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THE NEW SOFTWOOD LUMBER AGREEMENT BETWEEN THE UNITED STATES AND CANADA: FINALLY SEEING THE FOREST INSTEAD OF MERELY THE TREES (?)

R. Shane Sillivent*

I. INTRODUCTION

THE United States and Canada have been bickering about softwood lumber for some time now.¹ The U.S. lumber industry claims that the Canadian lumber industry is unfairly subsidized and that the Canadian firms' pricing of softwood lumber sold in the U.S. market constitutes illegal dumping.² After considering that the United States and Canada are the world's two most active trading partners,³ it should come as no surprise that the stakes involved in this trade dispute are significant. For example, \$8.5 billion worth of lumber is exported from Canada into the United States each year,⁴ over 7,280,000 jobs in U.S. and Canadian lumber-related industries are affected,⁵ and \$5.3 billion in duties has been collected from Canadian lumber companies by the U.S. government since May 2002.⁶ Because of these high stakes and the

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1. Foreign Affairs and International Trade Canada, Export and Import Controls, Softwood Lumber: Learn More, <http://www.dfait-maeci.gc.ca/trade/eicb/softwood/background-en.asp> (last visited Sept. 16, 2007).

The history of Canada's softwood lumber disputes with the United States is a long one. The first skirmishes date back to disagreements between New Brunswick and Maine in the 1820s. The issue of lumber also figured prominently when the U.S. House of Representatives considered a reciprocity treaty with Canada in 1853, as well as in later disagreements throughout the late 1800s and 1900s. *Id.*

2. *See generally* Coalition for Fair Lumber Imports, Issue Background: Canadian Lumber Is Heavily Subsidized and Unfairly Displaces U.S. Manufacturing, <http://www.fairlumbercoalition.org/general.cfm?page=12> (last visited Sept. 16, 2007).

3. Foreign Affairs and International Trade Canada, Export and Import Controls, Softwood Lumber, <http://www.dfait-maeci.gc.ca/eicb/softwood/intro-en.asp> (last visited Sept. 16, 2007).

4. *Id.*

5. *See id.*

6. *Softwood Deal Could Reach Commons Next Week*, CTV News, Sept. 13, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060913/softwood_emerson_060913/20060913/.

persistent volatility caused by over twenty years of contentious litigation, all interested parties are very anxious to see whether a new softwood lumber agreement signed on September 12, 2006, and effective since October 12, 2006, will finally provide a durable economic model and a framework for communication that is able to prevent future impasse.⁷

This note first explains the basics of U.S. countervailing duty and antidumping law, which are needed to understand the accusations made against the Canadian lumber industry. It then briefly surveys the history of the U.S.-Canadian softwood lumber dispute in order to delineate the reoccurring problems that have defeated past conciliatory efforts and to predict whether the new agreement will ultimately avoid such pitfalls. Finally, it examines the new U.S.-Canadian Softwood Lumber Agreement, the Canadian-administered export tax/quota system that it adopts, and a disagreement that has already arisen under the new agreement.

II. U.S. COUNTERVAILING DUTY AND ANTIDUMPING LAW

In the age of globalization, when domestic products must regularly compete with foreign goods, the legal measures taken to ensure equitable trade between international partners assume paramount importance.⁸ Particularly in regard to distortions in the U.S. market caused by imports that have been unfairly subsidized or that are being sold for prices below their fair value, the most vital safeguards available for equalizing competitive conditions are countervailing duties and antidumping tariffs, respectively.⁹ The legal doctrines that define countervailable subsidies and unfair pricing provide the background necessary to understand the U.S.-Canadian softwood lumber dispute.

A. COUNTERVAILING DUTY LAW

A countervailing duty is a tariff imposed on subsidized imports that is designed to even the playing field between domestic and foreign producers.¹⁰ A subsidy is a government conferral of economic benefits “such as direct cash payments, credits against taxes, [or] loans at terms that do not reflect market conditions” that assists a business or industry in producing its goods.¹¹ The general U.S. rule used to determine whether counter-

7. See, e.g., *Emerson and U.S. Counterpart Ink Softwood Deal*, CTV NEWS, Sept. 12, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060911/softwood_deal_060912?s_name=no_ads=; Press Release, Office of the U.S. Trade Representative, U.S. Trade Representative Susan C. Schwab Announces Entry into Force of U.S.-Canada Softwood Lumber Agreement (Oct. 12, 2006), http://www.ustr.gov/Document_Library/Section_Index.html (search “U.S.-Canada Softwood Lumber” in “Press Releases” category).

