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Canadian Speaker Section 1: Canada and U.S Approaches to Free Trade Agreements - Canada Speaker

Simon V. Potter

CANADIAN SPEAKER

Simon V. Potter[†]

And I want to congratulate you on the years and years of work that you've made and put into making these programs so successful and so influential. It is a great honor, too, Madam Ambassador, to be sitting next to you. I must say I agree with very nearly everything you said.

It is right for us to speak about attitudes and approaches. What are the different approaches to free trade agreements? It is time really for a little sitting back and wondering what are the best approaches, what are the approaches of Canada, of the United States, perhaps of other countries, too. What approaches should we be encouraging on our respective countries?

Should we be optimistic? Should we be pessimistic? Should we be idealistic? Should we be cynical about things? The overriding point that I am going to try and give you is that there are many encouragements to cynicism these days, and we must resist them. We must find another approach than the growing cynicism, which I do see now.

Madam Ambassador, I agree with everything you said except one. I think it is impossible to look at the current question of free trade agreements generally and simply see dispute settlement problems as an add-on to that. It is impossible to look at Canada's approach to free trade, for example, or, I believe, America's approach to free trade without a real solid look at what's happening to dispute settlement these days. The handling of lumber, but not just lumber, but certainly lumber, is throwing a taint on things, which is un-

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avoidable and must be discussed. It cannot be looked at as just another thing in the bag.

Now, I am going to be provocative because, Henry, you like it that way – I am normally not provocative of course. I avoid it like the plague. That's right. However, I am termed provocative because, frankly, Henry, the court reporter's tie is making me dizzy, and I don't know if that comes from last night or –

(Laughter)

But it is also just to get the ball rolling and people talking, but I don't want my message to be that everything is wrong. I just want to be provocative. The fact is nearly everything is good, certainly between Canada and the United States.

What goes across the bridge between Detroit and Windsor just overshadows any other trading relationship in the world. Most of all of our trade – ninety-six percent of our trade is dispute free. So most things are great, and even when there is a problem, it generally gets settled quickly. But the ones that don't get settled really do throw a taint.

Now, sitting back a bit, just what is the Canadian approach to free trade? I think it can be summed up in two things: First of all free trade is good. I think, though it wondered about this some years ago, there is no dispute in Canada now. Free trade is good. Free trade has worked. The Government of Canada web site, and Canada is not known for putting on web sites things that people don't actually agree with beforehand –

(Laughter.)

The web site says the agreement has brought economic growth and rising standards of living for people everywhere, a function for future growth,[1] and what is more – and this is another theme I am going to try and set out and you have used it too, Madam Ambassador, the "valuable example". If we can't make our Free Trade Agreement work between two such friends, what example is that for the FTAA or the CAFTA? We have got to make this thing work if we want those other things to work.

The other Canadian attitude, the second of the two, not only is free trade good but order is good. And this is a Canadian value. Americans live on the pursuit of happiness and liberty and shoot 'em up at the corral, but the Canadian constitution talks about "peace, order and good Government."[2]

The Canadian value of order is reflected in the Canadian approach to free trade. Order is good. Rules, we like rules. Rules are very, very good, and, of course, that's understandable. If you are a small country next to a big coun-

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[1] NAFTA Secretariat, Canadian Section, DPR 2001-2002, Nov. 7, 2002, *available at* http://tbs-sct.gc.ca/rma/dpr/01-02/NAFTA/nafta01-02dpr02_e.asp (last visited October 17, 2005).

[2] Section 91 of the Constitution Act, 1867 (U.K.).

try, you want the rules. You can't just be having people doing whatever they like.

The only way you will have influence as a smaller country is to have the rules, so rules are good, and I think it was this value of rules of order which brought Canada to have initially very, very big enthusiasm about the Free Trade Agreement.

But I think we have to ask your question, Dick: Have we had a move to entropy? Are we suddenly spinning – it is that tie again – are we spinning out of control into disorder?

