# THE DISPUTE SETTLEMENT PROCEDURES FOR COUNTERVAILING DUTIES UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE CANADA-U.S. FREE TRADE AGREEMENT: A REGIME ANALYSIS

**by**

**Tonino Pagliacci**

B.A., Simon Fraser University, 1991

Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Arts in the Department of Political Science



Simon Fraser University

August 1993

# Approval

Name: Tonino Pagliacci

Degree: Master of Arts

Title of thesis: The Dispute Settlement Procedures for Countervailing Duties Under the General Agreement on Tariffs and Trade and the Canada-U.S. Free Trade Agreement: A Regime Analysis

Examining Committee:

Chair: Dr. Laurent Dobuzinskis

Dr. Theodore H. Cohn
Senior Supervisor

Dr. Michael Howlett
Second Supervisor

Dr. Roger Hayter
External Examiner

Date Approved: 5/8/93

# Partial Copyright License

I hereby grant to Simon Fraser University the right to lend my thesis, project or extended essay (the title of which is shown below) to users of the Simon Fraser University Library, and to make partial or single copies only for such users or in response to a request from the library of any other university, or other educational institution, on its own behalf or for one of its users. I further agree that permission for multiple copying of this work for scholarly purposes may be granted by me or the Dean of Graduate Studies. It is understood that copying or publication of this work for financial gain shall not be allowed without my written permission.

Title of thesis

The Dispute Settlement Procedures for Countervailing Duties Under the General Agreement on Tariffs and Trade and the Canada-U.S. Free Trade Agreement: A Regime Analysis

Author:

(Signature)

Tonino Pagliacci
(Name)

Aug 5 / 93
(Date)

# Abstract

This thesis examines the effectiveness of the General Agreement on Tariffs and Trade (GATT) regime in dealing with dispute settlement, and assesses the degree to which the Canada-U.S. Free Trade Agreement (FTA) compensates for GATT deficiencies in this area. Disenchantment with the global trade management regime of the GATT combined with increased protectionism have pushed both Canada and the U.S. towards the regional route. Of particular concern to Canada is its asymmetrical interdependence with the United States. Since Canadian interdependence with the U.S. is highly asymmetrical, Canada has been more concerned than the U.S. to supplement the dispute settlement procedures of the GATT. The U.S. has pursued a FTA with Canada in part because a successfully implemented FTA would serve as a general framework for advancing U.S. inspired reforms in the GATT.

To compare the GATT and FTA dispute settlement procedures, I examine two countervailing duty cases. The first involves a pre-FTA dispute over Canadian softwood lumber exports to the United States, and includes the 1982-1983 and the 1986 phases. The large U.S. softwood lumber market is of significant importance to Canada and generates a positive balance of trade for the national economy. The

second case study focuses on a post-FTA dispute involving Canadian exports of fresh, chilled and frozen pork to the United States marking the first instance in which the FTA's extraordinary challenge provision was implemented. The pork industry also tends to generate a balance of trade surplus for Canada that has not gone unnoticed by the U.S. A regime analysis of a pre-FTA and post-FTA case provides us with a comparative view of the strengths and weaknesses of the GATT and FTA dispute settlement procedures.

The emergence of regional trade arrangements is in part a result of dissatisfaction with the global trade management regime. The genius of the FTA is the inclusion of dispute settlement procedures that supplement those of the GATT. Although some issues are better dealt with through the GATT, the FTA acts as a necessary supplement to the GATT regime. Both the GATT and the FTA are necessary but not sufficient in themselves to perpetuate global and regional trade liberalization. As a result, regime analysis needs to take into account the "balancing act" between global and regional trade arrangements if it is to remain applicable to the study of international relations.

## Acknowledgments

In the preparation of this research, I have benefited enormously from the guidance and scholarly example provided by my senior supervisor, Dr. Theodore H. Cohn. I am especially grateful to Dr. Cohn for suggesting this timely and original topic. Dr. Cohn's accessibility and thoughtfulness have made my task thoroughly gratifying.

I have also drawn encouragement from other professors who have contributed to my academic development. I wish to acknowledge Dr. Michael Howlett, Dr. Alexander Moens and Dr. Edward McWhinney, Q.C. I would like to express my appreciation to Dr. Howlett for his careful reading of this study. I also owe a debt to Dr. Moens; his objective counsel and direction have been invaluable.

I owe special thanks to my wife, Sharyn, who listened to me experiment with ideas and convinced me they were worth pursuing. Finally, I would like to thank my parents, Sylviane and Fausto Pagliacci. They have never wavered in providing me their unconditional support.

# Table of Contents

# Acronyms and Abbreviations

Canada-U.S. Free Trade Agreement----------FTA

Canadian Forest Industries Council----------CFIC

Canadian Meat Council----------CMC

Canadian Pork Council----------CPC

Canadian Softwood Lumber Committee----------CSLC

Coalition for Fair Canadian Lumber Imports----------CFCLI

Council of Forest Industries----------COFI

Court of Appeals for the Federal Circuit----------CAFC

Court of International Trade----------CIT

Department of National Revenue----------DNR

Extraordinary Challenge Committee----------ECC

Federal Court of Appeal----------FCA

General Agreement on Tariffs and Trade----------GATT

International Trade Administration----------ITA

International Trade Commission----------ITC

International Trade Tribunal----------ITT

Moose Jaw Packers----------MJP

Most Favoured Nation----------MFN

National Pork Producers' Council----------NPPC

North American Free Trade Agreement----------NAFTA

Supreme Court of Canada----------SCC

U.S. Trade Representative----------USTR

# CHAPTER I

## Introduction: Global & Regional Trade Arrangements: A Regime Analysis

This thesis examines the effectiveness of the General Agreement on Tariffs and Trade (GATT) in dealing with dispute settlement, and assesses the degree to which the Canada-U.S. Free Trade Agreement (FTA) compensates for GATT deficiencies in this area. In some ways the GATT's dispute settlement procedures have been problematic. For example, GATT panelists are not trade experts or citizens of the disputing countries, and their decisions are not binding since they can be blocked by the losing party. In view of these shortcomings, I hypothesize that the FTA's dispute settlement procedures provide an important supplement to GATT. Since the FTA dispute settlement procedures remain under the rubric of the multilateral trade regime they can only serve as a supplement and not as a substitute for GATT.

This analysis also provides an overview of the GATT as a global trade management regime and the FTA as a regional trading agreement. Since the thesis compares the GATT and the FTA's dispute settlement procedures, it is logical that both a pre-FTA and a post-FTA case be analyzed. Although there are some drawbacks to examining only two cases the advantage is that a more detailed examination can be

undertaken. The examination of two case studies will serve to highlight the strengths and shortcomings of the GATT and the FTA's dispute settlement procedures. In the first case study, I review the 1982-1983 and the 1986 phases of the Canada-U.S. softwood lumber dispute. The second case focuses on the dispute over fresh, chilled and frozen pork exports from Canada to the United States. The pork dispute was dealt with by both the GATT and the FTA providing a sound basis for comparison. These cases were selected for analysis because they are two of the most contentious and protracted trade disputes between Canada and the U.S.

This thesis relies extensively on primary documents, letters and interviews. I have exchanged letters and conducted telephone and personal interviews with a variety of trade policy experts. These sources include Gary Horlick a Washington based lawyer, Leslie Kiss a Manager of Forest Economics at the Council of Forest Industries, Gordon Ritchie the former Canadian Deputy Negotiator of the FTA, Michael Wilson the former Canadian International Trade Minister and several other unattributable sources.

Although there have been many studies of the GATT and the FTA dispute settlement procedures not much comparative analysis combining the two has been completed. More attention needs to be given to regional agreements like the

Canada-U.S. FTA, particularly since the FTA could have a demonstrative effect on the GATT. A useful framework for such an analysis is regime theory.

The definition of international regimes used in this study emerged from a conference of international relations scholars in October 1980, in Los Angeles. Subsequent articles by Jock A. Finlayson, Mark W. Zacher, Stephen D. Krasner and others have embraced the following definition: "A regime is composed of sets of explicit or implicit principles, norms, rules, and decision making procedures around which actor expectations converge in a given area of international relations and which may help to coordinate their behaviour."[1] Scholars such as Zacher, Finlayson and Krasner have further refined this definition, arguing that:

> (1) Principles are beliefs of fact, causation, and rectitude. In relation to the GATT, principles are a general framework which emphasize the correctness of behaviour and procedure of a state's international trading activity.
> (2) Norms constitute the general obligations and rights which establish the parameters of state behaviour in the application of rules and decision making procedures.
> (3) Rules are specific prescriptions and proscriptions regarding behaviour. In

---

[1] Jock A. Finlayson and Mark W. Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," in International Regimes, ed. by Stephen D. Krasner (United States, 1983), p.275.

> essence, rules establish specific courses of action permitted and prohibited by law. (4) Decision making procedures are the prevailing practices for making and implementing collective choices.[2]

Finlayson and Zacher suggest that although this definition is somewhat more extensive than past ones, it also leaves room for amplification and interpretation.

Regimes address problems pertaining to the management of power within the international community and most analysts assume that international regimes are more likely to develop and prosper in areas where there is a considerable amount of interdependence.[3] The nature of Canada-U.S. interdependence has been identified as "mutual dependence" which tends to be highly asymmetrical.[4] Over the years trade between Canada and the U.S. has continued to increase, thus adding to the level of interdependence between the two countries. The asymmetrical nature of Canada-U.S. relations stems from the fact that Canada is

---

[2] Ibid., pp.275-276. Also see Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in International Regimes, ed. by Stephen D. Krasner (United States, 1983), p.2.

[3] Theodore H. Cohn, "Canada and the Ongoing Impasse Over Agricultural Protectionism," in Canadian Foreign Policy and International Economic Regimes, ed. by A. Claire Cutler and Mark Zacher (Vancouver, 1992), p.65.

[4] Theodore H. Cohn, The International Politics of Agricultural Trade: Canadian-American Relations in a Global Agricultural Context, (Vancouver, 1990), p.8.

far more vulnerable to U.S. actions than the U.S. is to Canadian actions.[5] As Theodore H. Cohn has argued, "Since the growth of interdependence increases the capacity of all relevant actors to injure each other, regimes are necessary for managing conflict in highly interdependent areas...," such as trade.[6]

The Canada-U.S. trade relationship is highly interdependent compared to that of most GATT members. Indeed, prominent regime theorists such as Robert O. Keohane and Joseph S. Nye have maintained that Canada and the U.S. are the two most interdependent countries in the world.[7] In view of the high level of Canada-U.S. interaction, GATT rules and decision making procedures have been insufficient for settling trade disputes between these two countries. Thus, it is not surprising that Canada and the U.S. have established a bilateral free trade agreement partly in order to create more effective dispute settlement procedures.

---

[5] Ibid., p.10.

[6] Cohn, "Canada and the Ongoing Impasse Over Agricultural Protectionism," p.66. Also see Ernst Haas, "Words Can Hurt You; or, Who Said What to Whom Regimes," International Organization, 36 (Spring, 1982), pp.26-27.

[7] See Cohn, The International Politics of Agricultural Trade, p.23. Also see Robert O. Keohane and Joseph S. Nye, Power and Interdependence; (2nd ed.; Boston, 1989), p.165.

In this thesis, the GATT and the FTA's dispute settlement procedures will be compared by studying the Canada-U.S. lumber case and the Canada-U.S. dispute over fresh, chilled and frozen pork. An examination of the lumber case illustrates that the GATT dispute settlement procedures offered Canada little in the way of tangible solutions. Despite continuing bilateral friction over hog/pork trade, the dispute over fresh, chilled and frozen pork will demonstrate that the FTA has constituted a considerable improvement over the dispute settlement procedures of the GATT regime.

The lumber case was selected for analysis because it was initiated prior to Canada and the U.S. entering into a regional free trade arrangement and because of its importance to both countries. The lumber dispute is a complex case and continues to be an ongoing conflict that may ultimately be settled by the FTA's dispute settlement mechanism. As a result of the complexity of the lumber case and its ongoing nature, this analysis cannot be conducted with tremendous detail. For the purposes of this thesis the analysis of the lumber case will be limited to the 1982-1983 and 1986 phases of the dispute. The Canada-U.S. dispute over fresh, chilled and frozen pork has been selected for study because it was the first case to progress through all stages of the FTA's dispute settlement

procedures, including an extraordinary challenge. The pork case will, therefore, provide a comprehensive examination of the FTA's dispute settlement procedures.[8]

While a number of general studies have focused on global and regional approaches to trade, this thesis will utilize these cases to specifically examine the adequacy of regime rules and decision making procedures concerning dispute settlement. This will help us understand why countries have been turning increasingly to the regional route in their trading relationships. Globally the GATT regime has been experiencing a "...bitter dispute over trade distorting subsidies [which have] been the main obstacle[s] to a world trade deal being negotiated over the past six years under the auspices of the 108 nation Uruguay Round of the [GATT]."[9] Regionally, free trade agreements have been signed in many areas, including a North American Free Trade Agreement (NAFTA) which has been signed but not

---

[8] The second U.S. extraordinary challenge under the FTA procedures involved Canadian hog exports. Canada has not yet launched an extraordinary challenge under the FTA.

[9] Peter Morton, "U.S. Leads Move to Salvage GATT," in Financial Post, (October 20, 1992), p.1. Also see Editorial, "The Positives in NAFTA Deal," in Financial Post, (December 1, 1992), p.10. The government of Canada continues to be a strong supporter of the GATT and remains committed to the Uruguay Round negotiations. Canada has been careful to ensure that the NAFTA agreement is in accordance with the GATT. Participating in a regional trade deal does not mean Canada has no interest in trading with anyone except the U.S. and Mexico.

yet ratified by Canada, Mexico and the U.S. Regime analysis has usually dealt only with global consequences and not with regional results of trade. A regime analysis that includes a study of regional trade agreements needs to be done, particularly if failures at the global level have pushed governments toward the regional route.

In certain respects a regional trade agreement may go further than anything that can be expected from global arrangements. However, at the time of writing it remains a major challenge to persuade the U.S. Congress to ratify NAFTA. The signing of NAFTA means that it will fall under "...fast-track authority by which the president negotiates trade deals and Congress approves or disapproves with [a]...yes or no vote, with no amendments allowed."[10] Harry Freeman, a Washington trade lobbyist and Bill Clinton supporter said, "Clinton's going to have momentum in the early going and he could really push trade policy."[11] Assuming NAFTA is ratified by the January 1, 1994, start date, it is expected to replace the FTA's dispute settlement procedures. Thus, the dispute settlement mechanisms between Canada and the U.S. are presently in a

---

[10] Rod McQueen, "NAFTA will Likely be Pushed Through in U.S. Next Year," in Financial Post, (November 14, 1992), p.1.

[11] Ibid.

phase of transition. Nevertheless, an end-date needed to be drawn for the purpose of examining the extent to which rules and decision making procedures in the Canada-U.S. FTA may supplement the rules and decision making procedures of the global trade regime. Consequently, this study will not examine NAFTA's dispute settlement procedures nor the continuing Uruguay Round of the GATT. Since NAFTA has not been ratified by the 3 Parties, and a GATT Uruguay Round agreement has still not been signed, there is no certainty that the current dispute settlement procedures will actually be altered.

Before pursuing any substantive issues, I will discuss the theoretical perspective of regime analysis utilized in this thesis. Krasner distinguishes between three basic schools of thought: conventional structuralism, modified structuralism, and the Grotian tradition.[12] At one extreme, conventional structuralists believe that regimes serve no meaningful purpose, even if they do exist. As classical realists, conventional structuralists maintain that international relations is anarchical. As a result, power (and not regimes) is viewed as the main determinant

---

[12] Richard L. O'Meara, "Regimes and Their Implications for International Theory," in Millennium: Journal of International Studies, 13 (No.3, 1984), p.251. O'Meara refers to Conventional structuralism as the traditional paradigm.

of relationships among states.[13] Modified structuralists take an intermediate position, seeing regimes as international agreements that, "...coordinate state behaviour to achieve desired outcomes in particular issue areas."[14] Grotians adopt the most extreme position in favour of regime analysis. They tend to assume that regimes exist everywhere, and argue that regimes are "...inherent attributes of any complex, persistent pattern of human behaviour."[15]

## *Cognizant Theoretical Stand: Modified Structuralism and the Functional Aspects of Regime Analysis*

The modified structuralist orientation of regimes is epitomized in Keohane's article, "The Demand for International Regimes," and Arthur A. Stein's article, "Coordination and Collaboration: Regimes in an Anarchic World."[16] Stein has argued that:

---

[13] A detailed literature review on the different perspectives of regime analysis can be found in Krasner's edited volume of International Regimes.

[14] Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," p.7.

[15] Ibid., p.6.

[16] Both these articles are in Krasner's edited version of International Regimes.

> ...anarchy in the international arena does not entail continual chaos; cooperative international arrangements do exist. Sovereign nations have a rational incentive to develop processes for making joint decisions when confronting dilemmas of common interests or common aversions.[17]

Keohane concludes, in his article, that as long as "...actors...have the incentive to coordinate their behaviour...and when sufficient interdependence exists that *ad hoc* agreements are insufficient, opportunities will arise for the development of international regimes. If international regimes did not exist, they would surely have to be invented."[18]

As modified structuralists, both Stein and Keohane see the creation of regimes as necessary when conflict resolution becomes unavoidable in interdependent relationships. As global interdependence increases, regimes grow in importance. In essence, modified structuralists suggest that regimes may have a significant impact in a highly interdependent world in which

---

[17] Arthur A. Stein, "Coordination and Collaboration: Regimes in an Anarchic World," in International Regimes, ed. by Stephen D. Krasner (United States, 1983), p.140.

