FLIGHTS OF THE PHOENIX: EXPLAINING THE DURABILITY OF THE CANADA-US SOFTWOOD LUMBER DISPUTE*

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I. INTRODUCTION

For the last fifteen years Canada and the United States have been engaged in a dispute concerning billions of dollars of Canadian softwood lumber exports to the U.S. market.[1] As the largest and longest- lasting trade conflict between the two countries, the dispute has consumed vast amounts of time and money spent by industry and government officials on both sides of the border. It has also attracted the attention of an array of scholars in several disciplines. Despite this expenditure of human, financial, and intellectual capital, a long-term resolution has eluded policy makers. Even the latest truce signed in April, 1996, has a maximum life of only five years, after which discord is certain to continue.

This essay explores the causes of the dispute, accounts for its longevity, and examines options for a long-term solution. To accomplish these tasks, two factors must be given more attention than the literature has

*A list of acronyms used in this article is provided on page 37.

afforded them to date: 1) the reciprocal and paradoxical relationship between the evolution of U.S. liberal trade policy and the increase in administered protection through "fair trade" laws and 2) the influence of environmental forest policy and politics in Canada and the U.S. To date, legal scholars have emphasized the complex technical arguments and adjudication of this dispute while downplaying the role of congressional lobbying. Conversely, political scientists have given a traditional, interest-based "Olsonian" account regarding the ability of well-organized and geographically concentrated companies to lobby Congress more effectively than dispersed consumer-based interests,[2] often downplaying the role of institutions as independent variables.

Few analyses of the softwood lumber dispute have drawn on recent theories of U.S. trade policy that find both domestic and foreign policy centered explanations incomplete. This literature asserts that U.S. trade law after1934 has "locked in" both protectionist (fair trade)[3] and liberal (free trade) dynamics, leading to an institutional setting that can be seen as an explanatory variable.[4] Goldstein and Nelson both argue that liberal ideas generally dominate and are expressed through the executive branch, while congressionally-focused protectionist interests are sent to administrative agencies for redress, minimizing protectionist pressures.[5] These dynamics encourage Congress to bargain with the executive branch to protect specific industries while giving overall authority to the presidency to negotiate liberal trading agreements.[6] This account of U.S. trade policy helps explain why congressionally-focused protectionist interests have been circumvented to a greater degree than an interest-based account would predict, and why an overall liberal trading regime continues as a foreign policy objective despite the decline of U.S. dominance in world trade since the early 1970s.[7]

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A study of the softwood lumber dispute is aided by such an institutional approach because it helps to explain why 1) throughout the history softwood lumber conflict, the U.S. executive branch has repeatedly accepted negotiated deals in lieu of countervail tariffs, 2) Canada and the U.S. entered into a free trade deal during this dispute, something interest-based accounts predicted would not happen,[8] and why 3) the nature of congressional influence on this dispute was altered in the early 1990s, rendering lobbying activity that was more explicitly tied to the softwood issue.

Bringing an environmental forestry analysis to the trade dispute complements the institutional analysis and helps account for the decline of fiber supply from U.S. national forests, causing U.S. lumber companies to look north with envy at what they perceived to be less regulated Canadian competitors. It also explains why British Columbia officials at various times were able to use the countervail dispute as a way to justify stumpage rate increases and broad environmental forestry policy change,[9] as well as to account for the unusual coalition-building between U.S. lumber companies and North American environmental groups.

Based on these insights, the paper puts forward two central arguments. First, the cause of the Canada-U.S. softwood lumber dispute is about much more than the different ways each country charges for the right to harvest publicly-owned timber. The catalyst for the dispute can be traced to an increasing Canadian share of the U.S. market amidst a declining supply of timber from U.S. national forests, caused in part by increased environmental regulations. United States companies sought to minimize the effects of these economic and environmental pressures by turning their attention to foreign competitors. They sought redress through U.S. trade law changes in the 1970s that facilitated the use of countervail investigations. Second, U.S. trade legislation has nurtured this dispute by adapting to trade liberalization rules between Canada and the U.S. that, at first glance, appeared to lessen the influence of U.S. protectionist "fair trade" laws. In fact, the use of administered protection in the softwood dispute in part explains the success of the Canada-U.S. free trade talks, as it is doubtful Congress would have given approval to the FTA talks in the mid-1980s if domestic protection for the American softwood lumber industry had not occurred. The ability of U.S. companies to successfully push for changes in trade law in order to maintain their ability to pursue softwood lumber countervail action

largely explains why the dispute has lasted so long.[10] And part of their success in maintaining influence in Congress was by enlisting the support of Canadian actors critical of their own domestic policy, starting with those who initially criticized low stumpage rates but by the early 1990s had expanded their critique to British Columbia's environmental forestry issues, a strategy which entailed the cultivation of informal links between B.C. and U.S. environmental groups.

Thus, an examination of congressional pressure and U.S. case law is crucial to this story. But a full understanding of the causes and longevity of this dispute must also address the role of increasingly liberal trading policy between Canada and the U.S. as a cause of increased administered protection, and the role of environmental forestry politics in both countries. Hence the U.S.-Canada softwood lumber dispute is an important topic not only for those interested in international trade relations, but also for students of environmental policy, forest resource policy, and for those who analyse the role that political institutions have played in shaping state / societal relations.

This essay proceeds in three parts. First, it presents the economic, environmental, and trade policy setting as of 1982. Second, it reviews the history of the dispute from 1982 to 1997, looking at how the evolution of trade rules and environmental conflicts affected the conflict as well as how the conflict affected trade rules and environmental disputes. This section examines the influence of the Canada-U.S. Free Trade Agreement (FTA), the North American Free Trade Agreement (NAFTA) and various short-term deals to avoid imposition of U.S. countervail tariffs. Third, it examines the viability of four options for a long-term solution. The essay places special emphasis on the province of British Columbia, which exports the vast majority of Canadian softwood lumber to the U.S. (Figures 2 and 3) and whose forest policies continue to attract the most scrutiny from U.S. forest companies.

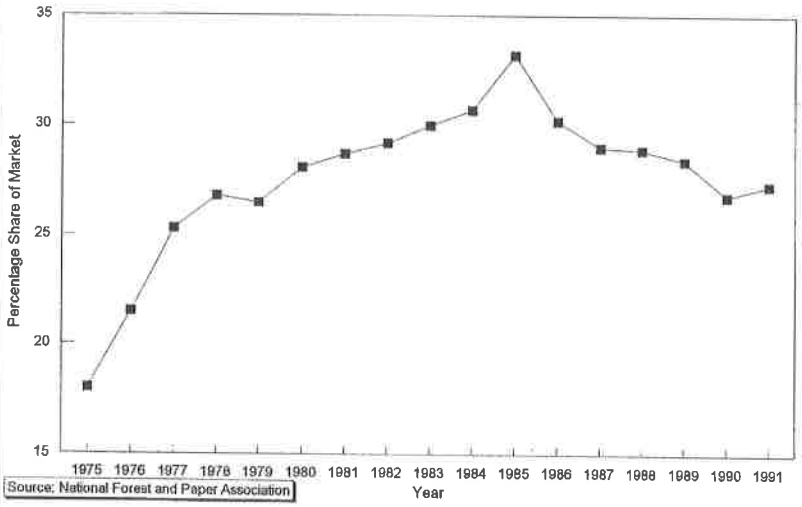
II. SOWING THE SEEDS OF DISCONTENT

In the decade and a half leading up to the dispute, two key factors increased financial stress on the U.S. timber industry: a dramatic increase in the amount of Canadian softwood lumber exported to the United States, and American environmental forestry legislation that restricted wood harvesting on federal forest lands. These pressures were joined by changes in trade law that made it easier for U.S. companies to launch countervail action against foreign

competitors, amidst a backdrop of increasingly liberalized and tariff-reducing trading arrangements.

Canadian softwood lumber exports to the United States changed in two important ways in the 1970s and early 1980s.[11] First, the Canadian share of the U.S. market increased substantially (Figure 1). Secondly, B.C. lost its position as "marginal supplier" to the U.S. market,[12] a status now held by the U.S. forest industry in the Pacific northwest.[13] Part of these changes is explained by increased Ameri-

Figure 1:
Canadian Penetration of U. S. Softwood Lumber Market



can demand and a decline in the value of the Canadian dollar relative to the U.S. dollar,[14] rendering Canadian timber less expensive to American purchasers. But U.S. lumber companies in the Pacific northwest argued that the 40-year-old system of calculating stumpage rates in B.C. and other provinces was also the culprit. The U.S. industry maintained that stumpage rates subsidized B.C. lumber companies by providing below-market costs to harvest publicly owned timber. Many critics of B.C. forestry in the early 1980s supported this argument, bolstered by an economic study which found

evidence that the B.C. government may not have been capturing the full economic rent.[15]

The American federal and B.C. governments responded to the "first wave of environmentalism" that began in the 1960s in different ways. From 1960 through 1976 the Congress addressed environmental and non-timber values on its national forests through a series of legislative measures, starting with discretionary and procedural legislation (the Wilderness Act, the National Environmental Policy Act), building with a broad, non-discretionary umbrella of environmental protection legislation (the Endangered Species Act, Clean Water Act) and ending with detailed legislation directing management of forest lands (National Forest Management Act and Federal Land Policy and Management Act).[16] Taken as a whole, these laws created a cumbersome statutory regime that includes non-discretionary substantive requirements within the legislation itself. The non-discretionary aspects have allowed environmental groups to pursue litigation, often forcing increased forest protection measures.[17] During the same period, B.C.'s environmental forestry legislative response was weak, new laws limited opportunities for litigation, and environmental groups were at the margins of the policy-making process.

American legislation caused immediate and future reductions in the supply of fiber on U.S. national forest land, greatly affecting small sawmill owners who relied on public land for the bulk of their timber supply. These companies consequently focused their efforts on banning raw log exports from all publicly-owned forests and from their B.C. and other Canadian competitors, who, until the early 1990s, operated in a less strict environmental regulatory environment.[18]

Two different policy legacies have influenced U.S. trade law, one rooted in 19th century protectionist tariff-setting policy and the other in the 1934 Reciprocal Trade Agreements Act in which Congress gave up its treaty-making power to the president, largely because the protectionist Smoot-Hawley tariff law had become discredited during the Great Depression.[19] The "fair trade laws" of the 19th century were not replaced, meaning that, "even in America's most liberal period, a legal mandate existed to exclude imports."[20] After 1934 interest groups could no longer petition Congress for direct tariff barrier relief. As an increasingly liberal trade bias in American trade policy took hold, companies seeking protection had to rely on administrative agencies for relief. Congress was still key

but became an arena in which to pressure for administrative adjudication . This created a strong constituency for administered protection, rendering efforts to dismantle the 19th century legislation unsuccessful. During the decline of U.S. trade dominance beginning in the 1970s, administered protection mechanisms were increasingly exploited by U.S. companies.[21]

Later, amidst increasingly liberalized trade policy (largely through GATT agreements) and domestic pressures for increased protection, Congress revised U.S. trade policy in 1974 and 1979. Elements of liberal fair trade ideas can be found in the legislation, but they also formalized and rendered administered protection for U.S. companies as well. The following section reviews these legislative changes, focusing on their impact on countervail policy.

