for the Secretary of Commerce, the U. S. Trade Representative," 52 *Fed. Reg.* 231 (Jan. 5, 1987).

⁵ "Self-Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada," 56 *Fed. Reg.* 56055 (Oct. 31, 1991); "Initiation of Section 302 Investigation and Request for Public Comment on Determinations Involving Expeditious Action: Canadian Exports of Softwood Lumber," 56 *Fed. Reg.* 50738 (Oct. 8, 1991). Under §§ 301 et seq. of the Trade Act of 1974, 19 U.S.C. §§ 2411-2420, the USTR may investigate and respond with a broad range of actions to foreign trade practices which are found to be illegal or unreasonable or discriminatory and burdensome to U.S. commerce.

January 1, 1989. In May 1993, the binational panel reviewing the subsidy determination remanded the DOC finding for further analysis, and in September, the DOC revised its finding to 11.54% ad valorem. In December, the binational subsidy panel again remanded the DOC finding and ordered the DOC to find no subsidies. In January 1994, the DOC complied with the order. Using a provision of the FTA, the USTR requested an Extraordinary Challenge Committee (ECC) to review the binational panel decisions, but the ECC was dismissed in August 1994 for failing to meet FTA standards. The DOC then revoked the CVD,⁶ and in October, the USTR announced that it would terminate the Section 301 action.

Two events in September of 1994 induced Canada to negotiate restrictions on its lumber exports to the United States. First, the U.S. lumber industry filed a lawsuit challenging the constitutionality of the binational panel review process, now contained in the North American Free Trade Agreement (NAFTA).⁷ Second, the President submitted implementing legislation for the GATT Uruguay Round agreements, which explicitly approved the President's Statement of Administrative Action (SAA) accompanying the proposed legislation,⁸ the document containing language indicating that because of Canadian practices, lumber imports from Canada could be subject to a CVD.⁹ In February 1996, the two nations announced an agreement-in-principle — a fee on Canadian lumber exports to the United States in excess of a specified quota for five years — with the final U.S.-Canada Softwood Lumber Agreement (1996 SLA) signed in May and retroactive to April 1, 1996. The 1996 SLA was effective through March 31, 2001.

⁶ The DOC originally instructed the Customs Service to refund with interest all cash deposits made on or after March 17, 1994, the date the FTA panel decision became final. "Certain Softwood Lumber Products from Canada: Notice of Panel Decision, Revocation of Countervailing Duty Order and Termination of Suspension of Liquidation," 59 *Fed. Reg.* 42029 (Aug. 16, 1994). Later, however, when the United States and Canada agreed to enter into consultations to attempt to resolve the underlying trade dispute, the United States stated that it would return duty deposits made before this date. See *U.S. to Repay Canadian Lumber Levies; Bilateral Consultations to Begin*, 11 Int'l Trade Rep. (BNA) 1981 (Dec. 12, 1994). In its March 1995 *Federal Register* notice, the DOC stated that it was using authority under the Tariff Act of 1930, as amended, to compromise its claims for duties on softwood lumber from Canada and that the compromise "resolved all remaining claims of the United States arising from the countervailing duty order on softwood lumber from Canada." "Certain Softwood Lumber from Canada; Determination to Terminate and Not To Initiate Countervailing Duty Administrative Reviews," 60 *Fed. Reg.* 13698 (Mar. 14, 1995).

⁷ *Coalition for Fair Lumber Imports v. United States*, No. 94-1627 (D.C.Cir. filed Sept. 14, 1994).

⁸ See Uruguay Round Agreements Act (URAA), P.L. 103-465, § 101(a)(2), 19 U.S.C. § 3511(a)(2).

⁹ H.Doc. 103-316, vol. 1, at 925-926, 930-931. The issues addressed in the SAA involved whether the benefit of a subsidy could be conferred through a private body (a key question in determining whether a governmental export restraint constitutes a subsidy), whether the effect of a government practice on price or output needed to be considered in order to determine if a subsidy existed, and which factors needed to be taken into account in determining *de facto* specificity, that is, whether a subsidy was specific to an industry in fact.

Industry Analysis: Subsidies and Injury

Annual Canadian lumber imports have risen from less than 3 billion board feet (BBF), about 7% of the U.S. market, in the early 1950s to more than 18 BBF, more than a third of the U.S. market, since the late 1990s. U.S. lumber producers argue that subsidies to Canadian producers give them an unfair advantage in supplying the U.S. market and that this has injured U.S. producers. These two issues — subsidies and injury — are the basis in U.S. trade law for determining whether a CVD is warranted. In addition, *critical circumstances*, which allow for retroactive duties, are deemed to exist if imports rise significantly after ending import restrictions. Finally, dumping — selling imports at less than the cost of their production — can lead to additional duties.

Subsidies: Canadian Stumpage Fees

The U.S. lumber industry has argued that the stumpage fees charged by the Canadian provinces are less than the market price of the timber would be and are therefore a subsidy to Canadian producers. About 90% of the timberlands in the 10 provinces are owned by the provinces. The provinces require management plans for forested areas and allocate the timber harvests through a variety of agreements or leases, often for five or more years with renewal options. Stumpage fees for the timber are determined administratively, often with adjustments to reflect changes in market prices for lumber. This contrasts with the U.S. situation, where 42% of the forests are publicly owned and where public timber is typically sold in competitive auctions; thus, much of the timber in the United States is sold by public and private landowners at market prices.¹⁰ The use of administered fees in Canada opens the possibility that the Canadian system results in transfers to the private sector at less than their fair market value, as the U.S. lumber industry has charged. However, comparisons of U.S. and Canadian stumpage fees are often disputed, because of: differences in measurement systems and the imprecision of converting Canadian cubic meters of logs to U.S. board feet of lumber; differences in the diameter, height, quality, and species mix of U.S. and Canadian forests; differences in management responsibilities imposed on timber buyers (e.g., road construction, reforestation); differences in environmental conditions and policies; and other factors.

Subsidies: Export Restrictions

In its 1992 CVD investigation, the DOC identified export restrictions by British Columbia (BC) as a subsidy to BC softwood lumber manufacturers.¹¹ The DOC

¹⁰ Some argue that U.S. federal agencies are not comparable to traditional, market-oriented private “willing sellers,” because they do not make investments or sales based on profitability, as a private landowner presumably would. However, the U.S. federal government owns only 33% of U.S. timberlands, and thus probably has less impact on timber markets than do the Canadian provinces.

¹¹ “Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada,” 57 *Fed. Reg.* 22570, 22604-22621 (May 28, 1992). In 1990, the DOC determined that an export embargo on raw hides constituted a countervailable (continued...)

found that the BC export scheme constituted indirect government action having the effect of lowering the price of logs sold in the BC domestic market and as a result conferring a benefit on the BC manufacturers by reducing their production costs. BC generally prohibits the export of logs from Crown (provincial) lands to ensure domestic production, provide jobs, and encourage economic development. Export restrictions on public timber in the United States indicate substantially higher prices for export logs than for comparable logs sold domestically. Most economists would consider restrictions that reduce domestic prices below the world market price to be subsidies, and the General Agreement on Tariffs and Trade (GATT) generally prohibits export restrictions. The DOC affirmed its earlier position on the countervailability of export restraints in implementing the Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM).¹² Canada later challenged this approach in a World Trade Organization dispute settlement proceeding, arguing that treating export restraints in this way violated the SCM Agreement. The case is discussed under “WTO Challenges,” below.

Injury to the U.S. Lumber Industry

Proving injury or threat of injury to U.S. lumber producers is also essential to establishing a CVD. The share of the U.S. softwood lumber market provided by Canadian lumber has grown substantially during the past 50 years. In 1952, lumber imports from Canada were less than 3 BBF and Canada’s market share was less than 7%. Beginning in 1998, Canadian lumber imports have been more than 18 BBF, rising to 22 BBF in 2005, and Canada’s market share has fluctuated between 33% and 35% since 1995. These facts are cited by U.S. producers as evidence that Canadian imports have come at the expense of normal domestic growth in industrial lumber production. U.S. homebuilders and other lumber users counter that Canadian lumber is essential to meeting domestic demand, and argue for unrestricted imports. Despite consistent ITC findings of injury, indisputable proof of injury to U.S. producers is difficult to establish.

The 2001-2002 Antidumping and Countervailing Duty Investigations

Immediately following the expiration of the 1996 SLA on March 31, 2001, the U.S. Coalition for Fair Lumber Imports filed antidumping and countervailing duty petitions with the Department of Commerce. The DOC announced the initiation of investigations on April 24, 2001, finding that petitioners had standing and had shown

¹¹ (...continued)

domestic subsidy to Argentinian leather tanners, changing its earlier position that border measures were not countervailable. “Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Leather from Argentina,” 55 *Fed. Reg.* 40212 (Oct. 2, 1990).

¹² See, e.g., “Countervailing Duties,” 63 *Fed. Reg.* 65348, 65351 (Nov. 25, 1998).

adequate industry support.¹³ On May 16, 2001, ITC issued its preliminary determination of threat of material injury, which permitted the investigations to continue.¹⁴ On August 17, the DOC published its preliminary determination of Canadian subsidies of 19.31% ad valorem and established a preliminary duty at that level.¹⁵ The DOC also preliminarily found that critical circumstances existed, potentially allowing for retroactive application of the duty.¹⁶ On November 6, 2001, the DOC published its preliminary determination that Canadian firms were dumping lumber, with margins ranging from 5.94% to 19.24% (12.58% for most firms).¹⁷ The DOC also aligned, and postponed until March 25, 2002, final determinations in the CVD and AD cases.¹⁸

Negotiations were undertaken to forestall final determinations of injury, subsidy, and dumping. The negotiations collapsed on March 21, 2002, and on March 22, the DOC issued final determinations that, as later amended, found Canadian subsidies of 18.79% ad valorem and dumping margins ranging from 2.18% to 12.44% for

¹³ “Notice of Initiation of Antidumping Duty Investigation: Certain Softwood Lumber Products from Canada,” 66 *Fed. Reg.* 21328 (Apr. 30, 2001)(Investigation No. A-122-838); “Notice of Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada,” 66 *Fed. Reg.* 21332 (Apr. 30, 2001)(Investigation No. C-122-839).

¹⁴ “Softwood Lumber from Canada,” 66 *Fed. Reg.* 28541 (May 23, 2001)(Investigations Nos. 701-TA-414 (CVD) and 731-TA-928 (AD)).

¹⁵ “Notice of Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Certain Softwood Lumber Products from Canada,” 66 *Fed. Reg.* 43186 (Aug. 17, 2001).

¹⁶ *Id.* at 43189-43190. Under U.S. CVD law, if a petitioner alleges critical circumstances in its original petition or later by amendment, the DOC must determine whether there is “a reasonable basis to believe or suspect” that the alleged subsidy is inconsistent with the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures and that there have been “massive imports” of the merchandise being investigated over a “relatively short period of time.” 19 U.S.C. §1671b(e). In effect, an affirmative determination results in a retroactive suspension of liquidation — that is, suspension of the final computation of duties — and brings merchandise that was entered but not liquidated before the date of an affirmative preliminary or final determination within the scope of the CVD order. If the final critical circumstances determination is negative, however, the DOC will terminate the retroactive suspension of liquidation and refund any cash deposits made for the affected merchandise.

