

**An Examination of Why a Long-term Resolution
to the Canada-US Softwood Lumber Dispute
Eludes Policy Makers**

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by

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An Examination of Why a Long-term Resolution to the Canada-US Softwood Lumber Dispute Eludes Policy Makers

INTRODUCTION

For the last 15 years Canada and the United States have been engaged in a dispute concerning billions of dollars of Canadian softwood lumber exports to the US market.¹ As the largest (Chart 1) and longest-lasting trade conflict between the two countries, the dispute has consumed vast amounts of time and money by industry and government officials on both sides of the border. It has also attracted the attention of an array of legal, economic, and political science scholars. 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 time 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 afforded them to date: the reciprocal and paradoxical relationship between the evolution of US liberal trade policy and the increased use of administered protection through US “fair trade” laws; and the influence of environmental forest policy and politics in Canada and the US.

To date, legal scholars have emphasized the complex technical legal arguments and adjudication of this dispute, while downplaying the role of Congressional lobbying. Conversely, political science approaches have given a traditional interest-based “Olsonian” account regarding the ability of well-organized and geographical concentrated companies to lobby Congress more effectively than dispersed consumer-based interests (Balmer 1993: 99-100; Kalt 1988: esp. 360-361; Percy and Yoder 1987), often downplaying the role of institutions as independent variables (Kalt 1994).²

Few analyses of the softwood lumber dispute have drawn on recent theories of US trade policy that find both domestic and foreign policy centred explanations incomplete. This literature asserts that US trade law post-1934 “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

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

².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).

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 US 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.

(Goldstein 1986; 1988; Nelson 1989).⁴ Goldstein and Nelson both argue that liberal ideas generally dominate and are expressed through the executive, while Congressionally-focused protectionist interests are sent to administrative agencies for redress, which have minimized protectionist pressures.⁵ These dynamics encourage Congress to bargain with the executive to protect specific industries, while giving overall authority to the Presidency to negotiate liberal trading agreements.⁶ This account of US 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 US dominance in world trade since the early 1970s.⁷

A study of the softwood lumber dispute is aided by this institutional account because it helps explain: why, throughout the history softwood lumber conflict, the US executive has repeatedly accepted negotiated deals in lieu of countervail tariffs; why Canada and the US entered into a free trade deal during this dispute, something interest-based accounts predicted would not happen (Kalt 1988: 361) and; why the nature of Congressional influence on this dispute was altered in the early 1990s, rendering lobbying activity 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 fibre supply from US national forests - which caused US lumber companies to look North with envy at what they perceived were less regulated Canadian competitors; why British Columbia state actors at various times were able to use the countervail dispute as a way of justifying stumpage rate increases and broad environmental forestry policy change⁸; and the unusual coalition building between US lumber companies and North American environmental groups.

Using these insights, this paper makes two central arguments: First, the cause of the Canada-US 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 market share of the US market, amidst a declining supply of timber from US national forests, in part caused by increased environmental regulations. United States companies sought to minimize the effects of these economic and environmental pressures by

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.

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 US post WWI dominance in world trading order. It would predict increasing protectionism as its hegemony declines (Goldstein 1986), but this has not happened.

⁸.The general point about the BC government using this pressure to further its own agenda is made by Bernstein and Cashore (1996).

turning their attention to their foreign competitors. They sought redress through US trade law, whose changes in the 1970s facilitated the use of countervail investigations.

Second, US trade law has nurtured this dispute by adapting to trade liberalization rules between Canada and the US that, at first glance, appeared to lessen the influence of US protectionist “fair trade” laws. In fact, the use of administered protection in the softwood dispute in part explains the success of the Canada-US 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 US softwood lumber industry had not occurred. The ability of US companies to successfully push for changes in US countervail trade law in order to maintain their ability to pursue softwood lumber countervail action, largely explains why the dispute has lasted so long.⁹ 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 first with those critical of low stumpage rates, but by the early 1990s expanding to a general critique of British Columbia's environmental forestry issues, a strategy which entailed the cultivation of informal links with BC and US environmental groups.

Thus, an examination of Congressional pressure and US case law are crucial to this story, but they are incomplete. A full understanding of the causes and longevity of this dispute must also address the influence of two broader factors: the role of increasingly liberal trading policy between Canada and the US as a cause of increased administered protection; and the role of environmental forestry politics in both countries.

The logic of this argument is that the US-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 political institutions have in shaping state/societal relations. Recognition of this enhances the last section of this paper, which examines options for a long-term solution.

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 1982-1997, 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-US Free Trade Agreement (FTA), the North American Free Trade Agreement (NAFTA) and various short-term deals to avoid imposition of US 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 US (Charts 3 and 4) and whose forest policies continue to attract the most scrutiny from US forest companies.

PRE-1982: SOWING THE SEEDS OF DISCONTENT

In the decade and a half leading up to the dispute, two key factors increased financial

⁹.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 US forest companies to continue countervail action.

stress on the US timber industry: a dramatic increase in the amount of softwood lumber BC and other provinces exported to the United States, and US environmental forestry legislation that restricted wood supply on US federal forest lands. These pressures were joined by changes in US trade law that made it easier for US companies to launch countervail action against foreign competitors, amidst a backdrop of increasingly liberalized and tariff reducing trading arrangements.

Increase in BC/Canadian Exports

Canadian softwood lumber exports to the United States changed in two important ways in the 1970s and early 1980s.¹⁰ First, the Canadian share of the US market increased substantially (Chart 2). Secondly, BC lost its position as “marginal supplier” to the US market¹¹, an status now held by the US forest industry in the Pacific Northwest.¹²

Part of these changes is explained by increased US demand and a decline in the value of the Canadian dollar to the US dollar (Adams, McCarl, and Homayounfarrokhi 1986; Merrifield, Monahan, and Alper 1988; Percy and Yoder 1987: 36), rendering Canadian timber less expensive to American purchasers. However, US lumber companies in the PNW argued that the 40 year old system of calculating stumpage rates in BC and other provinces was also the culprit. US industry officials argued that stumpage rates subsidized BC lumber companies by providing below market costs to harvest publicly owned-timber. Many critics of BC forestry in the early 1980s supported this argument, which was bolstered by an economic study (Haley 1980) which found evidence that the BC government may not be capturing the full economic rent.¹³

Environmental Forestry Legislation

The US federal government and BC government responded to the "first wave of environmentalism" that began in the 1960s in different ways. I have written elsewhere (Cashore 1997) that from 1960 through 1976, the US 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 broad non-discretionary umbrella 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 Management Policy Act). Taken

¹⁰.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.

¹¹.My thanks to Clark Binkley for this point.

¹².Gorte (1996) found that before 1975, Canadian lumber companies were “high cost” producers to the US market, with their share of the US market declining with the onset of each recession. However, in the early 1980s Canadian share of the US market actually rose slightly, while the PNW share actually declined (Gorte, 1-2)

¹³.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 BC interior, Uhler found that it had “no effect” on US prices or increased BC market share. Both sides have found economic studies to support their case.

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.¹⁴ During the same period, BC's environmental forestry legislative response was weak: legislation limited opportunities for litigation, and environmental groups were at the margins of the policy making process.

The US legislation caused immediate and future reductions in the supply of fibre on US national forest land, greatly affecting small sawmill PNW sawmill owners who relied on public land for the bulk of their timber supply (Reinhardt 1991; Tougas 1988-89: 147). These companies consequently focused their efforts on banning raw log exports from all publicly-owned forests (Vogel 1992: 165-166), and to their BC and other Canadian competitors, who, until the early 1990s, operated in a less strict environmental regulatory environment.

US Trade Law¹⁵

General

Two different legislative policy legacies have influenced US trade law: the first is rooted in 19th century protectionist tariff setting policy and the second has its roots in the 1934 Reciprocal Trade Agreements Act (Goldstein 1986; Goldstein 1988; Nelson 1989), in which Congress gave up its treaty-making power to the President, largely because the protectionist Smoot-Hawley tariff legislation had become discredited following the Great Depression (ibid).