U.S. countervail duties go back to the 19th century and were designed to "neutralize" foreign government payments to assist domestic exports to the U.S. Countervailing duties and subsidies are currently governed by the amended Tariff Act of 1930 which defines a subsidy as a "bounty" or "grant."[22] The law provides for the imposition of countervail duties if an "administering authority" determines that a country or individual provides a subsidy, "directly or indirectly" for "the manufacture, production, or exportation" of goods for importation into the U.S. (Section 1(A)(B)).[23] Countervail procedures were rarely used until the 1970s when Congress made administered protection easier to obtain.

The 1974 Trade Act detailed the process for countervail determination, reducing the discretionary ability of the executive branch to launch countervail proceedings. For the first time both dutiable and non-dutiable goods were made susceptible to countervail adjudication. Consequently, adjudicated CD cases increased from an average of two per year before 1974 to 61 after this time.[24] Other provisions in the act favored executive action and a liberal trade bias: final decision-making authority of CVD rulings rested with the secretary of the treasury; the amount of any duty could not be appealed; no duties would be imposed on subsidized non-dutiable goods until after the quasi-judicial International Trade Commission (ITC) ruled that these imports "injured" U.S. domestic companies;[25] and the secretary of the treasury was given the power to wave the conditions of any imposed duties through voluntary export restraints (VER) and orderly marketing agreements (OMA) with the foreign government. Although the 1974 act increased the ability to

launch countervail action, significant latitude still rested with treasury department in administration of the law.[26]

One of the original purposes of the 1979 Trade Act was to implement GATT obligations by requiring that all countervail determinations and not simply non-dutiable imports be subject to an injury test by the ITC.[27] But Congress used this opportunity to introduce protectionist measures, arguing that the executive branch was using its discretionary authority to minimize the effects of "fair trade" laws. Congress addressed these concerns in three key ways. First, it moved responsibility for countervailing duty investigations from the department of treasury to the commerce department, arguably eliminating bureaucratic officials from the determination process who had been hired partly because of their individual liberal trading biases.[28] To carry out its new responsibilities, the commerce department created an International Trade Administration division (ITA). Second, the 1979 legislation provided for appeals to the U.S. Court of International Trade (CIT), which Congress believed would further reduce the executive discretion to circumvent protectionist elements of the law and thus increase the number of affirmative countervail findings. Third, the legislation dictated that a foreign government's actions can be countervailed if they are provided as "preferential rates" to a "specific enterprise or industry, or group of enterprises or industries."[29] However, important for the softwood lumber dispute is that guidelines as to what constitutes a "specific enterprise or industry, or group of enterprises or industries" were avoided.[30] As a result, the commerce department decides on an *ad hoc* basis what constitutes a "specific group." It has generally interpreted this legislation "to mean that a government benefit other than an export subsidy is not a subsidy unless provided to a specific enterprise, industry, or group of enterprises or industries."[31]

Unlike previous elements of discretion that helped the executive branch reduce the effects of administered protection, students of trade policy were predicting that bureaucratic autonomy from the executive branch and the more formal rule-making procedures would usher in an era in which institutions would give protectionist elements dominance over liberal trading rules. Thus Goldstein argued that "with the move to the department of commerce and the mandate from Congress to enforce its legislation, countervailing duty laws could increasingly become an impediment to trade."[32] Or as Krueger

worried, "the shift toward trade policy in response to special interests has come at a time when the importance of an open trade policy and of an open international trading system has never been greater."[33]

The softwood lumber dispute also reveals that discretion over the definition of "specificity" can have liberal or protectionist dynamics. As Ragosta and Shanker note, the lack of a precise definition has meant that "Commerce is susceptible to arguments that narrow or expand the common meaning of the term used in the statute." In the softwood lumber case, discretion over the definition of "specificity" resulted in a negative determination in 1982, but also permitted the commerce department to alter its specificity definition following congressional pressure, paving the way for a preliminary positive determination in 1986.[34]

Thus, the American industry's increased use of countervail mechanisms must be seen in the light of an increasingly liberalized trading regime. By removing Congress's ability to take direct action, it was virtually inevitable that these industries would turn more often to countervail duties and other administered protection laws, and that Congress would be pressured to make the laws more friendly to domestic companies. As Goldstein explains,

> by making unilateral trade protectionism more difficult to attain, Congress encouraged relief under unfair trade laws. Because AD and CVD decisions remain out of the President's direct jurisdiction, rational industries increasingly petitioned for trade relief under these statutes. The increased salience of unfair trade relief then made it politically infeasible for Congress to liberalize these trade laws. Rather, congressional action since the 1970s has been the opposite: legislation has led to eased standards [required to obtain an affirmative countervail ruling] and greater autonomy [from the presidency] for the bureaucracy.

Summarizing this dynamic, Horlick has noted that

> ...each major revision in US trade laws, beginning in 1974, has seen AD/CVD amendments added to make it easier for domestic industry to obtain relief from imports. In some sense, that process became self-perpetuating; the easier it became to get relief, the more cases were brought, generating more interest in the use of these laws.[35]

III. HISTORY OF THE DISPUTE

The previous section developed the economic, environmental and legal context up until 1982 when the first softwood lumber countervail action began. But the central and official reason for the first countervail focused on the way governments charge companies to harvest publicly-owned timber. The publicly-owned timber issue is important, as it is a key difference between Canada and the United States. Over 90 percent of forest land in Canada is publicly owned as compared to only 36 percent in the U.S.[36] The essential difference between the two countries' method of collecting "resource rents" or "stumpage rates"[37] is that a system of "competitive bidding" is used on U.S. national forests whereby numerous companies are invited to bid for the right to harvest timber within a given area. The highest bidder wins, subject to a minimum "upset" price.

British Columbia once had a similar kind of approach, but after World War II it moved to the "tenure system." Large forest companies were given long-term rights to harvest a particular area. In exchange, the companies were required to manage the land on a "sustained yield" basis. Companies were also expected under these arrangements to operate mills and create employment.[38] In principle, this system would guarantee the provincial economy a stable supply of timber "in perpetuity." The government, rather than "market" forces, decides how much to charge companies for the timber they cut in a particular year. Until 1987, British Columbia's solution was to charge the company whatever revenue was left over after deducting operating expenses and allowing for a certain level of profit. Much of the economics literature focuses on which system best captured resource rents. Little consensus has emerged. Both systems have been criticized for not raising enough funds from stumpage or timber sales to cover the costs to governments of managing the forests.[39]

A. The First Countervail

The first countervail action began in 1982 when the Northwest Independent Forest Manufacturers (NIFM), a coalition of Pacific northwest sawmill companies, alleged that Canadian subsidies had become a major cause of increased unemployment in the regional forest industry.[40] At the request of Oregon Senator Bob Packwood, the senate finance committee instructed the U.S. International Trade Commission to conduct an investigation into these complaints. At the same time, the NIFM enlisted the support of companies outside

of the Pacific northwest, forming the U.S.-based Coalition for Fair Canadian Lumber Imports (CFCLI).[41] Although the ITC report fell short of claiming that Canadian provinces subsidized the timber industry, it was used by congressional members from timber-dependent states to promote trade action against Canada.[42]

In October, 1982, the CFCLI formally launched its first countervail duty petition, claiming that Canadian stumpage rates conferred a subsidy and materially injured U.S. producers. The commerce department ruled that no such subsidy existed because stumpage rates were not provided to a "specific" industry or enterprise.[43] The ITA ruled in 1983 that provincial stumpage programs were legally "available within Canada on similar terms regardless of the industry or enterprise of the recipient."[44] Any limitations on the types of industries that benefit from the stumpage rates were a result only of the "inherent characteristics of this natural resource" and "not due to any activities of the Canadian governments."[45]

B. The Second Countervail

Two years after this negative countervail determination, U.S. forest companies formed the Coalition for Fair Lumber Imports (CFLI) and launched a second countervail.[46] This time the ITA preliminary ruled that a subsidy existed. A voluntary export restraint (VER) known as the memorandum of understanding (MOU) between Canada and the United States was agreed upon just before a final determination was to have been announced. The deal saw the Canadian government impose a 15 per cent export tax on softwood lumber exports to the United States. To understand how this reversal of fortune happened, we must look at the dual track of congressional lobbying and legal strategy undertaken by the CFLI; efforts between Canada and the United States to begin negotiations for a free trade deal; and the desire of government actors in B.C. to increase the amount of money forest companies paid to harvest publicly-owned timber.

Leading CFLI officials say that they had learned two lessons from the failure of the first countervail initiative: they had to develop a "political" strategy focused on the U.S. Congress; and they had to cultivate necessary legal expertise to help reverse the 1982 decision.[47] It was for the former reason that the CFLI retained the law office of Dewey-Ballantine in 1985, which would eventually provide overall political and legal advice to the group.

Congressional lobbying in 1985 was orchestrated by Bill Lange, who ran the CFLI out of the National Forest Products Association's head office (now the American Forest and Paper Association).[48] The CFLI launched a massive lobbying effort on the U.S. Congress to generate pressure on the ITA to reverse its ruling. To buttress its arguments the CFLI forged links with British Columbia actors who were also arguing that stumpage rates were too low. British Columbia politicians and forest management critics were enlisted for their support, and published statements by opposition New Democratic Party members criticizing B.C.'s low stumpage rates were raised in Congress.[49] The result at the congressional level was that a number of pieces of legislation were drafted to address this issue. Some proposed to restrict directly Canadian softwood lumber exports to the U.S., while others would have changed the definition of subsidy to allow for a finding that B.C. and other provinces had subsidized their timber industry.[50]

At the same time the U.S. and Canada were about to engage in free trade talks, and negotiators were seeking "fast track" approval in the Congress. Members of Congress quickly moved to link approval of a Canada-U.S. free trade deal to action on the softwood lumber dispute; in other words linking overall acceptance of increased liberalized trade to a specific issue of administered protection.[51] During this period of intense CFLI lobbying, a majority of senators wrote to the administration asking for resolution of the lumber dispute before beginning negotiations over the Canada-U.S. FTA.[52] Then, half of the members of the senate finance committee sent a letter to U.S. Trade Representative Clayton Yeutter. While expressing support for the Canada-U.S. free trade talks, they reiterated their

> ...concern about Canadian softwood lumber imports....Any free trade agreement must be built on a foundation of mutually advantageous trade practices. Therefore, we believe the Administration should seek and early resolution of the softwood lumber trade issues. This would facilitate Finance Committee consideration of any Administrative proposals relating to the negotiation of a free trade agreement with Canada.[53]

