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Softwood Lumber's "Termite" Problem¹

WHY THE EXTENSION OF THE 2006 SOFTWOOD LUMBER AGREEMENT IS RIGHT FOR SOFTWOOD LUMBER BUT WRONG FOR THE MULTILATERAL TRADING SYSTEM

INTRODUCTION

On January 24, 2012, United States Trade Representative Ron Kirk and Canadian Minister for International Trade Ed Fast signed a two-year extension of the 2006 Softwood Lumber Agreement (SLA 2006),² extending the agreement through October 12, 2015.³ The SLA 2006 governs the most notorious trade dispute in the history of Canadian-American relations: the Canada-United States softwood lumber dispute.⁴ The softwood lumber dispute centers on allegations by the United States that the Canadian government unfairly subsidizes its softwood

¹ See JAGDISH BHAGWATI, *TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE* xii (2008).

² Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., Sept. 12, 2006, Temp. State Dep't No. 07-222, KAV 8209, *available at* http://www.ustr.gov/webfm_send/3254 (last visited Nov. 21, 2012), *amended by* Agreement Between the Government of Canada and the Government of the United States of America Amending the Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, U.S.-Can., Oct. 12, 2006, Temp. State Dep't No. 07-223, KAV 8310, *available at* <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/Agreementamending-en.pdf> (last visited Sept. 23, 2011) [hereinafter SLA 2006].

³ Agreement Between the Government of Canada and the Government of the United States of America Extending the Softwood Lumber Agreement Between the Government of Canada and the Government of the United States of America, as Amended, U.S.-Can., Jan. 23, 2012, http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/other-autres/SLA_2012.aspx?lang=eng&view=d (last visited May 16, 2012).

⁴ See *e.g.*, GREGORY W. BOWMAN, NICK COVELLI, DAVID A. GANTZ & IHN HO UHM, *TRADE REMEDIES IN NORTH AMERICA* 553 (2010) ("The softwood lumber dispute between the United States and Canada represents the longest-running and perhaps most bitter trade dispute ever between the two countries."); DAOWEI ZHANG, *THE SOFTWOOD LUMBER WAR: POLITICS, ECONOMICS, AND THE LONG U.S.-CANADIAN TRADE DISPUTE* 1 (2007) ("Since the value of softwood lumber trade currently exceeds US\$7 billion annually, this disagreement easily ranks as the largest trade dispute between the two countries in the modern era, and its longevity has defied many seasoned observers.").

lumber industry, allowing Canadian lumber producers to dump their products into the U.S. market at below production cost.⁵

In large part, these allegations stem from the countries' differing systems of forest management.⁶ In the United States, forest land is mostly privately owned, and market forces generally determine the stumpage fees harvesters must pay for timber.⁷ In Canada, because the majority of its forests are considered public land, provincial governments set the fees that harvesters must pay.⁸ Many U.S. lumber producers believe that the Canadian system qualifies as a subsidy, by creating "chronically below-market-value stumpage charges,"⁹ and have long urged the U.S. government to impose countervailing (CVD) and antidumping (AD) duties on imports of Canadian softwood products.¹⁰ Their claims have led to nearly three decades of litigation.¹¹

This dispute should be of particular concern to both Canadians and Americans alike, as Canada is currently the United States' largest trading partner in goods, with the two

⁵ See, e.g., Press Release, Coalition for Fair Lumber Imports, U.S. Coalition for Fair Lumber Imports Demands Relief from Canadian Subsidies, Dumping (Apr. 2, 2001), available at http://www.uslumbercoalition.org/doc/4_2_01release.pdf [hereinafter Coalition Demands].

⁶ BOWMAN ET AL., *supra* note 4, at 556 ("In the United States, some 70% of timberlands are privately owned. In Canada, in contrast, 94% of the forests are on provincial or federal government ('Crown') lands.").

⁷ Michael Hart & Bill Dymond, *The Cul-de-Sac of Softwood Lumber*, 26 POL'Y OPTIONS no. 9, 2005, at 20. "Stumpage [fees]" are what lumber companies must pay for the right to harvest timber. *Id.* at 19.

⁸ *Id.* at 19-20.

⁹ Henry Spelter, *If America Had Canada's Stumpage System*, 52 FOREST SCI. 443, 444 (2006). Spelter believes that it is "unclear whether this is a subsidy in the sense that the [NAFTA] and [WTO] agreements were meant to deal with, i.e., direct financial aid furnished by a government." *Id.*

¹⁰ See, e.g., Coalition Demands, *supra* note 5. In the United States, a domestic industry that believes it is being injured by way of a foreign government subsidizing foreign exporters or a foreign producer dumping an export in the United States at a price lower than its home market price may file a petition with both the International Trade Administration, which is part of the Department of Commerce (Commerce), and the International Trade Commission (ITC), which is an independent agency. U.S. Dep't of Commerce, *An Introduction to U.S. Trade Remedies*, IMP. ADMIN., <http://ia.ita.doc.gov/intro/index.html> (last visited Oct. 29, 2011). Commerce determines whether the import is, in fact, being subsidized or dumped into the market, while the ITC determines whether the import is causing material injury, or threatening to cause an injury, to the domestic industry. *Id.* "If both Commerce and the ITC make affirmative findings . . . , Commerce instructs U.S. Customs and Border Protection [(CBP)] to assess duties against imports of that product into the United States." *Id.*

¹¹ *Canada-U.S. Softwood Lumber Trade Relations (1982-2006)*, FOREIGN AFFAIRS & INT'L TRADE CAN., http://www.international.gc.ca/controls-controles/softwood-bois_oeuvre/notices-avis/82-06.aspx?lang=eng&view=d (last modified Apr. 20, 2009).

countries trading over \$597 billion during 2011 alone.¹² More specifically, Canada has historically been the largest source of lumber imports in the United States.¹³

Culminating with the SLA 2006, the most recent developments in the softwood lumber dispute resulted from what commentators have labeled a "hydra" of litigation.¹⁴ Disputes were settled under Chapters 11 and 19 of the North American Free Trade Agreement (NAFTA), the World Trade Organization (WTO) dispute settlement system, and within U.S. domestic courts.¹⁵ This overlap is a result of the proliferation of preferential trade agreements (PTAs)¹⁶ within the international trading system, which enable parties to seek recourse under multiple dispute settlement regimes.¹⁷ Although NAFTA contains a choice of forum clause intended to prevent overlap in dispute settlement,¹⁸ the clause does not apply to final AD or CVD determinations, such as those at issue in the

¹² *Top Trading Partners*, U.S. CENSUS BUREAU, <http://www.census.gov/foreign-trade/statistics/highlights/top/top1112yr.html> (last visited Dec. 19, 2012).

¹³ BOWMAN ET AL., *supra* note 4, at 553.

¹⁴ John H. Knox, *The 2005 Activity of the NAFTA Tribunals*, 100 AM. J. INT'L L. 429, 436 (2006).

¹⁵ *See infra* Part II.

¹⁶ Preferential trade agreements (also referred to as "regional trade agreements") are agreements by which "parties to [the agreement] offer to each other . . . more favorable treatment in trade matters than [what is offered] to the rest of the world, including WTO Members." Rafael Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?*, 11 CHI. J. INT'L L. 597, 600 (2011). PTAs are a "departure from the WTO [most-favored nation] principle of non-discrimination," but are WTO-consistent under three rules: (i) GATT Article XXIV:4-10; (ii) the Enabling Clause, and (3) GATT Article V. *Id.* at 602. The majority of PTAs are in the form of free trade agreements (FTAs), such as NAFTA. BHAGWATI, *supra* note 1, at 1. Because even those commentators who use the term "regional trade agreements" admit that these agreements "may be . . . concluded between countries not necessarily located in the same geographic region," I believe that PTAs is a more accurate label. Leal-Arcas, *supra*, at 600. Between 1985 and 2005, the share of world trade that came from PTAs grew from approximately 20% to around 50%. *Id.* at 602. To date, various states have notified over 500 PTAs to the WTO Secretariat and numerous others are currently under negotiation. *Regional Trade Agreements*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/region_e/region_e.htm (last visited Jan. 7, 2012). Of the 233 PTAs currently in force, approximately 85% are FTAs such as NAFTA. *See List of All RTAs*, WORLD TRADE ORG., <http://rtais.wto.org/UI/PublicAllRTAList.aspx> (last visited Sept. 12, 2012).

¹⁷ Jennifer Hillman, *Conflicts Between Dispute Settlement Mechanisms in Regional Trade Agreements and the WTO—What Should the WTO Do?*, 42 CORNELL INT'L L.J. 193, 194 (2009) (noting the "problems that can arise from the overlap or conflict between these RTA settlement provisions and the Dispute Settlement Understanding of the WTO").

¹⁸ North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, U.S.-Can.-Mex., art. 2005(6), Dec. 17, 1992, 32 I.L.M. 612, 695 (1993) [hereinafter NAFTA].

softwood lumber dispute.¹⁹ More generally, there is little clarity on the exact legal relationship between PTA and WTO dispute settlement systems.²⁰ General Agreement on Tariffs and Trade (GATT) Article XXIV addresses only the “formation” of PTAs and is silent on issues pertaining to the operational relationship between PTAs and the WTO.²¹ Moreover, there is no overarching statute that defines the authority of one tribunal in relation to another.²² This uncertainty is directly linked to the superfluous litigation discussed below.

The growth of PTAs has several explanations—most notably the stalled Doha Round of multilateral trade negotiations²³—and the impact PTAs have on the multilateral trading system is much debated.²⁴ This debate is beyond the scope of the instant analysis. For the purposes of this note, which examines a PTA sub-agreement (the SLA 2006),²⁵ I have accepted the position that PTAs undercut the multilateral trading system.

The extension of the SLA 2006 raises two important questions: first, what does it mean for the softwood lumber dispute itself; and, second, what does it mean for the multilateral trading system as a whole? Put differently, if PTAs such as NAFTA are the “termites” of the multilateral trading system,²⁶ can an agreement spawned from NAFTA’s own failures act as an insecticide, helping to exterminate these preferential

¹⁹ *Id.* at art. 2004. Parties have also been reluctant to rely on NAFTA Article 2005 even outside the context of AD and CVD cases. Joost Pauwelyn & Luiz Eduardo Salles, *Forum Shopping Before International Tribunals: (Real) Concerns, (Im)Possible Solutions*, 42 CORNELL INT’L L.J. 77, 89 (2009).

²⁰ Hillman, *supra* note 17, at 197.

²¹ Sungjoon Cho, *Breaking the Barrier Between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 HARV. INT’L L.J. 419, 452 (2001). The Doha Declaration includes a negotiating mandate to clarify and improve “disciplines and procedures under the existing WTO provisions applying to regional trade agreements.” World Trade Org., Ministerial Declaration of 14 Nov. 2001, ¶ 29, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).

²² Pauwelyn & Salles, *supra* note 19, at 84.

²³ Leal-Arcas, *supra* note 16, at 621-23 (listing other economic and political reasons why countries agree to PTAs so frequently); *see also* BHAGWATI, *supra* note 1, at 16-47 (listing the “many reasons why PTAs have now turned into a pandemic and a pox on the world trading system”).

²⁴ *See, e.g.*, Cho, *supra* note 21, at 429-35; Leal-Arcas, *supra* note 16, at 623-26.

²⁵ The term “PTA sub-agreement” is meant to describe a trade agreement between two countries that have already agreed to a PTA. In this analysis, the PTA sub-agreement at issue is the SLA 2006, between Canada and the United States who are both members of NAFTA.

²⁶ BHAGWATI, *supra* note 1, at xii (“Acting like termites, PTAs are eating away at the multilateral trading system relentlessly and progressively.”). *But see* Leal-Arcas, *supra* note 16, at 629 (arguing that RTAs can “complement” multilateralism). I should note that termites seem like an especially suitable analogy when discussing a trade agreement dealing with softwood lumber.

agreements? Or, does such an agreement only add to the forces undercutting the long-term prospects for multilateralism?

