
January 2006

Canadian Softwood Lumber and “Free Trade” Under NAFTA

Sydney M. Cone III
New York Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [International Law Commons](#), [International Trade Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

Sydney M. Cone III, *Canadian Softwood Lumber and “Free Trade” Under NAFTA*, 51 N.Y.L. SCH. L. REV. 842 (2006-2007).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

VOLUME 51 | 2006/07

SYDNEY M. CONE III

Canadian Softwood Lumber and “Free Trade” Under NAFTA

ABOUT THE AUTHOR: Sydney M. Cone III is the C.V. Starr Professor of Law at New York Law School.

I. INTRODUCTION

Canada and the United States have been involved in a long-running dispute over U.S. efforts to protect U.S. producers of softwood lumber by imposing high duties on imports of Canadian-origin softwood lumber. This dispute was prolonged by virtue of the fact that Canada and the United States not only are parties to the North American Free Trade Agreement (“NAFTA”), but also are members of the World Trade Organization (“WTO”). NAFTA contains provisions for the resolution of a trade dispute by an arbitration panel. A WTO agreement known as the Dispute Settlement Understanding (“DSU”) separately provides for the creation of panels to resolve trade disputes. Because these NAFTA provisions and the DSU are parallel dispute-settlement mechanisms, independent of each other, it is possible for a party to have separate recourse to each of these mechanisms. Seeking to compel the United States to refund duties already collected, and to refrain from collecting future duties, Canada had separate recourse to dispute settlement under each of NAFTA and the DSU. In response, the United States also had separate recourse to each of these dispute-settlement mechanisms.

This essay shows that the NAFTA proceedings were essentially favorable to Canada, but that the United States was unwilling to look to NAFTA, a regional agreement, as the appropriate basis for resolving this regional dispute. The essay argues that the United States sought to rely on its hegemonic economic power to coerce Canada to yield to the interests of U.S. producers, and shows that, when the result was a diplomatic crisis, the United States offered to settle the dispute, not on the basis of legal principle, but simply by making monetary payment in the form of a refund of certain of the duties that had been collected. The essay concludes by questioning whether the U.S. approach is either defensible as a matter of international law, or likely to prove sustainable over the long term.

II. BACKGROUND

Both Canada and the United States have commercially renewable forests of marketable softwood timber (for example pine, spruce or fir tree forests), and both produce lumber from this timber. The United States, particularly the U.S. home-construction industry, is a major purchaser of softwood lumber. Although both Canada and the United States are members of the North American Free Trade Area, there are no provisions in the constituent NAFTA that assure “free-trade” access to the U.S. market for softwood lumber of Canadian origin. Instead, as has been reported for some years, U.S. producers of softwood lumber have been able to initiate proceedings to levy substantial U.S. duties on Canadian exports of softwood lumber.

These U.S. duties are of two kinds: anti-dumping duties and countervailing duties. Anti-dumping duties require findings that the Canadian exports are being offered for sale in the United States at unfairly low prices. Countervailing duties (duties to offset subsidies) require findings that the Canadian gov-

ernment subsidizes the growing of Canadian softwood timber, transformed into lumber, and exported to the United States. In each case, the United States may levy the duties only if there is a further finding of material injury, or threat of material injury, to the U.S. softwood lumber industry. The proceedings for determining whether duties may be levied are not conducted pursuant to NAFTA, but pursuant to U.S. law before U.S. agencies — the U.S. Department of Commerce, and the U.S. International Trade Commission.

Once the U.S. anti-dumping or countervailing duty proceedings (or both) have been concluded, Canada, as a party to NAFTA, is entitled, under Chapter 19 of NAFTA, to request that a NAFTA Panel be created to review the correctness of the U.S. proceedings. The Panel determines whether the U.S. proceedings were conducted, and the resulting rulings were made, “in accordance with the anti-dumping or countervailing duty law of the importing Party [here, the United States]”¹ — this review by a NAFTA Panel relates exclusively to U.S. law.

Alternatively, or in addition, since both Canada and the United States are members of the WTO, either country is entitled to initiate WTO dispute-settlement proceedings to review U.S. action contested by Canada. If consultations do not resolve the dispute, either party may cause a WTO Panel to be established to investigate and issue a report on the dispute. Here, unlike NAFTA, there are WTO agreements relevant to review by the Panel, although, as will be seen, the WTO Panel is required to show considerable deference to the findings and determinations made by the U.S. agencies that handle anti-dumping proceedings. In the context of U.S. duties on Canadian-origin softwood lumber, Canada initiated proceedings under the relevant provisions of NAFTA, and both countries had resort to proceedings under the relevant WTO agreements.

