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Michel Paulin and Gilbert Gagné



Centre d'études sur l'intégration et la mondialisation
Institut d'études internationales de Montréal
Université du Québec à Montréal
C.P. 8888, succ. Centre-ville,
Montréal, H3C 3P8

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Tel : (514) 987 3000 # 3910
<http://www.ceim.uqam.ca>

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Initially contained in Chapter 19 of the Canada-United States Free Trade Agreement (CUSFTA), the dispute settlement mechanism for trade remedies (antidumping (AD) and countervailing duty (CVD) cases) of the North American Free Trade Agreement (NAFTA) is now more than two decades old. While some scholars point to the relative success of Chapter 19 in providing for speedy reviews of either Canadian or American trade remedy determinations and establishing a relatively predictable trade environment for both countries, they also indicate the inherent limits of this chapter despite its binding nature. Some, such as Robert Howse, say that the softwood lumber dispute clearly illustrates such inherent flaws.¹ In fact, the third and fourth episodes of the dispute, known as *Lumber III* (1991-1996) and *Lumber IV* (2001-2006), ended in stalemate with both sides unsatisfied with the results.² If a binding review mechanism seems adequate for other trade remedy disputes, Softwood Lumber has not been solved through adjudication, but instead through negotiations involving power and

¹ See Robert Howse, "Settling Trade Remedy Disputes: When the WTO Forum is Better than the NAFTA", *C.D. Howe Institute Commentary No. 111*, June 1998, p. 4.

² For a history of the softwood lumber dispute, see: Gilbert Gagné, "The Canada-US Softwood Lumber Dispute: A Test Case for the Development of International Trade Rules", *International Journal*, Vol. 58, No. 3, 2003, pp. 335-368; Daowei Zhang, *The Softwood Lumber War: Politics, Economics, and the Long U.S.-Canadian Trade Dispute*, Washington, DC: Resources for the Future, 2007. On the litigation episodes, issues and forums, see also: Greg Anderson, "Can Someone Please Settle This Dispute? Canadian Softwood Lumber and the Dispute Settlement Mechanisms of the NAFTA and the WTO", *The World Economy*, Vol. 29, No. 5, 2006, pp. 585-610; Gilbert Gagné and François Roch, "The US-Canada Softwood Lumber Dispute and the WTO Definition of Subsidy", *World Trade Review*, Vol. 7, No. 3, 2008, pp. 547-572; David Quayat, "The Forest for the Trees: A Roadmap to Canada's Litigation Experience in Lumber IV", *Journal of International Economic Law*, Vol. 12, No. 1, 2009, pp. 115-151; Russell Alan Williams, "Assessing the Success of the WTO DSM: Lessons from Softwood Lumber IV", *Canadian Foreign Policy*, Vol. 16, No. 1, 2010, pp. 17-34.

diplomacy. With this case in mind, it is not uncommon to hear that Chapter 19 lacks teeth to solve highly litigious trade disputes.³ Softwood Lumber, thus, has been a real test case for Chapter 19.

The application of trade remedies in cases of unfair trade has been an important element of U.S. protectionist measures of which Canada has been one of the main targets.⁴ In both *Lumber III* and *Lumber IV*, the United States faced adverse decisions in the review process. Unsatisfied with the results, the United States reacted by launching a wave of attacks, alleging that its legal losses were due to improper reviews on the part of panels. The United States, particularly the Coalition for Fair Lumber Imports (CFLI), has claimed that stumpage⁵ results in the subsidization of Canadian softwood lumber. It is then unsurprising, in light of the *Lumber III* and *Lumber IV* episodes, that the binational panel system is seen as a great obstacle to the U.S. resolve to offset what it considers unfair trade practices.

In *Lumber III*, the issue arose from the subsidy determination. Criticisms were voiced in the U.S. Senate Joint Committee in 1993, while most of the allegations were heard before an Extraordinary Challenge Committee (ECC). The ECC rejected the U.S. request to annul the panel's ruling that there was no subsidy for failure to meet the standards of an extraordinary challenge. Facing again an adverse decision, the United States first refused to abide by the decisions and to refund the duties collected on Canadian lumber products, which amounted to about C\$ 800 million. It was only after Canada committed itself to a negotiated settlement, the Softwood Lumber Agreement (SLA) of 1996, which involved quotas on Canadian lumber exports, that the United States agreed to reimburse the duties, ending the third episode of the dispute. As a reaction, the United States took the opportunity offered by its legislations implementing the NAFTA and the results of the Uruguay Round of multilateral trade negotiations to modify its laws so as to circumvent and restrain the scope of panels' authority, to facilitate future determinations of subsidy

³ See Anderson, 2006, p. 588.

⁴ See Gilbert Gagné, "North American Free Trade, Canada, and US Trade Remedies: An Assessment After Ten Years", *The World Economy*, Vol. 23, No. 1, 2000, p. 78.

⁵ Stumpage refers to the fees charged by provincial governments to private firms to harvest trees on public lands.

and resorts to ECCs.⁶

In *Lumber IV*, the issue arose from the injury determination. The panel considered that the United States failed to demonstrate a threat of material injury and, after two remands, directed the International Trade Commission (hereinafter ITC or Commission) to make a negative determination. The ITC complied with the injury panel, but did so reluctantly, alleging that the reason for its failure to prove a threat of injury was due to a disregard of the standard of review, excess of authority, violation of U.S. law and basic tenets of fairness. Accusations of this sort were even more severe as they resonated in Congress where many Senators, making their case before the President, argued that the panel ruling was illegitimate and qualified the injury panel as rogue. Later on, at the request of U.S. parties, the case was again brought to an ECC, even adding that one U.S. panellist was biased and in a situation of conflict of interest. As in *Lumber III*, the ECC upheld the panel's decision, concluding that it had not manifestly exceeded its authority. The United States ignored this ruling, refused to revoke its trade remedy orders and to refund the duties. The dispute was, once again, settled through diplomatic channels, leading to the SLA of 2006, the latter which involves voluntary export restraints and the return to Canadian lumber firms of only four of the five billion dollars illegally collected in duties.

During the proceedings, not only did the ITC accuse the panel of conducting an improper review, but the panel also accused the ITC of not responding to its instructions and, therefore, of not recognizing its authority as a reviewing body. Although the accusation that the panel misapplied or violated U.S. law is common, the agency's failure to render a decision not inconsistent with the panel's instructions is also a violation of U.S. law, but

⁶ On this subject, the reader can refer to a very extensive study published in 2004 by the law firm Baker & Hostetler LLP, *Duties and Dumping: What's Going Wrong with Chapter 19?* on the ways used by the United States to restrain the scope of action of binational panels and panellists. Available online: <<http://www.for.gov.bc.ca/het/softwood/Studies.htm>>.

had clearly gone unnoticed for two major reasons. First, the U.S. Congress has traditionally mistrusted international institutions. Hence, the panel was to be put under scrutiny and became an easy target for criticisms, thus overlooking ITC's behaviour. Besides, the NAFTA Chapter 19 relies on the good faith of the investigating agencies under review to comply faithfully with panels' instructions, something the ITC insisted it did. Second, the ITC's accusations were not to fall on deaf ears in Congress and their very nature had the effect of completely politicizing the softwood lumber dispute. Failure to apply the U.S. standard of review was a very sensitive argument. A panel review perceived as too intrusive was seen as undermining the independence and expertise of U.S. investigating agencies to make complex determinations and, especially, the rights of American industries and workers to be protected against the ill consequences of unfair trade practices.