Critical circumstances procedures are intended to deter foreign producers or exporters from increasing exports after an investigation is initiated but before a DOC preliminary determination, at which time (if the determination is affirmative), liquidation would ordinarily be suspended. As explained by the Senate Committee on Finance, “the critical circumstances provisions put at risk an importer who enters massive quantities of imports during the 90 days prior to the Commerce Department’s preliminary determination when the importer is on notice that the merchandise may be dumped or subsidized.” S.Rept. 100-71, at 93-94.

¹⁷ “Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Certain Softwood Lumber Products from Canada,” 66 *Fed. Reg.* 56062 (Nov. 6, 2001).

¹⁸ 66 *Fed. Reg.* at 43189 and 56063.

individually investigated companies and a margin of 8.43% for all other firms. The DOC did not find critical circumstances, however, in its final subsidy determination. On May 2, 2002, by a 4-0 vote of the commissioners, the ITC issued a final determination of threat of material injury. Duties averaging 27% went into effect May 22, 2002, when the DOC published the final duty notice in the *Federal Register*.¹⁹ The United States immediately began collecting duty deposits at this rate.²⁰

Canada's NAFTA and WTO Challenges

Seeking revocation of the antidumping and countervailing duty orders and return of the estimated duties deposited by importers on softwood lumber entries, Canada challenged DOC and ITC determinations in the softwood antidumping and CVD investigations before binational panels established under Chapter 19 of the North American Free Trade Agreement (NAFTA) and in dispute settlement proceedings

¹⁹ “Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products from Canada,” 67 *Fed. Reg.* 36068 (May 22, 2002); “Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada,” 67 *Fed. Reg.* 36070 (May 22, 2002).

²⁰ Official rates were later lowered as a result of annual DOC administrative reviews, though the United States also applied rates determined in response to decisions resulting from Canada's WTO challenges to the antidumping and countervailing duty orders. Rates calculated by the DOC in response to Canada's NAFTA challenges were not implemented before revocation of the AD and CVD orders. All rates calculated by the DOC before revocation are set out in Appendix I (dumping rates) and Appendix II (subsidy rates).

An administrative review is a mechanism used to administer the U.S. system of duty assessment, which is carried out on a retrospective basis. Under this approach, final liability for AD and CV duties is determined after goods are imported; ordinarily, the amount of duties owed is determined in an administrative review of the AD or CVD order covering imports for a specified annual period. Trade Act of 1974, § 751(a), 19 U.S.C. § 1675(a), 19 C.F.R. § 351.212(a), 351.213. The rate determined in the administrative review is also the rate at which estimated duties on imports entered during the succeeding year are assessed and will apply until any subsequent administrative review produces a new rate. Liquidation (i.e., the final computation of duties) of most softwood lumber entries covered by the now-revoked AD and CVD orders was suspended pending the ongoing softwood lumber litigation.

Before the duty orders were revoked, the DOC concluded two administrative reviews (2002-2003 and 2003-2004 imports), issued preliminary results in a third (2004-2005 imports), and on July 3, 2006, initiated a fourth review (2005-2006 imports). For further information on these reviews, see the following *Federal Register* notices:

First administrative review: 70 *Fed. Reg.* 3358 (Jan. 24, 2005)(amended final AD), 70 *Fed. Reg.* 9046 (Feb. 24, 2005)(amended final CVD);

Second administrative review: 70 *Fed. Reg.* 73448 (Dec. 12, 2005)(final CVD), 71 *Fed. Reg.* 7727 (Feb. 14, 2006)(second amended final AD);

Third administrative review: 71 *Fed. Reg.* 33932 (June 12, 2006)(preliminary CVD), 71 *Fed. Reg.* 33964 (June 12, 2006)(preliminary AD);

Fourth administrative review: 71 *Fed. Reg.* 37892 (July 3, 2006)(initiation of AD and CVD reviews).

initiated in the World Trade Organization (WTO). Canadian producers also filed claims against the U.S. government under the investor-state dispute settlement provisions of NAFTA, arguing that the imposition of the AD and CVD duties had caused the United States to breach obligations owed Canadian investors in the United States under NAFTA Chapter 11. In addition, Canada and Canadian producers filed suits in the U.S. Court of International Trade challenging agency actions in the softwood investigations, as well as related actions under other statutes, including the Continued Dumping and Subsidy Offset Act (CDSOA), which required the distribution of collected antidumping and countervailing duties to U.S. firms.

Although Canada had generally prevailed in its NAFTA and WTO cases, the United States continued to collect estimated duties on softwood entries. In particular, the United States used a WTO-related ITC affirmative threat of injury determination to maintain the AD and CVD orders, even though Canada had earlier obtained a negative threat determination a result of its NAFTA case. Although Canada had obtained a court order in its favor in the suit challenging the application of the CDSOA to Canadian imports, for the most part, domestic and international litigation directly affecting the AD and CV duty orders was not fully resolved at the time the April 2006 framework agreement was reached.²¹

Overview of NAFTA and WTO Dispute Settlement Procedures

Carrying forward the process first established in the U.S.-Canada Free Trade Agreement, NAFTA Chapter 19 provides for binational panel review of a final agency determination in an antidumping or countervailing duty investigation in lieu of judicial review in the country in which the determination is issued. Panel review may be requested by a NAFTA country on its own or on behalf of a firm that would otherwise be entitled to seek judicial review of the final determination in the country of issuance. The binational panel determines whether the challenged determination is in accordance with the antidumping or countervailing duty law of the country involved and, if the panel finds that it is not, directs the issuing agency to issue a new determination in accord with the panel decision within a prescribed time frame. Either party to the dispute may appeal a panel decision to an Extraordinary Challenge Committee (ECC) for review on a limited range of issues. NAFTA-implementing legislation requires that the International Trade Commission or the Department of Commerce, as the case may be, “take action not inconsistent with” a NAFTA or ECC panel decision within the time period set out by the panel.²² Multiple remands to an

²¹ This report does not examine in detail the possible interaction of the various avenues of legal challenge employed by Canada and Canadian producers regarding the AD and CVD orders. For further discussion, see Chi Carmody, *Softwood Lumber Dispute (2001-2006)*, 100 Am. J. Int'l L. 664 (2006); Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: the WTO-NAFTA 'Spaghetti Bowl' is Cooking*, 9 J. Int'l Econ. L. 197 (2006); Lawrence R. Walders & Neil C. Pratt, *Trade Remedy Litigation - Choice of Forum and Choice of Law*, 18 St. Johns. J. Legal Comment. 51 (2003). Elizabeth C. Seastrum & Myles S. Getlan, *The Globalization of International Trade Litigation: AD/CVD Litigation - Which Forum and Which Law?* 26 Brook. J. Int'l L. 893 (2001).

²² Tariff Act of 1930, § 516A(g)(7)(A), 19 U.S.C. § 1516a(g)(7)(A).

agency may occur if the reviewing panel is not satisfied with the agency determination issued in response to the panel's directions.

WTO dispute settlement, a government-to-government process set out in the WTO Dispute Settlement Understanding (DSU), involves a three-stage process consisting of consultations, panel and possibly Appellate Body review, and, if needed, implementation.²³ In contrast to NAFTA Chapter 19, a WTO panel reviews a challenged measure to determine whether it is consistent with international obligations contained in one or more WTO agreements.²⁴ The WTO process also permits a longer, and possibly open-ended, implementation phase. Rather than permitting the panel or the Appellate Body to prescribe a deadline for complying with an adverse WTO decision, the DSU allows the disputing parties to agree on a deadline themselves or, if they cannot do so, to have the period be determined by arbitration. The WTO cannot compel a WTO Member to comply with a decision; instead, if the defending Member does not implement the decision within the established period, the complaining Member may seek compensation from the defending party or request authorization from the WTO to impose a retaliatory measure, usually a tariff increase on selected products, until compliance is achieved. In addition, any party to the dispute may ask that a compliance panel be established to determine whether the defending party has abided by the WTO decision rendered in the case. In practice, such a proceeding, which may involve an appeal, is usually completed before the request to retaliate is placed before the WTO for final approval.

In contrast to NAFTA-implementing legislation, the Uruguay Round Agreements Act (URAA) provides the executive branch with discretion to determine how to respond to an adverse WTO decision involving an agency determination in an AD or CVD investigation. Although Section 129 of the URAA authorizes the DOC and ITC to issue new determinations in response to adverse WTO decisions, it does not authorize the agencies to do so on their own initiative, but instead allows the United States Trade Representative (USTR) to decide whether to request the agency involved to do so in a given case.²⁵ Section 129 determinations that are

²³ For a more detailed discussion of the WTO process, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization: An Overview*, by Jeanne J. Grimmer.

²⁴ While a DOC or ITC determination may be facially consistent with U.S. antidumping or countervailing duty law, it may still be challenged as violative of U.S. WTO obligations either because the agency has acted under a U.S. law viewed as requiring a WTO-inconsistent outcome or because an agency is seen as having interpreted and applied a statute in a manner that results in infringement of a WTO obligation.

²⁵ Section 129 of the URAA, 19 U.S.C. § 3538, sets out separate procedures for ITC and DOC determinations. If an interim WTO panel report or a WTO Appellate Body (AB) report concludes that an *International Trade Commission* action in an AD or CVD investigation is inconsistent with U.S. obligations under the WTO Antidumping or SCM Agreements, the USTR may request the ITC to issue an advisory report on whether U.S. law allows the ITC "to take steps in connection with the particular proceeding that would render its action not inconsistent with" the panel or AB findings. If a majority of the Commissioners have found that action may be taken under existing law, the USTR must consult with the House Ways and Means and Senate Finance Committees and may request the ITC to issue a new determination that would render the ITC action "not inconsistent

(continued...)

implemented under this section apply prospectively, that is, to unliquidated entries entered on or after the date the USTR directs the Commerce Department to revoke an AD or CVD order or to implement a new determination, as the case may be.²⁶

Unlike the government-to-government process set out in NAFTA Chapter 19 and the WTO Dispute Settlement Understanding, investor-state dispute settlement contained in NAFTA Chapter 11 allows a private person — in this case, an investor of a NAFTA party — to file an arbitral claim directly against the government of another NAFTA party. Claims may be made for a breach of a NAFTA investment obligation that has resulted in loss or damage to the investor. Each NAFTA party has consented to the establishment of such panels in NAFTA, and thus ad hoc consent by the party is not needed once a claim is filed. If the investor prevails in the dispute, the arbitral panel may award monetary damages to the investor. The panel may not order the NAFTA party to remove the offending measure, however, or to pay punitive damages.

NAFTA Challenges: Chapter 19 Cases

Canada and Canadian lumber producers sought binational panel review of DOC and ITC final determinations, as well as review of other agency actions, in both the AD and CVD cases. As a result of the challenges to the final determinations, Canada obtained a significantly reduced subsidy rate from the DOC and a negative threat of injury determination from the ITC. Although the DOC originally lowered AD rates for individually investigated companies, it raised dumping rates in a subsequent remand redetermination. Because of the negative ITC threat determination, Canada sought eventual revocation of the AD and CVD orders and return of more than \$4 billion in duty deposits. The U.S. position had been that even were the orders to be revoked, duties would not be refunded absent a negotiated settlement.