The “fair trade laws” of the 19th century were not replaced, which meant that, “even in America's most liberal period, a legal mandate existed to exclude imports” (Goldstein 1988: 198). After 1934 interest groups could no longer petition Congress for direct tariff barrier relief. As an increasingly liberal trade bias in US trade policy took hold, companies seeking protection had to rely on administrative agencies for relief. Congress was still key, but was now an arena in which to pressure for administrative adjudication (Goldstein 1986: 180).

This created a strong constituency for administered protection, rendering efforts to dismantle the 19th Century legislation unsuccessful (Goldstein 1996: 560). During the decline of

¹⁴.A classic example includes Spotted Owl litigation in the US 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 1998: 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 US protection on US companies that rely on national forests for their timber supply.

¹⁵.This is not intended as a complete review of US Trade Law, which Krueger (1995) criticizes for being unnecessarily complex and difficult to master. Us countervail policy is one of five key aspects of administered protection including escape clause cases, adjustment assistance, anti-dumping legislation, countervailing duty legislation, and unfair import practices (Goldstein 1986: 167-8). This paper will limit itself to countervail legislation.

US trade dominance beginning the 1970s¹⁶ administered protection mechanisms were increasingly exploited by US companies.

Amidst increasingly liberalized trade policy (largely through GATT agreements) and domestic pressures for increased protection, Congress revised its trade policy in 1974 and 1979. Elements of both liberal trade fair trade ideas can be found in the legislation, but a key effect was formalizing and rendering administered protection easier for US companies. The following reviews these legislative changes, focusing on their effects on countervail policy.

US Countervail Rules

The history of US countervail duties goes back to the 19th Century, which were designed to “neutralize” foreign government payments to assist domestic exports to the US (Goldstein 1986: 168). Countervailing duties and subsidies are currently governed by the amended Tariff Act of 1930 which defines subsidy as a “bounty” or “grant”¹⁷. It provides for the imposition of countervail duties if an “administering authority” determines that a country or individual of the country provides a subsidy, “directly or indirectly” for “the manufacture, production, or exportation” of goods for importation into the US (Section 1(A)(B)).¹⁸ Countervail procedures were rarely used until the 1970s after which time Congress made administered protection easier to obtain.

The 1974 Trade Act

The 1974 Trade Act more specifically 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 now susceptible to countervail adjudication. Consequently, adjudicated CD cases increased from an average of two per year before 1974 to 61 after this time (Goldstein 1986: 171; Goldstein 1988: 215).

Other provisions in the Act favoured 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” US domestic companies¹⁹; and the secretary of the treasury was given the power to waive the conditions of any imposed duties through Voluntary Export Restraints (VER) and Orderly Marketing Agreements (OMA) agreements with the foreign government (Goldstein 1986: 162-3). Although the 1974 Act increased the ability to launch countervail action, significant latitude still rested with Treasury Department in administration of the law (Goldstein 1988: 202) .

¹⁶.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 pressure's the executive's response, “has been guided by a desire to adhere to liberal norms to the extent possible given institutional constraints”.

¹⁷.19 U.S.C. _ 303, quoted in (Tougas 1988-89: 144).

¹⁸.Quoted in Bessko (1995: 337).

¹⁹. Injury is defined as having “the effect of substantially reducing sales of the competitive U.S., product in the United States (U.S. International Trade Commission Annual Report, 1975, p. 3, Quoted in Goldstein (1986: 168).)

1979 Trade Act Changes

One of the original purposes of the 1979 Trade Act was to implement GATT obligations by requiring that all countervail determinations be subject to an injury test by the ITC (not simply non-dutiable imports).²⁰ However, Congress used this opportunity to introduce protectionist measures, arguing that the executive was using its discretionary authority to minimize the effects of “fair trade” laws. Congress addressed these concerns in three key ways. First, Congress moved responsibility for countervailing duty investigations from the Department of Treasury to the Commerce Department (Manganiello 1993: 578) arguably eliminating from the determination process bureaucratic officials who had been hired partly because of their individual liberal trading biases. 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 US 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 are countervailable if they are provided as “preferential rates” to a “specific enterprise or industry, or group of enterprises or industries”²¹. 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 (Horlick and Oliver 1989: 1500). As a result, Commerce decided 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” (Lay 1989: 1499-1500).

Unlike previous elements of discretion that helped the executive reduce the effects of administered protection, students of trade policy were predicting that bureaucratic autonomy from the executive 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 (1988: 202) 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.

Or as Krueger (1995: 2) worried:

²⁰.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 U.S.C.). 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).

²¹.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)

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.

However, the softwood lumber dispute reveals that discretion over the definition of “specificity” can have liberal or protectionist dynamics. As Ragosta and Shanker (1994: 650) 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 Commerce to alter its specificity definition (following Congressional pressure), paving the way for a preliminary positive determination in 1986.

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

Inadvertently however, 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 (1989: 5) 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.

HISTORY OF THE DISPUTE

Difference in Management Systems

The previous section developed the economic, environmental and legal context up until 1982, when the first softwood lumber countervail action began. However, 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, while the figure is 36 percent in the US (Cubbage, O'Laughlin, and Bullock 1993: 238).

The essential difference between the two countries' method of collecting "resource rents" or "stumpage rates"²² is that a system of "competitive bidding" is used on US national forests. In this system, numerous companies are invited to bid to receive 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 long-term, "sustained yield" basis. Companies were also required under these arrangements to operate mills and create employment (Cashore 1988: 57; McAskill 1984). In principal, this system would guarantee the economy and people of BC a stable supply of timber "in perpetuity". The government, rather than "market" forces, has to decide 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 it had 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 government of managing the forests (Marchak 1983; O'Toole 1988).

Countervail I, 1982-1985

Countervail I began in 1982, when the Northwest Independent Forest Manufacturers (NIFM), a coalition of Pacific Northwest saw mill companies, alleged that Canadian subsidies were a large cause of increased unemployment in the PNW forest industry (Apsey and Thomas 1997: 10). At the request of Oregon Senator Bob Packwood, the Senate Finance Committee instructed the US International Trade Commission (ITC) 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 national-based Coalition for Fair Canadian Lumber Imports (CFCLI).²³ Although the ITC report (United States International Trade Commission 1982) fell short of claiming Canadian provinces subsidized their timber industry, the report was used by congressional members from timber-dependent states to promote trade action against Canada.

²².For simplicity, for the remainder of this paper I will use the term "stumpage rates."

²³.During Countervail I, small regional producers made up the majority of membership (Apsey and Thomas 1997: 10).

In October 1982, the CFCLI formally launched its first countervail duty petition, claiming that Canadian stumpage rates conferred a subsidy and materially injured US producers. The Commerce Department ruled that no such subsidy existed, because stumpage rates were not provided to a “specific” industry or enterprise (Rugman and Porteous 1988; Tougas 1988-89; Yoder and Gilliland 1991). The ITA found in 1983 that provincial stumpage programs were legally “available within Canada on similar terms regardless of the industry or enterprise of the recipient”.²⁴ 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”.²⁵

Reversal of Fortune: Countervail II and the MOU, 1985-1991

Two years after the negative countervail determination, US forest companies formed the Coalition for Fair Lumber Imports (CFLI) and launched another countervail.²⁶ 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 ruling 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 BC to increase the amount of money forest companies paid to harvest publicly-owned timber.

Congressional lobbying

Leading CFLI officials say that they learned two lessons after the failure of the first countervail initiative: that they needed to develop a “political” strategy focused on the US Congress; and that they needed to cultivate necessary legal expertise to help reverse the 1982 decision (personal interviews). 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 CFLI.

In 1985, Congressional lobbying 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).²⁷ The CFLI launched a massive lobbying effort on the US Congress to have it

²⁴.Certain Softwood Products from Canada, 48 Fed. Reg. 24159, 24167 (1983) (DOC, Final Neg.) Quoted in Rugman (1988: 40)

²⁵.Ibid: 40.

²⁶.Although the CFLI was officially a new organization, much of its membership overlapped with the old CFCLI (personal communication, CFLI).