8. JOSEPH E. PATTISON, 1 *ANTIDUMPING & COUNTERVAILING DUTY LAWS* § 1:1 (West 2007).

9. *Id.*

10. *Id.* § 1:6.

11. International Trade Administration, U.S. Department of Commerce, An Introduction to U.S. Trade Remedies, <http://ia.ita.doc.gov/intro/index.html> (last visited Sept. 16, 2007); 25 C.J.S. *Customs Duties* § 135 (West 2007).

vailing duties should be imposed is that if the U.S. Department of Commerce (DOC) establishes that a government is providing a financial benefit that assists a specific business or industry in producing goods that are exported to the United States, and if the U.S. International Trade Commission (ITC) determines that the exports cause material injury to or prevent the establishment of a domestic U.S. industry, then a countervailing duty will be charged on the foreign goods to level the playing field.¹²

The first part of the general U.S. countervailing duty rule dictates that only those subsidies that are granted to a specific business or industry¹³ that produces goods that are sold in the United States¹⁴ are countervailable. To honor the “specificity” requirement, the DOC applies a complex set of criteria in order “to differentiate between those subsidies that distort trade by aiding a specific company or industry, and those that benefit society generally, such as the police, fire protection, roads and schools, and thus minimally distort trade, if at all.”¹⁵ The seemingly obvious stipulation that the subsidies must go to firms that produce goods that will be exported to the United States actually accentuates the point that the very purpose of countervailing duties is to offset only those “unfair competitive advantage[s] a foreign producer [has] in selling in the American market [due to] that producer’s government in effect assum[ing] part of the producer’s expenses of selling [in the United States].”¹⁶ In any case, de minimis subsidies are not countervailable under DOC policy.¹⁷

The second part of the general U.S. countervailing duty rule requires the ITC to determine whether the imports caused material injury to a U.S. industry.¹⁸ To make this determination, the ITC first compares the imports with domestic products in order to identify the domestic industries that are potentially affected.¹⁹ Then the ITC determines whether any of the potentially affected domestic industries are in fact materially injured by the subsidized imports.²⁰ Finally, the ITC evaluates the causal nexus between the imports and the material injury by considering the volume of imports and their effect on U.S. prices and producers.²¹ It should be noted that the ITC is granted “considerable discretion” in its

12. Tariff Act of 1930, 19 U.S.C. § 1671 (2000). See also 25 C.J.S. *Customs Duties* §§ 135-44.

13. 25 C.J.S. *Customs Duties* § 141.

14. See *id.* § 136.

15. *Id.* § 141.

16. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986); 25 C.J.S. *Customs Duties* § 136.

17. PATTISON, *supra* note 8, §§ 6:4, 6:7 (explaining that the DOC adheres “to a policy of declining import relief when an investigation reveals that the action targeted by a petitioner is de minimis” and that “[s]uch a policy . . . seeks to . . . conserve administration and enforcement resources when it is believed that the benefit to be gained does not justify the expenditure of those resources”).

18. 25 C.J.S. *Customs Duties* § 143.

19. *Id.*

20. *Id.*

21. *Id.* § 144.

analysis and that it generally considers all relevant economic factors rather than isolating one single determinative factor.²² To summarize, if the DOC determines that a countervailable subsidy has been specifically granted to an industry that exports its goods into the U.S. market, and if the ITC determines that the subsidized imports caused material injury to a U.S. industry, then a countervailing duty will be levied to even the playing field.

B. ANTIDUMPING LAW

In addition to the imposition of countervailing duties, a domestic producer that believes foreign imports are being sold at unfair prices may petition for the imposition of antidumping duties. One court has explained that “[t]he act of selling imports at less than fair market value is called ‘dumping.’”²³ Dumping occurs when producers sell their goods in another country’s markets at lower prices than what they charge under similar conditions of sale in their own country.²⁴ Producers practice this form of price discrimination because it allows them to maximize their volume of production regardless of market demand, minimize their production cost per unit, and ultimately maximize their profit.²⁵ The general U.S. rule for determining whether antidumping duties should be used to counteract the unfair competitive advantage gained through international price discrimination is that if the DOC determines that foreign goods are being sold in the United States at less than their fair value, and if the ITC determines that a U.S. industry is materially injured as a result, then an antidumping duty equal to the excess of the price charged in the United States over the price charged in the foreign market will be imposed on the dumped goods.²⁶