[18] Robert O. Keohane, "The Demand for International Regimes," in International Regimes, ed. by Stephen D. Krasner (United States, 1983), p.171.

individualist calculations, based on self interest, could not provide the necessary level of coordination.[19]

Conventional structuralists are highly skeptical that regimes have any importance.[20] On the other hand, scholars that are influenced by the Grotian tradition "...accept regimes as a pervasive and significant phenomenon in the international system."[21] However, modified structuralists actually note the anarchic and decentralized characteristics of the international system while Grotians do not. The scope of this study will remain within the modified structuralist orientation of regime theory because modified structuralists believe that, "Regimes are developed in part because actors in world politics believe that with such arrangements they will be able to make mutually beneficial agreements that would otherwise be difficult or impossible to attain."[22]

For the purposes of this study the functional aspect of the regime analysis paradigm will also be used for

---

[19] Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," p.7.

[20] Ibid., p.10.

[21] Ibid.

[22] Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy, (New Jersey, 1984), p.88.

explaining international trade dynamics. The term "functional" is used as a form of explanatory logic concerning the function of the international political economy. Stephan Haggard and Beth A. Simmons discuss four theoretical approaches to regime development and change. They view functionalism as a particularly promising approach, claiming that:

> Functional theory explains behaviour or institutions in terms of their effects.... Thus, anticipated consequences explain the persistence of...regimes and compliance with its injunctions. Similarly, the modification of regimes or their weakening is likely to occur when they become 'dysfunctional.'[23]

Although the GATT has been somewhat helpful in resolving trade disputes among its members, its rules and decision making procedures for dispute settlement have not been fully up to the task, especially for highly interdependent members, such as Canada and the U.S. A reasonable hypothesis is that, to the extent that the global trade regime has been dysfunctional for resolving trade conflicts, highly interdependent countries, such as Canada and the U.S., have sought to supplement the GATT regime with regional trade agreements that include more effective

---

[23] Stephan Haggard and Beth A. Simmons, "Theories of International Regimes," in International Organization, 41 (Summer, 1987), pp.491-517. The four approaches discussed by Haggard and Simmons are structural, game-theoretic, cognitive and functional.

dispute settlement procedures. It is this hypothesis which will be investigated in this thesis.

In as much as competition and conflict continue to increase so too has "...the search for co-operative solutions."[24] Thus, while efforts were underway to conclude negotiations of the GATT Uruguay Round, Canada and the U.S. reached agreement on a regional free trade arrangement. The following chapter provides an overview of the GATT and the FTA's rules and decision making procedures (which emanate from general norms and principles). Moreover, the appropriate Canada-U.S. FTA provisions will be reviewed in order to determine how the FTA has built on the GATT's strengths while compensating for the shortcomings of the GATT's rules and decision making procedures.

---

[24] Cohn, The International Politics of Agricultural Trade, p.13.

# CHAPTER II

## An Overview of the GATT and the FTA

After World War II the major Western states shared a common interest in eliminating the protectionist measures responsible for plunging world trade into disarray during the 1930's. The disintegration of world trade, experienced during the Great Depression, generated interest among states for creating an open trade system. The U.S. took the lead in creating the postwar system because of its economic strength and importance to global markets. The U.S. State Department explained:

> The only nation capable of taking the initiative in promoting a worldwide movement toward the relaxation of trade barriers is the United States. Because of its relatively great economic strength, its favorable balance of payments position, and the importance of its market to the well-being of the rest of the world....[1]

During the early postwar years attempts were underway to form an international regime for trade management in which the contracting parties would cooperate and establish normative standards of behaviour. Cordell Hull, the U.S. Secretary of State and the primary advocate of open trade, argued that embracing the trade liberalization norm would

---

[1] Joan Edelman Spero, The Politics of International Economic Relations, 4th ed., (New York, 1990), p.68.

lead to prosperity and international peace.[2] The developing webs of interdependence between states were intended to reduce the likelihood of war in order to permit states to specialize in their areas of comparative advantage, thus improving standards of living. Interpreting these objectives from a modified structuralist perspective of regime analysis, states were making an effort to coordinate their behaviour in order to attain the common desired outcomes of peace and prosperity.

The first attempt at forging an international trade management regime came under the auspices of the Havana Charter from which the International Trade Organization (ITO) was to emerge.[3] Negotiations began in 1943, and in 1946 the U.S. called an international conference where discussions were held and proposals tabled for creating a global rule oriented regime to govern international trade. The ITO contained a comprehensive set of rules designed to regulate domestic policies in specific trade issue areas.[4] Over the course of negotiations U.S. authorities determined

---

[2] Ibid.

[3] The effort was spearheaded by the U.S. and had its roots in the liberal vision of Cordell Hull's Reciprocal Trade Agreements Act of 1934.

[4] Jock A Finlayson and Mark W. Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," in International Regimes, ed. by Stephen D. Krasner (United States, 1983), p.273.

that it would be difficult to reach an agreement with other international actors on a rule oriented regime. For example, the British insisted on rules for their system of "Imperial Preferences," other European countries insisted on safeguard rules for balance of payment problems, and the less developed countries requested rules facilitating economic development. In the U.S., Congress was hostile to the idea of an international trade organization that could potentially interfere with domestic politics. Negotiations that started in 1943 were to end in 1947 as a complex set of compromises for everyone that satisfied no one.[5]

Ironically, the U.S.-led Havana Charter fell victim to U.S. domestic politics. Protectionists felt that the Havana Charter went too far, while liberals felt it did not go far enough. Business groups also opposed the Charter, fearing too much government intervention in trade management. Although the U.S. Congress did not formally vote to reject the Havana Charter, it was clear to the Truman administration that Congress would not have ratified the proposal. Notwithstanding the prevailing norms of the post World War II era, which focused on international cooperation and trade liberalization, an agreement on rules to govern international trade proved elusive.

---

[5] Spero, The Politics of International Economic Relations, p.69.

With the collapse of the Havana Charter a limited trade management regime was to emerge. In 1947, the GATT had met in Geneva to develop procedural measures and guiding principles until the ITO could be established as a United Nations organization for the management of world trade. Unlike the ITO the GATT is premised on executive agreements and not on treaties, which meant that there was no requirement for Senate approval in the U.S. The GATT was created for documenting tariff conferences that were to be conducted periodically under the auspices of the ITO. Initially, the GATT was envisioned to be a temporary agency to serve until the Havana Charter could be implemented. However, with the demise of the Havana Charter the GATT assumed the role of global trade manager, encouraging freer trade among its members.[6]

Since principles and norms are often difficult to differentiate, I will use the terminology that Finlayson and Zacher employ in their contribution to Krasner's edited volume of International Regimes. Finlayson and Zacher refer to liberalization, non-discrimination and reciprocity as norms. They categorize both trade liberalization and non-discrimination as interdependence norms and reciprocity

---

[6] Jack C. Plano and Roy Olton, The International Relations Dictionary; (4th ed.; Oxford, 1988), p.162.

as a sovereignty norm.[7] Article I of the GATT is the "General Most-Favoured-Nation Treatment" (MFN) clause. This clause was intended to do away with trade discrimination against third parties by extending equal tariff reductions to all GATT members.

The MFN clause manifests itself in the interdependence norm of "non-discrimination" which directs the contracting parties to extend national treatment to imports. National treatment is designed to prevent discrimination against foreign products after they enter a country. Under GATT rules a country must give imports the same treatment as it gives domestic products in such areas as taxation, regulation and distribution. Although the interdependence norm reflected by the MFN clause remains strong among industrialized states, its strength has been weakened by agreed departures, such as voluntary export restraints and non-tariff barriers.[8]

As noted by Finlayson and Zacher, the U.S. has usually implemented the sovereignty norm of "reciprocity" for political reasons. Symbolic waivers of the reciprocity requirement for less developed countries in 1965, and the

---

[7] Finlayson and Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," pp.307-308.

[8] Ibid.

general system of preferences in 1971, have contributed to the weakening of the reciprocity norm.[9] However, reciprocity remains at the core of international bargaining on tariff rates because countries expect that reciprocity will eventually be extended to all GATT members. This *quid pro quo* continues to be the basis for negotiations and concessions on tariffs, within the GATT.[10]

Norms and rules are frequently difficult to separate, but rules are usually more specific in nature. It is the GATT's norms and the importance that the major powers attach to them that determine rules and decision making procedures.[11] Over time GATT members have diverged from key principles, norms, rules and decision making procedures, thus contributing to the deterioration of the GATT's dispute settlement procedures.

Currently, the GATT functions as a forum for negotiating tariff reductions and for eliminating other impediments to trade; it develops new trade policies; provides a dispute settlement process; and establishes

---

[9] Ibid., p.287.

[10] John A. Yogis, Canadian Law Dictionary; (2nd ed.; New York, 1990), p.181. The definition of *quid pro quo* is something for something.

[11] Finlayson and Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," p.305.

rules to govern international trade. However, over the decades important gaps began to emerge. Many countries began to depart from GATT norms and others began developing non-tariff barriers to trade which were not overseen by the GATT Articles of Agreement. Of particular concern to both Canada and the U.S. was the GATT's non-binding decision making procedures for dispute settlement, permitting parties to delay or block decisions.

The Canada-U.S. FTA was signed by Prime Minister Brian Mulroney and President Ronald Reagan on January 2, 1988, and entered into force on January 1, 1989. This event completed more than a century of effort and flirtation with the idea of a comprehensive bilateral trade arrangement. The preamble of the FTA promises to secure market access for goods and services produced in both Canada and the U.S. The intent of the FTA is to elevate the importance of the principles and norms that shape the rules establishing a fair and predictable trading environment. Indeed, the FTA marks the beginning of an evolutionary process of rule implementation and decision making along uncharted terrain. The FTA has introduced more extensive dispute settlement procedures and a rule oriented approach for the management of economic relations between the two signatories.[12]

---

[12] Frank Stone, "Institutional Elements and Dispute Resolution Under the FTA," in The Canada-U.S. Free Trade

According to Michael Wilson, the former Canadian Minister of Industry, Science and Technology and Minister for International Trade, "...the Free Trade Agreement [has given] Canadian exporters access to [dispute settlement] provisions that are not available to other trading partners of the [U.S.] and...this confers a significant advantage on them."[13] Due to the inadequate global trade regime, modified structuralists would explain the creation of a Canada-U.S. free trade deal as essential for the settlement of disputes between these two highly interdependent trading partners.

A number of complicating factors have been and continue to be debated in an effort to evaluate whether or not the FTA is beneficial for Canada. The importance of factors such as culture, sovereignty, regional and sectoral effects of the FTA along with many other issues are notable concerns; however, this undertaking will deal selectively with the rules and decision making procedures for the dispute settlement of countervailing duties. Opponents of the FTA object to the fact that U.S. non-tariff barriers continue to be defined by the U.S. (Canadian non-tariff

---

Agreement: Implications, Opportunities, and Challenges, ed. by Daniel E. Nolle (New York, 1988), p.67.

[13] Michael Wilson, "To Tony Pagliacci," 3 March 1992, Letter in the Simon Fraser University Archives, The Pagliacci Papers, MG 9, 12 March 1992.

barriers continue to be defined by Canada) and, therefore, remain subject to U.S. trade laws. Consequently, FTA opponents have concluded that the dispute settlement mechanisms of the FTA have failed to achieve Canada's objective of escaping U.S. protectionism. However, FTA proponents point out that U.S. trade laws applied against Canada are now less subject to political interference and Canadian petitioners have their cases dealt with in a more impartial and efficient manner than was previously possible through the U.S. court system and the GATT.

FTA opponents also often maintain that the GATT is an effective institution dedicated to resolving disputes through negotiation and diplomacy. Although this may not be perfect; the process of negotiation and diplomacy has served Canada well; thus, there was no need to depart from it. On the other hand FTA proponents favour a more legalistic or rule oriented approach (subscribed to by the U.S.) to decision making. It is important to note that some FTA opponents do not object to free trade in principle, but to the actual deal that resulted. Nevertheless, with the signing of the FTA both Canada and the U.S. have sent a powerful signal against protectionism and in support of the GATT's interdependence norm of trade liberalization. This despite the assertion of many analysts that regional FTA's fundamentally undermine both

the reciprocity and the non-discrimination norms of the GATT. Article XXIV, which deals with the creation of free trade areas, is considered by many trade specialists to be the most abused GATT provision.[14]

The dispute settlement procedures of the FTA have set new parameters for the Canada-U.S. trading relationship. The role of binational dispute settlement panels, in antidumping and countervailing duty cases, could act as a model for amendments to the dispute settlement mechanisms of the GATT. Some trade observers believe that the Canada-U.S model for dispute settlement will assist the Uruguay Round to yield results that will surpass most of the improvements achieved by the FTA. In fact, Richard Lipsey has argued that the dispute settlement procedures of the FTA are "...the envy of the world."[15]

### *Countervailing Duties and Rules Governing Regime Arrangements*

As a trade policy instrument, countervailing duty measures can be defined as special assessments levied on

---

[14] Theodore H. Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," in Canadian-American Public Policy, Series, University of Maine, Number 10 (June, 1992), p.3.

[15] "Verbatim," in The Vancouver Sun, (March 27, 1993), p.B3.

imports to offset a discount provided by a foreign seller or government. Countervailing duties are imposed on those products that are subsidized or granted special advantage over local producers.[16] The conventional logic for imposing countervailing duties is predicated on the belief that they nullify any special advantage enjoyed by foreign producers while, concurrently, protecting home markets from unfair competition. Countervailable actions include, "...direct government payments, tax relief and subsidized loans to a nation's exporters...."[17] When cheaper goods are imported the predictable behaviour of consumers is to purchase the less expensive product, thus substituting the foreign product for a domestically manufactured commodity. However, countervailing duty rules do not focus on benefits for consumers, rather they focus on the harm subsidies exact on import competing industries. Consequently, countervailing duty rules have served to make domestic producers and their goods more competitive. However, countervailing duties have at various times been viewed as both a legitimate measure to protect local producers from unfair subsidies provided to foreign producers, and as an excuse for protectionism.

---

[16] Plano and Olton, The International Relations Dictionary, p.154.

[17] Cletus C. Coughlin, "U.S. Trade-Remedy Laws: Do They Facilitate or Hinder Free Trade?" in Federal Reserve Bank of St. Louis, (July/August, 1991), p.6.

In the U.S., special prescriptions governing countervailing duty laws have been in existence since the Tariff Act of 1890. In Canada, the chief motivating factor for granting subsidies in the late nineteenth to early twentieth centuries, was to neutralize U.S. tariff rates. The U.S. in turn imposed countervailing duties to offset subsidies, thus restoring the amount of the original tariff.[18] The 1930 U.S. Tariff Act under Section 303 approved the imposition of countervailing duties no matter how far back in the production process a subsidy had been applied. This Act also provided for countervailing duties to be applied against non-governmental groups that provide a "bounty or grant" in the production process.[19] The standard consideration for imposing countervailing duties changed from a means for restoring tariff rates to a mechanism for remedying unfair trading practices from both governmental and non-governmental sources.

Prior to the completion of the GATT Tokyo Round, the U.S. rationale for imposing countervailing duties was

---

[18] Edward R. Easton and William E. Perry, "Countervailing Duty Investigations," in Law & Practice of United States Regulation of International Trade, ed. by Charles R. Johnston, Jr., (New York, 1989), p.3.

[19] Fred Lazar, The New Protectionism: Non-Tariff Barriers and Their Effect on Canada, (Toronto, 1981), p.27.

substantially different than that provided for by the GATT regime under Article VI. This divergence was permitted because U.S. countervailing duty laws had pre-dated the GATT regulations. U.S. legislation was broader in scope and there was no requirement for an "injury" test. The Trade Agreements Act of 1979, drafted by the executive branch after negotiations with Congress, added Title VII to the Tariff Act of 1930 and amended Section 303.[20] The Trade Agreements of 1979 introduced new countervailing duty rules premised on a new principle which required establishing a causal relationship between a subsidy and material injury.

Although the U.S. agreed to include an injury test for countervailing duties after the Tokyo Round negotiations, it also reformed legal and administrative procedures which made it easier for petitioners to begin and win a countervailing duty dispute.[21] The new injury test tightened the time limits on countervailing duty stages. For example, a countervailing duty investigation had to be initiated within 29 days, and only "clearly frivolous" petitions, or petitions lacking key information were to be

---

[20] Easton and Perry, "Countervailing Duty Investigations," p.3.

[21] I.M. Destler, American Trade Politics; (2nd ed.; Washington, 1992), p.149.

dismissed without any formal investigation.[22] "The overall timetable from initiation to final determination was compressed, in normal cases, from a year to seven months. This tended to favour [U.S.] petitioners, since foreign governments and firms had less time to develop the complicated counter cases that were needed to rebut the data of those seeking relief."[23] In addition, when a preliminary finding of subsidy was affirmed, importers were required to submit a deposit only after three months (rather than a year). This meant that U.S. petitioners could obtain trade restraints earlier than was previously possible.

