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NAFTA IN A WTO WORLD

SOFTWOOD LUMBER – LESSONS IN REGIONALISM

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Abstract

The Canada-U.S. dispute over softwood lumber far exceeds any previous disagreement between these two countries on trade matters and possibly on any other economic issue. The dispute seemed to be on the road to resolution by late February but the negotiation process seems to have stalled. Are there not some lessons to be gleaned here?

Looking at the NAFTA through the lens of experience as we approach its 10th anniversary, some thought should be given to strengthening treaty mechanisms to improve the process of settlement in future disputes of a major kind. One option is to strengthen the role of the NAFTA Free Trade Commission so that it can operate as an effective arbiter. Another option is to institutionalize the NAFTA panel system so that their *ad hoc* nature is eliminated.

A final option could be to devise some means of suspending the progress of private dumping or subsidy petitions where they engage major economic sectors or State interests, allowing consultations and possible settlement of these issues between or among NAFTA governments. While this suggestion may be controversial and technically

tricky, “NAFTA Ten” allows us the opportunity to consider innovations that might make the system work that much better.

These are ideas only and it is recognized that each generates its share of controversy. But occasions such as this Conference should be used for some brainstorming. Given that trade relations are dynamic by nature, lawyers should be constantly discussing ideas that might assist in adapting legal instruments to changing facts of trade life.

Some Introductory Comments

The twenty-year old Canada-U.S. softwood lumber saga continues. There were signs earlier in February that a settlement might be imminent¹ but this now appears less likely. Federal-provincial differences in Canada, the absence of unanimity among Canadian companies and the intractability of American producers still offer significant roadblocks to an accommodation. Concessions by the Canadian side that could have allowed the two governments to strike both an interim and longer-term deal in the next few weeks appears to have led nowhere and negotiations were suspended, at least for a time, on February 25th².

The current dispute³ has already spawned a vast number of commentary and learned articles, and will no doubt continue to do so, whether the dispute is settled or not⁴. If not

¹ “Lumber war about to be papered over”, *Globe and Mail*, Toronto, 6 Feb. 2003; “Canada U.S. near lumber truce”, *Globe and Mail*, 5 Feb. 2003.

² “Pettigrew Says U.S. Must Show Flexibility To Get Long-Term Deal on Softwood Lumber”, Vol. 20 Int’l Trade Reporter 315, 13 Feb. 2003; “Canada U.S. ‘Miles Apart’ on Softwood, DeJong Says”, *Financial Post*, 22 Feb. 2003; “Softwood talks break down over ‘excessive’ U.S. industry demands: Pettigrew”, *Canadian Press*, 25 February 2003; “Lumber talks break down”, *Globe and Mail*, 26 February 2003.

³ Softwood disputes go back a long way, to so-called *Lumber I* in 1982-83, in which the U.S. commerce Department issued a determination that Canadian provincial stumpage programs were generally available and thus not countervailable under U.S. law. However, in *Lumber II*, Commerce changed its interpretation

resolved, the WTO and NAFTA panels will proceed to release their findings on fundamental issues, such as the nature of subsidies under the SCM Agreement and the measurement of the subsidy benefit for purposes of countervailing duties.

Whether or not the governments manage to achieve a settlement in the next few weeks, this dispute will rank at, or very close to, the top tier in the history of Canada-U.S. disputes. If the case serves a useful long-term purpose beyond questions of subsidies in Canadian forestry practices, it is to illustrate some institutional weaknesses in the NAFTA and in the bilateral architecture generally.

At the same time, softwood lumber has sharpened the focus on the relationship between the NAFTA, as a regional trade agreement, and the WTO, as a global institution. Canada has initiated challenges in both fora and the cases are proceeding as the two governments struggle to find a negotiated solution⁵. The outcome of the first WTO case, reviewed below, has already affected the course of the dispute.

Elements of a Possible Settlement

Before the current impasse, reports were that the main elements of a settlement would consist, first, of an interim export tax applied by Canada to replace U.S. countervailing

and found stumpage to be a specific benefit and thus subject to countervailing duties. That case and the subsequent case in *Lumber III* were each settled by means of negotiated agreements between the two governments. The present incarnation of the dispute is *Lumber IV*, which resulted from a petition filed on the expiry of the latest bilateral agreement in April 2001. See Macrory, P., "Dispute Settlement in the NAFTA", C.D. Howe Institute, Toronto, September 2002.