The first part of the general U.S. antidumping rule stipulates that the DOC must determine whether the foreign goods are being sold for less than their fair value in the U.S. market.²⁷ To make this determination, the DOC must compare the price of the goods in their home market with their price in the U.S. market, and if the former price is higher than the latter, then the excess is referred to as the dumping margin.²⁸ This dumping margin is what the antidumping duties are designed to counteract.²⁹ When conducting this comparison, the DOC considers the respective prices at the same level of trade and time of sale to ensure that the comparison is as accurate and fair as possible.³⁰

22. *Id.*

23. *U.S. Steel Group v. United States*, 96 F.3d 1352, 1356 n.1 (Fed. Cir. 1996).

24. *PATTISON*, *supra* note 8, § 1:2.

25. *See id.* § 1:5.

26. *Tariff Act of 1930*, 19 U.S.C. § 1673 (2000); *see also* 25 C.J.S. *Customs Duties* § 148 (citing *Zenith Elec. Corp. v. United States*, 988 F.2d 1573, 1576 (Fed. Cir. 1993)).

27. 25 C.J.S. *Customs Duties* § 148.

28. *Id.*

29. *Id.*

30. *Id.*

The second part of the general U.S. antidumping rule stipulates that the ITC must determine whether the dumped goods materially injure or threaten to injure a U.S. industry.³¹ There must be findings of both material injury and causation.³² When making these determinations, the ITC considers the volume of imports and their effect on U.S. prices and producers.³³ It is important to note that the dumped imports need not be “the sole cause, or even a major cause, of the injury as long as the evidence shows that less than fair value imports are more than a de minimis factor in contributing to the injury.”³⁴ To summarize, if the DOC determines that foreign goods are sold in the United States at less than their fair value, and if the ITC determines that an industry in the United States is materially injured as a consequence, then antidumping duties shall be imposed in order to counteract the harmful effects of such price discrimination.

III. HISTORY OF THE U.S.-CANADIAN SOFTWOOD LUMBER DISPUTE

Although the extensive history of softwood lumber disputes between the United States and Canada actually reaches all the way back into the early nineteenth century,³⁵ the modern U.S.-Canadian softwood lumber dispute refers to the four major cycles of litigation that have occurred since 1982.³⁶ This latest era of disagreement began when a group of U.S. softwood lumber producers called the Coalition for Fair Lumber Imports (CFLI) started claiming that the Canadian provincial governments unfairly subsidize their domestic lumber industries and that Canadian lumber companies dump their products in the U.S. market at unfair prices.³⁷ According to the CFLI, since the Canadian provincial governments own most of the timber in Canada, they are able to administratively “set prices for public timber far below market value, thus lowering production costs for Canadian lumber companies.”³⁸ In addition to providing underpriced timber, the CFLI also claims that the “Canadian provinces have instituted policies designed to maximize jobs and production in the Canadian industry—including minimum harvest requirements, domestic processing mandates, and log export restrictions—resulting in artificially high timber harvesting and lumber production even when the market is

31. *Id.* § 151.

32. *Id.*

33. *Id.*

34. *Id.* § 152.

35. Softwood Lumber: Learn More, *supra* note 1.

36. Foreign Affairs and International Trade Canada, Export and Import Controls, Canada-U.S. Softwood Lumber Trade Relations (1982-2006), <http://www.dfait-maeci.gc.ca/eicb/softwood/chrono-en.asp> (last visited Sept. 16, 2007); *see also* Canadian Broadcasting Corporation, At Loggerheads: The Canada-U.S. Softwood Lumber Dispute, <http://archives.cbc.ca/300c.asp?id=1-73-787> (last visited Sept. 16, 2007) (“The [U.S.-Canadian softwood lumber] dispute dates back hundreds of years, but in the 1980s it turned nasty.”).

37. *See* Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36.

38. Coalition for Fair Lumber Imports, *supra* note 2.

oversupplied,” which in turn allows “Canadian companies [to] unload their excess production into the U.S. market.”³⁹ A brief survey of each cycle of litigation that has arisen out of the modern softwood lumber dispute will allow for a fuller appreciation of the provisions contained within the new U.S.-Canadian Softwood Lumber Agreement.