Yeutter replied that the administration had persuaded the Canadian government to commit to a series of meetings on the issue. Dissatisfied, Senator Max Baucus, on February 26, 1986, organized a group of

senators to raise the issue on the senate floor. Baucus argued: "They [Canada] cannot have it both ways. If they expect the United States to enter a free trade agreement, they must engaged in free trade... .I am optimistic about the benefits of a free trade agreement might bring, but I cannot support such an agreement, so long as subsidized Canadian lumber makes a mockery of free trade."[54] Finally, in a move that caught the administration off- guard, the senate finance committee let them know in April, 1986, that it would not give fast-track approval for Canada-U.S. FTA talks unless the softwood dispute was addressed.[55] The administration responded to this pressure in two ways: an official letter was sent to Senator Stephen Symms from President Reagan promising action; and USTR Representative Clayton Yeutter hand-wrote a message on a letter to Senator David Pryor during the senate fast-track hearings that said, "we'll get timber fixed."[56]

Meanwhile, legislative initiatives and court rulings altered the legal context from what it has been in 1982. Congress amended the Tariff Act of 1930 in 1984 to include "upstream" or "input product" subsidies as countervailable where "the input product bestows a competitive benefit on those goods by affecting significantly the cost of production."[57] This was important for the softwood case because it affirmed that subsidized log production could also show up as a subsidy in the production of those logs (i.e. as lumber). At the same time Dewey-Ballantine, the CFLI law firm, had been monitoring relevant case law and found a recent CIT ruling in the case of Cabot Corporation's subsidy allegations regarding the Mexican government's two-tiered price structure for the "input products" that go into the production of carbon black.[58] This case was relevant to the softwood lumber dispute because it ruled that *de jure* "general availability" may be too strict a test to find that "specificity" does not exist, and that cases of *de facto* specificity should also be considered.

The problem for the ITA was that the CIT actually gave it conflicting rulings during this time, actually upholding, in another case, the test the ITA used in the first countervail case when it determined that stumpage was generally available.[59] But with Congress threatening to take legislative action to remedy the restrictive *de jure* test, the ITA had little room to manoeuvre and eventually accepted the CIT's ruling in Cabot. Rugman and Porteous argue that "the acceptance of Cabot's narrower definition of general availability by the ITA prepared the ground for the reversal of its 1983 decision.

It enabled the ITA to claim that a new legal precedent existed, so that the 1983 decision could be reversed to accommodate the domestic political pressure."[60] Immediately following this decision, Senators who had been pressuring for a reversal of the 1983 softwood decision were briefed by the Commerce Department on the implications of these changes for the softwood case.[61] The go-ahead was given to U.S. industry to relaunch countervail proceedings, raising fears in the Mulroney government that Canadian hostility over this change could derail free trade talks.[62]

Subsequently, new countervail proceedings were launched one month later, catapulting the conflict into the Canadian media spotlight. Industry in B.C. stood ready to fight but the province's new premier, Bill Vander Zalm, who was looking for new sources of revenues, had different ideas.[63] The premier appointed Jack Kempf, a long-time critic of B.C.'s stumpage system, as minister of forests. Kempf and Vander Zalm used this opportunity to announce that the government was reviewing the province's stumpage system.[64] Vander Zalm said publicly that he hoped this would stall the countervail proceedings, but it was clear that the government was not disappointed with the U.S. countervail pressure.[65] As Kempf later noted, "it was quite clear to me that the U.S. Commerce Department and Coalition for Fair Lumber Imports had a very good case and so it behooved us to try then and get the best deal that we could, and I think we did."[66] In fact, Kempf attempted to circumvent Canadian federal government negotiations by contacting and exchanging information with the CFLI.[67]

In October of 1986, the U.S. commerce department reversed its 1983 ruling and found that B.C. and other provinces had subsidized their forest industries through below-market costs to harvest publicly-owned timber. The ITA explained that court rulings legislative changes and the correction of errors it made in 1983 were the causes of this reversal. Following the carbon black case, the ITA found that stumpage programs were provided *de facto* to a "specific group of industries"[68] and that it did so at "preferential rates" amounting to a 15 percent subsidy.[69] Citing lack of congressional direction, the ITA developed three measures to see if a program was "generally available," including "the extent to which the government exercises discretion in making the program available."[70] The ITA found that provincial governments exercised a high degree of discretion, resulting in a single industry benefiting from stumpage rates. Supporting

this finding, the ITA ruled that it had erred in 1983 when it had followed U.S. standard industrial classification (SIC) codes to determine that three industries benefited from stumpage rates. It argued that the pulp and paper, wood products and logging industries were so integrated in B.C. that they should be treated as a single industry. The U.S. international trade commission (ITC) subsequently voted 4-2 that Canadian imports "injured" U.S. producers.[71]

Critics assert that there were several suspicious parts to this preliminary decision. According to the CIT's own ruling in the carbon black case, Rugman and Porteous argue, the ITA's choice of a "preferentiality" test was not applicable to natural resources.[72] Many are uncertain as to how the commerce department came up with its figure of a 14.54 percent subsidy which Percy and Yoder argued included a case of "double counting," something immediately asserted by consultants retained by the Canadian government.[73] Even key CFLI officials felt that it was less than coincidental that the preliminary subsidy was half-way between the 30 percent subsidy alleged by the CFLI and the Canadian argument that there was no subsidy.[74]

Just before a final determination was to be announced, Canada and the U.S. signed the memorandum of understanding (MOU) in which a 15 percent export tax would be collected on Canadian softwood lumber exports to the U.S. in lieu of an export tax.[75] The MOU also listed provision for replacement measures whereby the U.S. government and CFCI could agree to lower the export tax if stumpage rates were increased.

The memorandum may have saved the Canada-U.S. free trade talks. It allowed a proliberal executive to maintain positive relations with the nation's most important trading partner while addressing protectionist pressures from Congress. While critics argued that the second countervail decision demonstrated why a free trade deal with the U.S. would never work, Prime Minister Mulroney made the opposite argument: that only a free trade deal would stop this type of "U.S. harassment."

B.C. state actors were pleased overall with the memorandum. The deputy minister of forests noted that "it is hard to complain when somebody is trying to help you have more revenue,"[76] a point not lost on then Commerce Department Undersecretary Bruce Smart. "From the point of view of B.C., it seems to me that they get a favorable impact on their budget under the circumstances in which they can

blame the United States. The United States is seen as the ogre, but we are giving you $500 million."[77] In fact, a key CFLI official felt that if it had not been for the actions for the B.C. government, there would never have been a memorandum of understanding.

> I don't think there would have been a negotiated settlement without Jack Kempf. He was the only one in Canada who recognized that B.C. was getting ripped off ... and made it plan to the Coalition that the B.C. government wanted to take more out of the industry, and after the initial meeting, we agreed to keep each other informed ... Until Kempf got involved, [federal Minister of International Trade] Pat Carney was stonewalling U.S.[78]

This interpretation is supported by the then federal minister of forests.

> There's no doubt what happened here. We, that is the federal government, accommodated nobody else but the B.C. Government, who had lost their nerve, who did not want to take the chance - and for good reason ... This has been a neat arrangement for the province. In the first year we collected the tax, we sent them a cheque for $320 million .... This was not a federal initiative ... They came up with this idea, which then on behalf of British Columbia we sold the Americans on.[79]

Both the B.C. forest industry and federal government were less enthusiastic and would have preferred to have fought this through the U.S. adjudication process, believing they would have prevailed.[80] Still, the lesson B.C. industry officials say they took away from their second countervail experience was that the adjudication process is politically influenced. "We failed to appreciate that the case had taken on such significance in U.S. politics that the normal handling of a trade case would be put aside. We did not know that the professionalism and independence of judgement that had resulted in the earlier determination in Canada's favour had dissipated under intense domestic pressure."[81]

Carrying along with its plan to increase revenues from the B.C. forest industry, provincial government actors seized on the provi-

sions of the memorandum to have it offset by increased stumpage fees, making permanent an understanding that Canada or the U.S. could cancel at any time.[82] The government did this by introducing a new, revenue-driven system of stumpage calculations, dramatically increasing revenues for the provincial government. By 1990 the U.S. had agreed that the province's replacement measures had completely offset the 15 per cent export tax, and provincial lumber was proceeding tax free to the U.S.[83]

Two years later the Canada-U.S. Free Trade Agreement was signed and came into effect in January, 1989. Chapter 19 of the deal included a binational dispute resolution process to which countervail disputes could be sent. The panels would not replace each country's trade laws but would have the power to ensure that the laws were applied properly. Canadian officials thought that this would eliminate the political interference they believed to have caused the second countervail reversal.

At about the same time, Congress codified the CIT Cabot ruling so that future ITA decisions could not reverse the new interpretation of *de facto* specificity.[84] Still, how to measure precisely what constitutes a "specific group of enterprises" was not addressed, leaving the ITA with considerable discretion in this regard. As Lay noted in 1989, "it is still not possible to articulate the concept of specificity in a way that predicts whether a given collection of industries will be deemed limited enough to constitute a "specific group of enterprises."[85] Recognition of this uncertainty led ITA officials to propose their own regulations, which they said would act as guidelines in their determination process. Reflecting their specificity test in the second countervail decision, they proposed that, "among other things," four factors should be considered in determining specificity: (i) the extent to which government acts to limit the availability of a program; (ii) the number of enterprises, industries, or groups thereof that actually use a program; (iii) whether there are dominant users of a program or whether certain enterprises, industries or groups thereof received disproportionately large benefits under a program; and (iv) the extent to which a government exercises discretion in conferring benefits under a program.

