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International Decisions- Softwood Lumber Dispute

Chios Carmody

The University of Western Ontario

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AJIL Note on Lumber IV

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UNITED STATES - PRELIMINARY DETERMINATIONS WITH RESPECT TO CERTAIN SOFTWOOD LUMBER FROM CANADA, WT/DS236/R. At<[http:// www.wto.org](http://www.wto.org)>.

World Trade Organization, September 27, 2002.

UNITED STATES - FINAL COUNTERVAILING DUTY DETERMINATION WITH RESPECT TO CERTAIN SOFTWOOD LUMBER FROM CANADA, WT/DS257/AB/R. At<[http:// www.wto.org](http://www.wto.org)>.

World Trade Organization, January 19, 2004.

UNITED STATES - FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA, WT/DS264/AB/R. At <[http:// www.wto.org](http://www.wto.org)>.

World Trade Organization, August 11, 2004.

UNITED STATES - INVESTIGATION OF THE INTERNATIONAL TRADE COMMISSION IN SOFTWOOD LUMBER FROM CANADA, WT/DS277/R. At <[http:// www.wto.org](http://www.wto.org)>.

World Trade Organization, March 22, 2004.

CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA (DEPARTMENT OF COMMERCE FINAL AFFIRMATIVE CVD AND FINAL NEGATIVE CRITICAL CIRCUMSTANCES DETERMINATION), USA-CDA-2002-1904-03. At <[http:// www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)>.

North American Free Trade Agreement, July 17, 2003, March 5, 2004 and June 9, 2005.

CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA (DEPARTMENT OF COMMERCE FINAL DETERMINATION OF SALES AT LESS THAN FAIR VALUE), USA-CDA-2002-1904-02. At <[http:// www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)>.

North American Free Trade Agreement, August 13, 2003, June 7, 2004, December 1, 2004, May 23, 2005, October 5, 2005 and March 17, 2006.

CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA (USITC FINAL INJURY DETERMINATION), USA-CDA-2002-1904-07. At <[http:// www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)>.

North American Free Trade Agreement, September 5, 2003, April 19, 2004 and August 31, 2004.

IN THE MATTER OF CERTAIN SOFTWOOD LUMBER FROM CANADA: OPINION AND ORDER OF THE EXTRAORDINARY CHALLENGE COMMITTEE, ECC-2004-1904-01USA. At<[http:// www.nafta-sec-alena.org](http://www.nafta-sec-alena.org)>.

North American Free Trade Agreement, August 10, 2005.

This case report provides an update and overview of litigation arising between Canada and the United States in a series of cases referred to here as *Lumber IV*.¹ The litigation began in August 2001 in response to certain determinations of the U.S. Department of Commerce (DOC) and International Trade Commission (ITC) and follows disputes known informally as *Lumber I* (October 1982 - May 1983), *Lumber II* (May 1986 - October 1986) and *Lumber III* (September 1991 – August 1994).² All have dealt with the price at which certain types of Canadian softwood lumber are sold in the U.S..

Lumber IV is made particularly complex by the range of proceedings undertaken. The Government of Canada challenged different aspects of the DOC's determinations under the WTO Agreement and NAFTA Ch. 19, Canadian lumber producers challenged the U.S. decision not to refund anti-dumping duties as a violation of NAFTA Ch. 11, and both the Government of Canada and the Coalition for Fair Lumber Imports³, part of the U.S. lumber lobby, engaged in follow-up litigation before U.S. courts. The multiplicity of challenges has spawned confusion as to what *Lumber IV* involves. An additional complicating factor is a proposed settlement announced between the Governments of the U.S. and Canada on April 28, 2006.⁴

Key to understanding the Canadian claims in *Lumber IV* is the requirement in international law that U.S. agencies do certain things when allegations of dumping or subsidization are made. *Dumping* is the practice of selling goods in a foreign market at less than fair value. *Subsidization* is the bestowal of a benefit by a government on

¹ The title "*Lumber IV*" is used here to refer to the cases mentioned at the beginning of this case report and corresponds with the appellation popularly used in the media: see for instance Marzena Czarnecka, *Softwood Lumber: the War without End?* LEXPERT 59 (February 2006). It does not correspond with the informal appellation given to certain individual softwood lumber cases in the WTO.