A. LUMBER I

The first cycle of litigation during the modern U.S.-Canadian softwood lumber dispute, Lumber I, was initiated in 1982 when the CFLI petitioned the DOC to impose countervailing duties in order to counteract the subsidy that was allegedly provided by the Canadian provinces’ system of granting its timber at administratively-set prices.⁴⁰ The DOC investigated the CFLI’s allegations, but concluded that any benefit provided by the Canadian system of setting timber prices (called the stumpage system) was not directed towards the lumber industry with sufficient specificity and was therefore not countervailable.⁴¹

B. LUMBER II

The second modern cycle of litigation, Lumber II, was initiated when the CFLI again petitioned the DOC for countervailing duties in 1986.⁴² This time the DOC’s preliminary determination was that the provincial stumpage system did confer a countervailable subsidy to the Canadian lumber producers, which averaged 15 percent.⁴³ But before countervailing duties were imposed, the United States and Canada entered into a memorandum of understanding to resolve the dispute.⁴⁴ The U.S.-Canadian Memorandum of Understanding (MOU) rendered the DOC’s preliminary determination of a 15 percent countervailable subsidy legally void, ended the appeals that had already been filed, and adopted a Canadian-administered tariff system, whereby either the Canadian government could collect a 15 percent charge on lumber exports or the provincial governments could increase the stumpage fees they charged for harvesting their timber and bypass the export charge.⁴⁵ Also, in 1989 the United States and Canada entered into a free trade agreement (U.S.-Canada Free Trade Agreement) that adopted a controversial dispute resolution system under chapter 19, whereby countervailing duty and anti-dumping determinations were subject to binding, bi-national panel re-

39. *Id.*

40. Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36.

41. Ministry of Forest and Range, Government of British Columbia, Canada-U.S. Lumber Trade Disputes, <http://www.for.gov.bc.ca/het/softwood/disputes.htm> (last visited Sept. 16, 2007) (explaining that the DOC found that the “stumpage programs were not countervailable because stumpage was generally available and not limited to a specific industry (i.e., the specificity test was not met)”).

42. Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36.

43. *Id.*

44. *Id.*

45. *Id.*

view.⁴⁶ This dispute resolution system was controversial because normally countervailing duty and anti-dumping determinations made by the DOC were reviewed by the U.S. Court of International Trade, and commentators even suggested that it effectuated an unconstitutional concession of U.S. sovereignty.⁴⁷

C. LUMBER III

After Canada withdrew from the MOU in 1991,⁴⁸ the third modern cycle of litigation, Lumber III, began when the “DOC self-initiated a new countervailing duty investigation” that ultimately concluded that the provincial stumpage system did confer a countervailable subsidy.⁴⁹ After this determination, the ITC found that the U.S. market was materially injured by the subsidized lumber imports, thereby paving the way for the DOC to impose a 6.51 percent countervailing duty on Canadian softwood imports.⁵⁰ In response, “Canada appealed both final affirmative determinations on subsidy and injury to binational panels established under Chapter 19 of the Canada-United States Free Trade Agreement (FTA).”⁵¹ This led to a flurry of remands adverse to the United States and a subsequent U.S. appeal to an Extraordinary Challenge Committee (ECC) under article 1904 of chapter 19 of the FTA.⁵² After losing the ECC challenge, the DOC revoked the countervailing duties it had imposed.⁵³

In 1996, Lumber III ended when the United States and Canada reached a five-year trade agreement, which would be their first softwood lumber agreement (SLA I).⁵⁴ Under its terms, Canada could export up to 14.7 billion board feet of its lumber annually to the United States without being charged any tariffs.⁵⁵ But any amount of exported lumber over 14.7 billion board feet would be taxed at “increasingly-prohibitive tariff rates.”⁵⁶ Unfortunately, the SLA I “did not bring the expected five years of trade peace,”⁵⁷ and when it expired in 2001, the United States and

46. *Id.*

47. See generally John R. Magnus, TRADEWINS, LLC, Lumber and the NAFTA Chapter 19 Mess, Presented to American University, Washington College of Law Conference (Feb. 27, 2006), available at <http://www.worldtradelaw.net/articles/magnuschapter19.pdf> (criticizing chapter 19 of the North American Free Trade Agreement, which was modeled on chapter 19 of the U.S.-Canada Free Trade Agreement).

48. Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36 (“While keeping these replacement measures in place, Canada exercised its contractual right to terminate the MOU on September 3, 1991.”).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. Lumber Trade Disputes, *supra* note 41 (“The consultations led to the negotiation of the five-year Softwood Lumber Agreement in April 1996.”).

55. *Id.*

56. Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36.

57. Lumber Trade Disputes, *supra* note 41.

Canada were unable to agree on a replacement.⁵⁸

D. LUMBER IV

Lumber IV commenced immediately after the expiration of the SLA I in 2001, when the CFLI again petitioned the DOC, this time for both countervailing and anti-dumping duties.⁵⁹ A detailed description of the complex and voluminous international litigation that followed, which included investigations by the DOC and the ITC; subsequent Canadian appeals to North American Free Trade Agreement (NAFTA, the agreement that superseded the FTA in 1994) chapter 19 binational panels and to the World Trade Organization (WTO); and U.S. appeals to NAFTA extraordinary challenge committees, is beyond the scope of this note.⁶⁰ Suffice it to say that the different rulings coming out of the NAFTA and WTO review systems, sometimes at odds with each other, strained not only the commercial but also the political relationship between the United States and Canada.⁶¹ In fact, there were strident calls from academia and politicians to reassess the utility of the NAFTA dispute resolution process and even to reassess the continued appeal of the trade agreement itself.⁶² Ultimately it became clear to both governments that a political solution was the only way to solve the puzzle that the litigation in the NAFTA and WTO venues had caused in the past and was sure to cause in the foreseeable future.⁶³ This was the realization that eventually led to the new softwood lumber agreement.

IV. THE NEW U.S.-CANADIAN SOFTWOOD LUMBER AGREEMENT

The end of Lumber IV was signaled when the United States and Canada reached an agreement in principle to resolve the dispute on April 27, 2006.⁶⁴ On July 1, 2006, the two governments were able to conclude their negotiations over what had become a new U.S.-Canada Softwood Lumber Agreement (SLA II).⁶⁵ On September 12, 2006, the SLA II was signed by U.S. Trade Representative Susan Schwab and Canadian Minis-

58. See Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36.

59. Lumber Trade Disputes, *supra* note 41.

60. See generally Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36 (discussing the extensive litigation taking place over the last five years).

61. See *id.*

62. See generally James Graham, *Re-evaluation of the Dispute Resolution Mechanism in the Canada-U.S. Free Trade Agreement: The Softwood Lumber Dispute*, 28 CASE W. RES. J. INT'L L. 473, 473 (1996) (foreshadowing the dangers posed to the NAFTA dispute resolution process by the "destructive precedent" set under the FTA).

63. See *Emerson and U.S. Counterpart Ink Softwood Deal*, *supra* note 7 (quoting U.S. Trade Representative Susan Schwab as saying "This is indeed a great day, and a day that's been a long time coming. We're talking about resolving over 20 years of litigation.").

64. Canada-U.S. Softwood Lumber Trade Relations (1982-2006), *supra* note 36.

65. *Id.*

ter of International Trade David L. Emerson.⁶⁶ The SLA II became effective October 12, 2006.⁶⁷ Although it is too early to predict if the framework adopted in this new agreement will be successful enough to run its full course or even induce renewal at the end of its term (and thereby succeed where the SLA I failed), a brief examination of the Canadian-administered regime that the SLA II adopts is necessary to judge its chances.

A. PRINCIPAL TERMS OF THE SLA II

The SLA II will run “for a term of seven years with an option to renew for two additional years,”⁶⁸ even though a termination clause will provide that “[e]ither party may, at any time after the [SLA II] has been in effect for eighteen months, terminate the agreement by providing six months’ notice.”⁶⁹ Regarding the initiation of any new countervailing or antidumping duties cases, the U.S. government agrees under the terms of the SLA II to forgo this prerogative and to dismiss any new trade-remedy petitions.⁷⁰ Similarly, the United States agrees to forgo the initiation of any new trade-remedy actions for twelve months after the agreement expires or is terminated.⁷¹ Regarding ongoing litigation, both governments agree to “terminate all litigation before the entry into force of the [SLA II].”⁷² Regarding duties collected in the past, the terms of the SLA II will require the U.S. government to return more than \$4.5 billion of the approximately \$5.3 billion collected in countervailing and antidumping duties from the Canadian lumber industry.⁷³ Importantly, disputes relating to the SLA II will be resolved through a final, binding, neutral, and transparent dispute settlement process, whereby a panel of non-North American commercial arbitrators will resolve any disagreements.⁷⁴