²⁷.Owing to a number of member companies of the US 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.

pressure the ITA to reverse its ruling. To buttress their arguments in the US Congress, the CFLI made links with British Columbia actors who were also arguing that BC stumpage rates were too low. British Columbia politicians and forest management critics were enlisted for their support and published statements by British Columbia opposition New Democratic Party members criticizing BC's low stumpage rates were raised in Congress (Cashore 1988: ch 5).

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 US while others would have changed the definition of subsidy to allow for a finding that BC and other provinces subsidized its timber industry (Apsey and Thomas 1997; Balmer 1991; 1993; Vernon, Spar, and Tobin 1991: 30).

At the same time, the US and Canada were about to engage in free trade talks, and negotiators were seeking "fast track" approval from the US Congress. Members of Congress quickly moved to link approval of a Canada-US free trade deal to action on the softwood lumber dispute; linking overall acceptance of increased liberalized trade to a specific issue of administered protection (Hayter 1992; Tougas 1988-89: 156-7). 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-US FTA (Apsey and Thomas 1997: 23).²⁸

Then, half of the members of the Senate Finance Committee sent a letter to US Trade Representative Clayton Yeutter on October 1, 1985. While expressing support for the Canada-US free trade talks, they warned:

...we reiterate our 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 an 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.²⁹

Yeutter wrote back that the Administration persuaded the Canadian government to commit to a series of meetings on the issue. Dissatisfied, Senator Max Baucus, on February 26, 1996, organized a group of Senators to raise the issue on the floor of the Senate. 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

²⁸.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).

²⁹.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.

agreement, so long as subsidized Canadian lumber makes a mockery of free trade.³⁰

Finally, in a move that caught the Administration off-guard, the Senate Finance Committee let the Administration know in April 1986 that it would not to give fast-track approval for Canada-US FTA talks unless the softwood dispute was addressed (personal interview, Vernon, Spar, and Tobin 1991: 36). 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” (Apsey and Thomas 1997: 25).

The Legal Context

Meanwhile, legislative initiatives and court rulings altered the legal context from what it was in 1982. In 1984, Congress amended the Tariff Act of 1930 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” (Tougas 1988-89: 144). 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, the CFLI law firm Dewey-Ballantine had been monitoring relevant case law and found a recent CIT ruling in the case of Carbon Black from Mexico (Sykes 1989; Tougas 1988-89) involving Cabot Corporations' subsidy allegations regarding the Mexican government's two tiered price structure for the “input products” that go into the production of carbon black (Tougas 1988-89: 149). 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 *defacto* 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 Countervail I when it determined that stumpage was generally available.³¹ However, with Congress threatening to take legislative action to remedy the restrictive *de jure* test, the ITA had little room to manoeuvre, eventually accepting the CIT's ruling in Cabot. Rugman and Porteous (1988: 50) 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.

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

³⁰.Quoted in Vernon, Spar, and Tobin (1991: 33).

³¹.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).

these changes for the softwood case (Lewington 1986)³². The go-ahead was given to US industry to relaunch countervail proceedings, raising fears among the Canada's Mulroney government that Canadian hostility over this change could derail free trade talks (Rugman and Porteous 1988).

Subsequently, new countervail proceeding were launched one month later, catapulting the conflict into the Canadian media spotlight. Industry in BC stood ready to fight, but BC's new Premier, Bill Vander Zalm, who was looking for new sources of revenues, had different ideas (Cashore 1988: 73). The Premier appointed Jack Kempf as Minister of Forests, a long-time critic of BC's stumpage system. Kempf and Vander Zalm used this opportunity to announce that it was reviewing BC's stumpage system (Groen 1994). Vander Zalm said publicly that he hoped this would stall the countervail proceedings (*ibid*: 151), but it was clear that the government was not disappointed with the US countervail pressure. As Kempf later noted:

It was quite clear to me that the US Commerce Department and Coalition for Fair Lumber Imports had a very good case and so it behoved us to try then and get the best deal that we could, and I think we did.³³

In fact, Kempf attempted to circumvent Canadian federal government negotiations by contacting and exchanging information with the CFLI.³⁴

The Ruling

In October of 1986, the US Commerce department reversed its 1983 ruling, and preliminary found that BC and other provinces 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 *Carbon Black*, the ITA found that stumpage programs were provided defacto to a “specific group of industries”³⁵ and that it did so at “preferential rates” (Tougas 1988-89: 157), amounting to a 15 percent subsidy (Cashore 1988; Ragosta and Shanker 1994: 650). 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”.³⁶ 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 erred in 1983 when it followed US Standard Industrial Classification (SIC) codes to

³².Quoted in Groen (1994).

³³.From Groen (1994) interview with Jack Kempf, August 29, 1990.

³⁴.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".

³⁵.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”.

³⁶.51 Federal Register No. 37,456 (1986), quoted in Tougas (1988-89: 158).

determine that three industries benefited from stumpage rates. It argued that the pulp and paper, wood products and logging industries were so integrated in BC that they should be treated as a single industry. The US International Trade Commission (ITC) subsequently voted 4-2 that Canadian imports “injured” US producers.³⁷

Critics of this decision assert that there were several suspicious parts to this preliminary decision. Rugman and Porteous argue that according to the CIT's own ruling in Carbon Black, the ITA's choice of “preferentiality” test was not applicable to natural resources (Rugman and Porteous 1988). 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” (Percy and Yoder 1987: xxx), something immediately asserted by consultants retained by the Canadian government.³⁸ Even key CFLI officials felt that it was less than coincidental that the preliminary subsidy ruling was half-way between the 30 percent subsidy alleged by the CFLI and the Canadian argument that there was a zero percent subsidy (Personal interview).

Just before a final determination was to be announced, Canada and the US signed the Memorandum of Understanding (MOU), in which a 15 percent export tax would be collected on Canadian softwood lumber exports to the US (Cashore 1988) in lieu of an export tax. The MOU also provided provisions for replacement measures, whereby the US government and CFLI could agree to lower the export tax if stumpage rates were increased.

The MOU may have saved the Canada-US Free trade talks. It allowed a pro-liberal executive to maintain positive relations with its most important trading partner, while addressing protectionist pressures from Congress. While critics argued Countervail II demonstrated why a free trade deal with the US would never work, Prime Minister Mulroney made the opposite argument: that only a free trade deal would stop this type of “US harassment”.

Post MOU

The Countervail II and MOU agreement affected immediate natural resource and trade policy changes in British Columbia, Ottawa, the US Congress, and the US Commerce Department's International Trade Commission.

British Columbia

BC state actors were overall pleased with the MOU, with BC's Deputy Minister of Forests

³⁷. This was a decision of much controversy. US 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).

³⁸. 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).

noting that “it is hard to complain when somebody (the US) is trying to help you have more revenue”,³⁹ a point not lost on then US Commerce Department Undersecretary Bruce Smart:

From the point of view of BC, it seems to me that they get a favourable 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.⁴⁰

In fact, a key CFLI official felt that if it was not for the actions for the BC government, there would have been no MOU:

I don't think there would have been a negotiated settlement without Jack Kempf. He was the only one in Canada who recognized that BC was getting ripped off...and made it plan to the Coalition that the BC 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 us.⁴¹

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 BC 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.⁴²

Both the BC forest industry and federal government were less enthusiastic and would have preferred to have fought this through the US adjudication process, believing they would have prevailed (personal interviews). Still, the lesson BC industry officials say they took away from their Countervail II experience was that the adjudication process is politically influenced:

We failed to appreciate that the case had taken on such significance in US 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 (Apsey and Thomas 1997).⁴³

³⁹.From (Cashore 1988: 143), originally quoted in Saturday Night magazine, July, 1987.

⁴⁰.From Saturday Night magazine, quoted in Cashore (1988: 143).

⁴¹.Gus Kuehne of the Coalition, quoted in Whitely (1987).

⁴².Frank Oberle, quoted in Groen (1994).

⁴³.Cohn (1996: 44) makes a similar argument.