As well as introducing an injury test for dutiable goods the Trade Agreements Act of 1979 also instituted a more precise definition of the term "subsidy."[24] Furthermore, the Trade Agreements Act enacted a means for remedying problems in the early stages of a dispute, combining a new method of adjudicating proceedings which includes a right to appeal preliminary and final decisions in customs courts.

---

[22] Ibid.

[23] Ibid.

[24] Lazar, The New Protectionism: Non-Tariff Barriers and Their Effect on Canada, p.30.

The changes to the rules in Section 303 of the Trade Act of 1930 only extended to the signatories of the Tokyo Round's subsidies and countervailing duties code, or countries that have accepted the equivalent normative obligations. One of the weaknesses of the Tokyo Round agreement was the ambiguous definition of what constituted material injury. Material injury is defined as "...harm which is not inconsequential, immaterial, or unimportant."[25] The term injury does not require that export subsidies be found to be the primary or even significant cause of poor performance. When interpreting injury, only a causal relationship between export subsidies and an industry's poor performance needs to be made. The definition which emerged from the Tokyo Round is so vague that verifying a causal relationship between a subsidy and material injury is virtually automatic.

### *Disenchantment with the Rules and Decision Making Procedures of the GATT Regime*

Prior to the FTA, trade liberalization between Canada and the U.S. was pursued through the multilateral framework of the GATT regime. In an effort to perpetuate the interdependence norm of trade liberalization, modified

---

[25] Ibid., pp.30-31.

structuralists suggest that GATT members need to coordinate mutually applicable rules for controlling state behaviour with the primary goal of reducing tariff barriers. The 1960's and 1970's have generally been perceived as successful decades for the GATT. However, the 1980's have proved to be a difficult decade, marked by the "new protectionism" of non-tariff barriers and the unprecedented injection of politics into trade issues. Trade observers, for example, have often criticized the fact that the procedures for applying U.S. trade laws are administered by political appointees.[26]

Ironically, the GATT's success at reducing tariff barriers has led to the increased use of non-tariff barriers. The reluctance among governments to eliminate non-tariff barriers emanates from the fact that they are generated from domestic structures. Government resistance is based on the notion that relinquishing control of non-tariff barriers is tantamount to surrendering control of domestic instruments for affecting normative standards of behaviour in economic matters.[27] According to modified structuralists, even if participation in a trade regime

---

[26] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," p.21.

[27] Reinhard Rode, ed., "Introduction," in GATT and Conflict Management: A Transatlantic Strategy for a Strong Regime, (Boulder, 1990), p.1.

requires countries to relinquish some degree of domestic control over trade policy, such arrangements could lead to mutual benefits that would otherwise be difficult or impossible to attain.

The rules for dispute settlement in the GATT Articles of Agreement are covered in Articles XXII and XXIII.[28] The GATT's central dispute settlement procedures under these articles allow for sympathetic consideration to consultations and nullification or impairment of attained GATT objectives.[29] The multilateral acceptance of the consultative process demonstrates an acceptance of the normative rights and obligations of GATT regime members to adhere to the decision making procedures for dispute settlement. The consultation provisions outlined in Articles XXII and XXIII must be exhausted before a resolution is attempted through the dispute settlement procedure. If the disputing GATT members are unable to reach an agreement, the aggrieved Party may request that the GATT Council establish a panel to adjudicate the

---

[28] Meinhard Hilf, "EC and GATT: A European Proposal for Strengthening the GATT Dispute Settlement Procedures," in GATT and Conflict Management: A Transatlantic Strategy for a Strong Regime, ed. by Reinhard Rode (Boulder, 1990), p.63.

[29] General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents: Text of the General Agreement 1969, Vol. IV., (Geneva, 1969), p.39.

dispute. Over time the assembling contracting parties have assumed the name of the GATT Council and for legal purposes both are equivalent.[30] When the contracting parties have exhausted the consultation procedures, a request for establishing a panel is granted automatically.

Rule implementation involves the interpretation of rules by the decision making bodies of the GATT regime. The GATT's decision making panels consist of 3 to 5 members who are not citizens of either of the countries involved in the dispute. This regulation is premised on the belief that selecting non-citizens would minimize the potential for a conflict of interest which could prejudice a panel's normative obligation to render objective decisions. However, difficulties can emerge when attempting to select objective non-citizens, particularly since the Parties to the dispute are involved in selecting panel members. Involvement of the disputing Parties in selecting panel members has resulted in the rejection of some panelists because of the positions previously adopted by their governments. It is also the usual case that the GATT panel members are not citizens of the disputing countries nor are they trade specialists. Consequently, they are not

---

[30] Pierre Pescatore, "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects," in Journal of World Trade, 27 (February, 1993), p.5.

familiar with the decision making procedures and practices of the countries involved in the dispute. Moreover, GATT panelists tend to be diplomats who understand their role as conciliators and not as interpreters of rules.

These shortcomings have resulted in a declining confidence in the GATT dispute settlement procedures and has encouraged GATT regime members to seek regional agreements that include dispute settlement procedures. As a result of declining trust in the GATT regime's dispute settlement machinery, compliance with GATT rules has also suffered.[31] According to Meinhard Hilf, the GATT regime has become increasingly defective since the introduction of waivers, agreed departures from the rules and the advent of negotiations of special trade arrangements.[32]

---

[31] Robert E. Hudec, "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business," in Cornell International Law Journal, 13 (Summer, 1980), p.148.

[32] Hilf, "EC and GATT: A European Proposal for Strengthening the GATT Dispute Settlement Procedures," p.72. Also see Richard L. O'Meara, "Regimes and Their Implications for International Theory," in Millennium: Journal of International Studies, 13 (No.3, 1984), p.256. Conventional structuralists would quickly point out that these departures strengthen their position that regimes do not serve any meaningful purpose. Supporters of the Grotian tradition would emphasize that these departures underline the need for additional cooperation, coordination and collaboration in a decentralized (but not anarchical) system.

Disputing GATT members may reach an agreement before the completion of the GATT panel's report, at which time the matter would be considered resolved. Panel reports adopted by the GATT Council must be accepted by consensus. The GATT regime upholds the normative right of either Party to block the adoption of a GATT report. Blockage by the losing Party is not uncommon and is a major weakness in the GATT regime. Gary Horlick and Amanda DeBusk believe that the GATT regime could be improved if the regime members agreed to be bound by panel decisions.[33] However, it is unlikely that GATT members would agree to binding decision making when the dispute settlement panels of the GATT are made up of non-citizens and non-experts.

Although Canada has historically depended primarily on antidumping duties it also has used countervailing duties, but with far less frequency than the U.S.[34] Antidumping and countervailing duty proceedings follow distinct administrative rules and decision making procedures. Concern over the GATT dispute settlement mechanisms highlighted the U.S. agenda to reform the rules and

---

[33] Gary N. Horlick and F. Amanda DeBusk, "The Functioning of U.S.-Canada Free Trade Agreement Dispute Resolution Panels," 21 June 1991, pp.39-40, in the Simon Fraser University Archives, The Pagliacci Papers, MG 9, 12 March 1992.

[34] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," p.19.

decision making procedures during the Tokyo Round. The Tokyo Round agreement on antidumping cases interprets the rules established in Article VI of the GATT on "Anti-dumping and Countervailing Duties."[35] Although Article VI determines the conditions in which antidumping duties may be imposed against imports, of concern to this study is the implementation of the 1979 Subsidies Code.[36] The rules governing subsidies are overseen by the Committee on Subsidies and Countervailing Measures.[37] The rules on subsidies require that consultations be continually available to permit the GATT members to arrive at a mutually acceptable settlement. These functional aspects of the GATT regime allow the disputing Parties the prerogative to reach a mutually acceptable settlement, thus ending the dispute on incontestable terms.

The Subsidies Code aims to ensure that the use of subsidies by any GATT member does not harm the trading rights of another and that countervailing duties do not unjustly impede normative rights and obligations of

---

[35] General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents: Text of the General Agreement 1969, p.10.

[36] General Agreement on Tariffs and Trade, GATT Activities 1989: An Annual Review of the Work of the GATT, (Geneva, 1990), p.117.

[37] Ibid., p.119.

international trade.[38] International regulation of subsidies continues to be a controversial issue. The ambiguous nature of the 1979 Subsidies Code reflects an unwillingness to deal with the fact that subsidies can be "trade distorting."[39] Governments, therefore, continue to use trade distorting subsidies as instruments of domestic policy.[40]

U.S. dissatisfaction with the GATT dispute settlement procedures is evident from proposals put forward for reform at the Uruguay Round. For example, the U.S. has proposed an "...imposition of tighter deadlines for various stages of the dispute settlement process; greater use of non-governmental experts as panelists; [and] the adoption of a declaration by the contracting parties of the GATT,

---

[38] General Agreement on Tariffs and Trade, GATT Activities in 1980, pp.21-22. More detailed information on the Tokyo Round Agreement may be obtained from the GATT Activities in 1978 or from a two volume report by the Director-General of the GATT entitled The Tokyo Round of Multilateral Trade Negotiations.

[39] One of the major disputes in the GATT Uruguay Round, FTA and NAFTA negotiations are attempts to determine which subsidies are trade distorting and which are not.

[40] Debra P. Steger, "Dispute Settlement," in Trade-Offs on Free Trade: The Canada-U.S Free Trade Agreement, ed. by Marc Gold & David Leyton-Brown (Toronto, 1988), p.186.

affirming their commitment to abide by dispute settlement procedures."[41]

The general Canadian perception that U.S. trade laws and prevailing practices are substantially prejudiced by political and economic interests served to reinforce dispute settlement as a foremost priority in bilateral trade negotiations. Canada pursued a FTA with the U.S. in order to secure and enhance access to the U.S. market. The GATT's reciprocity norm has affected the approach taken towards dispute settlement and has supported a bias favouring containing disputes within a bilateral framework.[42] The rise of U.S. protectionist rhetoric during the 1980's compounded Canadian anxieties over the impact U.S. trade relief laws could have on the Canadian economy.

Many trade observers have concluded that the object of the GATT dispute settlement mechanism is to ensure a "balance of advantage," therefore, advancing the "major interest norm" that is perceived to prevail at the

---

[41] Julia C. Bliss, "GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects," in Stanford Journal of International Law, 23 (Spring, 1987), pp.31-32.

[42] Finlayson and Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," p.304.

international level.[43] Even though one can argue that the rule making process is dominated by the major trading states, more regime members are participating in GATT negotiations than in the past. As a result Canada was determined to negotiate a FTA with the U.S. Canada's plans also included the development of better rules along with a framework for dispute settlement procedures. As later discussion will demonstrate the shortcomings of the GATT's dispute settlement procedures have encouraged both Canada and the U.S. to develop dispute settlement procedures in the Canada-U.S. FTA.

From the U.S. perspective one of the primary considerations in pursuing a Canada-U.S. FTA deal was linked to the potential impact the FTA's dispute settlement procedures would have on the GATT Uruguay Round. The U.S. wanted to set a good example by demonstrating that good neighbours, like Canada and the U.S., can liberalize trade and reach agreement on dispute settlement procedures.[44] U.S. analysts believed that a successfully negotiated Canada-U.S. FTA would also serve as a framework for advancing U.S. initiatives proposed at the Uruguay Round.

---

[43] Ibid.

[44] Robert E. Hudec, "Comments," in The Canada-United States Free Trade Agreement: The Global Impact, ed. by Jeffrey J. Schott and Murray G. Smith (Washington, 1988), p.93.

Although both Canada and the U.S. have been dissatisfied with the effectiveness of the GATT's dispute settlement system, it was Canada that insisted on including a binding dispute resolution mechanism in the FTA. This was important to Canada because it is more dependent on exports to the U.S., than vice versa. On the other hand, Canada is the largest trading partner of the U.S. According to the modified structuralist perspective the greater the degree of asymmetrical interdependence the more serious the need for the creation of trade management arrangements that will facilitate the settlement of disputes.

The resolve of both Canada and the U.S. to establish dispute settlement rules and decision making procedures in the FTA can be attributed to a shared sense of antipathy for the GATT regime's dispute settlement shortcomings. Since Canada-U.S. interdependence is highly asymmetrical, Canada is more concerned than the U.S. with supplementing the inadequacies of the GATT machinery. Dissatisfaction with the GATT dispute settlement procedures stem from the tedious panel selection process, a lack of competent and neutral panelists, and the poor quality of panel reports. However, the major criticism leveled against the GATT's

dispute settlement mechanism has primarily focused on time delays and the inability to enforce panel findings.[45]

In seeking a FTA with the U.S., Canada's primary goal was to gain secured access to the U.S. market which Canada felt was being threatened by U.S. trade relief laws.[46] The Canadian request to negotiate a FTA was accelerated by the apprehension over escalating protectionist sentiments that were sweeping the U.S. during the 1980's. The U.S. solution to GATT constraints regarding tariff and quota protections, was the use of what Alan Rugman and Andrew Anderson refer to as "administered protection" such as antidumping and countervailing duties.[47] These trade relief laws have served to create an atmosphere of tension and uncertainty between Canada and the U.S. As a smaller power, Canadian trade tensions are closely tied to its vulnerable position in relation to the U.S. Canada has attempted to find protection against asymmetrical interdependence through the creation of a free trade

---

[45] The Bureau of National Affairs, U.S.-Canada Free Trade Agreement: The Complete Resource Guide, Vol.I., (Washington, D.C. 1988), pp.21-23.

[46] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," p.20.

[47] Alan M. Rugman and Andrew D.M. Anderson, Administered Protection in America, (New York, 1987), pp.1-2.

agreement whose functional characteristics could exert indirect control over the behaviour of the U.S.

The Canadian concern over U.S. administered protectionism combined with the perceived ineffectiveness of the GATT's dispute settlement mechanism, thrust the question of rules and decision making procedures for dispute settlement to the fore. Although the Canada-U.S. trading relationship is highly interdependent and appears harmonious, complicated trade disputes are not uncommon. The result has been the establishment of dispute settlement procedures for dealing with countervailing duties in Chapter 19 of the FTA. Chapter 19 establishes a binational panel for settling disputes in antidumping and countervailing duty cases. The following chapter outlines the general dispute settlement provisions that relate to the FTA and the binational dispute settlement provisions delineated in Chapter 19.

# CHAPTER III

## The Binational Dispute Settlement Provisions of the FTA

The general dispute settlement procedures in the Canada-U.S. FTA are a long range permanent creation empowered to oversee the rule interpretation and implementation of the entire agreement. For this reason, it is important to discuss some of the institutional provisions included in Chapter 18 which deal with trade disputes. A Canada-U.S. Trade Commission (the Commission) is established under Article 1802 to supervise the implementation and to oversee further FTA rule elaborations. The Commission consists of representatives from both Canada and the U.S. The chief representatives are cabinet level officers or the Minister primarily responsible for international trade (or his or her designee).[1] Regular Commission meetings are to be held once a year, alternating from one country to another. On a day to day basis the Commission will be operating with "working groups." In practical terms the Commission may not appear to have a direct impact on Chapter 19 countervailing duty cases, but it interacts with the FTA's Binational Secretariat which administers the dispute

---

[1] External Affairs Canada, The Canada-U.S. Free Trade Agreement; (2nd ed.; Ottawa, 1988), p.261.

settlement procedures under Chapters 18 and 19. Article 1909.7 also specifies that, "The Secretariat may provide support for the Commission established pursuant to Article 1802 if so directed by the Commission." In light of this association between the Commission and the Secretariat, it is of special interest to briefly discuss some of the characteristics of Chapter 18.

The FTA disburses functional dividends by way of unique and efficient guidelines provided for resolving disputes. The general dispute settlement mechanisms provide that, "Either Party may request consultations regarding any actual or proposed measure or any other matter that it considers affects the operation of this Agreement...."[2] Both Parties are expected to make every effort to reach a consultative solution that is mutually agreeable. If a particular dispute cannot be resolved through consultations within 30 days the dispute may then be referred to the Commission.[3] The Commission attempts to arrive at a mutually satisfactory resolution, in a GATT-like consensual procedure. The principle of consensus is viewed as an instrument for ensuring the collective

---

[2] Ibid., p.262.

[3] Ibid., p.263.

implementation of decisions while also establishing an atmosphere of good faith.

If the Commission is unable to resolve a dispute within 30 days, it has the option of referring the dispute to arbitration by a non-binding or binding panel of experts. Both the binding and non-binding arbitration processes permit the disputing Parties to appear before a panel to present written submissions.[4] Chapter 18 panels are intended to be advisory only, and binding decision making can only proceed if both parties agree in advance. The exception to this rule involves "emergency actions" which, under Article 1806.1(a) of the FTA, must always be sent to binding arbitration. According to Article 1806.3, the Commission is not normally involved in reviewing arbiters' decisions, although the Commission can agree to implement a mutually agreed decision in the place of a decision reached by the arbitrators. The rules permitting the replacement of arbitrator decisions with Commission decisions are inconsistent with the rest of the decision making procedure--since no strict time periods were adopted. Furthermore, the Commission's decisions may have

---

[4] Stephen Kelleher, "Trans-Border Business Planning After Free Trade: Dispute Resolution Under Chapter 18 of the Canada-United States Free Trade Agreement," in The Continuing Legal Education Society of British Columbia, (Vancouver, 1989), pp.5.1.13-5.1.14.

a normative impact on any interaction it undertakes with the Binational Secretariat.