⁴ For a recent review of some of the *Lumber IV* issues, see: Garton, B and Duvall, J., "The Canada-U.S. Softwood Lumber Dispute: Is Canada Stumped Again?", [2001] 36 Can. Bus. L. J. 201; L. L. Herman, *Softwood Lumber: The Next Phase*, C.D. Howe Institute, December 2001.

⁵ A summary of these several WTO and NAFTA challenges can be found on the Department of Foreign Affairs and International Trade (DFAIT) web-site: www.dfait-maeci.gc.ca/eicb/softwood/menu-en.asp and on the British Columbia government's web-site: www.for.gov.bc.ca/HET/softwood/index.htm.

duties (thereby keeping prices high, or at least higher, for Canadian softwood in the U.S. marketplace)⁶. To gradually replace the export tax, Canadian provinces would be required to revise their stumpage programs for Crown timber so as to move to a market-based (i.e., auction) system for the sale of access rights. As this new market-based system comes into effect, the export tax will be correspondingly reduced⁷.

Assuming a settlement along these lines, the U.S. industry will have achieved its strategic and commercial objective, forcing a substantial upward revision to the selling price of Canadian timber in the U.S. market. The package that may still be concluded would mean that, notwithstanding the NAFTA and its free market principles, Canada-U.S. softwood trade will be highly managed and not in any sense “free”.

Lessons in Bilateralism

Whatever the outcome, the softwood case provides some important lessons regarding the advantages, and the limits, of bilateralism where critical economic interests are engaged. For Canada, it illustrates the dangers of over-exposure to -- indeed outright dependence on -- a single export market and the harm that can be inflicted when private trade law remedies are used to restrict access to that market.

On a broader front, the case has brought out shortcomings of traditional trade remedy laws (i.e., antidumping and countervailing duties) for settling these kinds of major economic disputes. Underscored in the recent episode are the difficulties of applying

⁶ “Canada studies lumber plan”, *Globe and Mail, supra*; 20 Int’l Trade Reporter 315, *supra*; “New hopes for truce as softwood talks back on”, *Financial Post*, 20 February 2003.

⁷ These concepts appear to have been accepted by at least one Canadian province: “Canada-U.S. Softwood Lumber Trade Dispute, Suggested Elements of a Resolution Agreement”, proposal by the Government of British Columbia, December 2002.

State-negotiated settlements in a system that is primarily geared to protect private interests, as opposed to protecting markets. The problem in achieving a broader market-based approach acceptable to governments is that, notwithstanding its achievements, the NAFTA does nothing to limit invocation by private parties of traditional trade remedies⁸.

As a final point, even though the dispute is fundamentally a North American one, events have also reinforced the central role of the WTO and brought home the fact that any negotiated settlement will be directly influenced by what WTO panels decide on the legal merits of each country's position under the *Subsidies Agreement*⁹.

WTO law has already had a major -- indeed decisive -- impact on what could otherwise have been a regional dispute and one that, as in previous instances, was dealt with largely under the FTA/NAFTA umbrella¹⁰. It is the interaction between the NAFTA and the WTO Agreement, in the present context of the dispute, that is the central feature of this brief commentary.

⁸ As is well known, NAFTA Article 1902 provides for the retention by each of the NAFTA parties of their domestic antidumping and countervailing duty law. This, combined with constitutional and/or common law guarantees in both Canada and the U.S. of access to private remedies makes it difficult to impose State-to-State settlements on unwilling or reluctant private parties.

⁹ The first WTO panel decision was issued in September 2002, following a complaint by Canada that the U.S. Commerce Department's preliminary subsidy determination regarding provincial stumpage programs offended the *Subsidies Agreement*. *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, Report of the Panel, 27 September 2002.

¹⁰ Neither Lumber I or Lumber II came before a GATT panel. The Lumber III was litigated before a NAFTA panel and likewise did not involve either the GATT or WTO process: *Certain Softwood Lumber Products from Canada*, USA-92-1904-01 (1993). An important factor in that phase of the dispute was the split of the NAFTA panel, and the subsequent Extraordinary Challenge Committee, along national lines. See: P. Macrory, *op cit.*, pp. 11-12.

The WTO Challenge

Canada's first legal challenges have already produced important clarifications of the scope of the WTO *Subsidies Agreement*. The first *Lumber IV* panel decision, in September 2002, decided that the U.S. had erroneously calculated the amount of Canadian stumpage subsidy by using U.S. open market prices, and not Canadian prices, as the benchmark for measuring the amount of the benefit. The panel held that under the *Subsidies Agreement*, "[t]he prevailing market conditions in the country of provision [i.e., Canada] are the benchmark and operate as the reference point" for measuring the amount of subsidy, not the market conditions in the United States¹¹.

