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U.S. AND CANADIAN TRADE WAR OVER SOFTWOOD LUMBER: THE CONTINUING DISPUTE

*Jennifer Lan**

I. BACKGROUND

THE United States had been peacefully importing Canadian softwood lumber for the past seventy years.¹ Over the past twenty years or so, however, the two countries have begun to battle over duties on softwood lumber.² During the 1982 recession, U.S. lumber companies were unable to meet their bids due to decreasing lumber prices.³ In an effort to maintain market share, the U.S. Coalition for Fair Lumber Imports criticized the Canadian softwood lumber industry, asserting that the Canadian companies were unfairly subsidized.⁴ Basically, the United States alleged that Canadian federal and provincial governments were conferring grants on their softwood lumber companies.⁵ After reviewing these allegations, the U.S. Department of Commerce and the U.S. International Trade Commission found no such grants existed.⁶ A few years later, the U.S. Coalition for Fair Lumber Imports used new evidence and changes in domestic law to compel the U.S. Department of Commerce to enact a temporary 15 percent tariff, called the Memorandum of Understanding, signed by both the United States and Canada.⁷

In 1991, Canada informed the United States that it would no longer abide by the Memorandum of Understanding because it believed the issues alleged no longer existed. Canada's decision, however, just resulted

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1. Free Trade Lumber Council: The Softwood Lumber Trade History Between Canada and the United States, <http://www.ftlc.org/index.cfm?Section=11&Detail=13> (last visited Sept. 28, 2005).

2. Ian Austen & Clifford Krauss, *U.S. Gets Lift in Lumber Fight With Canada*, N.Y. TIMES, Aug. 31, 2005, at C6, available at 2005 WLNR 13671118.

3. Free Trade Lumber Council, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

in another round of investigations into the subsidization of the Canadian softwood lumber industry.⁸ Canada emerged victorious as to this allegation, but because of complications arising from prior and possible future decisions, Canada agreed to enter into the Softwood Lumber Agreement Between the Government of the United States of America and the Government of Canada (Softwood Lumber Agreement).⁹ The Softwood Lumber Agreement “provided Canadian softwood lumber exporters with guaranteed market access to the United States and a guarantee against U.S. trade action” for the duration of the agreement.¹⁰ The Softwood Lumber Agreement allowed Canada to export 14.7 billion or less board feet per year into the United States fee free.¹¹ Any lumber exported in excess of these limits would be subjected to a tiered system of collection fees.¹² In exchange for fee-free exports, the United States agreed not to bring any actions against Canada regarding its softwood lumber procedures for the duration of this agreement.¹³

There was little evidence of any major dispute over softwood lumber for the five years that the Softwood Lumber Agreement was in effect. While the agreement appeared to alleviate the conflict, on March 31, 2001, it expired with neither the United States nor Canada showing any desire to extend its duration.¹⁴ Within days of the expiration of the Softwood Lumber Agreement, the U.S. Coalition for Fair Lumber Imports made yet another complaint against the Canadian softwood lumber industry, alleging the highest subsidies to date.¹⁵ This dispute is the one in contention in this paper.

II. THE CURRENT DISPUTE (LUMBER IV)

The United States and Canada appear to be at an impasse. The United States insists that Canada subsidizes its softwood lumber industry, thus, in its eyes, making it necessary to impose tariffs to protect its own lumber industry. Canada refuses to admit to subsidization and is starting to threaten the United States with retaliatory tariffs.¹⁶ Amid conflicting de-

8. *Id.*

9. *Id.*; Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., May 29, 1996, 1996 Can. T.S. No. 16, 35 I.L.M.1195 [hereinafter S.L.A.].

10. Foreign Affairs and International Trade Canada: Softwood Lumber Agreement 1996, <http://www.dfait-maeci.gc.ca/eicb/softwood/sla-en.asp> (last visited Sept. 30, 2005).

11. *Id.*; S.L.A., *supra* note 9, at 4.

12. Foreign Affairs and International Trade Canada: Softwood Lumber Agreement 1996, *supra* note 10.

13. *Id.*; S.L.A., *supra* note 9, at 2.