Although non-binding panel decisions are not intended to be "binding," Article 1807.8 of the FTA requires the Commission to "...agree on the resolution of the dispute that normally shall conform with the recommendation of the panel." This requirement is completely unenforceable, but it could constitute a normative expectation of behaviour to follow upon the Commission's deliberations.

Article 1806.3 affirms a Party's right to suspend the application of equivalent benefits of the FTA if one Party does not implement the findings of the binding arbitration panel and if both Parties are unable to agree on appropriate compensation or remedial action. Therefore, the "binding" rule could be interpreted as providing a normative right of "retaliation." The retaliation norm appears to undermine the "spirit" of free trade because it does not necessarily redress breaches or assure compliance. Moreover, asymmetrical interdependence, which characterizes the Canada-U.S. trading relationship, imposes certain constraints on Canada's ability to effectively institute the retaliation norm. However, this apparent shortcoming does not render the "binding" rule impotent, since binding decisions sanction the normative rights and obligations of

compensation or remedial action. The only real impetus to implement binding decisions is the internationally accepted principle against violating international norms regarding correctness of behaviour.[5] In a highly interdependent trade relationship, such as that shared by Canada and the U.S., the mutual consent to advance a binding arbitration rule should make it extremely effective.

### *The Establishment of the FTA's Binational Panels*

Under the FTA's Chapter 19, Canada and the U.S. are to "...establish permanent Secretariat offices to facilitate the operation of this Chapter and the work of panels or committees that may be convened pursuant to this Chapter."[6] Each country appoints a secretary to oversee the management of all administrative matters in their respective countries and shall provide support to the Commission established under Article 1802, if requested.

The selection of Chapter 19 panelists must be conducted under strict time tables. The FTA further envisions different panels for dealing with different

---

[5] Robert Hudec, "Comments," in The Canada-United States Free Trade Agreement: The Global Impact, ed. by Jeffrey J. Schott and Murray G. Smith (Washington, 1988), p.93.

[6] External Affairs Canada, The Canada-U.S. Free Trade Agreement, p.280.

disputes. By selecting panelists that are considered trade specialists, the FTA is attempting to redress complaints over the lack of trade expertise among GATT panelists. In contrast with GATT panels, FTA panels also include citizens of the countries involved in the dispute. This should increase the likelihood that Canada and the U.S. will accept the authority of binational panel decisions. The FTA supplements the inadequacies of the GATT regime by appointing trade experts from the disputing countries to render final decisions.

Both Parties are responsible for creating a roster of panelists (25 each) that are Canadian and U.S. citizens. Chapter 19 Annex 1901.2(1) requires "Candidates...[to] be of good character, high standing and repute...chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law."[7] The majority of panel members are anticipated to be lawyers who need not necessarily be selected from the official roster; however, the panelists are still subject to the rules in Annex 1901.2(1). If one of the Parties fails to appoint the appropriate number of panelists within 30 days or if a panelist is struck and no replacement is

---

[7] Ibid., p.285.

put forward within 45 days, such a panelist will be appointed by lot.[8]

The Parties have 55 days, beginning from the date a panel is requested, to select the fifth panelist. If the Parties are unable to reach agreement on the fifth panel member the four panelists shall, by agreement, select the fifth panelist within 60 days of the original request for a panel. Should this procedure be unsuccessful the fifth panelist will be selected by lot as described in Annex 1901.2(3).

After the fifth panelist has been appointed the panel members will, by majority vote, endeavor to elect a chair from among themselves. If a majority is not attainable the chair will be selected by lot from the five panelists. All members have a vote and decisions shall be reached by a majority vote. "The panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of [the] panelists."[9] If a panelist is unable to continue fulfilling his/her obligations or is disqualified as per Annex 1901.2(6), the proceeding will be stopped and

---

[8] Ibid.

[9] Ibid., p.286.

another panelist will be selected in accordance with the procedures established in Annex 1901.2.

Future amendments to U.S. antidumping and countervailing duty laws must specifically name Canada in any legislation designed to affect Canadian exports. When considering the introduction of new rules for antidumping and countervailing duties, both Canada and the U.S. must notify the other Party. Proposed changes to the rules must not be inconsistent with the FTA's Article 1902(d):

> i) the General Agreement on Tariffs and Trade (GATT), the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code), or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or
>
> ii) the object and purpose of this Agreement and this chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the two countries while maintaining effective disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.[10]

Neither Canada nor the U.S. can apply changes of countervailing duty laws to the other country unless the

---

[10] Ibid., pp.271-272.

legislation specifically states it will apply to the other country.[11] Notification of legal changes is required and consultation is available upon request. Amendments to Canadian and U.S. antidumping and countervailing duty laws must conform to both the object and purpose of the FTA and the GATT's Antidumping and Subsidy Codes. These arrangements are accommodated through agreements reached under the auspices of both the GATT regime and the FTA, which modified structuralists point out would be difficult or impossible to accomplish otherwise.

Moreover, the FTA provides a notification and consultation process which effectively acts as a forum for resolving proposed rule changes to antidumping and countervailing duty laws before harmful measures are implemented. Canada and the U.S. both have specialized forms of trade relief laws, although the U.S. laws are more expansive than those of their Canadian counterparts. A formal notification and consultation procedure serves as an early warning system to avoid potential disputes or to expedite any future dispute settlement procedures.

---

[11] Gary N. Horlick and Debra A. Valentine, "Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement," in The Continuing Legal Education Society of British Columbia, (Vancouver, 1988), p.6.1.24.

If a dispute is not resolved through consultations, either country may refer the matter to a binational panel to render a judgment--the panel can make recommendations to modify any non-conformity. The two Parties must then consult and reach a mutual agreement within 90 days. "If remedial legislation is not enacted within [9] months from the end of the 90 day consultation period..." the complainant government may take comparable action or terminate the FTA within 60 days written notice.[12] Proposed changes to the rules cannot have the effect of overturning a prior decision of a binational panel. The notification procedure may act as a mechanism for blocking the effect of any changes to the rules, before a party demands consultations or references to a binational panel for resolution.[13]

Requests for consultations are initiated through a written notice to the other country. An open line of communication between Canada and the U.S. administers a unique normative arrangement which should change how countervailing laws will apply to each country. Should consultations fail, the matter will proceed to the

---

[12] External Affairs Canada, The Canada-U.S. Free Trade Agreement, pp.272-273.

[13] Horlick and Valentine, "Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement," p.6.1.38.

Commission established in Article 1802 and potentially to arbitration. Prior to the FTA no such notice was required, and there was no official agency to accommodate consultations. The functional aspects of creating a Canada-U.S. free trade agreement are manifest in the distinct and efficient benefits not previously available.

The "nullification and impairment" rule under Article 2011 of the FTA is derived from Article XXIII of the GATT. Article 2011 of the FTA authorizes a Party to initiate dispute settlement procedures and the assembly of a decision making panel, if action by the other Party "...causes nullification or impairment of any benefit reasonably expected to accrue to that Party." However, difficulties emerge when decision making panels attempt to determine whether one Party's expectations have been fulfilled. The GATT clause has been criticized for being too ambiguous and this criticism can also be extended to the FTA's Article 2011. Nevertheless, referral of disputes to a binational decision making panel, which includes trade experts who are responsible for reaching binding decisions according to agreed rules and established time frames, is a definite improvement over the GATT.[14]

---

[14] Richard G. Lipsey and Robert York, Evaluating the Free Trade Deal: A Guided Tour Through the Canada-U.S. Agreement, (Toronto, 1988), p.94.

*The Binational Panel Rules and Decision Making Procedures for Dispute Settlement of Antidumping and Countervailing Duty Cases*

Chapter 19 of the FTA undertakes to review final decisions made on dumping and subsidy complaints under domestic laws. Under present U.S. laws a countervailing duty may be levied on subsidized imports that cause or are threatening to cause material injury to the domestic industry producing similar products.[15] The U.S. Department of Commerce's International Trade Administration (ITA) has the decision making mandate to determine whether imported goods are subsidized while material injury determinations are made by the quasi-independent International Trade Commission (ITC). The Canadian equivalent to the ITA is the Department of National Revenue (DNR) and the Canadian equivalent to the ITC is the International Trade Tribunal (ITT). Decisions rendered by these final decision making bodies, related to antidumping and countervailing duty cases, are also subject to binational panel reviews upon the request of either Party. According to Gordon Ritchie, former Canadian Deputy Negotiator of the FTA, one of the shortcomings of the FTA is that dispute settlement

---

[15] Margaret Smith, Subsidies and United States Trade Law: The Application to Canada, Library of Parliament Research Branch, (Ottawa, 1990), p.4.

procedures are "...not triggered until [this] lengthy domestic process [is] final."[16]

Chapter 19 was to be in effect for 5 to 7 years pending the outcome of negotiations on harmonizing antidumping and countervailing duty rules as they apply to bilateral trade. If within this 5 to 7 year period of negotiations the harmonizing of antidumping and countervailing duty rules had not been achieved a 2 year extension was to come into effect. The goal of establishing joint rules has now been deferred indefinitely, and the NAFTA provisions on dispute settlement no longer even mention this 5 to 7 year goal. However, it was unlikely that bilateral negotiations would have resulted in an agreement. Since progress in rule harmonization did not take any substantive form it is questionable if negotiations were ever taken seriously. The U.S. was not likely to change its subsidy or countervailing duty rules without changes from the European Community and Japan. This is a limitation of the FTA, since it is clear that contentious issues of this nature can be more effectively changed by looking to the GATT Uruguay Round. Meanwhile, existing administered procedures

---

[16] Gordon Ritchie, "To Tony Pagliacci," 5 March 1992, Letter in the Simon Fraser University Archives, The Pagliacci Papers, MG 9, 12 March 1992.

will remain in place with both Canada and the U.S. reserving the right to apply current antidumping and countervailing duty laws to imported goods.[17]

Due to the binational representation on Chapter 19 panels, both Canada and the U.S. will take part in the decision making process. This should result in a better understanding of each country's legal and administrative procedures. Since the FTA is a regional arrangement made between two signatories who share similar customs, it is easier to reach agreements than having to proceed through the GATT's global arrangement. For example, the GATT's third party involvement in the panel proceedings has served to complicate matters and delay resolutions. However, it is unlikely that the GATT will be able to avoid third party involvement.

Binational panel reviews dealing with antidumping and countervailing duties do not have the authority to review other administering authority (the U.S. Department of Commerce or the International Trade Commission in the U.S., and the Department of National Revenue or the Canadian Trade Tribunal in Canada). In addition, binational panels do not develop new rules or substantive laws. The

---

[17] External Affairs Canada, The Canada-U.S. Free Trade Agreement, p.271.

binational panel's decision making jurisdiction only extends to investigating whether a domestic agency's decision is in accordance with the domestic laws of the importing country.[18] After a preliminary investigation by a competent investigating authority, a final binational panel determination may be initiated. In accordance with Article 1904.8 a binational panel may uphold a final domestic agency determination, or remand the decision to the appropriate investigating authority requesting that its decision be made consistent with the panel's decision. Remand action will take into account the complex nature of the issue; however, at no time is it to require the panel to exceed its allotted time.

Under Article 1904.9, binational panel decisions are to be binding on both Parties and the investigating agency. Some trade specialists have suggested that binational panel decision making cannot be binding unless these decisions are enforced through the domestic courts. However, international agreements or treaties contain normative rights and obligations that are as valid as international law. Remedial action available to the two signatories, should one fail to live up to its obligations, is the right

---

[18] The Bureau of National Affairs, U.S.-Canada Free Trade Agreement: The Complete Resource Guide, (Washington, 1988), p.24.

to retaliate with equivalent measures or to terminate the FTA.[19] However, complexities arise in relationships characterized by asymmetrical interdependence, since it would be more difficult for the smaller Canadian partner to effectively retaliate against the U.S. Moreover, the option of terminating the FTA could jeopardize Canada's access to the large U.S. market. The consequences of retaliatory action or terminating the FTA could lead to increased use of non-tariff barriers by the U.S. which would have a direct negative impact on Canada's standard of living.

Before the creation of the FTA's dispute settlement procedures for antidumping and countervailing duty cases, Canadians dissatisfied with ITA and ITC determinations appealed to the U.S. Court of International Trade (CIT). If this process did not yield the desired results a further appeal could be made to the U.S. Court of Appeals for the Federal Circuit (CAFC). CIT appeals persisted for at least 1 year and delays of 2 to 3 years were not uncommon. A further appeal to the CAFC added another year to the process. Since the U.S. Constitution does not permit the CIT to be subject to time constraints, judicial review by

---

[19] Debra P. Steger, "Dispute Settlement," in Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement, ed. by Marc Gold & David Leyton-Brown (Toronto, 1988), p.186.

the courts is often a long process. In addition, during the period that such cases were proceeding through the U.S. court system the countervailing duty fees were continually being collected.

In Canada ITT decisions could be appealed to the Federal Court of Appeal (FCA). Only certain determinations from the Department of National Revenue could be appealed to the tariff board and subsequently to the FCA. On rare occasions, the Supreme Court of Canada (SCC) heard appeals from the FCA. Nevertheless, this was also a lengthy process taking as long as 2 to 4 years, which served as a convincing deterrent against continued legal action.[20]

The provisions contained in FTA Article 1904 declare that final binational panel decisions are to be reached within a 300 to 315 day period starting from the beginning of a panel review. This represents a significantly shorter time frame than was offered through the judicial review process. Shorter time frames advance the legal principle of justice delayed is justice denied.

---

[20] Horlick and Valentine, "Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement," p.6.1.10.

The review process is as follows:

Complaint filed by aggrieved party.....30 days
Administrative record designated and filed.30 days
Complaint's brief filed.....60 days
Respondent's brief filed.....60 days
Reply brief filed.....15 days
Panel convened to hear oral argument....15-30 days
Panel issues decision.....90 days[21]

Providing a faster review process grants the disputing Parties the ability to make more precise calculations concerning expected economic costs and benefits. Gordon Ritchie, believes that these "...time limits are still too long [and that] tightening the time limits [would] secure freer access to the North American market."[22]

Binational panel reviews are to replace the judicial review of antidumping and countervailing duty final determinations. Binational panels are expected to apply the same standards and legal principles of a court from the importing country. In essence, each country is judged by its own rules, and not by a set of internationally or binationally determined rules. The panels take on a further quasi-judicial role since their deliberations take place in private and remain secret. Furthermore, under the

---

[21] The Bureau of National Affairs, U.S.-Canada Free Trade Agreement: The Complete Resource Guide, p.24.

[22] Ritchie, "To Tony Pagliacci," 5 March 1992.

FTA the formation and cost of binational panels are borne by the national government. This permits smaller firms to gain access to a procedure that was previously avoided or unattainable due to high legal costs and time expenditures. Contrary to the conventional structuralist assessment of regime consequences, the GATT regime does facilitate agreements, such as the Canada-U.S. FTA which does serve a meaningful purpose by according smaller firms access to conflict resolution provisions. The time constraints and the replacement of judicial review advance the principles of economical and prompt decision making which could develop into a new normative standard.

A binational panel also promotes a sense of fair and impartial application of countervailing duty laws which modified structuralists suggest are the functional benefits of trade arrangements. A binational composition of Chapter 19 panels should ensure an equitable balance, with panelists voicing both Canadian and U.S. interpretations of countervailing duty laws. The symmetrical arrangement of binational panels should improve the trade environment by creating a perception among business leaders that countervailing duty laws are being fairly and impartially applied. Since action is often based on perception and if business leaders act according to benefits they perceive emanating from the FTA, then perception becomes reality.

Previous to the FTA, governments rarely appealed to the domestic courts of a foreign government. These appeals were often undertaken by business groups at substantial expense. Under the FTA small businesses that are entitled to a final agency determination in the domestic courts may ask the government to initiate a binational panel review.[23] However, it is not clear if the government is then obligated to facilitate that request.

Binational panel decisions are not to be reviewed by judicial procedures of the importing country. Reviews of binational panel decisions can only be undertaken by an Extraordinary Challenge Committee (ECC). This is expected to yield a more stable and predictable trading environment between Canada and the U.S. The decision to evoke the extraordinary challenge procedure is made by both governments. The members of the ECC are to be selected from a roster of 10 judges or former judges of the Federal Court of the U.S. or a Court of Superior jurisdiction in Canada. Both Canada and the U.S. will place 5 individuals on the roster. When an extraordinary challenge is launched each country will select 1 member from the roster. The third individual shall be selected by the 2 members already

---

[23] Horlick and Valentine, "Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement," pp.6.1.14-6.1.16.

chosen. If the 2 members fail to agree on a third member, then the selection will be by lot. Once an extraordinary challenge is launched the Parties have a 15 day period to establish a 3 member committee. The ECC is empowered to determine if grounds of alleged violations exist under the FTA's Article 1904.13. Decisions are to be rendered within 30 days of the establishment of the ECC.[24]

The FTA rules specify that, if the ECC finds that one of the grounds in Article 1904.13 has been realized, then the original decision of the binational panel is vacated and a new panel will be established to rehear the matter. The matter may also be remanded to the original binational panel for a decision that is consistent with that of the ECC. However, if grounds have not been realized then the ECC affirms the original binational panel decision.