²⁵ (...continued)

with” the WTO findings. The new determination must be issued within 120 days of the USTR’s request. If, as a result of the new determination, the AD or CVD order is no longer supported by an affirmative injury determination, the USTR may, after consulting with Congress, direct the DOC to revoke the antidumping or CVD order in whole or in part.

Where a *Department of Commerce* determination is at issue, the USTR is authorized to request the DOC to issue a new determination that would render its action “not inconsistent with” the panel or AB findings; if requested, the DOC must do so within 180 days of the request. While the USTR is not required to request a preliminary advisory report from the DOC in such cases, USTR must first consult with the DOC and the above-named committees before requesting the new determination. Once the new DOC determination is issued, the USTR, after consulting with Congress, may direct the DOC to implement it in whole or in part.

²⁶ URAA, § 129(c)(1), 19 U.S.C. § 3538(c)(1). In Canada’s unsuccessful WTO case against § 129(c)(1) (see discussion under “WTO Challenges,” below), the United States maintained that the provision does not address unliquidated entries made before the date described therein and that the United States thus has other options for determining the AD or CVD duty rate to be assigned to such entries. The bulk of softwood lumber entries would have fallen into this category.

In September 2005, shortly after NAFTA review of the ITC injury determination concluded in Canada's favor, the U.S. industry group Coalition for Fair Lumber Imports Executive Committee filed a constitutional challenge to the binational panel process in the U.S. Court of Appeals for the District of Columbia Circuit, as provided for in § 516A(g)(4) of the Tariff Act of 1930, 19 U.S.C. § 1516a(g)(4).²⁷ The case, which was pending at the time the April 2006 framework agreement was reached, is one of the legal proceedings that the United States and Canada agreed would be terminated as part of the SLA litigation settlement. Annex 2A of the SLA, as amended, requires the United States and Canada to "seek to dismiss" the case, and a motion to dismiss for lack of jurisdiction was filed October 12, 2006, the effective date of the agreement. The case was dismissed on December 12, 2006.²⁸

DOC Final Dumping Determination. In a report issued in July 2003, the binational panel unanimously affirmed the DOC final dumping determination in part and remanded in part, directing the DOC to publish revised dumping margins in light of the panel's instructions, which focused in part on the DOC's product comparisons.²⁹ In October 2003, the DOC submitted its new determination to the panel, which resulted in lower AD duty rates for all but one individually investigated producer (Slocan), as well as a slightly reduced "all others" rate.³⁰ The panel's decision on the remand, issued in March 2004, found the DOC determinations to be inconsistent with U.S. law and ordered new determinations for three Canadian exporters (Tembec, Slocan, and West Fraser).³¹ In its April 2004 redetermination,

²⁷ Complaint and Petition for Review for Declaratory Relief, Coalition for Fair Lumber Imports, Executive Committee v. United States, No. 05-1366 (D.C.Cir. filed Sept. 13, 2005). The plaintiff argued that the binational panel review system, *inter alia*, violates Article III of the U.S. Constitution by wholly precluding judicial review of binational panel and Extraordinary Challenge Committee decisions, circumvents the Article II Appointments Clause by not requiring that panelists, who in the plaintiff's view are either judges or federal officers for purposes of the Clause, be appointed pursuant to Article II requirements, and denies due process to U.S. producers of subject imports. For a discussions of constitutional arguments aired when the binational panel system was first proposed to be included in the United States-Canada Free Trade Agreement, see *United States-Canada Free Trade Agreement; Hearing Before the Sen. Committee on the Judiciary on the Constitutionality of Establishing a Binational Panel to Resolve Disputes in Antidumping and Countervailing Duty Cases*, 100th Cong., 2d Sess. (1990), and *United States-Canada Free Trade Agreement; Hearing Before the House Comm. on the Judiciary*, 100th Cong., 2d Sess. (1988).

²⁸ Coalition for Fair Lumber Imports, Executive Committee v. United States, No. 05-1366, slip op. (D.C.Cir. Dec. 12, 2006), available at [<http://pacer.cadc.uscourts.gov/docs/common/opinions/200612/05-1366a.pdf>].

²⁹ *Decision of the Panel*, In re *Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, No. USA-CDA-2002-1904-02 (July 17, 2003). All NAFTA panel decisions are available at [http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx].

³⁰ *Remand Redetermination*, In re *Sales at Less Than Fair Value of Certain Softwood Lumber Products from Canada*, No. USA-CDA-2002-1904-02 (Oct. 16, 2003), at [<http://ia.ita.doc.gov/remands/usa-cda-2002-1904-02.pdf>].

³¹ *Decision of the Panel Respecting Remand Redetermination*, In re *Certain Softwood* (continued...)

the DOC lowered the dumping margin slightly for two producers, found a de minimis (negligible) margin for the third (West Fraser), and recalculated the “all others” rate to 8.85%, slightly greater than the rate in the original AD order.³² The panel remanded the dumping determination in June 2005, with instructions to the DOC to revoke the AD order with respect to West Fraser.³³ In addition, the panel directed the DOC to recalculate dumping margins without using *zeroing* — a practice that involves assigning a zero value to transactions in which the export price or constructed export price exceeds normal value (i.e., where there is no dumping), and as a result not using the higher export prices in these transactions to offset the lower export prices in other sales. The NAFTA panel cited the earlier adopted WTO decision (discussed below) in which DOC’s use of zeroing in the final softwood dumping determination was found to be inconsistent with the WTO Antidumping Agreement.³⁴

In its July 2005 remand redetermination, the DOC took the approach that it had employed in responding to the earlier adverse WTO decision on its softwood dumping determination; namely, it used the transaction-to-transaction method of price comparison (a methodology not involved in the WTO case), applied zeroing in comparing prices under this method, and calculated dumping margins that exceed those in its original 2002 determination, specifically an average of 10.06% for individually investigated producers and a 10.52% “all others” rate.³⁵ Moreover,

³¹ (...continued)

Lumber Products from Canada: Final Affirmative Antidumping Determination, No. USA-CDA-2002-1904-02 (Mar. 5, 2004).

³² *Remand Redetermination*, In re *Sales at Less Than Fair Value of Certain Softwood Lumber Products from Canada*, No. USA-CDA-2002-1904-02 (Apr. 21, 2004), at [<http://ia.ita.doc.gov/remands/usa-cda-2002-1904-02-1.pdf>].

³³ *Decision of the Panel Following Remand*, In re *Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, No. USA-CDA-2002-1904-02 (June 9, 2005).

³⁴ *Id.* at 21-44. The panel’s conclusion involves the interplay of two U.S. Supreme Court cases: *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), under which a court must defer to an agency’s interpretation of an ambiguous statute so long as the interpretation is reasonable, and *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), under which a statute “ought never to be construed to violate the law of nations if any other possible construction remains.” U.S. courts and the panel had held that the Tariff Act of 1930 is ambiguous as to the use of zeroing in antidumping investigations. The NAFTA panel stated, however, that “an otherwise permissible agency interpretation — in the case of an ambiguous statute — which conflicts with an international legal obligation of the United States is unlawful if there is alternatively available interpretation that is consistent with that obligation.” The panel concluded that, in light of the earlier adverse WTO decision, which, it noted, had been accepted by the United States in its final Section 129 determination, DOC’s use of zeroing in the NAFTA remand determination was inconsistent with a U.S. international legal obligation and, by virtue of the *Charming Betsy* doctrine, was “unreasonable and not in accordance with law.”

³⁵ *Remand Redetermination*, In re *Sales at Less Than Fair Value of Certain Softwood Lumber Products from Canada*, No. USA-CDA-2002-1904-02 (July 11, 2005), at (continued...)

citing the need to apply the same methodology to all producers, the DOC calculated a rate of 3.21% for West Fraser, a margin that is no longer de minimis. The DOC also asked that the panel reconsider its WTO-related analysis and its seeming approval of using the legally discredited zeroing methodology for West Fraser. The panel had not issued a decision at the time of the April 2006 framework agreement. The 2006 SLA, as amended, provides that on the effective date of the agreement, Canada and the United States will seek to dismiss this action.

DOC Final Subsidy Determination. In August 2003, the binational panel upheld the DOC's treatment of provincial stumpage programs as subsidies and the DOC finding that the programs are "specific" to an industry (a necessary element of a domestic subsidy finding).³⁶ At the same time, it found as contrary to U.S. law the DOC's use of cross-border market comparisons to calculate the subsidy, the blanket refusal of the DOC to exclude from the scope of the CVD order reprocessed Maritime-origin softwood lumber, and other aspects of the DOC determination related to the exclusion of products. The DOC submitted its new determination in January 2004, lowering the duty rate from 18.79% to 13.23%.³⁷ As described in a DOC press release, the recalculated rate was based on a revised methodology using a benchmark "constructed on the basis of Canadian log prices and import value of logs, adjusting for harvesting costs." The DOC also excluded certain Maritime-origin lumber and old lumber, including used railroad ties, from the scope of the CVD order. In a June 2004 decision, the binational panel granted the DOC's request for a remand "to reconsider certain limited implementation issues" and additionally remanded to DOC with instructions to recalculate various provincial benchmark prices, to reconsider the adjustment for profit with respect to the benchmarks for all Canadian provinces, and to make two other recalculations.³⁸

The panel remanded to DOC three additional times. The DOC, which continued to take issue with the panel's rationale for calculating the benefit of the subsidy, issued its fifth remand determination on November 22, 2005, lowering the subsidy rate to 0.80%, a de minimis rate that does not permit the imposition of duties.³⁹ The

³⁵ (...continued)

[<http://ia.ita.doc.gov/remands/usa-cda-2002-1904-02-ad4.pdf>]. For further discussion of the WTO case, see *Final Dumping Determination on Softwood Lumber from Canada (DS 264)* under "WTO Challenges," below.

³⁶ *Decision of the Panel, In re Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, No. USA-CDA-2002-1904-03 (Aug. 13, 2003).

³⁷ *Remand Determination, In re Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, No. USA-CDA-2002-1904-03 (Jan. 12, 2004), at [<http://ia.ita.doc.gov/remands/usa-cda-2002-1904-03.pdf>].

³⁸ *Decision of the Panel, In re Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, No. USA-CDA-2002-1904-03 (June 7, 2004).

³⁹ *Fifth Remand Determination, In re Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, No. USA-CDA-2002-1904-03 (Nov. (continued...))

panel upheld the determination on March 17, 2006.⁴⁰ On April 27, 2006, the United States requested an Extraordinary Challenge Committee (ECC) to review the panel decision but immediately suspended its request in light of the framework agreement reached by United States and Canada to settle the softwood lumber dispute.⁴¹ Both countries subsequently notified interested parties in the proceeding that they had jointly agreed that the proceedings be suspended.⁴² A suit filed by Canadian industry groups in the Court of International Trade seeking a court order compelling the USTR to appoint a member to the ECC was dismissed on August 2, 2006.⁴³ The 2006 SLA, as amended, provides that on the effective date of the agreement, the United States will withdraw its request for the ECC.

