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Mark N. Jr. Lontchar

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THE SOFTWOOD LUMBER DISPUTE: REFUNDING COUNTERVAILING DUTIES UNDER THE U.S.- CANADA FREE-TRADE AGREEMENT

I. INTRODUCTION

When the United States and Canada entered into the U.S.-Canada Free-Trade Agreement (FTA) in the late 1980s, it marked the largest trade agreement ever concluded between two countries.¹ The agreement, based on principles from the General Agreement on Tariffs and Trade,² created a comprehensive scheme to liberalize trade in all sectors of the economy while improving both countries as competitors in the international marketplace.³ As contemplated, the agreement met the “test of fairness and mutual advantage.”⁴

Both governments believed the FTA would ease the tension growing over alleged subsidies of Canadian softwood lumber products imported to the United States. In fact, the softwood lumber dispute had quite a tumultuous history.⁵

1. The Canada-U.S. Free Trade Agreement 1 (Minister of Supply and Services Canada ed., 1988) [hereinafter U.S.-Can. FTA].

2. *See id.*

3. *Id.* at 4, 7.

4. *Id.* at 1.

5. The dispute over softwood lumber imports has been ongoing since 1982 when the U.S. Coalition for Fair Canadian Lumber Imports (Coalition) filed a countervailing duty petition with the U.S. Department of Commerce under 19 U.S.C.A. § 1671a(b). *In re Certain Softwood Lumber Products From Canada*, USA-92-1904-01, May 6, 1983, 1993 WL 566370, *2 (U.S.-Can. FTA Panel 1993) [hereinafter Softwood Lumber #1]. After concluding that the Canadian government was not providing subsidies to Canadian softwood lumber producers, the Commerce Department, in May 1983, issued a final negative determination, denying the imposition of a countervailing duty against softwood lumber imports. *Id.* However, in May 1986, the Coalition filed another petition, again alleging that the Canadian government was subsidizing softwood lumber imports. *Id.* at *3. After a second full investigation, the Commerce Department determined that softwood lumber imports were in fact being subsidized by the Canadian government at a rate approximately 15% *ad valorem*. 51 Fed. Reg. 37,453 (1986). Subsequent to the Commerce Department determination, the United States and Canada, in December 1986, entered into a Memorandum of Understanding (MOU) concerning softwood lumber. Softwood Lumber #1 at *3. Canada agreed to collect a 15% charge on softwood lumber exports bound for the United States in return for the withdrawal of the Coalition's petition and a termination of the countervailing duty investigation by the Commerce Department. *Id.* The MOU remained in effect until October 1991, when Canada exercised its right to terminate the MOU, pursuant to a study conducted, which concluded that the MOU had served its purpose and was no longer needed. On October 4, 1991, Canada

As part of the agreement, the draftsmen developed rules for applying the law of the importing country to settle anti-dumping and subsidy disputes.⁶ Furthermore, the FTA created a distinct dispute resolution mechanism⁷ ostensibly designed to help Canadian exporters compete in the U.S. market on more predictable and equitable footing.⁸ It was thought that politics would no longer play a part in the resolution of subsidy disputes between the United States and Canada. Instead, Binational Panels, convened under terms of the FTA and comprised of American and Canadian trade experts,⁹ would review disputes in an impartial manner without regard to political pressure. Overall, the Panel review process would lead to an era of fairness and equity in trade relations between Canada and the United States.

To date, however, the Panel review process has faltered in its attempt to resolve the softwood lumber dispute to the satisfaction of both parties. One Binational Panel recently determined that a countervailing duty collected by U.S. Customs officials on Canadian softwood lumber imports was improperly imposed.¹⁰ The decision mandated that the countervailing duty be lifted, yet was silent as to whether the United States was obligated to refund the millions of dollars it had previously collected as a countervailing duty.¹¹ The United States maintained that previously collected duties were not refundable. Canada adamantly disagreed.

With tensions rising, the Clinton Administration announced on December 15, 1994 that it would establish a consultative body with Canada to mediate trade disputes. More importantly, the body would refund, with interest, approximately \$450 million worth of cash deposits collected under a 1992 countervailing duty order.¹² In retrospect, refunding previously collected duties was a logical and prudent decision, considering the interests of all involved parties. However, U.S. law did not require refunding of these duties. This note will explore the history of the softwood lumber dispute with an emphasis on analyzing the legal arguments and policy considerations that led to the settlement agreement and refund announcement. Further, the analysis will illustrate why settlement became the only viable solution when considering the long-term interests of both Canada and the United States, as well as the overall goal of the FTA.

officially ceased collecting the export charge on softwood lumber products bound for the United States. *Id.* at *4. Almost immediately thereafter, the Commerce Department initiated the investigation discussed in Section II of the paper.