This is Canada's web site on the FTAA. "Canada supports developing consistent" – this is the first paragraph – "developing consistent, predictable and transparent rules", et cetera, et cetera.[3]

And we want everybody to follow the rules. We want rules. Some people might have trouble, says the web site, getting to these rules; some countries may need a little bit of time.[4] That's okay. We just want to get them to the rules, says Canada's web site,[5] so this is a very – I think it is a present, conscious attitude on the part of Canada towards free trade agreements, and this comes through, as well, if we look at even the provinces.

The provinces have their own web sites as to whether they like free trade, and British Columbia, just as an example (they all say the same thing) says having "well defined rules helps ensure our trading partners" – guess which one – "are not unfairly impeding the flow of goods" – guess which good – "from British Columbia."[6]

This is what is called transparency.

(Laughter.)

Now, in the NAFTA – in your materials, you have the NAFTA, starts with Article I. You don't have the preamble, but let me just read a few things from the NAFTA preamble. "The Governments of Canada, United Mexican States, United States of America resolve to" – bla, bla, bla – "contribute to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation."[7]

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[3] Free Trade Area of the Americas (FTAA), FTAA Draft Text, Canada's Positions and Proposals, and Frequently Asked Questions, Draft Market Access Chapters – Canada's Position and Proposals. Nov. 21, 2003, *available at* http://www.dfait-maeci.gc.ca/trade/tna-nac/MA-P&P-en.asp (last visited October 17, 2005).

[4] *Id.*

[5] *Id.*

[6] Government of British Columbia, Ministry of Economic Development, Programs & Services, Trade Agreements and Negotiations – Overview, *available at* http://www.ei.gov.bc.ca/programsandservices/trade (last visited October 17, 2005).

[7] North American Free Trade Agreement Preamb., U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289, 297 (1993) [hereinafter NAFTA].

This is the business about an example of hoping that this thing actually encourages other people to do the same thing. And one of our questions on cynicism is going to have to be: Are we by our operation of NAFTA really encouraging people to do these free trade agreements, or are we giving them a message the "what's the point?"

This is the preamble: "Establish clear and mutually advantageous rules", "ensure a predictable trading environment",[8] and, of course, when you get to the objectives, which are in your materials at tab 1,[9] you have things which echo that, but we also have as an objective in the NAFTA - and this, of course, was a prime Canadian objective to create effective procedures for, among other things, the resolution of disputes.[10]

It doesn't say provide procedures which actually don't lead to anything, for the eternal wrangling of disputes.[11] It says create effective procedures for the resolution of disputes,[12] and I think if you ask Canadians in the business now whether we are accomplishing that, people are going to say well, you know, it doesn't look like it.

Are you, Canada, prepared to go to Rio and to go to Buenos Aires and to encourage these people to get into a new Free Trade Agreement with the States? Are we prepared to advertise dispute settlement – well, no, frankly, we are not. So the example thing is taking a beating.

Interestingly in the Free Trade Agreement between Canada and Israel, there is absolutely nothing either in the preamble or the objectives about the resolution of disputes.[13] I wonder why.

So the Canadian view has generally been – and I think can be again – that NAFTA has been a great success; that free trade agreements are good; that order, which can be brought to trade, is good. And I think that there is a general view in the United States of the same thing.

In your materials, you have speeches from Senator Chuck Hagel, a Republican, and speeches from Aldonas, who bases his view of success mostly on the numbers.[14] But generally, people are saying that this is a good thing. In those speeches, though, comes across another difference in approach, an-

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[8] *Id.*

[9] *Id.* at Art. 102.

[10] *Id.* at ¶1(e).

[11] *Id.* at Art. 102.

[12] *Id.* at ¶1(e).

[13] Free Trade Agreement Between the Government of Canada and the Government of the State of Israel, Jul. 31, 1996, Art. 1.2, Art. ¶1, *available at* http://www.dfait-maeci.gc.ca/tna-nac/cifta-en.asp.