14. Foreign Affairs and International Trade Canada: Canada-U.S. Softwood Lumber Trade Relations (1982-2006), <http://www.dfait-maeci.gc.ca/eicb/softwood/chron-en.asp> (last visited Sept. 30, 2005).

15. *Id.*

16. *Canada Hints at Trade War With U.S.*, CNN.COM, Aug. 25, 2005, <http://www.cnn.com/2005/WORLD/americas/08/23/canada.lumber.ap/index.html> (last visited Aug. 31, 2005).

terminations by the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO), and the stubbornness of both the United States and Canada, no resolution appears in sight.

A. THE U.S. DEPARTMENT OF COMMERCE AND THE U.S.
INTERNATIONAL TRADE COMMISSION DETERMINATIONS

In response to the U.S. Coalition for Fair Lumber Imports' allegations, the Department of Commerce initiated yet another investigation to decide "whether [Canadian] provincial and federal forest management regimes . . . conferred a countervailable subsidy" on softwood lumber.¹⁷ The Department of Commerce looked into the practices of individual firms as well, conducting "a countrywide investigation to determine whether Canadian firms were dumping lumber into the U.S. market."¹⁸ The U.S. International Trade Commission reviewed the allegations and determinations as well.

In its preliminary determination, the U.S. International Trade Commission found only a threat of injury to the U.S. lumber industry, but no actual injury.¹⁹ The Department of Commerce, on the other hand, found a 19.31 percent subsidy on Canadian softwood lumber coming into the United States and "dumping margins . . . rang[ing] from 5.94% to 19.24%."²⁰ This margin "represent[ed] the amount by which the fair-value price exceed[ed] the dumped price."²¹ Unhappy with these determinations, Canada appealed to the Department of Commerce and several other organizations. While Canada and the United States attempted talks in an effort to resolve the dispute peacefully, no resolution resulted.²² With no adequate compromise established, the Department of Commerce issued its final determination.

In the spring of 2002, the U.S. Department of Commerce "ruled that Canadian producers and exporters of softwood lumber benefit from unfair subsidies and are dumping their products on the U.S. market."²³ The Department of Commerce found "that the net subsidy rate for all Canadian softwood lumber producers and exporters was 19.34 percent [and the dumping margins ranged from 2.26 percent to 15.83 percent."²⁴ Based on these determinations, the United States could have imposed

17. Foreign Affairs and International Trade Canada: Canada-U.S. Softwood Lumber Trade Relations, *supra* note 14.

18. *Id.*

19. *Id.*

20. *Id.*

21. Dumping is defined as "the import of goods at a price below the home-market or a third-country price of below the cost of production." Berta Gomez, *Commerce Dept. Rules Unfair Subsidies on Canada Softwood Lumber*, THE EMBASSY OF THE UNITED STATES OF AMERICA, OTTAWA, CANADA, Mar. 22, 2002, http://usembassy.canada.gov/content/content.asp?section=can_usa&subsection1=softwoodlumber&document=softwood_lumber_032202.

22. *Id.*

23. *Id.*

24. *Id.*

duties as high as 35 percent on Canadian softwood lumber, however, under U.S. law, countervailing and antidumping duties cannot be imposed without final determinations by both the U.S. Department of Commerce and the U.S. International Trade Commission.²⁵

In May of 2002, the U.S. International Trade Commission released its final determination concerning the allegations against Canadian softwood lumber.²⁶ The commission stated “that an industry in the United States is threatened with material injury by reason of imports of softwood lumber from Canada found to be subsidized and sold in the United States at less than fair value.”²⁷ During the period of investigation, the U.S. International Trade Commission found evidence that the U.S. softwood lumber industry experienced declining performance and were thus quite vulnerable within the industry.²⁸ The commission declared that “[b]ased on the record in these investigations, . . . further dumped and subsidized imports are imminent, . . . these imports are likely to exacerbate price pressure on domestic producers, and . . . material injury to the domestic industry [will] occur.”²⁹

Relying on the determinations by the U.S. Department of Commerce and the U.S. International Trade Commission, the United States thus imposed a tariff on Canadian softwood lumber.³⁰ This tariff was nearly 28 percent.³¹ Due to the very high nature of this tariff and the unsuccessful negotiations between Canada and the United States, Canada challenged the determinations, appealing now to the NAFTA panels and the WTO.³²