The focal point of the SLA II is the Canadian-administered regulatory regime it adopts. Basically, no export duties will be assessed if lumber prices are above \$355, but if the price dips to or below \$355, Canadian regions will be able to choose between an export duty that varies with price and a mixed regime consisting of an export duty and an export quota limit, both varying with price.⁷⁵ The SLA II also establishes a “Surge Mechanism” that first determines an export volume limitation for

66. *Emerson and U.S. Counterpart Ink Softwood Deal*, *supra* note 7.

67. Office of the U.S. Trade Representative, *Softwood Lumber*, http://www.ustr.gov/World_Regions/Americas/Canada/Softwood_Lumber/Section_Index.html (last visited Sept. 16, 2007).

68. Foreign Affairs and International Trade Canada, *Export and Import Controls, The Canada-U.S. Softwood Lumber Agreement*, <http://www.dfait-maeci.gc.ca/eicb/softwood/SLA-background-en.asp> (last visited Sept. 16, 2007).

69. *Id.*; see generally *Softwood Lumber Agreement, U.S.-Can.*, Sept. 12, 2006, <http://www.dfait-maeci.gc.ca/eicb/softwood/pdfs/SLA-en.pdf>.

70. *The Canada-U.S. Softwood Lumber Agreement*, *supra* note 68.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

each Canadian province based on its historic share of the U.S. market and then stipulates that if a province exceeds its assigned limitation by 110 percent in any month, “the export charge on shipments from that province during that month will be increased by 50 percent.”⁷⁶

B. INITIAL CANADIAN REACTION

The immediate Canadian political reaction to the SLA II was mixed: the agreement garnered support from the conservative Harper government but drew harsh criticism from the New Democratic and Liberal political parties.⁷⁷ But after the Bloc Quebecois announced its endorsement, the SLA II passed its first reading in the Canadian House of Commons with a 172-116 majority.⁷⁸ The Canadian lumber industry has largely viewed the SLA II as the best possible immediate solution,⁷⁹ although some producers’ refusal to abandon their ongoing litigation delayed the agreement’s taking effect.⁸⁰ Elliott Feldman, an international trade attorney and former director at the Canadian-American Business Council, insists that the deal is “entirely one-sided,” that it does not further Canada’s interest in the least, that its duration is too short to provide long-term stability in the market, and that “[t]he reason the Canadian industry has fallen into what’s euphemistically being called support for the agreement is because they have been bled dry[,] [i.e.,] [t]heir profits for five years have gone into the U.S. treasury.”⁸¹

C. DISAGREEMENT ALREADY

To a large extent, the SLA II’s success will depend on whether its provisions provide an effective way to solve disputes before the parties feel compelled to arbitrate or even terminate the agreement. Unfortunately, this capability is already being tested. On March 30, 2007, U.S. Trade Representative Susan Schwab requested formal consultations with Canada regarding “Canada’s application of certain adjustments to export levels based on differences between expected and actual conditions in the U.S. market” and regarding “assistance programs maintained by Quebec[,] Ontario[,] and the Canadian federal government,” which “provide benefits, such as grants, loans, loan guarantees, and tax credits,” to Cana-

76. *Id.*

77. *See, e.g., Emerson and U.S. Counterpart Ink Softwood Deal, supra note 7.*

78. *See Softwood Deal Survives Vote in House of Commons*, CTV NEWS, Sept. 19, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060919/softwood_vote_060919/20060919/ (explaining that “while the NDP and most Liberals voted against the deal, the separatist Bloc Quebecois threw it[s] support behind the government, allowing the deal smooth passage”).

79. *See, e.g., Emerson and U.S. Counterpart Ink Softwood Deal, supra note 7.*

80. *Ottawa Won’t Meet Oct. 1 Softwood Deadline*, CTV NEWS, Sept. 27, 2006, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060927/softwood_deadline_060927/20060927?hub=Canada.