On the question of whether stumpage constituted a financial contribution by a government, however, the WTO panel upheld the American position, stating,

“. . . we find that through the Canadian provincial stumpage programmes, Crown timber is being supplied to the tenure holders. Standing timber is a valuable input for logs which may be processed by sawmills into softwood lumber. We therefore find that the [Commerce Department's] determination that the provision of stumpage constituted a financial contribution, in the form of the provision of a good or service, is not inconsistent with Article 1.1 of the SCM Agreement, and therefore reject Canada's claims in this respect.”¹²

¹¹ *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, *supra*, para. 7.46.

¹² *Ibid.*, para. 7.30. Note that Article 1.1 of the *SCM Agreement* requires *both* a financial contribution by a government to a specific enterprise or group of enterprises *and* the conferral of a benefit. It is possible for a governmental financial contribution to be provided without the conferral of a benefit above that which is otherwise generally available in the private market. In this case, the WTO panel found that the measurement of the “benefit” part of the definition was incorrectly made by the Commerce Department.

These two findings -- that stumpage programmes are financial contributions and *prima facie* countervailable but that the measurement of any benefit must be based on Canadian market sales and not U.S. benchmarks -- have given each side some leverage in the attempts to settle.

As will be shown, however, the U.S. victory over the financial contribution issue swung the pendulum significantly to the U.S. side. This, plus the realization on the Canadian side that the WTO proceedings would take several years to conclude while duties were being channeled into the U.S. treasury, helped persuade key Canadian stakeholders that a negotiated settlement was probably preferable to stringing out the litigation.

The U.S. Government Position

The U.S. government's position on these issues following the panel decision came in early January 2003. Bolstered by the panel ruling that stumpage is a financial contribution and at least *prima facie* countervailable, a draft set of settlement proposals was issued by the Commerce Department, which says that nothing less than a wholesale change to provincial systems of tenure and forestry management through adoption of a market-based pricing system will be required to achieve a lasting resolution¹³.

The ultimate test, the paper says, will be "whether a province's modified stumpage system will produce results consistent with those the province could expect from the sale of all of its standing timber at open auction"¹⁴. Ideally, this should be through auctioning

¹³ "Proposed Analytical Framework for Changed Circumstances Reviews of the Outstanding Countervailing Duty Order on Imports of Softwood Lumber from Canada", Discussion Draft, U.S. Commerce Department, 6 January 2003. The document is often referred to as the "Aldonis" paper, after Grant Aldonis, Commerce Department Assistant Secretary.

¹⁴ *Ibid.*, p. 5.

off 100% or close to 100% of Crown timber and trashing the current stumpage systems of administered rents.

A surprising aspect of that document is that it fails to address the WTO panel's decision that Canadian benchmarks, not U.S. ones, were required to assess the extent of any benefit and thus the measure of any subsidy. The Aldonis paper simply states that "private markets in Canada will not offer an effective point of comparison" for determining whether provincial sales of timber ensure market prices¹⁵. It does not respond to the WTO finding or explain how the U.S. government would meet the panel's determination that Canadian benchmarks are required under the *SCM Agreement*.

The paper also provides that the Commerce Department alone would deal with any changes to provincial stumpage programs within the framework of existing U.S. trade law. The present countervailing duties would stay in place but a province that modified or eliminated its stumpage program could apply for a "changed circumstances" review¹⁶. The Commerce Department would conduct a review but only if the evidence showed "significant structural changes" in an individual province's stumpage measures¹⁷.

Under U.S. trade law, such a review would permit U.S. petitioners access to all data and give them the right to challenge each and every submission filed by the Canadian side. The Commerce proposals, in effect, would establish the U.S. government as the oversight authority for revisions to Canadian forestry management measures and practices.

According to some recent reports, the U.S. may have moved away from insisting entirely on the straightjacket of a statute-based "changed circumstance" review. Instead of trying

¹⁵ *Ibid.*, p. 17.

¹⁶ *Ibid.*, p. 8.

¹⁷ *Ibid.*, pp. 25-26.

to shoehorn this entirely into the review framework under U.S. law, the two governments seem to have agreed on setting up a North American Softwood Lumber Council with a role in monitoring and reviewing the implementation of any settlement agreement.

