NAFTA INJURY PANEL DECISION

Mr. CRAIG. Mr. President, I rise today to express my deep concern 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.

Because of the significant impact on many of our States, today I am joined by Mr. BAUCUS, Mr. CHAMBLISS, Mrs. LINCOLN, Mr. CRAPO, Mr. SMITH, and Mr. WYDEN for a discussion about the NAFTA Injury Panel and Order of August 31, 2004.

On August 31, 2004, this already rogue panel ordered the U.S. International Trade Commission to reverse its earlier rulings that, in fact, the U.S. lumber industry is injured by imports of subsidized and dumped Canadian lumber. In doing so, the NAFTA panel clearly exceeded its authority under U.S. law.

As we all know, Chapter 19 panels reviewing U.S. trade cases are to decide issues under U.S. law just like U.S. courts, applying the same legal standards and subject to the same limitations on their jurisdiction and authority. In fact, as it is structured, NAFTA panels have less authority because they do not have the ability to issue injunctions the way federal courts do.

As many of my colleagues know, just last year the U.S. Court of Appeals for the Federal Circuit, interpreting Supreme Court precedent, stated explicitly that a Federal court cannot simply reverse an ITC decision and cannot order the ITC to change its ruling from affirmative to negative. However, this is just what the NAFTA panel did in this case—told the United States ITC to change its previous ruling. U.S. courts have long determined that if some aspect of an ITC decision is not adequately supported by the evidence cited by the ITC, the proper action by a court is to remand the case to the ITC for further substantive analysis. Yet, in the lumber case the NAFTA panel expressly told the ITC it could not further analyze the facts and issues before it, but could only issue a new decision consistent with the NAFTA panel's view that the U.S. industry is not threatened with injury. This very action is usurping due process.

In other words, the NAFTA panel has effectively tied the hands of U.S. courts and prevented U.S. Federal courts from acting. This is exactly why I voted against NAFTA when it came up for a vote years ago. Simply put, here we go again having an international body, full of individuals who disregard U.S. law, dictating to the U.S. courts how to interpret our own laws. Not on my watch. I ask the rhetorical question, how can this NAFTA ruling be consistent with the requirements of the NAFTA agreement that Chapter 19 panels are to follow U.S. law when reviewing U.S. agency decisions? This ruling, without question, is a fundamental breach of the terms of the agreement—a breach that goes to the very integrity of the NAFTA dispute settlement system itself.

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 panel had ''violated U.S. law and 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.'' The Commission further described ''the panel's decisions throughout this proceeding as overstepping its authority, violating the NAFTA, seriously departing from fundamental rules of procedure, and committing legal error.''

My confidence in the NAFTA has always been shaky at best, but today that confidence is completely eroded. The Commission's expressed views on this matter are highly telling and descriptive of the NAFTA panel's overreaching and exceeding of its authority. I therefore wish to enter in their entirety into the RECORD the ''Views of the Commission in Response to the Panel Decision and Order of August 31, 2004'' issued by the Commission on September 10, 2004.

Mr. BAUCUS. Mr. President, I share the concerns of my colleague. For many U.S. industries, the laws against unfair trade are the last line of defense. American workers and their families should be able to count on the enforcement of U.S. antidumping and countervailing duty laws to provide a level playing field, and they should be able to rely on the Congress to ensure that those laws are fully enforced. The manner in which agency decisions are affected by NAFTA panel decisions should be closely scrutinized by the Senate.

As my colleague indicated, under the terms of the NAFTA, Chapter 19 panels are supposed to apply the law just as would a U.S. court. They are supposed to be bound by U.S. court precedents in their interpretation of U.S. law. Unfortunately, it has become clear that some of these panels think they do not have to abide by these rules. Again, one of the most blatant examples of this problem involves the ongoing lumber case.