In view of growing U.S. unilateralism and resentment against international trade and international institutions, the latter perceived as unfair and inimical to U.S. workers and industries, Congress increased pressure on the U.S. administration to reject the panel rulings in the softwood lumber dispute, thus nullifying the efforts made to solve the conflict through an adjudication process. On the one hand, the consequence of this wave of criticism is to discredit panel reviews and to make them unlawful from a U.S. perspective. On the other hand, as U.S. investigating agencies are practically shielded from criticisms, their behaviour clearly undermines the binding character of the binational review process. In the end, with dissatisfaction and pressure from Congress over the review from the injury panel in *Lumber IV*, it was unsurprising that the U.S. administration found it politically infeasible to accept the 2005 ECC order, thus disregarding a binding decision.

The paper examines the U.S. allegations against NAFTA panels in the softwood lumber dispute and is structured as follows. Part one reviews the working of the binational panel system and its binding nature. In part two,

we discuss the threat of injury adjudication in *Lumber IV* and the allegations against both the panel and the ITC. Finally, part three returns to these allegations and their consequences and analyze them in light of U.S. unilateralism. A conclusion ensues.

1. The Chapter 19 Panel Review Mechanism

Originally included in the CUSFTA, Chapter 19 provides the NAFTA with an international institution that could review trade remedy determinations. The establishment of a binding mechanism in 1988 represented a departure from the traditional dispute settlement procedure found in the General Agreement on Tariffs and Trade (GATT). Chapter 19 substitutes the review by domestic courts of AD and CVD determinations from national investigating agencies with reviews by binational panels composed of U.S. and Canadian trade law experts. The United States refused to exempt Canada from the application of its unfair trade laws, as Canada initially sought during the CUSFTA negotiations. In the end, however, the United States accepted to subject its AD and CVD determinations to binding reviews by binational panels. The binding character of this mechanism was essential for Canada whose main concerns were to obtain a more secure access to the U.S. market and to address the deference the U.S. Court of International Trade (CIT) gave administrative agencies in trade remedy cases. While this system was meant to be temporary in 1988, it became permanent with the ratification of the NAFTA.⁷

In the United States, in AD or CVD cases, once the International Trade Administration of the Department of Commerce (DOC or Commerce)

⁷ On the objectives of both parties towards the panel system during the CUSFTA and NAFTA negotiations, as well as the provisions and implementation of Chapter 19, see: Eric J. Pan, "Assessing the NAFTA Chapter 19 Binational Panel System: An Experiment in International Adjudication", *Harvard International Law Journal*, Vol. 40, 1999, pp. 379-431; Gagné, 2000; Anderson, 2006, pp. 586-596.

has made a final determination of either dumping or subsidy⁸, and the ITC has made a final determination of material injury, or threat thereof, to a domestic industry, binational panels can be established at the request of either governments or private parties to challenge these determinations. A panel is composed of five members of whom two are selected by each government from a roster and a fifth is chosen by agreement between the two governments or by lot in case of disagreement. In accordance with Article 1904.1 of the NAFTA, a panel established to review a final AD, CVD or injury determination replaces the judicial review process normally used in each country, which implies that a party to a dispute cannot bring the matter to its domestic courts. As each party under Article 1902 retains the right to use trade remedies against imported goods from another party, a panel must base its review on the law of the importing party in order to verify that the determination is in accordance with its own administrative law. The binational panel system does not create laws and precedents. The standard of review is the one used in each country, as set by judicial precedents and practice.

For example, the panels reviewing the determinations of U.S. administrative agencies must apply the U.S. standard of review, as interpreted by legal principles and precedents of U.S. administrative law. A standard of review “express[es] a deliberate allocation of power between an authority taking a measure and a judicial organ reviewing it”.⁹ Thus, the standard of review defines the scope of action of a panel and the degree to which it can second guess a determination to see that it conforms to the law

⁸ Dumping is defined as a product exported at less than its normal or fair value, that is, if sold below its price in the exporting country or its production cost. Subsidy is defined as a financial contribution from a government that confers a benefit and that is specific to certain enterprises. Governments can confer a benefit on firms through the provision of goods (trees, in the softwood lumber dispute) for less than adequate remuneration, that is, below market value. The conditions of trade or of competition are considered to be fair when no artificial advantage is conferred on firms through government measures and that products are sold at a market price.

⁹ Matthias Oesch, “Standards of Review in WTO Dispute Resolution”, *Journal of International Economic Law*, Vol. 6, No. 3, 2003, p. 636.

of the importing country. If the standard of review were *de novo*, it would allow a panel to make its own findings and substitute them for those of the investigating agency. At the other end is the total deference standard, meaning that a panel could not review “in substance” an agency’s determination and is restrained to review the formal application of procedure.

The U.S. standard of review is somewhere between *de novo* and total deference. As stipulated in U.S. law, section 516A(b)(1)(B) of the *Tariff Act of 1930*, the court “shall hold unlawful any determination, finding, or conclusion found [...] to be unsupported by substantial evidence on the record, or otherwise not in accordance with law”. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”. U.S. courts review the decisions of administrative agencies for reasonableness. A panel, then, should review whether an agency’s determination is a reasonable interpretation of the law and is defensible even if other conclusions can be drawn from the record. Consequently, it is clear that the U.S. standard of review does not allow a panel to reweigh the evidence for the agency or, otherwise stated, does not permit *de novo* review.

In the case of U.S. determinations, if an agency fails to raise its findings to the substantial evidence level or if they are not in accordance with law, under NAFTA Article 1904.8, a panel remands the matter for further clarification and investigation and an agency cannot make a decision inconsistent with a panel’s instructions. Hence, a panel has authority only to affirm or remand and cannot substitute its own interpretation of the record for that of an agency. As binational panels verify whether U.S. law has been correctly applied and, that, on the basis of the U.S. standard of review, for the United States it should not be any different from the CIT process. After all, as William Davey points out, it is in the interest of the United States that the

NAFTA Chapter 19 dispute settlement mechanism affects as little as possible, or absolutely not, its use of trade remedies.¹⁰

Overall, the binding nature of NAFTA's Chapter 19 rests on the ability of binational panels to review trade remedy determinations and remand them with instructions to their respective agencies. This binding character is well specified in Article 1904.9, which provides that "[t]he decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel". This is also recognized in the United States' implementing legislation of the NAFTA where it is stipulated that:

If a determination is referred to a binational panel or extraordinary challenge committee under the NAFTA or the Agreement and the panel or the committee makes a decision remanding the determination to the administering authority or the Commission, the administering authority or the Commission shall, within the period specified by the panel or committee, take action not inconsistent with the decision of the panel or committee.¹¹

In sum, the United States' agencies are bound to follow panels' instructions on remands and non-compliance is in violation of U.S. law. The decision from a panel cannot be appealed, as there is no court of appeal or no equivalent to the U.S. Court of Appeals for the Federal Circuit (CAFC). A panel's ruling can be reviewed by an ECC, however, if, according to Article 1904.13(a)(i):

a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, (ii) the panel seriously departed from a fundamental rule of procedure, or (iii) the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the

¹⁰ William Davey, *Pine & Swine. Canada-United States Trade Dispute Settlement: The FTA Experience and the NAFTA Prospects*, Ottawa: Centre for Trade Policy and Law, 1996, p. 98.