² In 1982 the U.S. Coalition for Fair Canadian Lumber Imports filed a petition with the DOC alleging that certain provincial and federal programs related to Canada's forestry sector constituted countervailable subsidies. The investigation resulted in a negative finding: *Certain Softwood Lumber Products from Canada*, 48 Fed. Reg. 24159 (May 31, 1983) (*Lumber I*). The investigation found that stumpage rights were not provided to a "specific enterprise or industry, or group of enterprises or industries" within the meaning of 19 U.S.C. § 1677(5)(B)(ii) and that stumpage did not constitute the "provision of goods or services at preferential rates." 19 U.S.C. § 1677(5). In another petition filed by the Coalition in 1986, the DOC reversed its previous position and issued a preliminary affirmative determination that certain provincial stumpage systems constituted countervailable subsidies: *Certain Softwood Lumber Products from Canada*, 51 Fed. Reg. 37453 (1986) (*Lumber II*). The change in position resulted both from a new factual record and a revised interpretation of U.S. law. *Lumber II* ended when Canada and the United States entered into a Memorandum of Understanding (MOU) in December, 1986. Pursuant to the MOU, Canada agreed to collect a charge on exports of softwood lumber to the U.S. in an amount which was about equal to that which had been calculated in the Preliminary Determination. Under the terms of the MOU the tax could be reduced or eliminated for provinces that instituted "replacement measures", e.g., increases in the amount of stumpage fees, or other charges. As a consequence, export charges for British Columbia and Québec were, in time, reduced or substantially eliminated. Certain Atlantic provinces were also eventually exempted. Canada then elected to terminate the MOU in September, 1991. The DOC self-initiated a third investigation in October 1991. The result of this investigation in May 1992 was an affirmative subsidy determination which found that provincial stumpage programs and log export restraints in British Columbia conferred countervailable subsidies: *Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22570 (May 28, 1992) (*Lumber III*). This determination was appealed to a binational panel under the Canada-United States Free Trade Agreement. The panel concluded that the DOC's determination that the export restraints were "specific" was unsupported by substantial evidence. The panel remanded to the DOC on this and other issues: *Softwood Lumber from Canada: Panel Decision*, USA-92-1904-01 (May 6, 1993). On remand the DOC again found a countervailable subsidy, and once more upon review the FTA panel held that the DOC had inadequately addressed certain issues, including specificity: *Softwood Lumber from Canada: Panel Decision on Remand*, USA-92-1904-01 (Dec. 17, 1993). The panel ordered Commerce to rescind the countervailing duty order, which it did on January 6, 1994: *Certain Softwood Lumber Products from Canada*, 59 Fed. Reg. 12584 (March 17, 1994). Later, negotiations between the Governments of Canada and the United States resulted in the Softwood Lumber Agreement of August 1995.

³ The Coalition for Fair Lumber Imports Executive Committee is comprised of Hood Industries, International Paper Co., Moose River Lumber Co., New South, Inc., Plum Creek Timber Co., Potlatch Corp., Seneca Sawmill Co., Shearer Lumber Products, Shuqualak Lumber Co., Sierra Pacific Industries, Swift Lumber, Inc., Temple-Inland Forest Products, and Tolleson Lumber Co., Inc..

⁴ Text of U.S.-Canada Lumber Deal, INSIDE U.S. TRADE (April 28, 2006).

producers of goods sold in a foreign market.⁵ Treaties ratified by the U.S. require domestic agencies to make three determinations prior to the levying of antidumping or countervailing duties in response. These are findings of:

- 1) dumping, subsidization, or the threat of either;
- 2) material injury to a domestic industry or the threat thereof, and
- 3) a causal link between the activity and the injury.⁶

In the U.S., findings of dumping and/or subsidization are made by the DOC. Findings of material injury and causation are made by the ITC.⁷

Canada and the U.S. continue to have the largest bilateral trading relationship in the world. In 2003 their two-way trade amounted to \$441.5 billion, some 1.7 percent of which – or \$7.5 billion worth - was made up of Canadian exports of softwood lumber to the U.S.. The wood is exported for a variety of commercial and construction-related purposes. Softwood grows in a number of Canadian provinces on tracts of federally and provincially-owned property known as “Crown Lands”. Canadian forest producers pay for the right to harvest trees from this land. The fee is commonly referred to as “stumpage”.

Canadian forestry arrangements differ significantly from those in United States, where most lumber is harvested from trees on private land. The amount of stumpage that Canadian lumber producers pay has been a butt of contention in virtually all of the softwood lumber litigation. American lumber interests assert that the effective rate of stumpage is below market value and therefore constitutes a subsidy. They also maintain that lax reforestation and other ancillary obligations contribute to subsidization, and that in addition, individual Canadian lumber producers price their product so as to dump softwood lumber in the American market.

In May 1996 the governments of Canada and the United States concluded the Softwood Lumber Agreement (SLA) to settle litigation arising in *Lumber III*.⁸ Under the SLA the Government of Canada undertook to effectively limit the export of Canadian softwood lumber to the United States to 14.7 billion board feet a year. It implemented the

⁵ Article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures mandates that a subsidy is deemed to exist where there is a financial contribution by a government, or there is any form of income or price support, and a benefit is thereby conferred. In order to be actionable under the SCM Agreement, the subsidy must also meet the requisite degree of specificity under Art. 2.

⁶ The relevant provisions in U.S. law are 19 U.S.C. §1671 (subsidization), 19 U.S.C. §1673 (dumping) and 19 U.S.C. §1671(a)(2)(A)(i)-(ii) and §1673(2)(A)(i)-(ii) (material injury).

⁷ In *United States - Investigation of the International Trade Commission in Softwood Lumber in Canada*, WT/DS277/R, para. 7.2 (March 22, 2004) the panel described the agencies' schedules as follows: “[The] USITC conducts its investigation in every case on a timetable which is separate from but overlaps the time table for USDOC's investigation of dumping and subsidization. Moreover, USITC and USDOC both conduct their investigations in two phases, preliminary and final. The preliminary phase of the injury investigation begins on the day an application for anti-dumping or countervailing duty measures is filed, and is completed before the preliminary determination of dumping and/or subsidization is made by USDOC. The final phase of USITC's injury investigation usually is begun after USDOC's preliminary determination and overlaps the issuance of USDOC's final determination of dumping and/or subsidization. If USDOC's final determination is affirmative, USITC completes the final phase of its investigation and issues a final determination.”

⁸ *Softwood Lumber Agreement Between the United States of America and the Government of Canada*, 35 I.L.M. P.R. List 1 47 (Vol. 2, Ex. 3) (May 29, 1996).

obligation by establishing a quota system among historic exporters and charging an export duty on softwood lumber. For its part, the U.S. government terminated all actions brought by the American lumber industry in U.S. courts.