81. *Emerson and U.S. Counterpart Ink Softwood Deal, supra note 7.*

dian companies.⁸² The CFLI “views the request for formal consultations as a necessary first step to resolving Canada’s failure to properly administer the surge provision of the agreement, and to address the new subsidy programs that are inconsistent with the anticircumvention provisions of the agreement.”⁸³

It is important to point out that these types of disagreements were anticipated by the drafters of the SLA II.⁸⁴ For this reason, the SLA II “contains several mechanisms for exchanging views and clarifying the terms of its operation,” with consultations being “the first step in [a] SLA dispute settlement process . . . designed to . . . resolve differences *short of arbitration*.”⁸⁵ Despite this design, the United States and Canada were unable to resolve their disagreement during formal consultations held on April 19, 2007.⁸⁶

On August 7, 2007, the United States announced its intention to initiate arbitration proceedings under the SLA II.⁸⁷ Canadian Minister of International Trade David Emerson has explained that the formal consultations did not work because the United States and Canada interpret parts of the SLA II differently.⁸⁸ Emerson has downplayed the effect this early disagreement will have on Canada’s commitment to the SLA II.⁸⁹ The arbitration proceedings will be “conducted under the rules of the London

82. Press Release, Office of the U.S. Trade Representative, United States Requests Consultations with Canada Under the 2006 Softwood Lumber Agreement (Mar. 30, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/March/United_States_Requests_Consultations_with_Canada_under_the_2006_Softwood_Lumber_Agreement.html.

83. Peter Morton, *Canada Flouts Deal, U.S. Says*, FINANCIAL POST, Apr. 2, 2007, <http://www.canada.com/nationalpost/financialpost/printedition/story.html?id=9cac7a71-2971-40d0-b75e-b07815505acf> (quoting CFLI spokesman Zoltan van Heyningen).

84. *Id.* (“Given the complexity of the agreement, we expected that such administrative issues would arise,” [Canadian Trade Minister David Emerson] said. “For this reason, the agreement contained a new framework to allow for a full exchange of views.”).

85. United States Requests Consultations, *supra* note 82 (emphasis added).

86. See News Release, Foreign Affairs and International Trade Canada, Statement from Minister Emerson on Softwood Lumber Agreement (Aug. 7, 2007), http://w01.international.gc.ca/minpub/Publication.aspx?isRedirect=True&publication_id=385355&docnumber=108&bPrint=False&Year=2007&ID=140&Language=E. “Despite extensive talks with industry, we were not able to resolve these issues during the consultation phase.” *Id.*

87. Press Release, Office of the U.S. Trade Representative, United States to Request Arbitration Challenging Canada’s Implementation of the 2006 Softwood Lumber Agreement (Aug. 7, 2007), http://www.ustr.gov/Document_Library/Press_Releases/2007/August/United_States_to_Request_Arbitration_Challenging_Canadas_Implementation_of_the_2006_Softwood_Lumber_Agreement.html.

88. Statement from Minister Emerson on Softwood Lumber Agreement, *supra* note 86 (“This announcement stems from differing interpretations of the Softwood Lumber Agreement by Canada and the [United States].”).

89. *Id.*

Different points of view may arise from time to time in administering such a complex agreement. It was for this reason that we included a dispute settlement mechanism in the agreement to facilitate the resolution of differences. . . . Canada remains committed to this agreement and its continued effective operation, and will abide by the outcome of the dispute settlement process. *Id.*

Court of International Arbitration,” will begin after “an approximately two-month process to select arbitrators,” and will conclude after the panel issues its final ruling “within six months of its appointment.”⁹⁰

V. CONCLUSION

The early failure of the formal consultation process and the resulting international arbitration—the last resort for dispute resolution under the SLA II—does not bode well for the SLA II’s long-term viability. The United States and Canada have to decide whether resolving future disputes through informal negotiations or formal consultations is more advantageous than initiating arbitration or prematurely terminating the SLA II altogether. The underlying problem remains the same: both nations’ lumber industries feel that they are abused by the other. At this point in the history of the softwood lumber dispute, it may be naïve to hope that the United States and Canada can break free from their historical pattern of political agreements separated by periods of costly and frustrating litigation that ultimately remind them why another political agreement is better than further litigation. But if enlightened diplomats can come together and realize that cooperation is almost always more profitable than litigation, then perhaps the United States and Canada will finally see the forest instead of merely the trees.

90. United States to Request Arbitration Challenging Canada’s Implementation of the 2006 Softwood Lumber Agreement, *supra* note 87.