B. NAFTA DETERMINATIONS

On January 1, 1994, the United States, Canada, and Mexico enacted NAFTA, an extension of the Canada-U.S. Free Trade Agreement of 1989.³³ NAFTA “immediately ended tariffs on some goods, and on other goods tariffs were scheduled to be eliminated over a period of time.”³⁴ One of the main purposes of NAFTA was to decrease tariffs in an effort to increase profits.³⁵ NAFTA includes administrative and institutional provisions.³⁶ Within these administrative and institutional provisions is

25. *Id.*

26. Softwood Lumber From Canada, USITC Pub. No. 3509, Invs. Nos. 701-TA-414 & 731-TA-928 (May 2002), available at http://hotdocs.usitc.gov/docs/pubs/701_731/pub3509.pdf.

27. *Id.* at 3.

28. *Id.* at 41-42.

29. *Id.* at 48.

30. *Canada Hints at Trade War With U.S.*, *supra* note 16.

31. Austen & Krauss, *supra* note 2.

32. *Id.*

33. Canadian Democratic Movement—Encyclopedia: NAFTA, http://www.canadiandemocraticmovement.ca/module-pnEncyclopedia-display_term-id-16-vid-1.html (last visited Oct. 1, 2005).

34. *Id.*

35. *Id.*

36. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

Chapter 19: review and dispute settlement in antidumping countervailing duty matters.³⁷ “Chapter 19[] provides for binational panels to review final determinations made in countervailing duty and anti dumping cases.”³⁸ While these decisions are generally binding, a NAFTA party may begin “one further level of review of binational panel decisions . . . [.] known as the Extraordinary Challenge Committee . . . procedure.”³⁹ Decisions made by the Extraordinary Challenge Committee panel are binding on the parties who brought the matter before it.⁴⁰

Chapter 19 is the provision Canada used to challenge the U.S. softwood lumber tariff.⁴¹ Three NAFTA panels were set up to review the determinations made by the U.S. Department of Commerce and the U.S. International Trade Commission: one to look at the countervailing duty determination, one to look at the antidumping determination, and one to look at the threat of injury determination.⁴²

As to the countervailing duty determination, the NAFTA panel has made several determinations, each time “requiring the Department of Commerce to review its determinations,” but to date, there is still no final determination.⁴³ In its initial determination, the NAFTA panel “properly found the elements necessary to support the conclusion that the Canadian Provincial governments provided a countervailable subsidy to timber harvesters, but that the Investigating Authority had not properly calculated the benefit flowing from the subsidy.”⁴⁴ While the panel still holds as such, there is no final decision because the determination is continually remanded for calculation errors.⁴⁵ So far, with each remand, the countervailing duty as calculated by the U.S. Department of Commerce continues to decrease with each remand.⁴⁶ On remand for the fourth time, the most recent determination, the Department of Commerce found the countervailing duty to be 1.21 percent.⁴⁷ This duty will either be confirmed by the NAFTA panel or remanded back to the Department of Commerce for yet another calculation adjustment.⁴⁸

37. *Id.* at 304.

38. Gov't of B.C., Ministry of Forests and Range: Softwood Lumber NAFTA Challenges and Decisions Background Overview, <http://www.for.gov.bc.ca/het/softwood/BGNAFTA.htm> (last visited Feb. 22, 2007).

39. *Id.*

40. *Id.*

41. Foreign Affairs and International Trade Canada: Canada-U.S. Softwood Lumber Trade Relations, *supra* note 14.

42. Gov't of B.C., Ministry of Forests and Range: Softwood Lumber NAFTA Challenges and Decisions Current Status, <http://www.for.gov.bc.ca/het/softwood/NAFTA.htm> (last visited Feb. 22, 2007) [hereinafter NAFTA Current Status].

43. *Id.*

44. Article 1904 Binational Panel Review Under the North American Free Trade Agreement, *In the Matter of Certain Softwood Lumber Products From Canada. Final Affirmative Countervailing Duty Determination*, at 4, File USA-CDA-2002-1904-03 (May 23, 2005) (Decision of the Panel on Third Remand) [hereinafter NAFTA Countervailing Duty Determination].