¹¹ *North American Free Trade Agreement Implementation Act*, Public Law 103-182, 8 December 1993.

appropriate standard of review, and (b) any of [these] actions [...] has materially affected the panel's decision and threatens the integrity of the binational panel review process.

This constitutes a safeguard against potential abuse or politicization of the review process. Private parties cannot invoke the Extraordinary Challenge Procedure, only governments can do so.

In the softwood lumber dispute, such a system proved unsatisfactory for both parties. The Canadian objectives of shielding the review process from political interference and obtaining speedier reviews were not met, whereas for the United States the panel system is seen as undermining its rights to use trade remedies. In *Lumber IV*, while the United States could not demonstrate that Canadian lumber threatened to cause injury to the U.S. industry, Canada did not obtain satisfaction either as the United States refused to comply and put the blame on the injury panel for failure to make a proper and impartial review. Not only is Softwood Lumber a contentious case, it is also a complex one where the review of U.S. determinations has proved difficult and opened the door to disagreements and tensions between NAFTA panels and U.S. agencies.

For the United States, the complexity of the determinations is less of an issue than the panel system itself, which has often been anything but a source of frustration, as shown during *Lumber III* and *Lumber IV*. In *Lumber III* in 1994, the U.S. chair of the ECC, Judge Malcolm Wilkey, attacked the validity of Chapter 19, strongly criticized the subsidy panel for failing to apply the proper standard of review and the Canadian panellists for being biased and for voting along national lines. Some similar allegations were made against the injury panel in *Lumber IV*, which we now review.

2. The Injury Panel Review and U.S. Allegations

2.1 *The ITC's and Panel's Decisions*

In *Lumber IV*, the ITC concluded in a final determination that the U.S. softwood lumber industry was threatened with material injury by reason of subsidized and dumped imports of Canadian softwood lumber. The ITC relied on three of eight factors to find a threat of material injury, these being: volume, capacity, and price. It determined that significantly increased imports of subject products were imminent and likely to have a significant depressing effect on domestic prices.¹² The NAFTA panel remanded, among other things, to distinguish the contribution to the threat of material injury caused by Canadian imports from the contribution by the domestic industry, third country imports, U.S. timber supplies, and the cyclical nature of the softwood lumber industry. The ITC was given 100 days to issue its redetermination.¹³ After considering the panel's instructions, the Commission essentially restated its conclusion of threat of material injury.¹⁴

In its decision on remand, the panel held that neither of the ITC's record evidence based on volume, capacity and price, whether alone or in combination, indicated a threat of material injury. First, the panel rejected the argument from the Commission that the volume alone or the price factor alone supported a finding of threat of material injury. Second, concerning one of the subsidiary factors to support the capacity threat factor, the panel complained that the Commission did not appropriately follow its instructions on remand. The panel pointed that an increase of production capacity in Canada cannot be fairly characterized as "imminent" and "substantial". The

¹² ITC, *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Determinations and Views of the Commission, USITC Publication No. 3509, 16 May 2002, pp. 47-48.

¹³ NAFTA, Article 1904 Binational Panel Review USA-CDA-2002-1904-07, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, Decision of the Panel, 5 September 2003.

¹⁴ ITC, *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final) (Remand), Views of the Commission, USITC Publication No. 3658, 15 December 2003.

panel rejected this capacity threat factor on the grounds that the Commission failed to tie the criterion of an “imminent”, “substantial” increase in production capacity in Canada to the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other markets to absorb any additional exports. However, on this, the Commission was intransigent and the panel argued that: “The Commission relies on the exact same record evidence that this Panel rejected in its original decision to show that there was ‘imminent, substantial increase in production capacity’ in Canada”. With respect to the export orientation of Canadian lumber producers to the U.S. market, the Commission on remand rejected without any explanation the projections of Canadian exporters. The panel did not accept this unexplained rejection and required the agency to consider such evidence. Then, on 19 April 2004, the panel directed the ITC to conduct further analyses within 21 days of its decision.¹⁵

On 10 June 2004, the Commission’s response to the panel’s second remand primarily consisted in a dissenting opinion. The Commission, first, complained that the panel had violated U.S. law and basic tenets of fairness by setting the procedural deadlines in that proceeding (21 days) and by preventing it from reopening the record. The Commission argued that it was within its authority and at its discretion to reopen the record, that if it had the opportunity it could have found more relevant information to address the panel’s concerns, but that the panel prevented it from doing so by setting a too short period of time and directing the agency to conduct its analysis with the original record. Second, once again the panel was accused of failing to apply the appropriate standard of review. The Commission complained that, in its instructions pertaining to capacity threat factors, the panel overstepped its authority and substituted its own view of the evidence of what is

¹⁵ NAFTA, Article 1904 Binational Panel Review USA-CDA-2002-1904-07, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, Remand Decision of the Panel, 19 April 2004.

significant and substantial. The Commission insisted that only the agency, not the panel, has the authority to consider specific factors and to determine the weight to be accorded to each. The Commission argued that the panel considered its own views of the facts as the only reasonable interpretation. Basically, the Commission accused the panel of conducting a *de novo* review. In response to the panel's criticism that its instructions had not been properly followed, the Commission argued that it continued to provide the panel with substantial evidence and a thorough analysis of that evidence, pointing to the fact that the analysis of all three factors proved a threat of material injury. Overall, the Commission refused to follow some of the panel's instructions, preferring instead to justify its non-compliance by arguing that the Commission's findings were correct and conclusive and, therefore, that the panel should have granted them deference.¹⁶

The same kind of allegations was made in *Lumber III* concerning a substitution of judgment by panels for that of U.S. investigating agencies and an insufficient amount of deference given to the latter. The DOC was of the view that the subsidy panel had exceeded the bound of its authority by not being deferential enough to its choice of methodologies pertaining to specificity and preferentiality. Although the panellists in the first remand were unanimous in their instructions to the DOC, the vote split three to two in the panel's final decision on remand, with the two U.S. panellists voting to uphold the DOC's decision. Davey mentions that the dissenting panellists, who argued that not enough deference was granted to the agency's discretion for the choice of methodology, were influenced by a recent judgment from the CAFC in the *Daewoo* case. The CAFC had to rule if, in *Daewoo*, the CIT erred in rejecting Commerce's methodology for making certain tax adjustments in determining a dumping margin. The decision was overturned by the CAFC on the basis that the CIT was not enough deferential to the agency's expertise

¹⁶ ITC, *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Remand) (Second), Views of the Commission, 10 June 2004.

and choice of methodology. The dissenters, therefore, were of the view that, according to U.S. principles of judicial review, the subsidy panel in *Lumber III* should have deferred to Commerce's expertise and choice of methodologies.¹⁷

Judge Wilkey reiterated these arguments during the 1994 ECC process, insisting that whenever Congress has not provided the agency with a specific methodology for a specific case, the choice of methodology is at the discretion of the agency and not of the courts or of substitute panels. Wilkey added that unless the agency has grossly departed from a specific provision of the governing statute, the agency's determination must prevail.¹⁸ Consequently, as we shall see, allegations of failure to apply the appropriate standard of review have increased U.S. suspicion towards the binational panel system and its capacity to perform, from a U.S. view, proper reviews. In the end, it inevitably brought under scrutiny the instructions from NAFTA panels and a perceived failure to correctly apply the U.S. standard of review remains, in the third and fourth episodes of the softwood lumber dispute, the main argument used by U.S. parties to explain their legal losses.