There is a potential for dissatisfied litigants to use this mechanism as a device for delay and repeated appeals. Andreas Lowenfeld indicates that, "...repeated resort to this procedure for the purpose of annulment of arbiters awards, when the original intention of the ECC was to act as a safety valve for gross violations of due process, could seriously undermine the dispute settlement

---

[24] External Affairs Canada, The Canada-U.S. Free Trade Agreement, p.272.

process."[25] Nevertheless, an examination of the fresh, chilled and frozen pork case will demonstrate that the ECC has not permitted manipulation of the process by disgruntled litigants. The hope is that the ECC will only be used in extraordinary circumstances and will, therefore, not be used very much. Although the extraordinary challenge mechanism only applies to antidumping and countervailing duty decisions, modified structuralists would argue that over time the ECC's decisions would lead to benefits that could serve a functional purpose, thus advancing the GATT regime's principles and norms into a uniform body of rules that would in turn have a comprehensive impact on the Canada-U.S. trading relationship.

The next chapter will provide an abridgment of the 1982-1983 and the 1986 phases of the Canada-U.S. softwood lumber dispute. The softwood lumber dispute provides insight to the deficiencies of the GATT regimes dispute settlement mechanisms, thus demonstrating why a regional FTA with more effective dispute settlement procedures were needed. The consequential stages and the administrative

---

[25] Andreas F. Lowenfeld, "Binational Dispute Settlement Under Chapter 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal," Administrative Conference of the United States, April 1991, pp.19-20, in the Simon Fraser University Archives, The Pagliacci Papers, MG 9, 12 March 1992.

dynamics for applying countervailing duties will be reviewed. Relevant trade rules and the authority of the investigating agencies will also be examined.

# CHAPTER IV

## The Canada-U.S. Softwood Lumber Dispute

The purpose of this chapter is to examine the dispute over Canadian softwood lumber exports to the U.S. This analysis will focus on the conflict resolution procedures for dealing with countervailing duties, and the investigative agencies associated with the 1982-1983 and 1986 phases of the Canada-U.S. softwood lumber dispute.

Canada-U.S. trade in forest products is often referred to as complementary, since U.S. exports to Canada are highly processed or manufactured products, while Canadian exports to the U.S. are less processed.[1] The Canadian lumber industry is significantly important to Canada's national economy because it tends to generate a large positive balance of trade.[2] At the beginning of the 1982-1983 phase of the softwood lumber dispute, British Columbia's sawmills exported 55-65 per cent of their lumber production to the U.S.[3] In 1980 the value of British

---

[1] Sharn Tyakoff, The Canada-U.S. Softwood Lumber Dispute: An Interdependence Approach, (Burnaby, 1988), p.18.

[2] Michael Howlett, "The Threat of U.S. Protectionism and the U.S.-Canada Free Trade Agreement Reconsidered: The Questionable Precedent of the 1986 Softwood Lumber Case," in World Competition, 12 (No.4, 1989), p.68.

[3] Mike Sasges, "Hurricane Brewing as Protectionism Gains Favor in U.S.," in The Vancouver Sun, (February 26, 1982), p.E7.

Columbia's lumber sales to the U.S. equaled 1.366 billion dollars.[4] For these reasons the British Columbian and Canadian lumber industry became increasingly concerned over protectionist talk coming from the U.S. lumber industry and its political representatives.[5]

Canadian softwood lumber producers are highly dependent on the large U.S. market. In 1981, U.S. government statistics reveal that Canada supplied nearly all softwood lumber imports to the U.S., with shipments totaling 1.688 billion dollars.[6] In some products, such as softwood shingles and fence, Canada is virtually the sole supplier and in 1981 the U.S. imported 132.3 million dollars and 30.3 million dollars worth of these products respectively.[7] This asymmetry of interdependence imparts significant power to the U.S. by enhancing its capacity to exact serious injury upon the Canadian softwood lumber industry. Many writers have questioned if the GATT regime's dispute settlement procedures are sufficient for dealing with disputes between asymmetrically interdependent countries. Indeed, modified structuralists maintain that

---

[4] Ibid.

[5] Ibid.

[6] "Canadian Lumber Ruled Possible Threat to U.S.," in The Globe and Mail, (November 18, 1982), p.B16.

[7] Ibid.

the greater the degree of interdependence the more important cooperation becomes.

While the federal governments of Canada and the U.S. were formal representatives in the softwood lumber dispute, in actuality the participants were more diffuse.[8] The Canadian Softwood Lumber Committee (CSLC) responded to the 1982-1983 petition filed by the U.S. Coalition for Fair Canadian Lumber Imports (CFCLI or hereafter the Coalition). The Coalition combines 8 trade associations and more than 350 companies. During the 1986 phase the CSLC changed its name to the Canadian Forest Industries Council (CFIC). Canadian interests were represented by the CFIC which in practice is led by the Council of Forest Industries of British Columbia (COFI).[9] Other participants included four Canadian provinces and members of the U.S. Congress.

The 1982-1983 phase of the softwood lumber dispute was predicated on a U.S. rule which states that subsidized imports are countervailable.[10] This rule is found in two

---

[8] Charles F. Doran and Timothy J. Naftali, U.S.-Canadian Softwood Lumber: Trade Dispute Negotiations, (Washington, 1987), p.5.

[9] Roger Hayter, "International Trade Relations and Regional Industrial Adjustment: The Implications of the 1982-86 Canadian-US Softwood Lumber Dispute for British Columbia," in Environment and Planning A, Vol. 24, 1992, p.159.

[10] Michael B. Percy and Christian Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, (Nova Scotia, 1987), p.81. This rule is found in the

pieces of U.S. legislation. The first is in the Trade Act of 1930 which provides that a "bounty or grant" imposed on any imported article is grounds for imposing countervailing duties.[11] The purpose of this rule is to offset any advantage bestowed on the imported article. This rule does not require an injury test and is applied to countries not a party to the GATT Subsidies Code. The second piece of legislation that speaks to subsidies is the Trade Agreements Act of 1979, which integrated the GATT Subsidies Code. The GATT regime performs an important function providing guidelines to U.S. laws. The U.S. system of countervail legislation has been interpreted and applied according to GATT Articles VI, XVI and XXIII with relation to the Subsidies Code.[12] The outcome of GATT negotiations has been instrumental in shaping the direction of the ITA and ITC investigations. In essence, the GATT regime provides a general framework that oversees trade disputes. Since Canada is a party to the GATT Subsidies Code the softwood lumber dispute was governed by the second formulation of the rule which requires an injury test.[13]

---

Tariff Act of 1930, as amended by the Trade Agreements Act of 1979.

[11] Ibid.

[12] The Bureau of National Affairs, "Countervailing Duties: Analysis," (Washington, 1982) p.33.

[13] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, pp.81-82.

The Trade Agreements Act of 1979, paragraph 1671 addresses the imposition of countervailing duties, declaring that:

> (1) the administering authority determines that--
>
> (A) a country under the Agreement, or
>
> (B) a person who is a citizen or national of such country, or a corporation, association, or other organization organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States, and
>
> (2) the Commission determines that--
>
> (A) an industry in the United States--
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise, then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.[14]

The ITA has the mandate to determine whether a country is providing a subsidy to the manufacture, production or exportation of any product. The ITC's role is to determine whether imports of a subsidized product are causing or threatening to cause material injury to U.S. firms. If

---

[14] Ibid., p.82.

these two investigative agencies determine that a subsidy is present and that material injury is the result, U.S. trade law provides that a countervailing duty be imposed equal to the subsidy amount. This process takes several months and involves an interlocking series of preliminary and final determinations by the ITA and the ITC.[15] The maximum length of the process is 270 days.[16]

Michael Percy and Christian Yoder describe the ITA's determinations as more normative in nature than those of the ITC. The ITA has assumed the responsibility of characterizing programs as fair or unfair, which is a normative judgment based on U.S. trade law doctrine. Conversely, the ITC's injury determination is based on facts which can be given more or less weight. Consequently, the ITC's decisions are viewed as more objective than those of the ITA. Notwithstanding the degree of subjectivity and objectivity in the decision making process, there remains a normative element to decision making throughout the proceedings. The importance of normative decision making at the ITA level, is of considerable consequence since an injury question is of no

---

[15] For the procedural information presented in this paragraph, I am indebted to the Council of Forest Industries for the use of their library collection of unpublished material on the softwood lumber dispute.

[16] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, p.83.

relevance unless a program is found to provide a countervailable subsidy.

The Department of Commerce interpretation of bounty or grant is amplified by the definition of a subsidy in the Trade Agreements Act of 1979. The definition of a subsidy in the 1979 Act is consistent with the ITA's normative understanding of bounty or grant, as it has developed over time. This definition is more detailed than previous definitions; however, it is not exhaustive. In Section 1677(5) the Trade Agreements Act of 1979 defines a subsidy as:

> Subsidy--The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and includes, but is not limited to, the following:
>
> (A) Any export subsidy described in Annex A to the Agreement (related to illustrative list of export subsidies).
>
> (B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (i) The provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations.
>
> (ii) The provision of goods or services at preferential rates.

> (iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
>
> (iv) The assumption of any costs or expenses of manufacture, production or distribution.[17]

As noted by Percy and Yoder, this definition of a countervailable subsidy was applied by the ITA in the 1982-1983 phase of the Canada-U.S. softwood lumber dispute.

The term "specificity test" is a frequently used expression in the softwood lumber dispute. This terminology emerged as a result of the word "specific" that appeared in Section 1677(5)(B) of the Trade Agreements Act of 1979 which is used to modify, "...enterprise or industry, or group of enterprises or industries." Another phrase that has often been used in the softwood lumber dispute is "generally available," which has surfaced from the ITA's practice of defining the type of subsidy granted. For the purposes of imposing countervailing duties, "specific" subsidies are countervailable while "generally available" subsidies are not. These understandings of countervailable subsidies are based on principles and norms established by market ideology; consequently, the rules and decision making procedures for imposing countervailing duties are determined by U.S. interpretations of comparative advantage. "If a particular entity is spared

[17] Ibid., pp.83-84.

the rigors of the market it has been subsidized and, under U.S. countervail laws, competitors of the subsidized entity have the right to have the comparative advantage of the subsidy eliminated by the imposition of countervailing duties."[18] The role of the ITA in the 1982-1983 phase of the softwood lumber dispute was to examine if "...alleged domestic subsidies...were specific to an industry or a region and if so, whether they bestowed a preferential benefit."[19]

### *The 1982-1983 Phase of the Softwood Lumber Dispute*

The 1982-1983 phase of the softwood lumber dispute began in July 1982 when the Coalition filed a petition to have countervailing duties imposed on Canadian softwood lumber.[20] The petitioner alleged that the Canadian federal and provincial governments were providing certain benefits which constituted subsidies to softwood lumber exports entering the U.S., mainly through low stumpage fees.[21] The Department of Commerce reviewed the petition and found

---

[18] Ibid., p.84.

[19] Ibid., p.85.

[20] Hayter, "International Trade Relations and Regional Industrial Adjustment: The Implications of the 1982-86 Canadian-US Softwood Lumber Dispute for British Columbia," p.159.

[21] Tyakoff, The Canada-U.S. Softwood Lumber Dispute: An Interdependence Approach, p.10.

sufficient grounds to proceed with a countervail inquiry, thus launching its countervailing duty investigation on October 27, 1982.[22] On November 17, 1982 the ITC made a preliminary ruling that there was a reasonable indication that Canadian softwood lumber imports were causing material injury to U.S. industries.[23] The ITA issued its preliminary ruling on March 8, 1983.[24] It found "...that certain benefits which constitute subsidies within the meaning of countervailing duty laws are not being provided to manufactures, producers or exports in Canada of certain softwood products."[25] The ITA decision revealed that Canadian stumpage programs did not confer any significant subsidies, thus the petition was rejected on two grounds:

> First, the ITA concluded on a preliminary basis that stumpage programs are generally available and hence are not targeted to a specific group of industries. Rather, the

---

[22] United States Department of Commerce International Trade Administration, "United States Department of Commerce International Trade Administration Preliminary Negative Countervailing Duty Determination Certain Softwood Products From Canada," (Washington, 1982), p.5.

[23] David Leyton-Brown, Weathering the Storm: Canadian-U.S. Relations, 1980-83, (Toronto, 1985), p.50. The ITA determines if subsidies exist and it also sets the amount of a countervailing duty if one is justified.

[24] Ibid., p.51. Because of the extraordinarily complicated nature of the 1982-1983 phase of the softwood lumber dispute, I will focus on the ITA, since an injury question is of no relevance unless the ITA determines a countervailable subsidy exists.

[25] Canadian Softwood Lumber Committee, "U.S. Countervailing Duty Investigation: March 23, 1983 Report #19," (Vancouver, 1983), p.2.

> timber sold under Canadian stumpage programs is widely used by diverse industries, including not only lumber but veneer, particle board, pulp and paper, and other specialty sectors producing items such as door stock. Second, the Commerce department [initially] determined that even where stumpage [was] provided to a specific group of industries, it would still not be a subsidy within the meaning of U.S. countervailing duty law, since timber was not sold at preferential rates and since provincial governments do not assume a cost of production, as alleged by the U.S. producers.[26]

The ITA stated that the evidence which emerged during the investigation demonstrated that, "Canadian prices for standing timber do not vary significantly from U.S. prices...indeed, in some cases the Canadian price may be higher."[27] Although the ITA did not go on to identify the number of programs that had a level of subsidy it was determined that this level of subsidy was under the *de minimis* rule of U.S. trade law.[28]

When the ITA's preliminary determination was made the Canadian lumber industry hailed it as a major victory against the imposition of tariffs on lumber exports to the

---

[26] Ibid. The preliminary decision is a 130 page document which provides the legal rationale for the preliminary finding.

[27] Ibid.

[28] See Steven H. Gifis, Law Dictionary; (3rd ed.; New York, 1991), p.128. *De minimis* is defined as something or some act which...does not rise to a level of sufficient importance to be dealt with judicially.

U.S.[29] The Canadian lumber industry felt that because the ITA recognized that, "Canadian and U.S. prices were adjusted to take into account differences in quality, accessibility, and forest management obligations, timber prices would not significantly vary."[30] The allegation that Canadian governments were providing a stumpage subsidy, thus selling timber at unfairly low prices, was dismissed.

Canada lobbied hard to demonstrate that Canadian softwood lumber was not subsidized and made it clear to the U.S. that an unfavorable ruling would be detrimental to Canada-U.S. relations.[31] The allegations by U.S. lumber companies were triggered by a severe economic recession which increased demands for protectionism. It is not unusual for petitioners to use countervailing duties as a means to protect domestic markets from competition.[32] The ITA's preliminary ruling that found Canadian softwood lumber not to be subsidized eased the tensions between Canada and the U.S.

---

[29] Canadian Softwood Lumber Committee, "U.S. Countervailing Duty Investigation: March 8, 1983 Report #18," (Vancouver, 1983), p.1.

[30] Ibid.

[31] John King, "Lumber Decision Eases U.S.-Canada Tension," in The Globe and Mail, (March 9, 1983), p.20.

[32] Ibid.

The Coalition, however, chose to appeal the ITA's preliminary ruling. The appeal process took place as a judicial proceeding with the ITA as the defendant before the U.S. Court of International Trade. The CSLC participated in the costly appeal process, referring to itself as an interested party. This introduced an additional step to the dispute settlement process. The Coalition appeal was challenged by two motions for dismissal; one by the U.S. Department of Justice; and the other by the CSLC.[33] The dismissal was granted on April 13, 1983. The court felt that rendering an opinion on the ITA's preliminary ruling would establish a normative precedent, thus interfering with the ITA's final deliberations.

On May 23, 1983 the ITA wrote its final ruling and determined, "...that imports of Canadian softwood lumber, shakes and shingles, and fence are not being subsidized by Canada's federal and provincial governments."[34] The final decision upholds the ITA's preliminary ruling stating that:

> The commerce department investigation arose from a petition filed by [the] U.S. Coalition for Fair Canadian Lumber Imports. The petition charged that Canadian federal

[33] Tyakoff, The Canada-U.S. Softwood Lumber Dispute: An Interdependence Approach, p.115.

[34] United States Department of Commerce News, "Commerce Finds No Significant Subsidies on Canadian Softwood Lumber Imports," (May 24, 1983), p.1.

> and provincial governments have been establishing prices lower than U.S. prices for publicly-owned timber and that Canadian lumber producers have, therefore, been subsidized. Commerce found that the Canadian governments' programs regarding their sales and allocation of standing timber on government owned lands, with certain minor exceptions, do not confer a subsidy. The programs are generally available within Canada on equal terms, [and] appear to be reasonable ways to sell the logging rights, and do not reduce the cost of producing softwood products. Commerce also found that, even though U.S. and Canadian prices for timber have differed significantly in recent years, the current price difference appears to reflect differences in quality and accessibility of the timber, the practice in Canada of requiring those who are allowed to harvest timber to perform significant forest management services for the governments and the fact that U.S. companies bid for timber anywhere between two to five years in advance of use, without taking into account the decline in the U.S. market for lumber and wood products.[35]

The Coalition's petition charged that the Canadian federal and provincial governments were selling publicly owned timber at a lower price than was available in the U.S. Therefore, Canadian lumber producers were accused of being subsidized. The ITA's final ruling determined that Canadian government programs did not confer a subsidy on softwood lumber producers. David Leyton-Brown points out that this quasi-judicial process is consistent with commitments made under the GATT regime, which are supported by both Canada and the U.S. The functional aspect of the

---

[35] Ibid.