The expiration of the SLA on March 31, 2001 brought this *modus vivendi* to an end. Canadian lumber producers were free to export softwood lumber to the U.S. without limit, something which led the Coalition to deposit an immediate countervailing duty petition on April 2, 2001. On May 23, 2001 the ITC published a preliminary affirmative determination which concluded that there was reasonable indication that the U.S. industry was threatened with material injury. Subsequently, on August 17, 2001, the DOC imposed a preliminary countervailing duty of 19.31 percent on softwood lumber imports from Canada.⁹

Canada then challenged the DOC's preliminary determination under the WTO Agreement. In *U.S. – Preliminary Determinations with respect to Certain Softwood Lumber from Canada*¹⁰ the panel held that the Canadian provincial stumpage programs were a “financial contribution”, but concluded that the DOC had incorrectly assessed whether stumpage conferred a “benefit” by using U.S. market conditions as a benchmark instead of Canadian ones.¹¹ The panel also held that the DOC had wrongly presumed that any alleged benefit from harvesting timber due to stumpage rates is automatically “passed through” from timber producers to downstream producers of softwood lumber.¹² The panel further held that under the WTO Anti-dumping Agreement the DOC had impermissibly applied provisional measures since any such measure could only be applied pursuant to a *final* determination.¹³

While *United States – Preliminary Determinations* was being argued and decided, several important developments took place. On October 30, 2001 the DOC issued a preliminary anti-dumping determination against six major Canadian softwood lumber producers, and following a process of verification, issued a final anti-dumping determination on April 2, 2002. On May 16, 2002 the ITC also completed its investigation into material injury. It concluded that while Canadian softwood lumber imports had not been shown to cause present material injury, they posed a *threat* of material injury to the U.S. industry. The result of these two determinations was a final countervailing duty rate of 18.79% and an average final anti-dumping duty rate of 8.43%, for a combined average total rate of 27.22%.¹⁴

⁹ 66 Fed. Reg 43186 (Aug. 17, 2001).

¹⁰ WT/DS236/R (Sept. 27, 2002).

¹¹ The panel found that the DOC failed to determine the existence and amount of benefit to producers on the basis of prevailing market conditions in *Canada*, as required by SCM Agreement Arts 1.1 (b), 14 and 14(d).

¹² “We find that in such circumstances, where a downstream producer of subject merchandise is unrelated to the allegedly subsidized upstream producer of the input, an authority is not allowed to simply assume that a benefit has passed through. ... The fact that in the large majority of cases the lumber producers and the harvesters are related, does not imply that it is no longer necessary in cases where there is no such relationship to examine and determine whether a benefit existed for the independent producers of the subject merchandise including independent re-manufacturers.” *United States – Preliminary Determinations*, WT/DS236/R, para. 7.74 (Sept. 27, 2002).

¹³ See *United States – Preliminary Determinations*, WT/DS236/R, paras 7.93 and 7.104 (Sept. 27, 2002).

¹⁴ 67 Fed. Reg. 36069 (May 22, 2002). The final anti-dumping rates established were: Abitibi-Consolidated (12.44%), Canfor (5.96%), Slocan (7.71%), Tembec (10.21%), West Fraser (2.18%), Weyerhaeuser (12.39%) and an all others rate (8.43%).

The U.S. determinations had an impact on the Canadian industry. Some smaller mills and related businesses were forced to shut, but larger Canadian-based companies took the opportunity to become leaner, more nimble players and began to turn their attention towards newer markets such as China.¹⁵ Overall, Canadian exports of softwood lumber remained at about one-third of U.S. domestic consumption.

Canada then challenged the U.S. final determinations under both the WTO Agreement and NAFTA. The following summarizes the course of litigation.

In *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*¹⁶ the Appellate Body held that harvesting rights granted by Canadian provincial governments could constitute a “provision of goods” in terms of the “financial contribution” element of a subsidy. However, the Appellate Body also found itself unable to complete the legal analysis concerning the “benefit” bestowed because of insufficient factual findings concerning benchmark prices by the panel.¹⁷ It agreed, nevertheless, that the DOC had acted inconsistently with both the WTO Agreement on Subsidies and Countervailing Measures (SCM) and GATT 1994 by failing to analyze whether subsidies were passed through in sales of timber to unrelated producers of softwood lumber.¹⁸

To comply with the WTO’s recommendation, the DOC subsequently performed a pass-through analysis in respect of certain transactions.¹⁹ However, the new rate of subsidization was calculated to be no different from the old one. Consequently, Canada challenged the consistency of the compliance measures. A compliance panel under Art. 21.5 of the WTO Dispute Settlement Understanding (“DSU”) found continuing failure to conduct pass through methodology with respect to certain sawmill-to-sawmill sales of timber as well as associated calculating errors, and therefore that the U.S. remained inconsistent with obligations in SCM Agreement and GATT 1994.²⁰ These findings were upheld by the Appellate Body.²¹

¹⁵ “In a poll of its members in June 2003, the Canadian Federation of Independent Business found that 33% of [British Columbia’s] small businesses felt their business was significantly harmed by the lumber dispute and a further 37% were slightly harmed.” British Columbia Ministry of Management Services, SMALL BUSINESS QUARTERLY 2-3 (3rd Quarter 2004). The Report also noted that “[i]n an effort to remain profitable despite the imposition of the punishing duties, larger firms attempted to rationalize their operations by shutting down inefficient mills and ramping up production at other mills to gain efficiencies and benefit from economies of scale. ... While this was a successful strategy for some of the larger lumber companies in the province, it was not an option available to many small business operations with only one small mill and a limited amount of wood supply. Many of these smaller operations simply could not operate with a duty of that magnitude and were forced to shut their doors.” *Ibid.*

¹⁶ WT/DS257/AB/R (Jan. 19, 2004).