As regards the issue of methodologies, according to Wilkey, Commerce in *Lumber III* failed to demonstrate that stumpage and log export restrictions were subsidies, not because its findings were not based on substantial evidence, but because the use of methodologies the panel had directed necessarily resulted in a negative determination.¹⁹

In *Lumber IV*, with regard to the complaint that it was prevented from reopening the record, the ITC constantly argued that such instructions from the panel were not in accordance with law and that when it failed to respond appropriately to those instructions, it was because of insufficient time to

¹⁷ Davey, 1996, p. 178.

¹⁸ CUSFTA, Article 1904.13 Extraordinary Challenge Committee ECC-94-1904-01USA, *In the Matter of Certain Softwood Lumber Products from Canada*, Dissenting Opinion of United States Circuit Judge (Ret.) Malcolm Wilkey, 3 August 1994, pp. 38-39.

¹⁹ *Ibid.*, pp. 38-43.

reopen the record. Even though the Commission argued that it could find more evidence, it maintained that its actual findings proved the existence of a threat of material injury. It added that: “The Panel’s action in setting forth the procedures for this remand investigation appears to be an attempt to limit Commission’s discretion to discharge its duties under the AD and CVD statutes”.²⁰ Thus, not only did the Commission argue that it complied faithfully with unlawful instructions, but also that the panel was not fair in setting a too short amount of time. The Commission was nevertheless fully aware that U.S. law forced it to comply with the instructions within the time limit specified by the panel.

Whereas in *Lumber III* the subsidy panel remanded the matter only once, the injury panel in *Lumber IV* appeared to have been more patient. However, in its second remand decision on 31 August 2004, the panel impatiently stated that:

The Commission has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel’s review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process.²¹

The panel decided that it would be futile, given the Commission’s attitude, to remand the matter back a third time. Therefore, it precluded the ITC from undertaking another analysis. “Accordingly, in the face of the Commission’s regrettable position, this Panel specifically precludes the Commission on remand from undertaking yet another analysis of the substantive issues”.²² Under Rule 2 of the *Rules of Procedure for Article 1904 Binational Panel Reviews*, to secure “the just, speedy and inexpensive review

²⁰ ITC, Views of the Commission, 10 June 2004, p. 10.

²¹ NAFTA, Article 1904 Binational Panel Review USA-CDA-2002-1904-07, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination*, Second Remand Decision of the Panel, 31 August 2004, p. 3.

²² *Ibid.*, p. 4.

of final determinations”, the panel issued an order instructing the Commission to determine, within 10 days, that the evidence on the record did not support a finding of threat of material injury.²³

U.S. panellist Mark Joelson issued a separate opinion concurrent with the panel’s decision and directly answered the Commission’s allegations. With respect to the denial to reopen the administrative record, Joelson reminded the Commission that it already had ample opportunity to try to fashion an appropriate record and that the panel’s decision to impose limitations on the prolongation of the proceeding was reasonable and justified, stressing that “[d]ue process is not endless process”.²⁴ As regards the fact that the panel ordered a specific determination, Joelson mentioned that the role of a panel is normally to affirm or remand but:

We have here a very unusual situation in which the Commission has three times presented the same record evidence to support its conclusion of threat of injury, and the Panel has each time found that evidence to be inadequate to constitute substantial evidence to support the Commission’s conclusion. The Commission has made it plain by its actions and words that it is disinclined to accept the Panel’s review authority under Chapter 19 in this case.²⁵

In response to this order, the Commission restated that the role of a panel is not to review the evidence *de novo* and is not allowed to compel a negative determination. This time, faced with the accusation from the panel of not respecting its authority, the Commission was more careful and argued that it followed the panel’s instructions although they were clearly in excess of its authority. Again, the issue of reopening the record was brought. The Commission said that it followed the panel’s instructions on remand to conduct its analysis on the original record, even though it was solely within the Commission’s authority to decide to reopen the record or not. Rejecting

²³ *Ibid.*, p. 7.

²⁴ *Ibid.*, p. 8.

²⁵ *Ibid.*, pp. 11-12.

the accusation of presenting the same evidence to preserve its findings, the Commission insisted that it was the panel “that has preordained the outcome as negative determinations and ignored the Commission’s analysis and exposition of record evidence that addressed the Panel’s concerns in its prior decisions”.²⁶ The Commission reiterated that the panel had incorrectly reweighed the evidence and substituted its judgment for that of the agency, thereby exceeding its authority and violating U.S. law.

In light of U.S. law that makes panels’ instructions binding and the remark from the panel that the ITC had failed to abide by them, it was unsurprising from the latter to claim innocence, arguing that it faithfully followed these instructions and that, had the panel followed correctly the standard of review, its determinations would have prevailed. As it put it: “the Commission’s good faith efforts to comply with the panel’s explicit instructions in the first remand have continued to be used against the Commission to confine its scope of action”.²⁷ Once again, even though the ITC may not have consciously followed the panel’s instructions, the blame was placed on the injury panel. During the 1994 ECC episode, Wilkey specified that Commerce had faithfully complied with the panel’s instructions, even though such instructions were said to be unlawful as the panel should not have directed the use of methodologies.²⁸ It seems, therefore, that whenever it is an international institution that issues such orders or instructions, a U.S. agency is given the benefit of the doubt as to whether it complied faithfully with its own national laws, which makes it easier to attack the credibility of a binational panel. Given this reality, such reactions by the DOC and the Commission should not be surprising.

Responding to the panel’s third remand, the Commission specified that

²⁶ ITC, *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928, Views of the Commission in Response to the Panel Decision and Order of August 31, 2004, 10 September 2004, p. 6.

²⁷ *Ibid.*, p. 12.

²⁸ ECC 1994, Dissenting Opinion of Judge Malcolm Wilkey, pp. 36-37.

it did not question the authority of the panel, as it would have questioned the U.S. law itself. It rather questioned the way the panel conducted its review and its order, which was nothing but a reversal of the Commission's affirmative determination, not allowed by either U.S. law or the NAFTA. Insisting that it was the victim of an unlawful review, the Commission nevertheless concluded: "Because the Commission respects and is bound by the NAFTA dispute settlement process, we issue a determination, consistent with the Panel's decision, that the U.S. softwood lumber industry is not threatened with material injury".²⁹ However, the Chairman of the Commission, Stephen Koplan, dissented, holding to the threat of injury finding, and, in so doing, overtly disregarded the NAFTA panel's authority.³⁰ On 12 October 2004, the panel affirmed the ITC's third remand determination and, on 25 October, directed the NAFTA Secretariat to issue a Notice of Final Panel Action.

The ITC's attitude in *Lumber IV* clearly violated U.S. law, which, as we have seen, directs investigating agencies to render decisions not inconsistent with panels' instructions. The ITC's failure to adequately address the injury panel's concerns undoubtedly erodes the binding character of NAFTA reviews under Chapter 19. As seen above, this binding character rests on the capacity of a panel to affirm or remand, with instructions, a case to the respective agency. In both *Lumber III* and *Lumber IV*, the U.S. agencies, whose determinations were subject to binational reviews, proved intransigent and reluctant to abide by the instructions from CUSFTA/NAFTA panels. Although U.S. agencies have overtly challenged the instructions given by panels, they have been cleared of any accusation of not following them. The ensuing controversy raised issues in Congress, politicizing the softwood lumber dispute even more.