[14] *See NAFTA: A Ten Year Perspective and Implications For the Future: Hearing before the Senate Foreign Relations Comm.*, 108th Cong. 3-5 (2004) (statement of Grant Aldonas, Under Sec'y for Int'l Trade Admin.).

other difference in attitude, which also came out a little bit, Madam Ambassador, in your talk.

In American discourse, there are things which don't exist in Canadian discourse, and this is an example: There was a view expressed in those speeches by Aldonas – but also by Assistant Secretary Earl Anthony Wayne of the State Department – that the purpose of NAFTA is actually to get domestic change on a political level in the other country.[15] It is not just trade. It is not just movement. It is not just rules. It is actually to change the politics in the other country.

Aldonas said Mexico now has a healthy democracy, and that's because of NAFTA, he said.[16] Maybe it is. But I don't know. This is a very explicit articulation of a purpose for a free trade agreement, which is not part of the Canadian attitude or approach.

Indeed, Madam Ambassador, you made the point – and it is true – it is unbelievable for Canadians, but it is true, that free trade agreements are used not only to change the political climate but to change another country's foreign policy.

You said – and it is true – the American Government uses free trade agreements as a carrot, as a reward for allies, for people who do the right thing in, for example, the Middle East. That I can tell you is not part of the Canadian approach or attitude. The Canadian attitude is: Let's get the trade moving. The rules will help us, and things will sort themselves out.[17]

And additionally, we see – and I was very happy to hear your approach, Madam Ambassador, to it – that NAFTA has to be an instrument of security in this new world, that we must use NAFTA to make sure we have security.

That is not the Canadian view, and the Canada approach is much more like yours, Madam Ambassador; yes, we must have security, but we must use NAFTA to make sure that the security measures do not get in the way of an efficient and free movement of trade.[18]

So now, with that step backwards, let me move to the problems, the problems which get in the way of being too idealistic about these free trade agreements, which get in the way of our Free Trade Agreement between two

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[15] *See id.* at 5-7 (statement of Earl Anthony Wayne, Assistant Sec'y for Econ. & Bus. Affairs).

[16] *NAFTA: A Ten Year Perspective and Implications for The Future*: *Hearing Before the Subcomm. on International Economic Policy, Export and Trade Promotion of the S. Comm. on Foreign Relations*, 108th Cong. 4 (2004) (statement of Grant Aldonas, Under Secretary for Int'l Trade Admin., Dep't of Commerce).

[17] *See generally* Press Release, World Trade Organization, *Canada's Domestic and External Reforms Help Create Stronger Base for Economic Expansion* (Nov. 11, 1996), *available at* http://www.wto.org/english/tratop_e/tpr_e/tp48_e.htm.

[18] *See generally id.*

such friends being advertising for the next Free Trade Agreement with the next country.

We see a growing view in Canada, and I would say not only growing and broadening, but deepening. It is going to be very hard to change people's attitudes about this in Canada, certainly after lumber, but lumber is not the only one, a growing view that the American side has an astonishing attachment to technical detail, much more of an attachment to that than to the spirit of the agreement itself. There is now a well-entrenched view that the U.S. is always ready to play hardball and to push that envelope, and to go one more, one more, and one more step to get what it wants, despite what the agreement says and despite what the dispute settlement says.

Imagine as well – take yourselves outside the NAFTA and imagine that you are in a Third World country, and you're receiving advice from the United States. Oh, you must reduce your barriers to trade. Please get rid of all your customs duties. We would love to have duty-free trade. And the next thing you know you have discussions of quotas in Congress. You have AD/CVD hearings. You have safeguard proceedings. You have textile quotas. This does not encourage, I think, a view of an American attachment to principle and to spirit of agreements.

And if we look at the lumber case, I think it is very hard not to draw some very, very difficult conclusions, very hard not to draw the conclusion that we have some mending to do.