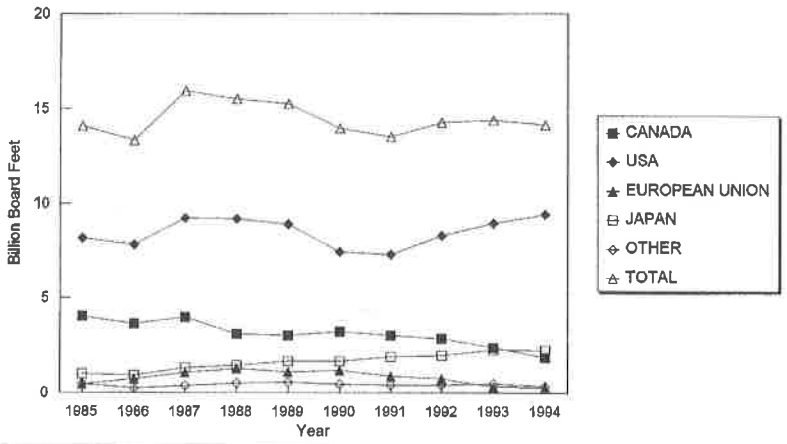
For five years following the memorandum of understanding, all was quiet on the countervail front. Meanwhile, a second "wave of environmentalism" was taking place in North America, with forestry practices in the U.S. Pacific northwest and British Columbia galva-

nizing concern among North American and European environmental groups.[86] Reductions in forest harvesting in the Pacific northwest to protect the spotted owl and other endangered species heightened demands for increased raw log export bans.[87] Both environmental groups and small sawmill owners supported increased controls because they believed this would offset some of the fiber shortage caused by decreased harvesting on national forests. They also felt it would minimize job losses owning to environmental restrictions.[88] For the first time there was a direct alliance with U.S. industry and environmental groups in order to offset environmental restrictions to foreign competitors. President Bush was against increasing raw log export bans because he viewed them as protectionist, but as Vogel notes, Bush capitulated when "the sawmill operators gained a significant ally - the American environmental movement."[89] Supporting a ban on state-owned lands, Bush made the link between processing and the environment: "there can be no doubt that high levels of export of unprocessed timber have contributed to the decline in habitat that caused this species to be listed as endangered."[90]

In B.C., calls for heightened environmental regulations were met with limited success until the early 1990s as European and U.S. groups began to focus their attention on B.C. forest policy.[91] The October, 1991, provincial election changed the policy climate with the electionof a New Democratic Party government on a platform of significant forest policy change, including a desire to obtain increased revenue from the forest industry to double the amount of protected areas in the province to equal 12 percent of the land, and to increase forest practices regulations.[92]

In the meantime, B.C. forest industry representatives were increasingly annoyed at having to open their books to U.S. officials. Never having liked the memorandum of understanding, they pressured the Mulroney government to repeal it. About to enter into a provincial election the B.C. government saw political mileage in cancelling the agreement.[93] Both the provincial government and industry leaders believed that increased stumpage fees and the new Chapter 19 binational panel process would enable them to successfully fight a potential third countervail.

Figure 2:
British Columbia Lumber Shipments, 1985-1994



Source: B.C. Council of Forest Industries, Statistics Canada

C. The Third Countervail

Pressured by forest industry officials and the B.C. government, in 1991 Ottawa exercised its option to terminate the memorandum, arguing that virtually all of Canada's softwood exports were not subject to an export tax since they had been made up in replacement measures. Swiftly responding, the CFLI and U.S. officialdom argued that they had not been given adequate notice. Yet another Senator Packwood letter signed by 67 of his colleagues said that if a reluctant White House was not going to respond, Congress would take legislative measures.[94] Consequently the commerce department "self-initiated" a third countervail action on October 31, 1991.[95] For the first time the CFLI actively sought informal links with British Columbia environmental groups. Self-initiation posed some obvious problems: if most provinces had replaced subsidies with other measures, how could the commerce department now find that a subsidy still existed? The answer came with the added complaint that raw log controls were an additional subsidy by driving down the price of timber.

Once again the softwood lumber dispute became a major story in Canadian papers. Opposition party officials went to Washington,

D.C. to argue that self-initiation was an affront to Canadian sovereignty. They also criticized the action of Congressman Ron Wyden and Senator Max Baucus for their support of the countervail.[96] The U.S. National Lumber and Building Material Dealers Association (NLBMDA) and the U.S. National Association of Home Builders (NAHB) began to launch their own lobbying effort, arguing that the CFLI was hurting the home building industry and pushing the cost of homes out of the reach of some first-time buyers. The NAHB and NLBMDA also began to interact with Canadian industry and government officials. The CFLI's influence over Congress, although still dominant, was not being challenged by consumer-oriented industry interests.

The CFLI responded to this counter-pressure by increasing its ties with Canadian and U.S. environmental groups and initiating a congressionally-focused attack on British Columbia forestry management practices. This was an effort to convince the U.S. public and Congress that not only were Canadian provinces subsidizing their forest companies through low resource rent rates, but also that Canadian industry was benefiting from lax environmental regulations. Key congressmen took up this argument. For example, Congressman Wyden's office solicited the help of two B.C.-based groups, the Western Canada Wilderness Committee (WCWC) and B.C. Sierra Club, in a highly public and political fight with Canadian officials over the countervail issue. Citing official letters from these groups, Wyden asserted that there was a direct relationship between this long-standing, heavy subsidization of Canadian stumpage and poor forest practices in British Columbia. He quoted one B.C. environmental official as saying that his group "believes that the underpricing of timber has resulted in a B.C.-wide logging horror show," and another as arguing that the "underpricing" of Canadian timber "does not provide opportunities for the most efficient and best use of timber."[97] In a letter to Canadian Ambassador Burney, Wyden (1992) said that

> neither am I startled by criticism of Canadian forestry practices by U.S.-based environmental groups. What does draw my attention is criticism from these western Canada environmentalists who strongly disagree with your assertions that B.C. practices good forestry, and that there are no give-aways to Canadian wood product manufacturers in the pricing of provincial stumpage.

The efforts to bring in the environment at this juncture were not to influence the adjudication process, which, as Burney (1992) responded to Wyden, did not take into account different levels of environmental protection in each country. Rather, it was to maintain political pressure on the ITA determination process and to prepare lobbying efforts aimed once again at changing U.S. trade law.

At the same time that these highly public criticisms were taking place, informal discussions were being held between the U.S. Natural Resources Defense Council (NRDC) and CFLI officials about the possibility of launching a joint effort to have Congress change the definition of subsidy that would permit a countervail action against B.C.'s arguably less strict environmental regulations.[98] These informal discussions did not go further at this time for two reasons. First, the CFLI was achieving success without undertaking such a dramatic effort to expand the definition of subsidy. Secondly, as long as the CFLI continued to win on its own, the NRDC had no incentive to invest its time and resources in such an effort.[99]

In the midst of this complex coalition-building, the U.S. international trade commission issued a preliminary ruling on December 27, 1991, that the American industry had been materially injured by Canadian softwood lumber imports.[100] Then, on March 12, 1992, the ITA tentatively ruled that stumpage programs in Canada's four key provinces and B.C.'s raw log export bans constituted "specific" and "preferential" programs, resulting in a net subsidy to Canadian producers estimated at 14.48 percent *ad valorem* (percent of market value). Pending final rulings, Canadian companies had to post bonds equal to the preliminary amount which would be collected pending a final affirmative ruling. Over half of the calculated subsidy was attributed to B.C.'s raw log export restrictions.[101]

This time Canadian interests were in no mood to negotiate a compromise. Canadian politicians decried the "U.S. harassment" as an attack on Canadian sovereignty. Many argued that it was "hypocritical" of the U.S. to penalize British Columbia for using raw log export restrictions when the U.S. also restricted raw log exports on its publicly-owned lands. British Columbia's minister of forests would later publicly attack the B.C.-based Western Canada Wilderness Committee for supporting a countervail that was largely successful because of raw log export restrictions, claiming that the WCWC support of the countervail undermined forest jobs in the province.[102]

The ITA issued a final ruling on May 28, 1992, upholding its preliminary judgment that a subsidy existed but then revising the amount downward to 6.51 percent.[103] As Balmer has noted, BC's raw log export restrictions accounted for 3.6 percent of this amount. Stumpage payments, once the key complaint of the CFLI and its member forest companies, by the ITA's own calculations, now amounted to less than a 2.91 percent subsidy.[104] In July 15, 1992, the ITA issued a final affirmative injury ruling.[105] However, the panel split 4-2. Those supporting an injury finding argued, in part, that countervail tariffs were required to avoid provinces reverting to their previous stumpage prices, a point to which the minority took great exception.[106] Now strongly convinced that ITA determinations were subject to considerable political interference and pressure from congressional interests, the Canadian government sought immediate review under Chapter 19 of the Canadian-US Free Trade Agreement.

D. Adjudication Under the FTA

Two FTA panels were constituted to examine the ITA's subsidy determination and injury ruling. On May 12, 1993, the subsidy panel remanded the commerce department ruling. It told the ITA that it needed to consider all four measures of the "specificity" guidelines that it had issued in 1989.[107] It further argued that in order to find that the price was "preferential," a 1986 federal circuit court ruling in *Georgetown Steel Corp. v. United States* now required the ITA to apply an "effects test" providing evidence that stumpage prices distorted markets.[108] On July 26, 1993, the injury panel remanded the ITC determination, arguing that the ITC did not provide sufficient evidence that Canadian softwood lumber exports were the cause of material injury.[109]

The ITA responded in September, 1993, asserting the FTA panel had misunderstood that its guidelines for specificity were "sequential," and that any one measure was enough to find specificity.[110] Nonetheless, it applied all four measures and again found specificity, actually revising its subsidy estimate to 11.54 percent.[111] At the same time, the department of commerce refused to apply an "effects" test, maintaining that this requirement was limited to cases involving non-market economics.[112] Similarly, the ITC responded in October, 1993, by analyzing the volume of Canadian softwood imports, the effect of these imports on prices, and other factors that could contribute to material injury and again found that, based on the evidence,

Canadian subsidized imports were the cause of material injury to U.S. companies.[113]

These rulings fueled beliefs in Canada that the ITA and ITC adjudication processes were subject to political influence, while the FTA panels were beneficial in checking congressional pressure. Not unexpectedly, these rulings caused rumblings in the Congress, with some members questioning the validity of FTA panels. Before waiting for the conclusion of the binational process, the joint senate committee report on NAFTA implementation condemned the panel rulings. It argued in general terms that more deference to administrative authorities must be shown.

> The Committee believes ... that FTA binational panels have, in several instances, failed to apply the appropriate standard of review, potentially undermining the integrity of the binational process. Specifically, the Committee believes that some binational panels have not afforded the appropriate deference to US agency determinations required by the United States Supreme Court .... Absent a direct conflict with the plain language of the statute, panels, like the courts for which they substitute, are restricted to examining whether the agency's view is a permissible construction of the statute. The Committee emphasizes in this regard that it is the function of the courts, and thus panels, to determine whether the agency has correctly applied the law, not to make the ultimate decision that Congress has reserved to the agency.[114]

The committee also set its sights on the ITA subsidy panel. It "clarified" that only one measure of "specificity" needed be found, directly contradicting the binational panel ruling.