Carrying along with its plan to increase revenues from the BC forest industry, BC government actors seized on the provisions of the MOU to have it offset by increased stumpage fees⁴⁴, making permanent an MOU Canada or the US could cancel at any time.⁴⁵ The government did this by introducing a revenue-driven, new system of stumpage calculations. The new system dramatically increased stumpage revenues for the BC government. By the end of 1987, the US agreed that BC replacement measures had completely offset the 15 per cent export tax, and BC lumber was proceeding tax free to the US.⁴⁶

The Canada/US Free Trade Deal and Bi-national Panels

Two years later, the Canada-US Free Trade Agreement was signed, and started to come into effect in January, 1989. Chapter 19 of the deal included a binational dispute resolution process to which countervail disputes could be sent. However, the panel process would not replace each country's trade laws, but would have to power to ensure that the laws were applied properly. Canadian officials believed that this would eliminate the political interference that it felt caused the Countervail II reversal.

Congress Codifies Cabot

Congress codified the CIT Cabot ruling in 1988 so that future ITA rulings could not reverse the new interpretation of defacto specificity (Horlick and Oliver 1989: 8).⁴⁷ 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 (1989: 1503) 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".

⁴⁴.The new system starts with an stumpage revenue target, rather than leaving stumpage as a residual that is determined once operating costs and profit are deducted.

⁴⁵.The BC 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 position is 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 US market...We do not want to pay tariff to the US on stuff we're shipping to China (Personal interview).”

⁴⁶.Never a primary target of the CFLI, the US agreed to drop the export tax from the Maritime provinces in the fall of 1987, at the same time that BC's export tax was also dropped. At the time of the termination of the MOU, 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.

⁴⁷.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, grant, 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).

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 Countervail II, 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.⁴⁸

Countervail III (and the end of the MOU)

For five years following the MOU, all was quiet on the countervail front. Meanwhile, a second “wave of environmentalism” (Paehlke 1992) was taking place in North America, with forestry practices in the US Pacific Northwest and British Columbia galvanizing concern among North American and European environmental groups (Cashore 1997). Reductions in forest harvesting in the Pacific Northwest to protect the Spotted Owl and other endangered species heightened demands for increased raw log exports bans (Cashore 1998).⁴⁹ Both environmental groups and small saw mill owners supported increased controls, because they believed this would offset some of the fibre shortage caused by decreased harvesting on national forests. And they felt it would minimize job losses owing to environmental restrictions (Vogel 1992: 165-166). For first time, there was a direct alliance with US industry and environmental groups in order to offset environmental restrictions to foreign competitors. President Bush was against increasing raw log exports bans because he viewed them as protectionist but, as Vogel notes (1992: 165-166) Bush capitulated when “the sawmill operators gained a significant ally - the American environmental movement”. Supporting a ban on state-owned lands, President 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 (Wall Street Journal 1990).⁵⁰

⁴⁸.Quoted in Bessko (1995: 349).

⁴⁹.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.

⁵⁰.Quoted in Vogel (1992: 165).

In BC, calls for heightened environmental regulations were met with limited success until the early 1990s as European and US groups began to focus their attention on BC forest policy (Bernstein and Cashore 1996; Stanbury, Vertinsky and Wilson 1995). The October 1991 the BC provincial election changed the policy climate, with the election of a New Democratic government on a platform of significant forest policy change, including: a desire to obtain increased revenue from the forest industry; double the amount of protected areas in the province to equal 12 percent of the land, and increase forest practices regulations (Cashore 1997).

In the meantime, BC forest industry officials were increasingly annoyed at having to open their books to US officials, and, never having liked the MOU, pressured the Mulroney government to repeal it. About to enter into a provincial election, the BC government saw political mileage in cancelling the MOU (Balmer 1993: 99). Both the BC government and industry believed that increased stumpage fees and the new Chapter 19 binational panel process would lead them to successfully fight off a potential third countervail.

Countervail III

Pressured by BC forest company officials and the BC government, the Canadian government exercised its option to terminate the MOU in 1991. The Canadian government argued that since the US agreed to exempt over 90 percent of Canada's softwood exports from the export tax following provincial replacement measures, the MOU had outlived its purpose. The response from CFLI and US Congress official was swift, who argued that they were not given adequate notice. Although the White House was reluctant to respond, yet another Senator Packwood letter to the White House signed by 67 Senators said that if it was not going to take action, Congress would take legislative measures (Blumenthal 1992). The result was that the Commerce Department "self-initiated" Countervail III on October 31, 1991 (Gorte 1992: 4)⁵¹, and for the first time, the CFLI actively sought informal links with British Columbia environmental groups.

Canadian federal and provincial officials argued that self-initiation exposed the role of US domestic politics in this dispute. They wondered just how the Commerce Department could possibly find that a subsidy existed when even the US agreed to allow the vast majority of exports to proceed duty free (and all of British Columbia's exports) because of replacement measures. The US CFLI argued that there was nothing sinister about self-initiation- without the MOU there was nothing stopping provincial governments from removing the *replacement* measures. However, most Canadian officials seized on a new aspect of the dispute that reinforced their belief that even if they addressed stumpage issues, other programs would be countervailed. The new aspect was the additional complaint that British Columbia's raw logs export restrictions were an additional subsidy (by arguably driving down the price of timber).

Once again the softwood lumber dispute became a major story in Canadian national papers. Opposition political party officials went to Washington, DC to argue that the self-initiation was an affront to Canadian sovereignty, and to publicly criticizing the actions of

⁵¹.Canada appealed this self-initiation to a GATT panel, which ruled the US was acting within treaty obligations, although the panel did rule that the US should not have imposed temporary bond requirements pending final resolution (Pierson 1994: 1190).

Congressman Ron Wyden and Senator Baucus for their support of the countervail (Gardiner et al. 1992). The US National Lumber and Building Material Dealers Association (NLBMDA) and the US National Association of Home Builders (NAHB) began to launch their own effort on the US Congress, arguing that the CFLI was hurting the home building industry, and pushing the cost of US 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 now being challenged by consumer-oriented industry interests.

The CFLI responded to this counter pressure by increasing its ties with Canadian and US environmental groups, initiating a Congressionally-focused attack on British Columbia forestry management practices. This was an effort to convince the US public and Congress that not only were Canadian provinces subsidizing their forest companies through low resource rent rates, 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 BC-based groups: the Western Canada Wilderness Committee (WCWC) and the BC 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 is a direct relationship between this long-standing, heavy subsidization of Canadian stumpage, and resulting poor forest practices in British Columbia. He quoted one BC environmental official as saying that his group "believes that the underpricing of timber has resulted in a BC-wide logging horror show" (Foy 1992) and another as arguing that the "underpricing" of Canadian timber "does not provide opportunities for the most efficient and best use of timber" (Chow 1992). In a letter to Canadian ambassador Burney, Wyden (1992) argues that:

Neither am I startled by criticism of Canadian forestry practices by US-based environmental groups. What does draw my attention is criticism from these western Canada environmentalists who strongly disagree with your assertions that BC 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 affect the adjudication process, which, as Burney (1992) responded to Wyden, do 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 at once again changing US trade law.

At the same time that these highly public criticisms were taking place, informal discussions were being held between the US Natural Resources Defence Council (NRDC) and CFLI officials about the possibility of launching a joint effort to have Congress change the definition of subsidy under US trade law that would permit a countervail action against BC's arguably less strict environmental regulations (Personal interviews, Cashore 1996).⁵² 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. Second, as long as the CFLI continued to win on its own, the NRDC had no incentive to invest the time and resources necessary in such an effort (personal interviews).

The Ruling

In the midst of this complex coalition building, the US International Trade Commission preliminary ruled on December 27, 1991 that the US industry had been materially injured by Canadian softwood lumber imports (Gorte 1992: 4). Then, on March 12, 1992, the ITA preliminary ruled that stumpage programs of Canada four key provinces and BC 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 collecting pending a final affirmative ruling. Over half of the calculated subsidy was attributed to BC's raw log export restrictions.⁵³

This time Canadian interests were in no mood to negotiate a compromise. Canadian politicians decried the “US harassment” as an attack on Canadian sovereignty. Many argued that it was “hypocritical” of the US to penalize BC for using raw log export restrictions, when the US also restricted raw log exports on its publicly-owned lands. British Columbia's Minister of Forests, would later publicly attack the BC-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 was anti-BC forest jobs (Vancouver Sun 1994).