ITC Final Threat of Injury Determination. In September 2003, the binational panel affirmed parts of the ITC threat of injury determination but also remanded the determination to the ITC, directing it to examine, among other things, whether certain factors other than dumped or subsidized imports may have contributed to the threat of injury, to reexamine one of its like product determinations, and to reconsider its interpretation of a statute which, in the ITC's view, allowed it to cross-cumulate dumped and subsidized imports in the context of its threat determination.⁴⁴ In response, the ITC issued a new affirmative threat of injury determination,⁴⁵ which was also remanded⁴⁶ and followed by a third ITC affirmative threat determination.⁴⁷ Instead of remanding for a third time, the binational panel in August 2004 directed the ITC to issue a "no threat" determination

³⁹ (...continued)

22, 2005); see also Commerce News, November 22, 2005, at [<http://ita.doc.gov/media/PressReleases/1105/NAFTALumber-112205.html>].

⁴⁰ *Decision of the Panel on the Fifth Remand Determination*, In re *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, No. USA-CDA-2002-1904-03 (Mar. 17, 2006).

⁴¹ *Canada's Harper Confirms Softwood Lumber Framework; USTR Says 'Core Terms' Reached*, 23 Int'l Trade Rep. (BNA) 674 (May 4, 2006).

⁴² See *Ontario Forest Industries*, *infra* note 43, slip op. at 13.

⁴³ *Ontario Forest Industries Assoc. v. United States*, No. 06-00156, slip op. 06-123 (Ct. Int'l Trade Aug. 2, 2006), at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-123.pdf].

⁴⁴ *Decision of the Panel*, In re *Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, No. USA-CDA-2002-1904-07 (Sept. 5, 2003).

⁴⁵ *Views of the International Trade Commission on Remand*, In re *Certain Softwood Lumber Products from Canada*, No. USA-CDA-2002-1904-07 (Dec. 15, 2003), at [http://hotdocs.usitc.gov/docs/pubs/701_731/pub3658.pdf].

⁴⁶ *Remand Decision of the Panel*, In re *Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, No. USA-CDA-2002-1904-07 (Apr. 19, 2004).

⁴⁷ U.S. International Trade Commission, *Softwood Lumber from Canada (Views on Remand)*; Investigation Nos. 701-TA-414 and 731-TA-928 (Final), Second Remand, Pub. 3715 (June 2004), at [http://hotdocs.usitc.gov/docs/pubs/701_731/pub3715.pdf].

within 10 days.⁴⁸ With the chairman dissenting, the ITC did so under protest on September 10, 2004.⁴⁹ The panel affirmed the new determination on October 12, 2004, and directed the NAFTA Secretariat to issue a Notice of Final Panel Action on October 25, 2004.⁵⁰ On November 24, 2004, the United States requested an Extraordinary Challenge Committee (ECC) to review the underlying NAFTA panel decisions.⁵¹ The ECC unanimously affirmed the panel decisions August 10, 2005.⁵²

While Canada maintained that the NAFTA results required the United States to remove the AD and CVD orders in question, the United States claimed that the affirmative threat determination issued by the ITC on November 24, 2004, in response to the 2004 adverse WTO decision on the same issue, superseded the earlier NAFTA-related determination and legally supported the continued imposition of duties. Canada, along with Canadian producers and provincial governments, successfully challenged implementation of the November 2004 ITC determination in the U.S. Court of International Trade (USCIT), which on July 21, 2006, ruled that the USTR's order to the DOC to implement the WTO-related determination was ultra vires. The court later ruled that all softwood lumber entries for which liquidation (i.e., the final computation of duties) was suspended were to be liquidated in accordance with the final negative NAFTA panel decision. As a result, duty deposits on these entries were to be returned. For further discussion of the USCIT and WTO cases, both of which are part of the litigation settlement in the 2006 SLA, see "Investigation of the International Trade Commission in Softwood Lumber from Canada (DS277)," under "WTO Challenges," below.

Other U.S. Administrative Actions. Three binational panels requested in 2005 involved the review of further U.S. administrative actions in the softwood AD and CVD investigations. At issue were

- the final results of DOC's first administrative review of the CVD order,⁵³

⁴⁸ *Second Remand Decision of the Panel, In re Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, No. USA-CDA-2002-1904-07 (Aug. 31, 2004).

⁴⁹ U.S. International Trade Commission, *Softwood Lumber from Canada (Views on Remand)*, Investigation Nos. 701-TA-414 and 731-TA-928 (Final), Third Remand, Pub. 3815 (Sept. 2004), at [http://hotdocs.usitc.gov/docs/pubs/701_731/pub3815.pdf].

⁵⁰ See "Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products from Canada: NAFTA Panel Decision," 69 *Fed. Reg.* 69584 (Nov. 30, 2004).

⁵¹ See "North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Notice of Request for an Extraordinary Challenge Committee," 69 *Fed. Reg.* 70235 (Dec. 3, 2004).

⁵² *Opinion and Order of the Extraordinary Challenge Committee, In re Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, No. ECC-2004-1904-01USA (Aug. 10, 2005).

⁵³ *Certain Softwood Lumber Products from Canada: Department of Commerce Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company Specific* (continued...)

- implementation of the affirmative ITC determination on threat of injury issued in response to the WTO ruling on the ITC's final threat determination,⁵⁴ and
- the DOC dumping determination issued in response to a separate WTO ruling.⁵⁵

The binational panel on the ITC injury determination was stayed as of March 22, 2005, pending the outcome of the NAFTA ECC proceeding, described above. At the time the April 2006 framework agreement was reached, the proceeding had not been reactivated, nor had panel decisions been issued in the other two cases. The 2006 SLA, as amended, provides that "as promptly as possible" after the effective date of the agreement, Canada and the United States will file joint motions to dismiss on the grounds of mootness the panel involving the first administrative review of the CVD order. The two referenced WTO proceedings (DS277 and DS264) are discussed under "WTO Challenges," below.

In addition, Canadian producers filed panel requests in 2006 concerning

- the results of DOC's second administrative review of the AD order,⁵⁶
- DOC's second administrative review of the CVD order (also filed by Canada),⁵⁷ and

⁵³ (...continued)

Reviews, No. USA-CDA-2005-1904-01; see "North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review," 70 *Fed. Reg.* 4093 (Jan. 28, 2005).

⁵⁴ *Certain Softwood Lumber Products from Canada: U.S. Implementation of the New Determination Under Section 129(a) of the Uruguay Round Agreements Act*, No. USA-CDA-2005-1904-03; see "North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review," 70 *Fed. Reg.* 4093 (Jan. 28, 2005).

⁵⁵ *Certain Softwood Lumber Products from Canada: Department of Commerce Determination under Section 129 of the Uruguay Round Agreements Act*, No. USA-CDA-2005-1904-04; see "North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review," 70 *Fed. Reg.* 34088 (June 13, 2005).

⁵⁶ *Certain Softwood Lumber Products from Canada: Department of Commerce Final Results of Antidumping Administrative Review*, No. USA-CDA-2006-1904-01; see "North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review," 71 *Fed. Reg.* 3051 (Jan. 19, 2006).

⁵⁷ *Certain Softwood Lumber Products from Canada: Department of Commerce Final Results of Countervailing Duty Administrative Review*, No. USA-CDA-2006-1904-02; see "North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review," 71 *Fed. Reg.* 3052 (Jan. 19, 2006).

- a March 2006 ruling by the DOC that certain products entering under a particular tariff item (HTSUS 4409.10.05) fell within the scope of the CVD order.⁵⁸

These three cases were also pending at the time the April 2006 framework agreement was reached.

NAFTA Challenges: Chapter 11 Investment Claims

Three Canadian lumber companies — Canfor Corporation, Tembec Inc., and Terminal Forest Products Ltd. — filed arbitral claims against the United States under the investment chapter of the NAFTA, arguing that the United States breached various NAFTA investment obligations by virtue of final agency determinations in the softwood lumber investigations.⁵⁹ After the cases were consolidated,⁶⁰ the arbitral panel ruled on June 6, 2006, that it did not have jurisdiction over the parties' AD and CVD claims, finding that Article 1901(3) of NAFTA, which provides that parties' AD and CVD obligations under NAFTA are with one exception limited to those set out in Chapter 19, rendered the claims non-justiciable before a Chapter 11 panel.⁶¹ At the same time, the panel concluded that it was not barred from adjudicating claims relating to the Continued Dumping and Subsidy Offset Act. The 2006 SLA, as amended, provides that on the effective date of the agreement, Canfor Corporation will withdraw its claim against the United States in the consolidated Chapter 11 arbitration.

WTO Challenges

Along with the NAFTA proceedings, Canada also initiated a number of WTO cases related to or directly involving the softwood antidumping and CVD investigations. Canada's WTO challenge of the Continued Dumping and Subsidy Offset Act is discussed in a separate section below.

Although the WTO cases had produced mixed outcomes for the parties, Canada prevailed to some degree in each of its complaints involving the final U.S. subsidy, dumping, and injury determinations. Both the DOC and the ITC issued new

⁵⁸ *Certain Softwood Lumber Products from Canada: Department of Commerce Final Scope Ruling Regarding Entries Made Under HTSUS 4409.10.05*, No. USA-CDA-2006-1904-05; see "North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews; Request for Panel Review," 71 *Fed. Reg.* 19874 (Apr. 18, 2006).

⁵⁹ For further information on NAFTA investor-state arbitrations brought against the United States, including the arbitrations discussed here, see the Department of State website at [<http://www.state.gov/s/l/c3741.htm>].

⁶⁰ See generally *NAFTA Panel Consolidates Three Softwood Lumber Investment Claims Against the United States*, 100 *Am. J. Int'l L.* 243-44 (2006).

⁶¹ *Canfor Corp. v. United States and Terminal Forest Products Ltd. v. United States*, Decision on Preliminary Question (June 6, 2006), at [<http://www.state.gov/documents/organization/67753.pdf>]. Tembec is not a party to the consolidated proceeding. See *id.* at ¶¶ 27-28.

determinations under § 129 of the Uruguay Round Agreements Act (Section 129 determinations), which resulted in a subsidy rate substantially the same as the original rate, higher dumping margins, and reconfirmation of a threat of material injury from dumped and subsidized Canadian imports. These determinations were later challenged by Canada in WTO compliance proceedings. The six WTO cases directly involving the AD and CVD investigations have been settled as part of the 2006 SLA.⁶²

Export Restraints as Subsidies (DS194). As noted earlier, the DOC recognized the countervailability of export restrictions in its 1992 determination that Canadian softwood lumber was subsidized. The subsequent Uruguay Round Agreement on Subsidies and Countervailing Measures (SCM Agreement) set out a definition of the term “subsidy,” stating that a subsidy will be deemed to exist if there is a financial contribution by a government and a benefit is conferred thereby. Under the agreement, a financial contribution may consist of government provision of goods and services other than general infrastructure and includes a situation where the government entrusts or directs a private body to carry out the financial contribution involved. In the Statement of Administrative Action accompanying the 1994 Uruguay Round Agreements Act, and in the *Federal Register* explanation of the DOC’s subsequent implementing rule for countervailing duties, the executive branch made clear that U.S. law and the SCM Agreement recognized that an indirect subsidy could be provided through an export restraint scheme, the DOC stating that although export restraints “may be imposed to limit parties’ ability to export, they can also, in certain circumstances lead those parties to provide the restrained good to domestic purchasers for less than adequate remuneration.”⁶³ The DOC also confirmed that were it again to investigate situations and facts similar to those in the 1992 softwood case, U.S. trade law would continue to permit it to reach the same conclusion.