GATT regime has been to provide guidelines for U.S. rules and decision making procedures in dealing with countervailing duties.

The ITA's final ruling was not appealed, thus marking the conclusion of the 1982-1983 phase of the Canada-U.S. softwood lumber dispute. Leyton-Brown explains that the softwood lumber case was "...expensive for the petitioners, even though much of the investigation was [conducted] at public expense." The financial commitment required to appeal the final ruling may have acted as a disincentive for continuation. Nevertheless, fiscal constraints place a heavier burden on Canada. The asymmetry of interdependence between Canada and the U.S. manifests itself through disparity in market size and economic strength; therefore, the Canadian side feels disproportionately disadvantaged by the threat of legal challenges in the U.S.

The outcome of the 1982-1983 phase established that the Canadian stumpage system did not provide a subsidy. This decision making process set an "...administrative precedent that the United States will not necessarily consider differing natural resource policies and administrative pricing systems as countervailable subsidies."[36] However, the ITA ruling did not eliminate

---

[36] Leyton-Brown, Weathering the Storm, p.55.

the possibility that natural resource policies could at some future date be found to be a countervailable subsidy.

### *The 1986 Phase of the Softwood Lumber Dispute*

On May 19, 1986 the Coalition formally filed a *de novo* petition requesting a 27 per cent countervailing duty.[37] In this second phase of the softwood lumber dispute the Coalition alleged that the Canadian federal and provincial governments were subsidizing softwood lumber. However, during the 1986 phase of the dispute the Coalition was calling for a 27 per cent countervailing duty to be placed on imports of Canadian softwood lumber.[38] The fundamental complaint was no different than that made during the 1982-1983 phase. Once again the Coalition argued that Canadian softwood lumber cut from crown land was priced so low that it constituted a subsidy to the softwood lumber industry in Canada.

Since the 1982-1983 phase of the dispute, no substantive changes had been made to Canadian forestry programs which establish stumpage fees in Canada. Nonetheless, the U.S. lumber industry continued to pressure

---

[37] Gifis, Law Dictionary, p.130. De novo is defined as new...renewed, revived. A second time.

[38] David A. Pease, "Conversation: Coalition Prospects Never Better," in Forest Industries, (July, 1986), p.2.

Congress for changes to the definition of the term "subsidy."[39] The U.S. legal *modus operandi* is similar to Canada's in that they both operate under a common law system. When the courts interpret a statute it considers the legal precedents established by other courts. In the common law system, precedents are regarded as the major source of law.[40] In 1985, various bills requesting that tariffs be placed on Canadian lumber imports were introduced in Congress. However, as noted by Michael Howlett, "...U.S. trade law which would allow Canadian production to be countervailed...was not forthcoming." Nevertheless, the U.S. courts reconsidered the Department of Commerce's application of a subsidy. The Department of Commerce's decision on the "specificity test" had been based on interpretations developed up to and during the time of the 1982-1983 phase. Between the 1982-1983 phase and the 1986 phase, the U.S. courts decided to establish a new precedent and widened the application of the "specificity test."[41] In essence, the U.S. courts determined that, "...generally available benefits...may constitute specific grants...."[42] This change forced the

[39] Howlett, "The Threat of U.S. Protectionism and the U.S.-Canada Free Trade Agreement Reconsidered: The Questionable Precedent of the 1986 Softwood Lumber Case," p.71.

[40] Gifis, Law Dictionary, p.364.

[41] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, p.94.

[42] Ibid.

Department of Commerce to review its interpretation of a subsidy and whether Canadian stumpage policies were in fact a subsidy.

On the one hand the Coalition argued that Canadian stumpage fees were too low, while COFI argued that changes including the value of the Canadian dollar made Canadian softwood lumber imports more attractive to U.S. purchasers. The declining Canadian currency increased Canada's share of the U.S. softwood lumber market; indeed, Canada's share rose from 27.6 per cent in 1982 to 31.6 per cent in 1985.[43] COFI also pointed out that "...superior Canadian productivity resulting from aggressive modernization programs in mills traditionally oriented to international markets," contributed to Canada's growing market share.[44] Canada was prepared to discuss problems in forest management; however, feeling that the 1982-1983 decision had vindicated its position, Canada was not well prepared for negotiations.[45] As a result the Canadian softwood

---

[43] Canadian Softwood Lumber Committee, "Chronology of Events Regarding U.S. Actions Against Canadian Softwood Lumber Industry," (Vancouver, 1986), p.1.

[44] Hayter, "International Trade Relations and Regional Industrial Adjustment: The Implications of the 1982-86 Canadian-US Softwood Lumber Dispute for British Columbia," p.160.

[45] Doran and Naftali, U.S.-Canadian Softwood Lumber: Trade Dispute Negotiations, p.12.

lumber industry was not genuinely concerned with this new offensive.

In an attempt to circumvent another investigation by the ITA and ITC, Canada raised its concerns at a GATT Council meeting. Canada seized this opportunity to characterize "...the petition as an offense to the principles of natural justice and suggested that a resumption of the investigation, after so exhaustive an inquiry in 1983, would constitute a violation of the GATT."[46] At this time the Canadian government was also pursuing the option of consultations which are made available through the GATT Subsidies Code.[47] Canada submitted that the facts of the case had not changed since the 1982-1983 phase, and that accepting a second petition implied that the ITA was prepared to appoint itself as its own court of appeal.[48] The Canadian side advised that this would establish a dangerous precedent which would permit the reopening of other negative determinations. "The Canadian government maintained that GATT parties never

---

[46] Ibid., p.20.

[47] Canadian Forest Industries Council, "Chronology: United States/Canada Trade Actions 1982-1987 Re Lumber and other Forest Products," (Vancouver, 1987), p.15.

[48] Doran and Naftali, U.S.-Canadian Softwood Lumber: Trade Dispute Negotiations, p.20.

intended the subsidies code to be used to address the perceived problem of national resource pricing."[49]

Notwithstanding Canada's objections, the quasi-judicial investigations by the U.S. authorities continued uninterrupted. Canada's minor power status underlines the diminished weight of its arguments when compared to the arguments put forth by the U.S. If the U.S. were to have presented the same arguments against a Canadian investigation the likelihood of the dispute persisting would have been dramatically decreased. The GATT regime was ineffective in protecting Canada from changes to U.S. laws and precedent setting interpretations of legislation which allowed the ITA to reverse itself.

On June 26, 1986 the ITC delivered an affirmative preliminary ruling on injury.[50] The ITC's preliminary ruling was not a surprise since an affirmative preliminary determination on injury is fairly easy to realize. Furthermore, the same preliminary ruling had been made in the early stages of the 1982-1983 phase (which Canada had won). However, an affirmative preliminary determination was made even easier during the 1986 phase, since Canada's

---

[49] Ibid.

[50] Canadian Forest Industries Council, "Chronology: United States/Canada Trade Actions 1982-1987 Re Lumber and other Forest Products," p.15.

share of the U.S. softwood lumber market rose between 1982 and 1985. The difference between the 1982-1983 phase and the 1986 phase came when the ITA delivered its preliminary ruling. The ITA found that "...the pricing practices of Alberta, British Columbia, Ontario, and Quebec for harvesting softwood timber (stumpage) constitute subsidies because they are provided at preferential prices to a specific industry or group of industries."[51] "In order to find a subsidy the [ITA] devised a measure never used before...computing not only actual costs of timber management, but the intrinsic value of a tree, as costs that must be recovered."[52]

The Coalition charged that stumpage fees were too low and did not capture the economic rent involved. The rent was then passed on (by way of low stumpage fees) to Canadian lumber producers, which was construed as granting the Canadian softwood lumber industry an unfair comparative advantage over the U.S. industry. However, some differences between Canadian and U.S. timber rights must be acknowledged. For example, in Canada a higher percentage of all forest land is held in Crown land accounts than in the U.S. Moreover, the purchasing of much timber in the

[51] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, p.22.

[52] Canadian Softwood Lumber Committee, "Chronology of Events Regarding U.S. Actions Against Canadian Softwood Lumber Industry," p.2.

U.S. is conducted in a bidding forum. The use of the term stumpage in the U.S. represents an estimated rate of future returns, with contracts extending up to 5 years. In contrast, Canadian stumpage fees reflect current market prices; this eliminates the potential risks of market fluctuations. Consequently, the understanding of stumpage fees reflects different normative premises that ultimately affect the interpretation of rules.

In the 1982-1983 phase the ITA had decided that because stumpage rights were made available to a cross section of industries the Canadian forest programs did not violate the specificity criterion of the U.S. subsidy test. During the 1986 phase the ITA examined how the Canadian federal and provincial governments approved the allocation of stumpage fees, deciding that stumpage fees were set in such a way as to favour the softwood lumber industry.[53] Percy and Yoder have concluded that, "It is difficult to imagine how any government program designed to allocate natural resources to the private sector could not be in violation of this interpretation of the specificity test."[54] The ITA also noted that stumpage programs were not allocated on a first come first served basis. It then computed a timber management cost that must be recovered.

[53] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, p.100.

[54] Ibid.

The ITA concluded that, "While the provincial governments incur no direct cost for trees and the land on which they are situated, an imputed and indirect cost is associated with the intrinsic value of the tree and land."[55] These decisions by the ITA resulted in its calculation of an estimated net subsidy of 14.542 per cent *ad valorem*.[56] The reasoning behind these decisions could have the effect of establishing new normative standards for resolving trade disputes and this was the precise outcome hoped for by U.S. interest groups. In a preamble to the 1986 decision the ITA reveals "...that what it is actually doing in applying the specificity test is trying to determine if a given program is unfair."[57]

The ruling by the ITA maintains that the allocation of natural resources by Canadian federal and provincial governments, which for historical reasons has cost them nothing, is unfair. In devising such normative standards, the ITA decided that it could make a legal ruling between what is a fair or unfair trade practice. According to this

[55] Ibid., p.101.

[56] See Gifis, Law Dictionary, p.14. *Ad valorem* [value added tax] a tax imposed upon the difference between the cost of an asset to the taxpayer and the present fair market value of such asset; a tax based on a percentage of the value of the property subject to taxation, as opposed to a specific tax, which is a fixed sum applied to all of a certain class of articles.

[57] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, p.100.

ruling, since the federal and provincial governments of Canada did not incur a cost in obtaining the timber resources it could not allocate stumpage fees unless it was to devise a plan that could demonstrate incurred costs. Canada had to pretend it incurred a cost in obtaining the timber resources and then it was obligated to allocate the resources on a first come first served basis. In essence, the ITA ruling seems to insinuate that "...if U.S. resource industries are suffering, foreign government ownership of any input products of competing natural resource imports is unfair."[58]

Canada soon changed its strategy when it realized it was opposing a determined and politically influential lumber industry lobby. The U.S. lumber industry lobby, headed by Georgia-Pacific, was well organized and had well defined goals. "Georgia-Pacific's T. Marshall Hahn and International Paper's John Georges used trade laws to help them gain a cost advantage over Canadian competitors. The [U.S.] lobby used sophisticated and powerful backroom deal makers, such as Senator Robert Packwood of Oregon, who in 1986 used his influence with the Reagan administration to swing the softwood lumber war the U.S. way."[59] Leslie Kiss, a Manager of Forest Economics at COFI in British

[58] Ibid., p.101.

[59] Kimberley Noble, "An Industry at War," in The Globe and Mail, (November 16, 1991), p.B18.

Columbia, believes that the ITA and ITC interpret U.S. laws in a manner that is intended to satisfy U.S. interest groups and their political agendas.[60] As Kiss suggests, recognizing that the countervailing duty issue is more of a "political game" than a substantive issue, Canada began looking for other solutions.[61] Before a final ITA ruling could be reached on the question of countervailing duties, a solution presented itself in the form of a Canada-U.S. Memorandum of Understanding (MOU).

Under the terms of the MOU, Canada was required to collect a 15 per cent export charge on softwood lumber exports to the U.S. Subsequently, the Coalition agreed to withdraw its petition for countervailing duty action. In effect, the MOU suspended the countervailing duty action. The MOU allowed for the reduction or elimination of the export charges only if Canadian governments implemented replacement measures by increasing stumpage fees or the other costs connected to timber harvesting. The value of replacement measures was to be approved through a consultation process between Canada and the U.S. Canada also agreed to U.S. monitoring of softwood harvest levels.

---

[60] Leslie Kiss, Telephone Interview, 16 April 1993, in the Simon University Archives, The Pagliacci Papers, MG 9, 12 March 1992.

[61] Ibid.

The Canadian strategy had remained unchanged since the 1982-1983 phase. This seemed a reasonable manner in which to proceed, particularly since the 1982-1983 phase was considered a "Canadian victory." Canadian strategists did not adequately evaluate their new opponents, who used the political apparatus of the U.S. with absolute precision. Furthermore, it was evident that the Canadian front was not as united during the 1986 phase as it was during the 1982-1983 phase. The Canadian softwood lumber industry found itself opposing a powerful U.S. lumber industry lobby at a time when the U.S. Congress and government tribunals were becoming more protectionist. In British Columbia the lumber industry found itself dealing with a new premier (Bill Vander Zalm), whose political position was to favour small businesses while looking with suspicion at the powerful forest product manufacturers.[62]

During the 1986 phase of the softwood lumber dispute, Canada and the U.S. were involved in negotiating a FTA. As explained by Roger Hayter, the Coalition was successful in politicizing the softwood lumber dispute by raising the profile of the dispute and linking it to the FTA negotiations.[63] Also weakening the Canadian side were

---

[62] Kimberley Noble, "How Lumber Firms Lost Lobbying War: Lumber Lobby Fell Short in Failing to Sway Public," in The Globe and Mail, (December 15, 1987), p.B4.

[63] Hayter, "International Trade Relations and Regional Industrial Adjustment: The Implications of the 1982-86

obvious splits that occurred between the federal government and COFI. The federal government accepted the connection made between the 1986 phase and the FTA negotiations, while COFI insisted the issue be brought to the GATT for conciliation "...in case the final determination went against Canadian interests."[64] Whereas the federal and provincial governments were prepared to raise stumpage, COFI opposed higher stumpage arguing that, "...higher stumpage would raise costs throughout the industry and not simply on lumber exports to the [U.S.]."[65] The original idea of an export tax was first proposed by COFI during confidential discussions as an attempt to sidestep higher stumpage.[66] COFI's idea of an export tax was embraced by the Canadian government but since COFI was excluded from the final months of negotiations they were uninformed of the MOU's substance.[67]

Canada's vulnerable asymmetrical interdependence with the U.S. raised concerns over the possibility that the ITA would make a final ruling against Canada. A Department of Commerce spokesperson was quoted as commenting that, "We

---

Canadian-US Softwood Lumber Dispute for British Columbia," p.161.

[64] Ibid.

[65] Ibid.

[66] Ibid.

[67] Ibid., p.162.

are puzzled by the Canadians' unwillingness to reach a solution. The U.S. industry has done everything it could to accommodate the Canadian concerns."[68] It was clear to the Canadian side that the ITA was expressing sympathetic overtures in support of the Coalition; thus, the Canadian contingent decided not to chance an ITA decision against it.

If the ITA's final ruling was to have gone against Canada there would be some undesirable consequences. For example, a final ruling against Canada had the potential for acting as a precedent on all Canadian resource industries exporting to the U.S. A strategical error made on the part of Canada was to assume that the 1986 phase of the softwood lumber dispute would be judged on its merits. Although the Grotian tradition of regime analysis regards international relations as being based on law, political dynamics must not be underestimated. The U.S. investigating authorities are not disengaged from the political process. This was extraordinarily consequential during the 1980's when political pressures reflected the rise of protectionist sentiments that permeated the Congress and U.S. investigative agencies. It appeared that Canada was in a no win situation and wanted to avert a negative final judgment against it.

[68] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, p.123.

The GATT Council route could not have forced the U.S. to cancel its countervailing duties on softwood lumber.[69] The best Canada could have expected by proceeding with the GATT strategy, was a GATT sanctioned retaliation against the U.S. The GATT regime's dispute settlement mechanism did not seem to be a viable alternative for Canada in the softwood lumber dispute. Weakened by its dysfunctional procedures, Canada (and the U.S.) have sought to supplement the GATT regime with the FTA dispute settlement procedures.

If Canada had opted for a GATT solution it is conceivable that a minimum 15 per cent duty would have been imposed. The GATT option could have resulted in "...the U.S. treasury [capturing] an additional 500 to 600 million Canadian dollars in additional revenues."[70] On the other hand the negotiated MOU authorized Canada to collect the 15 per cent export tax with revenues remaining in Canada.[71] This would also allow Canada to phase out the tax if the provinces preferred to increase stumpage fees. The U.S. government agreed to allow Canada to collect the 15 per cent tax in an effort to relieve strained relations between Canada and the U.S., especially during a period of intense

[69] Ibid., pp.128-129.

[70] Ibid., p.129.

[71] Doran and Naftali, U.S.-Canadian Softwood Lumber: Trade Dispute Negotiations, p.36.

negotiations over the FTA. Moreover, the GATT dispute settlement procedures could have persisted for over 3 years which "...could have resulted, perhaps, in a moral victory for Canada but there would have been little in the way of tangible compensation."[72] Although the MOU is criticized for its many shortcomings it was, perhaps, the best result Canada could have anticipated.

