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DISCUSSION FOLLOWING THE REMARKS OF MR. CUNNINGHAM AND MR. POTTER

COMMENT, MR. McILROY: Before we move to questions, Richard is going to rebut Simon.

COMMENT, MR. CUNNINGHAM: It is awfully hard to deal with somebody that would question the U.S. standard of injury, a standard that is clearly and rationally defined by the Congress of the United States. Material injury is clearly and rationally defined as any injury greater than immaterial.

I would make one comment on one of Simon's revolutionary ideas, not on the Don Quixote idea of the saving provision, but on the precedential effect. I must say I am tempted with that myself. I will say, however, that what that gets you into, if you follow the logic, must be a comprehensive change in the relationship first between panels, U.S. court panel decisions, U.S. court decisions, Mexican court decisions, and Canadian court decisions, and beyond that, in the relationship between U.S. law and Mexican law and Canadian law. Where that eventually leads you, and it may well be a good thing, particularly if it turns out to be U.S. law, God help us, is to an integrated North American free trade import relief law structure and set of interpretations.

Finally, let me quarrel with one characterization of the comment by Simon (who is otherwise his normal, balanced, and objective self), when he characterized my comments as wishing to write the bi-national panel provision out of the law for everybody except Mexico. I really do not mean that. Let me give you a specific example where you need it. In U.S./Canadian situations, you remember, I said that one of the reasons it is important to keep the bi-national panel provision is that you cannot go to the WTO, sometimes, because your government may not sympathize with your idea of how you want to change the other government's position. That is not unusual in the case of Canadian companies objecting to decisions by U.S. import relief authorities.

Let me give you an example. As you know now, we have a sunset review process for all countries that are members of the WTO. In the United States, an order to terminate must be given after five years unless both the Department of Commerce finds there is no likelihood of future dumping and the International Trade Commission finds there is no likelihood of future injury. They have been remarkably good about it so far. It is probably getting worse. We have steel cases coming in, nevertheless, it has been good. The Commerce Department, on the other hand, has adopted what I call the

“Monty Python Rule.” My vision of that is a Monty Python sketch in which Eric Idle sits behind a desk wearing a typical gangster suit: black shirt, white tie, sunglasses, thin mustache, and a sign that says, “Insurance Agent.” In comes an insured man who is very upset, played by John Cleese. He is a minister complaining about his claim having been denied. He cannot understand why that is the case, because what happened was his car, which was in the garage, was damaged when it was struck by another car. Eric Idle tosses out a bottle of scotch, throws out a bunch of papers, and finally comes up with a crumbled piece of paper and says “I have your policy right here.” I see your policy. I am afraid you did not read your policy. In here it says very clearly, under 47.3.7.23, the company is under no obligation to honor any claim that you make.” I told that joke one time at a Commerce Department seminar, and the Commerce Department got up next and said it absolutely defined our intention in our policy hearing.

We have a Canadian company that is going through a sunset process now. We are anticipating that we are not going to make it. We will not get the Commerce Department to give a favorable determination because nobody else has. We have been consulting with the Canadian Council, maybe we can get the Canadian government to take this to the WTO. After all, it is a WTO-imposed regime. That is the logical place for this to go. We are not so sure that the Canadian authorities would want to raise a challenge that would limit their discretion to keep borders in place. What do you need that for? They may need the bi-national panel.

QUESTION, MR. TUTTLE: If Chapter 19 should stay, what about its extension to future free trade agreements? If we made an agreement with Chile, if we made a FTA agreement, there is some sentiment in Congress against a Chapter 19 extension. It seems that it was created originally out of Canadian concerns over U.S. practice, but with U.S. exporters anti-dumping countervailing duties, and actions increasing in foreign countries, maybe there will be an incentive for U.S. exporters to demand this. Some of these other countries may not have a very judicious review. How do you see that playing out?

ANSWER, MR. POTTER: Even American exporters are likely to see some value in this. The real answer can be found in the Canada/Chile Free Trade Agreement. One of Chile’s prime targets in the free trade agreement was to get a Chapter 19. They have one with Canada. Some people believe that is one of the reasons that Chile was quite happy to sign with Canada and to make sure they have the precedent of a free trade agreement with Chapter 19 before they start their discussions with Washington.

You will see a lot of Latin American pressure for access to a Chapter 19. I agree with you that American exporters, the more they look at it, and the

more they look at judicial review, for example with Chile, may come to the conclusion that it is not such a bad idea.

ANSWER, MR. CUNNINGHAM: I would agree that the great benefit is for American exporters to Mexico. That is not to say that there are not problems. The problems tend to arise from the lack of formality in the administrative proceedings in some of these countries.

Even in Mexican cases, there have been some distressing instances that in the midst of a panel process, something will turn up to be “in the record” that nobody had ever heard of before. There have been delay problems and there have been mechanical problems that are giving some degree of a bad name to the Mexican aspect of the bi-national panel process. In my mind, those are all tinkerable and curable. What the United States needs to keep in mind is that in those countries, we have got more to gain than we have to lose by having a bi-national panel procedure. I do not think that is a close question at all.

QUESTION, PROFESSOR KING: What I was concerned about was the issue of pay for panelists and exhausting the supply of panelists. You both mentioned the problem. Play doctor. What do you think? Should there be a new pay deal? Will Canada go along with more pay for these panelists? That has been one of the problems. What are we going to do about getting new people in there? Do you have any suggestions about that?