The ITA issued a final ruling on May 28, 1992 upholding its preliminary ruling that a subsidy existed, but revised the amount downward to 6.51 percent.⁵⁴ As Balmer (1993: 104) 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. In July 15, 1992, the ITC

⁵².These discussions occurred amidst calls by some environmentalists to change US trade law to allow poor environmental standards in other countries to be treated as a subsidy, and thus potentially countervailable (Barcelo 1994; Saunders 1995).

⁵³.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).

⁵⁴.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)

issued a final affirmative injury ruling (Gorte 1994). 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 (Balmer 1993: 105).

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 Canada-US Free Trade Agreement.

The Binational Panels

Two FTA binational panels were constituted to examine the ITA's subsidy determination and the ITC injury ruling. On May 12, 1993 the subsidy binational panel remanded the Commerce Department ruling. The panel told the ITA that it needed to consider all four measures of its "specificity" guidelines that it issued in 1989 (Bessko 1995: 350). It further argued that in order to find that the price was "preferential", a 1986 Federal Circuit case ruling on *Georgetown Steel Corp. V. United States* now required the ITA to apply an "effects test" providing evidence that stumpage prices distorted markets (Gastle and Castel 1996: 840, 879).⁵⁵ On July 26, 1993, the injury binational panel remanded the ITC determination. It argued that the ITC did not provide sufficient evidence that Canadian softwood lumber exports were the cause of material injury (Pierson 1994: 1190).⁵⁶

The ITA responded in September, 1993 by asserting the binational panel misunderstood that its guidelines for specificity were "sequential" - and that any one measure was enough to find specificity (Ragosta and Shanker 1994: 656).⁵⁷ Nonetheless, it applied all four measures and again found specificity, actually revising its subsidy estimate to 11.54 percent (Pierson 1994: 1187). At the same time, Commerce refused to apply an "effects" test, asserting that this requirement was limited to cases involving non-market economies (Gastle and Castel 1996: 879). Similarly, the ITC responded in October 1993 by analysing the volume of Canadian softwood imports, the effect of these imports on prices, and other factors that could contribute to material injury (ibid: 1193) and again found that, based on the evidence, Canadian subsidized imports were the cause of material injury to US companies (Gorte 1994: 1).

These rulings fueled Canadian government and industry officials' beliefs that the ITA and ITC adjudication processes were subject to political influence, and that the binational panel process was beneficial in checking Congressional pressure. Not unexpectedly, these rulings caused rumblings in the US Congress, with some questioning the validity of binational process. Before waiting for the conclusion of the binational process, the joint Senate Committee report on

⁵⁵.This is also known as the "effects" test.

⁵⁶.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 US industry arguments. The US position was also supported by leading forest economists.

⁵⁷.Commerce argued that all four measures must be applied only in cases of a negative "specificity" requirement.

NAFTA implementation condemned the binational 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.⁵⁸

The Committee also set its sights on the binational ITA subsidy panel. It “clarified” that only one measure of “specificity” need be found, directly contradicting the binational panel ruling:

[T]he Committee is concerned that, in several cases, binational panels have misinterpreted US law and practice in two key substantive areas of US 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 (*ibid*).

With respect to the “effects” test, the committee reported that:

... the binational panel misinterpreted US 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 or 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 countervailing duty law...*From a policy perspective, the Committee believes that an “effects” analysis should not be required (*ibid*).

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, nor that they distorted competitive markets (Pierson 1994: 1191).

⁵⁸.Quoted in Gastle and Castel (1996: 840).

The ITC panel similarly found that there was insufficient evidence to find injury. However, this time now both decisions broke down 3-2 along national lines (Bessko 1995).

The American minority members in the subsidy-focused (ITA) panel argued that a recent ruling by the Federal Circuit Court of Appeals in the case of Daewoo Electronics⁵⁹, meant that they erred in the original ruling. They argued 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 preferentialist. Both Canadian and US panelists have been accused of being influenced by more than legal arguments alone. Gastle and Castel (1996: 878) assert that, “...what woke up the US minority were the Congressional reports, not Daewoo”. The US CFLI dismisses these assertions, arguing that not only was the law very clear regarding Daewoo, the professional background of the US panelists make such accusations “absurd” (personal communication, CFLI). The CFLI has, in turn, argued that two of the three Canadian panelists were in a conflict of interest because they failed to disclose their law firms’ relationships with Canadian forest companies.⁶⁰

Following the second remand, the Commerce Department's ITA reluctantly withdrew the existing countervail tariff. However, the USTR and the CFLI then appealed the binational panel decision to an Extraordinary Challenge Committee (ECC), as per provisions of Chapter 19 of the Canada-US FTA.⁶¹ The CFLI also launched a constitutional challenge to the binational panel process (Burke and Walsh 1995: 559), the success of which would have raised serious questions about the Administration's overall liberal trade policy objectives.

During the EEC hearing, the USTR and the CFLI argued that the binational panels “so misconstrued US law that the integrity of the process was threatened” (Gastle and Castel 1996: 824). However the EEC panel upheld the binational panels in its August 1994 ruling, but once again it was a split 2-1 decision along national lines. The majority Canadian justices argued that previous EEC panels defined a narrow role for the EEC based upon a standard of review that limited the ECC to determining whether the binational “panel conscientiously attempted to apply the appropriate law as they understood it” (Gastle and Castel 1996: 824). Dissenting Judge Wilkey disagreed, argued that such a narrow interpretation means that the EEC panels have virtually no role at all (Jordan Goldstein 1995: 301).⁶²

If the story were to end here, the evidence would support scholars of US trade law who argue that the FTA/NAFTA binational process has reduced the influence of protectionist pressures in the US Congress. For example, Rugman (1989) predicted that:

⁵⁹. Daewoo Electronics Co., Ltd V. International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO.

⁶⁰.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).

⁶¹.Once the ITA withdrew its subsidy determination, the ITC response to the second remand became moot.

⁶².Jordan Goldstein (1995: 298) 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.

...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 US trade law. This will result in an overall improvement in bilateral economic relations.

Indeed, those critical and supportive of the binational panel process on the softwood lumber dispute agree that the panels gave less deference to the Commerce Department's ITA than a US court would have.⁶³ Judith Goldstein argues that this dynamic is exactly the type of result *Congress* had hoped for. She argues that the FTA binational panel process was actually supported by members of Congress who, being far less protectionist than what much of the literature suggests (Goldstein 1995: 561-2), 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 powerful interest group (ibid).

Supporting this conclusion is Krauss (1993: 95-96) whose review of binational panels lead 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." Or as Jordan Goldstein (1995: 275) puts it, "[t]he fears of [US] industry, labor, and politicians that the FTA and NAFTA will limit the use of US trade-remedy laws may be coming to pass".

Yet, the softwood story to follow 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 US countervail law - but the effect was to formalize the procedures Commerce used to find that a subsidy existed in Countervail III, reducing agency discretion to find in favour of the foreign competitor in the future. This improved US 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.

⁶³ 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."

Consider the changes in US trade law that took place after the binational panels. The CFLI lobbied a more than willing Congress and the executive 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).⁶⁴ The SAA addresses the subsidy binational panel findings regarding defacto 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”.⁶⁵ It also gives clear direction that “in determining whether a subsidy exists, Commerce is not required to consider the *effects* of the subsidy”.⁶⁶ Explicitly addressing the softwood binational panel rulings, the SAA state further 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 analyse 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.⁶⁷ 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]

⁶⁴.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 Agreement “inconsistent” with US law will have any effect.

⁶⁵.Italics added. Quoted in Gastle and Castel (1996: 878).

⁶⁶.*Ibid*: 879. Italics added.

⁶⁷.A US 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.