In May 2000, Canada challenged this policy in the WTO, alleging that the U.S. interpretation, as set forth in the above-cited documents, was inconsistent with U.S. obligations under the SCM Agreement. Focusing on the requirement that there be a governmental financial contribution, Canada argued that the language in the SAA and the *Federal Register* required the United States to interpret the U.S. countervailing duty statute “to treat an export restraint as a subsidy, if it has a price effect beneficial to users of the restricted product in the restricted market,” while in fact there would be no such contribution for purposes of the SCM Agreement.⁶⁴

The WTO panel agreed with Canada that an export restraint “cannot constitute government-entrusted or government-directed provision of goods” and thus does not constitute a financial contribution from the government as contemplated by the

⁶² Canada and the United States notified the WTO of the settlement on October 12, 2006. The notifications are contained in the following WTO documents: WT/DS236/5, WT/DS247/2, WT/DS257/26, WT/DS264/29, WT/DS277/20, WT/DS311/2.

⁶³ H. Doc. 103-316, vol. 1, at 925-926; “Countervailing Duties,” 63 *Fed. Reg.* 65348, 65351 (Nov. 25, 1998).

⁶⁴ Request for the Establishment of a Panel by Canada, *United States — Measures Treating Export Restraints as Subsidies*, WT/DS194/2 (July 25, 2000).

agreement's definition of "subsidy."⁶⁵ At the same time, the panel found that the U.S. statute read in light of the interpretative documents does not require that export restraints be treated as financial contributions, and thus recommended no remedial action. The panel report was adopted by the WTO Dispute Settlement Body (DSB) on August 23, 2001.

Section 129(c)(1) of the Uruguay Round Agreements Act (DS221).

In apparent anticipation of possible U.S. AD and CVD investigations of Canadian softwood lumber imports, Canada filed a WTO complaint against the United States in January 2001, challenging § 129(c)(1) of the URAA, 19 U.S.C. § 3538(c)(1), which provides that a Section 129 determination that is implemented applies to unliquidated entries of the subject merchandise that are entered on or after the following dates: in the case of an ITC determination, the date on which the USTR directs the DOC to revoke an antidumping or countervailing duty order pursuant to that determination; in the case of a DOC determination, the date on which the USTR directs the DOC to implement the determination, which sets forth procedures for administrative compliance with adverse WTO panel reports involving U.S. AD or CVD determinations.⁶⁶ Were AD and CVD duties to be applied to softwood lumber entries, liquidation — that is, the final computation of duties — of the subject entries would initially be suspended because of the retrospective nature of the U.S. system. Were the agency determination to be challenged, the suspension would be extended until the litigation were settled. Thus Canada was concerned that even were it to succeed in having a duty order revoked or amended in its favor as a result of a WTO challenge, duties deposited on goods entered before the date set out in § 129(c)(1) would not be returned and, moreover, might be made available to domestic producers under the Continued Dumping and Subsidy Offset Act, discussed below.

Canada thus alleged in its WTO case that § 129(c)(1), being prospective, effectively prohibited the United States from refunding estimated antidumping or countervailing duties deposited with Customs and Border Protection where a determination in the underlying investigation had been found to be inconsistent with WTO obligations. In Canada's view, the statute, by mandating this outcome, violated portions of the WTO Dispute Settlement Understanding and various WTO antidumping and CVD duty obligations.

In response, the United States maintained that § 129(c)(1) only addresses the treatment of imports entered after the implementation date and does not govern the treatment of prior entries for which final duties have not yet been calculated, referred to in the dispute as "prior unliquidated entries." The United States further argued that, as such, the statute does not mandate any particular treatment of prior unliquidated entries and that the United States has other legal options for dealing with these entries, including establishing a new dumping or subsidy margin by using a WTO-consistent methodology in an administrative review of the entries or, in the

⁶⁵ Panel Report, *United States — Measures Treating Export Restraints as Subsidies*, ¶ 8.75 WT/DS194/R (June 29, 2001). All WTO panel and Appellate Body reports and other WTO documents related to specific disputes are available at [<http://www.wto.org>].

⁶⁶ *Canada Seeks WTO Consultations with U.S. on Refunding of Certain Duties Held Illegal*, 18 Int'l Trade Rep. (BNA) 139 (Jan. 25, 2001).

event the duty order or orders were revoked as a result of the WTO proceeding, revising the duty rate in response to a domestic court decision involving the earlier entries.⁶⁷

The July 2002 panel report concluded that Canada failed to establish that the statute either required WTO-inconsistent action on the part of the United States or precluded the United States from taking action in accordance with its WTO obligations.⁶⁸ The panel report was adopted by the DSB August 30, 2002.

Preliminary Softwood CVD Determinations (DS236). In August 2001, Canada challenged the DOC's preliminary subsidy and critical circumstances determinations in the softwood lumber CVD proceeding, arguing that the determinations violated the SCM Agreement and the GATT 1994. As noted earlier, the SCM Agreement provides that a subsidy will be deemed to exist if there is a financial contribution by a government and a benefit is conferred thereby. A financial contribution may consist of government provision of goods and services other than general infrastructure. Domestic subsidies are countervailable if they are specific to an industry.

The WTO panel upheld the U.S. determination that provincial stumpage programs constitute a financial contribution to the industry but faulted the methodology used by the DOC in determining whether a benefit was conferred on Canadian lumber producers, citing the DOC's use of cross-border price comparisons and the Department's failure to examine whether a subsidy had passed through an unrelated upstream supplier to a downstream user of lumber inputs.⁶⁹ Although the panel also found that DOC's preliminary critical circumstances determination (allowing retroactive duties) was improper, the DOC did not find critical circumstances in its final CVD determination, an outcome requiring it to terminate the retroactive suspension of liquidation that it had ordered after the preliminary affirmative determination and to release any bond or security and to refund any cash deposits made with respect to the entries covered by the retroactive suspension.

⁶⁷ Second Written Submission of the United States, *United States — Section 129(c)(1) of the Uruguay Round Agreements Act*, ¶¶ 17-20, WT/DS221 (Mar. 8, 2002), available at [http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file327_6455.pdf].

⁶⁸ Panel Report, *Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221/R (July 15, 2002). Canada later proposed in the WTO Doha Round negotiations that, as adverse decisions of the WTO Dispute Settlement Body (DSB) are implemented prospectively, there be special dispute settlement provisions in the Agreement on Antidumping and the SCM Agreement that “would require the return of anti-dumping and countervailing duties or duty deposits in cases where a Member’s compliance action with a DSB decision results in the measure being withdrawn, or a partial return of duties or duty deposits where the amount of duties/deposits that would have been collected under a WTO-compliant measure is less than the amounts actually collected.” WTO Negotiating Group on Rules, *Submission from Canada Respecting the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-dumping Agreement)* at 7, TN/RL/W/27 (Jan. 28, 2003).

⁶⁹ Panel Report, *United States — Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R (Sept. 27, 2002).

Finally, the panel upheld U.S. laws and regulations regarding expedited and administrative reviews in CVD cases, finding that they did not require the executive branch to act inconsistently with WTO obligations. Neither party pursued an appeal and the panel report was adopted November 1, 2002. The United States later reported to the WTO that it did not need to take any action to comply with the panel report on the ground that the preliminary duties were no longer in effect and the provisional cash deposits at issue had been refunded to Canada before the panel report was circulated.⁷⁰ Issues raised in this case were further pursued by Canada in its WTO challenge of the final DOC CVD determination (DS257), discussed below.

Provisional Softwood Antidumping Measure (DS247). On March 6, 2002, Canada requested consultations with the United States on the provisional AD measure imposed on Canadian lumber after the DOC's affirmative preliminary dumping determination October 31, 2001 (i.e., the suspension of liquidation of all entries and the requirement for a cash deposit or posting of a bond equal to the preliminary dumping margin).⁷¹ Canada argued that neither the initiation of the AD investigation nor the preliminary determination was in accord with the WTO Antidumping Agreement. Canada did not request a panel in this case.

Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (DS257). Canada challenged the DOC's final affirmative subsidy determination in the softwood lumber CVD investigation as violating the WTO SCM Agreement and the GATT 1994. Like the panel report in DS236, discussed above, the panel report on the final DOC determination upheld the DOC finding that provincial stumpage programs were financial contributions by the government and that the subsidies were specific,⁷² but faulted the DOC's use of cross-border price comparisons and the Department's determination that the subsidy from the stumpage program passed through to downstream users. The report was appealed by both the United States and Canada.

In a January 2004 decision, the WTO Appellate Body upheld the panel's stumpage determination but reversed the panel on its finding that cross-border comparisons could not be used in determining a benefit and on its consequential finding that the U.S. determination of the existence and amount of the benefit violated WTO rules.⁷³ Because of insufficient information, however, the Appellate

⁷⁰ Dispute Settlement Body, *Minutes of Meeting*, Nov. 28, 2002, at 4-6, WT/DSB/M/137 (Feb. 3, 2003).

⁷¹ Request for Consultations by Canada, *United States — Provisional Anti-Dumping Measure on Imports of Certain Softwood Lumber from Canada*, WT/DS247/1 (Mar. 12, 2002).

⁷² Panel Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R (Aug. 29, 2003). The panel found that because the Canadian provincial stumpage programs give tenure holders a right to cut standing timber that is in the nature of a proprietary right, the governments are in essence providing standing timber to timber harvesters and thus providing a good for WTO purposes. *Id.* ¶¶ 7.9-7.30. See also Appellate Body Report, *infra* note 73, ¶¶ 46-76.

⁷³ Appellate Body Report, *United States — Final Countervailing Duty Determination with* (continued...)

Body could not complete the analysis as to whether the benchmark that the United States did use was proper and consequently whether the U.S. benefit finding and ultimately its imposition of countervailing duties based on that determination comported with WTO obligations.

Regarding downstream users, the issue before the Appellate Body concerned situations where harvesting and processing were not carried out by vertically integrated enterprises, thus requiring an examination of “whether the subsidy conferred on products of certain enterprises in the production chain was ‘passed through,’ in arm’s length transactions, to other enterprises producing the countervailed product.”⁷⁴ The Appellate Body upheld the panel’s finding that United States had violated WTO obligations when the DOC failed to conduct a pass-through analysis regarding arm’s-length sales of *logs* by tenured harvesters/sawmills to unrelated sawmills, but reversed the panel on its finding that the DOC acted inconsistently with WTO obligations when it failed to conduct a pass-through analysis regarding arm’s-length sales of *primary lumber* by such sellers to unrelated remanufacturers.