A. The NAFTA Proceedings

Pursuant to NAFTA, Canada referred the softwood lumber dispute to a three-person NAFTA Panel to review determinations by U.S. agencies that had resulted in the levying of anti-dumping and countervailing duties. Before the Panel, Canada focused on the finding by the U.S. International Trade Commission that imports of softwood lumber from Canada constituted a “future threat of material injury to the U.S. [softwood lumber] industry.”² With respect to this finding, Canada argued, and the NAFTA Panel found, that there was not “substantial evidence,” as required by U.S. law, to support a determination that the contested imports constituted a “future threat of material injury to the U.S. in-

1. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1904, ¶ 2, Dec. 17, 1992, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

2. For the NAFTA proceedings, see Opinion and Order of the Extraordinary Challenge Committee, *In the Matter of Certain Softwood Lumber Products from Canada*, ¶ 67, NAFTA Secretariat File No. ECC-2004-1904-01USA (Aug. 10, 2005) [hereinafter Extraordinary Challenge Committee].

dustry.”³ In the absence of the requisite “substantial evidence,” the NAFTA Panel was able to conclude that the U.S. proceedings had failed to establish a viable basis under U.S. law for the duties that were being imposed.

While the preceding paragraph is a fair summary of the principal conclusion of the NAFTA Panel, this summary omits not only many pages of argument, but also the complications caused over time by remands from the NAFTA Panel back to the U.S. International Trade Commission, and consequent remand determinations by the Commission which were later reviewed by the NAFTA Panel. This review-remand-re-review process was quite lengthy. Eventually, the NAFTA Panel observed that the “Commission had made it abundantly clear to this Panel 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.”⁴

Notwithstanding these comments on the attitude of the U.S. International Trade Commission, the NAFTA Panel continued to find that, as a matter of U.S. law, the requisite level of “substantial evidence” was lacking to support the Commission’s finding of “future threat of material injury” — the finding that had provided the basis for the U.S. duties imposed on Canadian exports of softwood lumber. The next stage in the NAFTA proceedings came when the U.S. Trade Representative requested the establishment under NAFTA of an Extraordinary Challenge Committee, to receive submissions on the dispute and to review the work and decisions of the NAFTA Panel. A bi-national three-person Extraordinary Challenge Committee was created under NAFTA. On August 10, 2005, it issued an Opinion and Order that, after reviewing the record as well as presentations by the United States and Canada, affirmed the challenged decision of the NAFTA Panel. Thus, at that point, Canada had seemingly prevailed in the NAFTA proceedings.⁵

This decision, however, was not the end of the NAFTA proceedings. In January 2006, “interested persons” (who seem to be Canadian timber and lumber interests) filed requests for new NAFTA proceedings. The requested proceedings would constitute a review by a NAFTA Panel (or Panels) of determinations by the U.S. International Trade Commission with regard to Canadian softwood lumber.⁶ In yet another NAFTA proceeding, in March 2006, a NAFTA Panel issued a decision relating to a countervailing duty determination by the U.S. Department of Commerce. This NAFTA decision was inconclusive. In rather short space, the decision declined to re-examine the record on a pricing issue, and

3. *Id.*

4. *Id.* ¶ 127.

5. *Id.* ¶ 4.

6. Notice of First Request for NAFTA Panel Review, 71 Fed. Reg. 3051-01 (Jan. 19, 2006).

further declined to consider whether the countervailing duty at issue should be revoked.⁷

B. The WTO Proceedings

At about the same time as the original NAFTA proceedings were taking place, largely parallel proceedings concerning essentially the same dispute took place under certain WTO Agreements. Indeed, in this dispute, more than one proceeding took place under the WTO Agreements. The principal agreements were the WTO Dispute Settlement Understanding (“DSU”), the WTO agreement relating to anti-dumping measures (“AD Agreement” which, formally, is the WTO agreement on implementing Article VI of the General Agreement on Tariffs and Trade), and the WTO Agreement on Subsidies and Countervailing Measures (“SCM Agreement”). Pursuant to the DSU, for each WTO proceeding, a three-person Panel was created. Each Panel held hearings, received submissions, and issued a Report. Two of these WTO proceedings are summarized below — a proceeding that related to the U.S. International Trade Commission, and a proceeding that related to the U.S. Department of Commerce.