Earlier this year, the same panel that recently ordered the ITC to reverse itself had questioned some of the reasoning of the ITC in its injury decision and sent the case back to the ITC for further explanation. My understanding is that the Federal courts issue such remand orders all the time. Here, however, the panel not only told the ITC to reconsider its decision, but then gave the Commission only 7 business days in which to complete its remand determination, instead of the 60 to 90 days that a court would normally give.

In response to this order from the panel, the Commission requested additional time, and explained that to properly address the panel's concerns, the ITC would have to gather new evidence and request additional comments from the parties to the case, so that all views could be heard. This should have been an easy request for the panel to grant, because just a few months earlier the U.S. Court of Appeals for the Federal Circuit had issued an opinion stating plainly that the decision to reopen the record on remand rested exclusively with the ITC. Incredibly, the NAFTA panel ignored this binding court ruling and forbade the Commission to consider new evidence, and again demanded a new determination by the ITC in a mere 7 business days. This is another clear case of overreaching by a NAFTA panel that should not be permitted.

Continued support for free trade initiatives such as NAFTA rests upon the promise of full enforcement of U.S. laws. American industries and workers must be able to rely on the promises made to them by the Congress that unfair trade practices will not be tolerated. When NAFTA panels exceed their authority, confidence is lost not only in the dispute settlement system but in trade agreements generally. We need to inject credibility back into the NAFTA system by reforming Chapter 19.

Mr. CHAMBLISS. I wholeheartedly concur with the concerns of my colleagues regarding the far-reaching effects of NAFTA panel decisions. I am especially troubled by the fact that NAFTA panels often blatantly fail to apply the required standard of review.

NAFTA requires panels to apply the standard of review of the country imposing the duty. The panels are thus obliged to apply the same standard as would the U.S. Court of International Trade—namely, to determine whether the ITC's decision was reasonable and supported by substantial evidence on the record of the case, even if there was also evidence supporting an alternative conclusion. The courts—and NAFTA panels—are not supposed to second-guess the ITC or reweigh the evidence considered by the ITC, but simply to ensure there is a reasonable basis in the record to support the Commission's conclusions. In practice, however, NAFTA panels have often ignored this requirement and have instead substituted their judgment for that of the ITC or the Commerce Department.

This is especially problematic given that agencies review all of the evidence collected during a proceeding, have substantial experience administering the laws, and often consult with and advise Congress in the drafting of the statutes.

Unlike a court or a panel, the ITC has the resources—including industry analysts, economists, and accountants—and the expertise needed to review and analyze the often voluminous records in these proceedings. The Commission is therefore plainly better suited to make determinations based on the facts. As a result, U.S. law could not be clearer: Courts and panels are

not to second-guess an agency but are only to ensure that the agency followed the express requirements of the statute and that there is substantial evidence—''more than a scintilla''—in support of the agency's ultimate conclusion. While the U.S. courts follow this essential element of review in administrative cases, the NAFTA panels do not.

Indeed, as the recent ITC decision referenced by my colleague makes clear, in the softwood lumber injury case the NAFTA panel substituted its judgment for that of the International Trade Commission on any number of evidentiary questions. Unfortunately, the lumber panel is just the latest example of a proceeding in which NAFTA panels have reached legally untenable results completely at odds with U.S. law and NAFTA requirements. We in Congress must monitor this situation very closely. We cannot allow our domestic industries and their workers to become defenseless against unfairly traded imports due to flawed decisions by runaway panels. A better means of dispute settlement within the NAFTA must be created, and the proper standard of review requirements must be enforced.

Mrs. LINCOLN. Mr. President, there is another aspect of the recent softwood lumber NAFTA panel process that deserves our attention. As you know, NAFTA Chapter 19 is a unique form of international dispute settlement that applies to antidumping and subsidy cases involving Canada and Mexico. Normally, U.S. Government decisions to impose duties on unfairly traded goods are reviewed by the U.S. Court of International Trade, a Federal court with judges appointed by the President with the advice and consent of the Senate. For dumped and subsidized goods from Canada and Mexico, however, court review is often replaced with review by a panel of private citizens—mostly members of the bar or other private citizens who are experts in various capacities, but who are not themselves U.S. jurists.