¹⁷ “[T]here are insufficient factual findings by the Panel and undisputed facts in the Panel record to enable us to examine whether the benchmark used by USDOC in the underlying investigation related or referred to, or was connected with, prevailing market conditions in Canada, as required by Article 14(d), so as to adequately reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale. Consequently, we are unable to complete the legal analysis ...” *U.S. – Final Countervailing Duty Determination*, WT/DS/AB/R, para. 118 (Jan. 19, 2004).

¹⁸ “Where the input producers and producers of the processed products operate at *arm’s length*, the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority. In the absence of such analysis, it cannot be shown that the essential elements of the subsidy definition in Article 1 are present in respect of the *processed product*.” *U.S. – Final Countervailing Duty Determination*, WT/DS/AB/R, para. 143 (Jan. 19, 2004).

¹⁹ *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).

²⁰ A U.S. argument before the compliance panel was that the Appellate Body’s original decision only required pass-through analysis with respect to transactions between tenured timber harvester/sawmills and unrelated, non-tenure holding sawmills. The compliance panel disagreed, holding that the U.S. had not complied because it had failed to conduct a pass-through analysis in respect of sales, found by [the] USDOC *not* to be at arm’s length, of logs by tenured timber harvesters, whether or not they also produce lumber, to

In *United States – Final Dumping Determination of Softwood Lumber from Canada*²² the Appellate Body upheld a finding that the DOC had acted inconsistently with the WTO Anti-dumping Agreement by calculating anti-dumping margins on the basis of a weighted average comparison employing a “zeroing” methodology. Zeroing means that in an anti-dumping investigation some export prices for certain transactions are treated as if they were *less* than what they actually are, thereby potentially depressing the average export price and *increasing* the rate of dumping.

To comply with the WTO’s recommendation, the DOC subsequently calculated new rates for Canadian exporters by employing a “transaction-to-transaction” methodology.²³ The DOC summed up amounts by which, on individual transactions, the export price was *less* than the normal value, but did not include amounts by which the export price *exceeded* the normal value. Canada then challenged the WTO consistency of this method. The compliance panel found that in the absence of any further definition of the phrase “margins of dumping” in the WTO Anti-dumping Agreement, and in the absence of any requirement in “T-T” methodology to ensure that all comparable export transactions are represented in the weighted average export price, there was no obligation to establish a dumping margin by offsetting *non-dumped* amounts against *dumped* amounts.²⁴ This conclusion was appealed by Canada and had not been completed at the time that the settlement in *Lumber IV* was first announced.

In *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*²⁵ a WTO panel found the ITC’s determination concerning the potential threat of injury to be unfounded for lack of evidence.²⁶

To comply with the panel’s decision the ITC issued a revised threat of injury determination on November 16, 2004 which elaborated upon, but did not change, the original analysis.²⁷ Canada subsequently sought compliance review of the ITC

unrelated lumber producers, whether or not they also held tenure rights. The panel also faulted the DOC for including in its subsidy numerator transactions for which it had not demonstrated that the benefit of subsidized log inputs had passed through to the processed product. See WT/DS257/RW, para. 4.73, 4.82, 4.103 (Aug. 1, 2005).

²¹ WT/DS257/AB/RW, para. 96 (Dec. 5, 2005).

²² WT/DS264/AB/R (Aug. 11, 2004).

²³ *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). Article 2.4.2 of the Anti-dumping Agreement states that “the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.”

²⁴ “In our view, this would be a permissible interpretation of the relevant part of the first sentence of Article 2.4.2, even though it does not reflect the full results of all comparisons. In other words, when establishing the amount of dumping for the purpose of calculating a margin of dumping under the T-T comparison methodology, an investigating authority need not include in its calculations the results of comparisons where export price exceeds normal value.” *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/RW, para. 5.28 (April 3, 2006).

²⁵ WT/DS277/R (March 22, 2004).

²⁶ “It is clear to us that the fundamental basis of the USITC’s affirmative threat determination is the conclusion that dumped and subsidized imports from Canada would increase substantially. However, looking at the evidence relied on by the United States in support of the determination, we cannot accept that this conclusion is one that could be reached by an objective and unbiased decision maker. It seems to us that, at most, the evidence relied upon by the USITC could support a conclusion that imports of softwood lumber would continue at the historical levels, and might increase somewhat, in keeping with increased demand, and consistent with historical patterns. But we can find no rational explanation in the USITC’s determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently.” WT/DS277/R, para. 7.89 (March 22, 2004)

²⁷ See *Section 129 Consistency Determination: Views of the Commission*, Inv. 701-TA-414 and 731-TA-938 (Nov. 24, 2004) available at <http://www.usitc.gov/fopin.129.pdf>. A majority of the ITC understood its task on redetermination as follows: “the Commission

redetermination. The compliance panel upheld the redetermination. Its opinion stressed the need for deference to domestic agency decision-making.²⁸ That conclusion was later overturned by the Appellate Body, which asserted that the compliance panel had articulated and applied an improper standard of review.²⁹ Nevertheless, due to the presence of considerable contested evidence, the Appellate Body declined to complete the analysis. Thus, while it reversed the panel's conclusion that the U.S. had brought itself into conformity with the WTO Agreement, it was unable to make a recommendation concerning any further action that the U.S. should take.

Canada also mounted similar challenges under NAFTA Ch. 19.