45. *Id.*; NAFTA Current Status, *supra* note 42.

46. NAFTA Countervailing Duty Determination, *supra* note 44.

47. NAFTA Current Status, *supra* note 42.

48. *Id.*

As to the antidumping determination, after two remands, the NAFTA panel released its affirmative antidumping determination on June 9, 2005.⁴⁹ Subsequently, the panel remanded the case to the U.S. Department of Commerce with instructions to revoke the antidumping margins as to West Fraser Mills, a large Canadian lumber company, and to recalculate the antidumping margin as to the other Canadian lumber companies.⁵⁰ In response to the order by the NAFTA panel, the U.S. Department of Commerce reassessed the antidumping margins and issued a determination using the calculation methods specified by the NAFTA decision.⁵¹ This recalculation resulted in increased dumping rates for all Canadian lumber companies and revocation of the West Fraser Mills antidumping margin.⁵²

As to the threat of injury determination, the NAFTA panel ruled in favor of Canada, but similarly, only after several remands.⁵³ After reviewing the allegations, the panel remanded the case back to the U.S. International Trade Commission so that the commission could “make a determination consistent with the decision of this Panel that the evidence on the record does not support a finding of threat of material injury.”⁵⁴ The International Trade Commission was given ten days to comply with this ruling.⁵⁵ Therefore, on September 10, 2004, the U.S. International Trade Commission released a determination consistent with the NAFTA panel’s order.⁵⁶ The commission maintained, however, that “it was only complying with the NAFTA ruling because it ‘respects and is bound by the NAFTA dispute settlement process’” and not because it agreed with the determination.⁵⁷

Dissatisfied with this ruling, the United States requested yet another review of the issue, asking for the Extraordinary Challenge Committee to oversee the matter.⁵⁸ After hearing arguments from both sides, on August 11, 2005, the Extraordinary Challenge Committee “unanimously upheld the NAFTA panel ruling.”⁵⁹ The committee found that even if the

49. *Id.*; Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement, *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Determination*, at 1, Secretariat File No. USA-CDA-2002-1904-02 (June 9, 2005) (Decision of the Panel Following Remand) [hereinafter NAFTA Antidumping Determination].

50. NAFTA Antidumping Determination, *supra* note 49, at 45; NAFTA Current Status, *supra* note 42.

51. NAFTA Current Status, *supra* note 42.

52. *Id.*

53. *Id.*; Article 1904 Binational Panel of Review Pursuant to the North American Free Trade Agreement, *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Threat of Injury Determination*, at 13, Secretariat File No. USA-CDA-2002-1904-07 (Aug. 31, 2004) (Second Remand Decision of the Panel) [hereinafter NAFTA Threat of Injury Determination].

54. NAFTA Threat of Injury Determination, *supra* note 53, at 7.

55. *Id.*

56. NAFTA Current Status, *supra* note 42.

57. *Id.*

58. *Id.*

59. *Id.*; Article 1904 Extraordinary Challenge Pursuant to the North American Free Trade Agreement, *In the Matter of Certain Softwood Lumber Products From Ca-*

panel had committed errors in its decision, none of those errors were material or would threaten “the integrity of the binational panel review process.”⁶⁰ Canada emerged mostly victorious, at least according to the NAFTA panels.

C. THE WTO DETERMINATIONS

Throughout the investigations and determinations, Canada appealed to the WTO for assistance as well. Formed in 1995, the WTO oversees and enforces over twenty international agreements through the use of international trade tribunals.⁶¹ Part of the WTO’s job is to settle disputes between various countries and ensure that actions taken by these countries are consistent with the various international agreements the organization oversees.⁶² In the event of a dispute, the Dispute Settlement Body establishes a panel to review the issues and make rulings and recommendations.⁶³

As with NAFTA, Canada appealed to the WTO with regards to the countervailing duty determination, the antidumping determination, and the threat of injury determination.⁶⁴ In reference to the countervailing duty determination, the panel upheld this duty; however, it instructed the United States to assess the duty using a different method.⁶⁵ After reassessing the duty, the United States maintained that it had complied with the panel’s instructions.⁶⁶ Dissatisfied with this reassessment, Canada appealed the decision once again.⁶⁷ On August 1, 2005, the panel determined that the United States had not properly followed instructions and asserted that if the United States did not properly comply with the determination Canada would be able to obtain retaliatory damages against them.⁶⁸ Even with this decision, the WTO upheld the countervailing duty in direct contrast to the NAFTA decision. On the other hand, the panel held the antidumping duty inappropriate even after the United States ap-

nada, at 2, Secretariat File No. ECC-2004-1904-01USA (Aug. 10, 2004) (Opinion and Order of the Extraordinary Challenge Committee) [hereinafter Extraordinary Challenge Committee Determination].