²⁹ Views of the Commission, 10 September 2004, p. 13.

³⁰ *Ibid.*, p. 14.

2.2 *The EEC's Decision*

In *Lumber IV*, as the ITC failed to address the concerns of the injury panel on remands and as its findings failed to reach the substantial evidence level, the panel concluded that the ITC failed to prove a threat of material injury. The Commission insisted that there were still unresolved issues and that the panel did not have the authority to direct a specific determination. It was therefore easy for the U.S. parties to conclude that the panel had exceeded its authority. When this allegation was reviewed by an ECC in 2005, it recognized that the role of a reviewing panel is indeed limited to affirm or remand an agency's determination. Yet, the Committee pointed out that, in rare circumstances, when a remand would be an exercise of futility as there are no live issues and the agency is intransigent, a panel may, under such circumstances, direct a particular determination. This "rare circumstances" factor was acknowledged by the Office of the United States Trade Representative (USTR), as the Committee reminded the parties. Such a factor, however, could be subject to diverging interpretations and, unsurprisingly, the USTR believed it did not apply in this case. The Committee referred to past cases to demonstrate that the CIT sometimes used the same argument as the panel and, thus, that the CIT may also direct an agency to enter a specific determination, as in *Florida Power and Light Co.* and *Nippon IV*.³¹

Therefore, the ECC could not conclude that the injury panel had overreached itself in *Lumber IV*. Whenever the ITC is intransigent and quick to remind a panel that it is limited to remand or affirm, it may well lead to an outcome where a panel has no other choice but to direct a determination. Otherwise, the binational panel system would be useless. It appears that the ITC pushed the panel against the wall and forced it to direct a determination. As it failed to have its determination upheld, the Commission could argue

³¹ NAFTA, Article 1904 Extraordinary Challenge ECC-2004-1904-01USA, *In the Matter of Certain Softwood Lumber Products from Canada*, Opinion and Order of the Extraordinary Challenge Committee, 10 August 2005, pp. 44-45.

that the panel made errors or exceeded its authority. The binding character of the binational panel system was not respected, but this issue was beyond the ECC's jurisdiction and mandate. Overall, the ITC could be seen as violating U.S. law, an issue with which Congress would certainly disagree. The Commission, nonetheless, took great care to argue that its failure to address the panel's concerns was due to the fact that the latter refused to let it reopen the record and required the remand to be done in such a short time as to deliberately prevent the agency from responding appropriately to the instructions.

On this, the three ECC judges found that the U.S. case law referred to by the Commission to demonstrate that it had sole discretion and authority to reopen the record could not be so interpreted. The Committee even demonstrated that the CIT could deny such reopening, as happened in *Nippon IV*. More precisely, the Committee restated the reasons for the panel's refusal to grant an extension of 73 days and a permission to reopen the record, namely, that the Commission had three opportunities to support its conclusion (including an initial investigation that lasted a year), that there were no new issues in the remand to be addressed, and that the Commission failed to explain what information it wanted to obtain in reopening the record. The ECC recalled that a panel's mandate, which has no equivalent in U.S. law, is to secure a just and speedy review process, acknowledging at the same time that Canadian lumber exporters had to deposit US\$ 4 million a day in CVDs. Hence, the Committee was of the view that there was no clear legal basis to conclude that the panel had manifestly exceeded its authority.³² Once again, the ECC's mandate was notably to determine if the integrity of the NAFTA review process were threatened by the panel's actions, not the ITC's, and the issue whether the ITC had violated U.S. law was ignored. Canada was to request a review of the U.S. government's stance before the CIT. The latter, unsurprisingly, ruled that the

³² *Ibid.*, p. 16.

United States had violated its own laws. However, the binding character of NAFTA dispute settlement in trade remedy cases was meant to ensure that Canada would not anymore have to resort to U.S. courts to obtain relief from such U.S. actions.

The Americans are suspicious of international experts interpreting their own laws.³³ This is the case even when NAFTA panels or committees are composed of a majority of U.S. members, as with the vilified injury panel in *Lumber IV*. On the other hand, they are not suspicious about their own agencies respecting U.S. laws. The United States is quick to point to situations where the integrity of the NAFTA trade remedy mechanism is affected by panels' misbehaviour, but not to U.S. agencies putting this system in jeopardy. The finality and integrity of the NAFTA dispute settlement process in trade remedy matters are also greatly affected by the attitude of U.S. agencies. Although the merit of their allegations against panels is questionable, they have attracted Congressional attention, which has further compromised the whole process and put it on hold, as in *Lumber IV*.

3. U.S. Unilateralism

3.1 Attacking Panels' Credibility

In *Lumber IV*, the United States proved determined to have *gain de cause* in the NAFTA panel review proceedings. Besides, the dumping and subsidy determinations were still under review when the injury panel rendered its last decision. Therefore, a failure to demonstrate a threat of material injury would have forced the DOC to revoke both the CVD and AD orders on Canadian lumber, an outcome which the CFLI would certainly have tried to prevent. The same thing happened in *Lumber III* when the subsidy panel rendered its final decision. There were thus good reasons for U.S. parties to claim that the subsidy panel had not conducted a proper

³³ Howse, 1998, p. 14.

review or that the DOC was forced to abide by unlawful orders.³⁴

Consequently, in *Lumber IV*, the injury determination was crucial not only for Canada and the United States, but also for the CFLI. It is in fact interesting to note that each factor and subsidiary factor the panel reviewed for a finding of a threat of material injury were commented upon by the CFLI on the ground that the instructions from the panel were in breach of the standard of review. The Coalition represents over two hundred associations of U.S. lumber producers. The ITC's intransigence could therefore reflect political pressures on the part of the Coalition, which is a very powerful lobby group.³⁵ However, Robert Howse and Michael Trebilcock demonstrate that such a situation is not unusual and point out that:

Binational panels have become impatient with the failure of the U.S. agencies to respond adequately in remand determinations to failures in their initial analysis, or alternatively, to shift the ground, either legal or evidentiary or both, of their decision to impose duties, so as merely to evade the panel's criticism.³⁶

Homer E. Moyer also reports that in many cases adverse panel rulings have been met with criticism and initial refusal to comply. As he stresses: "in a few instances, [U.S. agencies complied] defiantly, disparaging the legally binding decisions of the reviewing authority in a manner that many U.S. reviewing courts would have found contemptuous".³⁷ Are the agencies acting differently than if their determinations had been reviewed by the CIT? Arguments that CIT judges are more inclined to defer to an agency's expertise have been made in both *Lumber III* and *Lumber IV*. Yet, Davey

³⁴ Davey, 1996, pp. 176-179.

³⁵ Gagné, 2000, p. 84.

³⁶ Robert Howse and Michael Trebilcock, *The Regulation of International Trade*, New York: Routledge, 1999, p. 86.