Canada's options were limited. Pursuing a complaint through the GATT Council would have entailed a substantially different procedure. After unsuccessful consultations a complaining Party may request that a dispute settlement panel be established. However, if the dispute is simultaneously being pursued through U.S. investigative agencies it is unlikely that the U.S. would react favourably to a GATT panel investigation. In trade conflicts involving countervailing duties, unless both Parties are prepared to subject themselves to a GATT panel decision, it ceases to be an option. In addition both Canada and the U.S. have expressed dissatisfaction with the GATT's dispute settlement mechanism. Under the GATT, dispute settlement determinations are to be adopted by consensus, which means that either Party is within its rights to block decisions. Canada expressed its concern that the GATT rulings are not binding and, therefore, carry

[72] Percy and Yoder, The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources, p.129.

no legal consequence to the more powerful U.S. Although the GATT procedures provide for retaliation, this option may prove counter productive for Canada in view of the asymmetry of interdependence.

The GATT rules and dispute settlement procedures have proven insufficient for settling conflicts between asymmetrically interdependent countries, such as Canada and the U.S. In light of the fact that asymmetrical interdependence increases the capacity of one actor to cause serious injury to another trade agreements are often preferred by smaller countries involved in a highly interdependent trade relationship. "The lack of an effective regime for limiting injury...[can be] particularly problematic for smaller country exporters such as Canada."[73]

The absence of an agreement such as the Canada-U.S. FTA with binational panels for settlement of countervailing duty disputes contributed to the highly politicized solution in the softwood lumber case. Highly politicized solutions to disputes tend to lead to retaliation and increased protectionism. Decisions made by trade experts would to some extent remove highly technical disputes from

[73] Theodore H. Cohn, "Canada and the Ongoing Impasse Over Agricultural Protectionism," in Canadian Foreign Policy and International Economic Regimes, ed. by A. Claire Cutler and Mark Zacher (Vancouver, 1992), p.66.

the scope of political machination. The Canada-U.S. softwood lumber dispute demonstrates that, in order to advance the interdependence norm of trade liberalization, dispute settlement solutions need to be arbitrated in a depoliticized forum.

The creation of a government commission with representation from both Canada and the U.S. provides a preliminary consultative process which could eliminate some conflicts before they develop into unmanageable disputes. Binational dispute settlement panels could act as an alternative mechanism to unilateral decision making and the pursuit of often inadequate GATT procedures.[74] Decisions rendered on unilateral grounds are difficult for governments to accept, and the GATT dispute settlement procedures have proved insufficient for controlling U.S. behaviour. According to the modified structuralist orientation, the greater the degree of interdependence between countries, the more important it becomes to develop a trade arrangement that establishes effective dispute settlement procedures.

The FTA could have been a useful supplement to the GATT during the softwood lumber dispute. The FTA's Article 1902 includes a notification and consultation process which

[74] Doran and Naftali, U.S.-Canadian Softwood Lumber: Trade Dispute Negotiations, pp.39-40.

has the potential for acting as a forum for deliberating changes to countervailing duty laws before damaging measures are implemented. Under the FTA's Article 1902, the U.S. would have had to consult with Canada which may have led to an agreement before the courts could be asked to make a ruling.[75] Expressing Canadian sentiments over proposed changes to countervail laws could have removed the potential of a U.S. court establishing a new precedent unfavourable to Canada. Although no amended statutes were enacted between the 1982-1983 phase and the 1986 phase, it is conceivable that amending a U.S. statute, with both Canada and the U.S. at the consultation table, could have yielded reasonable results. In addition, if Canada would have taken part in a consultation process making changes to U.S. countervailing duty law, Canada would surely have been better prepared to oppose the 1986 phase of the dispute.

Although a precedent is a decision that can be regarded as a major source of law, changes in law due to court interpretations are not covered by Article 1902 of the FTA. The FTA would not have solved all of Canada's problems in the 1986 case, since Article 1902 of the FTA would not have prevented the U.S. courts from widening the application of the "specificity test." This is a weakness in the FTA. However, changes to the FTA's Article 1902

[75] A statute is an act of the legislature, adopted pursuant to its constitutional authority.

requiring "notification or consultation" with Canada before applying new precedents, would be impractical.[76] On the other hand any amendment to U.S. statutes are also required to conform with the object and purpose of the FTA and the GATT's Subsidy Codes.[77] Still the FTA would have provided the binational dispute settlement mechanism. Canada might not have agreed to the 15 per cent tax and might have been willing to take a U.S. countervailing duty decision to the binational dispute settlement panels.

The next chapter examines the workability and effectiveness of the Canada-U.S. FTA's dispute settlement procedures for dealing with countervailing duties. This analysis will be undertaken by examining the Canada-U.S. dispute over fresh, chilled and frozen pork, dealt with under the FTA's Chapter 19. This case was selected because it marked the first instance in which the FTA Extraordinary

---

[76] *Stare decisis* is the backbone of both the Canadian and the U.S. legal system which demands that laws only be overturned for good cause. Where such good cause is not shown the law is not to be repudiated.

[77] On May 6, 1993 the Canadian softwood lumber industry won a significant victory in the ongoing dispute that began in 1982. However, the dispute is not over yet as U.S. softwood lumber companies have signaled their intent to pursue an extraordinary challenge. The 15 per cent export tax imposed by Ottawa after 1986, was lifted in late 1991 in the hope that U.S. concerns about Canadian stumpage practices had dissipated. The U.S. reacted by launching a trade dispute against Canada. See Drew Fagan, "Canada Wins Trade Round: Panel Rules Mainly Against U.S. Stand on Softwood Lumber," in The Globe and Mail, (May 7, 1993), pp.A1-A2.

Challenge Committee was asked to review a decision made by a binational panel, thus facilitating a comprehensive examination of the Chapter 19 provisions.

# CHAPTER V

## The Canada-U.S. Fresh, Chilled and Frozen Pork Dispute

The production of livestock for meat is a principal enterprise for many Canadian farmers. Pig production represents 30.2 per cent of livestock farms in Quebec and 20.4 per cent of livestock farms in Ontario. As of January 1, 1991, 87 per cent of Canada's 10.6 million pigs were concentrated in four provinces: Ontario 30.1 per cent, Quebec 28 per cent, Alberta 16.9 per cent and Manitoba with 12.1 per cent.[1] The Canadian hog production industry totaled 2.02 billion dollars constituting 9.3 per cent of farm receipts or nearly one-third of total livestock receipts.[2] At a hearing before the Subcommittee on Livestock, Dairy, and Poultry, Canada was acknowledged as the "...largest supplier of live hogs and pork to the United States, accounting for more than 40 per cent of U.S. imports."[3] Clearly, hog/pork production is an important industry in Canada, affecting the overall Canadian economy as it relates to the production of livestock for meat.

---

[1] Leonard A. Christie, "Livestock: Issues in the Canadian Pork Industry," Research Branch of the Library of Parliament, (November, 1991), p.1.

[2] Ibid.

[3] "Review the Inspection and Increased Importation of Canadian Market Swine and Pork Products," Hearing before the Subcommittee on Livestock, Dairy, and Poultry of the Committee on Agriculture, Serial No. 101-16, May 19, 1989, p.2.

Between 1982 and 1989 Canadian hog/pork production grew at an annual rate of approximately 2.8 per cent with pork production peaking in 1988 at 1.6 times the quantity of domestic consumption. The growth rate was sustained by a rapidly growing demand for hog/pork in the U.S. The Canada-U.S. hog/pork trading relationship is characterized by a high degree of asymmetrical interdependence which stems from "...differences in production levels and market size."[4] Canada is fairly self-sufficient with 98 per cent of Canadian consumption supplied by the Canadian pork industry, while the remaining 2 per cent is imported from the U.S. and Europe. In 1990, Canada's balance of trade surplus with the U.S. in pork totaled 423 million dollars, and its trade surplus for swine equaled 112 million dollars.[5]

Canada's balance of trade surplus was a concern for U.S. producers and in 1984 the U.S. National Pork Producers' Council (NPPC) filed a petition seeking countervailing duties against Canadian live swine and fresh, chilled, and frozen pork. In 1985 the ITA

---

[4] Theodore H. Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," Series, University of Maine, Number 10 (June, 1992) p.22.

[5] Christie, "Livestock: Issues in the Canadian Pork Industry," pp.1-2.

determined that the Canadian government was conferring countervailable subsidies to both live swine and pork exports.[6] In determining the injury question the ITC later found against Canadian live swine imports but not Canadian pork imports. Canada appealed these rulings to the CIT and in 1987 the court upheld the ITA's findings that the Canadian government was granting countervailable subsidies to hog producers. The CIT further found "...that the ITA could not view benefits to hog growers as constituting subsidies to pork producers without conducting an upstream subsidy investigation. [Since the CIT] subsequently upheld the ITC's negative injury ruling for pork, there was no reason for the ITA to conduct the upstream subsidy investigation."[7] The NPPC won its case with regard to Canadian hog exports, but lost its case against Canadian pork exports. The end result was that countervailing duties were imposed on Canadian live swine exports but not on pork exports.

Unable to impose countervailing duties on Canadian pork exports, U.S. producers successfully pressured the

---

[6] Department of External Affairs, "U.S. Commerce Department Decision on Subsidies Affecting Canadian Live Swine and Fresh, Chilled or Frozen Pork," in Communiqué, No. 80, June 11, 1985, p.1.

[7] For the detailed information presented in this paragraph, I am indebted to Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," p.23.

Congress to change the rules. Section 1313 of the Omnibus Trade and Competitiveness Act of 1988 amended the Tariff Act of 1930 to include a new provision under Section 771B which reads as follows:

> In the case of an agricultural product processed from a raw agricultural product in which--
>
> (1) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
>
> (2) the processing operation adds only limited value to the raw commodity, subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production or exportation of the processed product.[8]

This change in the law occurred before the FTA came into effect. Under this new section of the tariff act, the U.S. pork producers then asked the ITA (in 1989) to determine if subsidies on live swine were being passed through to the processing and exportation of fresh, chilled or frozen pork.

U.S. interest groups have historically lobbied senators to spearhead changes to U.S. trade laws. The trade laws that are drafted with a view to procuring U.S.

---

[8] "Preliminary Affirmative Countervailing Duty Determination; Fresh, Chilled, and Frozen Pork from Canada," Federal Register, Vol. 54, No. 87, May 8, 1989, p.19583.

victories in trade disputes have put smaller countries, such as Canada, on the defensive. New laws that clearly bestow advantages to U.S. complainants or defendants invariably raise trade tensions between Canada and the U.S. Furthermore, these laws tend to increase Canada's vulnerability to U.S. interest group pressures. However, modified structuralists would presume that one of the benefits of trade agreements rests in their ability to provide some protection against larger trading partners. Perhaps calculating this anticipated benefit, Canada looked to both the GATT regime and the FTA for protection against U.S. actions. Canada's expectation, in turning to both the GATT and the FTA, was that the functional aspect would serve to control the behaviour of the U.S.

Armed with changes to the Tariff Act of 1930, U.S. producers launched a new countervailing duty action against Canadian pork producers. On January 5, 1989, (5 days after the Canada-U.S. FTA came into effect) the NPPC and others filed a petition with the ITC and the ITA.[9] The NPPC alleged that the U.S. pork industry was materially injured or was threatened with material injury due to subsidized imports of fresh, chilled or frozen pork from Canada. With the change to U.S. countervailing duty laws, the Canadian

---

[9] "Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement," Memorandum Opinion and Remand Order, USA 89-1904-11, August 24, 1990, p.2.

pork industry encountered renewed demands by U.S. pork producers for the imposition of new penalties and this revived trade tensions between the two countries.

The ITA and ITC then began their investigations on the questions of subsidies and material injury. The ITC issued its preliminary determination on February 21, 1989, stating that there was a reasonable indication that the U.S. pork industry was materially injured or threatened with material injury by subsidized Canadian imports of fresh, chilled or frozen pork. On May 1, 1989, the ITA issued its preliminary ruling determining "...that Canadian federal and provincial programs provided benefits to producers and exporters of fresh, chilled or frozen pork that constituted subsidies within the meaning of the countervailing duty law."[10] The ITA published its final countervailing duty ruling on July 24, 1989, finding that the federal and provincial governments of Canada granted countervailable subsidies on producers of fresh, chilled and frozen pork. The ITC issued its final determination on September 9, 1989, ruling that the U.S. pork industry was threatened with material injury by reason of Canadian pork imports.[11]

---

[10] "United States-Canada Binational Panel Review," Memorandum Opinion and Order, USA 89-1904-06, September 28, 1990, pp.5-6.

[11] Ibid.

On August 22, 1989, Canada reacted by requesting a binational panel review under the FTA.[12] The complainants were the Moose Jaw packers (1974) Ltd.; the Canadian Pork Council and its members; Canada Packers, Inc.; and the governments of the provinces of Alberta and Quebec. A binational panel hearing was held on May 23, 1990, with the ITC and the NPPC defending the final determination of the ITC. The then International Trade Minister John Crosbie and Agriculture Minister Don Mazankowski expressed their preference for establishing a panel of Canadian and U.S. experts, however, Canada was also prepared to make use of the dispute settlement procedures provided for by the GATT to review the U.S. decision.[13]

Seeking protection from asymmetrical interdependence and a new U.S. countervailing duty law, Canada initiated a "twin tracks" approach against the U.S. trade ruling by launching complaints to both the GATT and the FTA. Under the auspices of the FTA Canada requested a Chapter 19 review of the U.S. determination while under the GATT Canada requested consultations. In the GATT, Canada argued that U.S. countervailing duties levied on pork exceeded the

---

[12] Ibid. See also External Affairs and International Trade Canada, Canadian International Relations Chronicle, (July-September, 1989), p.17.

[13] External Affairs and International Trade Canada, Canadian International Relations Chronicle, (July-September, 1989), p.17.

amount equal to the subsidy Canada granted on the production of pork. This is contrary to GATT Article VI:3, which only permits the imposition of countervailing duties equal to the amount of a subsidy of a particular product.[14] Canada also requested that the U.S. repeal Section 771B, because it incorrectly viewed a subsidy on hogs as automatically being a subsidy on pork. The U.S. rejected Canada's arguments and called on the GATT panel to disallow the Canadian complaint.[15] The GATT panel decided that its mandate only permitted the examination of alleged U.S. disregard for GATT Article VI:3 and not Canada's concerns over Section 771B. The panel concluded that U.S. countervailing duties on pork did not comply with Article VI:3, and it recommended that the U.S. "...either reimburse the countervailing duties corresponding to the amount of the subsidies granted to producers of swine or to make a subsidy determination which meets the requirements of Article VI:3 and reimburse the duties to the extent that they exceed an amount equal to the subsidy so determined to have been granted to the production of pork."[16]

---

[14] General Agreement on Tariffs and Trade, "United States-Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada," Report by the Panel, September 5, 1990, p.5.

[15] Ibid.

[16] Ibid., p.21.

The GATT panel did not find that no countervailing duties are required, but rather that the U.S. imposition of countervailing duties on pork were excessive.[17] However, since the FTA's binational panel requested the ITC and the ITA to review the issue concerning countervailing duties on Canadian pork, the U.S. was not prepared to agree with the adoption of the GATT panel report.[18] Although it was Canada that launched the GATT and FTA dispute settlement procedures, the U.S. resourcefully exercised its normative right to block the report's adoption in the GATT. As discussed in chapter II this normative right of the contracting parties is a major weakness in the GATT regime, because major powers are more often willing to block the adoption of GATT panel reports than minor powers. Furthermore, the U.S. has the resolve to pursue disputes through various international routes in an effort to successfully achieve its goals. Although these undertakings are time consuming and expensive, they are disproportionately onerous for smaller countries such as Canada.

---

[17] Focus GATT Newsletter, "Canada/United States: US Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada," October, 1990, p.4. The excessive application of countervailing duties does not comply with the GATT's Article VI:3.

[18] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA" p.24. Also see External Affairs and International Trade Canada, Canadian International Relations Chronicle, (July-September, 1990), p.15.

The ITC and ITA investigations combined with the binational panel responses involve elaborate legal arguments that cannot be thoroughly explored in one chapter. Due to the legal foundation on which the FTA is premised, the following section of this chapter will necessarily contain some pieces of complex legal arguments. Nevertheless, the pork case warrants some detailed attention. The object of this analysis will be to provide a sense of the issues at the core of the dispute. The examination of a selected portion of the procedural deliberations will encourage thoughtful consideration of the principles, norms, rules and decision making procedures that underline the trade tensions between the disputing parties. The upcoming discussion will deal with the interplay between the U.S. investigative authorities and the FTA's binational panel responses.

### *ITC and ITA Findings and Binational Panel Responses*

The binational panel was to determine if the ITC's findings were supported by substantial evidence. The Canadian side complained that the ITC used faulty statistics and analysis for determining that Canadian pork exported to the U.S. threatened material injury to U.S. pork producers. While the ITC maintained that Canada was

benefiting from increased exports to the U.S. due to trade distorting subsidies, the binational panel endorsed the Canadian view that the ITC's conclusions were based on dubious interpretations of unreliable statistics.[19] The ITC further found that the nature of Canadian subsidies provided the foundation for increased exports to the U.S. This finding was based on the appearance that pork production was increasing. The binational panel determined that the appearance of increased production of Canadian pork was inaccurate because it excluded other components of the record which indicated a decline in exports to the U.S.