> [T]he Committee is concerned that, in several cases, binational panels have misinterpreted U.S. law and practice in two key substantive areas of U.S. countervailing duty law-regarding the so-called "effects test" and regarding the requirement that a subsidy must be "specific" to an industry. Thus, the Committee believes it is appropriate to clarify US law and practice in these two areas, so that these misinterpretations can be corrected.[115]

> With respect to the "effects" test, the committee reported that " ... the binational panel misinterpreted U.S. law to require that, even after the Department of Commerce has determined that a subsidy has been provided, the Department must further demonstrate that the subsidy has the effect of lowering the price of increasing the output of a good before a duty can be imposed. *Such "effects" test for subsidies has never been mandated by the law and is inconsistent with effective enforcement of the counterviewing duty law.* ... From a policy perspective, the Committee believes that an "effects" analysis should not be required."[116]

Following these congressional initiatives, the binational panels again ruled that both the ITA and ITC rulings were based on insufficient evidence. The subsidy (ITA) binational panel ruled on December 17, 1993, that the ITA did not provide evidence that provincial stumpage programs were either specific or that they distorted competitive markets.[117] The ITC panel similarly found that there was insufficient evidence to find injury. But by now both decisions had broken down 3-2 along national lines.[118]

The American minority members in the subsidy-focused panel argued that a recent ruling by the federal circuit court of appeals in the case of Daewoo Electronics[119] meant that they had erred in the original ruling. They argued instead that the Daewoo ruling meant that the ITA only be subject to a "reasonable" test, and that deference must be given to the commerce department (ITA) over how it decides to measure specificity and preferentialism. Both Canadian and U.S. panelists have been accused of being influenced by more than legal arguments alone. Gastle and Castel assert that " ... what woke up the U.S. minority were the congressional reports, not Daewoo."[120] The U.S. CFLI dismisses these assertations, arguing that not only was the law very clear regarding Daewoo, but that the professional background of the U.S. panelists makes such accusations "absurd."[121] The CFLI has, in turn, argued that two of the three Canadian panelists were in a conflict of interest because they had failed to disclose their law firm's relationships with Canadian forest companies.[122]

Following the second remand, the commerce department's ITA reluctantly withdrew the existing countervail tariff. But the USTR and the CFLI then appealed the binational panel decision to an extraordinary challenge committee (ECC) under provisions of Chapter 19 of the FTA.[123] The CFLI also launched a constitutional challenge to the binational panel process, the success of which would have

raised serious questions about the administration's overall liberal trade policy objectives.[124]

During the ECC hearing, the USTR and the CFLI argued that the binational panels "so misconstrued U.S. law that the integrity of the process was threatened."[125] But the ECC panel upheld the binational panels in an August, 1994, ruling, and once again it was a split 2-1 decision along national lines. The majority Canadian justices argued that previous ECC panels had defined a narrow role for the ECC based upon a standard of review that limited them to determining whether the "panel conscientiously attempted to apply the appropriate law as they understood it."[126] Dissenting Judge Wilkey argued that such a narrow interpretation meant that the ECC panels had virtually no role at all.[127]

If the story had ended here, the evidence would support scholars of American trade law who argue that the FTA/NAFTA binational process has reduced the influence of protectionist pressures in the Congress. For example, Rugman (1989) predicted that " ... on average, the binational panels will probably give less deference than in the past to the administrative agencies in the United States ... Since actions on countervail are the major bilateral irritants, the net outcome should be greater discipline in the administration of this aspect of U.S. trade law. This will result in an overall improvement in bilateral economic relations." Indeed, both those critical and supportive of the binational panel process on the softwood lumber dispute agree that the panels gave less deference than a U.S. court to the commerce department's ITA.[128] Judith Goldstein argues that this dynamic is exactly the type of result *Congress* had wanted. She maintains that the FTA process was actually supported by members of Congress who, far less protectionist than much of the literature suggests, actually sought to shield themselves from domestic pressure by transferring some of their authority to the binational panels. " ... Congress may not only defend policies that benefit constituents but as well support rules such as fast-track, binational judicial review or an executive veto as a convenient shield from a powerful interest group."[129] Supporting this conclusion is Krause whose review of binational panels leads him to assert " ... that the Chapter 19 binational review procedure lowers the expected benefits of protectionist measures .... It has produced timely, judicious, and nonpartisan opinions."[130] Or as Jordan Goldstein puts it, "[t]he fears of [U.S.] industry, labor, and politicians that the FTA and NAFTA will limit the use of U.S. trade-remedy laws may be coming to pass."[131]

Yet the softwood story actually presents a slightly different picture than the arguments about the FTA insulating protectionist pressure would suggest. While agency discretion appears to have decreased, the softwood story after the binational panel rulings is one of *increased* protectionist pressure at the congressional level. Rather than walk away content that it had shielded itself from powerful domestic interests as Judith Goldstein's argument would predict, Congress became increasingly active on the countervail file. The binational panels did have an effect on U.S. countervail law, but it was to formalize the procedures the commerce department used to find that a subsidy existed in Countervail III, reducing agency discretion to find in favor of the foreign competitor in the future. This improved the U.S. domestic industry's use of, or threat of, countervail actions as a tool for increased relief, as well as reducing the likelihood of future NAFTA binational panels remanding ITA and ITC judgements.

Consider the changes in U.S. trade law that took place after the binational panels. The CFLI lobbied a more than willing Congress and the executive branch to specifically address each of the contentious points made by the binational panels. The mechanism used this time was the WTO/GATT (Uruguay Round) implementing legislation, which came into effect December 8, 1994, and its accompanying "Statement on Administrative Action" (SAA).[132] The SAA addresses the subsidy binational panel findings regarding *de facto* specificity and the effects test. Contradicting the binational panel finding that all four measures of specificity must be considered, the SAA states that "Commerce shall find de facto specificity if *one or more* of the factors exist."[133] It also gives clear direction that "in determining whether a subsidy exists, Commerce is not required to consider the *effects* of the subsidy."[134] Explicitly addressing the softwood binational panel rulings, the SAA goes on to state that

> In *Certain Softwood Lumber Products from Canada* ... a three-member majority ruled that in order to find certain government practices to be subsidies, Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation. In so ruling, the majority *misinterpreted the holding in Georgetown Steel Corp. V. United States* ... which was limited to the reasonable

> proposition that the CVD law cannot be applied to imports from nonmarket economy countries .... [T]he Administration wants to make clear its view that the new definition of subsidy does not require that Commerce consider or analyze the effect (including whether there is any effect at all) of a government action on the price or output of the class or kind of merchandise under its investigation or review."

The SAA also takes preemptive action, explicitly permitting raw log export controls to be considered as countervailable, something the Uruguay Round subsidy agreement arguably intended to exempt.[135] Again referring explicitly to softwood lumber, the SAA states:

> In the past, the Department of Commerce has countervailed a variety of programs where the government has provided a benefit through private parties (see, e.g. Certain Softwood Lumber Products from Canada, Leather from Argentina...) .... It is the Administration's view that Article 1.1(a)(1)(iv) of the [GATT/WTO] Subsidies Agreement and section 771 (5)(B)(iii) encompass direct subsidy practices like those which Commerce has countervailed in the past, and that *these types of indirect subsidies will continue to be countervailable* ...[136]

These changes belie predictions that the influence of protectionist interests would dissipate following the FTA binational panel process. In fact, those U.S. industry organizations supporting the binational panel outcomes, such as the NAHB, were not even made aware of these changes until they were a *fait accompli.*[137] Instead, these developments support the trade theory literature asserting that U.S. trade law has created an institutional setting that encourages overall liberal dynamics but which facilitate administered protection. In this case, as free trading arrangements created less deference to the countervail adjudication process and bureaucratic discussion, Congress moved swiftly to ensure that American forest companies would not lose their administered protectionist mechanisms. Hence, the binational panel rulings resulted in more *explicit* direction from Congress that made it *easier* for American forest companies to prevail in countervail determinations.

Figure 3: Canadian Softwood Lumber Exports to the United States

Billions of Dollars

Source: Natural Resources Canada, Canadian Forest Service

IV. THE SOFTWOOD LUMBER AGREEMENT

Once these changes were made, Canadian government and industry officials recognized that the CFLI could very well win another countervail.[138] Following their successful dual track strategy of congressional lobbying and legal action, the CFLI buttressed its constitutional challenge of Chapter 19 by stepping up its criticism of B.C.'s environmental forestry practices in Congress and referring to its support from provincial environmental groups.[139] Its official briefing included a section criticizing Canada's inadequate environmental initiatives, asserting that "sound trade policy and environmental policy support taking action to offset Canadian timber subsidies."[140] The CFLI used these environmental arguments when critiquing the NAHB, which had announced it was placing the softwood lumber dispute at the top of its agenda and would fight strongly for a fourth countervail initiative.

It was in this context that Ottawa and the B.C. government began a series of meetings in an attempt to avert Countervail IV. Canadian officials were looking for a deal that would be less painful than another import tariff, while administration officials wanted to pursue any arrangement that would serve the dual purposes of stopping a potential trade skirmish with Canada, as well as securing

the CFLI's agreement to drop its constitutional challenge of Chapter 19 (which posed a serious threat to its overall liberal trading objectives).[141]

Informal meetings first took place in the spring of 1995, followed by formal meetings at the Canadian Embassy in September. For the next eight months a series of meetings, first exploratory and then moving toward intense negotiations, were held among officials from the office of the United States trade representative, the commerce department, the B.C. ministry of forests, other provincial governments, the Canadian department of foreign affairs and international trade, and the Canadian Embassy. In addition, industry officials in Canada and the U.S. were central to these discussions.[142] During the exploratory phase environmental changes in British Columbia were raised, but the central focus was on timber pricing changes.[143] The provincial government was able to point to stumpage increases it had made in 1994, following two years of increased industry profits.[144]

A number of options were discussed that might avoid a fourth softwood countervail, including having each province adopt a different set of initiatives that would satisfy the CFLI. In the end, a British Columbia "quota" proposal put forth by Jake Kerr, an industry representative, was accepted. The final agreement allows the first 14.7 billion board feet (BBF) of softwood lumber exports from British Columbia, Alberta, Ontario and Quebec to enter the U.S. market tax free, and 16.3 BBF were exported from these provinces in 1995.[145] But any amount above this figure would be subject to an export tax. The first 650 million board feet in excess is subject to a $50 tax per thousand board feet (MBF), while any further exports are subject to a $100 tax MBF. In exchange, the CFLI and key American companies agreed not to launch a countervail petition for five years, the CFLI dropped its Chapter 19 constitutional challenge, and the commerce department agreed not to proceed with any softwood countervail petition it might receive in the next five years.

Unlike the case in 1986, this proposal originated not from the provincial government but from B.C. industry. The government, having just implemented a new stumpage increase, had no interest in using this pressure to find increased provincial revenues. Industry officials from other provinces went along with the deal, accepting it with varying degrees of enthusiasm. But Ottawa disliked this approach, involving as it did a high degree of bureaucratic adminis-

tration. It also involved turning negotiations inward to politically sensitive questions regarding how much of the national export quota each province would receive, and within each province, what share would go to each company.[146]

The agreement was vehemently opposed by the NAHB and the NLBMDA, who argued that purchasers of lumber, the only losers to this deal, were not a party to it. Timber prices went up in the aftermath of the deal, and the home builders quickly asserted that the agreement was the cause. They were equally critical of the effect of this deal on price volatility, which the NAHB argued would create additional uncertainty in the U.S. housing market. Stepping up its pressure, the NAHB focused the bulk of its efforts on publicly criticizing the CFLI's largest member company, Georgia-Pacific, and on initiating its own legislative measures in the U.S. Congress.[147] Some critics of the deal suggested that upward pressure on timber prices might actually help the B.C. forest industry's bottom line. Unlike the 1986 memorandum of understanding, British Columbia forest industry officials have a vested interest in making the agreement work and have spent much of their time with CFLI officials discussing related management issues. Meanwhile, Canada's traditional American allies in this dispute, such as the NAHB, are working to have the agreement terminated.