The mandate and authority of such a council is sketchy but it appears to reflect a desire on the part of the two governments to manage any future differences through something more than a unilateral enforcement regime under traditional trade remedy law. That could be a useful development in bilateral relations should it come to pass, although, as stated earlier, it will result in highly managed trade in this particular sector¹⁸.

Moreover, the lumber council's jurisdiction over implementation issues, combined with ingredients of a changed circumstances review under U.S. law, will still provide the U.S. government with a substantial measure of unilateral oversight and effective authority in approving changes in provincial forest management policies. If the lumber council has any teeth, however, it should mean that a measure of oversight of provincial policy changes will be done within a binational framework. If changes to stumpage do not reflect the requirements of the bilateral agreement for moving to free market prices, the export tax would be applied to the extent of any shortfall.

While the interaction between the proposed council and U.S. trade law is not clear, it appears that the council concept will also include a mechanism for resolving legal issues affecting implementation by the Canadian provinces. That would represent an interesting institutional development in itself, although it is clear that removing this from the

¹⁸ In a different but pertinent context, the NAFTA governments have issued a joint declaration and are entering into preliminary discussions on trade issues affecting the North American steel market: American Iron and Steel Institute press release, 19 December 2002. While the circumstances differ in that there is no major trade remedy action underway, there is an active proposal to create a NAFTA Steel Committee. While this is a long way from a continuing trilateral body, as in the case of softwood lumber, it recognizes the desirability of a permanent framework to deal with the effects of greater integration in the North American market in selected sectors.

exclusive purview of the Commerce Department will be strenuously resisted by U.S. lumber producers.

Regionalism and the WTO

The proposed lumber council is an important step in “bilateralizing” the softwood file. While the result will be a treaty framework for managed trade that will slowly see the watering down and possibly elimination of Canada’s present forest management system, the crisis atmosphere inherent in a trade action will be reduced, if not eliminated. The ongoing uncertainties of over 20 years of softwood lumber disputes could be replaced by a permanent sectoral framework and new and transparent rules and established criteria for the charging of economic rent by provincial governments.

Some commentators have suggested that regional agreements such as the NAFTA weaken the universality of the WTO as a central institution. There is some merit to that concern. The softwood dispute, as contentious as it has been, nevertheless illustrates a positive aspect of the interplay of regionalism and multilateralism. In this case, the universal rules of the WTO Agreement provided the over-arching elements of a possible regional accommodation. At the same time as making that regional settlement possible, one could conclude, arguably, that the universality of the WTO, as the world’s primary trade institution, has been strengthened.

Of interest is the interaction between the universal rules of the WTO and the regional arrangements enshrined in the NAFTA. At the end of the day, it was the WTO panel’s determination that Canadian stumpage programs are subject to restrictions under the *Subsidies Agreement* that appears to have been decisive in shifting the debate on legal issues to the U.S. side. That decision robbed Canada of an important argument and provided the U.S. side with considerable negotiating leverage.

Developing Some True NAFTA Institutions

The NAFTA has undoubtedly been a major success in establishing a system of law within a treaty framework for regional integration. Many of these same rules were adapted from the pre-existing provisions of the GATT and now form part of the corpus of international trade law at the universal as well as the regional level. The fact that the NAFTA has incorporated much of the multilateral system under the GATT and the WTO Agreement is a testimonial to the success and values of both systems.

On the dispute settlement front, the NAFTA system appears to be working reasonably well. While early indications were that there would be a plethora of NAFTA disputes, particularly in agency reviews under Chapter 19, there have been relatively few such cases in recent years, at least in Canada-U.S. trade¹⁹. The absence of large numbers of such appeals leads to the conclusion that the system is working well.

Data also suggests that anti-dumping cases in the U.S involving goods from Canada and Mexico have been much less frequent than those involving other countries since 1994, which leads to the conclusion that the binational panel review system, directly or indirectly, dampens trade litigation in the NAFTA context²⁰. In addition, there are other advantages of the Chapter 19 system in terms of timeliness compared with national courts and the WTO system²¹

¹⁹ Indeed, today the NAFTA Secretariat records only two active Canada-U.S. cases under Chapter 19 involving Canadian agency decisions and nine active cases involving U.S. agency decisions, including the three involving softwood determinations in *Lumber IV*. Of the six remaining non-softwood cases, two involve determinations regarding magnesium from Canada and four cover steel products: www.nafta-sec-alena.org.

²⁰ Macrory, *op cit.*, pp. 14-15.

²¹ *Ibid.*, pp. 18-22.