Chapter 19 empowers these panelists to review U.S. legal decisions according to whether they are consistent with NAFTA obligations. Unlike any dispute settlement system in any other trade agreement to which the U.S. is a party, Chapter 19 also empowers these panelists to review cases according to whether they are consistent with U.S. law. NAFTA inherited this particular power from the preceding U.S.-Canada Free Trade Agreement. Unfortunately, as in the softwood case, this system has led to panel judgments that actually overturn valid U.S. legal decisions.

I find this state of affairs to be extremely troubling. In my view, Chapter 19 is clearly in need of reform, and the Senate must be prepared to act to revise this system to prevent unjust situations. If we hope to maintain confidence in, and public support for, our system of trade, then we have to repair the system when it doesn't work. The NAFTA panel in the softwood case has dealt a major blow to our faith in the system. It is time we did something about it.

Mr. CRAPO. Mr. President, I concur with my colleague that the integrity of the NAFTA panel system has been put into serious doubt as a result of the recent panel decision in the softwood lumber case. When NAFTA panels prevent appropriate enforcement of the U.S. trade laws, the public will cease supporting our participation in NAFTA. It is simply unacceptable for a NAFTA panel to dictate the outcome of an investigation to any U.S. court or agency. That is not the purpose of a NAFTA panel. Such authority was not granted by the U.S. Congress to the NAFTA, the WTO, or any other foreign organization.

Congress approved the NAFTA based on its understanding that effective trade remedies would not be eroded. Preservation of these remedies is essential to the overall process of opening foreign markets to imports of goods and services and to prevent harm to American industry and agriculture. Popular support for the principles of free trade and the NAFTA as a whole will be weakened if the dispute settlement system is continually misused to overturn legitimate agency decisions.

In my view, it is essential that future NAFTA panel decisions are carefully scrutinized by Congress. With respect to the seriously flawed NAFTA panel decision in the softwood lumber case, I believe the U.S. Government must pursue an Extraordinary Challenge Committee appeal in order to restore the rights of the American industry and its workers.

Mr. SMITH. Mr. President, I would like to join my colleagues in expressing concern about the Canadian lumber NAFTA panel decision. The experience in the lumber case suggests that greater safeguards may be needed to prevent abuse by rogue panels. Without such reform, I fear Canada will continue its strategy of litigation over negotiation. Indeed, the softwood lumber dispute has reached a critical phase. Since backing away from a tentative agreement reached in December 2003, the Canadian Government has pursued an even more aggressive litigation strategy in an effort to insulate its unfair practices. Most recently, the Canadian Government has urged the Commerce Department to act contrary to U.S. law and return on a retroactive basis antidumping and countervailing duties collected prior to recent Chapter 19 rulings.

In my view, it is imperative that the Commerce Department clearly and emphatically reject requests that deposits already collected be repaid as a consequent result of Chapter 19 panel decisions. U.S. law clearly follows the generally-accepted convention that international dispute settlement decisions are to be implemented prospectively only. The Commerce Department cannot repay deposits already made without express statutory authorization. And the law as passed by the Congress is clear that entries prior to any panel decisions would be ''liquidated'' in the circumstances of the lumber case at the duty rates that Commerce Department established in its original countervailing duty and antidumping duty determinations in 2002.

I find the Canadian Government's current position with respect to repayment of duties to be particularly remarkable considering the Commerce Department's treatment of this issue in the previous softwood lumber dispute. In 1994, the Commerce Department stated that the statute implementing the U.S.-Canada Free Trade Agreement did not permit it to refund deposits paid prior to the implementation date of a panel decision. Since the relevant statutory provisions under the NAFTA remain the same, the Canadian parties know that their position is wrong as a matter of U.S. law. Canadian parties could have appealed the 2002 lumber trade findings to the Court of International Trade, which might have issued an injunction to protect their ability to obtain a retroactive refund of the deposits, but they chose the NAFTA panel route knowing full well that NAFTA panels cannot issue such injunctions.