ANSWER, MR. POTTER: There are only two solutions. One is a permanent body with a permanent set of judges.

COMMENT, PROFESSOR KING: That is the answer I wanted.

ANSWER, MR. POTTER: The other solution is more money and more reasonable conflict rules. One of the reasons that the bi-national panel has been less deferential and, therefore, contributing toward a greater confidence in the system, is that panelists have been in and out and are not permanent and institutionalized. I do not know which of the two solutions is better, but it has to be one or the other.

Would Canada go along with more money? I am guessing Canada would go along with it in order to preserve the value of Chapter 19.

ANSWER, MR. CUNNINGHAM: Henry, my understanding is that the American Bar Association has in contemplation a funding device based on something like an excess profits tax, which would be applied to the salaries of first-year associates in the United States now.

QUESTION, MR. RANDALL: I wanted to ask, continuing on the Mexico theme, are you or anybody here aware of whether Chapter 19 was contained in the recent Mexican/E.U. Free Trade Agreement discussions?

ANSWER, MR. POTTER: I know it was in the discussions. I do not know what the result was. I apologize.

QUESTION, MR. LADD: We talked about 'two trees' before. If those two softwood lumber trees were in Germany and in France, using the E.U. model, a forester in one of those countries could organize an enterprise and go cut the tree in the other country. Therefore, there would not be any perceived advantage for a resident of one country over the other. Indeed one government would be subsidizing the tree as opposed to the woodcutter. Do you see a similar type of solution to the *Softwood Lumber* case in our future?

ANSWER, MR. CUNNINGHAM: My short answer is that I see no solution to the *Softwood Lumber* case in our lifetimes, being twenty-one-plus years old. But, that is a creative idea. It is probably not an idea that satisfies domestic lumber constituencies. It would satisfy some of them if they have interests on both sides of the border, or if they have access to lands over there. It is conceptually interesting, but probably not politically viable.

COMMENT, MR. POTTER: Well, I hesitate to say what can be done or cannot be done, because I am involved in the case, as probably several other people here are. As Mr. Blanchard says, the mistake is wondering just what things will be. Your question carries with it the germ of something, because the fact is it already happens a great deal. Quebec has a great number of what we call border mills. These mills cut wood in the United States, paying American stumpage rates and bring the wood back to Canada where it is turned into lumber in Canadian mills. Nevertheless, these mills were the target of countervailing duty proceedings in Washington and are covered by the current volume restraints of the softwood lumber restraint agreement. Cite Yes, there is already a cross-border agreement for cutting and paying the other jurisdiction's stumpage rates. Does someone want to extrapolate on that fact which is already there?

QUESTION, MR. BAILEY: My name is Paul Bailey. The question I have regards your visionary approach to extending Chapter 19, whether to include other countries or to establish precedent, to get at the underlying law. What I would like you to do is comment on the plausibility of this happening, in particular, in the United States.

My sense is that the focus is not outward. It is not how to deal with Mexico or all the other countries in the world that are developing anti-dumping and countervailing duty law (CVD). It is inward looking. How do you ever get anyone in the steel lobby and anyone that is at all influenced by the steel lobbies and other lobbies to allow any other foreigners to have any more say in U.S. law than they have already got now?

ANSWER, MR. CUNNINGHAM: My reaction to that is that I do not think it is out of the question in the long term. There are three forces that make it – which means that we should keep our eye on goals like that. One, we are getting increasing integration of our three economies here. Two,

technology is changing the emphasis of issues in trade, emphasis on sectors in our economy, and the sectors that have been most resistant to this are becoming less influential in the economy.

Third, as a subset of that, the steel industry, in particular, and not so much the lumber industry is demonstrably losing influence politically in the United States. If one compares the steel plans of a year ago with the 1984/1992 set of steel plans — with trigger price mechanisms, any of the grandiose schemes that were put into effect to help the steel industry in the past — one sees the extent to which steel industry's power is diminishing politically. If one looks at the way the International Trade Commission is dealing with steel cases — not that the International Trade Commission even subliminally takes note of the political strength of industries — but steel industry cases these days are not anywhere near the automatic winners that they were as recently as three or four years ago.

ANSWER, MR. POTTER: For all the reasons you have given, the short-term plausibility is nil. On the other hand, no revolutionary idea ever sounded plausible. We should not be surprised about that. I agree with Dick. There are forces that should make us a bit cautious about the longer term, and then there is the fact that we already have a little bit of it under Chapter 20. It would be a long-shot now under Chapter 20 to seek to change — let's say — Washington's CVD law on the basis that it does not comply with WTO law, considering that it appears that everyone agreed on signing the NAFTA. We will have to leave those laws the way they were.

On the other hand, Chapter 20 is a good precedent, a good example, for Canada, Mexico, and the United States to foresee a way to get panels which will, not in a binding sense, but in a very encouraging sense, point the way to substantive change.

COMMENT, MR. McILROY: We are going to wrap this up. We can all agree, as litigators, they were quiet and shy and not very outspoken. I would like to thank them both, both Dick and Simon, for sharing with us all their hands-on experience. This is not theoretical, they are involved in actual cases. I would also like to mention that Professor King again has made sure that you have two of the best possible people before you to speak on a very timely topic.