6. U.S.-Can. FTA, *supra* note 1, Art. 1902(1).

7. *Id.* Art. 1904.

8. *Id.* at 268.

9. *Id.* Annex 1901.2.

10. 59 Fed. Reg. 12,584 (1994).

11. *See id.*

12. *U.S. to Repay Canadian Lumber Levies; Bilateral Consultations to Begin*, 11 Int'l Trade Rep. (BNA) No. 50, at 1981 (Dec. 21, 1994).

II. STATEMENT OF THE CASE

A. *Facts*

In October 1991, the International Trade Administration of the U.S. Department of Commerce (Commerce Department) initiated a countervailing duty investigation¹³ based on allegations that federal and provincial governments in Canada were subsidizing production of softwood lumber products exported to the United States.¹⁴ After careful study and analysis, the Commerce Department made a preliminary affirmative countervailing duty determination that Canada was subsidizing its softwood lumber industry¹⁵ through two types of subsidies.¹⁶ In accordance with United States law, the Commerce Depart-

13. A countervailing duty shall be levied and paid on any product imported into the United States whenever the Commerce Department determines that any country, colony, province, or other political subdivision "pay[s] or bestow[s], directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such . . . political subdivision . . ." 19 U.S.C.A. § 1303(a) (West 1980). The procedure for initiating a countervailing duty investigation is outlined in 19 U.S.C.A. § 1671a (West Supp. 1994). If the investigation concludes that a country is providing a direct or indirect subsidy with respect to the manufacture or production of a product imported into the United States and an industry in the United States is materially injured, the Commerce Department shall impose upon that product a countervailing duty equal to the amount of the net subsidy. 19 U.S.C.A. § 1671(b) (West Supp. 1994).

14. Softwood Lumber #1, *supra* note 5, at *4.

15. 57 Fed. Reg. 8,800 (1992). The Commerce Department calculated the subsidy to be 14.48% *ad valorem*. *Id.*

The term "subsidy" has the same meaning as the term "bounty or grant" as the term is used in section 1303 of this title and includes, but is not limited to, the following:

(i) Any export subsidy described in Annex A to the Agreement (relating to the illustrative list of export subsidies).

(ii) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(I) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(II) The provision of goods or services at preferential rates.

(III) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(IV) The assumption of any costs or expenses of manufacture, production, or distribution.

19 U.S.C.A. § 1677(5)(A) (West Supp. 1994).

16. *U.S.-Canada Review Panel Remands Commerce Ruling on Softwood Lumber*, 10 Int'l Trade Rep. (BNA) No. 19, at 783 (May 12, 1993). The two types of subsidies provided by Canada were stumpage programs of several provinces and log export restrictions in British Columbia. *Id.*

Stumpage programs constitute the system by which individuals and enterprises acquire rights from the Crown in right of the province to cut and remove standing timber from Crown lands. The vast majority of public forests in Canada are owned by provincial governments. Under the Constitution Act, 1867, the provinces bear the responsibility for managing and administering these "Crown" forests.

Softwood Lumber #1, *supra* note 5, at 88 n.3. See generally 57 Fed. Reg. 22,570 (1992) (providing a detailed explanation of log export restrictions in British Columbia).

ment then suspended the liquidation of all entries of softwood lumber products from Canada subject to the countervailing duty determination. Further, it ordered Canada to post a cash deposit for each entry¹⁷ of softwood lumber equal to the estimated net subsidy.¹⁸ Based on the preliminary determination, the U.S. Customs Service (Customs Service) immediately began collecting cash deposits from Canadian lumber producers for softwood lumber imports.

Upon further investigation, the Commerce Department made a final countervailing duty determination,¹⁹ reiterating that both the federal government and several provincial governments in Canada were passing subsidies along to softwood lumber producers.²⁰ In its May 28, 1992, public notice, the Commerce Department concluded that the estimated net subsidy derived from the Canadian government was 6.51%.²¹ Because the decision affirmed the previous determination by the Commerce Department, Customs Service officials continued to collect cash deposits on all entries of softwood lumber products from Canada to offset the net subsidy.

B. Decisions

Both the Canadian lumber industry and the Canadian government sought redress for what they believed to be a clearly erroneous decision by the Commerce Department. Normally under U.S. law, the aggrieved parties from Canada would petition the U.S. Court of International Trade for judicial review of the final determination made by the Commerce Department. However, prior to the investigation initiated by the Commerce Department in 1991, the United States and Canada signed a comprehensive free trade agreement that changed the mechanism of dispute resolution for certain matters arising under terms of the trade agreement.²² Because the imposition of countervailing duties fell under the umbrella of the trade agreement,²³ Canada filed a petition to convene a Binational Panel to review the matter in question.²⁴

17. "Entry" means filing appropriate documentation with a Customs Service officer to secure the release of imported products from the custody of Customs Service officials. 19 C.F.R. § 141.0a(a) (1994).

