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### Time to axe U.S. softwood lumber logic

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On Sept. 3, the U.S. Trade Representative, Rob Portman, wrote a Globe and Mail Comment article to explain the U.S. position in the softwood lumber dispute. The U.S. doesn't much like the timber management policies of Canada's provincial governments, he says, because they provide subsidies to the Canadian lumber industry. American producers "do not feel they are competing on a level playing field" and as a result, the U.S. government has imposed trade remedies as a way of levelling that field.

Fair enough. The problem is that a NAFTA panel, on three occasions, said that, in so doing, the U.S. International Trade Commission failed the requirements of U.S. law. In a nutshell, the panel said that the commission lacked the evidence needed to conclude that Canadian imports threatened injury to U.S. producers.

This threat of injury is an essential - repeat, essential - element for any government to apply countervailing and anti-dumping duties. It is a fundamental requirement of the law of the United States.

As provided under NAFTA, the panel, after two successive remands, finally directed the International Trade Commission to issue a non-injury finding. This was done after two unsatisfactory responses by the commission to the previous remands. Those responses, the panel said, totally failed to show where there was evidence in the record to justify its threat of injury determination. As a result of the final panel directive, the commission issued a non-injury finding.

Now, one would reasonably conclude that this non-injury finding means that the duties that were collected and any future duties on Canadian softwood have no foundation in law. Just to make it perfectly clear, it is the law of the United States, not NAFTA, that provides for collection duties only in the event that injury or a threat of injury is established.

Mr. Portman tries to explain away the effect of the Extraordinary Challenge Committee's recent decision, which turned down the U.S. request to have that NAFTA-panel ruling set aside. He says that the committee's decision is irrelevant because the commission had actually issued a revised decision in 2004 to comply with a separate WTO panel finding. In his view, the revised decision supersedes the original commission decision and allows the U.S. to keep the duties in place.

While this explanation appears superficially plausible, it is not legally convincing. The reasons are that the WTO agreement and Chapter 19 of NAFTA deal with completely different matters.

Remember: Just because the United States might be in conformity with its WTO obligations doesn't mean it complies with NAFTA.

As an international treaty, the WTO agreement contains general rules for international trade that apply between WTO member states. WTO panels adjudicate whether a WTO member has complied with those general rules. But even if a WTO member meets all the WTO requirements, it doesn't mean its own trade agencies have complied with that member's internal laws, which are enacted to meet the general norms in the WTO agreement.

NAFTA is also an international treaty. But the difference is that under Chapter 19, NAFTA panels review decisions of those national trade agencies, and decide whether those agencies have met the requirements of that country's own laws. The general treaty obligations under the WTO agreement are not in issue here.

This distinction is critical. It means that a state can comply with its WTO obligations under international law and yet a decision of its governmental agency can be out of step with that country's own domestic legislation.

That is exactly what happened in the softwood lumber case. Whether or not the United States complied with its WTO obligations is irrelevant to the free-trade agreement. A NAFTA panel, acting as a U.S. appellate court and following American jurisprudence, said that the International Trade Commission contravened the domestic law of the United States. It said that the commission did not have evidence to justify its conclusions about the threat posed by Canadian lumber imports.

There are a couple of other troubling aspects to Mr. Portman's explanation. The first is that the U.S. government appealed to an Extraordinary Challenge Committee the very NAFTA-panel decision it now says is irrelevant. Having lost that appeal, the United States now says it doesn't matter because it had no intention of complying with the panel decision in the first place.

The second difficulty is the logic implicit in Mr. Portman's reasoning. In effect, he is saying that unless both a NAFTA panel and a WTO panel find a domestic agency's decision wanting, the decision stands. In other words, a positive NAFTA panel decision has no independent legal validity unless a parallel WTO panel decision reaches the same conclusion.

Of course, there is no basis for such a position in the free-trade agreement, which is a standalone treaty with the express obligation on NAFTA governments to give "binding effect" to NAFTA panel decisions.

As to Mr. Portman's call that Canada return to the negotiating table, one cannot disagree as a matter of principle. The problem is that the U.S. position on the legal front appears to be so far out of step with the letter of the free-trade agreement and the very spirit of the bargain, that many in Canada question whether sufficient good faith exists to allow Canada to do so.

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