The appellate and modified panel reports were adopted by the DSB in February 2004, and the United States and Canada later agreed on a compliance deadline ending December 17 of that year.⁷⁵ The DOC issued a revised CVD determination pursuant to § 129 of the URAA on December 10, 2004, and instructed Customs to collect estimated CVDs of 18.62% on goods entered for consumption or withdrawn from warehouse after that date, a reduction of 0.17% from the original net subsidy rate.⁷⁶

At Canada’s request, a compliance panel reviewed the new DOC determination, as well as U.S. action in the first administrative review of the CVD order.⁷⁷ The review, which covered 2002-2003 imports, reduced the net subsidy rate to 16.37% ad valorem.⁷⁸ Canada also sought to impose retaliatory measures against the United States; the request was automatically sent to arbitration upon U.S. objection, but

⁷³ (...continued)

Respect to Certain Softwood Lumber from Canada, WT/DS257/AB/R (Jan. 19, 2004).

⁷⁴ *Id.* ¶ 124.

⁷⁵ Agreement under Article 21.3(b) of the DSU, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/13 (Apr. 30, 2004).

⁷⁶ “Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products from Canada,” 69 *Fed. Reg.* 75305 (Dec. 16, 2004).

⁷⁷ Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Canada, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/15 (Jan. 4, 2005).

⁷⁸ “Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada,” 69 *Fed. Reg.* 75917, 75919 (Dec. 20, 2004), amended by “Notice of Amended Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products from Canada,” 70 *Fed. Reg.* 9046, 9048 (Feb. 24, 2005).

under an agreement between the two parties, the arbitration was suspended until completion of the compliance panel process.⁷⁹

In an August 2005 report, the compliance panel found that the DOC had not carried out the necessary pass-through analysis regarding non-arm's-length sales of logs by tenured timber harvesters to unrelated lumber producers and concluded that, in both the Section 129 determination and the first administrative review, the DOC had made its calculations using transactions for which it had not demonstrated that the benefits of subsidized log inputs had passed through to the processed product.⁸⁰ The United States appealed, arguing that the first administrative review was outside the scope of the panel's jurisdiction. In a report issued December 5, 2005, the AB upheld the panel's conclusion that the first administrative review fell within its mandate to the extent that the pass-through analysis was involved and ruled that the panel had acted within the scope of its authority in making its legal conclusions regarding U.S. actions in the review.⁸¹ The panel and AB reports were adopted by the DSB on December 20, 2005.⁸² Neither the Canada nor the United States asked that arbitration of Canada's retaliation request be resumed, an option available to them under their bilateral procedural agreement.

Final Dumping Determination on Softwood Lumber from Canada (DS264). In September 2002, Canada requested consultations with the United States regarding the DOC's final affirmative softwood dumping determination, claiming various violations of the WTO Antidumping Agreement and the GATT. Canada argued that the DOC had improperly initiated the case; improperly applied a number of methodologies, resulting in artificial or inflated dumping margins; not established a correct product scope for its investigation; and failed to adhere to various WTO requirements involving procedural matters in the investigation.⁸³

The panel report, issued April 13, 2004, generally rejected Canada's claims, though (with one dissent) it faulted the United States for calculating dumping

⁷⁹ Request for the Establishment of a Panel, Recourse to Article 21.5 of the DSU by Canada, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/15 (Jan. 4, 2005).

⁸⁰ Panel Report, Recourse by Canada to Article 21.5, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/RW (Aug. 1, 2005).

⁸¹ Appellate Body Report, Recourse by Canada to Article 21.5, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/RW (Dec. 5, 2005).

⁸² Action by the Dispute Settlement Body, Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/25 (Dec. 22, 2005).

⁸³ Request for the Establishment of a Panel by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/2 (Dec. 9, 2002).

margins with the use of *zeroing*, under which the DOC assigns a zero value to non-dumped sales.⁸⁴ The United States appealed the panel report on this issue.

On August 11, 2004, the Appellate Body upheld the panel's conclusions on zeroing and, regarding an issue appealed by Canada, reversed the panel's finding that the United States had not infringed various Antidumping Agreement provisions in calculating financial expenses for softwood lumber for one company under investigation (Abitibi).⁸⁵ Because the reversal focused only on the panel's interpretation of the legal standard that the panel used to evaluate the Commerce Department's approach, the Appellate Body did not make any findings as to whether the United States in fact acted consistently or inconsistently with the provisions involved. The reports were adopted by the DSB August 31, 2004.

On January 31, 2005, the DOC issued a preliminary Section 129 determination in which it continued to find dumping and moreover increased dumping margins.⁸⁶ The DOC compared prices on a transaction-to-transaction basis, rather than on the weighted-average-to-weighted-average basis used in its original determination. The DOC maintained that the WTO ruling applied only to the use of zeroing in the methodology involved in the case and did not apply to other modes of price comparison that the DOC has discretion to use in dumping investigations. With a May 2, 2005, compliance deadline in place,⁸⁷ the DOC published a final Section 129 determination in the May 2 *Federal Register* in which it used the same methodology that it had used in the preliminary determination and again posted higher dumping margins.⁸⁸ The margins ranged from 3.93% to 16.35% for individually investigated producers and an "all others" rate of 11.54%, approximately three percentage points higher than the original rate.

At Canada's request, the new determination was referred to a WTO compliance panel on June 1, 2005. Canada also sought authorization to suspend concessions in the amount of C\$400 million for 2005 and, for each subsequent year, in an amount that equaled "the portion of the total antidumping duties illegally collected and not

⁸⁴ Panel Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004). The U.S. practice of *zeroing* was successfully challenged by the European Communities in a separate WTO case (DS 294) and is the subject of a number of other challenges by WTO Members. Federal courts have consistently held *zeroing* to be valid under U.S. AD law, finding the statute to be silent on the issue and deferring to DOC's statutory interpretation. See, for example, *Timken Co. v. United States*, 354 F.3d 1334 (2004), *aff'g* 240 F.Supp. 2d 1228 (Ct. Int'l Trade 2002).

⁸⁵ Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004).

⁸⁶ "Preliminary Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada," at [<http://ia.ita.doc.gov/download/section129/Canada-Lumber-129-Prelim-013105.pdf>].

⁸⁷ Modification of the Agreement under Article 21.3(b) of the DSU, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/15 (Feb. 17, 2005).

⁸⁸ "Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada," *70 Fed. Reg.* 22636 (May 2, 2005).

refunded for that year as a result of the United States non-compliance.”⁸⁹ On U.S. objection, the request was sent to arbitration. Under an agreement between the United States and Canada, the arbitration was suspended pending completion of the compliance proceedings.⁹⁰

In a decision circulated April 3, 2006, the compliance panel found that the use of zeroing in transaction-to-transaction comparisons was consistent with U.S. obligations under the Antidumping Agreement and that the United States had thus implemented the WTO ruling in the case.⁹¹ On appeal by Canada, the Appellate Body reversed the panel, finding that the Antidumping Agreement does not permit the use of zeroing in the transaction-to-transaction methodology and recommending that the DSB request the United States to bring its measure into compliance with its obligations under the agreement.⁹² The Appellate Body report and the panel report, as reversed by the Appellate Body, were adopted on September 1, 2006.

Investigation of the International Trade Commission in Softwood Lumber from Canada (DS277). On December 20, 2002, Canada requested consultations with the United States regarding the ITC’s May 2002 final threat of injury determination. Canada claimed violations of the GATT, the Antidumping Agreement, and the SCM Agreement, alleging, among other things, that the ITC based its threat of injury determination “on allegation, conjecture and remote possibility” and that it failed to consider properly a number of relevant factors in its determination.⁹³

A final panel report faulting the ITC’s threat determination and its causal analysis was publicly circulated March 22, 2004.⁹⁴ Although the panel recommended that the United States bring its measures into conformity with the WTO Antidumping and SCM Agreements, it declined to recommend any ways for the United States to

⁸⁹ Recourse to Article 21.5 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/16 (May 20, 2005); Recourse to Article 22.2 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/17 (May 20, 2005).

⁹⁰ Understanding between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/18 (May 30, 2005).

⁹¹ Panel Report, Recourse to Article 21.5 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/RW (Apr. 3, 2006).

⁹² Appellate Body Report, Recourse to Article 21.5 of the DSU by Canada, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/RW (Aug. 15, 2006).

⁹³ Request for Consultations by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/1 (Jan. 7, 2003). For amplification of Canada’s claims, see Request for the Establishment of a Panel by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/2 (Apr. 4, 2003).

⁹⁴ Panel Report, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (Mar. 22, 2004).

do so. The United States took issue with the panel's negative findings but chose not to appeal; the report was adopted on April 26, 2004.⁹⁵ The United States told the WTO Dispute Settlement Body that it intended to comply,⁹⁶ and the United States and Canada subsequently agreed on a nine-month compliance period ending January 26, 2005.⁹⁷

On November 24, 2004, ITC issued a Section 129 determination in which, with one dissent, it affirmed its earlier threat of injury determination.⁹⁸ In making its determination, the ITC reopened the administrative record and took into account additional evidence, an action foreclosed to it in the NAFTA binational panel review of the threat determination. The USTR later requested the DOC to implement the new ITC determination, which it did by amending the AD and CVD orders to reflect its issuance and implementation.⁹⁹

In February 2005, Canada requested the establishment of a compliance panel and authorization to impose approximately C\$4.25 billion in sanctions, an amount it stated represents the total amount of CVD and AD duty cash deposits collected and not refunded as a result of the United States' failure to revoke the May 22, 2002, CVD and antidumping orders, which Canada viewed as proper implementation of the WTO rulings in the case.¹⁰⁰ As is it did in the other softwood disputes, the United States objected to the retaliation request, sending it to arbitration. Under an agreement between the parties, the arbitration was suspended until the rulings in the compliance procedure were adopted, with either party able to request that arbitration be resumed if the rulings were ultimately adverse to the United States.¹⁰¹

⁹⁵ *WTO Adopts Ruling Condemning ITC Probe on Softwood Lumber; U.S. Declines Appeal*, 21 Int'l Trade Rep. (BNA) 751 (2004).

⁹⁶ Dispute Settlement Body, *Minutes of Meeting*, May 19, 2004, at 8, WT/DSB/M/169 (June 30, 2004).

⁹⁷ Agreement under Article 21.3(b) of the DSU, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/7 (Oct. 4, 2004).

⁹⁸ U.S. International Trade Commission, *Softwood Lumber from Canada; Investigation Nos. 701-TA-414 and 731-TA-928 (Section 129 Consistency Determination)*, Pub. 3740 (Nov. 2004), at [http://hotdocs.usitc.gov/docs/pubs/701_731/pub3740.pdf]; see also "Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada," 69 *Fed. Reg.* 75916 (Dec. 20, 2004).

⁹⁹ See "Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada," 69 *Fed. Reg.* 75916 (Dec. 20, 2004).

¹⁰⁰ Recourse to Article 21.5 of the DSU by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/8 (Feb. 15, 2005); WTO Recourse to Article 22.2 of the DSU by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/9 (Feb. 15, 2005)

¹⁰¹ Understanding between Canada and the United States Regarding Procedures under Articles 21 and 22 of the DSU, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/11 (Feb. 25, 2005).