18. 19 U.S.C.A. § 1671b(d) (West Supp. 1994). Liquidation is defined as "the final computation . . . of the duties . . . accruing on an entry." 19 C.F.R. § 159.1 (1994); *American Permac, Inc. v. United States*, 642 F. Supp. 1187, 1190 (Ct. Int'l Trade 1986) (defining liquidation as the final computation by the Customs Service of all duties accruing on an entry). Net subsidy can be calculated by subtracting from the gross subsidy any fees paid to qualify for the subsidy, any loss in the value of the subsidy resulting from the deferred receipt, and charges levied to offset the subsidy. 19 U.S.C.A. § 1677(6) (West Supp. 1994).

19. By statute the Commerce Department was compelled to continue its investigation and make a final determination concerning whether Canada was providing a subsidy to its softwood lumber industry. 19 U.S.C.A. § 1671d(a) (West Supp. 1994).

20. 57 Fed. Reg. 22,570 (1992).

21. *Id.*

22. *See generally*, U.S.-Can. FTA, *supra* note 1. The effective date of the U.S.-Canada FTA was January 1, 1989. *Id.* Art. 2105; *See also* The United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 (1988) (Congress was required to pass implementation legislation adopting the terms of the FTA before the Agreement could have the effect of law).

23. U.S.-Can. FTA, *supra* note 1, Art. 1901(1).

24. Softwood Lumber #1, *supra* note 5, at 8; *see* U.S.-Can. FTA, *supra* note 1, Art. 1904 (creating entire Binational Panel review process); *see* 19 U.S.C.A. § 1516a(g)(8)(A)(i) (West Supp. 1994) (authorizing request to seek Binational Panel review in accord with terms of the U.S.-Can. FTA). The procedure for choosing Panel

The Panel convened July 29, 1992, to consider several issues related to the softwood lumber problem.²⁵ Initially, the Binational Panel remanded the countervailing duty question to the Commerce Department²⁶ claiming that the imposition of a duty was not supported by substantial evidence.²⁷ Upon remand, the Department concluded, in September 1993, that federal and provincial governments in Canada were indeed subsidizing the softwood lumber industry.²⁸

The Binational Panel reviewed the remand determination of the Commerce Department but nonetheless found, on December 17, 1993, that the Department's conclusions were unsupported by substantial evidence.²⁹ Although the December decision was split along national lines, all Panel members agreed that the Commerce Department had failed to show that the subsidy bestowed a competitive advantage on Canadian softwood lumber producers.³⁰ In other words, the lumber industry in the United States was not materially injured by the subsidy. Therefore, the imposition of a countervailing duty was improper.

In addition to overturning the Commerce Department's first remand determination, the Panel ordered a second remand, requiring the Department to affirmatively find that no subsidies were provided by the Canadian government.³¹ After the Commerce Department complied with the order, the Panel affirmed the Department's determination that no subsidies on Canadian softwood lumber products existed.³² The effective date of the final order was March 17, 1994.³³

Dissatisfied with the ruling from the Binational Panel review, the Commerce Department requested that a three member Extraordinary Challenge Committee (ECC) be convened to review the decision of the Binational Panel.³⁴ However, the ECC "was not intended to be an appellate court but rather a committee of limited jurisdiction to protect the integrity of the system."³⁵ Thus, under terms of the FTA, the United States could avail itself of the ECC only if it alleged that:

members is outlined in U.S.-Can. FTA Annex 1901.2.

25. See Softwood Lumber #1, *supra* note 5, at 8.

26. Analyzing the Binational Panel remand determination. See Softwood Lumber #1, *supra* note 5, at 16-78.

27. *In re Certain Softwood Lumber Products from Canada*, ECC-94-1904-01USA, Aug. 3, 1994, 1994 WL 405928, *4-6 (U.S.-Can. FTA Panel, 1994) [hereinafter Softwood Lumber #2]. The Panel was required to apply "the same standard of review as described in Article 1911 and the general legal principles that a court of the importing Party would apply to a review of a determination of the investigating authority." U.S.-Can. FTA, *supra* note 1, Art. 1904(3). Because the United States was the importing party, the Panel was obligated to "hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C.A. § 1516a(b)(1)(B) (West Supp. 1994).

28. Softwood Lumber #2, *supra* note 27, at *6.

29. *Id.*

30. *Id.* Before a countervailing duty may be lawfully imposed, the Commerce Department must determine an industry in the United States has either been materially injured or is threatened with material injury by the subsidy. 19 U.S.C.A. § 1671d(b) (West Supp. 1994).

31. Softwood Lumber #2, *supra* note 27, at *6.

32. 59 Fed. Reg. 12,584 (1994).