In addition to market distortions, the agreement, like the memorandum before it, has again resulted in CFLI and U.S. scrutiny of Canadian forest management practices to ensure compliance. And once again, B.C. environmental groups have been enlisted by the CFLI for their support in this regard.[148] The CFLI has warned the provincial government that any environmental relaxation measures would be weighed against the terms of the agreement, for the first time giving environment issues some legal teeth in the softwood lumber conflict. So, when the B.C. government held closed-door discussions with stakeholders about streamlining its recent forest practice changes, some provincial environmental groups notified the CFLI of these plans.[149] An official of the B.C.-based Sierra Legal Defence Fund acknowledges that "it is a case of strange bedfellows," but the "environmental lobby will use any tool it can, including the softwood lumber agreement," to exert pressure for maintaining or increasing environmental protection.[150]

Canadian Embassy officials in Washington have had to explain to the U.S. commerce department and USTR officials recent B.C.

forest policy initiatives that affect job requirements, environmental forestry regulations, and stumpage fees. But it is clear that the CFLI is more interested in maintaining stumpage rates than environmental protection *per se.* Provincial industry officials have briefed U.S. trade representatives and the CFLI about the three current areas of B.C. policy change--job targets, relaxing some administrative requirements in BC's new forest practices code, and reducing stumpage owing to recent declines in the price of timber. Based on these discussions, provincial industry spokesmen believe that neither job targets nor forest practices code administrative changes will be challenged under the agreement as long as no significant modifications are made in stumpage rates.[151] But owing to slumping prices and the decline of the Japanese market in early 1998, stumpage rate reductions in B.C. appear imminent, and the CFLI is closely monitoring the situation.[152]

V. CONCLUSION

The Canada-United States softwood lumber dispute generally supports the argument that the development of U.S. trade policy is one in which "[t]he norms and institutions of fair trade [have] coexisted with their liberal counterparts."[153] Liberal dynamics tended to come from the executive branch in its pursuit of bilateral (Canada-U.S. FTA), trilateral (NAFTA) and multilateral (WTO/ Uruguay Round) trading agreements that occurred since the dispute first began in the early 1980s, while the administration has minimized the protectionist elements of U.S. trade law through the negotiation of VERs. Protectionist pressures have largely been felt through U.S. countervail law and through Congress, which, during this dispute, has quickly altered American trade law to facilitate affirmative countervail rulings.

The development of the Canada-U.S. FTA and later the NAFTA binational panel mechanisms can be seen in this light. Far from reducing pressure in Congress for administered protection, binational panel rulings had the effect of tying congressional changes in U.S. trade law more directly to the softwood lumber conflict. To be sure, the department of commerce has lost discretion as a result of the binational panel mechanism, but the direction of this loss in the case of softwood lumber has been the opposite of predictions: it is now *more difficult* for the commerce department to find in favor of the foreign competitor.

Given these outcomes, what are the prospects for a long-term resolution to this dispute? One obvious option is for the U.S. to engage in wholesale change of its domestic trade law, something Krueger (1995) and other scholars have long called for, arguing that they fail to protect American consumers. But given the dynamics noted above, any sweeping changes are unlikely. The following section considers options that the CFLI believes would end the dispute if implemented.

The prospect of British Columbia returning to a system of competitive bidding appears to hold the most promise in arriving at a long-term solution, as it would be much more difficult for the CFLI to assert, and for the ITA to rule, that rates are provided "preferentially" if they are offered on a market basis. And, unlike the scenario to be discussed below, a move toward competitive bidding is supported by most environmental groups in B.C. and the United States. Environmental groups believe competitive bidding will lead to greater logging costs, which some believe would have the effect of reducing the harvest rate. They also believe that such a system would encourage value-added production by allowing secondary manufacturers greater access to the wood supply.

Conceivably, if a B.C. government wanted to head in this direction, it could use the softwood lumber dispute as a reason for doing so. Indeed, changes were made in 1987 that increased access to small scale, short-term competitive bidding on timber sales.[154] But there are a number of problems with this possibility. First, the current tenure system has created some powerful actors with a vested interest in the *status quo*. Forest workers have benefited from this system in the form of high wages and employment levels, and government officials have been able to use the "appurtenancy" regulations to require forest companies to maintain employment levels in specific locations, thus encouraging regional development.[155] Current tenure holders are also hesitant to open up the Pandora's box of tenure reform, in part because of uncertainty about any new system and in part because their tenure is a company asset.[156] Moreover, Zhang and Pearse (1996) have documented the positive effects of secure and long-term tenure on investment and forest practices. Thirdly, and most importantly, even if the province moved to a competitive bidding system, government and industry officials worry that U.S. companies will simply find other ways to countervail softwood exports (as witnessed by the inclusion of B.C. raw log

exports controls as a subsidy in Countervail III). Certainly the evidence presented here indicates that U.S. trade law would appear to encourage the CFLI to look for other programs in the future that might be considered countervailable, including environmental forestry differences.

Another potential solution is to allow free trade in raw logs between Canada and the United States. This option would essentially remove all arguments that the subsidy reflects "preferential rates," since U.S. producers would now have access to the raw materials. But the likelihood of any B.C. government removing its raw log restrictions seems doubtful, because the goals of creating value-added industry and jobs, environmental protection, and Canadian sovereignty are tied up in this ban. These are the same reasons why the U.S. has been tightening its own raw log export restrictions. There is an increasingly strong sentiment in Canada and the U.S., and one that has solidified following increased environmental forestry protection, that the government has the right to insist that trees cut on government-owned land are processed in the region where they are being cut rather than shipped to foreign markets.

There is another heretofore unexplored possibility that may reduce the threat of future countervail action, and that is a mutual recognition agreement (MRA) between Canada and the U.S. over forest management practices. In recent years MRAs have gained increased popularity as a way of tolerating "acceptable differences" between domestic regulatory systems.[157] The U.S., the European Union, and Canada are three countries currently negotiating sectoral and inter-sectoral agreements that would reduce international regulatory oversight without forcing countries / domestic sectors to converge around one specific system. Thus far, MRAs have centered on regulations and certification measures to facilitate product entry into domestic markets. This narrow focus does not generally apply to the U.S. / Canada softwood lumber trade, where the issue is about pricing rather than quality or safety of the product, although the growing move toward forest certification and the fear of future countervails explicitly addressing environmental forestry practices may also play an important role here. But given the attractiveness of agreeing to "acceptable differences," it may be worth exploring whether this concept could be expanded to apply to issues concerning the Canada / U.S. softwood lumber conflict. An MRA could be broad-based, involving forest management pricing systems and forest regulations,

or a narrowly focused one that would remove key factors in previous disputes, such as declaring raw log export controls as non-countervailable. Obviously, key obstacles are posed here as well, including just what incentive would exist for the U.S. to enter into such an agreement. But the lesson from the whole story recited here is that any efforts to reduce U.S. administered protection will get a much better hearing from the executive branch, which would be the key player in any softwood lumber MRA negotiations.

Finally, it is worth reflecting on the nature of the environmental connection in this dispute, and the odd coalition-building between American lumber companies and Canadian and U.S. environmental groups. The story presented on these pages makes it clear that the CFLI has forged these linkages insofar as it helps its case and not because the CFLI supports increased environmental initiatives. Indeed, CFLI opposes increased environmental restrictions in the U.S., but believing those on U.S. national forest lands to be stronger, sees this as an area to exploit. Vogel has noted that U.S. industry attempts to reach out to environmental interests have increased in recent years as a way for it to legitimize its protectionist efforts.

> To the extent that producers and employees who stand to suffer financially from liberalized trade find themselves on the defensive, they are apt to make greater use of health, safety, and environmental arguments to justify their case for trade restrictions. These economic arguments resonate with significant segments of the electorate in a way that economic defenses of protectionism no longer do.[158]

As for the question whether environmental groups benefit from using the softwood dispute to further their goals, the evidence to date is ambivalent. On the one hand, the countervail has clearly resulted in dramatically higher stumpage fees in B.C. and exerted some pressure for a competitive bidding system. On the other hand, although many environmental groups tend to support a competitive bidding system because they argue it would increase industry costs and provide greater access to the fiber, evidence shows that U.S. competitive bidding is not a panacea for environmental protection. The increased environmental protection measures in the U.S. were a result of its non-discretionary environmental forestry legislation rather than a system of competitive bidding.

Certainly the role of environmental groups in the softwood dispute must be seen as part of a larger strategy of using economic pressure and boycotts to force the B.C. government into increased environmental forestry regulations.[159] But there are costs resulting from the inclusion of the softwood dispute as one of these economic tools. This is because supporting the countervail dispute in the 1990s puts environmental groups in an awkward position. Recall that Countervail III was largely successful owing to the commerce department's ITA ruling that B.C. log exports were a subsidy. Yet environmental groups in B.C. and the U.S. are also strong supporters of raw log export restrictions in both jurisdictions because they believe such policies create domestic value-added jobs and thus reduce job losses associated with environmental protection. While environmental groups may feel that the means justify the ends, they also risk losing some credibility when they support a countervail initiative that puts pressure on the B.C. government to remove log restrictions. Such interaction could hurt the credibility of environmental groups.

> The dispute also suggests a possible down side to environmentalists forming common cause with industry groups pursuing normal self-interest. By playing the trade card in concert with such groups, there is a real danger that the environmental dimensions of the problem will be lost in the inevitable backlash against protectionism. If one of the longer-term objectives of environmental groups is to educate the public and develop broad support for an environmental ethos, it is not clear that alliances of temporary convenience will always prove useful.[160]

No one would dispute that the objective of environmental groups to increase environmental protection is laudable. Perhaps the lesson in all of this is that we need to shift focus toward greater cross-border cooperation to achieve sustainable forestry in both countries. In an era of increasing globalization, the ability to work cross-nationally appears to be crucial if we are to move forward on environmental protection. A first step might be the creation of a multi-stakeholder, cross-border commission designed to build mutual understanding and address environmental forestry issues and concerns in both countries. Perhaps if we undertake more of these

efforts, we may find that their results have the effect of dampening enthusiasm for bilateral softwood lumber trade conflicts.

Short of a complete convergency by B.C. and other provinces toward the U.S. model, the incentives offered by the American trade law institutional setting will almost certainly nurture the softwood dispute for decades to come. The most policy makers on both sides of the border can probably hope for is to address bilaterally issues such as the environmental forestry policy. Canada-U.S. agreements on these issues may end up removing some fuel from the softwood fire.