This note will argue that parties directly involved in the Canadian-American softwood lumber trade should welcome the extension of the SLA 2006. But this support should come with pause—especially for those who wish to see the global trading community return more ardently to the multilateral system. While the streamlined dispute settlement process of the SLA 2006²⁷ has thus far proven to be the most effective solution to the lumber saga, this is only because the alternative monstrous “hydra” of litigation is impracticable. A workable resolution to NAFTA’s largest and most bitter dispute that fails to directly address the systemic shortcomings of PTAs will only temporarily insulate the parties from the underlying problems and will draw their attention further away from wholesale multilateralism.²⁸ The SLA 2006 is not a grand solution for the problems of the multilateral trading system.

This note is divided into five sections. Part I describes the early history of the softwood lumber dispute from 1982 to 2001. Part II highlights the superfluous litigation that occurred between 2001 and 2006, which culminated in the SLA 2006. This section provides a brief overview of the disputes that occurred within NAFTA, the WTO, and U.S. domestic courts, and it highlights the problems that were caused by these overlapping dispute settlement mechanisms. Part III provides an overview of the SLA 2006 and briefly addresses the disputes that have arisen under this agreement. Part IV explains why the SLA 2006 is the most practical solution to the softwood lumber dispute, arguing that a negotiated agreement with a straightforward dispute settlement mechanism is necessary to offset the United States’ stubborn political protection of its softwood lumber industry. Finally, Part V explains how the softwood lumber dispute highlights the shortcomings of PTAs and argues that, in the case of NAFTA, taking lumber out of the equation removes a major incentive to correct these deficiencies.

²⁷ SLA 2006, *supra* note 2, at art. XIV.

²⁸ See Michael S. Valihora, *NAFTA Chapter 19 or the WTO's Dispute Settlement Body: A Hobson's Choice for Canada?*, 30 CASE W. RES. J. INT'L L. 447, 471 (1998). (“Perhaps the Softwood Lumber Dispute is simply too big for [NAFTA Chapter 19], but the mechanism is sufficient in most circumstances.”). This point, made in 1998, highlights both the atypical size of the softwood lumber dispute, and the shortcomings of NAFTA. A dispute settlement mechanism that is “sufficient in *most* circumstances” is, by its nature, patently insufficient.

I. THE EARLY BATTLES—THE HISTORY OF THE SOFTWOOD LUMBER DISPUTE (1982–2001)

The modern history of the softwood lumber dispute is best understood as four discrete “battles”²⁹: Lumber I (1982–1983), Lumber II (1986–1991), Lumber III (1991–1996), and Lumber IV (2001–2006).³⁰ As one commentator suggests, this history “involves extremely arcane points of anti-dumping and countervailing duty law and an extraordinarily convoluted litigation history.”³¹ Despite the protracted nature of the dispute, it is important to address each stage in order to understand how and why wood has been the source of a thirty-year trade war. Accordingly, this note will briefly address Lumber I, II, and III below.³² This note will discuss Lumber IV in greater detail in Part II, given that it culminated in the agreement that is the focus of this note: the SLA 2006.³³

A. *Lumber I (1982–1983)*

Lumber I began in 1982 when a coalition of U.S. lumber producers, later known as the Coalition for Fair Lumber Imports (Lumber Coalition), filed a CVD petition with the Department of Commerce (Commerce).³⁴ The petition alleged that the Canadian government subsidized softwood lumber through various programs that set artificially low stumpage rates for Canadian producers.³⁵ Commerce initiated an investigation, but it eventually determined that no subsidy existed within the meaning of domestic CVD law and dismissed

²⁹ BOWMAN ET AL., *supra* note 4, at 554. Other commentators describe the dispute as “A War between Friends.” See ZHANG, *supra* note 4, at 1.

³⁰ *Canada-U.S. Softwood Lumber Trade Relations (1982–2006)*, *supra* note 11. For the purposes of this note, I address Lumber IV as beginning with the expiration of the 1996 Canada-United States Softwood Lumber Agreement, which occurred on March 31, 2001. *Id.*

³¹ Jeffrey L. Dunoff, *The Many Dimensions of Softwood Lumber*, 45 ALTA. L. REV. 319, 320 (2007).

³² Other sources provide excellent summaries of the early history of the dispute in much greater detail. See, e.g., BOWMAN ET AL., *supra* note 4, at 556-69; ZHANG, *supra* note 4, at 24-165; Kevin C. Kennedy, *A Legal History of the Softwood Lumber Dispute (in a Nutshell)*, 52 FOREST SCI. 432, 432-36 (2006).

³³ See *infra* Part II.

³⁴ U.S. Dep’t of Commerce, Initiation of Countervailing Duty Investigations; Certain Softwood Lumber Products from Canada, 47 Fed. Reg. 49,878 (Nov. 3, 1982); see also *supra* note 10 (discussing CVD laws).

³⁵ Certain Softwood Lumber Products from Canada, 47 Fed. Reg. 49,878.

the petition.³⁶ Lumber I is the only round of the softwood lumber dispute that did not produce a negotiated settlement.³⁷

B. Lumber II (1986–1991)

The peace that Lumber I established was short-lived. In 1986, the Lumber Coalition filed a second CVD petition, but this time Commerce issued an affirmative preliminary determination, ruling that Canada's provincial stumpage programs constituted a 15% subsidy.³⁸ Although an affirmative preliminary determination is usually followed by a final determination, no final determination was reached in Lumber II.³⁹ Rather, the investigation was suspended when Canada and the United States signed a Memorandum of Understanding (MOU) in December 1986, where Canada agreed to impose a 15% tax on exports of softwood lumber to the United States, which Canada could proportionately phase out if the provinces increased their stumpage fees.⁴⁰ Despite this agreement, both governments reserved their positions as to whether Canada's stumpage programs qualified as subsidies.⁴¹ As a result, the conflict at the root of the dispute remained unresolved.

By 1991, Canada's major lumber exporting provinces had independently increased their stumpage fees and, pursuant to the terms of the agreement, Canada eliminated the export tax for exports from British Columbia and lowered it to 3.1% for exports from Quebec.⁴² Nevertheless, high-level Canadian officials remained dissatisfied with the agreement. In October 1991, armed with a new dispute settlement

³⁶ U.S. Dep't of Commerce, Final Negative Countervailing Duty Determinations: Certain Softwood Products from Canada, 48 Fed. Reg. 24,159, 24,159 (May 31, 1983) (finding that the subsidies were "de minimis" and therefore did not constitute subsidies within the meaning of section 701 of the Tariff Act of 1930). CVDs may only be imposed if the countervailable subsidy is above a de minimis level. BOWMAN ET AL., *supra* note 4, at 128. The standard de minimis threshold for CVD investigations is 1%. *Id.*

³⁷ David Quayat, *The Forest for the Trees: A Roadmap to Canada's Litigation Experience in Lumber IV*, 12 J. INT'L ECON. L. 115, 122 (2009).

³⁸ U.S. Dep't of Commerce, Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Oct. 22, 1986).

³⁹ BOWMAN ET AL., *supra* note 4, at 134.

⁴⁰ See Statement Regarding the Agreement Between the United States and Canada Concerning Trade in Certain Softwood Lumber Products with Memorandum of Understanding, Agreed Minute and Related Letters, U.S.-Can., Dec. 30, 1986, Temp. State Dep't No. 87-31, KAV 272, at [i].

⁴¹ *Id.* ¶ 3(b).

⁴² BOWMAN ET AL., *supra* note 4, at 560.

provision under the Canada-United States Free Trade Agreement (CUSFTA)—which permitted review of adverse AD/CVD determinations directly to a binational panel⁴³—Canada terminated the MOU.⁴⁴ The United States' reaction was both "swift and unprecedented,"⁴⁵ and Lumber III was launched before the end of the month.

C. *Lumber III and the 1996 Softwood Lumber Agreement (1991–2001)*

Although Canada's termination of the MOU should have come with little surprise to U.S. officials, Commerce's swift response was indicative of its disappointment with Canada's decision.⁴⁶ On October 31, 1991, Commerce took the exceptional step of self-initiating a CVD investigation for the first time in its history.⁴⁷ Unlike in Lumber II, Commerce eventually reached a final affirmative subsidy determination, which was soon followed by a final affirmative injury determination by the U.S. International Trade Commission (ITC).⁴⁸ As a result of these rulings, Canadian lumber exporters faced an unprecedented CVD of 6.51% on all products entering the U.S. market.⁴⁹

⁴³ Canada-United States: Free-Trade Agreement, U.S.-Can., ch. 19, Dec. 22, 1987, 27 I.L.M. 293 (1988). The Canada-United States Free-Trade Agreement (CUSFTA) was a predecessor to NAFTA. Quayat, *supra* note 37, at 123. During the negotiations for the CUSFTA, AD/CVD were a source of much controversy. Canada wished to see AD/CVD eliminated, and the United States was intent on retaining them. Knox, *supra* note 14, at 434. The result was that the parties were allowed to seek review of adverse AD/CVD determinations directly to a binational panel, rather than to the domestic court of the country imposing the duties. *Id.* Despite the fact that this was meant only to serve as a temporary solution, NAFTA negotiators included it with only "minor modifications." *Id.*

⁴⁴ BOWMAN ET AL., *supra* note 4, at 560.

⁴⁵ Quayat, *supra* note 37, at 123.

⁴⁶ BOWMAN ET AL., *supra* note 4, at 560-61.

⁴⁷ U.S. Dept. of Commerce, Self-Initiation of Countervailing Duty Investigation: Certain Softwood Lumber Products from Canada, 56 Fed. Reg. 56,055 (Oct. 31, 1991); Kennedy, *supra* note 32, at 434. A CVD investigation is usually initiated by an industry petition. *See supra* note 10.

⁴⁸ U.S. Dep't of Commerce, Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570 (May 28, 1992); Softwood Lumber from Canada, Inv. Nos. 701-TA-414, 731-TA-928, 57 Fed. Reg. 31389 (July 15, 1992) (final). Under U.S. CVD laws, both a finding of an actionable subsidy and a finding of a material injury are required to apply CVDs. *See supra* note 10.

⁴⁹ Certain Softwood Lumber Products from Canada, 57 Fed. Reg. 22,570. Commerce found two types of subsidies—stumpage programs and log export regulations—and determined that they resulted in a net subsidy of 6.51% *ad valorem*. *Id.* at 22,570, 22,580, 22,604. Softwood Lumber I ended when Commerce determined that no countervailable subsidy existed. *See supra* Part I.A. Softwood Lumber II ended with the 1986 Memorandum of Understanding. *See supra* Part I.B.

This, however, was only the beginning of Lumber III. The defining characteristic of the modern state of the softwood lumber dispute is a seemingly endless, often controversial course of litigation. And as a sign of things to come, Canada responded by exercising its rights under the recently enacted dispute settlement mechanisms of the CUSFTA and seeking panel review of the United States' use of trade remedies against its exports of softwood lumber.⁵⁰ Canada appealed both the ITC's injury determination⁵¹ and Commerce's subsidy determination.⁵² These appeals were resolved largely in Canada's favor.

First, in reviewing the affirmative injury determination, the CUSFTA panel rejected the ITC's finding of material injury and remanded the issue for reconsideration.⁵³ Despite the ITC's multiple attempts to address the panel's concerns on remand, the CUSFTA panel continued to rule in Canada's favor.⁵⁴ Similarly, in reviewing Commerce's affirmative subsidy determination, the CUSFTA panel found that a number of Commerce's findings were unsupported by law and remanded the issue to Commerce for further consideration.⁵⁵ After one remand, the CUSFTA panel ruled along national lines, with a Canadian majority finding that Commerce's determinations were again unsupported by U.S. law and remanding with instructions that Commerce make a determination consistent with the panel's finding that no countervailable subsidy existed.⁵⁶

⁵⁰ Chapter 19 is a dispute resolution mechanism that replaces U.S. or Canadian judicial review of final AD/CVD determinations with a binational panel. See *supra* note 43.