In *Certain Softwood Lumber Products from Canada (Department of Commerce Final Affirmative CVD and Final Negative Critical Circumstances Determination)*³⁰ the binational panel reviewed a challenge to the DOC's final countervailing duty rate.³¹ The issues were ones already seen in the context of WTO challenges involving subsidization: "financial contribution" and "benefit". The panel agreed that the DOC had proven financial contribution and benefit based on U.S. benchmarks. Although it expressed some skepticism about the choice of benchmark, under the applicable standard of review it upheld the DOC's determination.

Subsequently, in a remarkable series of five remands, the panel determined that while the DOC's approach was not unreasonable, the calculations were not supported by the evidence. It therefore directed the DOC to undertake certain revisions and other action which caused the recalculated rate to fall. Following the panel's fifth and final remand to the DOC on March 17, 2006, the subsidy rate was recalculated to be 0.8%, an amount which under U.S. law is considered *de minimus* and therefore not a subsidy. This outcome was the subject of an Extraordinary Challenge by the U.S. which has been suspended pending the outcome of final settlement negotiations between the two governments.³²

understands that the WTO wants the Commission to provide more explanation and reasoning for its decision." However, it also reopened the record and collected more information and evidence. *Ibid.*, pp. 5-6.

²⁸ WT/DS277/RW (Nov. 15, 2005).

²⁹ "First, the Panel's repeated reliance on the test that Canada had *not* demonstrated that an objective and unbiased authority "could not" have reached the conclusion that the USITC did, is at odds with the standard of review that has been articulated by the Appellate Body in previous reports. As we noted earlier, the standard applied by the Panel imposes an undue burden on the complaining party. Secondly, the "not unreasonable" standard employed by the Panel at various reprises is also inconsistent with the standard of review that has been articulated by the Appellate Body in previous reports, and it is even more so for ultimate findings as opposed to intermediate inferences made from particular pieces of evidence. Thirdly, the Panel did not conduct a critical and searching analysis of the USITC's findings in order to test whether they were properly supported by evidence on the record and were "reasoned and adequate" in the light of alternative explanations of that evidence." WT/DS277/AB/RW, para. 138 (April 13, 2006).

³⁰ USA-CDA-2002-1904-03 (decisions rendered August 13, 2003, June 7, 2004, December 1, 2004, May 23, 2005, October 5, 2005 and March 17, 2006).

³¹ *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15455 (April 2, 2002), amended 67 Fed. Reg. 36070 (May 22, 2002). On August 2, 2001 Commerce amended the Notice of Initiation to exempt certain softwood lumber products harvested and produced in the provinces of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland from investigation in the countervail case only. The reasons given for the exclusion were that the Atlantic provinces substantially increase their stumpage fees from Crown land at a level substantially above the appraised values, and that 60% of their timber is privately owned.

³² Under NAFTA Art. 1904.13 binational panel decisions may be subject to Extraordinary Challenge where there are allegations that a panel member is guilty of misconduct, the panel seriously departed from a fundamental rule of procedure, or the panel manifestly exceeded its powers, authority or jurisdiction. The Extraordinary Challenge in *Certain Softwood Lumber Products from Canada (Department of Commerce Final Affirmative CVD and Final Negative Critical Circumstances Determination)* was launched April 27, 2006 but was immediately suspended under the terms of a proposed settlement between the U.S. and Canada over the *Lumber IV* dispute. See *U.S.-Canada Lumber Deal Hinges on Canadian Mills Dropping Litigation*, INSIDE U.S. TRADE (April 28, 2006).

In *Certain Softwood Lumber Products from Canada (Department of Commerce Final Determination of Sales at Less than Fair Value)*³³ a number of the Canadian companies subject to anti-dumping duties on softwood lumber challenged the DOC's anti-dumping determination. The original determination was remanded to the DOC twice on a number of points having to do mainly with explanations sustaining the DOC's reasoning and certain adjustments. In the third remand of June 9, 2005 the panel directed the elimination of anti-dumping duties for one Canadian producer (West Fraser) and a recalculation of anti-dumping rates for all other subject companies. In particular, the panel sought DOC compliance with the Appellate Body's decision in *United States – Final Dumping Determination of Softwood Lumber from Canada*, seen above. The panel considered whether the *Charming Betsy* doctrine and the informal nature of zeroing – an administrative practice conducted without statutory basis under U.S. law – could lead to *retrospective* effect for the WTO decision in the NAFTA challenge. The panel ultimately concluded that they could, principally because the WTO decision involved action concerning the *same* anti-dumping investigation. The panel therefore directed the DOC to apply non-zeroing methodology, observing that “[o]ur decision does not purport to change U.S. antidumping law; rather it applies U.S. antidumping law (as appropriately interpreted through *Charming Betsy*) to agency action.”³⁴

A third NAFTA challenge by Canada, *Certain Softwood Lumber Products from Canada (Final Affirmative Threat of Injury Determination)*³⁵, dealt with the ITC's threat of injury determination. The principal basis of the challenge was the lack of evidence. In its first remand order of September 5, 2003 the panel directed the ITC to analyze several new analytical approaches. In its second remand of April 19, 2004 the panel directed the ITC to conduct the threat of injury analysis consistent with a number of conclusions that obviated key parts of the ITC's original findings. The panel's third remand of August 31, 2004 was more pointed still. Noting that the ITC relied on the same record that the panel had twice found insufficient, the panel took the view that the ITC's behaviour amounted to an unwillingness “to accept the Panel's review authority”, something which “obviates the impartiality of the decision-making process” and “severely undermines the entire Chapter 19 panel review process.”³⁶ Noting too that further remands would be an “idle and useless formality”, the panel concluded that there was little record evidence to sustain an affirmative threat determination and “explicitly instruct[ed] the [ITC] to make a determination consistent with the determination of this Panel” within 10 days.³⁷ The panel's decision was subject to an Extraordinary Challenge by the U.S., later dismissed on August 10, 2005.³⁸

³³ USA-CDA-2002-1904-02 (decisions rendered July 17, 2003, March 5, 2004 and June 9, 2005).