33. *Id.*

34. U.S.-Can. FTA, *supra* note 1, at Annex 1904.13.

35. Softwood Lumber #2, *supra* note 27, at *7.

- a) i.) A member of the [binational] panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
- ii.) the panel seriously departed from a fundamental rule of procedure, or
- iii.) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and
- b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process.³⁶

In the formal request for an ECC filed April 6, 1994, the Commerce Department attacked both the substance of the Panel's majority decision as well as the conduct of two Canadian panelists.³⁷

On August 3, 1994, the ECC affirmed the decision of the Binational Panel, ruling that no competitive advantage flowed to Canadian softwood lumber producers by way of the stumpage programs and log export restrictions alleged to be subsidies.³⁸ Therefore, the imposition of a countervailing duty against Canadian softwood lumber imports was improper.

C. Issue

While the ECC decision raises several interesting issues, no one issue is more important to Canadian interests and the U.S. government than the refunding of countervailing duties previously collected by the United States. From March 12, 1992, when the countervailing duty was first imposed, to August 3, 1994, when the ECC decision was rendered, U.S. Customs officials collected between \$575 million and \$600 million on softwood lumber imports.³⁹ However, because of the limited jurisdiction and authority of both the Binational Panel and the ECC, decisions from these governing bodies were silent with regard to the refunding of duties.⁴⁰

36. U.S.-Can. FTA, *supra* note 1, Art. 1904(13).

37. *United States Challenges Softwood Lumber Panel Decision*, 11 Int'l Trade Reporter (BNA) No. 15, at 586 (Apr. 13, 1994).

38. *Softwood Lumber #2*, *supra* note 27, at *1-45. The ECC decision, like the Binational Panel decision, split along national lines, with both Canadian members upholding the Panel ruling that no countervailing duty should be imposed. Some questioned the impartiality of both decisions. The lone dissenter, Malcolm Wilkey, a retired federal circuit judge from the United States, blasted the rationale of the ECC majority opinion. *Id.* at *45-89. He stated, "I believe this ECC majority opinion may violate more principles of appellate review of agency action than any opinion by a reviewing body which I have ever read." *Canada Prevails in Softwood Lumber Extraordinary Challenge Ruling*, 11 Int'l Trade Reporter (BNA) No. 32, at 1245 (Aug. 10, 1994). Judge Wilkey argued the Binational Panel violated principles of appellate review under American law by redetermining technical issues properly before an administrative agency. *Softwood Lumber #2* at *63. The Panel placed its own interpretation and evaluation on the weight of the evidence rather than giving high deference to the Commerce Department's expertise and discretion. *Id.*; see also *Daewoo Electronics Co., LTD. v. International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO*, 6 F.3d 1511 (Fed. Cir. 1993) (discussing the proper standard of review to be used in actions against administrative agency determination).

39. See *Lawmakers Blast Canada Lumber Ruling, Urge Solution to Flaws in Panel System*, 11 Int'l Trade Reporter (BNA) No. 34, at 1308 (Aug. 24, 1994) (estimating the refund to be approximately \$575 million dollars); see also *Canada: Maclaren Says Canada Expects Payment of Lumber Duties Despite Legal Action*, INT'L TRADE DAILY (BNA), Sept. 22, 1994 available in WESTLAW, BNA-ITD File (estimating the refund to be approximately \$600 million dollars).

40. See generally U.S.-Can. FTA, *supra* note 1, Art. 1904.

On August 16, 1994, the Commerce Department revoked the countervailing duty order on certain softwood lumber products from Canada.⁴¹ It instructed the Customs Service to cease collection of cash deposits on softwood lumber products from Canada. The Customs Service was also ordered to terminate the suspension of liquidation of all entries made on or after March 17, 1994, the effective date of the Binational Panel's final decision reviewing the Commerce Department's remand determination.⁴² Most importantly, the Commerce Department ordered the Customs Service to refund with interest all cash deposits made on or after March 17, 1994,⁴³ specifically avoiding the issue of cash deposits collected prior to that time. As the Federal Register notice stated, "[c]ash deposits made prior to March 17, 1994, are not addressed in this notice."⁴⁴

The question arose whether the United States owed Canadian interests all previous duties collected (March 12, 1992, to August 3, 1994) or only the duties collected on or after March 17, 1994. The difference was approximately \$400 million.⁴⁵ According to Canada's International Trade Minister, the Canadian government emphatically believed the United States was obligated to fully refund, with interest, all duties collected on softwood lumber products, including those duties collected between March 12, 1992, and March 16, 1994.⁴⁶

Nonetheless, the Commerce Department refuted Canada's argument, insisting refunds prior to March 17, 1994, presented a different set of circumstances.⁴⁷ Counsel for the U.S. interests claimed U.S. law did not require a full refund of all duties collected, noting that prospective panel decisions are not uncommon (like the March 17, 1994, panel decision) and that a U.S. Court of International Trade case supported this position.⁴⁸ With the integrity of the FTA and the NAFTA at stake, the Clinton Administration eventually moved to negotiate a settlement and to refund a substantial portion of previously collected duties.⁴⁹ Why was the refunding of duties such a prudent move?