⁵¹ United States-Canada Free Trade Agreement Binational Panel Review, *In the Matter of: Softwood Lumber from Canada, Reviewing the Final Determinations of the U.S. International Trade Commission*, at 1, USA-92-1904-02 (July 26, 1993) [hereinafter Lumber III Injury CUSFTA Panel Decision].

⁵² United States-Canada Free Trade Agreement Binational Panel Review, *In the Matter Certain Softwood Lumber Products from Canada*, at 1, USA-92-1904-01 (May 6, 1993) [hereinafter Lumber III Subsidy CUSFTA Panel Decision].

⁵³ Lumber III Injury CUSFTA Panel Decision, *supra* note 51, at 20 (concluding that "the [U.S. International Trade] Commission's determination of material injury by reason of subsidized Canadian imports is not supported by substantial evidence on the record," and remanding "the Commission's final determination for reconsideration").

⁵⁴ United States-Canada Free Trade Agreement Binational Panel Review, *In the Matter of: Softwood Lumber from Canada*, at 8, USA-92-1904-02 (July 6, 1994); United States-Canada Free Trade Agreement Binational Panel Review, *In the Matter of: Softwood Lumber from Canada, Decision of the Panel on Review of the Remand Determination of the U.S. International Trade Commission*, at 35, USA-92-1904-02 (Jan. 28, 1994).

⁵⁵ Lumber III Subsidy CUSFTA Panel Decision, *supra* note 52, at 147.

⁵⁶ United States-Canada Free Trade Agreement Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada*, at 7-8, USA-92-1904-01 (Dec. 17, 1993).

Adding to the controversy, the United States appealed the panel's ruling to an Extraordinary Challenge Committee (ECC).⁵⁷ The United States alleged that the panel "exceeded its powers, authority and jurisdiction by ignoring the Chapter 19 standard of review" and that certain members of the panel were in "a serious conflict of interest."⁵⁸ Ultimately, in another vote running along national lines, the ECC dismissed the United States' challenges.⁵⁹ Despite this ruling, Lumber III continued.

Although the United States agreed to revoke its CVD order, terminate the collection of all duties, and refund approximately \$800 million that Canadian softwood lumber importers had paid,⁶⁰ Congress responded to the ECC decision by amending U.S. trade law in a manner that "effectively neutralized" the CUSFTA panel findings on subsidy and injury.⁶¹

Shortly after the passage of these amendments, and with the Lumber Coalition poised to file a new CVD petition,⁶² the United States and Canada began negotiating an agreement to resolve Lumber III. The two countries eventually signed the 1996 Softwood Lumber Agreement (SLA 1996),⁶³ and in exchange for Canada's commitment to reduce its lumber

⁵⁷ Although Chapter 19 decisions are binding and cannot be appealed in national courts, the ECC may reverse a panel finding where a member of the panel is "guilty of gross misconduct, bias, or serious conflict of interest," or where a panel "seriously departed from a fundamental rule of procedure" or "manifestly exceeded its powers." NAFTA, *supra* note 18, at art. 1904(13).

⁵⁸ United States-Canada Free Trade Agreement Extraordinary Challenge Proceeding, *In the Matter of: Certain Softwood Lumber Products from Canada*, at 11-12, ECC-94-1904-01 USA (Aug. 3, 1994) (Opinion of Mr. Justice Gordon L.S. Hart).

⁵⁹ *Id.* at 33 (Opinion of the Hon. Herbert B. Morgan). Judge Malcolm Wilkey, the retired Chief Judge of the D.C. Circuit, dissented and accused the panel of substituting its judgment for what U.S. law should be, rather than deferring to what U.S. law was, as required by the Chapter 19 standard of review. *Id.* at 11 (Dissenting Opinion of U.S. Circuit Judge (Ret.) Malcolm Wilkey) ("The United States never contemplated that *United States law* would be *changed* by a binational body. If the [Chapter 19] appellate system does not achieve similar results in applying U.S. law, it may not be long continued."). Despite fears of national bias, as of 2006, the Lumber III review remained the only instance under Chapter 19 where binational panels have split along national lines. Kennedy, *supra* note 32, at 435.

⁶⁰ Notice of Panel Decision, Revocation of Countervailing Duty Order and Termination of Suspension of Liquidation, 59 Fed. Reg. 42,029 (Aug. 16, 1994); Drew Fagan & Barrie McKenna, *Softwood Duties Coming Home: U.S. to Return About \$800-million to Canadian Exporters*, GLOBE & MAIL (Can.), Dec. 3, 1994, at B1.

⁶¹ Quayat, *supra* note 37, at 125; see also Kennedy, *supra* note 32, at 435.

⁶² BOWMAN ET AL., *supra* note 4, at 565.

⁶³ Softwood Lumber Agreement, U.S.-Can., May 29, 1996, available at <http://www.international.gc.ca/controls-controles/assets/pdfs/softwood/treaty-e.pdf> (last visited Nov. 2, 2011) [hereinafter SLA 1996].

exports to the United States through a soft quota,⁶⁴ the United States agreed not to initiate any new trade actions.⁶⁵ Few disputes arose under the SLA 1996,⁶⁶ but, despite a provision for extending the agreement,⁶⁷ Canada and the United States failed to agree to the terms of an extension. Accordingly, the agreement expired on March 31, 2001.⁶⁸

While the disputes under Lumber I, II, and III are telling examples of a "[w]ar between [f]riends,"⁶⁹ not until Lumber IV did it become painstakingly clear that the region's foremost trade agreement, NAFTA, was incapable of providing a Softwood Lumber armistice.

II. THE SOFTWOOD LUMBER "HYDRA"⁷⁰—LUMBER IV (2001–2006)

Canada deployed what has been aptly described as an "exhaustive" litigation strategy in Lumber IV.⁷¹ Following another round of AD/CVD petitions from the Lumber Coalition,⁷² a "hydra" of litigation ensued under NAFTA Chapters 11 and 19, the WTO dispute settlement system, and U.S. domestic trade law.⁷³ These challenges, which are addressed below,⁷⁴ created a chaotic overlap between dispute settlement processes that ultimately pushed the parties toward a negotiated settlement in the form of the SLA 2006. Although this agreement

⁶⁴ Canada was entitled to ship 14.7 billion board feet of lumber duty free annually. Amounts shipped in excess of the amount were subject to a series of escalating export taxes. *Id.* at art. II(2).

⁶⁵ *Id.* at art. I.

⁶⁶ Sarah E. Lysons, Comment, *Resolving the Softwood Lumber Dispute*, 32 SEATTLE U. L. REV. 407, 421 (2009).

⁶⁷ SLA 1996, *supra* note 63, at art. X.

⁶⁸ BOWMAN ET AL., *supra* note 4, at 569.

⁶⁹ ZHANG, *supra* note 4, at 1.

⁷⁰ Knox, *supra* note 14, at 436.

⁷¹ Quayat, *supra* note 37, at 126.

⁷² In a move that demonstrates why parties directly involved in the Canadian-American softwood lumber trade should welcome the extension of the SLA 2006, it took all of one business day after the expiration of the SLA 1996 for the Lumber Coalition to file fresh AD/CVD petitions. BOWMAN ET AL., *supra* note 4, at 569.

⁷³ Knox, *supra* note 14, at 436.

⁷⁴ The futility of overlapping dispute-settlement mechanisms is best highlighted through a focus on the concurrent litigation that occurred under NAFTA and the WTO with regards to the United States' determination that Canada had subsidized its lumber industry. *See, e.g.*, Sydney M. Cone III, *Canadian Softwood Lumber and "Free Trade" Under NAFTA*, 51 N.Y.L. SCH. L. REV. 840 (2006-2007). These forums, therefore, are discussed first and in the greatest detail. The subsequent discussions regarding dumping determinations, NAFTA Chapter 11, and disputes within the U.S. domestic legal system serve to underscore the convoluted nature of the multilateral trading system's various dispute settlement mechanisms.

acknowledges the systemic shortcomings of PTAs and the overlapping dispute settlement mechanisms they create, the SLA 2006's failure to address these issues head on does more to add to the forces undercutting multilateralism than it does to resolve the issues that created the need for an agreement.

A. *Are Two Heads Better than One?—Canada's Challenges to the United States' Subsidy Determinations Under NAFTA Chapter 19 and the WTO Dispute Settlement System*

Following the Lumber Coalition's newest AD/CVD petitions, Commerce and the ITC made final affirmative determinations that Canada was subsidizing its softwood lumber industry⁷⁵ and that the subsidized Canadian softwood lumber imports presented a threat of material injury to the U.S. lumber industry.⁷⁶ Canada sought review of these determinations under both Chapter 19 of NAFTA and the WTO dispute settlement mechanisms.⁷⁷ Although Canada was largely successful in its appeals, the "two uncoordinated avenues for resolving disputes" failed—perhaps unsurprisingly—to reach uniform resolutions and allowed the parties to engage in "litigious gamesmanship" that prolonged an already protracted dispute.⁷⁸

1. Canada's Success Under NAFTA

a. *NAFTA's Review of Commerce's Affirmative Subsidy Determination*

Canada was successful in its NAFTA challenge to Commerce's final affirmative subsidy determination. The NAFTA panel reviewing the determination found that while Canada's

⁷⁵ U.S. Dep't of Commerce, Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,545 (Apr. 2, 2002); U.S. Dep't of Commerce, Notice of Final Determination of Sales at Less than Fair Value: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 15,539 (Apr. 2, 2002).

⁷⁶ Softwood Lumber from Canada, Inv. Nos. 701-TA-414, 731-TA-928, 67 Fed. Reg. 36,022 (May 22, 2002) (final).

⁷⁷ North American Free Trade Agreement Binational Panel Review, *In the Matter of Certain Softwood Lumber from Canada, Final Affirmative Countervailing Duty Determination*, at 5, USA-CDA-2002-1904-03 (Aug. 13, 2003) [hereinafter Lumber IV Subsidy NAFTA Panel Decision]; Panel Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 1.1, WT/DS257/R (Aug. 29, 2003) [hereinafter Lumber IV Subsidy WTO Panel Report].

⁷⁸ Cone, *supra* note 74, at 850.

stumpage program constituted a financial contribution,⁷⁹ the evidence Commerce relied on did not reveal the existence of a benefit. Accordingly, the panel ruled that the imports had not received an actionable subsidy.⁸⁰ What resulted was a game of “ping-pong” between Commerce and the panel, where the panel would remand the determination, and Commerce would revise its methodology.⁸¹ The result of each revised subsidy determination was a reduction in the CVD rate, and by the time Commerce issued its fifth subsidy finding, it had determined that the benefit given to Canadian producers was de minimis in nature.⁸² Essentially, Commerce was forced to reluctantly accept the panel’s determination that Canada’s provisional stumpage programs did not confer a benefit on softwood lumber producers, and thus that no actionable subsidy existed.

b. NAFTA’s Review of the ITC’s Affirmative Injury Determination

Canada was also largely successful in its challenge to the ITC’s affirmative threat of injury determination. According to a NAFTA panel, there was insufficient evidence to support the ITC’s finding.⁸³ Following this decision, another series of remands ensued. This time, however, the panel “lost patience with the game [of ping-pong],”⁸⁴ refused to remand for further re-evaluation, and ordered the ITC to enter a finding of no material injury.⁸⁵ From NAFTA’s perspective, a U.S. agency had, again, improperly applied its domestic trade laws and improperly subjected Canadian imports of softwood lumber to CVDs.