60. Extraordinary Challenge Committee Determination, *supra* note 59, at 68.

61. Canadian Democratic Movement—Encyclopedia: WTO, http://www.canadiandemocraticmovement.ca/module-pnEncyclopedia-display_term-id-3-vid-1.html (last visited Oct. 5, 2005).

62. Gov’t of B.C., Ministry of Forests and Range: Softwood Lumber WTO Challenges and Decisions Background Overview, <http://www.for.gov.bc.ca/het/softwood/BGWTO.htm> (last visited Feb. 22, 2007).

63. *Id.*

64. Gov’t of B. C., Ministry of Forests and Range: Softwood Lumber WTO Challenges and Decisions Current Status, <http://www.for.gov.bc.ca/het/softwood/WTO.htm> (last visited Feb. 22, 2007) [hereinafter WTO Current Status].

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*; Panel Report, *United States—Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*, at 32, WT/DS257/RW (Aug. 1, 2005).

pealed that determination.⁶⁹ Finally, in reference to the threat of injury determination, the panel did not draw the same conclusion as the United States though it relied on the same evidence.⁷⁰ As instructed, the United States entered a determination consistent with the panel; however, under a new investigation, the United States yet again came up with a threat of injury.⁷¹ Relying on this new investigation, the United States implemented new countervailing and antidumping duties, maintaining that it had complied with the panel's determination; Canada, of course, has appealed these duties but no final determination has yet been made.⁷²

III. CONCLUSION

With so many different decisions and opinions, it is difficult to forecast how this dispute will be resolved. While the United States insists that it wants to negotiate with Canada, it has refused to comply with the decisions made by NAFTA, including the binding decision made by the Extraordinary Challenge Committee.⁷³ Canada is infuriated by the United States' lack of compliance and has withdrawn from talks between the two countries and has even threatened to levy duties on various goods it imports from the United States.⁷⁴ While no end appears to be in sight, softwood lumber is only a tiny fraction of the total trade between the United States and Canada. This dispute is thus not likely to end amicable relations between the two countries. But with the increased prices in softwood lumber comes increased prices in housing and other construction projects.⁷⁵ Under normal circumstances the general public would not be concerned with softwood lumber subsidies. But if the cost of housing escalates enough, the public may start to take notice. Mexico has even started to chime in to this dispute, even though it really has no relation to it. Recently, Mexico released statements saying that it is taking Canada's side in the lumber dispute with the United States.⁷⁶ This dispute has been ongoing for the past twenty years, and while it seems to be gaining steam, more than likely nothing outrageous will occur. "Despite the dispute, the U.S.-Canadian relationship is 'deep, rich, robust and personal.'"⁷⁷

69. WTO Current Status, *supra* note 64; Panel Report, *United States-Final Dumping Determination on Softwood Lumber From Canada*, at 8, WT/DS264/R (Apr. 13, 2004).

70. WTO Current Status, *supra* note 64; Panel Report, *United States-Investigation of the International Trade Commission in Softwood Lumber From Canada*, at 8, WT/DS277/R (Mar. 22, 2004).

71. WTO Current Status, *supra* note 64.

72. *Id.*

73. *Canada Hints at Trade War With U.S.*, *supra* note 16.

74. *Id.*; James Morrison, *Embassy Row*, WASH. TIMES, Sept. 23, 2005, available at <http://washingtontimes.com/world/20050922-111323-9324r.htm>.

75. Morrison, *supra* note 74.

76. *Mexican President Backs Canada in Lumber Feud*, WASH. TIMES, Oct. 4, 2005, available at <http://washingtontimes.com/world/20051003-095236-3235r.htm>.

77. Morrison, *supra* note 74.