41. 59 Fed. Reg. 42,029 (1994).

42. *Id.* at 42,030.

43. *Commerce Reviewing Law on Repayment of Duties in Wake of ECC Lumber Ruling*, 11 Int'l Trade Reporter (BNA) No. 33, at 1275 (Aug. 17, 1994).

44. 59 Fed. Reg. 42,030 (1994).

45. *See US to Refund Only Part of Canadian Softwood Duties*, Reuter Newswire, Aug. 16, 1994, available in DIALOG, INT-NEWS-C.

46. *Canada: Maclaren Says Canada Expects Payment of Lumber Duties Despite Legal Action*, INT'L TRADE DAILY (BNA), Sept. 22, 1994, available in WESTLAW, BNA-ITD File. Canada is so adamant about the matter that it has submitted a "protective filing" with the U.S. Court of Appeals for the District of Columbia Circuit to ensure that it can use legal remedies to regain lost countervailing duties should the Commerce Department ultimately refuse to refund them. *Canadian Lumber Group Scoffs at U.S. Challenge to Refunds*, J. Com., Sept. 19, 1994.

47. *Commerce Reviewing Law on Repayment of Duties in Wake of ECC Lumber Ruling*, 11 Int'l Trade Reporter (BNA) No. 33, at 1275 (Aug. 17, 1994).

48. *Id.*

49. *U.S. to Repay Canadian Lumber Levies; Bilateral Consultations Begin*, 11 Int'l Trade Rep. (BNA) No. 50, at 1981 (Dec. 21, 1994).

III. ANALYSIS OF THE LAW

The following discussion of U.S. law analyzes the refunding of duties from both American and Canadian perspectives, including the applicable legal and policy arguments. The analysis will also touch on the most plausible courses of action for each party, considering the desire to maintain the integrity of the trade agreement, while also promoting fair and mutually beneficial hemispheric trade relations. Because of the United States' willingness to compromise, the short-term gain was sacrificed for a long-term benefit.

Article 1904(15) of the FTA specifies that both parties to the agreement shall amend statutes and regulations to ensure that existing procedures concerning the refund, with interest, of countervailing duties will operate to give effect to a final panel decision that a refund is due.⁵⁰ Unfortunately, no Binational Panel decision addressed the issue of repayment of duties imposed on softwood lumber imports. Therefore, the parties were required to consider U.S. law for an answer.⁵¹

According to the United States, it is not obligated to refund previously collected countervailing duties. The legal argument supporting such a proposition rests on very solid ground. The Commerce Department published its preliminary affirmative countervailing duty determination on March 12, 1992.⁵² In accordance with federal law, it ordered the suspension of liquidation of certain softwood lumber products subject to the determination on or after March 12. It further ordered the posting of a cash deposit for each entry of the softwood lumber concerned equal to the estimated amount of the net subsidy, or 14.48%.⁵³ When the Commerce Department's final affirmative countervailing duty determination was published on July 12, 1992,⁵⁴ it declared,

all unliquidated entries of certain softwood lumber products, which were entered, or withdrawn from warehouse, for consumption, on or after March 12, 1992, . . . will be liable for the assessment of countervailing duties. Furthermore, a cash deposit of the estimated countervailing duties must be made on all entries or withdrawals from warehouse, of certain softwood lumber products from Canada, for consumption, made on or after the date of publication of this countervailing duty order in the Federal Register.⁵⁵

By law, on July 13, 1992, the effective date of its final determination, the Commerce Department was authorized to retroactively liquidate, on or after March 12, 1992, all entries of certain softwood lumber imports from Canada with the countervailing duty attached.⁵⁶

50. U.S.-Can. FTA, *supra* note 1.

51. *See* U.S.-Can. FTA, *supra* note 1, Art. 1902.

52. 57 Fed. Reg. 8800 (1992).

53. *Id.*; *See* 19 U.S.C.A. § 1671b(d) (West Supp. 1994). The Commerce Department later revised the net subsidy to 6.51%. *See* 57 Fed. Reg. 22,570 (1992).

54. The notice published was actually an order required by federal statute. *See* 19 U.S.C.A. § 1671e(a) (West Supp. 1994).

55. 57 Fed. Reg. 30,955 (1992). The cash deposit required to meet the countervailing duty changed because the estimated net subsidy from March 12 changed to 6.51%. *See* 57 Fed. Reg. 22,570 (1992).