⁷⁹ Lumber IV Subsidy NAFTA Panel Decision, *supra* note 77, at 20. Under U.S. trade law, for a subsidy to be actionable via the imposition of countervailable duties, it must result in both a financial contribution and a benefit to the recipients of the subsidy. *Id.* at 17.

⁸⁰ *Id.* at 35.

⁸¹ Knox, *supra* note 14, at 437.

⁸² North American Free Trade Agreement Binational Panel Review, *In the Matter of Softwood Lumber from Canada, Final Affirmative Countervailing Duty Determination*, at 4, USA-CDA-2002-1904-03 (Mar. 17, 2006).

⁸³ North American Free Trade Agreement Binational Panel Review, *In the Matter of Softwood Lumber from Canada: Final Affirmative Threat of Material Injury Determination*, at 107, USA-CDA-2002-1904-07 (Sept. 5, 2003).

⁸⁴ Knox, *supra* note 14, at 437.

⁸⁵ North American Free Trade Agreement Binational Panel Review, *In the Matter of Softwood Lumber from Canada: Final Affirmative Threat of Injury Determination*, at 7, USA-CDA-2002-1904-07 (Aug. 31, 2004). The panel noted that, “The Commission has made it abundantly clear . . . 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.” *Id.* at 3.

The United States launched an Extraordinary Challenge to both of the NAFTA panel rulings, but the ECC upheld the panel's injury ruling⁸⁶ and, prior to its decision on the panel's subsidy finding, the two parties agreed to the terms of the 2006 SLA, which ended the challenge.⁸⁷

Although Canada emerged victorious in the NAFTA rulings, simply cutting off one of the hydra's heads does not slay the beast. Indeed, Canada's challenges to the United States' subsidy determinations also took place under the WTO dispute settlement process. Unfortunately, with no clear roadmap in place to outline the legal relationship between NAFTA and WTO dispute settlement systems,⁸⁸ the WTO proceedings ran the risk of being, at best, tedious and, at worst, contradictory.

2. Mixed Results at the WTO

a. The WTO's Review of Commerce's Affirmative Subsidy Determination

Canada's WTO arguments regarding Commerce's affirmative subsidy determination "mirrored" its arguments before the NAFTA Chapter 19 panel.⁸⁹ Similar to the NAFTA panel, both a WTO Panel and the Appellate Body (AB) agreed with the United States that the Canadian stumpage programs constituted a financial contribution under WTO subsidy law.⁹⁰ Yet while NAFTA ruled decisively that the subsidy did not benefit Canadian producers—making it non-actionable—the WTO ruling on this issue is less clear.

Although the WTO Panel sided with Canada and ruled that the United States used an improper methodology to

⁸⁶ North American Free Trade Agreement Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada, Opinion and Order of the Extraordinary Challenge Committee*, at 2, ECC-2004-1904-01USA (Aug. 10, 2005). Notably, the panel held that "in rare circumstances," a Panel may remand to the Commission with instructions to enter a decision that the evidence on the record does not support a threat of material injury. *Id.* at 15.

⁸⁷ Notice of Suspension of Extraordinary Challenge Committee, 71 Fed. Reg. 28,854 (May 18, 2006).

⁸⁸ See *supra* notes 18-22 and accompanying text. In addition to there being no overarching statute that defines the relation between PTA and WTO tribunals, domestic law concepts such as *res judicata*, *lis pendens*, and *forum non conveniens*, which address overlapping authority, do not apply in the NAFTA/WTO context where the two panels are, strictly speaking, applying different law. Pauwelyn & Salles, *supra* note 19, at 102-13.

⁸⁹ Quayat, *supra* note 37, at 135.

⁹⁰ Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 76, WT/DS257/AB/R (Jan. 19, 2004) [hereinafter Lumber IV Subsidy WTO AB Report].

determine that Canada's stumpage programs resulted in a benefit, the AB reversed this ruling.⁹¹ Nevertheless, this reversal focused on the WTO Panel's flawed reasoning, leaving open the question of whether a benefit existed.⁹² Indeed, due to an "insufficient factual basis to complete the legal analysis," the AB was unable to definitively determine whether Canada's financial contribution had produced a benefit and thus was unable to determine whether both elements for an actionable subsidy existed.⁹³ An issue that a NAFTA panel determined decisively was therefore left unresolved at the WTO.

For the United States to successfully defend its affirmative subsidy determination at the WTO, Commerce also needed to show that the alleged subsidies to timber *harvesters* "pass[ed]-through" to the *producers* of the softwood lumber imported into the United States.⁹⁴ Following several WTO Panel and AB reports,⁹⁵ the AB eventually found against Commerce on this point, ruling that Commerce had conducted a defective pass-through analysis and had failed to comply with its WTO obligations.⁹⁶ This marked yet another victory for Canada.

b. The WTO's Review of the ITC's Affirmative Injury Determination

Canada's challenge to the ITC's injury determination before the WTO was again similar to its challenges brought under NAFTA. Canada attempted to persuade the WTO that the ITC's affirmative threat of injury finding was not supported by proper evidence.⁹⁷ A WTO Panel sided with Canada, ruling that an "objective and unbiased decision maker" could not have properly found a threat of injury based upon the evidence presented to the ITC.⁹⁸ But, the Panel denied Canada's requests

⁹¹ *Id.* ¶ 119.

⁹² *Id.* ¶ 122.

⁹³ *Id.*

⁹⁴ Cone, *supra* note 74, at 847.

⁹⁵ These included: (i) an August 19, 2003 Panel Report, (ii) a January 19, 2004 Appellate Body Report, and (iii) an August 1, 2005 Panel Report. *Id.* at 848.

⁹⁶ Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 96, WT/DS257/AB/RW (Dec. 5, 2005). The AB upheld the panel's findings that Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994 require a pass-through analysis in circumstances in which a subsidy is received by a *harvester*, and CVDs are then attached to the imports from an unrelated *producer*. *Id.*

⁹⁷ Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, ¶¶ 4.2-4.62 (Mar. 22, 2004).

⁹⁸ *Id.* ¶ 7.89.

to recommend that the United States revoke its final determination of threat of injury, stop the application of duties, and return the cash deposits already collected.⁹⁹ Neither the United States nor Canada appealed the Panel's decision, but the U.S. response to the ruling gave rise to one of the most controversial events of Lumber IV.¹⁰⁰ This suspect response underscored both the lengths the United States was willing to go to protect its softwood lumber industry and the opportunities for manipulation available within overlapping dispute settlement forums.¹⁰¹

3. The United States Uses a WTO Defeat to Mitigate Adverse NAFTA Rulings

After the WTO Panel's ruling that no threat of injury existed, the ITC undertook a new injury determination and again concluded that a substantial increase of Canadian softwood lumber imports presented a threat of material injury to the U.S. industry.¹⁰² From the United States' perspective, this "new" affirmative injury finding meant that earlier rulings by multiple NAFTA panels—finding the ITC's injury determination to be unsubstantiated by the evidence—were now moot because the ITC had made, and Commerce had adopted, a new finding.¹⁰³ Put differently, the United States attempted to "use[] a WTO defeat to justify ignoring several adverse NAFTA Panel findings."¹⁰⁴

Canada challenged the ITC's new threat of injury finding at the WTO, but its legitimacy was never definitively ascertained. First, a WTO Panel ruled that the ITC had cured the defects identified in the original WTO ruling, which in

⁹⁹ *Id.* ¶¶ 8.7-8.8.

¹⁰⁰ Quayat, *supra* note 37, at 134.

¹⁰¹ BOWMAN ET AL., *supra* note 4, at 581.

¹⁰² U.S. Trade Rep., WTO Dispute Settlement Proceeding Regarding Investigation of the International Trade Commission in Softwood Lumber from Canada, 70 Fed. Reg. 36,687 (June 24, 2005). Under U.S. law, WTO rulings do not automatically bind the Executive. Rather, Section 129 of the Uruguay Round Amendments Act allows the U.S. Trade Representative to request that the ITC "issue a determination in connection with the particular proceeding that would render the Commission's action . . . not inconsistent with the findings of the panel or Appellate Body." 19 U.S.C. § 3538(a)(4) (2006).

¹⁰³ U.S. Dep't of Commerce, Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada, 69 Fed. Reg. 75,916, 75,917 (Dec. 20, 2004); Quayat, *supra* note 37, at 134.

¹⁰⁴ BOWMAN ET AL., *supra* note 4, at 581.

essence affirmed the ITC's new injury determination.¹⁰⁵ The AB, however, set aside this ruling, finding that the Panel had applied an improper standard of review and had failed to perform a complete analysis.¹⁰⁶ But the AB did not complete the analysis itself.¹⁰⁷ The AB reasoned that "completing the analysis . . . would require us to review extensive aspects of the [ITC]'s threat of injury and causation analyses, and would require us to engage in a comprehensive examination of highly complex and contested facts."¹⁰⁸ In the end, the AB was "unable to make a recommendation to the Dispute Settlement Body," and the validity of the ITC's "new" injury determination was never definitively settled under WTO law.¹⁰⁹

Although U.S. attempts to nullify the adverse NAFTA rulings were deemed improper once the issue reached the United States Court of International Trade (CIT),¹¹⁰ the discordant overlap between NAFTA's and the WTO's dispute settlement mechanisms allowed the United States to—at least temporarily—disregard a PTA dispute settlement panel's rulings under the guise of complying with the rules of the multilateral trading system. Among the dangers associated with incongruous legal forums, this is perhaps the most alarming.

B. *New Allegations—Dumping Claims Under NAFTA Chapter 19 and the WTO*

In addition to allegations of illegal subsidies, Lumber IV also included, for the first time, a dumping claim against Canadian lumber producers.¹¹¹ This claim ultimately turned on

¹⁰⁵ Reversing its earlier finding, the Panel was unable to "conclude that an objective and unbiased investigation authority could not find that [the evidence] supported the conclusion reached by the USITC." Panel Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, ¶ 7.39, WT/DS277/RW (Nov. 15, 2005).

¹⁰⁶ Appellate Body Report, *United States—Investigation of the International Trade Commission in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, ¶ 138, WT/DS277/AB/RW (Apr. 13, 2006) [hereinafter Lumber IV Injury WTO AB Report].

¹⁰⁷ The AB only has the authority to "uphold, modify, or reverse the findings" of a WTO Panel. There is no provision at the WTO for remand with instructions. "This means that the legal issue involved can be resolved only if the [AB] completes the analysis itself." DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 54 (2008).

¹⁰⁸ Lumber IV Injury WTO AB Report, *supra* note 105, ¶ 160.

¹⁰⁹ *Id.* ¶ 163.

¹¹⁰ See *infra* Part II.D.

¹¹¹ BOWMAN ET AL., *supra* note 4, at 569. Dumping occurs under U.S. law when a foreign producer sells an export in the United States at a price lower than its home

the United States' use of a controversial practice known as "zeroing," which often results in higher margins with respect to dumping calculations.¹¹² As with Canada's challenges to the United States' subsidy determinations, Canada appealed to two independent dispute settlement bodies in order to resolve a single claim. After the AB upheld a WTO Panel ruling that sided with Canada and found that the United States' use of zeroing was a violation of the WTO's Antidumping Agreement,¹¹³ a NAFTA Chapter 19 Panel essentially incorporated the WTO's decision and directed Commerce to make a determination on dumping without using the zeroing technique.¹¹⁴ While the two dumping rulings were consistent with one another, the duplicative litigation again highlights the inefficiency that plagued Lumber IV.¹¹⁵

C. *Investor-State Claims Under NAFTA Chapter 11*

Adding to the "[s]paghetti bowl of WTO and NAFTA proceedings,"¹¹⁶ Lumber IV also included claims under NAFTA

market price. See 19 U.S.C. § 1673 (2006). Dumping investigations are conducted much in the same way as subsidy investigations. See *supra* note 10.