³⁴ USA-CDA-2002-1904-02, *Decision of the Panel on the Third Remand*, p. 42 (June 9, 2005).

³⁵ USA-CDA-2002-1904-07 (decisions rendered September 5, 2003, April 19, 2004 and August 31, 2004).

³⁶ USA-CDA-2002-1904-07, *Second Remand Decision of the Panel*, p. 3 (August 31, 2004).

³⁷ USA-CDA-2002-1904-07, *Second Remand Decision of the Panel*, p. 7 (August 31, 2004).

³⁸ ECC-2004-1904-01USA.

The U.S.'s decision to retain duties paid by Canadian softwood lumber producers was also challenged under the investor-state mechanism of NAFTA Ch. 11. Canfor Corporation filed a notice of arbitration on July 11, 2002 and was followed by similar claims made by Terminal Forest Products and Tembec. All of the companies are Canadian forest products producers and all alleged breaches of NAFTA due to the ITC and DOC determinations seen above. The cases asserted violations of NAFTA Art. 1102 (national treatment), Art. 1103 (Most Favoured Nation treatment), Art. 1105 (the minimum standard of treatment) and Art. 1110 (expropriation). On September 7, 2005 a panel of arbitrators agreed to a U.S. request to consolidate the proceedings. The consolidated case apparently continues and is not referred to in the government-to-government settlement.

Lumber IV has also been accompanied by follow-up litigation in U.S. courts. In the first case, launched on August 25, 2005 in the U.S. Court of International Trade (CIT), the Government of Canada disputed the contention that application of s. 129 of the Uruguay Round Agreements Act (URAA) by the DOC in *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada* was proper.³⁹ Specifically, Canada argued that s. 129(a)(6) only empowers the USTR to direct *revocation* of an existing anti-dumping or countervailing duty order following a negative determination by the ITC, not to submit a new one in its place. The litigation was prompted by ITC action to comply with the Appellate Body's finding concerning the threat of injury, which the ITC had attempted to remedy by reopening the record and elaborating upon, but not changing, the original analysis.⁴⁰ Canada also challenged distributions of countervailing duties collected from Canadian entities under the Byrd Amendment, asserting that this was in violation of NAFTA 1902.2.⁴¹ In a decision of early April 2006 the CIT substantially agreed with the Canadian position on both points and ordered the parties to meet to discuss a possible remedy.⁴²

In the second case, launched September 13, 2005 in the United States Court of Appeals for the District of Columbia, the Coalition sought a declaration that the NAFTA Ch. 19

³⁹ *Tembec, the Canadian Lumber Trade Alliance, and the Government of Canada v. United States of America and the Coalition for Fair Lumber Imports Executive Committee*, Consol. Ct. No. 05-00028.

⁴⁰ See *Section 129 Consistency Determination: Views of the Commission*, Inv. 701-TA-414 and 731-TA-938 (Nov. 24, 2004) available at <http://www.usitc.gov/fopin.129.pdf>.

⁴¹ The *Continued Dumping and Subsidy Offset Act of 2000*, 19 U.S.C. §1675c (also known as "the Byrd Amendment") came into effect in October 2000. It provided that duties assessed pursuant to a countervailing duty order, an anti-dumping duty order, or a finding under the Antidumping Act of 1921 were to be distributed on an annual basis to "affected domestic producers" for "qualifying expenditures". In January 2003 the law was found to violate the WTO Agreement and suspension of concessions by several countries was authorized in November 2004. The law was partly repealed by Congress in December 2005, with full repeal scheduled in October 2007. NAFTA Art. 1902.2 requires that changes to domestic antidumping and countervailing duty laws by NAFTA countries may only be applied to goods from other NAFTA countries provided that the amending statute expressly so specifies. The Byrd Amendment did not refer to either Canadian or Mexican goods and therefore pursuant to U.S. implementing legislation could not be applied to Canadian or Mexican products.

⁴² See *U.S. Court Rules Byrd Law Cannot be Applied to Canadian Imports*, INSIDE U.S. TRADE (April 14, 2006). An additional aspect of the decision was the judge's conclusion on Canada's standing. Canada had argued that NAFTA was a contract and that the U.S. had breached the contract by applying the Byrd Amendment to Canadian imports. Given Canada's status as a party to NAFTA it was entitled to sue. Pogue J. ruled against Canada because he said it had already found a remedy for the problem by pursuing and winning a claim in the WTO that the Byrd Amendment violated WTO rules. He also noted that Canada had retaliated against the U.S. in the case after receiving WTO authorization. The judge ruled that Canadian sawmills did have standing because they would likely suffer injury as a result of redistributions under the Byrd Amendment.

binational panel system was unconstitutional and violated the due process rights of the principal group of American lumber producers.⁴³ The case was later suspended as part of a general settlement of the *Lumber IV* dispute.

On April 28, 2006 the Governments of Canada and the United States announced the basic terms by which they will draft a proposed Agreement resolving *Lumber IV*.⁴⁴ The proposal requires the U.S. to revoke anti-dumping and countervailing duties on Canadian softwood lumber imports. When the final Agreement is concluded it is estimated that the U.S. will hold at least \$5 billion in duty deposits. The U.S. is to receive \$1 billion. The remainder is to be distributed to the importers of record. The amount going to the U.S. will be divided as follows: 50% to members of the Coalition, a portion for a joint initiative benefiting the North American lumber market, and the remainder going to initiatives in the U.S. as identified by the U.S. government in consultation with Canada.