In a report issued November 15, 2005, the compliance panel found that the ITC determination was consistent with U.S. obligations under the Antidumping and SCM Agreements.¹⁰² In describing its standard of review, the panel noted, inter alia, that unless evidence and arguments detracting from the agency's conclusions "demonstrate that an unbiased and objective investigating authority **could not** reach a particular conclusion, we are obliged to sustain the investigating authorities' judgment, even if we would not have reached that conclusion ourselves."¹⁰³ In an appeal by Canada, the WTO Appellate Body on April 13, 2006, reversed the compliance panel, ruling that it had applied an improper standard of review and had not examined the ITC determination with an adequate level of scrutiny.¹⁰⁴ The Appellate Body did not itself examine the WTO-consistency of the ITC determination, however, and thus did not recommend that the United States take any action regarding the determination.

As noted above, the United States maintained that the Section 129 determination issued in response to the WTO ruling legally supported the continued imposition of AD and CVD duties on Canadian softwood lumber, notwithstanding ITC's "no threat" determination issued in September 2004 at the direction of the NAFTA binational panel, as subsequently upheld by the NAFTA Extraordinary Challenge Committee.¹⁰⁵ In January 2005, Canada and Canadian producers, in three separate actions, challenged implementation of the Section 129 determination in the U.S. Court of International Trade on the ground that the USTR's order to the DOC to implement the new determination was ultra vires, that is, beyond the scope of USTR's authority under the statute. Plaintiffs argued that § 129 only authorizes the USTR to order the revocation of an AD or CVD order in response to a new negative ITC determination and thus where a new determination does not legally undermine an existing order no further administrative action is authorized. The court later stayed the proceedings temporarily pending the outcome of the NAFTA Extraordinary Challenge Committee proceeding and in September 2005 consolidated the three cases in one action, *Tembec, Inc. v. United States*.

On July 21, 2006, the court ruled that the USTR was not authorized to issue the order to the DOC and that as a result the May 2002 antidumping and countervailing duty orders were not supported by an affirmative finding of injury or threat thereof.¹⁰⁶ The court also directed the parties to respond to various questions relating to whether

¹⁰² Panel Report, Recourse to Article 21.5 of the DSU by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/RW (Nov. 11, 2005).

¹⁰³ *Id.* ¶ 7.63 (emphasis in original).

¹⁰⁴ Appellate Body Report, Recourse to Article 21.5 of the DSU by Canada, *United States — Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/AB/RW (Apr. 13, 2006).

¹⁰⁵ *NAFTA Lumber Panel Orders ITC to Find No Injury Threat in 10 Days*, Inside U.S. Trade (Sept. 3, 2004), at 1; *ITC Reverses Threat Ruling in Canadian Softwood Cases*, 21 Int'l Trade Rep. (BNA) 1522 (2004).

¹⁰⁶ *Tembec, Inc. v. United States*, No. 05-00028, slip. op 06-109 (Ct. Int'l Trade July 21, 2006), at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-109.pdf].

federal law required that cash deposits on softwood entries whose liquidation had been suspended before November 2004, in this case the bulk of the softwood duties, be returned to the importers of record.¹⁰⁷ Liquidation of most of the softwood lumber entries — that is, the final computation of duties — had been suspended since the ITC’s final threat of injury was published in May 2002; the suspension was continued under § 516A(g)(5)(C) of the Tariff Act of 1930, 19 U.S.C. § 1516a(g)(5)(C), a provision that may be invoked in the event of certain NAFTA panel reviews.¹⁰⁸ On October 13, 2006, the court ruled that liquidation of all entries subject to a suspension of liquidation under the cited provision is to occur in accordance with a NAFTA panel’s final determination.¹⁰⁹ As a result, all unliquidated softwood entries were to be liquidated in accordance with the final negative decision of the NAFTA injury panel and thus without the imposition of antidumping and countervailing duties. Accordingly, these deposits were to be refunded as well.

The United States had retroactively revoked the antidumping and countervailing duty orders on October 12, 2006, the effective date of the SLA, the same day that Canada had stipulated to the dismissal of its complaint in the USCIT proceeding and the United States filed a motion to dismiss on the ground that retroactive revocation and liquidation in accordance with the revocation rendered the action moot.¹¹⁰ The United States subsequently asked the court to vacate its October 13 decision; Canada and Canadian producers have opposed the granting of this later motion.¹¹¹

DOC Reviews of Countervailing Duty on Softwood Lumber (DS311).

On April 14, 2004, Canada requested consultations with the United States regarding the CVD case, arguing that the United States had violated the SCM Agreement and the GATT by failing to provide expedited and administrative reviews to establish individual CVD rates for specific exporters who had requested them.¹¹² No panel request was made in this case.

¹⁰⁷ *Tembec, Inc. v. United States*, No. 05-00028 (Ct. Int’l Trade July 21, 2006)(order to parties to respond to specific questions). The specified date is the date of the so-called “*Timken* notice,” that is, the *Federal Register* notice stating that the NAFTA panel had issued a report not “in harmony” with the original ITC determination. According to the court, the parties appeared to agree that, in the event of a court decision striking down the USTR’s action, duty deposits collected on entries after this date would be returned to the plaintiffs. *Tembec*, slip. op. 06-109, at 16-17. The fate of the earlier entries, however, remained in dispute.

¹⁰⁸ See *Tembec, Inc.* slip op. 06-152, *infra* note 109, at 9-11.

¹⁰⁹ *Tembec, Inc. v. United States*, Consol. Ct. No. 05-00028, slip. op 06-152 (Ct. Int’l Trade Oct. 13, 2006), at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-152.pdf].

¹¹⁰ See Motion for Reconsideration and to Vacate *Tembec II*, at 1-3, *Tembec, Inc.*.

¹¹¹ *U.S., Canada Lumber Groups Oppose Dismissal of NAFTA Case*, Inside U.S. Trade, Dec. 1, 2006, at 8, 9.

¹¹² Request for Consultations by Canada, *United States — Reviews of Countervailing Duty on Softwood Lumber from Canada*, WT/DS311/1 (Apr. 19, 2004).

Softwood Lumber Imports and the Continued Dumping and Subsidy Offset Act (“Byrd Amendment”)

As evident from several of the legal proceedings discussed above, Canada was concerned that in cases where Canadian firms were subsequently excluded from an AD or CVD order, or were the orders to be eventually revoked, duty deposits would not be returned to importers. Moreover, were these duties not refunded, they might eventually be available for distribution to U.S. lumber firms under the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), also known as the “Byrd Amendment,” 19 U.S.C. §1765c, which mandated the annual disbursement of AD and CVD duties to petitioners and interested parties in the underlying trade remedy proceedings for a variety of qualifying expenditures. Although Congress repealed the CDSOA in February 2006, it also required the continued distribution of duties collected on entries of goods made and filed before October 1, 2007.¹¹³ As discussed below, however, the U.S. Court of International Trade, in a suit filed by Canada and Canadian producers, ruled that the CDSOA does not apply to Canadian imports.

Prior to Canada’s federal court suit, Canada and 10 other WTO Members had successfully challenged the CDSOA in a WTO dispute proceeding. The WTO panel and Appellate Body ruled that the statute violated provisions in the Antidumping and SCM Agreements prohibiting WTO Members from maintaining a “specific action against” dumping or subsidization except as provided in WTO agreements.¹¹⁴ Canada was one of eight complainants who requested and received authorization to retaliate against the United States for its failure to repeal or modify the law by December 27, 2003, the end of the compliance period in the case. An arbitral panel ruled that each could retaliate in an amount equal to 72% of the annual CDSOA disbursements relating to duties paid on imports from that country.¹¹⁵ Having identified a current annual retaliation level of \$14 million, Canada began to impose a 15% surcharge on imports of U.S. live swine, cigarettes, oysters, and certain

¹¹³ Deficit Reduction Act of 2005, P.L. 109-171, §7601.

¹¹⁴ Panel Report, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234/R (Sept. 16, 2002); Appellate Body Report, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003).

¹¹⁵ Canada stated in its retaliation request that it intended either to place additional import duties on U.S. products or to suspend the application of specified obligations under the WTO Antidumping Agreement and the WTO SCM Agreement “to determine that the effect of dumping or subsidization of products from the United States is to cause or threaten material injury to an established domestic industry [*sic*], or is to retard materially the establishment of a domestic industry,” or to do both. Recourse by Canada to Article 22.2 of the DSU, *United States — Continued Dumping and Subsidy Offset Act of 2000*, WT/DS234/25 (Jan. 16, 2004). In other words, Canada also proposed to suspend the material injury test in AD and CVD investigations involving imports from the United States. For the arbitral ruling on Canada’s retaliation request, see Decision by the Arbitrator, Recourse to Arbitration by the United States under Article 22.6 of the DSU, *United States — Continued Dumping and Subsidy Offset Act of 2000 (Original Complaint by Canada)*, WT/DS234/ARB/CAN (Aug. 31, 2004).

specialty fish as of May 1, 2005. Although the United States now considers that with repeal of the CDSOA it has fulfilled its WTO obligations, Canada and other complainants have expressed concerns that the continued payments authorized under the legislation prevent the United States from fully complying with the WTO decision in the case.¹¹⁶

In April 2005, Canada and Canadian industry groups challenged CDSOA distributions based on Canadian imports in a suit in the U.S. Court of International Trade, arguing that, because of a provision in the NAFTA Implementation Act stating that any amendment to U.S. AD and CVD laws enacted after the NAFTA entered into force “shall apply to goods from an NAFTA country only to the extent specified in the amendment,¹¹⁷ the CDSOA, in not expressly referring to Canada, does not apply to imports of Canadian products. On April 7, 2006, the court held that due to the cited statutory requirement, the U.S. Bureau of Customs and Border Protection (CBP) does not have authority under the CDSOA to distribute AD or CVD duties collected on Canadian or Mexican imports.¹¹⁸ On July 14, 2006, the court permanently enjoined CBP from making any CDSOA payments to the extent they derive from antidumping or countervailing duties imposed on softwood lumber and two other Canadian products.¹¹⁹ Although other WTO Members have continued their retaliatory measures in the WTO case, Canada did not renew its tariff surcharge, which expired April 30, 2006.¹²⁰

The 2006 U.S.-Canada Softwood Lumber Agreement

On April 26, 2006, the United States and Canada announced a tentative agreement to terminate the AD and CVD duties and related litigation. An early version of the agreement was signed on July 1, 2006, with a finalized version signed September 12, 2006. Amendments to the September 12 text were subsequently

¹¹⁶ Dispute Settlement Body, *Minutes of Meeting*, Feb. 17, 2006, at 5-10, WT/DSB/M/205 (Mar. 31, 2006).

¹¹⁷ North American Free Trade Agreement Implementation Act, P.L. 103-182, § 408, 19 U.S.C. § 3438.

¹¹⁸ Canadian Lumber Trade Alliance v. United States, 425 F.Supp.2d 1321 (Ct. Int’l Trade 2006), at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-48.pdf]. The court also ruled that Canada did not have standing to sue in this case.