¹¹² When zeroing is applied,

the analysis treats the margins for transactions made at [less than fair value] (dumped) in accordance with the actual amounts (positive numbers), while transactions with dumping margins of less than zero (that is, made at more than fair value) are treated as zero rather than as negative numbers. Under such circumstances, higher non-dumped export prices do not offset the lower dumped export prices.

BOWMAN ET AL., *supra* note 4, at 574. This has the potential to inflate the margins of dumping. *Id.*

¹¹³ Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada*, ¶ 117, WT/DS264/AB/R (Aug. 11, 2004).

¹¹⁴ North American Free Trade Agreement Binational Panel Review, *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, at 2, USA-CDA-2002-1904-02 (June 9, 2005).

¹¹⁵ See, e.g., Lysons, *supra* note 66, at 423-24 (arguing that Canada's litigation strategy in Lumber IV "increased costs to both Canadian and American taxpayers" and added to "the political tensions between the two countries . . . [making] settlement negotiations difficult"). The Canadian federal government spent an estimated \$13 million on softwood legal fees from 2005 to 2006 alone. Sources indicate that when one combines the spending of the Canadian federal government, the provinces, individual forest companies, and forest lobby groups, the figure rises to more than \$300 million over the course of Lumber IV. Sylvain Larocque, *Legal Tab in Lumber Battle May Hit \$300M*, TORONTO STAR, Oct. 30, 2006, at A3, available at <http://www.thestar.com/news/canada/article/113100--legal-tab-in-lumber-battle-may-hit-300m>.

¹¹⁶ Joost Pauwelyn, *Adding Sweeteners to Softwood Lumber: The WTO-NAFTA 'Spaghetti Bowl' Is Cooking*, 9 J. INT'L ECON. L. 197 (2006). The term "spaghetti bowl," when discussing international trade, has been attributed to Professor Jagdish Bhagwati and is meant to describe the chaotic scene that results from multiple trade

Chapter 11.¹¹⁷ Three Canadian lumber producers initiated separate arbitration proceedings against the United States,¹¹⁸ alleging that its conduct in investigating and imposing of AD and CVD orders had violated their rights to national treatment,¹¹⁹ most-favored-nation treatment,¹²⁰ and the minimum standard of treatment guaranteed under customary international law.¹²¹ In the end, the arbitral tribunal found that Chapter 11 does not encompass claims where the allegations confront the administration of trade remedy laws.¹²² In other words, the parties could not use Chapter 11 as an end run around Chapter 19.¹²³

Although this ruling prevented yet another decision on the legitimacy of the United States' use of its trade laws, the simple initiation of arbitration proceedings during Lumber IV is another example of the seemingly endless cycle of litigation that the participants faced. It was not until after the dispute reached U.S. courts that a final disposition was achieved. To the chagrin of many, however, this finality would not come by

agreements crisscrossing one another like spaghetti noodles. *See, e.g.*, BHAGWATI, *supra* note 1, at 61. Lumber IV is a prime example of this confusion.

¹¹⁷ NAFTA Chapter 11 deals with investor-state arbitrations and contains provisions designed to protect cross-border investors and facilitate the settlement of investment disputes. NAFTA, *supra* note 18, at art. 1101-138.

¹¹⁸ Tembec, Inc. v. United States, Notice of Arbitration and Statement of Arbitration Claim (NAFTA 2004), *available at* <http://www.state.gov/documents/organization/27805.pdf>; Terminal Forest Prods. Ltd. v. United States, Notice of Arbitration (NAFTA 2003), *available at* <http://www.state.gov/documents/organization/31360.pdf>; Canfor v. United States, Notice of Arbitration and Statement of Claim (NAFTA 2002), *available at* <http://www.state.gov/documents/organization/13203.pdf>.

¹¹⁹ "Each Party shall accord to investors [and investments of investors] of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors [and investments of its own investors] . . ." NAFTA, *supra* note 18, at art. 1102(1)-(2).

¹²⁰ "Each Party shall accord to investors [and investments of investors] of another Party treatment no less favorable than that it accords, in like circumstances, to investors [investments of investors] of any other Party or of a non-Party . . ." *Id.* at art. 1103(1)-(2).

¹²¹ "Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." *Id.* at art. 1105(1).

¹²² Canfor v. United States; Terminal Forest Prods. Ltd. v. United States, Decision on Preliminary Question, ¶ 273 (NAFTA 2006), *available at* <http://www.state.gov/documents/organization/67753.pdf> [hereinafter Canfor Arbitration Decision].

¹²³ *See* Quayat, *supra* note 37, at 132-33. The SLA 2006 resulted in the withdrawal of all claims under NAFTA Chapter 11. *See* SLA 2006, *supra* note 2, at art. XI(2) ("The operation and application of Section B of Chapter Eleven of the NAFTA is hereby suspended with respect to any matter arising under the SLA 2006 and any measure taken by a Party that is necessary to give effect to or implement the SLA 2006. Consequently, no claim under Section B of Chapter Eleven of the NAFTA may be made against a Party by investors of the United States or Canada in respect of any such matter or measure.").

way of judicial disposition, but rather through a negotiated settlement—calling into question the purpose of the previous five years' battles.¹²⁴

D. The End of Litigation—Claims Under United States Law

By the time the parties agreed to the “Basic Terms” of the SLA, the softwood lumber saga had entered a third arena: the CIT. Litigation involving a single trade dispute was now pending in three separate forums. But with Canada poised to claim victory, a deal was struck, and the SLA 2006 brought an end to litigation before the effects of the CIT's rulings were realized.¹²⁵ Nevertheless, it is important to briefly address the two principal issues that were raised before the CIT, adding to the complexity of Lumber IV.

First, several interested Canadian private and governmental parties brought suit to have the so-called “Byrd Amendment” struck down.¹²⁶ The amendment called for the distribution of AD/CVD duties directly to members of an industry that successfully obtained protection under U.S. trade law.¹²⁷ This essentially created a financial incentive for companies to file trade remedy petitions.¹²⁸ The CIT sided with Canada and halted future distributions under the Byrd Amendment for actions brought against NAFTA parties.¹²⁹ The United States eventually repealed the amendment, which made it clear to the Lumber Coalition that further litigation would not result in the direct delivery of any money to the U.S. lumber industry.¹³⁰

Second, another group of Canadian private and governmental parties sought to challenge what they characterized as an unlawful exercise of statutory authority by

¹²⁴ See, e.g., Eliot J. Feldman, *Deal or No Deal: Snatching Defeat from the Jaws of Victory*, 13 INT'L TRADE L. & REG. 91, 95 (2007) (arguing that “instead of winning free trade through legal proceedings, including a confirmation that Canadian provincial governments do not subsidise softwood lumber production or exports, Canada accepted draconian managed trade for potentially nine years”).

¹²⁵ See *infra* Part III.

¹²⁶ *Can. Lumber Trade Alliance v. United States*, 517 F.3d 1319, 1333-34 (Ct. Int'l Trade 2008).

¹²⁷ 19 U.S.C. § 1675c (repealed 2006).

¹²⁸ Quayat, *supra* note 37, at 138.

¹²⁹ *Can. Lumber Trade Alliance*, 517 F.3d at 1344 (affirming a 2006 CIT declaratory judgment that the Byrd Amendment did “not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico”).

¹³⁰ Feldman, *supra* note 124, at 91.

the United States in its attempts to evade NAFTA panel rulings under the guise of implementing a WTO panel decision.¹³¹ A three-judge CIT panel, headed by the Chief Justice, ruled that Section 129—the tool that the United States used in its attempt to moot the NAFTA Panels' adverse rulings on the ITC's threat of injury findings—did not permit the substitution of a new injury determination to support existing duty orders.¹³² Consequently, the court validated the original NAFTA rulings, which held that the United States' CVD/AD orders were improper, and it found that NAFTA panel review had the same legal effect as review in a U.S. court.¹³³ The United States was, therefore, without a legal basis for maintaining its CVD/AD orders, and the Canadian parties were "entitled to a full refund of the deposits collected on softwood lumber."¹³⁴ The United States had, in effect, improperly collected over \$5 billion worth of deposits.¹³⁵

Over the course of Lumber IV, a disagreement over the lawfulness of differing forest management systems produced nearly thirty international and domestic decisions.¹³⁶ The discordant dispute settlement mechanisms gave Canada multiple "bites at the apple" and permitted both superfluous and disingenuous litigation.¹³⁷ Nevertheless, it finally appeared that the CIT's decisions would allow Canada to claim a definite victory. Yet with this end in sight,¹³⁸ it was the negotiating table, not the courtroom, that finally brought Lumber IV to a close.

¹³¹ See *supra* Part II.A.3; see also *Tembec, Inc. v. United States*, 441 F. Supp. 2d 1302, 1306 (Ct. Int'l Trade 2006) ("[Plaintiffs] allege that the United States has illegally continued to enforce antidumping ('AD') and countervailing duty ('CVD') orders following the illegal implementation of an affirmative injury determination issued by the ITC pursuant to section 129 of the Uruguay Round Agreements Act ('URAA').").

¹³² *Tembec*, 441 F. Supp. 2d at 1336 ("Because section 129 only applies where the United States has lost before the WTO, Congress expected that adoption of WTO recommendations with respect to an ITC determination would result in determinations *revoking* all or part of an existing order, if implementation were necessary at all." (emphasis added)).

¹³³ *Tembec, Inc. v. United States*, 461 F. Supp. 2d 1355, 1364 (Ct. Int'l Trade 2006).

¹³⁴ Quayat, *supra* note 37, at 143; see also *Tembec*, 461 F. Supp. 2d at 1367 ("The legislative history makes it clear that Congress did not set up a system to retain duties that are not owed.").

¹³⁵ BOWMAN ET AL., *supra* note 4, at 553.

¹³⁶ See Quayat, *supra* note 37, at 116. Quayat counts twenty-six NAFTA (including panel and appellate body) and WTO decisions. Combined with the various decisions of the CIT, this number rises to nearly thirty.

¹³⁷ Lysons, *supra* note 66 at 423.

¹³⁸ The Canadian government appears to disagree with this proposition. Canada pressed its softwood lumber industry to accept the SLA 2006 by arguing the opposite: that litigation would never end. Feldman, *supra* note 124, at 95.

III. “SNATCHING DEFEAT FROM THE JAWS OF VICTORY”¹³⁹—
THE TERMS OF THE 2006 SOFTWOOD LUMBER
AGREEMENT

On September 12, 2006, despite, or perhaps as a result of,¹⁴⁰ Canada’s legal victories during Lumber IV, Canadian and American authorities signed the SLA 2006—a negotiated settlement that ended the most recent and heavily litigated round of the softwood lumber dispute.¹⁴¹ The impacts of the agreement were twofold. First, it brought stability and clarity to the dispute settlement process—much to the delight of those involved in the Canadian-American softwood lumber trade. And second, it removed much of the parties’ incentive to address NAFTA’s shortcomings head on—which should raise concerns for those who are committed to strengthening the multilateral trading system. But before addressing the conflicting impacts of the agreement and its subsequent extension, it is important to first understand what the parties actually agreed to.

A. *The United States Retains Its Spoils—The Issue of Duty Deposits*

Despite the CIT’s determination that Canada was entitled to a full refund of the deposits collected on softwood lumber,¹⁴² the SLA 2006 failed to deliver such a result.¹⁴³ Under the terms of the agreement, the United States agreed to revoke its AD/CVD orders and refund approximately \$4.5 billion¹⁴⁴ in deposits it collected since 2002.¹⁴⁵ The United States, therefore, was permitted to retain \$1 billion of illegally collected duties.¹⁴⁶ This included \$500 million to the members of the Lumber Coalition, which some viewed as “a reward for

¹³⁹ *Id.* at 91.