1. WTO Proceeding Relating to the U.S. International Trade Commission

In one of the WTO proceedings, a WTO Panel considered findings by the U.S. International Trade Commission, and issued a Report thereon. On April 26, 2004, the members of the WTO sitting as the Dispute Settlement Body (“DSB”) adopted this Report. The WTO Panel had found that the determination of the U.S. Trade Commission regarding a threat of material injury was not consistent with the AD and SCM Agreements because the data considered by the Commission and its reasoning did not support “the finding of a likely imminent substantial increase in [U.S.] imports [of Canadian-source softwood lumber].”⁸ Pursuant to its general WTO obligations and its obligations under the AD and SCM Agreements, the United States (through the U.S. Trade Representative) requested the U.S. International Trade Commission to render the earlier action by the Commission “not inconsistent” with the Report of the WTO Panel. On November 26, 2004 (seven months to the day after the DSB had adopted this Report), the U.S. International Trade Commission issued a new determination in which it again concluded that there would be a substantial increase of imports

7. Decision of the Panel on the Fifth Remand Determination, *In the Matter of Certain Softwood Lumber Products From Canada. Final Affirmative Countervailing Duty Determination*, USA-CDA-2002-1904-03 (Mar. 17, 2006).

8. 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*, ¶ 4, AB-2006-01, WT/DS277/AB/RW (Apr. 13, 2006) [hereinafter *Investigation of the ITC Appellate Report*].

of Canadian-source softwood lumber at prices that, without more, would threaten material injury to the U.S. softwood lumber industry.

At the request of Canada, the WTO asked the original WTO Panel to review the new determination by the U.S. International Trade Commission. Essentially, the Panel was to decide whether the Commission had cured the defects that had been specified in the Panel's original Report. This time, the Panel found that the Commission's determination of future threat of material injury was "not inconsistent" with the requirements of the relevant WTO Agreements.

Here, it becomes essential to look at the requirements of the AD Agreement as they relate to review by a WTO Panel of action by a national agency under domestic law on anti-dumping measures. The AD Agreement (but not the SCM Agreement) sets out a special standard of review for a WTO Panel considering anti-dumping determinations by national (here, U.S.) authorities. This special standard of review is found in Article 17.6 of the AD Agreement, which is a provision that had been insisted on by the United States when the creation of the WTO and the WTO Agreements were being negotiated. Under Article 17.6, a WTO Panel is to determine whether the national authority in question had established the facts in a "proper" manner, and whether its "evaluation of those facts was unbiased and objective."⁹ Article 17.6 goes on to say: "If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the [WTO Panel] might have reached a different conclusion, the evaluation shall not be overturned."¹⁰

This standard seems to have been scrupulously observed by the WTO Panel in its review of the new determination by the U.S. International Trade Commission. Even though the standard is found in the AD Agreement, the WTO Panel seems to have applied it to the subsidy (SCM Agreement) as well as the anti-dumping aspects of the dispute — possibly because it found the two aspects of the dispute to be intertwined to the point that Article 17.6 applied throughout.

The WTO Panel said that it had "looked at the underlying information" relied on by the Commission.¹¹ The WTO Panel then went on to say (in double-negative phraseology): "[We] cannot conclude that an objective and unbiased investigation authority could not find that [the information] supported the conclusion reached by the [Commission]."¹² Referring to Canada's arguments, the WTO Panel (again in double-negative phraseology) said this: "[We] cannot see

9. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Consultation and Dispute Settlement, Dec. 15, 1993, Multilateral Agreements on Trades in Goods, Part II Annex IA Art. 17.6 –Final Act Embodying the Results of the Uruguay Round (1994), *available at* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf [hereinafter Anti-Dumping Agreement].

10. *Id.*

11. Panel Report, *United States — Investigation of the Int'l Trade Comm'n in Softwood Lumber from Canada, Recourse to Article 21.5 of the DSU by Canada*, ¶ 7.39, WT/DS277/RW (Nov. 15, 2005) [hereinafter Investigation of the ITC Panel Report].