First of all, leaving aside the current dispute, the fact that we are in Lumber IV[19] and that people are now talking about trying to avoid, if we possibly can, Lumber V, this doesn't indicate that we are on the right track. The fact that in all of these lumber cases the DOC has changed its methodology not four, five times but 30 times in calculating whether there is or is not a subsidy, how to calculate how much it is, which benchmarks to use.[20]

Even in the current Lumber IV case, we have had an all-country Canada rate calculated by DOC, which depending on the month has been 20 percent, or 1 percent.[21] This doesn't sit well with the Canadian view that we should be living by rules.

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[19] *See* Ross W. Gorte & Jeanne Grimmett, *Lumber Imports From Canada: Issues and Events*, Congressional Research Service (2002). *See also Canada-U.S. Lumber Trade Disputes, available at* http://www.for.gov.bc.ca/HET/Softwood/disputes.htm.

[20] *See generally* Mark Benitah, *Canadian Softwood Lumber: What Kind of Ruling Could Emerge from a WTO Panel?*, American Society of International Law, March, 2002, *available at* http://www.asil.org/insights/insigh85.htm.

[21] *See generally Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Softwood Lumber Products From Canada,* 69 Fed. Reg. 3415 (Int'l Trade Admin. June 14, 2004).

What about America's use of Section 129,[22] a perfectly good provision of law, which allows the United States to comply with a WTO decision that one of its agencies has gone the wrong way, and really they should have a negative injury finding?[23]

Well, in lumber, we had a NAFTA panel essentially strike down the injury finding by the ITC,[24] and we also had a WTO finding saying that that ITC determination could not have been rendered by an impartial body. Can you imagine language more strong from Geneva?

So the United States says well, great. Let's use our Section 129, and under the guise of complying with WTO judgment, we will come out with a new injury finding, which will then trump the loss we have had before a NAFTA panel.[25] We will use one loss to get out of another loss. This doesn't strike trading partners as playing by the spirit of things.

The Byrd Amendment: you have got judgments saying you must get rid of Byrd, but nothing is done to do it.[26] This does not strike people as playing by the rules.

And the lumber duty deposits, there are $4 billion dollars of deposits now.[27] If this dispute goes on much longer, it could predictably be $10 billion dollars sitting in trust in Washington, and the statement we get out of Mr. Aldonas just a few months ago is that there will be no refund of that money.[28] Even if the U.S. loses all the litigation, there will be no refund of that

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[22] *See* Ross W. Gorte & Jeanne Grimmett, *Softwood Lumber Imports from Canada: Issues and Events*, Congressional Research Service (2005).

[23] *See generally id.*

[24] *See generally id.*

[25] *See generally* Yoshiki Naiki, *The Mandatory/Discretionary Doctrine in WTO Law The US – Section 301 Case and Its Aftermath*, 7 J. Int'l Econ. L. 23, 65; *see also* Barbara Tillman, *Preliminary Determination Under Section 129 of the Uruguay Round Agreements Act: Anti-dumping Measures on Certain Softwood Lumber Products from Canada*, U.S. Department of Commerce, Import Administration, *available at* http://ia.ita.doc.gov/download/section129/Canada-Lumber-129-Prelim-013105.pdf.

[26] *See generally Byrd Amendment: Canada to Retaliate Against United States*, Canada's Department of Foreign Affairs and International Trade, March 31, 2005 (presents Canada's view of the Byrd Amendment as anti-free trade), No. 56, *available at* http://w01.international.gc.ca/minpub/Publication.asp?publication_id=382342&language=E; *see also The Continued Dumping and Subsidy Offset Act ("Byrd Amendment")*, Congressional Research Service Report for Congress, Aug. 22, 2005 (explains the Byrd Amendment's recent controversial history with the WTO and Canada)., *available at* http://www.dfait.maeci.gc.ca/tna-nac/documents/RL33045.pdf

[27] *Aldonas Says U.S. Will Not Return Lumber with Canada over Duties; NAFTA Dispute*, INSIDE U.S. TRADE, Jan. 28, 2005 [hereinafter *Aldonas Says*]; Barrie McKenna, *Talks Only Way to End Softwood Fight, U.S. Official Says*, GLOBE AND MAIL, Jan. 26, 2005, at B8.

