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TRADE LAW MEMORANDUM

To: Our Clients and Friends

Re: EARLY GAMBITS IN THE SOFTWOOD LUMBER CASE

Date: September 1, 2001

1. The softwood lumber dispute is already before the World Trade Organization. It didn't take long. The U.S. Commerce Department announced preliminary duties on Canadian lumber imports on August 9th. Canada referred that decision to the WTO on August 21st. Pretty quick work.

2. First, it's a signal to the American side that Canada intends to fight this battle at every step, beginning with this preemptory move at the opening act of a very long game. Second, it shows how key the WTO dispute settlement system is becoming in international trade, in effect the court of appeal in bilateral trade disputes.

3. This is a much different from the 1980's, when Canada had fewer options and when it eventually had to settle an earlier softwood lumber dispute to avoid paying U.S.

duties. Then, the old General Agreement on Tariffs and Trade (or “GATT”) provided little recourse. Requests for dispute panels could readily be blocked by the other side. There was no defined time-frame for decision-making and, once a panel decision was made, its adoption by the full GATT body (a requisite for legal enforcement) could be blocked by the losing government.

4. The WTO Dispute Settlement Understanding (“DSU”) changes this, with fixed time-lines for rulings that can no longer be blocked by the other side. While there are some procedural issues that have to be ironed out, basically governments have to abide by WTO panel decisions or face retaliation.

5. Given the improvements in the DSU system, all sorts of trade disputes are now being referred to the WTO by countries large and small. WTO panels and the supra-legal organ known as the Appellate Body are churning out hundreds of pages of trade jurisprudence daily.

6. While referring disputes to the WTO is now commonplace, that in itself shows the extent to which the paradigm has shifted. WTO panels are regularly striking down decisions of national trade agencies that offend international obligations. There is no need to go to local courts for this.

7. So the WTO is the forum of choice for settling trade disputes or brokering some kind of resolution. Given the threat of retaliation, there is considerable leverage for the winning side in getting the loser to change its system. Witness the huge *Canada-Brazil Aircraft Subsidies Case*, where the Canadian government was at least partially successful in getting the Brazilian subsidy program altered.

8. In softwood lumber, this initial Canadian challenge is based on a number of grounds, the central one being an attack on the U.S. preliminary finding that Canadian stumpage rates are “subsidies” as defined under the WTO Subsidies and Countervailing Measures (“SCM”) Agreement. Canada will argue that stumpage, in fact and law, is simply a license or right of access to timber and not a “financial contribution” by governments, as the SCM requires.

9. The U.S. side, on the other hand, will be relying on the most recent decision of a WTO panel in the *Milk and Dairy Products Case*, 11 July 2001. That case, which found fault with Canada’s implementation of an earlier WTO ruling, appeared to give a more expansive reading to the definition of “subsidy” to include cases where lower-than-market-priced goods are made available to industries “by virtue of government action”.

10. It is too early in the game to predict the likely outcome on the merits. As long as the provinces and the Canadian producers hang together, however, this case will be at the

WTO for years, whatever penalties the U.S. Commerce Department might apply in the meantime.

11. The main point is that unlike some previous instances, the U.S. government and industry will not have an open field in this investigation. Judging from Canada's opening gambit, the WTO will not only have the final word. It will have a say in each of the many interim decisions made along the way by U.S. agencies.

12. For all of these reasons, this case will occupy a leading place in the annals of international dispute settlement. It will provide fodder for press commentary and legal analysis for years to come. As opposed to 10 or 15 years ago, it also shows just how central international treaty law and the WTO, as the court of first and last resort, has become in these matters.

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