12. *Id.*

that [Canada's arguments] demonstrate that the [Commission's] determination was not one that could be reached by an unbiased and objective investigating authority, on the basis of the evidence and the explanations."¹³ Still later (and still faithful to double-negative formulations), the WTO Panel made this observation: "Against that background, while it is possible to disagree with the [Commission's] analysis, we cannot conclude that it is unreasonable."¹⁴

In sum, in examining the U.S. Trade Commission's new determination, the WTO Panel seems to have taken care to stay within the scope permitted by Article 17.6 when reviewing the anti-dumping determinations of a national authority. In so doing, the WTO Panel refrained from finding fault with the new determination made by the U.S. International Trade Commission, although, at bottom, the new determination had a great deal in common with the Commission's original determination that had been faulted in the WTO Panel's earlier Report. Thus, Canada, having prevailed before this WTO Panel at an earlier stage, was unsuccessful when the Panel reconsidered the dispute.

The WTO proceedings continued, however. On April 13, 2006, the WTO Appellate Body issued a Report reviewing the Panel Report just discussed. The effect of the Appellate Body's Report was to set aside the Panel's Report, thus leaving the matter essentially unresolved. Lacking remand authority under the DSU, the Appellate Body could not and did not send the case back to the Panel. Instead, at the end of an exhaustive examination of the case, the Appellate Body declared itself "unable to make a recommendation to the Dispute Settlement Body."¹⁵

2. *A WTO Proceeding Relating to the U.S. Department of Commerce*

The U.S. Department of Commerce determined the rate of countervailing duties to be imposed on softwood lumber imported from Canada. These duties were calculated to offset the subsidies alleged to be inherent in the rights granted by Canadian governmental authorities to Canadian companies that harvested timber on state-owned lands in Canada. The United States claimed that Canada sold these rights at prices below the market rates for U.S. purchasers of timber-harvesting rights in the United States, and that the differential represented the subsidization of Canadian-source softwood lumber. It was necessary, however, for the U.S. Department of Commerce to connect allegedly subsidized rights to harvest *timber* in Canada to the subsidization of the Canadian-source softwood *lumber* that was actually imported into the United States. The establishment of this connection was called the "pass-through issue."

13. *Id.* ¶ 7.50.

14. *Id.* ¶ 7.57.

15. Investigation of the ITC Appellate Report, *supra* note 8, ¶ 163.

The “pass-through issue” raises the question of whether the U.S. Department of Commerce, in its analysis of subsidization, established that the Canadian subsidies had been passed through from the harvesters of timber to the lumber derived from the timber and imported into the United States. This question, first raised by Canada before the WTO on May 3, 2002, has, to date, been the subject of (1) a WTO Panel Report circulated on August 29, 2003, (2) a WTO Appellate Body Report (reviewing the Panel Report) circulated on January 19, 2004, (3) the adoption of the two foregoing Reports by the DSB on February 17, 2004, (4) a second WTO Panel Report circulated on August 1, 2005, to determine whether the United States had complied with the Reports adopted by the DSB, (5) a second WTO Appellate Body Report (reviewing the second Panel Report) circulated on December 5, 2005, and (6) the adoption of this last Report by the DSB on December 20, 2005.

By the time of the second WTO Panel and Appellate Body Reports, the “pass-through issue” had been narrowed somewhat to cover the majority of transactions between unrelated parties — transactions in which saw-mill owners sold logs to unrelated producers of lumber. The United States had argued this pass-through question not on the merits but on a procedural point. The United States asserted that the second WTO Panel was not entitled to take into consideration proceedings by the U.S. Department of Commerce (“Commerce”) known as the First Assessment Review. Additionally, the United States argued that the jurisdiction of the WTO Panel was limited to reviewing a determination by Commerce (a determination communicated to the DSB on December 17, 2004) that Commerce’s “pass-through analysis” had been brought into conformity with the Panel and Appellate Body Reports adopted by the DSB on February 17, 2004.

This determination by Commerce, that it had brought its analysis into conformity with WTO rulings, is similar to the determination made by the U.S. International Trade Commission, discussed above, dated November 26, 2004 (three weeks prior to the date on which Commerce communicated its own determination to the DSB). The subsidy determination by Commerce was, however, different from the determination by the U.S. International Trade Commission in one vital respect: Unlike the latter determination, which (as discussed above) was subject to review by a WTO Panel within the strictures of Article 17.6 of the AD Agreement, the determination by Commerce fell within the purview of the SCM Agreement, and it does not contain a counterpart to Article 17.6.