³⁷ Homer E. Moyer, "How the Uruguay Round Will Change the Practice of International Trade Law in the United States: Two Views. View Two: U.S. Institutions, not the WTO, May Hold the Answer", in Terence P. Stewart (ed.), *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, Washington, DC: American Bar Association, Section of International Law and Practice, 1996, p. 730.

demonstrates that the way binational panels have made their reviews is no different from the U.S. CIT.³⁸ The key difference is that U.S. agencies find it easier to allege improper review on the part of a NAFTA panel. Such attitude from U.S. agencies might also be explained as attempts to bring Congress into the review process and use it as a last recourse or as safety valve against adverse decisions from binational panels.

Legal experts Charles Gastle and Jean Castel analyzed the dissenting opinion in the ECC during *Lumber III* and provide an interpretation of the standard of review. They argue that, although discretion is normally granted to an agency to construct the evidence, a CIT judge or a NAFTA panel is not automatically obliged to give total deference to an agency. If it is determined that the findings are not based on substantial evidence or are not in accordance with law, the determination of a U.S. administrative agency can be reversed.³⁹ For Gastle and Castel, Wilkey's view of the standard of review is that total or absolute deference must be granted to an agency unless it deliberately and irrationally abused discretion. As they put it: "If judge Wilkey is correct, this raises the question of whether there is any need for a binational panel mechanism".⁴⁰ In fact, they argue that the first prong of the standard of review "based on substantial evidence on the record" only applies to factual determinations. Normally, the CIT must accord deference to the construction of the evidence, but such construction must be based on relevant evidence or on evidence that a reasonable mind might find acceptable to uphold a decision. They then add that: "While an agency has discretion to give a reasonable interpretation of the evidence, a reviewing body is not compelled to give absolute deference to such interpretation".⁴¹

³⁸ Davey, 1996, pp. 244-250.

³⁹ Charles M. Gastle and Jean-G. Castel, "Should the North American Free Trade Agreement Dispute Settlement Mechanism in Antidumping and Countervailing Duty Cases Be Reformed in the Light of *Softwood Lumber III*?", *Law and Policy in International Business*, Vol. 26, No. 3, 1995, p. 825.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

Addressing this issue, the ECC in *Lumber IV* recognized that a determination can be upheld even if other conclusions can be drawn from the record. A reviewing court, however, must consider whether a determination is based on substantial evidence and whether there is “a rational connection between the facts found and the conclusion reached”.⁴² With respect to subsidiary factors, the injury panel in *Lumber IV* estimated that the “likely future import trends” were of little significance to support the Commission’s conclusions, while the latter responded that the panel had reweighed the evidence. The ECC was of the opinion that: “If the Panel is required to accept subsidiary findings without looking at whether they logically support the ultimate conclusion, the Panel is stripped of its ability to assess the rationality of the ultimate conclusion. We cannot agree that the Panel is so constrained”.⁴³ What the ITC seemed to argue was that as long as it followed the proper procedure, its determination must have prevailed.

For the United States, both in the NAFTA and the World Trade Organization (WTO), the standard of review should be as close as possible to total deference. In this regard, James R. Cannon provides a good explanation of two key U.S. objectives during the GATT Uruguay Round negotiations concerning dispute settlement and the standard of review. The United States is both a major importer and exporter and, thus, must consider being the defendant as well as the plaintiff in dispute proceedings within the WTO. Whereas the old GATT procedure required unanimity for a dispute settlement report to be adopted, at U.S. request, the WTO Dispute Settlement Mechanism (DSM) requires unanimity for a report to be blocked. The United States, thereby, protects its export interests and meets its market opening objectives by avoiding that the losing party block the adoption of a

⁴² Opinion and Order of the ECC, 10 August 2005, pp. 21-22.

⁴³ *Ibid.*, p. 28.

report.⁴⁴ Yet, as David Palmeter and Gregory Spak point out, “this raises the question of how the United States will comply with adverse decisions”, especially in cases involving the refund of duties.⁴⁵ In view of this reverse consensus rule, the United States shifted its attention to the standard of review. To ensure the use of trade remedies to protect its domestic industries against “unfair” imports, it was important for Washington that the standard of review placed limits on the authority of a panel to re-evaluate, reweigh, or substitute its judgment for that of an investigating authority.⁴⁶

It is therefore unsurprising that in each adverse decision under the CUSFTA/ NAFTA, the United States has used the argument of the standard of review. This is also a frequent argument heard at the WTO. To protect itself from adverse rulings, a U.S. agency often alleges that a panel did not apply the appropriate standard of review and substituted its own interpretation of the record. As Howse and Trebilcock point out, “appropriate is a vague legal category, and leaves ample room for voicing objections to just about any panel ruling”.⁴⁷ Such allegations, however, have been made not only by the United States, but also by a majority of countries within the WTO. They are indeed common and reflective of protectionist tendencies. Matthias Oesch points out that “it has, over the years, become a routine criticism by WTO Members that have lost disputes in Geneva to claim that panels or the Appellate Body have applied a too intrusive or too deferential standard of review”.⁴⁸

Despite the fact that those arguments are common, what is clear from *Lumber IV* is that U.S. administrative agencies have sought to make

⁴⁴ James R. Cannon, “Dispute Settlement in Antidumping and Countervailing Duty Cases”, in Terence P. Stewart (ed.), *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, Washington, DC: American Bar Association, Section of International Law and Practice, 1996, p. 384.

⁴⁵ David Palmeter and Gregory J. Spak, “Resolving Antidumping and Countervailing Duty Disputes: Defining GATT’s Role in an Era of Increasing Conflict”, *Law and Policy in International Business*, Vol. 24, No. 4, 1993, p. 1164.

⁴⁶ Cannon, 1996, p. 384.

⁴⁷ Howse and Trebilcock, 1999, p. 88.

⁴⁸ Oesch, 2003, p. 635.

instructions from NAFTA panels appear to violate U.S. law. Indeed, failing to have a binational panel uphold its decision in 2004, the ITC might have found itself in such an impasse that the only option left was to attack the panel's credibility, accusing it of violating U.S. law and disregarding the agency's scope of action.

Allegations of improper review on the part of international panels invariably attract the attention of the U.S. Congress. The latter has been inclined to consider adverse panel decisions as resulting from a misapplication of U.S. law and/or errors, especially as regards the standard of review. The argument that international institutions and NAFTA panellists are not well suited to apply U.S. law properly has long been heard in the United States. The issue of the reviewing process was indeed raised during the CUSFTA and NAFTA negotiations. The Chapter 19 process was to be the same as under U.S. law and not affect the U.S. right to apply trade remedies. For the United States, there was a danger in having the actions of U.S. agencies reviewed by panellists, particularly foreign ones, perceived as less inclined to grant them proper deference.⁴⁹ As in *Lumber III*, there were also complaints that panels composed of trade law experts in lieu of U.S. judges are likely to be less deferential to the agencies' expertise and cannot be expected to apply or understand U.S. law correctly. During the NAFTA negotiations, the United States secured a modification pertaining to the composition of binational panels to increase this level of deference. In Annex 1901.2 of the NAFTA, it is stipulated that a majority of the panellists on each panel must be lawyers and that the roster of panellists must include "judges or former judges to the fullest extent practicable".