Subsidies Agreement and section 771 (5)(B)(iii) encompass indirect subsidy practices like those which Commerce has countervailed in the past, and that *these types of indirect subsidies will continue to be countervailable...*⁶⁸

These changes belie predictions that the influence of protectionist interest would dissipate following the FTA binational panel process. In fact, those US industry organizations supporting the binational panel outcomes, such as the NAHB, were not even made aware of these changes until that were a fait accompli (personal interview). Instead, these developments support the trade theory literature that asserts that US trade law has created an institutional setting that encourages overall liberal dynamics, but one in which administered protection co-exists. In this case, as free trading arrangements created less deference to the US countervail adjudication process and bureaucratic discussion, Congress moved swiftly to ensure that US forest companies would not lose their administered protectionism mechanisms. Thus, the binational panel rulings resulted in more *explicit* direction from Congress that made it *easier* for US forest companies to prevail in countervail determinations.

The Softwood Lumber Agreement

Once these changes were made, Canadian government and industry officials recognized that the CFLI could very well win another countervail (personal interviews).⁶⁹ 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 BC's environmental forestry practices in Congress, and referring to its support from BC environmental groups (Vancouver Sun 1994). Its official briefing package 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" (Coalition for Fair Lumber Imports 1994: Section D).⁷⁰ 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 (National Association of Home Builders 1994) and would fight strongly a fourth countervail initiative.

It was in this context that the Canadian and BC governments 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 tariff⁷¹, 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).

⁶⁸.From Statement of Administrative Action, page 926.

⁶⁹.Now, BC's raw log export restrictions, could, by themselves result in an affirmative countervail finding.

⁷⁰.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 BC and US-based environmental groups on how to exploit the softwood lumber conflict to further their aim of increased environmental protection (personal interviews).

⁷¹.Canadian agreement to these consultations preceded the US returning to Canadian forest companies much of the monies it had collected under the Countervailing Duty.

Informal meetings first took place in the Spring of 1995, followed by formal meetings at the Washington, DC Canadian embassy in September. For the next eight months a series of meetings, first exploratory and then moving toward intense negotiations, would be held among officials in the United States Trade Representatives office, the Commerce Department, from the BC Ministry of Forests, other provincial governments, the Canadian Department of Foreign Affairs and International Trade, and the Canadian embassy in Washington. In addition, industry officials in Canada and the US were central to these discussions.⁷²

During the exploratory phase environmental changes in BC were raised, but the central focus was on timber pricing changes.⁷³ The BC government was able to point to stumpage increases it made in 1994 (Schreiner 1994), following two years of increased industry profits (British Columbia. Office of the Premier 1994; Weatherbe 1994).

A number of options were discussed that might avoid a fourth softwood countervail, including each province adopting a different set of initiatives that would satisfy the CFLI. In the end, a British Columbia “quota” proposal put forth by industry representative, Jake Kerr, 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 US market tax free (16.3 BBF were exported from these provinces in 1995).⁷⁴ However, any amount above this figure would be subject to an export tax. The first 650 million board feet over this amount is subject to a \$50 tax per each thousand board feet (MBF), while any further exports are subject to a \$100 tax MBF. In exchange, the CFLI and key US companies agreed not to launch a countervail petition for five years, the CFLI agreed not to re-launch 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. US Customs also committed to begin refunding the remaining duties collected during Countervail III. The agreement also contained a dispute settlement process for adjudicating possible non-compliance allegations.

Unlike in 1986, this proposal originated not from the BC government but from BC industry. The government, having just increased stumpage rates, 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. However, the Canadian federal government disliked this approach, involving as it did a high degree of bureaucratic administration. It also involved turning negotiations inward to politically sensitive questions as to

⁷².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.

⁷³.Officials from the NRDC met with USTR officials regarding BC 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).

⁷⁴.Coalition for Fair Lumber Imports (1996: 1).

how much of the national export quota each province would receive⁷⁵, and within each province, what share would each company get.⁷⁶

Initial Reaction to the SLA

The SLA was vehemently opposed by the NAHB and the NLBMDA who argued that the only losers to this deal - purchases of timber - were not parte to it. Timber prices went up in the aftermath of the deal, and the Home Builders quickly asserted that the SLA 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 US 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 their own legislative measures in the US Congress.⁷⁷ Some critics of the deal suggested that the deal's upward pressure on timber prices might actually help the BC forest industry's bottom line. Unlike the 1986 MOU, British Columbia forest industry officials initially had a vested interest in making the SLA work, and spent much of their time during the first two years meeting with CFLI official over SLA management issues. Meanwhile Canada's traditional US allies in this dispute such as the NAHB, worked to have the SLA terminated. For the first year the SLA did not appear to adversely affect Canadian industry. Owing to record US demand, the first year witnessed a record amount of softwood lumber exports to the US.⁷⁸

Like the MOU before it, the SLA resulted in CFLI and US scrutiny of BC and other provinces' forest management practices. And once again, BC environmental groups were enlisted by the CFLI for their support (Hamilton 1997). The CFLI warned the BC government that any environmental relaxation measures would be considered as against the terms of SLA - for the first time giving the CFLI a legal tool with which to directly raise environment issues in the context of the softwood lumber conflict. When the BC government held closed-door discussions with stakeholders about streamlining its recent forest practice changes in 1997, BC environmental groups notified the CFLI of these plans (Hamilton 1997). An official of the BC-based Sierra Legal Defence Fund acknowledges that "it is a case of strange bedfellows", but "environmental lobby will use any tool it can, including the softwood lumber agreement" to pressure for maintaining or increasing environmental protection" (Hamilton 1997).

Subsequently Canadian embassy officials in Washington, DC argued to the US Commerce Department and USTR officials that BC's 1997 forest policy initiatives regarding forest job

⁷⁵.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 US market.

⁷⁶.Recent collapse of the Japanese market has even led to divisions within British Columbia. The bulk of BC exports to Japan come from Coastal forest company operations. Yet, coastal companies have been stopped by the SLA quota system from redirecting to the US exports original intended to go to Japan - while forest companies operating in the interior have been left relatively unscathed.

⁷⁷.The NAHB has proposed a bill that would modify US law to say that raw log exports cannot be countervailable. It has received 59 sponsors in the US House of Representatives as of December 15, 1997.

⁷⁸ The most controversial dispute was a CFLI complaint that "drilled studs" were not being counted as part of the quota. The CFLI eventually won a US customs declaration that drilled studs would be included as part of the quota.

requirements, environmental forestry regulations, and stumpage fees were not geared toward circumventing the agreement. However, it is clear that the CFLI is more interested in maintaining stumpage rates than environmental protection per se. In 1997 BC industry officials actually briefed US trade officials and the CFLI about the three potential areas of BC forest 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, BC industry officials believe that neither job targets or forest practices code administration changes would be challenged under the SLA, as long as no significant changes were made in stumpage rates (personal interviews). However, the unforeseen collapse in the Asian market led to economic hardship in the BC forest industry, and the uneasy peace began to unravel.

Reaction to SLA-post Asian Economic Collapse

The Asian collapse sent the coastal BC forest industry into a serious economic downturn. Japanese markets plummeted (Hamilton 1998a) while the SLA made it impossible for firms to redirect shipments to the US market without exceeding their individual quotas. Coastal company officials began to complain that their BC interior competitors had an unfair advantage under the SLA quota system, since most of them had few Asian markets, and were thus less effected by that downturn. Opposition grew against the architect of the SLA quota system, which was proposed by the CEO of Lignum, a BC-interior based company. The Council of Forest Industries hired a new CEO, and moved to have this official replace Lignum's CEO as the chief BC point person on the softwood lumber dispute. Heavy lobbying was made to the BC government to reduce significantly stumpage rates (Canadian Press 1998; Hamilton 1998b). In June of 1998 the BC government responded with an 16 percent reduction in stumpage rates, and the US CFLI countered with a challenge under the SLA dispute settlement procedures. The CFLI argued that the non-derogation clause did not permit stumpage reductions. The government of Canada argues that the SLA quota system, unlike its MOU predecessor, says nothing about reducing stumpage reductions. As of early February 1999, the adjudication process was still underway, and no ruling had been announced.

Amidst these uncertainties BC forest companies began to pursue a number of strategies. The Council of Forest Industries at first argued that the SLA should be scrapped, but after Premier Clark gave his enthusiasm to this idea, COFI's new president, Ron McDonald, backtracked and said that scrapping should only be one option.

