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THE SOFTWOOD LUMBER DISPITE

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We do not have quite an even balance here in that I am the Council to the Government of Canada, and, indeed, the coordinating Council for all those lawyers, all those provinces and all those industry associations on softwood lumber matters. However, tonight, I am not representing the Government of Canada. I am speaking for myself. I am not going to try to even the scales by presenting the arguments made by Council for the U.S. Coalition.

What I thought I would do instead, is try to put the softwood lumber dispute in the context of the U.S. politics and the world trade organization (WTO) and discuss whether that has changed anything.

With respect to the role of and the regard for the WTO in trade remedy proceedings, it is appropriate to look at that question given what is going on in Quebec City. Apart from the demonstrators in Quebec City, one of the things that is holding back the Free Trade Agreement of the Americas is the in Brazilian view, shared by many other developing countries in the world, that there can no longer be a U.S. refusal to put trade remedy laws on the table of negotiation, whether it is in the Federal Trade Agreement (FTA) or in the broader multilateral trade round.

Coming back to softwood lumber in its current context. There is a new U.S. administration. That is to the relief of free traders because the Bush administration is putting a new emphasis on restoring some U.S. leadership in which, in my personal opinion, has been seriously damaged, if not totally lost over the last eight years.

In the first three months, this new has been hit by a number of very politicized pushes for trade protection, and one of them started a little in advance of the lumber dispute was pressure from the steel industry for there to be the self initiation of the safeguards action under Section 201 of the U.S. trade laws; and that, of course, had a lot of Congressional support from the Congressional steel caucus and from anybody who ever heard of a steel mill in their state.

The next thing that happened and everybody knew it was coming because there was a lot of fan fair about it for months before the expiration of the softwood lumber agreement, was the so called U.S. Coalition for free trade lumber imports talking about how outrageous Canadian subsidies are, and

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how environmentally horrible Canadian forestry practices are and how the U.S. industry was hemorrhaging because of these outrageously low priced and subsidized imports from Canada. This is a lot of sound bites having little to do with fact. However, it was enough to get fifty-one Senators on a letter saying, "We want something done about Canada softwood lumber."

I should say as a footnote here, for the first time in twenty years, there is a serious contingent of U.S. interests who are opposed to this so called U.S. lumber coalition on the softwood lumber issue. There are a lot of people and a lot of companies who think that this long-term campaign about supposed subsidies to Canadian lumber have got to stop. There is a voice on the other side for the first time.

This lumber issue came out with great political fan fair pushed by huge lobbying by the U.S. coalition and their lawyers.

Now, this is not a pleasant thing to hit a new administration, which has in mind a new free trade agenda. The good news is that the Bush administration, has been pretty careful and restrained in what they have said. This is not lumber 3 all over again, when suddenly the U.S. government was expressing outrage and threatening self-initiations in the use of 301. This is a relative thing. We have to keep this in perspective. It is not they said anything nice. It is just they have been pretty restrained in the nasty things they said. They have said, "There should be action under the U.S. trade laws if there are subsidies or not and those processes should go forward."

What is good about it is that is a more even keel than saying that the U.S. government itself was going to take some kind of extraordinary action rather than letting the U.S. industry go forward under U.S. trade laws.

Now, the good and bad news about the new administration from a softwood lumber perspective is that the new administration has a very clear priority to get trade promotional authority, what used to be called Fast Track Authority, to negotiate trade agreements.

They need that to get a new international WTO trade round launched. They need that for completion of the Free Trade Agreement for the Americas. This would make it a lot easier to do a bilateral Free Trade Agreement.

So the new U.S. administration has a very clear priority to get trade promotion authority. The problem with that is that there is a great likelihood that the new administration will sacrifice it is free trade principles in the real world immediate disputes, whether it's steel or softwood lumber, for the possibility of getting trade promotion authority down the line.

There is a certain irony in that. The point of having trade negotiations is to lower trade barriers is to increase trade liberalization and get agreements to real commitments by countries to live by the rule of law in trade. The point of the negotiation is to reach agreements to which countries commit to

abide by; and they commit to abide by those agreements when they sign them, not just when they are caught years later because there is an Appellate body decision against them and the time for compliance with the Appellate body decision has run out. Countries are supposed to be complying from the day they sign the agreement, if not before, because, if they really believe in those principles, they probably would have been living by them. That, unfortunately, has not been the U.S. approach. I do not say this as a Canadian speaker, because I am not one. I say this as a U.S. person who was in the U.S. Government and believes this, as much as when I was in the U.S. government as I do today. I know there are probably a lot of people in the U.S. Government who would share this view, but cannot exactly stand up here and say this.

The U.S. approach has been, in my opinion, not to abide by its WTO obligations in the trade remedies area at least, but rather to push it to the limit, to ignore those obligations as much as possible; and when somebody took them to dispute settlement in the WTO and there is a decision against them, finally they say, "Oh, yes, we will abide by that, but we need many months to do that; and we will only do it in this little piece of this case. We will not take that as a general principle for anything else we do." It is getting the U.S. to abide by WTO obligations and trade remedy cases by millimeters, one at a time. I do not happen to think that is a very good way for the U.S. to set an example for the rest of world.