¹⁴⁰ See Quayat, *supra* note 37, at 144-46 (arguing that rather than using “litigation as a path to victory,” Canada used “litigation as a negotiating tool,” and “secured a sufficiently broad range of legal victories to create a significant incentive for the [United States] to find a negotiated settlement”).

¹⁴¹ SLA 2006, *supra* note 2; Quayat, *supra* note 37, at 116.

¹⁴² See *supra* Part II.D.

¹⁴³ SLA 2006, *supra* note 2, at art. III-IV.

¹⁴⁴ *Softwood Lumber: Canada-U.S. Softwood Lumber Agreement—Backgrounder*, FOREIGN AFFAIRS & INT’L TRADE CAN., http://www.international.gc.ca/controls-contrôles/softwood-bois_oeuvre/notices-avis/agreement-accord.aspx?lang=eng&view=d (last modified Feb. 13, 2012).

¹⁴⁵ SLA 2006, *supra* note 2, at art. III-IV.

¹⁴⁶ *Id.* at Annex 2C(5).

sponsoring . . . illegal trade actions" and a "nest egg that will finance future trade harassment,"¹⁴⁷ and \$450 million for a "meritorious initiatives" account, which was viewed as "a gift" to the U.S. government.¹⁴⁸ Needless to say, this outcome was deeply problematic for opponents of the settlement.¹⁴⁹

B. Canada Agrees to Less than Free-Trade—The Issue of Export Measures

The SLA 2006 has also been criticized for codifying protectionist trade remedies.¹⁵⁰ Under the agreement, various regions in Canada are subject to a three-tier tariff or a tariff-rated quota system.¹⁵¹ When lumber prices are below \$315 per unit, Canadian lumber exporters pay either: (a) a 15% export tax, or (b) a 5% tax accompanied by a volume restraint on exports.¹⁵² As the price of lumber increases, export charges decline and export quotas increase.¹⁵³ Only when lumber prices go over \$355 per unit is lumber imported without export charges or volume restraints.¹⁵⁴ As those opposed to extending the agreement point out, "the price [of lumber] has risen above the \$355 threshold only once" since 2006, meaning that the

¹⁴⁷ *Softwood Lumber Deal: Hearing Before the Standing Comm. on Int'l Trade*, 39th Parliament 1st Sess. at 5 (2006) (statement of Mr. Normand Rivard, Council Chair, United Steelworkers), available at <http://www.parl.gc.ca/content/hoc/Committee/39/CIIT/Evidence/EV2326139/CIITEV23-E.PDF> [hereinafter *Canadian Parliament Softwood Lumber Hearing*].

¹⁴⁸ *Id.* at 2 (statement of Dr. Elliot Feldman, Trade Lawyer, Baker & Hostetler LLP); see also SLA 2006, *supra* note 2, at Annex 2C(5).

¹⁴⁹ See Feldman, *supra* note 124, at 94 (arguing that "had litigation continued on its course without extra-legal interference from the two sovereign governments . . . , Canadian industry would have received back all of its money and the [U.S.] industry would have received none"). Eventually, however, Mr. Feldman (or at least the clients he represents) came to support extending the SLA 2006. That support was based on the fact that "Canada's softwood lumber industry paid a very significant initiation fee for the SLA, \$1 billion," and "in light of its prior payment and sacrifice, now looks to whatever continuing benefits may be derived from the SLA according to its already agreed terms." Letter from Elliot J. Feldman, Baker & Hostetler LLP, on behalf of the Ontario Forest Indus. Assoc. and the Conseil de l'Industrie Forestière du Québec, to Mary Sullivan Smith, Dir. for Can. Affairs, Office of the U.S. Trade Rep. (Oct. 6, 2011), available at <http://www.regulations.gov/#!documentDetail;D=USTR-2011-0011-0002> (follow "View Attachment: PDF" hyperlink).

¹⁵⁰ *Soft in Wood and Head U.S.-Canadian Lumber Deal Makes a Mockery of Free Trade*, FIN. TIMES, Apr. 29, 2006, at 6 [hereinafter *Soft in Wood and Head*] (arguing that "[i]f private companies were to attempt, on their own, to strike this kind of anti-competitive deal, they would be rightly hauled before [U.S.] and Canadian authorities. Yet the latter can call it managed trade, and get away with it.").

¹⁵¹ SLA 2006, *supra* note 2, at art. VII.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

vast majority of softwood lumber imported from Canada has arrived subject to trade restrictive duties and volume restraints.¹⁵⁵ This fact gives credence to those who argue that the agreement is one that would make the “Comecon officials of the Soviet era look like relative Friedmanites.”¹⁵⁶

C. *Slaying the Softwood Hydra—The Issue of Dispute Settlement Mechanisms*

The proliferation of PTAs and the lack of legal certainty governing their relationship with WTO dispute settlement mechanisms have negatively affected the softwood lumber dispute by providing the parties with a near endless recourse to dissonant legal forums. The SLA 2006 mitigates this problem by streamlining the dispute settlement process.¹⁵⁷

If the parties fail to “arrive at a satisfactory resolution of the matter” through consultations, the agreement authorizes the parties to arbitrate the matter in the London Court of International Arbitration (LCIA).¹⁵⁸ Moreover, the SLA 2006 specifically protects against the potential for overlapping adjudication. For the duration of the agreement, “neither Party shall initiate any litigation or dispute settlement proceedings with respect to any matter arising under the SLA 2006, including proceedings pursuant to the Marrakesh Agreement Establishing the World Trade Organization or Chapter Twenty of the NAFTA.”¹⁵⁹ Additionally, the United States is not permitted to “self-initiate” any AD or CVD investigations for the duration of the agreement, and private parties involved in various lawsuits were forced to consent in writing to terminate all outstanding NAFTA and domestic legal proceedings.¹⁶⁰ These provisions limit adjudication of the softwood lumber

¹⁵⁵ Letter from Gerald M. Howard, Pres. & CEO, Nat’l Ass’n of Home Builders, to Mary Sullivan Smith, Dir. for Can. Affairs, Office of the U.S. Trade Rep. (Oct. 14, 2011), available at <http://www.regulations.gov/#!documentDetail;D=USTR-2011-0011-0003> (follow “View Attachment: PDF” hyperlink) [hereinafter Howard, USTR Comment] (labeling homebuilders, remodelers, and homebuyers as “downstream consumers”).

¹⁵⁶ *Soft in Wood and Head*, supra note 150, at 6.

¹⁵⁷ SLA 2006, supra note 2, at art. XIV.

¹⁵⁸ *Id.* at art. XIV(4)-(6). This procedure is “unusual” in that the LCIA is known as a nongovernmental commercial arbitration institution that typically administers matters between private parties as opposed to sovereign governments. John R. Crook, *United States and Canada Arbitrate a Softwood Lumber Dispute in the London Court of International Arbitration*, 102 AM. J. INT’L L. 192, 192 (2008).

¹⁵⁹ SLA 2006, supra note 2, at art. XIV(2).

¹⁶⁰ *Id.* at art. V & Annex 2A.

dispute to a single forum, the LCIA, effectively "slay[ing] the softwood lumber hydra."¹⁶¹

D. Agree to Disagree—Disputes Under the SLA 2006

Despite successfully addressing one of the major problems facing Lumber IV, the SLA 2006 was not designed to resolve the underlying legal issues of the dispute. The positions of both parties—with regard to the validity of the United States' AD/CVD orders and the legal effect of courts' or other dispute settlement bodies' decisions regarding those orders—were explicitly reserved.¹⁶² Therefore, it is not surprising that limiting the forums in which disputes can arise has not ended all conflict with regard to the softwood lumber dispute.

To date, the United States has filed three separate Requests for Arbitration under the SLA 2006, and decisions in each case indicate that the LCIA is an effective tribunal.¹⁶³ The first request by the United States protested Canada's alleged failure to properly calculate export quotas during the first six months of 2007.¹⁶⁴ The tribunal largely sided with the United States, ruling that Canada had failed to properly calculate quotas on exports from certain regions and consequently ordering Canada to impose an additional 10% charge on exports from those regions.¹⁶⁵

Separately, another tribunal was formed in response to the United States' request to consider whether certain provincial assistance programs—which Quebec and Ontario put into place to aid Canadian softwood lumber producers and exporters—breached Canada's obligation under the anti-circumvention provisions of the SLA 2006.¹⁶⁶ The tribunal again agreed with the United States, finding that certain measures

¹⁶¹ Knox, *supra* note 14, at 436. *See generally* Lysons, *supra* note 66, at 430 (noting that the dispute settlement provision of the SLA 2006 is "evidence of lessons learned in the softwood lumber dispute").

¹⁶² SLA 2006, *supra* note 2, at art. XI(1).

¹⁶³ *See* Lysons, *supra* note 66, at 431 tbl.2 (noting the faster schedule stipulated in the SLA 2006 as compared to NAFTA and the WTO).

¹⁶⁴ United States v. Canada, Request for Arbitration, ¶¶ 12-14 (LCIA Aug. 13, 2007), http://www.ustr.gov/sites/default/files/us_request_for_arbitration.pdf.

¹⁶⁵ United States v. Canada, Case No. 7941, Award on Remedies, at 148 (LCIA Feb. 23, 2009), http://www.ustr.gov/sites/default/files/award_on_remedy.pdf.

¹⁶⁶ United States v. Canada, Request for Arbitration, ¶ 4 (LCIA Jan. 18, 2008), http://www.ustr.gov/sites/default/files/provincial_us_request_for_arbitration.pdf. The "Anti-circumvention" provision of the SLA 2006 states that "[n]either Party . . . shall take action to circumvent or offset the commitments under the SLA 2006." SLA 2006, *supra* note 2, at art. XVII.

taken by Canada violated its obligations under the agreement.¹⁶⁷ Yet, the tribunal sided with Canada on how to calculate the remedy and granted significantly less compensation than was initially sought by the United States.¹⁶⁸ Following this ruling, both Canada and the United States offered their continued support for the agreement.¹⁶⁹ Given the litigious back and forth of Lumber IV, these responses are encouraging.¹⁷⁰

The most recent Request for Arbitration, brought by the United States in early 2011, involved U.S. allegations that timber harvested from public lands in British Columbia's interior region was being sold at prices below those provided for under the timber pricing system, which was grandfathered under the SLA 2006.¹⁷¹ Canada fought these allegations, arguing that the increased amount of low-priced timber from British Columbia was the result of a mountain pine beetle infestation and was not a violation of the SLA 2006's anti-circumvention provisions.¹⁷² In July of 2012, the LCIA sided with Canada and dismissed the U.S. claims in their entirety.¹⁷³ Although the Lumber Coalition was "very disappointed" with the ruling, it has reiterated its "respect and appreciat[ion] [for] the efforts of [the LCIA] and the U.S. government to grapple with the complex issues involved in this case."¹⁷⁴

¹⁶⁷ United States v. Canada, Case No. 81010, Award, ¶ 415 (LCIA Jan. 20, 2011), http://www.ustr.gov/webfm_send/2573.

¹⁶⁸ *Id.*

¹⁶⁹ Barrie McKenna, *Lumber Deal Still A Good One Despite New Arbitration Loss, Ottawa Says*, GLOBE & MAIL (Can.), Jan. 21, 2011; *Lumber Deal is Safe, Emerson has Heard*, TORONTO STAR, Mar. 6, 2008, at B2 (noting that the Canadian trade minister received assurances from the United States Trade Representative that the SLA 2006 was safe). Following the ruling, the president of the Quebec Forest Industry Council stated that, "[t]he Canadian government has indicated it intends to comply with the ruling and impose the additional export charges by the end of February [2011]." *U.S. Prevails in Lumber Dispute with Canada, But Falls Short on Remedy*, 29 INSIDE U.S. TRADE, Jan. 28, 2011, available at 2011 WLNR 1763804.

¹⁷⁰ See *supra* Part II.