Past cases of trade disputes with Canada, such as *Pork*, *Swine*, and *Lumber III*, have made the U.S. Congress more and more suspicious of the NAFTA panel review mechanism. The debates surrounding the *Uruguay Round Agreements Act* in 1994 revealed a similarly high degree of mistrust

⁴⁹ See ECC 1994, Dissenting Opinion of Judge Malcolm Wilkey, pp. 40-41.

towards the creation of the WTO DSM.⁵⁰ Anticipating its potential adverse effects, Congress expressed concerns that international panels might be disrespectful of U.S. law. A *WTO Dispute Settlement Review Commission Act*, introduced by Senator Dole in 1995 and by Senator Baucus in 2003, would have allowed U.S. judges to review adverse panel decisions. Moyer compares this proposed Commission and the WTO DSM with a football game. If the United States gets penalized, the review of the referees' decisions, not all but only the ones that penalizing the U.S., is to lead to instructions to the President to change the rules of the game so that referees will do a better job. This, he argues, is a clear demonstration of potential U.S. unilateral actions.⁵¹ This is reminiscent of *Lumber III* when, after an adverse decision, the U.S. Congress seized opportunities to change the rules so as to facilitate a subsidy determination, to extend the time-limits for proceedings, and to include a failure to apply the standard of review in the prongs to invoke the establishment of an ECC.⁵²

This time, in light of the *Lumber IV* outcome, some Senators suggested that panel decisions should be reviewed by Congress in order to avoid such errors or misapplication of U.S. law. Even though such reviewing body does not exist for NAFTA Chapter 19, the standard of review for an ECC is nonetheless very similar to what was intended for the Review Commission.⁵³ Resorting to an ECC seems to become a U.S. habit in highly litigious cases, as it was invoked in *Pork, Swine, Lumber III, Cement, Magnesium*, and *Lumber IV*. Yet, in all cases, the United States failed to have the panels'

⁵⁰ For arguments against the WTO DSM and how it is perceived as being inimical to the interests of U.S. producers, see Alan Wm. Wolf and John A. Ragosta, "How the Uruguay Round Will Change the Practice of International Trade Law in the United States: Two Views. View One: Will the WTO Result in International Trade Common Law? The Problem for U.S. Lawyers", in Terence P. Stewart (ed.), *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, Washington, DC: American Bar Association, Section of International Law and Practice, 1996, pp. 697-726.

⁵¹ Moyer, 1996, pp. 737-738.

⁵² See the Baker and Hosteler LLP study.

⁵³ Moyer, 1996, p. 753.

decisions reversed. This suggests that the allegations of the ITC in *Lumber IV* were to reach the political level, as they contained very sensitive arguments. Whereas Congress could not directly scrutinize NAFTA panel reviews, the allegations satisfied the requirement to invoke an ECC. While the case was still pending, the ITC's dissenting opinion already suggested that the whole issue was to be reviewed by an ECC. Later, at CFLI's request, a further allegation was added that one U.S. panellist was in a situation of conflict of interest.⁵⁴

3.2 Lumber IV and the U.S. Congress

Following the injury panel review in *Lumber IV*, six Senators, representing lumber producing constituencies, complained of the NAFTA ruling to the President. Senators asked the President to request an ECC and claimed that the NAFTA had lost credibility. Reflective of U.S. unilateralism, the reaction in the Senate was strong and the attacks on the injury panel and Chapter 19 were fierce. In fact, words such as runaway or even rogue panel could be heard. Senator Lincoln found it troubling that panellists are empowered to review trade remedy cases as to whether they are consistent with U.S. law, especially when decisions actually overturn U.S. law. Senator Craig added: "Simply put, here we go again having an international body full of individuals who disregard U.S. law, dictating the U.S. courts how to interpret our own laws". At the same time, it was suggested that not only did the panel commit errors, but did so deliberately. For Senator Craig, the ITC had not violated U.S. law as it faithfully complied with the panel's instructions, even though the latter failed to apply the proper standard of review and issued an unlawful order to reverse the ITC's findings. As he put it:

The ITC, as it is required by the NAFTA law Congress passed, has complied with the NAFTA panel order to reverse its affirmative threat of injury determination. Thankfully, however, the ITC emphasized that the NAFTA

⁵⁴ *Inside U.S. Trade*, 12 August 2005, p. 7.

panel had “violated U.S. law, exceeded its authority as established by the NAFTA [by] failing to apply the correct standard of review and by substituting its own judgment for that of the Commission”.⁵⁵

The issue that mostly concerned the Senators was the order from the panel instructing the ITC to reverse its finding from affirmative to negative. For these Senators, this “runaway” or “rogue” panel prevented the United States from offsetting the effect of Canadian unfair trade practices and, thus, violated the rights of American industries and workers to be protected against such practices. Senator Chambliss voiced these concerns: “We cannot allow our domestic industries and their workers to become defenceless against unfairly traded imports due to flawed decisions by runaway panels”.⁵⁶ Senator Craig commented that: “the rights of U.S. lumber producers to remedy against unfairly traded imports from Canada have been improperly curtailed by a runaway NAFTA Chapter 19 dispute settlement panel”. He added that: “this already *rogue panel* ordered the U.S. International Trade Commission to reverse its earlier ruling that, in fact, the U.S. lumber industry is injured by imports of subsidized and dumped Canadian lumber”⁵⁷ (emphasis added). Both Senators argued that the panel had no more right than a U.S. court to reverse an agency’s finding. In their view, the panel was way too intrusive as it dictated the outcome of the investigation. Therefore, it was not only that the panel made errors and that there were no checks, the panel was a rogue one and made its review based on a predetermined outcome. Judge Wilkey in 1994 and the Senate ten years later complained that the expertise of the agencies for making complex determinations was not recognized. Panel experts pretended to know better than the agencies what the decisions should be. The two Senators further argued that, in fact, this expertise was used against the agencies to confine their scope of action.

Consequently, the harsh criticism against the injury panel in *Lumber*

⁵⁵ U.S. Senate, Congressional Record, 5 October 2004, S10420-21.

⁵⁶ *Ibid.*, S10421.

⁵⁷ *Ibid.*, S10420.

IV was to completely overshadow the Commission's own intransigence and failure to respond adequately to the panel's instructions, which could also be recognized as a violation of U.S. law. Once again, the ITC did not hesitate and, indeed, had no difficulty to argue that it was forced to comply with unlawful orders. Such resentment towards international institutions reflects a U.S. tendency to unilateralism. Yet, this most acrimonious episode in the softwood lumber dispute happened in the aftermath of the events of 9/11, which have exacerbated U.S. unilateral tendencies. The United States was more aggressive in face of alleged cases of unfair trade practices, particularly as the NAFTA binational panel mechanism was perceived as preventing the U.S. application of trade remedies. *Lumber IV* also took place at a time Canada-U.S. relations were strained by divergent views over the war in Iraq and Canada's ambivalence towards the U.S. missile defence project.

Given the rise of U.S. unilateralism since 9/11 and a certain weakness of the American economy, it was no surprise that the U.S. frustration over free trade was at a high point.⁵⁸ Such anger against free trade was apparent in 2002 when the Trade Promotion Authority (TPA) was debated in both houses of the U.S. Congress, especially by representatives whose constituencies have, over the years, suffered from job losses and associated them with international trade. It is the prerogative of the Congress to grant the Executive the authority to negotiate free trade agreements. The protection of specific industries is usually part of the bargain between the Congress and the Executive for allowing TPA.⁵⁹ Hence, the climate of mistrust towards international institutions and international trade in general was high, particularly in the House where the TPA was accepted by only a thin majority.

