Intelligence MEMOS

As NAFTA renegotiations proceed through the summer and fall, the C.D. Howe Institute Intelligence Memos will be looking at what to expect and provide analysis on the latest developments at the table. This post is part of that series.

From: Jon Johnson

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

Date: August 18, 2017

Re: **Critical Choice Looming in Softwood Lumber**

While the renegotiation of NAFTA commenced only a few days ago, softwood lumber has been ticking along for some time along two parallel tracks. The first is negotiating a settlement that both the Canadian industry and the US industry can live with. The second the antidumping and countervailing duty trade actions that have been initiated by the US industry.

Settlement negotiations must continue, whether as part of the broader negotiations now currently underway or on a separate track. One significant benefit of settling is that the excess charges resulting from limiting the supply of Canadian softwood lumber to the US accrue to the benefit of the Canadian industry or provincial governments or both. Absent complete success in fighting the trade actions, the excess charges will take the form of antidumping and countervailing duties that will be paid into the US treasury.

While negotiating a settlement, Canada and the Canadian industry must keep their legal options open by resisting the trade actions. Final determinations of subsidy and dumping by the Department of Commerce (DOC) are expected in September. The US International Trade Commission (USITC) will make final determinations of injury or threat of injury shortly thereafter. Once these final determinations are made, the Canadian industry and the Canadian government will have a limited period of time to have these determinations reviewed, either through judicial review under the US system or by binational panels constituted under NAFTA Chapter 19. If Canada and the Canadian industry do not take either of these courses of action within the time periods prescribed, the final determinations take effect and the Canadian industry will be stuck with high duties for a long period of time. If this is permitted to happen, the US industry would no incentive to negotiate a settlement.

Canada and the Canadian industry will have a critical choice to make, namely between binational panel review under NAFTA Chapter 19 and judicial review under US law. Only one of these two options can be chosen.

Canada and the Canadian industry would doubtless feel more comfortable with binational panel review based on past experience. However, there are a host of problems with Chapter 19. Chapter 19 is on the NAFTA negotiating table and the US negotiators have made it very clear that they want to get rid of it. As occurred in Softwood IV, US agencies can significantly prolong the binational panel process, with duties continuing to pile up. The US lumber producers will doubtless challenge Chapter 19 in the US courts as being unconstitutional. This litigation could drag on for years, and the defendant in a constitutional challenge would be the US government, the same party whose negotiators will be demanding the removal of Chapter 19 in the NAFTA negotiations.

Given the difficulties presented by the binational panel approach, Canada and the Canadian industry will have to seriously consider the alternative of pursuing judicial review through the US system.

Jon Johnson was a former advisor to the Canadian Government during NAFTA negotiations and is a Senior Fellow at the C.D. Howe Institute.

To send a comment or leave feedback, email us at blog@cdhowe.org.