¹⁷¹ United States v. Canada, Case No. 111790, Request for Arbitration, ¶ 4 (LCIA Jan. 18, 2011), http://www.ustr.gov/webfm_send/2484.

¹⁷² United States v. Canada, Case No. 111790, Canada's Response to Request for Arbitration, ¶¶ 1-6 (LCIA, Feb. 17, 2011), http://www.international.gc.ca/controls-contrôles/assets/pdfs/softwood/Resp_Req_%20Arbitration_Can_2011_02_17%20.pdf (alleging that the United States has attempted to "create a violation of the SLA out of the devastation inflicted on the forests of British Columbia by the Mountain Pine Beetle").

¹⁷³ United States v. Canada, Case No. 111790, Final Award, ¶ 439 (LCIA July 26, 2012), <http://www.international.gc.ca/controls-contrôles/assets/pdfs/softwood/111790.pdf>.

¹⁷⁴ Press Release, U.S. Lumber Coal., U.S. Lumber Coalition Disappointed by Arbitral Decision Regarding British Columbia Softwood Lumber Agreement Timber Pricing Violations (July 18, 2012), available at http://www.uslumbercoalition.org/doc/press_release_07-18-12.pdf.

Despite these continued disputes, the extension of the SLA 2006 offers the best hope for lumber peace to both Canada and the United States. Without first addressing the underlying conflicts between the dispute settlement mechanisms in NAFTA and the WTO, a return of the softwood lumber hydra, in the form of a prospective "Lumber V," would force the parties back into a costly and ineffective system of trade litigation.

IV. WHY THE 2006 SOFTWOOD LUMBER AGREEMENT IS RIGHT FOR SOFTWOOD LUMBER

Supporters of the SLA 2006 extension argued that it has "brought an element of stability and predictability to trade in softwood lumber products."¹⁷⁵ Those who wished to see it expire derided it as protectionist and claimed that it "reduces the incentive for the U.S. [lumber] producers . . . to increase production and improve efficiency of their mills so as to be internationally competitive," which ultimately has a negative economic effect on consumers.¹⁷⁶ While there is truth to both of these statements, a negotiated agreement that streamlines the dispute settlement process is necessary to offset the United States' aggressive support for its softwood lumber industry. Furthermore, although the SLA 2006 is not a complete victory for either country, new trading partners have the potential to alleviate the remaining tensions between the parties, increasing the likelihood that the SLA 2006 extension will bring internal peace to the softwood lumber dispute.

A. *A Stable and Predictable Dispute Resolution Mechanism Is Needed to Offset the United States' Obdurate Political Protection of Its Softwood Lumber Industry*

An exasperated Prime Minister Jean Chretien once reminded President George W. Bush, "You want gas, you want oil and you don't want wood? It's too bad, but if you have free

¹⁷⁵ Letter from David A. Yocis et al., Picard Kentz & Rowe LLP, on behalf of the U.S. Lumber Coal., to Mary Sullivan Smith, Dir. for Can. Affairs, Office of the U.S. Trade Rep. (Oct. 14, 2011), <http://www.regulations.gov/#!documentDetail;D=USTR-2011-0011-0004> (follow "View Attachment: PDF" hyperlink) [hereinafter Yocis, USTR Comment].

¹⁷⁶ Howard, USTR Comment, *supra* note 155 (labeling homebuilders, remodelers, and homebuyers as "downstream consumers"). The National Association of Home Builders, whose members construct approximately 80% of the new homes built each year in the United States, is a trade association whose "mission is to enhance the climate for housing and the building industry." *Id.*

trade, you have free trade.”¹⁷⁷ While this statement is theoretically sound, in reality trade does not exist in isolation, and when it is influenced by political favoritism, economic logic does not always prevail.¹⁷⁸ The United States has shown tremendous political resolve in its commitment to protect its softwood lumber industry and has brazenly used controversial litigation tactics in order to stretch the limits of that protection. Conversely, such steadfastness does not exist north of the border. Until U.S. resolve is weakened or until the overlapping dispute settlement mechanisms of global trade are disentangled in a way that prevents disingenuous litigation, a negotiated agreement with a single dispute resolution forum is the only outcome capable of guiding softwood lumber through the current mix of regionalism and multilateralism in the international trading regime.

1. Political Support Within the United States for Trade Restrictions on Canadian Softwood Lumber

Influential Senators from lumber-producing states, such as Max Baucus (D-Mont.), have long expressed their desire for a negotiated settlement to the lumber dispute in order to limit imports of Canadian softwood products. In an attempt to “spark a return . . . to the negotiating table,” Baucus went so far as to introduce the Softwood Lumber Duties Liquidation Act in 2004, which sought to liquidate \$3 billion in Canadian duty deposits prior to the resolution of ongoing legal appeals surrounding those deposits.¹⁷⁹ Although Canadian lumber industry insiders downplayed the legislation, characterizing it as a “message bill and not a serious threat,” evidence indicates that past U.S. Presidents have responded to Senators’ softwood lumber demands by supporting restrictions on imports of Canadian

¹⁷⁷ Barry Brown, *Lumber Dispute Could Affect State’s Imports of Canadian Gas*, BUFFALO NEWS, Aug. 23, 2001, at E1.

¹⁷⁸ See, e.g., Daniel N. Adams, Comment, *Back to Basics: The Predestined Failure of NAFTA Chapter 19 and Its Lessons for the Design of International Trade Regimes*, 22 EMORY INT’L L. REV. 205, 228 (2008) (noting that the SLA 2006 was a bargain “heavily influenced by political considerations”). During a 2009 Canada-United States Law Institute Conference on “North American Dispute Resolution,” John Terry, a Canadian trade lawyer, argued that, “despite the dispute settlement mechanisms [Canada has] put into place, realpolitik tends to continue to play the role it has always or has traditionally played.” John A. Terry, Canadian Speaker, North American Dispute Resolution, Proceedings of the Canadian-United States Law Institute Conference (Apr. 2-4, 2009), in 34 CAN.-U.S. L.J. 399, 416 (2010).

¹⁷⁹ *Baucus Pressures Canada on Lumber with Bill to Liquidate Duties*, INSIDE U.S. TRADE, Nov. 19, 2004, available at 2004 WLNR 10906271.

lumber.¹⁸⁰ Indeed, evidence from both Lumber III and Lumber IV shows that such demands were catalysts for trade restrictions.

After Canada notified the United States of its plans to withdraw from the MOU signed during Lumber II,¹⁸¹ a group of sixty-four Senators wrote a letter to the President, demanding that the Administration take action against Canada.¹⁸² The letter threatened that "if [diplomatic or trade] remedies are not pursued, we are prepared to find a legislative remedy to fully offset Canada's timber subsidies."¹⁸³ Lumber III was initiated in the immediate wake of this threat, with Commerce self-initiating trade proceedings against Canada.¹⁸⁴ Then, with the SLA 1996 set to expire, a group of fifty-one Senators wrote to the President, urging him "to make resolving the problem of subsidized lumber imports from Canada a top trade priority."¹⁸⁵ The response to this petition was Lumber IV, launched on the first business day after the 1996 agreement expired.¹⁸⁶ At minimum, these two letters coincided with major events in the softwood lumber dispute and highlight the broad level of political protection enjoyed by the U.S. lumber industry.¹⁸⁷ Most

¹⁸⁰ *Id.* In all four rounds of the softwood lumber dispute, Senators involved themselves indirectly in the negotiations by writing letters to the President, Commerce, and the USTR, urging them to resolve the dispute through negotiation with Canada or by imposing trade restrictions. Daowei Zhang & David Laband, *From Senators to the President: Solve the Lumber Problem or Else*, 123 PUB. CHOICE 393, 393-94 (2005) (conducting a roll call analysis to identify the factors influencing a Senator's willingness to sign letters demanding that the executive branch solve the lumber problem and showing that the economic importance of the lumber industry in a Senator's home state is positively correlated with signatory on these letters and that the presence of a large housing industry in a state makes a Senator less likely to sign these letters).

¹⁸¹ *See supra* Part I.B.

¹⁸² Zhang & Laband, *supra* note 180, at 397.

¹⁸³ *Id.*

¹⁸⁴ *See supra* Part I.C.

¹⁸⁵ Zhang & Laband, *supra* note 180, at 399.

¹⁸⁶ *See supra* Part II.

¹⁸⁷ Commentators argue that these Senators are influenced by the highly effective lobbying efforts of the Lumber Coalition. Zhang & Laband, *supra* note 180, at 407 (arguing that their findings are consistent with the "interest group theory of political decision making" whereby a "small but concentrated softwood lumber industry can successfully lobby their elected officials such as Senators and demand protection from foreign competition, despite the fact that such protectionism harms the economic welfare of the nation as a whole"). Although the Lumber Coalition has faced opposition in its quest to impose trade penalties on Canadian lumber, primarily from the National Association of Home Builders, the opposition has proven ineffective in its lobbying efforts as compared to the Lumber Coalition. *Id.* at 396, 398. As recently as 2011, Lumber Coalition officials have publicly stated that, "in the absence of an agreement between the two governments, the Coalition would have no choice but to petition for new antidumping and countervailing duty orders against unfairly traded softwood lumber products from Canada." Yocis, USTR Comment, *supra* note 175. Considering the Lumber Coalition filed fresh AD/CVD petitions on the first business day after the

recently, at least twenty-three members of Congress formally offered their support for the SLA 2006 extension.¹⁸⁸ In a letter to the United States Trade Representative, these lawmakers offered their support for extending the agreement in exchange for an “iron clad commitment that any Canadian violations will be addressed in a timely and effective manner.”¹⁸⁹

2. Controversial Litigation Tactics Utilized by the United States to Protect Its Softwood Lumber Industry

In addition to overt political support for trade restrictions, the United States has also proved willing to push the legal envelope in its attempts to protect its domestic softwood lumber industry. The most blatant example of this controversial gamesmanship is evident from the United States’ attempt to moot the unfavorable NAFTA rulings regarding the ITC’s injury determinations, under the guise of WTO compliance.¹⁹⁰ Although the CIT denounced this particular practice,¹⁹¹ it is indicative of how far the U.S. government is willing to go to protect domestic lumber interests.¹⁹² Until a solution is found to deal with the discordant overlap of dispute settlement mechanisms, other opportunities to thwart the system will remain. Therefore, express agreements like the SLA 2006 are—at least for the time being—essential in providing legal clarity and limiting the parties’ ability to manipulate the incongruous relationship between NAFTA and the WTO.¹⁹³

expiration of SLA 1996, the parties would be well served to give credence to these warnings. *See supra* Part II. One commentator also notes that the SLA 2006 delivered \$500 million to the Lumber Coalition, “many times more than enough to protect its interests,” which means the “[Lumber] Coalition is more than ready for trade action were it to think more restraints needed.” Feldman, *supra* note 124, at 96.

¹⁸⁸ Rossella Brevetti, *23 House Lawmakers Condition Support for Lumber Pact Extension on Enforcement*, 28 Int’l Trade Rep. (BNA) 1755 (Oct. 27, 2011).

¹⁸⁹ *Id.*

¹⁹⁰ *See supra* Part II.A.3.

¹⁹¹ *See supra* Part II.D.

¹⁹² BOWMAN ET AL., *supra* note 4, at 581; Quayat, *supra* note 37, at 134.

¹⁹³ *See Pauwelyn & Salles, supra* note 19, at 117 (arguing that the best short term solution to address forum shopping among international tribunals is to regulate overlaps with explicit treaty clauses).