The softwood dispute reveals other aspects of the NAFTA, however, that may be in need of re-consideration. These shortcomings are longer-term and less obvious than the details of the Chapter 19 and 20 dispute resolution mechanisms. The main long-term deficiency, it is suggested, is the absence of a central institutional core in the NAFTA, which, in this writer's view, affects the robustness of the bilateral and trilateral regimes.

While there are NAFTA working groups on technical issues which seem to be working well²², these groups are an amalgam of national experts charged with working out detailed and technical implementation issues of the nuts-and-bolts kind. At the highest level, there are no overriding NAFTA bodies or enforcement mechanisms to ensure that the treaty obligations of the three parties are complied with or that review the ongoing operations of the treaty regime and pinpoint areas of shortcoming.

Unlike the WTO Agreement or the Treaty of Rome, the NAFTA essentially runs on an *ad hoc* basis, making it difficult to negotiate and to organize settlement proposals or deal with a myriad of ongoing issues that are in need of some form of resolution on a supra-national basis. Such institutions, it is suggested, could better help achieve orderly and effective resolution of disputes²³.

While it is unrealistic to expect the NAFTA governments to agree to create new central bodies, there are aspects of the NAFTA that could reasonably lend themselves to some modest institution building. With some elementary changes, existing NAFTA mechanisms could be transformed into bodies with a separate juridical status and a

²² Such as a Working Group on Rules of Origin, a Working Group on Tariff Rate Quotas, etc.

²³ It is conceded that there is a counter-argument, to the effect that the absence of permanent NAFTA institutions did not prevent the ultimate resolution of the case on a governmental basis, with the outlines of a compromise being the result of the inter-play of numerous actors and stakeholders under ongoing governmental auspices.

mandate to help ensure the smooth working of the treaty. The result would be to start to build a true NAFTA edifice, with additional parts of the structure to be added in future.

A Permanent NAFTA Commission

A first step could be to re-examine the status and functions of the Free Trade Commission under NAFTA Articles 2001 and 2002. Under Article 2001, the Commission is “established” by the Parties, with the mandate to “supervise the implementation of the Agreement” and “resolve disputes that may arise regarding its interpretation or application”. It also has the authority to delegate responsibilities to ad hoc committees, working groups or expert groups and general responsibilities under Article 2001 to take such actions as the governments may agree.

While all this is true, the Commission is essentially a periodic gathering of trade ministers whose discussions are largely at the political or general trade policy level. While such meetings are important, the Commission is totally unlike the European Commission and, on a smaller scale, lacks even the authority and powers of the International Joint Commission established under the 1909 Canada-U.S. *Boundary Waters Treaty*²⁴.

In only one case in the first 10 years of the operation of the NAFTA has the Commission taken any executive action under Article 2001, when the Commission issued an interpretative bulletin regarding the application of the investment dispute provisions in

²⁴ For example, under the 1909 Treaty, the IJC has defined powers of decision-making. Article VIII provides that the Commission “shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters”. While its juridical status is less than clear under the Treaty, under Article XII, the Commission has the power to administer oaths to witnesses, and to take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction

Chapter Eleven²⁵. Other than that, the Commission's annual meetings seem to be confined to issuing congratulatory statements of a general nature²⁶.

This lacunae could be filled by enlarging on the status of the Commission Secretariat under Article 2002, from a non-judicial body made up of three national sections, to a body staffed by a single Secretariat, separate from the three governments themselves. Commission itself would remain as is, but the Secretariat could be given separate legal status, permanent employees and a central location and unified structure and with additional defined roles in treaty supervision and implementation to assist the Commission²⁷. The staff would have tenure as NAFTA Commission employees, outside of the three governments.

It would be politically problematic to give powers to the Secretariat that currently can only be exercised by consensus among the political ministers acting as the Commission. However, even without amending the NAFTA, the permanent Secretariat could be given additional treaty roles by the Commission, such as collection of NAFTA trade and investment data, issuing regular reports to governments and to the Commission on any shortcomings in the implementation of treaty obligations²⁸.

²⁵ Notes on Interpretation of Certain Chapter 11 Provisions, NAFTA Free Trade Commission, 31 July 2001; www.dfait-maeci.gc.ca/tna-nac/NAFTA.

²⁶ The most recent Commission meeting, in Puerto Vallarta, Mexico, 28 May 2002, the Commission issued a joint statement expressing hopes and expectations on the future of the world trading system but nothing more specific emerged than this: www.dfait-maeci.gc.ca/tna-nac/NAFTA.