Of course, the deposits made could always be returned as part of a negotiated settlement that preserves the interests of U.S. workers and sawmills, as was done in 1994. But the Commerce Department is otherwise forbidden by law from refunding the deposits made prior to international panel rulings. I expect the Commerce Department to make this clear to Canada.

I think it is important for each of us to encourage the stakeholders to come back in good faith to negotiations to resolve these cases once and for all. I believe there will be a window of opportunity later this year and will work with all parties to encourage meaningful negotiations to find a balanced solution.

Mr. WYDEN. I, too, rise today to share concerns about the recent NAFTA panel decision. Today, the Canadian share of lumber in the U.S. market is reaching record highs. Canada's practice of dumping subsidized timber in our domestic market continues to wreak havoc on U.S. mills and jobs. My own State of Oregon has been hit especially hard, losing over 3000 jobs in the timber industry since 2002. For years now, my colleagues and I have worked with the International Trade Commission, the Department of Commerce, and the U.S. Trade Representative to help maintain mill operations and keep jobs in our country.

As my colleagues have made clear today, I believe the blatant disregard for U.S. law by the panel will further damage already suffering U.S. timber workers.

Moreover, I cannot refrain from adding, as I watch jobs in the timber industry continue to disappear at an

alarming rate, I find recent decisions by the administration to lower the duties, as a result of administrative reviews, to be particularly egregious and out of line. These decisions have exacerbated an already terrible crisis, and weakened my confidence in the administration's willingness to help our timber workers.

Simply put, I believe it is time to move toward a fix for a system that currently appears to be broken.

STATEMENT OF INTENTION ON S. 2796

Mr. CRAIG. Mr. President, as our colleagues know, Senator DURBIN and I have introduced S. 2796, pertaining to the legal treatment of certification marks, collective marks, and service marks.

Federal law protects all four kinds of marks equally. Specifically, 15 U.S.C. §1503 and 15 U.S.C. §1504 provide that service marks, collective marks, and certification marks ''shall be entitled to the protection provided'' to trademarks, except where Congress provides otherwise by statute. However, the clarity of the Federal laws on this point has been confused by a recent decision of the Second Circuit Court of Appeals in the case of Idaho Potato Commission v. M&M Produce Farm and Sales. That decision interpreted the Lanham Act as requiring that certification marks should be treated differently from trademarks with respect to ''no challenge'' provisions.

We introduced S. 2796 to underscore the policy that Congress clearly intended in the first place. I ask the distinguished Senator from Illinois, is that not the case?

Mr. DURBIN. Mr. President, the Senator from Idaho is correct. Let me say to all our colleagues, this bill does not change current law. Our purpose in drafting S. 2796 was to make it clear that, in our view, the Second Circuit reached an incorrect decision in its interpretation of the Lanham Act. S. 2796 would simply restate the original intent of Congress when we enacted the Lanham Act, and indicate our support of the view that these marks are to be given equal legal treatment by the courts, not the anomalous reading that the Second Circuit gave to it in the Idaho Potato Commission decision.

Mr. CRAIG. I thank the Senator for his clarification and hope all our colleagues will join us in this effort to protect important public policy interests.

Mrs. LINCOLN. Mr. President, I thank the chairman for bringing up for consideration legislation providing multiyear reauthorization of the Economic Development Administration. EDA provides critical resources to communities experiencing significant economic distress and dislocation. The partnership between the planning and development districts in my State of Arkansas and the EDA has been a successful one. It is my hope that this partnership will continue to provide the flexibility that is needed to respond to constantly changing economic conditions.