The Agreement requires Canada to establish a scheme of border measures for the export of Canadian softwood lumber to the U.S.. This is to be composed of export measures, third-country triggers, and a surge mechanism, with the particular choice of export measure – either an export charge or an export charge plus volume restraint – left to the individual Canadian provinces.⁴⁵ Canada, the provincial governments and the U.S. are to make best efforts to define “policy exits” from the export measures within 18 months of the new Agreement entering into force. The Agreement is to run for a term of 7 years, with the possibility of a two-year renewal.

The basic terms of the settlement announced in late April 2006 were to be followed by detailed negotiations over a final agreement. Industry sources said the talks could be complex and controversial since a number of outstanding issues remain, including a dispute settlement mechanism to resolve disagreements over the deal and an anti-circumvention clause intended to prevent Canadian provinces from taking actions that would offset the projected export tax.⁴⁶ On the American side, recipients would also have to agree how to apportion the \$500 million in proceeds which, in light of the CIT’s finding on the Canadian exemption from the Byrd Amendment, would have to be handled under the U.S. federal government’s settlement authority.⁴⁷

One lingering question is how to bring all of the associated litigation to an end. The U.S. has made clear that all litigation must terminate for a final deal to go forward. The Canadian government has moved to cut-off an aid package designed to assist Canadian

⁴³ The challenge covered the first three articles of the U.S. Constitution as well as the Coalition’s due process rights under the Fifth Amendment. It contested the decision in *Certain Softwood Lumber Products from Canada (USITC Final Injury Determination)*, USA-CDA-2002-1904-07. See *Lumber Coalition Files NAFTA Chapter 19 Constitutional Challenge*, INSIDE U.S. TRADE (Sept. 16, 2005).

⁴⁴ See *supra*, note 3.

⁴⁵ Logs harvested from Canada’s Atlantic provinces, from the Yukon, Northwest Territories or Nunavut, will remain generally exempt from border measures, but exports from the Atlantic provinces to the U.S. exceeding 100% of production in any quarter will be subject to a penalty on the excess.

⁴⁶ *Distribution of Duties Still Big Obstacle to U.S.-Canada Lumber Deal*, INSIDE U.S. TRADE (May 5, 2006).

⁴⁷ *Ibid.*

forest producers in *Lumber IV*.⁴⁸ It has also suggested to forest producers engaged in investor-state litigation under NAFTA that it may seek to suspend Ch. 11 between itself and the U.S. for the purposes of the *Lumber IV*-related claims by invoking Art. 58 of the Vienna Convention on the Law of Treaties.⁴⁹ One case that may continue is litigation associated with Canadian challenges to the Byrd Amendment in the CIT, since the dispute also involves duties paid by Canadian producers of wheat, steel and magnesium.⁵⁰

Reaction to the proposed settlement has been mixed. The settlement is WTO-inconsistent in the sense that it will impose restrictions on imports of Canadian softwood lumber in violation of free trade commitments,⁵¹ but much has been made of the fact that at current prices Canadian softwood lumber would face no tax or volume restrictions and that, in any event, settlement is the price of peace.⁵²

It is easy to be intimidated – if not a little confused – by all that has taken place in *Lumber IV*. What needs to be kept in mind, however, is that while the two treaties are substantively similar, their cores are fundamentally distinct. The WTO Agreement creates a body of *international law* while NAFTA Ch. 19 refers back to a country's own *domestic law*. The differences can be profound. These are further accentuated by small, but cumulatively significant, distinctions in the treatment of evidence, the standard of review, and evolving self-understandings of what panels under each treaty are supposed to do.

Under the WTO Agreement panels are to make “an objective assessment of the matter”, a standard which has been held to lie somewhere between deference and *de novo* review.⁵³ In addition, in cases under the WTO Anti-dumping Agreement, panels are required to sustain factual findings and interpretations of domestic agencies so long as these are properly established, even though the panel itself might have decided differently.⁵⁴ The

⁴⁸ “Industry sources said the federal Canadian government had threatened to withhold support from the industry if it did not endorse the agreement The threats include promises to cancel a loan program proposed by the previous Canadian government that would help mills continue litigation with the U.S. while dealing with losses related to the duties they paid on exports since 2002, sources said. However, Canadian Ambassador to the U.S. Michael Wilson said Canada had pledged to move forward with this program if the two sides were unable to reach a final deal.” *U.S. Canada Lumber Deal Hinges on Canadian Mills Dropping Litigation*, INSIDE U.S. TRADE (April 28, 2006).

⁴⁹ Article 58.1(c) of the Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) allows for the suspension of a multilateral treaty by two parties to the treaty where the suspension is not prohibited, where it “does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations” and where it is not incompatible with the object and purpose of the treaty. See *Ontario Groups Sue U.S., Canada for Suspending NAFTA Lumber ECC*, INSIDE U.S. TRADE (May 19, 2006).

⁵⁰ *Distribution of Duties Still Big Obstacle to U.S.-Canada Lumber Deal*, INSIDE U.S. TRADE (May 5, 2006).

⁵¹ Article 11.1(b) of the WTO Safeguards Agreement states that “a [WTO] Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.” See also GATT Art. XI. A long-standing decision holds that even quantitative restrictions having no trade impact violate GATT: *EEC – Quantitative Restrictions against Imports of Certain Products from Hong Kong*, B.I.S.D. 30th Supp. 129 (1983).