I should say the U.S. is not alone in that approach. A lot of governments do that. Unfortunately, it is the U.S. that wants to get leadership back on the trade front; and it is the U.S. that has refused to put the dumping laws on the table in Free Trade Area of the Americas (FTAA) negotiations, and that was a big problem in Seattle, and they would not put the dumping and presumably countervailing, because they are all thought of as dumping laws, on the table for new multilateral trade round.

It seems to me somebody ought to think about what compliance with international agreements means.

Let me come back to the softwood lumber agreement and softwood lumber and what this, the U.S. politics and U.S. approach to the WTO, means for softwood lumber.

What has happened so far is that on April the third petitions were filed for the imposition of both countervailing duties and antidumping duties against softwood lumber Canada.

In the succeeding twenty days, there are normally three issues, and there, indeed, have been three issues. One is standing. I mean is there anybody who has filed the case who has standing? Do they, in fact, represent an industry in the U.S.?

Under the rules of the WTO agreements and under U.S. law, the interesting thing about that question under U.S. law is that all gets decided on the day of initiation. If the Commerce Department says somebody had standing to bring the case, you can never raise that issue again until you get to appeal. It simply will not be discussed as a matter of U.S. law.

The second thing that comes up in this very early period in a case is the question of whether the petition that has been filed meets the standards for initiation either under U.S. law or hopefully the WTO agreements on subsidies and countervailing measures and the antidumping agreement of the WTO.

The third thing that happens as a matter of the subsidies agreement and WTO is the two governments get to consult during and before initiation as to whether the petition is sufficient and the idea of those consultations is that the government that is accused, if you will, should have the opportunity to say, "No, that petition is wrong. It does not have sufficient evidence. It is inaccurate for a variety of reasons and you cannot initiate on that basis consistent with international law."

Well, what actually happened is that there have been some submissions on the question of standing. The standing question in this case is very bizarre because the petitions were filed on behalf of the U.S. Coalition Executive Committee, not on behalf of a U.S. Coalition, not on behalf of an association, but an Executive Committee made up of a few companies. It is not at all clear that that Executive Committee qualifies under U.S. laws as an interested party to file a petition, but leaving that aside, there is another question about whether they really have the support, as they claim, of sixty-five percent of the production in the U.S. of the softwood lumber industry for purposes of the breath of the case, very broad, covers softwood lumber, lots of remanufactured products, very broad scope, for purposes of figuring out how much of U.S. production their supporters represent, the industry suddenly becomes a good deal narrower. When you redo those numbers, they probably have support substantially below fifty percent, and that has been put on the record in these cases, and, on that basis, the U.S. Government should poll the industry to determine if there really is sufficient support for these petitions. I am not holding my breath for that to happen.

On the initiation standards question, I will say that when initiation occurs, I think that the U.S. will have thrown the already very low initiation standards pretty much out of the window in a number of respects.

I will not bore you with all the reasons, but I will just mention a few. There are subsidies alleged. I do not think there are subsidies under the subsidies agreement of the WTO; and the way the so-called evidence for a benefit from those subsidies would be illegal under the WTO agreements. That

would seem to suggest that there is not enough evidence in the petition to make out a subsidy.

The dumping case is probably even more blatant. The basic initiation standards require that petitioners provide information reasonably available to them on certain points. They have to provide prices, in this case, the Canadian market, they have to provide export prices from the Canadian market to the U.S; and if they are alleging something having to do with cost of production, they should try to provide cost of production of the Canadian companies they are talking about or somebody in Canada.

Well, they have said, "We have tried, and it is not available to us as petitioners to get any transaction prices in Canada. We just cannot get them. We just cannot get an export price to the U.S. We have tried and tried. There is not a single market research organization in Canada that will talk to us. Do you believe that?

They say, "We just do not have access to that information," and, so, they make up the numbers or they take other numbers and put them in the petition. What is incredible about that is that on this coalition Executive Committee is International Paper, one of the biggest lumber producers in Canada, which has access to transaction prices in Canada and export prices to the U.S. and Canadian production costs, and International Paper is not alone in that regard.

In addition, the petitioners argue that the department, that they had to keep some of their supporters confidential because those supporters relationships either with customers in Canada, with suppliers in Canada, would be damaged. Well, it is very apparent that a great many of the companies, either purporting to be petitioners or supporting the petition have ready access to information that is required in a dumping petition; and it would seem the only conclusion is they have not provided it because it would not show dumping.

This has been pointed out to the Commerce Department. I think they will probably ignore it; and initiate anyway based on what is in the petition. That is why I say I think when they do this; they will have lowered the initiating standards very substantially.

Anyway, that is only the first twenty days, but it is only the first twenty days and it does not necessarily mean it will go all the way through. We will see how it plays out. There will be a political process of getting trade promotion authority and maybe some of the pressure for protectionism will come off. We will see, maybe we can convince the U.S. Government to take seriously its obligations under the Subsidies and Contervailing Measures (SCM) Agreement and the dumping agreement and the WTO in the course of the

case. If not, I guess we will convince them in a North American Free Trade Agreement (NAFTA) Panel and WTO, so stay tuned.