56. *See* 19 U.S.C.A. § 1303 (West. 1980). The lumber products affected by the duty included:

Since Canada requested a Binational Panel to review the matter, the issue became, according to the United States, whether liquidation should have been suspended during the review process, thus invalidating the Commerce Department's order to retroactively liquidate entries beginning March 12, 1992. Federal law addresses the liquidation issue by authorizing liquidation during appellate review of a countervailing duty determination unless otherwise enjoined by the court.⁵⁷ The statute expressly refers to the court as the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit.⁵⁸

However, with the trade agreement's enactment, Congress also provided for liquidation of entries during Binational Panel or ECC review of final determinations made by the Commerce Department.⁵⁹ The relevant language of the statute states that unless the reviewing body enjoins liquidation, entries of merchandise shall be liquidated:

if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the administering authority of notice of the final decision of a binational panel, or extraordinary challenge [which] is not in harmony with [the determination of the administering authority].⁶⁰

The Binational Panel did not discuss liquidation of entries.⁶¹ Therefore, under the present facts, the Commerce Department could dictate how and when entries would be liquidated, at least until the Panel ruled otherwise.⁶² On December 17, 1993, the Binational Panel rejected the second affirmative countervailing duty determination of the Commerce Department, instead ruling that no Canadian subsidies on softwood lumber products existed.⁶³ Because the Panel had no authority under the terms of the trade agreement to expressly overrule the Commerce Department decision,⁶⁴ it remanded the case to the

(1) Coniferous wood, sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimeters; (2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbitted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed; (3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbitted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed; (4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbitted, chamfered, V-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.

57 Fed. Reg. 30,955 (1992).

57. 19 U.S.C.A. § 1516a(c) (West Supp. 1994).

58. *Id.*

59. See 19 U.S.C.A. § 1516a(g)(5) (West Supp. 1994).

60. *Id.*

61. See generally Softwood Lumber #1, *supra* note 5; See also Softwood Lumber #2, *supra* note 27.

62. The Commerce Department actually retained the power to order the assessment and collection of duties until the Panel's final decision was published in the Federal Register and took effect, March 17, 1994. See 19 U.S.C.A. § 1516a(g)(5)(B) (West Supp. 1994).

63. *In re Certain Softwood Lumber Products From Canada USA-92-1904-01*, Dec. 17, 1993, 1993 WL 549652 (U.S.-Can. FTA Panel 1993).

64. The power of a Binational Panel is limited under the terms of the FTA. "The panel may uphold a final determination or remand it for action not inconsistent with the panel's decision." U.S.-Can. FTA, *supra* note 1, art. 1904(8).

Commerce Department. The Commerce Department was ordered to reverse its affirmative countervailing duty determination and to find that neither federal nor provincial governments in Canada were subsidizing softwood lumber imports.⁶⁵

On January 6, 1994, the Commerce Department complied by filing an amended determination which concluded that Canadian softwood lumber imports were not being subsidized.⁶⁶ The Panel affirmed the Commerce Department's negative determination on March 7, 1994. However, its decision did not become effective until March 17, 1994, when published in the Federal Register.⁶⁷ The Commerce Department, therefore, had full authority by law to order Customs Service officials to retroactively assess and collect countervailing duties from March 12, 1992, until March 17, 1994.

The preceding legal argument advanced by the United States logically follows from the Commerce Department's revocation order dated August 16, 1994.⁶⁸ At that time, the Department revoked its countervailing duty order by directing the Customs Service to retroactively terminate collection of cash deposits on softwood lumber entries made on or after March 17, 1994.⁶⁹ Not coincidentally, the Binational Panel's decision became effective on the same date. Therefore, based upon the Panel's binding decision, the Commerce Department was obligated to refund only deposits made on or after March 17, 1994.

From the Canadian perspective, the United States legal analysis is flawed. Though Congress contemplated the liquidation of entries during the review process by a Binational Panel,⁷⁰ Congress did not address how duties should be refunded upon a subsequent negative determination by such a panel. Because the implementing legislation passed by Congress⁷¹ contains no clear Congressional intent as to how to refund duties after a negative determination,⁷² the Commerce Department's analysis is not supported by substantial evidence, as required by statute.⁷³ Further, the Commerce Department's reasoning is not in accordance with law⁷⁴ and justice because it is inequitable, unfair, and, most importantly, contrary to the intent of the trade agreement as set forth in its Preamble and objectives.⁷⁵

65. *Commerce Agrees to Accept FTA Panel Ruling Disallowing Duties on Lumber*, 11 Int'l Trade Rep. (BNA) No. 2, at 61 (Jan. 12, 1994).

66. *Court Decision and Suspension of Liquidation on Certain Softwood Lumber Products From Canada*, 59 Fed. Reg. 12,584. (1994).

