Intelligence MEMOS

From: Jon Johnson

To: The Honourable Ministers of International Trade, and Foreign Affairs

Date: May 25, 2017

Re: **Return of the Softwood Lumber Dispute (Part V)**

Like a bad movie sequel, Canadians are enduring a fifth round of softwood lumber disputes. The US Department of Commerce (DOC) has determined that provincial stumpage fees (i.e., price to harvest timber) and log export restrictions are subsidies. It has levied preliminary countervailing (CV) duties on imports of softwood lumber from BC, Alberta, Ontario, Quebec and New Brunswick, and layoffs have started as a result. The DOC is also expected to find Canadian dumping and impose preliminary antidumping (AD) duties in June. Final duties will be applied when the DOC finalizes its decisions, assuming the US International Trade Commission (USITC) finds that subsidies and dumping have injured the US industry.

Canadian industry can challenge these duties through binational panel review under NAFTA Chapter 19, by judicial review through the US Court of International Trade (CIT), or at the WTO. Each approach has its problems, and Canada should seek a more promising path forward.

Chapter 19

The Canadian industry can in principle achieve a better result with the NAFTA binational panel process. However, the US industry will challenge the binational process as unconstitutional, which could take years to resolve given the possibility of appeal to the US Supreme Court. Deposits on account of AD/CV duties will continue to be collected, to the detriment of the Canadian industry. Taking this route would also encourage those who wish to do away with Chapter 19 altogether in the NAFTA renegotiations.

Judicial Review

Judicial review is problematic because the CIT would be far more deferential to DOC subsidization and dumping determinations and USITC injury determinations than would a binational panel. Even if the Canadian industry did succeed through the CIT process, the US industry could appeal through the federal appellate process and, with leave, to the US Supreme Court, with deposits continuing to be collected from Canadian industry.

World Trade Organization

The Canadian Government can also initiate WTO challenges. However, WTO findings have prospective effect only, meaning that deposits collected up to the date that the panel or Appellate Body ruling is final and will not be refunded. Also, unlike with binational panel or CIT findings, the US Government is not legally bound under US law to comply.

A More Promising Path Forward

The recourse to existing dispute settlement mechanisms is likely a poor substitute for a negotiated settlement which, unlike the imposition of AD/CV duties by the US, means that the higher prices in the US market resulting from restricted Canadian exports would at least accrue to Canadian producers and governments.

It is important to remember that provincial stumpage practices and log export restrictions lie at the heart of the dispute. Reforming such practices to ensure that market forces govern the prices of logs and cut timber may be one approach to resolving softwood on a permanent basis. However, this would only work if the US agreed to amend its CV duty laws to set out precise criteria that a provincial stumpage system must satisfy to be considered as not conferring a subsidy. And log export restrictions from Canada would likely need to be eliminated.

The Canadian government's strategy should therefore focus on a sectoral deal, whether temporary or permanent. This could ensure that this latest iteration of Canada-US softwood lumber dispute is the last of its saga.

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