Most importantly, BC industry officials began to talk about creating a lumber market in BC through the introduction of competitive bidding on large tracts of the public land. In the past, industry had been wary to propose such alternatives because it was feared that these changes would lead to a Pandora's box of tenure reform that might have far reaching and negative consequences for the industry. Arguably as a sign of increased frustration with the decade and a half old dispute, COFI and MacMillan Bloedel both called for the introduction of a US-style competitive bidding system and for the removal of raw log export restrictions.

MacMillan Bloedel, Canfor and Doman Forest Industries took the additional step of forming the Canadian Coalition of Softwood Exporters⁷⁹, who, looking ahead to the end of the five year SLA, took their case directly to US consumers in hopes of gaining political support south of the border.

In a bizarre twist, US environmental groups began litigation against the SLA, arguing that the quota agreement resulted in *increased* and unsustainable harvesting levels and contravened US domestic legislation. Contrary to Canadian groups who attempted to use the SLA to their advantage, their US counterparts appeared to reason that litigating against the deal would be a better tactical choice.

CONCLUSION

The case of the Canada-United States softwood lumber dispute generally supports the argument that the development of US trade policy is one in which “[t]he norms and institutions of fair trade [have] coexisted with their liberal counterparts” (Goldstein 1986). Liberal dynamics tended to come from the Executive in its pursuit of bilateral (Canada-US FTA), trilateral (NAFTA) and multilateral trading agreements (WTO Uruguay Round) that occurred since the dispute first began in the early 1980s; while the Administration has minimized the protectionist elements of US trade law through the negotiation of VER agreements. Protectionist pressures have largely been felt through US countervail law, and through Congress, which, throughout this dispute has quickly altered US Trade Law to facilitate affirmative countervail rulings.

The development of the Canada-US FTA and later 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 US trade law more directly to the softwood lumber conflict. To be sure, 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 not been as predicted: it is now *more difficult* for the Commerce Department to find in favour of the foreign competitor.

Given these lessons, what are the prospects for a long-term resolution to this dispute? One obvious option is for the US to engage in wholesale change its domestic trade law, something Krueger (1995) and other scholars have long called for, arguing that they fail to protect the US consumers. However, given the dynamics noted above, any whole sale change is unlikely. The following considers options that the CFLI say, if implemented, would end the dispute.

Competitive bidding

The prospect of BC 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

⁷⁹ The Canadian Coalition planned to ask eastern Canadian companies such as Domtar and Tembec. Reflecting division within BC, the COFI had not jointed the coalition as of February, 1999.

assert, and for the ITA to rule, that rate are provided “preferentially” if they are provided on a market basis.

Unlike the removal of raw log exports scenario to be discussed below, a move toward obtaining a market rent is not opposed by most environmental groups in BC and the United States. Environmental groups believe competitive bidding will lead to greater costs of logging, which some believe would have the effect of reducing the harvest rate. They also believe that such a system would encourage value added, by allowing secondary manufacturers greater access to the wood supply. And recent proposals by MacMillan Bloedel and COFI to consider such a policy option gives this scenario increased promise.

Conceivably, if a BC government also felt compelled to head in this direction for philosophical reasons, it could fend off domestic opposition by arguing that softwood lumber dispute led it to make these changes. Indeed, changes were made in 1987 that increased access to small scale short term competitive bidding timber sales.⁸⁰ However, despite increased attraction by some in the BC industry, there remain a number of obstacles. First, the current tenure system has led to 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 “appurtenancey” regulations to require forest companies to maintain employment levels in specific locations, thus encouraging regional development.⁸¹ And despite recent interest by some within the BC forest industry, reluctant by at least some current tenure holders would remain. They would be 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 (Schwindt and Heaps 1996: 48).⁸² Moreover, Zhang and Pearse (1996) have documented the positive effects of secure and long-term tenure on investment and forest practices. It is doubtful that current New Democratic Party government in BC, with its strong ties to organized labour, would move toward either competitive bidding and/or the removal of raw log export restrictions when such recent proposals were vehemently opposed by the largest workers union in the province.

A window in this direction would be more likely if the public opinion poll leading opposition conservative Liberal Party gained power in the province, which is supported financially by the forest industry.

Thirdly, and most importantly, even if BC moved to a competitive bidding system, government and industry officials worry that US companies will simply find other ways to

⁸⁰.After the passage of the new 1978 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. As a result of these requirements, the US did not view this program as a “competitive” one (My thanks to Michael Whybrow for explaining this point).

⁸¹.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).

⁸².Depending on how tenure rights were altered, existing tenure holders might not oppose 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).

countervail softwood exports (as witnessed by the inclusion of BC raw log exports controls as a subsidy in Countervail III). Certainly the evidence presented indicates that US 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.

Free trade in raw logs

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 at “preferential rates”, since US producers would now have access to the raw materials. And like the competitive bidding scenario, some BC forest industry officials including MacMillan Bloedel have supported such measures as a way to finally escape the ongoing softwood lumber dispute. However, the likelihood of any BC government permanently removing its raw log restrictions seems doubtful. This is because tied up in this ban are the goals of creating value added industry and jobs, environmental protection, and Canadian sovereignty. These are the same reasons why the US has been tightening its own raw log export restrictions. There is an increasingly strong sentiment in Canada and the US, and one that has solidified following increased environmental forestry protection, that the government has the right to insist that trees that are cut on government owned land are processed in the region they are cut, rather than being shipped to foreign markets.

A Mutual Recognition Agreement

There is another heretofore unexplored possibility that may reduce the threat of future countervail action, and that is the exploration of an MRA between Canada and the US over forest management practices. In recent years, Mutual Recognition Agreements (MRAs) have gained increased popularity as a way of seeking agreement upon “acceptable differences” between domestic regulatory systems (Nicolaidis and Schmitz 1996). The US, 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 centred on regulations and certification measures to facilitate product entry into domestic markets. This narrow focus does not generally apply to US/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 may and the fear of future countervails explicitly addressing environmental forestry practices may also play an important role here). But given the attractiveness of the MRAs concept of agreeing to “acceptable differences”, it may be worth exploring whether the MRAs concept could be expanded to apply to issues concerning the Canada/US softwood lumber conflict. An MRA could be broad-based (involving forest management pricing systems and forest regulations) or a narrow focused MRA (one that would remove key factors in previous disputes, such as an MRA that would declare raw log export controls as non-countervailable).

Obviously key obstacles are posed here as well, including just what incentive would exist for the US to enter into such an agreement. However, the lesson from the story above is that any efforts to reduce US administered protection will get a much better hearing from the US executive, which would be the key player in any Canada/US softwood lumber MRA negotiations.

Environmental Implications

Finally, it is worth reflecting on the nature of the environmental connection of this dispute, and the odd coalition building between US lumber companies and Canadian and US environmental groups. The story above is clear that the CFLI has made 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 US, but believing those on US national forest lands to be stronger, sees this as an area to exploit. Vogel (1992: 173) has noted that US industry attempts to reach out to environmental interests has increased in recent years, as a way for US industry to gain legitimacy for 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.

As for the question as to 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 BC and put on 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 fibre, evidence shows us that competitive bidding is not a panacea for environmental protection. The increased environmental protection measures in the US were a result of its non-discretionary environmental forestry legislation, rather than its system of competitive bidding.

Certainly the role of environmental groups in the softwood dispute must be seen as part of their larger strategy of using economic pressure and boycotts to force the BC government into the use of increased environmental forestry regulations (Bernstein and Cashore 1996; Bernstein and Cashore, 1998; Stanbury, Vertinsky and Wilson 1995). Their efforts to link to the softwood dispute are in part a function of the limited legal tools they have in the province to affect forest policy change. And this partly explains why some of their US counterparts have now litigated against the dispute and making creative claims about how an export restricting VER somehow *increases* production.

Aside from confusing tactics, there are possible additional costs to including the softwood dispute as an economic/legal tool to force change in BC. 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 BC log exports were a subsidy. Yet, environmental groups in BC and the US are also strong supporters of raw log export restrictions in BC and the US, because they believe such policies create domestic value added jobs (and thus reducing 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 BC

government to remove log restrictions. As Saunders (1995) concurs, this interaction could hurt 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.

