

# Intelligence MEMOS



From: Jon Johnson  
To: Canadians Following the Softwood Lumber Dispute  
Date: September 18, 2019  
Re: **THE LATEST MOVES ON SOFTWOOD LUMBER**

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The current softwood dispute between Canada and the US is moving forward on two fronts.

On the binational panel front, a NAFTA Chapter 19 panel considering the final injury determination by the US International Trade Commission (USITC) issued an Interim Decision and Order on September 4 remanding 11 issues back to the USITC for reconsideration.

The USITC makes injury determinations in US antidumping and countervailing duty cases. These duties cannot be levied unless the USITC finds that the dumping or subsidization is causing material injury to the US domestic industry.

With a remand decision, the binational panel identifies issues that it considers were not correctly decided (in this case under applicable US law) and orders that the responsible agency reconsider the matter in light of criteria identified by the panel. The panel identified 11 issues under five broad categories that now require USITC reconsideration.

The panel has given the USITC 90 days from September 4 to submit its redetermination. If not satisfied with the redetermination, the panel can remand issues back for further redetermination and, ultimately, can direct a decision by the USITC.

Two other binational panels have been established in the current dispute. One is reviewing the subsidy determination by the US Department of Commerce and the other panel is reviewing the department's determination that Canadian softwood was being dumped and that "critical circumstances" justified the imposition of retroactive duties. Neither of these panels has yet issued an order.

On the WTO front, Canada has initiated challenges of the Commerce department's dumping determination and its determination of subsidization.

The WTO panel in the dumping challenge released its report on April 9. While the panel took issue with certain aspects of the Commerce determination, it upheld its practice of "zeroing" under the particular circumstances of the case before it. Zeroing treats negative dumping margins (which occur when the export price exceeds the normal value) as zero so that only positive dumping margins count, which significantly increases the chances of an affirmative dumping finding.

Canada appealed this finding to the Appellate Body on June 4 but was advised that it would not be able to issue its report within the usual 60-day period owing to the queue of pending appeals, and it has still not reported.

The NAFTA binational panel process is much more effective than the WTO process for two reasons. First, it is embedded in US law and binational panel decisions are binding on the US Government. Second, with the remand process, a binational panel can focus on issues and ultimately force a determination by the US agency. A WTO panel, or the Appellate Body, simply issues its report, which the Dispute Settlement Body adopts, but it is left to the losing party to comply or not comply.

However, the binational panel process, while having survived the NAFTA renegotiation, remains vulnerable to a constitutional challenge by the US Lumber Coalition, which is a virtual certainty if the US loses.

While a constitutional challenge is by no means certain to succeed, its resolution through the US courts will take years, during which time the US Treasury will continue to collect deposits on account of the anti-dumping and countervailing duties. This will add pressure on Canada and its softwood lumber producers to accept yet another managed trade regime as occurred in 2006.

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