In contrast to the second WTO Panel Report governed by Article 17.6 (discussed above), the second WTO Panel Report and the related Report of the WTO Appellate Body dealing with the “pass-through issue” found against the determination by Commerce. The Appellate Body Report found as follows: the Panel had acted properly in taking into account Commerce’s First Assessment Review of the countervailing duties; contrary to Commerce’s determination, Commerce’s pass-through analysis was defective and failed to implement the Reports adopted by

the DSB; the United States thus remained in violation of the SCM Agreement. As a result, Canada prevailed in its challenge of the calculation by Commerce of (a) the subsidies that Canada had allegedly granted in respect of exports of softwood lumber to the United States, and (b) the countervailing duties imposed by the United States on those exports to offset the subsidies.¹⁶

III. THE UTILITY OF NAFTA AND PARALLEL DISPUTE-SETTLEMENT MECHANISMS

As has been seen, the dispute between Canada and the United States over Canadian exports of softwood lumber has gone on for years and has engendered proceedings before more than one NAFTA Panel as well as before more than one WTO Panel and the WTO Appellate Body. It is a regional dispute within the North American Free Trade Area, yet it has not been resolved under NAFTA. Apparently, the existence of NAFTA did not lead to the conclusion that recourse to dispute-settlement proceedings of a complex and protracted nature before the WTO was undesirable and unnecessary. On the contrary, it can be said that the softwood lumber dispute has pointed up the shortcomings of NAFTA, as well as the wastefulness and potential futility of referring a dispute to parallel NAFTA and WTO proceedings.

Free-trade areas comprising the United States, on the one hand, and, on the other, countries with substantially less economic strength than that of the United States, must deal with the asymmetric power of the United States. By their nature, these free-trade areas run the risk of becoming extensions of hegemonic U.S. policies. When the United States, rather than accommodate the interests of another country in a free-trade area, forcefully defends the economic interests of a domestic U.S. industry, it may evoke unfavorable or resentful reactions in the other country.¹⁷ The dynamics of such a free-trade area contrast with the diplomatic give-and-take in the WTO, a large multilateral organization, or in a customs union like the European Union, where hegemonic power may be diluted or effectively contained.¹⁸

The softwood lumber dispute may have elicited forthright hegemonic U.S. behavior because, once U.S. anti-dumping and countervailing duties had been brought into play, the parties had to deal with unusually protectionist and intractable U.S. laws, policies and procedures. Even so, the NAFTA proceeding could have provided a way out of the protectionist trap if the United States had been

16. For the Appellate Body Report on the “pass-through issue,” see 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).

17. For a discussion of adverse Canadian reactions to U.S. measures in the softwood lumber dispute, see Lawrence Herman & Gary Hofbauer, *Lost in the Woods*, N.Y. TIMES, Oct. 25, 2005, at A25.

18. For the author’s analysis of these as well as a number of other considerations, see Sydney M. Cone III, *The Promotion of Free-Trade Areas Viewed in Terms of Most-Favored-Nation Treatment and “Imperial Preference,”* 26 MICH. J. INT’L L. 563 (2005).

willing and able to induce its domestic industry to accept the conclusions of the NAFTA Extraordinary Challenge Committee. Admittedly, U.S. action along these lines might require a high degree of statesmanship and political creativity, and might result in U.S. abandonment of scorched-earth litigation tactics that could serve as an on-going barrier to trade.

The foregoing observations do not dispose of various questions, however. Rather, they lead to a fundamental question: Do the regional and free-trade policies underlying NAFTA, without more, constitute sufficient reasons for the exercise of a high degree of statesmanship and political creativity? Put more harshly, the question can be phrased as follows: Does NAFTA serve a useful purpose in terms of regional and free-trade policies if it does not bring out the requisite level of statesmanship and political creativity in the circumstances of a dispute like the one involving softwood lumber? Thus viewed, the dispute can be said to call into question NAFTA's utility and, hence, some of the reasons for its continued existence.