3. Canada's Lackluster Response to the United States' Steadfast Support of Its Lumber Industry

In contrast to the United States' commitment to the lumber trade, Canada's support for its own lumber industry does not appear as steadfast. During the negotiations of the SLA 2006, some have argued that newly elected Canadian Prime Minister Stephen Harper prioritized restoring ties with the Bush Administration over supporting the Canadian lumber industry.¹⁹⁴ Prior to announcing the SLA 2006, Canada had to persuade most of its softwood lumber producers to refrain from objecting publicly to an agreement that the industry did not favor.¹⁹⁵ Today, Canada continues to waver in its support. Critics contend that the federal government "still strong-arms provincial governments to change [their] forestry practices."¹⁹⁶ And the government has applauded British Columbia for increasing the amount of its forest land put to auction.¹⁹⁷ These actions suggest that—despite numerous legal victories to the contrary—the Canadian federal government believes that the provinces do subsidize their production of exported lumber, and they offer a contrast to the rigid support for the industry found south of the border.¹⁹⁸

In explaining why Canadian lumber producers consented to the SLA 2006, the executive director of the Alberta Forest Products Association stated, "We picked the best of two bad situations."¹⁹⁹ This may be the most apt description of the current agreement. Although far from perfect, the SLA 2006 appeases U.S. demands for managed trade and provides Canada with a degree of legal certainty absent from the overlapping dispute settlement mechanism of NAFTA and the WTO. And while Canada may still have misgivings about its neighbor's fickle free trade preferences, new markets will provide Canada with options to escape the restricted U.S. market, and they will offer the United States relief from an otherwise continued influx of Canadian products.

¹⁹⁴ Adams, *supra* note 178, at 228.

¹⁹⁵ Feldman, *supra* note 124, at 91; Canadian Parliament Softwood Lumber Hearing, *supra* note 147, at 5 (statement of Normand Rivard, Council Chair, United Steelworkers) (opposing the SLA 2006).

¹⁹⁶ Feldman, *supra* note 124, at 97.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Josie Newman, *Timber Accord Rankles Canadian Firms*, CHRISTIAN SCI. MONITOR, Oct. 18, 2006, at 7, available at <http://www.csmonitor.com/2006/1018/p07s02-woam.html>.

B. New Lumber Markets Will Allow Canada and the United States to Mitigate Any Lasting Tensions

Throughout much of the softwood lumber dispute, the United States has been Canada's only major export market for softwood lumber.²⁰⁰ Recently, however, lumber exports to China have grown significantly, and Canada's reliance on the U.S. market has declined.²⁰¹ May 2011 was the first month in which the value of softwood lumber from British Columbia exported to China outstripped that exported to the United States.²⁰² China's purchases of softwood lumber from Canada grew from 9.04% of Canadian softwood exports in 2010 to 21.4% in 2011.²⁰³ This corresponded with a drop in Canada's softwood exports to the United States, from 66.71% of total exports in 2010 to 54.63% in 2011.²⁰⁴ This diversification of Canada's lumber market will only alleviate U.S. concerns that too much Canadian lumber is entering its market, and it will provide the Canadian lumber industry with alternative trading options if it finds the terms of the SLA 2006 too onerous.

While critics abound, and future conflicts are sure to emerge, the SLA 2006 both effectively slays the softwood lumber hydra and appeases the obdurate demands of U.S. lawmakers. Unfortunately, an unwanted side effect of this peace is that it removes a major incentive to address the monstrous dispute resolution system that exists beneath the softwood lumber dispute. In short, while the SLA 2006 is a workable solution to the softwood lumber dispute, it also adds to the perilous forces undercutting the multilateral trading system.

V. A PYRRHIC VICTORY—WHY THE SLA 2006 ADDS TO THE FORCES UNDERCUTTING THE MULTILATERAL TRADING SYSTEM

Before the SLA 2006 was signed, commentators predicted that the new dispute settlement system proposed in the agreement “spell[ed] the end of NAFTA’s [C]hapter 19, and

²⁰⁰ BOWMAN ET AL., *supra* note 4, at 553-54.

²⁰¹ *Forest Product Markets*, NAT. RES. CAN., <http://cfs.nrcan.gc.ca/pages/330> (last updated Oct. 22, 2012).

²⁰² Jeremy Hainsworth, *British Columbia Lumber Exports to China Outstrip in Value Softwood Exports to U.S.*, 28 Int'l Trade Rep. (BNA) 1249 (July 28, 2011).

²⁰³ *Id.*

²⁰⁴ *Id.*

in many ways the end of NAFTA itself.”²⁰⁵ If this were the lasting impact of the SLA 2006, it would be cause for celebration: a response to the failures of NAFTA would have highlighted a major problem brought on by the proliferation of PTAs—namely, discordant dispute resolution—and brought about the demise of one of those problematic agreements. Unfortunately, this did not occur, and Chapter 19 is still used today.²⁰⁶ Indeed, since 2006, the most bitter trade dispute in North America has been immunized from many of the problems caused by the existence of PTAs. Unless Canada and the United States recognize that the SLA 2006’s straightforward dispute settlement mechanism is what has alleviated their softwood lumber problems and choose to apply a similarly coherent principle to the larger trading regime, the extension of the SLA 2006 is, at most, a Pyrrhic victory.

A. *A Dispute Settlement Cacophony—The Problems with Preferential Trade Agreements*

Although some argue that “overlapping legal systems [are] unavoidable” in today’s global landscape,²⁰⁷ the softwood lumber dispute presents a telling example of the “wastefulness and potential futility” of such overlap in hotly contested trade disputes.²⁰⁸ Specifically, the unresolved fragmentation between regionalism and multilateralism creates at least three serious

²⁰⁵ Canadian Parliament Softwood Lumber Hearing, *supra* note 147, at 1 (statement of Dr. Elliot Feldman, Trade Lawyer, Baker & Hostetler LLP).

²⁰⁶ See, e.g., North American Free Trade Agreement Binational Panel Review, *In the Matter of: Certain Welded Large Diameter Line Pipe from Mexico*, at 1, USA-MEX-2007-1904-03 (Aug. 29, 2011) (reviewing the ITC’s decision “that revocation of [an] antidumping order on Certain Large Diameter Line Pipe from . . . Mexico would not likely result in the continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time”).

²⁰⁷ See, e.g., Elizabeth Trujillo, *Disaggregating the Regional-Multilateral Overlap: The NAFTA Looking-Glass*, 19 IND. INT’L & COMP. L. REV. 533, 558 (2009). According to Trujillo, “In order to preserve its power, the WTO must share its adjudicatory power and force regional and bilateral tribunals to settle matters regionally” and must become “the coordinating force of the global trade system by creating concrete linkages to its Member States and their regional concerns.” *Id.* at 568.

²⁰⁸ Cone, *supra* note 74, at 849 (arguing that free trade areas comprising the United States and countries with substantially less economic strength “run the risk of becoming extensions of hegemonic U.S. policies”); see also Dunoff, *supra* note 31, at 337 (noting that other trade disputes raise similar issues, but arguing that “with three different lines of litigation proceeding virtually simultaneously before domestic fora, NAFTA panels, and WTO panels, the Softwood Lumber dispute presents in a particularly stark form the issues raised by litigation before multiple fora”).

problems for the current international trade dispute settlement system.²⁰⁹

First, it prolongs the underlying dispute.²¹⁰ Despite numerous legal victories over the course of Lumber IV, it took Canada over five years to slay the softwood lumber hydra.²¹¹ Moreover, the longer the dispute carried on, the more opportunities there were for U.S. agencies to issue additional determinations, each of which started the challenge process anew.²¹² Second, when multiple forums address the same issue, the possibility of inconsistent judgments increases.²¹³ In particular, state practices, such as the United States' use of zeroing, may be deemed valid in one forum and invalid in another.²¹⁴ Finally, the existence of multiple forums gives rise to litigious gamesmanship. If a state is able to win even a partial affirmation of an AD/CVD ruling, as the United States did at the WTO during Lumber IV,²¹⁵ its trade agencies may argue that, notwithstanding adverse rulings in one forum, success in another provides legal cover to ignore the unfavorable result.

During the course of the softwood lumber dispute, the relationship among the various dispute settlement forums spanned a "continuum from deference to defiance,"²¹⁶ but there was an ever-present possibility that one of the issues discussed above would surface and derail any apparent progress. Canada and the United States addressed this concern by drafting a PTA sub-agreement, the SLA 2006, which effectively trumped NAFTA and the WTO with a new dispute resolution mechanism exclusively for softwood lumber disputes.²¹⁷ As will be shown below, this was a misguided attempt to solve a much deeper problem.

²⁰⁹ Dunoff, *supra* note 31, at 332.

²¹⁰ Knox, *supra* note 14, at 436.

²¹¹ *See supra* Part II.

²¹² Knox, *supra* note 14, at 436.

²¹³ *Id.*

²¹⁴ Dunoff, *supra* note 31, at 332 (noting that by late 2004, the United States' use of zeroing had been upheld in both the U.S. Court of Appeals for the Federal Circuit and NAFTA, but that the WTO's AB had found the zeroing to be inconsistent with U.S. obligations under international trade law).

²¹⁵ *See supra* Part II.A.2.b.

²¹⁶ Dunoff, *supra* note 31, at 337-38.

²¹⁷ *See supra* Part III.

B. PTA Sub-Agreements Deter a Return to Multilateral Trade

While PTAs have their own set of problems, the additional risks of PTA sub-agreements are twofold. They both pilfer from the finite amount of human and administrative capital available to conduct trade agreements, and they remove incentives to address the larger issues at stake.

One of critics' main concerns with the proliferation of PTAs is that their negotiation, ratification, implementation, and enforcement come at the expense of the multilateral system.²¹⁸ PTA sub-agreements take this problem one step further by focusing additional human and administrative energy on agreements that are further removed from multilateral objectives. This would not be a cause for concern if these sub-agreements solved the fundamental shortcomings of PTAs. Unfortunately, agreements such as the SLA 2006 merely immunize certain key industries from the drawbacks of PTAs while leaving others to languish in an entangled mess of trade agreements.

The SLA 2006 acknowledges the problems with bilateral agreements, yet it provides the largest trade dispute in Canadian-American relations with immunity from those problems. As of 2006, the "longest running and perhaps most bitter trade dispute ever between the two countries" is no longer saddled with a cacophony of dispute settlement mechanisms.²¹⁹ With billions in trade now beyond the convoluted interplay between NAFTA and the WTO, Canada and the United States are that much less likely to address the problems of overlapping jurisdiction.²²⁰ While the saying is that things get worse before they get better, those in the multilateral trading community might worry that PTA sub-agreements are an example of things getting better before they get worse.

²¹⁸ As a World Bank study noted, "[r]eserves of administrative skill, political capital, or imagination are finite; if they are devoted to a [PTA] they are not available for multilateral objectives." Dunoff, *supra* note 31, at 334 (citation omitted).

²¹⁹ BOWMAN ET AL., *supra* note 4, at 553.

²²⁰ *Id.* (noting that Canada exported nearly \$7 billion worth of softwood lumber to the United States in 2000). By 2011, bilateral trade in softwood lumber had decreased to \$3 billion. *Canada Applauds Softwood Lumber Ruling on British Columbia's Timber-Pricing System*, FOREIGN AFF. & INT'L TRADE CAN., http://www.international.gc.ca/media_commerce/comm/news-communiques/2012/07/18a.aspx?view=d (last modified July 19, 2012).

CONCLUSION

Softwood lumber's termite problem is an infestation that concerns the entire trading community, and PTA sub-agreements are not the insecticide that the multilateral system is waiting for. If Canada and the United States are to assist in addressing the real issues at stake, they must look beyond creating a solution only for lumber. Rather than allowing an armistice in the softwood lumber dispute to serve as an excuse to ignore the concerns surrounding PTAs, the two parties must recognize why the SLA 2006 has been able to mitigate the dispute and extend that rationale to the greater disconnect between NAFTA and the WTO.

The SLA 2006 replaces a discordant dispute settlement scheme with a straightforward and efficient arbitral tribunal. Until Canada and the United States integrate a similar solution into the larger trading system, the lessons of the softwood lumber dispute will continue to go unheeded.

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