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 on how to achieve sustainable forestry in each country. In this 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 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 kinds of 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 BC and other provinces toward the US model, the incentives offered by the US 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 - where Canada-US agreements on these issues may end up removing some fuel from the softwood fire.

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Chart 1: Canada-US Trade Disputes, 1989-95

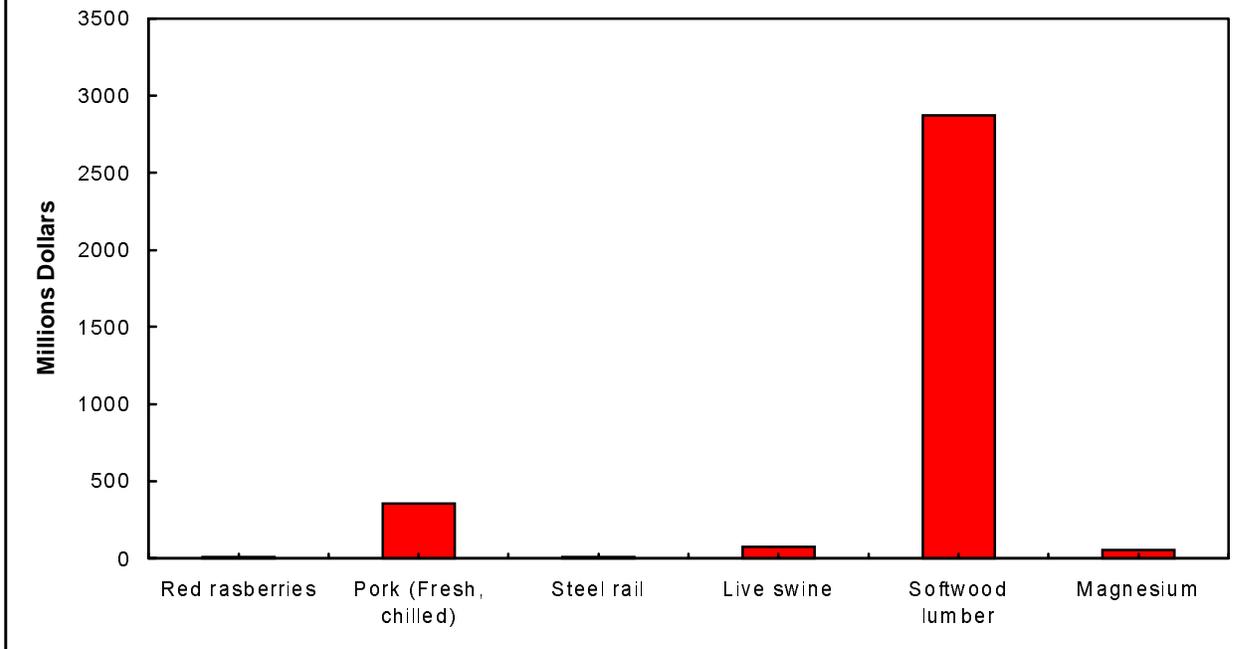


Chart 2: Canadian Penetration of U.S. Softwood Lumber Market

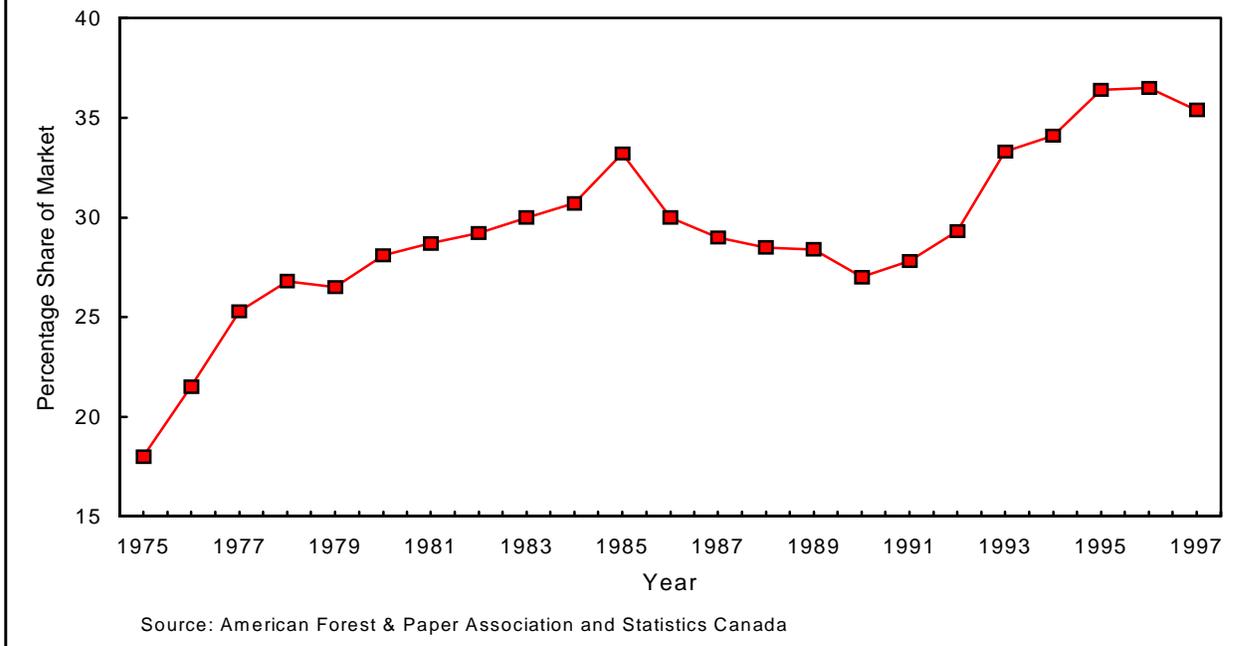
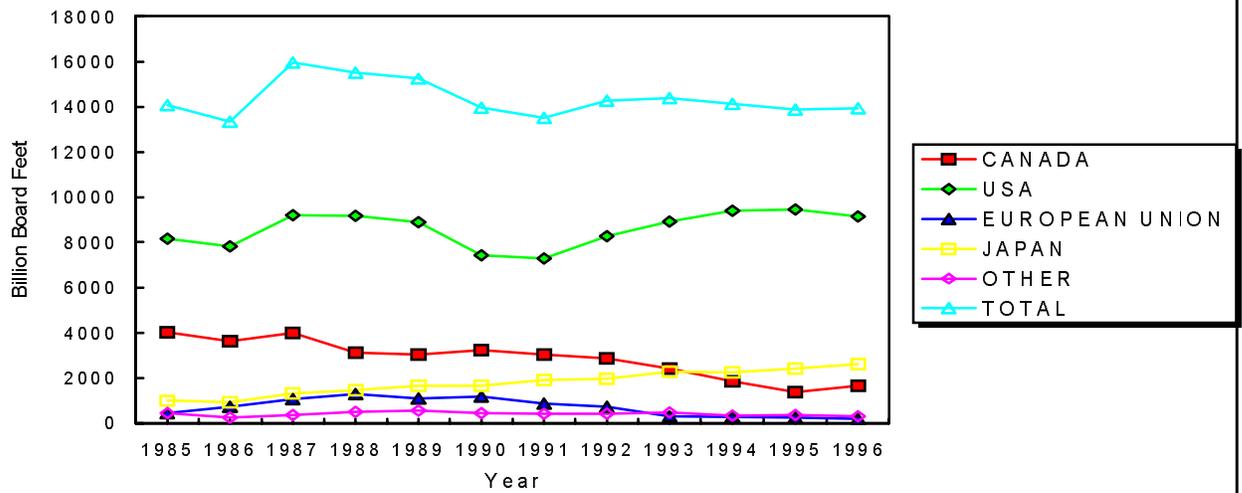


Chart 3: Canadian Softwood Lumber Exports to the United States, 1994



Source: Natural Resources Canada, Canadian Forest Service.

Chart 4: British Columbia Lumber Shipments, 1985-1996



Source: Council of Forest Industries, Statistics Canada