[28] *Aldonas Says, supra* note 27, at 24.

money.[29] The only way you can get a refund, he said, is by making a deal with us.[30]

Even if the logical conclusion after all this judicial review is that those duties ought never to have been collected in the first place, you are not going to see a penny unless we make a deal. What kind of deal? A deal like the softwood lumber agreement. A deal which is the antithesis of free trade.

In order for you to get your money back, you must make a deal, which is the antithesis of free trade. This is not designed to encourage idealism.

Not only that, why aren't you getting your money back? Well, because you are not Korea. If you were Korea, you might have won this judgment, and you could have then had your refund but, unfortunately, you made the mistake of attacking this thing under the wonderful NAFTA, and since you've done it under NAFTA, well, you don't get your money back. The implementing legislation is different for NAFTA than for the WTO and, because Canada actually uses its free trade agreement, Canada is worse off than Korea, it turns out.

Well, this is not an encouragement so sign another Free Trade Agreement. And if you are looking at this and you're Brazil, it doesn't make you think warm and friendly thoughts about it. Let me just read you the Crédit Suisse report about this. It is not just Canada saying this; the whole world is saying this.

I can't possibly finish this in two minutes. You might as well put that down.

This is Crédit Suisse:

> Canada uses some funny non-market mechanisms to price the timber it sells to paper and wood companies, and they are different from the funny non-market mechanisms used by the U.S. Government. So Congress, through the Commerce Department, gets a pile of lawyers to make a big deal out of the differences with the goal of trying to prop up an underinvested U.S. wood industry by using trade policy to penalize a better invested Western Canadian wood industry: classic protectionist policy and bipartisan to boot.

Then he goes on about, you know, whether there is any point in signing a Free Trade Agreement. Crédit Suisse:

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[29] Chuck Gastle, *U.S. Playing Hardball with Canada over Duties; NAFTA Dispute*, TORONTO STAR, July 30, 2004 at A19.

[30] *Aldonas Says*, *supra* note 27, at 24.

> Commerce understands that the laws and the treaties make it impossible for Canada to win in the real world. Even if they win every time in Court, it takes years to get through the courts, and by the time you do, the tariffs, duties, and quotas the U.S. has imposed have completely wrecked the targeted industry in Canada. So who cares what the courts say?

That's Crédit Suisse talking.

I am going to add something now. There is another thing going on – and you referred to it, Madam Ambassador – which is very difficult for Canadian ears, and it is a level of discourtesy, a hard-ball discourtesy, which for Canadians is a very difficult thing to swallow. And this is not just by protectionist senators, something we are used to; it is actual discourtesy by the administrative agencies, towards a panel of judicial review. Not only the very existence of extraordinary challenge based on personalized approaches as you have mentioned, but in briefs, in filings, in public statements, the most immoderate and scathingly insulting language, and this of a unanimous panel.

It is as though the U.S. institutions had concluded that, because deference is owed by the panel, the judicial review panel, there is no deference owed to it. This for Canadians is a very hard thing to understand. And it doesn't make us feel at home in the system. And I expect you would have the same difficulty of feeling at home in the system if you were Venezuelan or Central American.

There is a huge irony as well, which goes to whether America plays by the spirit or not. The fact is the NAFTA forced Canada to make a change in its law compared to what the FTA had required.[31] Under the NAFTA, Canada had to change its law to make Canadian judicial review less deferential.[32]

Now, why was Chapter 19 needed in the first place? It was needed in the first place because of a perception of bias, because business was not comfortable. There was an apprehension of bias which had to be countered. But now we have a WTO panel talking about a judgment which could not have been rendered by an impartial body, and we get to a point where it appears that Commerce and the ITC and the Administration generally are encouraging a politicized, energetic hard-ball approach to things.