¹¹⁹ Canadian Lumber Trade Alliance v. United States, 2006 WL 2168520 (Ct. Int’l Trade July 14, 2006), at [http://www.cit.uscourts.gov/slip_op/Slip_op06/06-48.pdf]; see also *CIT Issues Permanent Injunction On Some Byrd Amendment Distributions*, 23 Int’l Trade Rep. (BNA) 1108 (July 20, 2006).

¹²⁰ Canada, Dept. of Foreign Affairs and International Trade, *Dispute Settlement: Questions and Answers - Expiration of Retaliatory Measures*, at [<http://www.dfait-maeci.gc.ca/tna-nac/disp/byrdqa-en.asp>]; *EU Increases U.S. Exports Subject To WTO Retaliation for Byrd Transition*, 23 Int’l Trade Rep. (BNA) 695 (May 4, 2006); and *Japan to Extend Retaliatory Tariffs Against United States for One Year*, Daily Rep. for Executives (BNA) A-3 (Aug. 8, 2006).

agreed upon, and, on October 12, 2006, the Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America (SLA 2006) entered into force.¹²¹

Under the agreement, the United States has revoked the CVD and AD orders on Canadian lumber. In exchange, and as discussed earlier, the parties have agreed to terminate, or in some cases to seek to dismiss, NAFTA, WTO, and domestic court cases filed by Canada and Canadian producers, as well as the U.S. court case filed by U.S. industry challenging the constitutionality of the NAFTA binational panel system (described above). The Canadians are imposing export charges when the Random Lengths' Framing Lumber Composite Price¹²² falls below US\$355 per thousand board feet (MBF), with the rate charged varying with how far the composite price falls.¹²³ The export charges can be significantly reduced if the Canadian producing region also agrees to volume restraints, which become increasingly restrictive as the average price falls. Lumber prices have been falling in 2006, falling below the trigger in May and to the maximum rate of 15% (or less with restrictive volume restraints) for July through September.¹²⁴

There are several additional provisions relating to export charges and volumes. There is a third country trigger, allowing export charge refunds if, for consecutive quarters, the third country share of U.S. lumber consumption grows, the U.S. share increases, and the Canadian share decreases. A surge mechanism generally provides for substantially greater export charges if a Canadian region's exports exceed 110% of its allocated share of total Canadian exports. For high-value products — those valued at more than C\$500 per MBF — the export charges are calculated at C\$500 per MBF.

Canada and the United States have agreed to make “best efforts” to define “policy exits” from the export charges for each province within 18 months of the final agreement. Also, the export measures would not apply to lumber products from timber harvested in the Atlantic Provinces, the Yukon, Northwest Territories, or Nunavut, or for the companies excluded from the CVD order.

¹²¹ The amendments to the September 12 text mainly address the distribution of duties and the treatment of pending legal cases. The text of the SLA is available at [<http://www.dfait-maeci.gc.ca/eicb/softwood/pdfs/SLA-en.pdf>] (text of September 12, 2006) and [<http://www.dfait-maeci.gc.ca/eicb/softwood/pdfs/Agreementamending-en.pdf>] (amendments of October 12, 2006).

¹²² This is a weighted average framing lumber prices calculated weekly by Random Lengths, Inc., a wood products price reporting firm located in Eugene, OR.

¹²³ The Softwood Lumber Products Export Charge Act, 2006, described by Canada as the “last step” in implementing the SLA, became law December 14, 2006. *Softwood Lumber Legislation Receives Royal Assent*, Government of Canada, News Release No. 157 (Dec. 14, 2006).

¹²⁴ The Random Lengths Framing Lumber Composite Price can be found at [http://www.randomlengths.com/base.asp?s1=In_Depth&s2=Useful_Date&s3=Monthly_Composite_Prices#revised%20lumber].

SLA 2006 is for seven years and may be renewed for two additional years. Once the agreement has been in force for 18 months, however, it may be terminated by either party upon six-month notice. In addition, the United States may immediately terminate the agreement if Canada fails to apply the export measures agreed to in the SLA; likewise, Canada may immediately terminate the agreement if the United States breaches its commitments not to undertake trade remedy investigations involving softwood lumber while the SLA is in effect.¹²⁵

The SLA precludes new cases, investigations and petitions, and actions to circumvent the commitments in the agreement. In addition, U.S. producers who are participating in the SLA have agreed that, in the event the SLA expires under its own terms or the United States exercises its option to terminate the agreement after it is in effect for 18 months, they will not file AD or CVD petitions or request a Section 301 investigation involving Canadian softwood lumber, and will oppose the initiation of any such investigations, for a period of 12 months after the termination.

Finally, on the issue of the roughly \$5 billion deposited under the CVD and AD orders, the funds have been allocated to importers of record and other recipients. The greater of \$4 billion or 80% of the deposits, plus interest, are being returned to the importers of record. The remaining \$1 billion is being split between the members of the U.S. Coalition for Fair Lumber Imports (\$500 million), a proposed bilateral industry council charged with improving North American lumber markets (\$50 million), and jointly agreed “meritorious initiatives,” including assistance for timber-reliant communities, low-income housing and disaster relief (such as aid to victims of Hurricane Katrina), and promotion of sustainable forest management practices (\$450 million).¹²⁶ On October 12, 2006, the USTR announced that the three meritorious initiatives would be the United States Endowment for Forestry and Communities, Inc. (\$200 million), Habitat for Humanity International (\$100 million), and the American Forest Foundation (\$150 million).¹²⁷

¹²⁵ The SLA further provides that if, at the end of a proceeding under the agreement’s dispute settlement article, Canada makes adjustments to its export measures, or the United States imposes a volume restraint or customs duty on Canadian softwood lumber, as the case may be, either party may terminate the agreement on one-month notice if the parties have consulted on the status of the SLA in the interim.

¹²⁶ The Administration revoked the antidumping and countervailing duty orders and is returning duty deposits pursuant to the litigation settlement authority of the Department of Justice. *Lumber Coalition Executive Committee Seen as Winner in Lumber Deal*, Inside U.S. Trade, June 2, 2006, at 1, 15; *U.S.-Canada Lumber Deal Hinges on Canadian Mills Dropping Litigation*, Inside U.S. Trade, April 28, 2006, at 1, 17-18. Under the SLA, as amended, Canada is obligated to enter into agreements with importers of record under which Canada receives the rights to the cash deposits and accrued interest for covered softwood entries. Under the agreements, Canada is to repay importers with the stipulation that a percentage of the cash deposits otherwise owed each importer, proportionate to \$1 billion, will be paid directly by Canada to accounts for the Coalition, the bilateral industry council, and the designated meritorious initiatives.

¹²⁷ Office of the United States Trade Representative, “U.S. Trade Representative Susan C. Schwab Announces Entry into Force of U.S.-Canada Softwood Lumber Agreement,” Press Releases, October 12, 2006, at [http://www.ustr.gov/Document_Library/Press_Releases/]

Additional Reading

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CRS Report

CRS Report RL30826, *Softwood Lumber Imports From Canada: History and Analysis of the Dispute*, by Ross W. Gorte.

Appendix A. Softwood Lumber from Canada: Dumping Margins

| | Original (May 2002) | Admin. Rev. (1) Final (Dec. 2004) | Admin. Rev. (2) Final (Dec. 2005) | Admin. Rev (3) Prelim. (June 2006) | NAFTA 1 st Remand Redeterm. (RR) (Oct. 2003) | NAFTA 2 nd RR (Apr. 2004) | NAFTA 3 rd RR (July 2005) | WTO § 129 Determin. (Apr. 2005) |
|---------------------|------------------------|---|---|--|--|--|--|--|
| Abitibi | 12.44% | 3.12% | 2.52% | — | 11.85% | N/A | 8.88% | 13.22% |
| Blanchette | — | — | — | 1.25% | — | — | — | — |
| Buchanan | — | 4.76% | 2.52% | — | — | — | — | — |
| Canfor | 5.96% | 1.83% | 1.35% | — | 5.74% | N/A | 8.29% | 9.27% |
| Interfor | — | — | — | 6.46% | — | — | — | — |
| Rene Bernard | — | — | — | 8.62% | — | — | — | — |
| Slocan ^a | 7.71% | — | — | — | 8.77% | 8.56% | 13.32% | 12.91% |
| Tembec | 10.21% | 9.10% | 4.02% | 1.85% | 6.66% | 6.28% | 9.08% | 12.96% |
| Tolko | — | 3.72% | 3.09% | 0.90% | — | — | — | — |
| Weldwood | — | — | 0.61% | — | — | — | — | — |
| West Fraser | 2.18% | 0.91% | 0.51% | 1.47% | 2.22% | 1.79% | 3.19% | 3.92% |
| Weyerhaeuser | 12.39% | 7.99% | 4.43% | 2.38% | 12.36% | N/A | 17.59% | 16.35% |
| WFP | — | — | — | 7.33% | — | — | — | — |
| All Others | 8.43% | — | — | — | 8.07% | 8.85% | 10.52% | 11.54% |

Notes: First Administrative Review (AR) rates applied to imports from May 22, 2002, to April 30, 2003; Second AR, imports from May 1, 2003, to April 30, 2004; Third AR, imports from May 1, 2004, to April 30, 2005 (rate not implemented because review was pending at time AD order was revoked); final AR rates also apply to estimated duties on imports entered during the succeeding year and continue until subsequent administrative review produces a new rate. NAFTA rates were not implemented. Only “all others” rate in Section 129 determination was implemented; applied to certain exporters for entries on or after April 27, 2005.

a. Slocan later merged with Canfor.

b. RSA, or review-specific average, applied to producers requesting, but not selected for, individual review in the annual administrative review.

c. Adverse Facts Available (AFA) rate applied to 15 specified companies for failure to provide the DOC with requested quantity data.

Appendix B. Softwood Lumber from Canada: Subsidy Rates

| | Original (May 2002) | Admin. Rev. (1) Final (Dec. 2004) | Admin. Rev. (2) Final (Dec. 2005) | Admin. Rev. (3) Prelim. (June 2006) | NAFTA 1st RR (Jan. 2004) | NAFTA 2d RR (July 2004) | NAFTA 3rd RR (Jan. 2005) | NAFTA 4th RR (July 2005) | NAFTA 5th RR (Nov. 2005) | WTO § 129 Determin. (Dec. 2004) |
|-----------------------------|-------------------------------|---|---|--|---|--|---|---|--|---|
| All producers/ exporters | 18.79% | 16.37% | 8.70% | 11.23% | 13.23% | 7.82% | 1.88% | 1.21% | 0.80% | 18.62% |

Notes: First Administrative Review rate applied to imports from May 22, 2002, to March 31, 2003; Second Administrative Review rate applied to imports from April 1, 2003, to March 31, 2004; Third Administrative Review rate applied to imports from April 1, 2004, to March 31, 2005, but was not implemented because review was pending at time CVD order was revoked; final AR rates also apply to estimated duties on imports entered during the succeeding year and continue until subsequent administrative review produces a new rate. NAFTA remand rates were not implemented. Section 129 Determination rate was implemented with respect to imports entered on or after December 10, 2004.