67. *Certain Softwood Lumber Products From Canada: Notice of Panel Decision, Revocation of Countervailing Duty Order and Termination of Suspension of Liquidation*, 59 Fed. Reg. 42,029 (1994).

68. *Id.*

69. *Id.* at 42,030.

70. *See* 19 U.S.C.A. § 1516a(g)(5)(B) (West Supp. 1994).

71. *United States-Canada Free-Trade Agreement Implementation Act of 1988*, Pub. L. No. 100-449, 102 Stat. 1851 (1988).

72. *See generally* H.R. REP. No. 816, 100th Cong., 2d Sess., pt. 1-9 (1988).

73. *See* 19 U.S.C.A. § 1516a(b)(1)(B) (West Supp. 1994).

74. *Id.*

75. In the Preamble to the trade agreement, the governments of Canada and the United States resolve, among other things:

TO STRENGTHEN the unique and enduring friendship between their two nations;

According to Canada, a decision not to refund the duties would reinforce a Canadian perception of increased U.S. trade protectionism.⁷⁶ As one international trade consultant stated, “[p]olitics still plays a major role in U.S.-Canada trade relations and . . . the softwood lumber dispute has been particularly significant in forming Canadian public opinion.”⁷⁷ A decision not to refund duties contradicts most, if not all, objectives contemplated by Canada and the United States when entering into the trade agreement. Such a decision might lead the Canadians to retaliate in other areas of trade. It might also affect future negotiations aimed at expanding membership in the NAFTA. Without question, according to Canadian interests, public policy and both governments’ interests in a long-term, expanding trade relationship dictate that all duties previously collected should be refunded.

While Canada’s argument might arouse emotion, precedents in U.S. law fall squarely on the side of the Commerce Department. Assuming for a moment that Congressional intent is ambiguous, as the Canadians could argue, the law requires a court to determine if an administrative interpretation is sufficiently reasonable.⁷⁸ When the question is one of statutory interpretation, the U.S. Supreme Court has “long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer.”⁷⁹ A court need not conclude that the agency’s interpretation is the only one reasonable.⁸⁰ It must defer to the agency’s interpretation, rather than the court’s.⁸¹ In other words, a court must only decide “whether [the agency’s] interpretation of its statutory power falls within the range of permissible construction.”⁸²

The Commerce Department’s interpretation is consistent with statutory law. It takes into account refunds due after a final negative determination made by an

TO ADOPT clear and mutually advantageous rules governing their trade;
 TO ENSURE a predictable commercial environment for business planning and investment;
 TO STRENGTHEN the competitiveness of United States and Canadian firms in global markets;
 TO REDUCE government-created trade distortions while preserving the Parties’ flexibility to safeguard the public welfare.

U.S.-Can. FTA, *supra* note 1, at 5. The objectives of the FTA are as follows:

- a) eliminate barriers to trade in goods and services between the territories of the Parties;
- b) facilitate conditions of fair competition within free-trade area;
-
- d) establish effective procedures for joint administration of this Agreement and resolution of disputes;
- e) lay the foundation for further bilateral and multilateral cooperation to expand and enhance the benefits of this Agreement.

Id. Art. 102.

76. See *Canada Unlikely to End FTA with U.S. if Panel Process Found Unconstitutional*, INT’L TRADE DAILY (BNA), Oct. 26, 1994, available in WESTLAW, BNA-ITD File.

77. *Id.*

78. See *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

79. *Id.* at 843. See also *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

80. *Zenith*, 437 U.S. at 450.

81. *Daewoo Electronics Co., LTD. v. International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO*, 6 F.3d 1511, 1516 (Fed. Cir. 1993) (citing *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 663 (Fed. Cir. 1992)).

82. *Daewoo Electronics Co.*, 6 F.3d, at 1516.

administrative agency.⁸³ Once an affirmative preliminary countervailing duty determination is made, the Commerce Department can only order the Customs Service to suspend liquidation of entries and begin collecting cash deposits.⁸⁴ It cannot authorize assessment of the duty.⁸⁵ Therefore, any cash deposit made is actually held in trust until the final countervailing duty is assessed. If such a duty is never assessed, all cash deposits logically should be refunded.⁸⁶ That situation is fundamentally different from the present facts where the Commerce Department has made both a preliminary and final countervailing duty determination and by law is vested with authority to order the assessment of the duty.⁸⁷ This interpretation also follows precedent in Panel decisions made under other trade agreements to which the United States is a party.⁸⁸ Based on the foregoing analysis and the deference given to the Commerce Department's expertise in its administration of statutory authority, a court would conclude that the Commerce Department's analysis should be followed and, therefore, duties collected prior to March 17, 1994, are not refundable.