⁵² “U.S. and Canadian officials noted that today’s lumber prices are about \$370 per thousand board feet, which means if the deal were in effect today, Canada could face no taxes or volume restrictions. The deal also includes a surge mechanism that would increase the a Canadian region’s export taxes if its exports exceeded 110 percent of its recent export levels. However, if U.S. prices are above \$355, no export tax would be in place, and thus the surge mechanism would not discourage Canadian exports since there would be no tax in place to increase.” *U.S. Canada Lumber Deal Hinges on Canadian Mills Dropping Litigation*, INSIDE U.S. TRADE (April 28, 2006).

⁵³ “...the applicable standard is neither *de novo* review as such, nor “total deference”, but rather the “objective assessment of the facts”” *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R para. 117 (16 January 1998).

⁵⁴ See Art. 17.6 of the WTO Anti-dumping Agreement.

standards are opaque, and what is especially apparent in the WTO litigation in *Lumber IV* is a real struggle by the panels to apply them conscientiously, if not always successfully.

Under NAFTA Ch. 19 by comparison, binational panels take the place of judicial review. Panels are required to apply the same evidentiary standards and standards of review as found in the domestic law, something which allows them to draw on the ready-made store of law and doctrine developed by domestic courts. Application of the *Charming Betsy* doctrine is a good example. At least one binational panel based much of its reasoning on the idea that U.S. courts interpret U.S. law where at all possible as consistent with international law and thereby directed the DOC to cease zeroing. Given this background, it is clear that binational panels simply have more law to guide them.

The NAFTA Ch. 19 litigation in *Lumber IV* was also marked by the evolving self-understanding of what Ch. 19 panels are supposed to do. Under NAFTA there is little to define what panels can do, or conversely, what national agencies must do in response.⁵⁵ For this reason, panels have taken it upon themselves to fill the void assertively through the use of a body of instructions. In several of the NAFTA challenges panels directed the DOC and ITC to do certain things – for example to undertake certain lines of analysis – that at the end of the day led to highly specific results.

The contrast with WTO proceedings could hardly be more stark. Under DSU Art. 19.1 WTO panels finding a violation must recommend that a country bring its law “into conformity” with the WTO Agreement, a formula which is sufficiently vague that it can mean many things. The imprecision can be exploited by a wily defendant, which is free to engage in a shell-game of legal amendment aided by the fact that there is no formal power of remand under the DSU. The generally inconclusive results in the WTO cases speak for themselves.

One particularly interesting issue is the interplay between outcomes in both fora. The cases reviewed the *same* administrative findings and therefore could be expected to raise the danger of conflicting conclusions and issue estoppel. Some of this did in fact occur.⁵⁶ Again, however, it is useful to recall that the two treaties involve distinct sets of rights and obligations and that for the most part, while there were some mutual cross-reflections in the litigation, the provocative question of legal conflict did not arise.

Even if it did, there is some difficulty in understanding how it would have affected matters legally. In its recent decision in *Mexico – Soft Drinks*⁵⁷ the Appellate Body sidestepped the issue of potential conflict between the WTO Agreement and NAFTA by treating it as a matter of jurisdiction. The Appellate Body expressed the view that a

⁵⁵ NAFTA Art. 1904(8) states that “[t]he panel may uphold a final determination, or remand it for action not inconsistent with the panel’s decision.” For further details on the interaction of binational panels with domestic agencies see Chi Carmody, *Continental Conversations: Remand of Binational Panel Decisions under NAFTA Ch. 19* in KEVIN KENNEDY (ed), *THE FIRST DECADE OF NAFTA: THE FUTURE OF FREE TRADE IN NORTH AMERICA* 431-464 (2004).

⁵⁶ See, for example, the assertion by the U.S. that *Section 129 Consistency Determination: Views of the Commission*, Inv. 701-TA-414 and 731-TA-938 (Nov. 24, 2004) circumvented the panel’s decision in *Certain Softwood Lumber Products from Canada (Final Affirmative Threat of Injury Determination)*, USA-CDA-2002-1904-07, by providing for a new threat of injury determination. See also *Canadian Appeal of WTO Lumber Decision to Focus on Standard of Review*, INSIDE U.S. TRADE (Nov. 18, 2005).

⁵⁷ WT/DS308/AB/R (March 6, 2006).

decision to decline to adjudicate due to conflict would appear to diminish the right of a country to seek redress under the treaty. At the same time the Appellate Body also disclaimed “any basis in the DSU for panels and the Appellate Body to adjudicate non-WTO disputes.”⁵⁸ Whether this is ultimately satisfying reasoning or not, the Appellate Body appeared to regard the resolution of conflict as something to be dealt with elsewhere. Its attitude contrasts with NAFTA decisions in *High-Fructose Corn Syrup*⁵⁹ and *Lumber IV* where binational panels have been relatively receptive to WTO decision-making.

All of this seems to present a decidedly mixed picture of the outcome in *Lumber IV*. Still, it is important to recall what was achieved. Both the countervailing and anti-dumping duty rates were substantially lowered. A sustained effort was made to deal with zeroing. Distribution of antidumping and countervailing duties to domestic interests under the Byrd Amendment was held to violate international law. The U.S. and Canada might appear to be back where they began, that is, with a politically brokered settlement, but the litigation probably helped them get there. In that sense, *Lumber IV* is a useful reminder of the limits of the law.

CHI CARMODY⁶⁰

Faculty of Law, University of Western Ontario

⁵⁸ *Ibid.*, para. 56.

⁵⁹ MEX-USA-98-1904-01 (April 15, 2002).

⁶⁰ Associate Professor, Faculty of Law, University of Western Ontario and Canadian Director, Canada-United States Law Institute. Email: ccarmody@uwo.ca. I would like to thank Janice Ho for her research assistance.