Chapter 19 was needed not just because of the bias but to reduce the delays. The delays for judicial review before NAFTA were as long as 1,210 days to get something through the CIT.[33] NAFTA came in great for the first

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[31] Free Trade Agreement, Can.-U.S., Jan. 2, 1988, 27 I.L.M. 281, Art. 1904.

[32] *See* NAFTA, *supra* note 7.

[33] Patrick Macrory, Commentary, *Dispute Settlement in the NAFTA: A Surprising Record of Success*, 168 C.D. HOWE INST. (2002).

five or six years. It was 315 days.[34] Wonderful improvement, but that 315 days is now 768.[35] And nothing is ever over. In every administrative review even for the same product, you have got to argue the same case again. People say when you get to Pork XIV, what's the point?

So let me conclude by addressing what is it that has to happen? There are only three choices: Either we forget Chapter 19 altogether, and I can tell you right now most Canadian lawyers are saying do not use Chapter 19 in the States. Don't do it. What's the point? You don't get your money back first of all. And you are going to get into this unbelievable business of people insulting each other in public.

Secondly, if you don't just abandon Chapter 19, maybe you should fix Chapter 19 by giving more money to the secretariat. The U.S. NAFTA Secretariat has ten times the workload of the Ottawa Secretariat and one-third the budget.[36] We need some kind of precedential value in there. We can't have the DOC relying on the words "particular matter" in 1904.13[37] in order to say that you have to re-litigate every issue in every administrative review. That cannot go on. So the second way is to fix it.

The third way, which I think is the right way but will never happen, is to get rid of dumping altogether between our two countries. Who cares about it? Really. The Chile-Canada Free Trade Agreement says we won't have anti-dumping procedures against each other.[38] We just won't do it.

Now, why can't we do that if we really are after integration? I think it is the right way, but I agree, Madam Ambassador, it is just not going to happen. We will not get there.

So it leaves us with only one alternative: The manageable and the modest, but with determination, as you say, Madam Ambassador, we can get there. We must sit back and quietly fix this thing. And if we leave NAFTA and look generally at the question of free trade agreements, what is the approach, Henry, that we should have both in Washington and in Ottawa?

It must be that we must get away from this cynicism. We must stop being cynical, and we must stop doing things which breed the cynicism. We have to be perhaps a little more boyish about it.

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[34] NAFTA, *supra* note 7, at art. 1904.

[35] Memorandum from Baker & Hostetler LLP on Investment and Trade Disputes in North America: Institutional Failures and Government Apprehension to The Can.-American Bus.Council and the Ctr. for Strategic and Int'l Studies (June 16, 2004), *available at* http://www.canambusco.org.

[36] NAFTA Secretariat Can. Section – Report on Plans and Priorities (October 2005) *available at* http://www.nafta-sec-alena.org/Canada/index_e.aspx?DetailID=913; *see also* US Customs and Border Protection (October 2005) http://www.cbp.gov/nafta/nafta008.htm.

[37] NAFTA, *supra* note 7, at art. 1904.13, ¶3.

[38] Free Trade Agreement, Can.- Chile, Dec. 5, 1996, 36 I.L.M. 1067, Art. M-01.

Maybe the Canadian view is naive and a little boyish, but maybe we have to get a little more that way. And that means for example: Can we really preserve a Sugar Program in something called the Free Trade Agreement? I don't think we can. Can we really preserve Canadian measures regarding dairy and cheese and eggs and so on? No, we can't. Let's get a little bit more idealistic and in that way save something which has been really of an immense benefit, not just to us but as an example to the rest of the world.

MR. CUNNINGHAM: Thank you, Simon. Before we turn to questions, I would like to make a point and clarify a point. The point I want to make is that while it is absolutely justifiable to reach a state of deep despair as to NAFTA, when one focuses on cases like softwood lumber, don't be in total despair because NAFTA is still working in other context and is still achieving things in other context.