Mr. BAUCUS. It is my understanding that this legislation preserves current EDA practices and administration of the Planning Partners Program for economic development districts, as currently authorized under Public Works and Economic Development Act of 1965. This is a critical program providing important continual professional and technical assistance to rural and distressed communities to assist in developing economic strategies and implementing infrastructure improvements. It is essential that the legislation maintain this program consistent with current authorization, practices and policies.

Mr. INHOFE. Mr. President, that is correct. The EDA planning program is an important program which provides technical assistance to communities to develop and implement comprehensive economic development strategies. As a matter of fact this bill will provide an historic increase in funding for this important program and will give planning partners the additional resources to address local needs and improve the delivery of federal economic development efforts.

Mrs. LINCOLN. I thank the chairman for his strong leadership and attention to this important matter.

LOCAL LAW ENFORCEMENT ACT OF 2003

Mr. SMITH. Mr. President, I rise today to speak about the need for hate crimes legislation. On May 1, 2003, Senator KENNEDY and I introduced the Local Law Enforcement Enhancement Act, a bill that would add new categories to current hate crimes law, sending a signal that violence of any kind is unacceptable in our society.

On August 27, 2000, Christopher Weninger, who is not gay, was walking home from a party when three men approached him and one asked him for a cigarette. As Weninger handed the man a cigarette, another man punched him in the face and called him ''queer.'' Weninger suffered a broken nose and eye socket. Police investigated the beating as a hate crime.

I believe that the Government's first duty is to defend its citizens, to defend them against the harms that come out of hate. The Local Law Enforcement Enhancement Act is a symbol that can become substance. I believe that by passing this legislation and changing current law, we can change hearts and minds as well.

NINETY YEARS OF MUSICAL SUCCESS

Mr. LEAHY. Mr. President, I am proud to salute the American Society of Composers, Authors and Publishers, better known as ASCAP, on its anniversary of 90 years of successful representation of America's songwriters and music publishers.

ASCAP formally began when a group of noted songwriters and their supporters gathered at the Hotel Claridge in New York City on February 13, 1914, at a monumental event that would forever change music history. These visionaries, whose members included some of that era's most active and talented songwriters, such as Irving Berlin, James Weldon Johnson, Jerome Kern and John Philip Sousa, began a tradition of outstanding public advocacy on behalf of songwriters that continues to this very day.

Soon after its founding, a prominent member of ASCAP, Victor Herbert, brought a lawsuit against Shanley's Restaurant that established the legal basis for songwriters to protect their ''performing right'' in the music they created. In a legal battle that took 2 years to reach the U.S. Supreme Court, ASCAP finally prevailed in a unanimous opinion written by Justice Oliver Wendell Holmes. Once their legal authority to protect the musical performing right was secure, ASCAP provided its owner-members with several ways to be compensated for the performances of their copyrighted works.

In advancing its members' interests, ASCAP has traditionally welcomed the marketing of new technologies as opportunities to expand the reach of their musical entertainment to new audiences. With the advent of radio, ASCAP began an interdependent relationship that remains one of its most important sources of revenue to this very day. Today, under the leadership of its distinguished chairman and award winning songwriter, Marilyn Bergman, ASCAP licenses over 11,500 local commercial radio stations and 2,000 non-commercial radio stations and ASCAP music is a dominant entertainment feature of our airwaves.

With the Internet explosion, ASCAP responded with its own technological innovations. It fielded ACE, the first interactive online song database, and EZ-Seeker software for tracking Internet performances. Most recently, it has developed Mediaguide which is probably the world's most comprehensive and accurate broadcast tracking system. Thus, creative innovation and vigilance on behalf of its members have been an ASCAP hallmark since its formation.

While ASCAP has had a deep involvement with the innovative telecommunications technologies and the marvels they have added to our lives, its institutional essence is its people. We have all been admirers of many of the more renowned ASCAP members who now number in the many hundreds over the years. They include such extraordinary talents as: Billy Joel, Hal David, Cy Coleman, Garth Brooks, Irving Berlin, Prince, Lyle Lovett, Henry