IV. FUTURE IMPLICATIONS

Canadian interests certainly would not be pleased with paying almost \$600 million in countervailing duties and then being told, although the duty should never have been imposed by law, it nevertheless could not recoup roughly \$550 million of the \$600 million paid. Where is the equity in such a result? From a practical point of view, some would argue that Canada did not raise the refund issue during the Panel review process. Thus, the outcome is merely an expensive lesson. Yet, by looking at the trade agreement on its face, negotiators from both sides obviously contemplated a Binational Panel that had jurisdiction to make decisions on the refund of countervailing duties.⁸⁹ Perhaps the agreement could be interpreted to mean that review by a Panel is ripe only after a final determination on the refund of duties has been made by an appropriate administrative agency. While no clause in the agreement expressly addresses this point, such a broad interpretation of the phrase "final determination" at least seems to be consistent with the spirit and intent of the trade agreement.

Hypothetically, assume for a moment "final determination" is interpreted broadly so that a Commerce Department decision denying refunds of countervailing duties collected prior to March 17, 1994, is a reviewable matter before a Binational Panel. Would the United States ever want to find itself in such a far-fetched, hypothetical problem, especially after members of both the Binational Panel and the ECC in the previous two decisions split along national lines?⁹⁰

83. See 19 U.S.C.A. § 1671d(c)(2) (West 1980).

84. See 19 U.S.C.A. § 1671b(d) (West Supp. 1994).

85. See generally 19 U.S.C.A. § 1671b (West Supp. 1994).

86. See 19 U.S.C.A. § 1671d(c)(2) (West 1980).

87. See 19 U.S.C.A. § 1671d(c) (West 1980).

88. See generally *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078 (Ct. Int'l Trade 1994).

89. See U.S.-Canada FTA, *supra* note 1, Art. 1904(15)(d).

90. Quite possibly the splits along national lines were coincidental. However, the dissenter in the ECC suggested the Canadian panel members did not understand the standard of appellate review in administrative

In such a scenario, the United States loses regardless of the outcome of the Panel decision. If a Commerce Department decision denying a refund is affirmed by a Binational Panel, what are the ramifications? One result is regional friction and possibly a movement toward trade protectionism between the two countries, exactly the opposite to the objective behind the FTA. Second, the shock waves from friction might spread throughout the Western Hemisphere, sabotaging any attempts to expand the NAFTA into Central and South America. Certainly, countries expressing desire to join the NAFTA would stand up and take notice. Third, the United States would suffer a severe blow to its reputation in the international community because of the impression created that it was merely taking advantage of a weaker, smaller Canada.

If the hypothetical Panel decision instead obligated the United States to refund all previously collected duties, the result, more likely than not, would spark a constitutional challenge to the entire Binational Panel review process. Coincidentally, the United States found itself in such a predicament after a constitutional challenge was filed in September 1994 by the Coalition for Fair Lumber Imports.⁹¹ If the Binational Panel review process was ever successfully challenged on constitutional grounds, as the deputy chief negotiator of Canada put it, "then that's the end of the FTA, and the NAFTA. And the [World Trade Organization] isn't worth the paper it's printed on."⁹²

V. CONCLUSION

The United States faced a major decision when considering if it should refund countervailing duties collected on Canadian softwood lumber imports. Almost all alternatives guaranteed some type of political backlash against the U.S. government. In retrospect, the Clinton Administration's announcement of a settlement to the softwood lumber dispute and subsequent refund of collected duties makes the most sense of any alternative considered. Additionally, the Coalition for Fair Lumber Imports dropped the constitutional challenge to the Binational Panel review process.⁹³

By refunding \$450 million of previously collected duties,⁹⁴ the U.S. government satisfied Canadian interests. By agreeing to set up a consultative body with Canada to mediate future softwood lumber trade disputes,⁹⁵ the United States displayed its commitment to preserve and protect American business and trade interests. By avoiding a constitutional challenge to the Binational Panel review process,⁹⁶ the United States ensured that it could pursue expansion of the NAFTA and other potential hemispheric trade arrangements.

agency action under U.S. law. *Softwood Lumber #2*, *supra* note 27, at 45-86.

91. See *Maclaren Says Canada Expects Payment of Lumber Duties Despite Legal Action*, INT'L TRADE DAILY (BNA), Sept. 22, 1994, available in WESTLAW, BNA-ITD File.

92. *Id.*

93. *U.S. To Repay Canadian Lumber Levies; Bilateral Consultations To Begin*, 11 Int'l Trade Reporter (BNA) No. 50, at 1981 (Dec. 21, 1994).

94. *Id.*

95. *Id.*

96. *Id.* at 1982.

In the end, the negotiated settlement and announcement of a countervailing duty refund allowed all interested parties to benefit.

Mark N. Lontchar, Jr.