This last year we got the long-standing antidumping order on magnesium obliterated over the strong opposition of the Commerce Department by a NAFTA panel.[39] NAFTA can work. The political cases are very difficult for it to work.

Now, let me get to the clarification because this is, after all, the U.S.-Canada – Canada-U.S. – sorry, I lost my head – Canada-U.S. Law Institute, and I think it is important for you to understand the two points of law that the U.S. relies upon for all – for most of this obstructionist and perplexing tactical effort that Simon so complains of and justifiably.

But there are two points of law: One is retroactivity. Under U.S. implementation of law, U.S. law and NAFTA, decisions of a NAFTA panel cannot have retroactive effect.[40] Ah, but you say, those duties haven't been collected yet. Surely the NAFTA panel's effect could be to prevent the collection of the duties and, thus, require the refund of the deposits.

U.S. law is more specific than that. What the U.S. law says is that the action of a panel can have no effect as to imports that enter the country, United States, prior to the panel's decision.[41] That means that all of those imports have to be finally liquidated, duties finally assessed up till the day – all those imports that came in before the panel decision have to be liquidated as if there was no panel decision.

Second issue of law that underlies the U.S. tactical work here is the implementation provision. Let me just speak for a moment to give you a little history on this. The United States jurisprudence, there is a wonderfully

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[39] NAFTA Chapter 19, "Pure Magnesium From Canada," USA-CDA-00-1904-06 (October 27, 2002).

[40] United States-Sec. 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221 (Jan. 22, 2002).

[41] *See id.*

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named case called *Charming Betsy*,[42] a recent decision from the Supreme Court in 1804 or thereabouts, and it says that, where possible, United States laws are to be interpreted so as not to have an inconsistency between U.S. law and U.S. international agreement obligations.[43]

The position very recently has evolved in the U.S. Administration, in the Justice Department, in the U.S. Trade Representative, the International Trade Commission, the Commerce Department is that has no relevance whatsoever to international trade agreement decisions and provisions relating to the U.S. import relief decisions.

Why is that you say?

Well, the U.S. Government now is taking the position in court that because we have Section 129, a provision which specifically says that there is a process for the U.S. Administration, the executive branch to implement decisions by NAFTA panels, WTO panels, that that is the only way – the only way in which U.S. law can take any account of those decisions.[44]

Therefore, there is no precedent setting. There is no general effect of the decisions, and a U.S. court – *Charming Betsy* to the contrary – may not look to the decisions of an international panel for guidance on how to interpret U.S. trade law, even though these trade laws that are being interpreted by the courts are trade laws primarily and from the Uruguay Round Agreement Act;[45] an act explicitly to conform U.S. law to those international agreements.[46] But that is now the position of the U.S. Government. Whether it will stand up in court is still somewhat in doubt.

The court recently in the *Allegheny Ludlum* case seemed to go against that position,[47] on the other hand; the case that unfortunately we handled where, of course, they went the other way and seemed to uphold that position by the Government. The returns aren't all in on that, but these are the two law points, retroactivity and implementation only; no precedent, no effect on interpretation of U.S. law. Those are the two law points that underlie the U.S.' tactical work in cases like softwood lumber.

So if we have a few minutes you think, Henry?

DR. KING: Yeah.

MR. CUNNINGHAM: And I bet I know who has the first question. Henry, I call on Henry King.

(Laughter.)

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[42] Murray v. Schooner Charming Betsy, 6 U.S. 64 (1804).

[43] *See id.*

[44] United States-Sec. 129(c)(1) of the Uruguay Round Agreements Act, WT/DS221.

[45] Uruguay Round Agreements Act, Pub. L. No. 103-465 § 513, 108 Stat. 4809, 4975 (1994) (codified at 18 U.S.C. § 2319A (2002)).

[46] *Id.*

[47] Allegheny Ludlum Corp. v. U.S, 367 F.3d 1339, 1344 (Fed. Cir. 2004).