Moreover, as Charles Doran points out, trade disputes involving agricultural and commodity products, as is the case with softwood lumber,

⁵⁸ Carl Grenier, "Getting Religion on Softwood Lumber: A Biblical Test of the Rule of Law", *Policy Options*, Vol. 27, No. 1, 2005-2006, p. 17.

⁵⁹ Gagné, 2003, p. 339.

tend to easily reach the political process because “they affect large numbers of voters, often concentrated within regions where their votes count even more”.⁶⁰ Indeed, in light of the coming presidential election in November 2004, the President could not ignore these facts.⁶¹ What is more telling, however, is that the protection of the U.S. economy against unfair trade practices is becoming a security issue and has been included in the *National Security Strategy of the United States of America*. In the latter, the presidential letter clearly specifies that the United States will pressure other countries to adopt economic policies similar to American ones. As John Herd Thompson argues, “this statement has profound implications for the U.S.-Canada relationship”. On Softwood Lumber, the U.S. position is that there would not be any dispute if Canada adopted an auction-based system to determine the price of stumpage.⁶²

One of the key concerns of the United States, and especially of Congress, is surely to offset the consequences of unfair trade practices. Overall, the Senators complained to the President that their already shaky confidence as well as that of their voters was greatly eroded. Senator Crapo indeed said that: “When NAFTA panels prevent appropriate enforcement of the U.S. trade laws, the public will cease supporting our participation in NAFTA”.⁶³ An argument the President could hardly afford to ignore. The binational panel system, as Judith Goldstein demonstrates, provides the President or the Executive with a better control over independent agencies, especially when protectionism is inconsistent with the national interest.⁶⁴ Besides, the NAFTA implementing legislation authorizes the President to

⁶⁰ Charles F. Doran, “Trade Dispute Resolution ‘on Trial’: Softwood Lumber”, *International Journal*, Vol. 51, No. 4, 1996, p. 724.

⁶¹ John Herd Thompson, “Playing by the New Washington Rules: The U.S.-Canada Relationship, 1994-2003”, *American Review of Canadian Studies*, Vol. 33, No. 1, 2003, p. 13.

⁶² *Ibid.* See also Gilbert Gagné and Éric Jasmin, “Les politiques forestières du Québec et le commerce «loyal»: le différend sur le bois d’œuvre”, *Canadian Public Policy*, Vol. 36, No. 1, 2010, pp. 91-106.

⁶³ U.S. Senate, Congressional Record, 5 October 2004, S10421.

⁶⁴ Judith Goldstein, “International Law and Domestic Institutions: Reconciling North American ‘Unfair’ Trade Laws”, *International Organization*, Vol. 50, No. 4, 1996, p. 556.

accept panel decisions and to force an agency to comply, even if the latter considers it unlawful to do so.⁶⁵ Within a context of growing unilateralism in the United States, the allegations of the ITC were to attract much attention in Congress, which then pressured the Executive to reject the order from the injury panel in *Lumber IV*. This could explain why the Bush Administration had no difficulty to refuse to revoke the order regardless of the ECC decision in August 2005.

The credibility of a binding dispute settlement mechanism ultimately rests upon the good faith of the parties to comply with its rulings. If compliance is crucial and the United States openly decides not to comply, for instance, with a WTO DSM ruling, it could expect others to adopt the same attitude when the United States is the plaintiff. As Moyer points out, non-compliance would result in “immediate stress on the WTO [DSM] and reduce credibility for the U.S. in multilateral trade discussions”.⁶⁶ However, according to Richard Cunningham, “the only way to send a shot across the bow may be to openly disagree with the WTO and to offer a thorough explanation of that disagreement”.⁶⁷ We saw that non-compliance is often defended by allegations of improper review, a strategy that the ITC has used extensively. In fact, Moyer asks whether such attacks and criticisms of the Chapter 19 process “are more reflective of litigation losses than of structural issues”.⁶⁸ It is rather easy in order to justify non-compliance to argue that a panel’s instructions were unlawful.

In *Lumber IV*, given that Congress was already infuriated with the fact that the injury panel directed the ITC to enter a negative determination, and in a context of American unilateralism, it would have been surprising for the United States to accept this result. Therefore, it refused to revoke the AD

⁶⁵ Cannon, 1996, p. 372.

⁶⁶ Moyer, 1996, p. 730.

⁶⁷ Richard O. Cunningham, “Dispute Settlement Through the Lens of ‘Free Flow of Trade’: A Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures”, *Journal of International Economic Law*, Vol. 6, No. 1, 2003, p. 170.

⁶⁸ Moyer, 1996, p. 747.

and CVD orders, regardless of the ECC's ruling. As a result, the question has been asked whether the credibility of the United States would be affected, especially with present or potential trading partners. As Michael Hart and Bill Dymond put it, the decision to ignore the ECC's ruling "brought into question the fundamental commitment of the United States to the rule of law and to its treaty obligations".⁶⁹ In fact, the United States is sometimes willing to disregard international trade rules to maintain its positions.⁷⁰ What is more troubling, however, is that not only international trade rules, here NAFTA provisions, were disregarded, but the United States' own domestic laws. Nonetheless, the blame was put exclusively on the injury panel. In the end, the key question was what to think of U.S. behaviour in light of the binding nature of NAFTA Chapter 19.

4. Conclusion

A NAFTA panel in the *Lumber IV* episode ruled that the ITC failed to prove a threat of material injury. According to the U.S. NAFTA implementing legislation, this decision was to have direct effect under U.S. law and U.S. administrative agencies were to duly implement it. An assessment of the ensuing U.S. allegations of improper panel review reveals that the nature of these allegations is not new and should not surprise anyone. The Chapter 19 system, however, is ill-equipped to deal with the failure of investigating agencies to respond adequately to panels' instructions on remands. As discussed before, such failure is clearly in violation of U.S. law, an issue which is hardly considered. Even though the United States acknowledges that, in rare circumstances, a NAFTA panel can direct a specific determination, it inevitably considers such an action as an excess of authority. Panels are easy targets for criticisms, which also carry sensitive arguments resonating in Congress, while the U.S. agencies' intransigence

⁶⁹ Michael Hart and Bill Dymond, "The Cul-de-Sac of Softwood Lumber", *Policy Options*, Vol. 26, No. 9, 2005, p. 24.

⁷⁰ Gagné, 2003, p. 340.

goes unnoticed or is justified by panels erring in their reviews. Whether U.S. agencies comply faithfully with their obligations under NAFTA and their own laws has not been addressed by the U.S. government. Although the United States often argues after an adverse decision that the integrity of the NAFTA panel system is threatened, it is actually the binding character of this mechanism that is compromised.

In line with U.S. unilateralism, between defending its implementation of domestic trade laws or the binding character of the NAFTA Chapter 19 process, the United States opts for the former as it is associated with the integrity of its laws. Thus, not only did the United States fail to respect its international obligations, its own agencies were disrespectful of U.S. laws. Nevertheless, the allegations made by the ITC and Congress alluded these two issues, insisting that the United States was subject to unlawful orders. Therefore, in *Lumber IV*, allegations of improper review provided the United States with arguments to discredit adverse findings and to justify its non-compliance with NAFTA panel rulings.