²⁷ The Secretariat would continue to function within this unified structure in respect of Chapter 19 and Chapter 20 disputes, with additional jurisdiction over investment disputes under Chapter 11 (and possibly financial services disputes under Article 1414).

²⁸ This would be a kind of NAFTA performance review, much like the trade policy reviews of member States done in the WTO. Like the WTO process, the review would be done by an independent body that would be able to be critical of government policies where these failed to live up to NAFTA obligations.

Another step, perhaps reserved for subsequent consideration, could be the establishment of the NAFTA Commission itself as a permanent institution, with an executive head with specific powers, as opposed to the present arrangement where the Commission meets infrequently as a gathering of trade ministers.

Second Step – A Permanent NAFTA Court

Along with establishing a permanent Commission and independent Secretariat, the second suggestion is to create permanent NAFTA arbitration court. Again, this would build on the present NAFTA structure under Chapters 19 and 20 and would change the current temporary panels into a permanent institution. Taking into account the combined growth in investment disputes and trade remedy panels under Chapter 19, it would seem that there is enough work for such a body.

In addition to disputes under Chapters 19 and 20, Chapter 11 entails investment disputes under the auspices of the International Centre for the Settlement of Investment Disputes (“ICSID”) or by use of the Rules of the U.N. Commission on International Trade Law (“UNCITRAL”). These investment arbitrations are separate from the Chapter 19 and 20 panels but logic suggests that jurisdiction over Chapter 11 disputes could be conferred on a central NAFTA juridical body as well.

Such a permanent NAFTA judicial organ would replace the existing *ad hoc* panels that are appointed to decide on individual cases. These panelists would have security of tenure and independence from governments. This would seem to be a relatively straightforward way of giving additional weight and authority to the present NAFTA system, without radically altering the respective mandates of these bodies.

Indeed, a recommendation along these lines is contained in the recent report on Canada-U.S. relations issued by the Standing Committee on Foreign Affairs and International Trade of the Canadian House of Commons²⁹.

Third Step - Improving Options for Dispute Resolution

A further deficiency under the NAFTA underscored by the softwood case is the limitation on governments in moving early on to try to resolve large-scale anti-dumping or countervailing duty cases which raise broad economic interests or major issues of national policy. Having begun by way of private petition, there are significant legal roadblocks to sidelining the private interest elements in trade remedy actions by removing the case from the trade remedy docket and elevating it to the level of governments to settle³⁰.

An area for exploration would be whether procedures could be devised under the NAFTA so that, in cases that engage major economic interests of the State, the private remedy process could either be suspended or side-tracked so that the issues could be placed on the Chapter 20 agenda for governments to settle or, if bilateral settlement through negotiation were not possible, to be resolved through panel adjudication.

As an illustration, this would mean that the AD/CDV aspect of the softwood lumber case would be “off-ramped” from the private remedy process allowing a period wherein State-to-State mechanisms could be applied. Ultimately, if a negotiated settlement could not be

²⁹ *Partners in North America*, Report of the Standing Committee on Foreign Affairs and International Trade, House of Commons, Ottawa, December 2002, p. 162.

³⁰ As noted above, the recent U.S. government proposals for resolving the softwood lumber case offer some possibilities for settlement but totally within the framework of U.S. countervailing duty laws, by way of a “changed circumstances review” by the Commerce Department.

achieved, a Chapter 20 NAFTA panel would determine if provincial stumpage programs were or were not contrary to treaty rules.

An alternative avenue of this kind obviously could not be automatic. Criteria would have to be carefully crafted to allow a NAFTA Party (meaning one of the three governments) to invoke the off-ramp mechanism and suspend the private AD or CVD process and elevate the issue to State-to-State settlement. Such criteria would entail disputes that engage significant public issues of the exporting country and represent more than the standard dumping or subsidy action.

It is recognized that this suggestion is controversial. There are laws in place in all three NAFTA countries that would have to be changed and private rights would be impacted. However, Canadian experience indicates that only where these large-scale private actions can be resolved outside of the constraints of a standard dumping or subsidy investigation is there chance of settlement.

Conclusions – The Importance of Institution Building

The present NAFTA, modeled on the Canada-U.S. FTA, is a first-generation trade agreement. It made important advances in Canada-U.S. relations and went some way in leveling the playing field. But it is less than complete from an institutional point of view. It may now be timely to think about moving on to a second generation of institution building. This could be done, not by offering politically unrealistic suggestions such as moving to a full customs union as in the case of the E.U., but by carefully building on existing NAFTA institutions and strengthening the NAFTA at its core.

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