ACRONYMS

BBF	billion board feet
CFC LI	Coalition for Fair Canadian Lumber Imports
CFLI	Coalition for Fair Lumber Imports
CIT	Court of International Trade
CVD	countervail duty
ECC	extraordinary challenge committee
FTA	(Canada-U.S.) Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ITA	International Trade Administration
ITC	International Trade Commission
MBF	thousand board feet
MOU	memorandum of understanding
MRA	mutual recognition agreement
NAFTA	North American Free Trade Agreement
NAHB	National Association of Home Builders
NFPA	National Forest Products Association
NIFM	Northwest Independent Forest Manufacturers
NLBMDA	National Lumber and Building Material Dealers Association
NRDC	National Resources Defense Council
OMA	orderly marketing agreements
SAA	(WTO) statement on administrative action
SBEP	small business enterprise program
SBFEP	small business forest enterprise program
SIC	standard industrial classification
USTR	U.S. Trade Representative
VER	voluntary export restraints
WCWC	Western Canada Wilderness Committee
WTO	World Trade Organization

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NOTES

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[1]This dispute has historical antecedents to the 1960s, and back to the turn of the century (Apsey and Thomas 1997).

[2] Balmer 1993: 99-100; Kalt 1988: esp. 360-361 Percy and Yoder 1987. An important exception is Balmer (1991) who argues that broad difference in each country's political institutions was a key factor in this dispute. Some of the most comprehensive critiques have come

from active policy participants on both sides of the issue. See Apsey and Thomas (1997), Kalt (1988; 1994) and Ragosta and Shanker (1994), Kalt 1994.

[3]The term "protectionism" is used in this essay to describe a process whereby domestic industry obtains relief from foreign competitors, and is not intended to be construed in a pejorative manner. Indeed, the expressed purpose of U.S. fair trade laws is to permit administered protection in order to reduce to zero the benefit of a foreign government's subsidy to it domestic industry.

[4]This institutional approach argues that ideas also matter, but they must be understood in the context of the institutional setting. Indeed, Goldstein has argued (1995) that one explanation for Congress giving fast track authority was to insulate itself from domestic pressure - institutionalizing a pro-liberal trading bias. (Goldstein 1986; 1988; Nelson 1989).

[5]Nelson (ibid) argues that a prerequisite to liberal trade policy dominating over Congressional protectionism is the presence of a president who takes an active role in pursuing liberalized trading agreements.

[6](Nelson 1989: 89) asserts that an "The explanation of this phenomenon is the development of a new institutional definition of trade policy that permitted executive dominance of trade policy, in conjunction with a changed perception of the role of trade policy by the executive branch. Specifically, it is argued that post-war executives (at least until Reagan) came to associate trade policy with broader foreign policy goals."

[7]The international regimes literature (e.g. Keohane and Nye 1977) argues that liberal trading is a function of U.S. post WWI dominance in world trading order. It would predict increasing protectionism as its hegemony declines (Goldstein 1986).

[8] Kalt 1988: 361.

[9]The general point about the B.C. government using this pressure to further its own agenda is made by Bernstein and Cashore (1996 {revised February 1997}) and Cashore and Bernstein (1997).

[10]In addition, since the potential benefits of winning a countervail action are so large and the costs are relatively small, a structural incentive exists on the part of U.S. forest companies to continue countervail action.

[11]British Columbia is by far Canada's largest exporter of softwood lumber to the United States, representing about 60 per cent of the national figure (Chart 3). For this reason, this paper will concentrate its focus on British Columbia forest policy and stumpage changes.

[12]My thanks to Clark Binkley for this point.

[13]Gorte (1996) found that before 1975, Canadian lumber companies were "high cost" producers to the U.S. market, with their share of the U.S. market declining with the onset of each recession. However, in the early 1980s Canadian share of the U.S. market actually rose slightly, while the PNW share actu

[14] Adams, McCarl, and Homayounfaarrokh 1986; Merrifield, Monahan, and Alper 1988; Percy and Yoder 1987: 36.

[15]This is a controversial figure, and hard to predict. Uhler (1991) has found little evidence of such underpricing, but some of over pricing. Where underpricing was possibly occurring in the B.C. interior, Uhler found that it had "no effect" on U.S. prices or increased B.C. market share. Both sides have found economic studies to support their case. Haley 1980.

[16] Cashore 1997.

[17]A classic example includes spotted owl litigation in the U.S. Pacific Northwest. An important caveat is that this legislation was either directed only at federally-owned forests, or contained more requirements of federal land management agencies than they did for private land managers. Instead, comparatively weaker regulations for privately-owned land have been developed by individual states. The private/public dichotomy is important, as many argue (Cashore forthcoming: 1; Citizen Forester 1992: 18; Robertson 1990; Rowland 1994) that increases in environmental protection on federal forest lands results in decreased protection on private lands. But what is important for the purposes of this paper is the effect of this increased U.S. protection on U.S. companies that rely on national forests for their timber supply.

[18] Reinhardt 1991; Tougas 1988-89: 147. Vogel 1992: 165-166.

[19] Goldstein 1986; Goldstein 1988; Nelson 1989.

[20] Goldstein 1988: 198.

[21] Goldstein 1986: 180. Goldstein 1996: 560. Goldstein (1986: 175) argues that as imports have increasingly dominated the market in the U.S., industries have responded by repeatedly asking the government for aid. Despite these pressures the executive's response, "has been guided by a desire to adhere to liberal norms to the extent possible given institutional constraints."

[22]Goldstein 1986: 168. 19 USC. i 303, quoted in Tougas 1988-89: 144

[23]Quoted in Bessko (1995: 337).

[24] Goldstein 1986: 171; Goldstein 1988: 215.

[25] Injury is defined as having "the effect of substantially reducing sales of the competitive U.S., product in the United States (US International Trade Commission Annual Report, 1975, p. 3, Quoted in Goldstein (1986: 168).) Goldstein 1986: 162-3. Goldstein 1988: 202.

[26] Goldstein 1988: 202.

[27]As Lay (1989: 1498-99) details, "Subsequent to the United States accession to the Subsidies Code, Congress implemented the Code by means of the Trade Agreements Act of 1979. (Pub. L. No 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 USC.). Non GATT signatory countries can still have their cases reviewed under section 303 of the Tariff Act of 1930, which does not require an injury test (Sykes 1989: 202)

[28] Manganiello 1993: 578.

[29]Section 677(5)(B)) of the Tariff Act of 1930, as amended. (Pub. L. No. 96-39, (1979), Title VII, Subtitle D, Sec. 771(5)(B)). Quoted in Rugman (1988) Lay (1989).and Bessko (1995: 337-8)

[30] Horlick and Oliver 1989: 1500.

[31] Lay 1989: 1499-1500.

[32] Cashore, 1988:202.

[33] Krueger 1995:2.

[34] Cashore, 1994:650.

[35] Horlick, 1989:5.

[36] Cubbage, O'Laughlin, and Bullock 1993:238.

[37]For simplicity, for the remainder of this paper I will use the term "stumpage rates."

[38] Cashore 1988: 57; McAskill 1984.

[39] Marchak 1983; O'Toole 1988.

[40] Apsey and Thomas 1997: 10.

[41]During Countervail I, small regional producers made up the majority of membership (Apsey and Thomas 1997: 10) .

[42] United States International Trade Commission, 1982.

[43] Rugman and Porteous 1988; Tougas 1988-89; Yoder and Gilliland 1991.

[44]Certain Softwood Products from Canada, 48 Fed. Reg. 24159, 24167 (1983) (DOC, Final Neg.) Quoted in Rugman (1988: 40)

[45] Ibid:40.

[46]Although the CFLI was officially a new organization, much of its membership overlapped with the old CFCLI (personal communication, CFLI).

[47] Personal interviews.

[48]Owing to a number of member companies of the U.S. National Forest Products Association (NFPA) that were ambivalent about the countervail (Shinn 1987: 12-14) , the NFPA decided to let the CFLI take the official lead role during Countervail II. However, the NFPA provided office space to the CFLI during this time, and senior NFPA officials strategized with the CFLI. The NFPA was not involved during Countervail III.

[49] Cashore 1988: ch5.

[50] Apsey and Thomas 1997; Balmer 1991; 1993; Vernon, Spar, and Tobin 1991: 30.

[51] Hayter 1992; Tougas 1988-89: 156-7.

[52]Yeutter wrote back that the administration "persuaded the Canadian government to commit to series of meetings on the issue" (Vernon, Spar, and Tobin 1991: 32);

[53]Letter from ten senators to Clayton Yeutter, October 1, 1985. Reproduced in Glenn Tobin, "U.S.-Canada Free Trade Negotiations: Gaining Approval to Proceed," Case Program, No. C16-87-785, Appendix G, John F. Kennedy School of Government, Harvard University, 1987.

[54]Quoted in Vernon, Spar, and Tobin (1991: 33).

[55] Personal interview; Vernon, Spar, and Tobin 1991: 36.

[56] Apsey and Thomas 1997:25.

[57] Tougas 1988-89: 144.

[58] Sykes 1989; Tougas 1988-89; Tougas 1988-89: 149.

[59]The CIT upheld the ITA *de jure* "general availability" test during its adjudication of *Tire and Rubber Company v. United States* (see Rugman and Porteous 1988)É165). *Wall Street Journal* 1990.

[60] 1988:50.

[61]Quoted in Groen (1994); Lewin

[62] Rugman and Porteous 1988.

[63] Cashore 1988:73.

[64] Groen 1994.

[65] *Ibid*: 151.

[66] From Groen (1994)

[67] There is some debate about the level of support Kempf had from the Premier and cabinet in this regard, but there is evidence that the cash-strapped cabinet had deliberated over this strategy. Groen (1994: 73) quotes former Social Credit Finance Minister, Mel Couvalier, as saying, "...it wasn't like Jack Kempf pulled off a coup. In fact, shortly after taking office we worked out the strategy that we eventually used."

[68] As Bessko (1995: 348) notes, the ITA move from an "inherent characteristics" test regarding *de jure* specificity, to a "sequential" test, where a hierarchy of factors is looked at to determine specificity, and where "any one of several factors would constitute defacto specificity."

[69] Tougas 1988-89: 157; Cashore 1988; Ragosta and Shanker 1994: 650.

[70] 51 Federal Register No. 37,456 (1986), quoted in Tougas (1988-89: 158).

[71] This was a decision of much controversy. U.S. experts hired by the Canadian government argued before the ITC that according to an economic theory of rent, since Canadian producers were "price takers", any alleged subsidy could not distort prices, but show up as increased profit for individual companies (see Scherer 1986). However, the CFLI argues that even if this argument were true, such a situation would contribute to "excess investment" (personal communication, CFLI).

[72] Rugman and Porteous 1988.