Moreover, given the extensive involvement of WTO Panels, the WTO Appellate Body and the DSB (as discussed above), the softwood lumber dispute calls for analysis of co-existing dispute-settlement procedures under NAFTA and the WTO. It can hardly be said that these co-existing procedures worked to facilitate resolution of the dispute. On the contrary, the availability of uncoordinated alternative proceedings may have encouraged litigious gamesmanship, and may have rendered the dispute increasingly difficult to resolve. Even so, it is far from clear what conclusion Canada or the United States can be expected to draw from this unfavorable characterization of the availability of two uncoordinated avenues for resolving disputes. Canada might consider it a fortuity that, in this case, it prevailed before a NAFTA Panel, and might be unwilling to forego recourse to the WTO in the future when NAFTA is also available. As for the WTO, Canada prevailed with respect to the U.S. Department of Commerce and countervailing duties, while neither Canada nor the United States has prevailed in the WTO with respect to the U.S. International Trade Commission and antidumping duties. Both Canada and the United States might, therefore, want to preserve the right to convene a WTO Panel in a case also involving NAFTA.

V. CONCLUSION

Preserving the WTO option in a case like softwood lumber may undermine the rationale for a regional free-trade agreement like NAFTA. Softwood lumber is the quintessential regional case, involving comparable and, to a significant extent, contiguous timber forests, as well as similar lumber industries in the two disputing countries. The dispute seems to cry out for a regional solution reached pursuant to a regional trade agreement. Is NAFTA to be more than just another hegemonic free-trade arrangement involving the United States? Can NAFTA justify itself in the face of the comprehensive, worldwide WTO system for resolv-

ing trade disputes? To answer these questions in the affirmative, the parties to NAFTA could recognize it as providing the unique, if not the ideal, forum in which to resolve certain disputes that arise in, and that are limited to trade in, the North American Free Trade Area. Softwood lumber would seem to be such a dispute.

The United States may have exercised statesmanship and political creativity not by promoting the regional dynamics of NAFTA, but by deciding, after years of bitter, costly and divisive legal combat, to take the dispute out of NAFTA and WTO proceedings altogether, and to resolve it through a specially negotiated Canadian–U.S. agreement on softwood lumber. The agreement was reported in the press on April 28, 2006.¹⁹ This approach could be said to represent statesmanship and political creativity designed to avoid permanent damage to NAFTA, and to permit NAFTA, over time, to contribute to healthy trade relations between North American countries. Only the future will tell whether the softwood lumber dispute has inflicted irreparable harm, or whether it will turn out to be a cautionary tale that will induce nations to avoid similar exercises in frustration and sterility.

It seems too soon to reach a conclusion, however. The Canadian–U.S. agreement on softwood lumber contains both short-term and long-term provisions. In the short term, the United States will stop collecting a ten percent duty on Canadian softwood lumber, and will refund to Canadian companies about eighty percent of the duties collected since 2002, a refund amounting to about U.S.\$4 billion. The remaining twenty percent, or about U.S.\$1 billion, will be divided between U.S. lumber producers and funding for timber-marketing initiatives in the United States.²⁰

Over the long-term, the United States retains the right to limit access to the U.S. market of softwood lumber of Canadian origin. Canadian suppliers will be limited to about thirty-four percent of the U.S. market. For its part, Canada will be expected to impose export taxes on softwood lumber when exports to the U.S. market exceed specified levels.²¹ In effect, Canada has agreed to limit and, if necessary, to tax its exports over the long term in order to enable Canadian exporters to recover some U.S.\$4 billion in the short term. Not inconceivably, the long-term consequences could give rise to renewed disagreements, particularly as the parties experience the long-term consequences and start to anticipate the agreement's expiration.²²

19. See, e.g., Ian Austen & Clifford Krauss, *U.S. Will Lift a Lumber Duty in a Trade Deal With Canada*, N.Y. TIMES, Apr. 28, 2006, at A6; Bernard Simon, *Canada and U.S. End Long Dispute Over Lumber*, FIN. TIMES (London), Apr. 28, 2006, at 6.

20. Austen & Krauss, *supra* note 19; Simon, *supra* note 19.

21. Austen & Krauss, *supra* note 19.

22. An earlier Softwood Lumber Agreement between Canada and the United States expired on April 1, 2001.

Indeed, criticism of the agreement has already begun. It was immediately called “anti-competitive” and an illustration of what happens when nations ignore dispute-settlement procedures and “go on slugging it out.”²³ It is thus far from clear that NAFTA has either benefited from, or played a useful role in achieving, this resolution of the softwood-lumber dispute between Canada and the United States. The agreement could be said to raise anew the question of whether NAFTA is just another hegemonic arrangement involving the United States.

23. *Soft in Wood and Head U.S.—Canadian Lumber Deal Makes a Mockery of Free Trade*, Editorial, FIN. TIMES (London), Apr. 29–30, 2006, at 6.