[73] Personal interview, Prof. Michael Scherer, John F. Kennedy School of Government, Harvard University, November, 1996. The double counting argument is asserted because the ITA added "the direct cost of producing stumpage to an indirect cost of representing the intrinsic value of the standing timber" (Rugman and Porteous 1988: 52). The CFLI argues that although the ITA's figure was an estimate, it is incorrect to label these calculations as "double counting" (personal communication). Percy and Yoder 1987.

[74] Personal interview.

[75] Cashore 1988.

[76]From (Cashore 1988: 143), originally quoted in *Saturday Night* July, 1987.

[77]From *Saturday Night,* quoted in Cashore (1988: 143).

[78]Gus Kuehne of the Coalition, quoted in Whitely (1987).

[79]Frank Oberle, quoted in Groen (1994).

[80]Personal interviews.

[81]Cohn (1996: 44) makes a similar argument. Apsey and Thomas 1997.

[82]The new system starts with a stumpage revenue target, rather than leaving stumpage as a residual that is determined once operating costs and profit are deducted. The B.C. forest industry was opposed to such measures, arguing that if there had to be a tax at all, they preferred it to be transparent, rather than affect the industry's competitiveness with other countries. As one company official said back in 1987: "Our positionis retain the tariff as a tariff so we can point to it. If it is diluted through the stumpage system, it may end up affecting lumber no geared for the U.S. market ... We do not want to pay tariff to the U.S. on stuff we're shipping to China" (Personal interview).

[83]Never a primary target of the CFLI, the Maritimes had ceased to be subject to the export tax in the fall of 1987. At the time of the termination of the memorandum, replacement measures in Quebec had resulted in a reduced rate for exports from this province, while Alberta and Ontario exports were still subject to the duty.

[84]A "special rule" was inserted in 1677(5) of the Tariff Act of 1930 which states, in part, "Nominal general availability ... is not a basis for determining that bounty, grnat, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof". Quoted in Bessko (1995: 349). Horlick and Oliver 1989: 8.

[85]1989: 1503.

[86]Paehlke 1992; Cashore 1997.

[87]A long-standing policy on raw log exports bans from federal forests was made permanent. Led by Oregon Senator Packwood, Congress

imposed raw log export bans on state-owned lands in the late 1980s. Efforts are now underway to ban raw log exports from private lands. Cashore, forthcoming.

[88]Vogel 1992: 165-166.

[89]Vogel 1992: 165-166.

[90]Quoted inVogel (1992: 165). *Wall Street Journal* 1990.

[91]Bernstein and Cashore 1996 {revised February 1997}; Stanbury and Vertinsky 1995.

[92]Cashore 1997.

[93]Balmer 1993: 99.

[94]Blumenthal 1992.

[95]Canada appealed this self-initiation to a GATT panel, which ruled the U.S. was acting within treaty obligations, although the panel did rule that the U.S. should not have imposed temporary bond requirements pending final resolution (Pierson 1994: 1190). Gorte 1992:4.

[96]Gardiner *et al.* 1992.

[97]Foy 1992; Chow 1992.

[98]These discussions occurred amidst calls by some environmentalists to change U.S. trade law to allow poor environmental standards in other countries to be treated as a subsidy, and thus potentially countervailable (Barcelo 1994; Saunders 1995). Personal interviews, Cashore 1996.

[99]Personal interviews.

[100]Gorte 1992: 4.

[101]Export restrictions in Alberta, Ontario and Quebec were deemed to have had "no practical effect" (57 Fed. Reg. at 8811-12, quoted in Nance 1992: 354).

[102]*Vancouver Sun* 1994.

[103]Unlike 1986, only the top four exporting provinces were subject to the countervail proceedings, with other provinces exempt from any potential tariffs. A subsidy was calculated first for each province, and then applied to a national average. BC's subsidy was calculated at 7.95 percent; Alberta's at 1.25 percent; Ontario's at 5.95 percent; and Quebec's at .01 percent (Balmer 1993: 104)

[104]Balmer 1993: 104.

[105]Gorte 1994.

[106]Balmer 1993: 105.

[107]Bessko 1995: 350/

[108]This is also known as the "effects" test. Gastle and Castel 1996: 840, 8879.

[109]The binational panels heard evidence from Joseph Kalt and William Nordhaus, who further developed Scherer's 1986 arguments about the inability of price takers to injure domestic producers. These arguments seemed to resonate more with binational panels that adjudicators at the ITC or ITA, where Kalt's (1994) study found decisions biased toward U.S. industry arguments. The U.S. position was also supported by leading forest economists. Pierson 1994: 1190.

[110]Commerce argued that all four measures must be applied only in cases of a negative "specificity" requirement. Ragosta and Shanker 1994: 656.

[111]Pierson 1994: 1187.

[112]Gastle and Castel 1996: 879.

[113]Ibid: 1193, Gorte 1994: 1.

[114]Quoted in Castle and Castel (1996: 840).

[115]*Ibid.*

[116]*Ibid.*

[117]Pierson 1994: 1191.

[118]Bessko 1995.

[119]Daewoo Electronics Co., Ltd. V. International Union of Electronic, Electrical, Technicla, Salaried and Machine Workers, AFL-CIO.

[120]Gastle and Castel 1996: 878.

[121]Personal communications, CFLI.

[122]For a detailed review of the conflict of interest argument, see Burke and Walsh (1995: 557). The Extraordinary Challenge Committee rules that there was "no intentional refusal to reveal any matter that would justify the opposite party in removing either panelist" *(ibid).*

[123]Once the ITA withdrew its subsidy determination, the ITC response to the second remand became moot.

[124]Burke and Walsh 1995: 559.

[125]Gastle and Castel 1996: 824.

[126]Gastle and Castel 1996: 824.

[127]Jordan Goldstein (1995: 298, 301) further argues that this is evidence that it is difficult for an EEC to reign in a panel that "fails to apply" the "correct" standard of review.

[128]Judge Wilkey argues that the panels were not as deferent as they should have been (quoted in Burke and Walsh 1995: 544-5), a point to which Judge Hart concurred:

> ... in reality the replacement of court adjudication by a five-member panel of experts in international trade law may very well reduce the amount of deference to the Department [of Commerce] in the future. When the Court of International Trade reviews the determinations of Commerce, it would be expected to bow to the expertise within the Department. When the parties to the FTA agreed to replace that court with this type of panel they must have realized and intended that a review of the actions of commerce or of the Canadian agency would be more intense.

[129]Goldstein 1995: 561-2. *Ibid.*

[130]Krauss 1993: 95-96.

[131]Goldstein 1995: 275.

[132]The SAA was signed by President Clinton on September 26, 1994, while Uruguay Round legislation accepting the SAA was enacted on December 8, 1994. Finally, Title I of the implementing legislation, "Uruguay Round Agreements Act" gives legal weight to the SAA by stating that Congress approves of the SAA and that no provision of the Uruguay Round Agrement "inconsistent" with U.S. law will have any effect.

[133]Italics added. Quoted in Castle and Castel (1996: 878).

[134]*Ibid:* 879. Italics added.

[135]A U.S. Congressional budget office report (1994: 62) noted in September of 1994 that the new subsidy code "stipulates that only specific subsidies [including de facto] are subject to being prohibited, retaliated against, or countervailed" and expressly give the example of Argentina's embargo on the export of leather hides as following outside this definition. My thanks to Michael Carliner for this point.

[136]From Statement of Administrative Action, page 926.

[137]Personal interview.

[138]Now, B.C.'s raw log export restrictions, could, by themselves result in an affirmative countervail finding. Personal interviews.

[139] *Vancouver* Sun 1994.

[140] The briefing package asserts that "As a result of timber undervaluation, Canadian funds for reforestation are less than they otherwise would be"(Coalition for Fair Lumber Imports 1994: Section D). During this time, informal discussions were taking place between B.C. and U.S.-based environmental groups on how to exploit the softwood lumber conflict to further their aim of increased environmental protection (personal interviews). Coalition for Fair Lumbe

[141] Canadian agreement to these consultations preceded the U.S. returning to Canadian forest companies much of the monies it had collected under the countervailing duty.

[142] Owing to anti-trust rules, the CFLI eventually excused itself from being part of these discussions. However, they were briefed by USTR and Commerce officials, and their support of the final agreement was pivotal.

[143]Officials from the NRDC met with USTR officials regarding B.C. forest practices, but USTR officials explain that these meetings were for information gathering purposes only, and that USTR did not consider the dispute to be about environmental policy differences (personal interview, USTR).

[144] Schreiner 1994. British Columbia. Office of the Premier 1994; Weatherbe 1994.

[145]Coalition for Fair Lumber Imports (1996: 1)

[146] These fears were realized when Ontario argued that it should receive a higher percentage of the quota based on its growing market share in recent years, while British Columbia was adamant that its quota equal its historically high share of the U.S. market. Recent collapse of the Japanese market has even led to divisions within British Columbia. The bulk of B.C. exports to Japan come from coastal forest company operations. Yet, coastal companies have been stopped by the SLA quota system from redirecting to the U.S. exports original intended to go to Japan, while forest companies operating in the interior have been left relatively unscathed.

[147] The NAHB has proposed a bill that would modify U.S. law to say that raw log exports cannot be countervailable. It has received 59 sponsors in the U.S. House of Representatives as of December 15, 1997.

[148] Hamilton 1997.

[149] Hamilton 1997.

[150] Hamilton 1997.

[151] Personal interviews.

[152] Hamilton 1998a. Canadian Press 1998; Hamilton 1998b.

[153] Goldstein 1986.

[154]After the passage of the new 1980 Forest Act, a Small Business Enterprise Program (SBEP) established competitive short term timber sale licences in British Columbia. The SBEP was expanded in 1987 by taking a small percentage of the Annual Allowable Cut away from major licence holders, and was renamed the Small Business Forest Enterprise Program (SBFEP). However, awards were determined on the basis of both the "highest bid", and the value added to new or existing plants (My thanks to Michael Whybrow for explaining this point).

[155]My thanks to Clark Binkley for this point. For further detail regarding the history and use of the tenure system's appurtenancey regulations, see Cashore (1988: 57) and McAskill (1984)rposes of stopping a potential trade skirmish with Canada, as well as securing the CFLI's agreement to drop its constitutional challenge of Chapter 19 (which posed a serious threat to its overall liberal trading objectives).

[156]Schwindt and Heaps 1996: 48. Depending on how tenure rights were altered, existing tenure holders might not opposed a move toward competitive bidding. For example, if a new system divided current tenure holder companies between their mills and forests operations, their shareholders would probably be satisfied (My thanks to Clark Binkley for this point).

[157] Nicolaïdis and Schmitz 1996.

[158] Vogel 1992: 173.

[159] Bernstein and Cashore 1996 {revised February 1997}; Cashore and Bernstein 1997; Stanbury and Vertinsky 1995.

[160] Saunders (1995).

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