The ITC also raised concerns over the potential for an increase in Canada's share of the U.S. market, hence threatening material injury to the U.S. industry. In this instance the binational panel established that the ITC's findings were not supported by substantial evidence and that the record was misapplied. The ITC expressed concern that increased Canadian pork imports could have the effect of price suppression. Here again the binational panel determined that this observation was based on the incorrect application of Canadian statistics. The Canadian side argued that the ITC's findings of "imminence of threat" was not based on the evidence, but rather on mere conjecture.

---

[19] "Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement," Memorandum Opinion and Remand Order, USA 89-1904-11, August 24 1990, p.17.

The binational panel's position on this issue was that the "...imminence of the threatened injury must be apparent from analysis of the economic factors."[20] In essence, the U.S. case was based on imminence of threat, but the binational panel concluded that the threat was not apparent.

Finally, the ITC assumed that since Canada's share of the U.S. pork market would increase, this would injure the U.S. industry. This was challenged by the Canadian side, which stated that the ITC's findings on vulnerability were not based on substantial evidence. The binational panel decided that the finding of vulnerability by the ITC misrepresented Canadian statistics, and gave insufficient consideration to other aspects of the record. The binational panel determined that several of the ITC's findings were based on the use of faulty statistics, and this affected the ITC's conclusions.[21]

As a result, the binational panel ruled that the "...ITC's final determination [be remanded] for reconsideration because it relied heavily throughout on statistics which appear at best questionable and that this reliance colored the ITC's assessment of much of the

---

[20] Ibid., p.31.

[21] Ibid., pp.13-16.

additional evidence. The ITC is instructed to reconsider the evidence on the Record, and more particularly the figures on Canadian pork production, for action consistent with the [binational] panel's decision."[22] For the Canadian side, Crosbie commented that this was "...a welcome development for the Canadian pork industry and its members are to be congratulated for bringing this issue to dispute settlement and making such a convincing case...."[23]

In the complaint against the ITA, the Canadian side argued that the ITA overstated the amount of government subsidies received by Canadian producers.[24] The ITA determined that "...the demand for live swine is 'substantially dependent' on the demand for fresh, chilled and frozen pork, inasmuch as pork constitutes the primary product of the slaughtered hog."[25] The Canadian group challenged the ITA's application of Section 771B, stating that it must be interpreted in accordance with U.S. countervail law and the GATT Articles of Agreement. In an

---

[22] Ibid., p.5.

[23] External Affairs and International Trade Canada, "FTA Injury Panel on Pork," in News Release, No. 180, August 24, 1990, p.1.

[24] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA" p.24.

[25] "United States-Canada Binational Panel Review," Memorandum Opinion and Order, USA 89-1904-06, September 28, 1990, p.12.

earlier decision, the GATT panel had ruled that the ITA's "...use of the automatic subsidy pass-through provision of U.S. trade law was inconsistent with the GATT. This provision deems that subsidies given to hog producers are passed on to pork processors."[26] In essence, the Canadian side argued that Section 771B must be interpreted so that countervailing duties are imposed on subsidies actually received. Section 771B views an upstream subsidy as automatic; i.e., that a subsidy on hogs would also be considered a subsidy on pork. The binational panel determined that upstream subsidies must be proved, and are not automatic. The Canadian complainants reasoned that the record did not reveal any supportive evidence that upstream subsidies supplied to hog producers were passed on to pork producers; therefore, Section 771B cannot be interpreted to impose countervailing duties on pork producers.[27] The binational panel deemed that the language of Section 771B and the legal history of the "...provision suggest that the statute was designed so as to [preclude] the need for such a test."[28]

---

[26] External Affairs and International Trade Canada, "DOC Responds to FTA Panel," in News Release, No. 282, December 7, 1990, p.1.

[27] "United States-Canada Binational Panel Review," Memorandum Opinion and Order, USA 89-1904-06, September 28, 1990, p.13.

[28] Ibid., p.23.

As a result, the binational panel decided that the ITA was misleadingly grouping the entire subsidy conferred on hogs to pork products. "The second binational panel maintained that the ITA's methodology was flawed when deriving subsidy figures for pork production from subsidies for live hogs."[29] As a result, the panel's ruling on the ITA's final determination was to remand the case for further consideration. In a Government of Canada news release, Crosbie expressed the general Canadian sentiment when he said, "We are encouraged by the panel's finding that the [Department of Commerce] must provide more evidence to support its ruling on the countervailability issue and the appropriateness of the conversion factor it used."[30]

The ITC and ITA subsequently issued their views on remand by reaffirming their previous decisions. It is conceivable that due to the asymmetrical nature of the Canada-U.S. trading relationship, Canada would not have undertaken the same course of action if the roles were reversed. Similar action by Canada might trigger an angry

---

[29] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA" p.25.

[30] External Affairs and International Trade Canada, "Ministers Pleased with Pork Ruling," in News Release, No. 219, September 28, 1990, p.2.

response in the U.S., thus endangering Canada's access to the U.S. market.

The binational panel determined that the ITC failed to follow its own notice on remand.[31] The ITC was "...criticized for [committing] errors of law and that the [ITC's] findings of material injury were still not adequately supported."[32] As a result, the binational panel remanded the case for a second time stating that the ITC's decision "...not [be] inconsistent with the panel's decision."[33] The ITC responded to this second remand order by reversing its final determination, concluding that Canadian pork imports to the U.S. did not constitute material injury to the U.S. pork industry. The Canadian side hailed this reversal as "...a great victory for the Canadian pork industry."[34] From the time the U.S. began imposing countervailing duties on pork (in September of

---

[31] "Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement," Memorandum Opinion and Order Regarding ITC's Determination on Remand, USA 89-1904-11, January 22, 1991, p.37.

[32] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA" p.25. The arguments presented by the binational panels are far more detailed, but could only be briefly discussed in this thesis.

[33] External Affairs Canada, The Canada U.S. Free Trade Agreement, (Ottawa, 1988), p.274.

[34] External Affairs and International Trade Canada, "Government Welcomes Latest Pork Ruling," in News Release, No. 35, February 12, 1991, p.1.

1989), to the February 1991 decision the U.S. had collected 17 million dollars which were now to be refunded to Canadian exporters.[35] The FTA's ability to curb U.S. behaviour bodes well for Canada-U.S. trade relations.

### *The First Extraordinary Challenge Committee Application Under the FTA*

Canadian enthusiasm was premature, since the political apparatus in the U.S. continued to operate. Two ITC Commissioners expressed their discontent by criticizing the binational panel for committing grievous errors in applying the FTA and interpreting U.S. law. Armed with these accusations the NPPC pressured the U.S. government to file an extraordinary challenge.[36]

To the disappointment of the Canadian side, the United States Trade Representative (USTR) Carla Hills was persuaded by U.S. pork producers to request the formation of an Extraordinary Challenge Committee (ECC). The request for an ECC was made in order to review the second remand decision of the ITC.

---

[35] External Affairs and International Trade Canada, Canadian International Relations Chronicle, (January-March, 1991), p.12. Also see External Affairs and International Trade Canada, "Government Welcomes Latest Pork Ruling," in News Release, No. 35, February 12, 1991, p.2.

[36] Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA" p.25.

> The parties that filed briefs and appeared before the Committee in support of the extraordinary challenge included: the U.S. Trade Representative ("USTR"), on behalf of the Government of the United States; the U.S. International Trade Commission ("ITC" or "Commission"); and the National Pork Producers Council, et al. ("NPPC"). [Hereinafter collectively referred to as "Petitioners"]. The parties that filed briefs and appeared before the Committee in opposition to the extraordinary challenge included: the Government of Canada; the Government of the Province of Alberta; the Canadian Meat Council, et al.("CMC") and Canada Packers, Inc.; and Moose Jaw Packers (1974) Ltd. ("MJP"). [Hereinafter collectively referred to as "Respondents"].[37]

On May 15, 1991, the ECC heard oral arguments.[38] The ECC is to review final decisions of a binational panel according to the threshold established under Article 1904.13:

> Where, within a reasonable time after the panel decision is issued, a Party alleges that:
>
> a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
> ii) the panel seriously departed from a fundamental rule of procedure, or
> iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and

---

[37] "Article 1904.13 Extraordinary Challenge Committee United States-Canada Free Trade Agreement," Memorandum Opinion and Order Regarding Binational Panel Remand Decision II, ECC-91-1904-01USA, June 14, 1991, p.7.

[38] Ibid., p.2.

> b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,
>
> that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.[39]

The first task of the ECC is to determine if grounds for an extraordinary challenge exist. The ECC must also find that such action "...materially affected the panel's decision and threatens the integrity of the binational panel review process...." This procedure is intended to protect the extraordinary challenge process from potential abuse by repeated appeals. The ECC is not an appeal mechanism to judge the merits of a binational panel decision. Some trade experts have denounced the U.S. request for a ECC review as yet another example of U.S. trade harassment.

Reinforcing the vision of the ECC as an extraordinary challenge body is the time frame in which decisions are to be rendered. Binational panels are to reach their final decisions within 315 days, while the ECC is given 30 days to issue its decision. Furthermore, while a binational panel review can be initiated by any interested party, only the U.S. and Canadian governments can request an extraordinary challenge. The petitioners supported their

---

[39] External Affairs Canada, The Canada U.S. Free Trade Agreement, pp.275-276.

claim for an extraordinary challenge by inferring that the binational panel "...seriously departed from a fundamental rule of procedure or manifestly exceeded its powers, authority or jurisdiction. [In addition] the petitioners alleged that in each instance, the panel's actions materially affected the panel decision and threatened the integrity of the binational panel review process."[40]

The petitioners claimed that the second remand decision, to strike certain evidence from the record, created a due process principle independent of U.S. law. The petitioners maintained that it was the responsibility of the binational panel to determine what U.S. law required with respect to such evidence. It was on this point that the U.S. felt the binational panel had "...seriously departed from a fundamental rule of procedure and manifestly exceeded its powers, authority or jurisdiction." The ECC responded to this argument by disagreeing with the U.S. allegations. The ECC cited the fact that the binational panel did examine a number of cases under U.S. law and balanced their findings with the parameters imposed on them by the FTA. The ECC established that the argument put forth by the petitioners did not prove that the

---

[40] "Article 1904.13 Extraordinary Challenge Committee United States-Canada Free Trade Agreement," Memorandum Opinion and Order Regarding Binational Panel Remand Decision II, ECC-91-1904-01USA, June 14, 1991, p.14.

binational panel ignored U.S. law. Consequently, the ECC concluded that the U.S.'s claim did not establish grounds for an extraordinary challenge according to Article 1904.13(a) of the FTA.

The petitioners also claimed that the binational panel "...improperly considered evidence outside the administrative record to arrive at its own conclusion that the ITC's determination of threat of injury was not supported by substantial evidence."[41] However, the ECC found that the U.S. did not provide substantial evidence to corroborate the claim that the binational panel substituted its own judgment for that of the ITC. Since the binational panel did not base its decision solely on the extra-record evidence, and since other evidence was considered the U.S. request for an extraordinary challenge was deemed not to meet the requirements under the FTA.

Subsequent contentions by the petitioners were that the binational panel "...created a rule of finality thereby usurping administrative authority that no U.S. court reviewing agency action possessed."[42] The binational panel's requirement that the issue be resolved in the second review restricted the number of times a binational

---

[41] Ibid., p.17.

[42] Ibid., p.18.

panel could send a dispute to remand. However, the ECC judged that the binational panel was within its authority to suggest the issue be resolved in the second review procedure. The binational panel's mandate is to resolve disputes in a timely fashion, and thus it was within its rights to remand the ITC's ruling and insist on a speedy resolution.[43] This functional aspect of the FTA is the introduction of unique and efficient procedures which, modified structuralists explain, would not be available in the absence of such an agreement.

The petitioners presented several other arguments against the binational panel's actions, which were also rejected by the ECC.[44] Since the grounds for an extraordinary challenge under the FTA's Article 1904.13 were not met, the ECC dismissed the U.S. request. As a result the ECC affirmed the binational panel's January 22, 1991 determination.[45] The binding ECC decision succeeded in putting an end to the collection of countervailing

---

[43] Ibid., pp.19-20. The rules of procedure that include designated time limits on the Chapter 19 procedure is outlined in The Canada U.S. Free Trade Agreement, Article 1904.14.

[44] Ibid. The other arguments presented by the petitioners against the binational panel are to complex to deal with in this thesis. However, of importance to this study is that the arguments by the petitioners did not satisfy the ECC.

[45] Ibid., p.24.

duties on Canadian pork. The U.S. also reimbursed Canada for 20 million dollars in paid duties.[46]

In the closing chapter, I will assess the significance of the FTA's dispute settlement mechanism compared to the GATT's dispute settlement procedures. A final assessment will also be undertaken of regime analysis and its relevance to future studies of regional as well as global trade agreements.

---

[46] External Affairs and International Trade Canada, "Extraordinary Challenge Committee Upholds Canadian Position in Pork Case," in News Release, No. 139, June 14, 1991, p.1.

# CHAPTER VI

## Conclusions and Observations

This thesis has demonstrated that the FTA dispute settlement mechanisms supplement those of the GATT in a number of respects. Dispute settlement in the FTA certainly has some of its own deficiencies. For example, the U.S. extraordinary challenge in the pork case demonstrates that FTA dispute settlement procedures can be prolonged, and binational panels under the FTA can only determine whether U.S. or Canadian investigating agencies have acted in accordance with each country's domestic laws. They cannot question the validity of the law itself. Nevertheless, my findings show that the FTA's dispute settlement mechanisms could have a positive demonstrative effect on the GATT's dispute settlement procedures.

One of the similarities that links the softwood lumber dispute with the pork dispute is the strategy used by U.S. interest groups to bring about changes to U.S. law or court interpretations of U.S. law. However, since the softwood lumber phases considered in this thesis are pre-FTA cases and the pork dispute under examination was conducted under the FTA's Chapter 19, the end results were different. In both the softwood lumber and pork disputes, part of the reversal of U.S. decisions was due to the changes in U.S.

law or the court interpretation of U.S. law.[1] Under the FTA changes to U.S. law would be more difficult. While this is an improvement over GATT, the FTA has no mechanism for dealing with changes in U.S. law made by new interpretations of past court precedents as was the case in the softwood lumber dispute.[2]

Although the FTA does not prevent the parties from changing countervailing duty laws, the requirement of notification and prior consultations are significant improvements over the GATT. These requirements act as an early warning system against potentially objectionable actions. Implementing notice and consultation processes, before the imposition of any potentially injurious laws take effect, may serve to eliminate or expedite the resolution of disputes. If changes in law are made they must be consistent with the GATT Subsidies Code and the objectives of the FTA. Another feature not found in the GATT is the requirement of each party to specifically name

---

[1] One should note that the change in legal interpretation in the pork case occurred just before the FTA came into effect.

[2] It is important to note that at the time of negotiations Canada was not concerned with new court interpretations of law (which in effect change laws), rather, the Canadian concern focused on senators responding to interest group pressures for amending U.S. statutes. Under the FTA, U.S. senators wanting to amend U.S. laws must specify Canada in the proposed legislation.

the other in legislative changes. Under Article 1903 which speaks to the review of statutory amendments, binational panels are permitted to recommend modifications and present declaratory opinions in regard to legislative changes. If recommendations are made, compulsory consultations lasting 90 days take place where both parties attempt to reach a mutual agreement which could include remedial legislation. If remedial legislation is not introduced or enacted into law within 9 months, the other party may take retaliatory action in the form of legislation of comparable effect or equivalent executive action or may terminate the FTA with 60 days notice. The GATT provides no such mechanisms.[3]

The FTA further supplements the GATT by appointing trade experts to dispute settlement panels. Unlike the GATT these panel members are also citizens of the disputing countries. GATT panels examine whether a country is in compliance with vaguely outlined normative standards of behaviour which are subject to political and ideological interpretations. On the other hand, the FTA's binational panels examine whether a country is complying with its own domestic laws which are characterized by more precise and defined rules regarding expected behaviour. This is also a

---

[3] Due to asymmetrical interdependence it is questionable if Canada really can initiate a retaliatory blow; furthermore, to terminate the FTA could lead to an increased use of countervailing duties by the U.S.

shortcoming of the FTA, since the dispute settlement mechanism can only question if decisions are made in accordance with U.S. or Canadian law. The FTA does not provide for questioning the fairness of the U.S. or Canadian law itself. Although the FTA has shortcomings in some respects, overall the FTA does provide some advantages over GATT.

The GATT's decision making procedures for dispute settlement are undermined by a number of shortcomings, such as blockage by losing parties, delays in the establishment of panels, an inadequate panel selection process and a lack of competent and neutral panelists. In contrast, the FTA attempts to promote harmonious trade relations by providing procedures for quick and effective conflict resolution. Since the Canada-U.S. FTA is a two party agreement, the elimination of third party involvement which could significantly complicate and delay settlements, should make dispute settlement less cumbersome.[4]

Without the FTA Canada would not have binational panels, which could leave Canada captive to unilateral

---

[4] Gary N. Horlick and Debra A. Valentine, "Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement," in The Continuing Legal Education Society of British Columbia, (Vancouver, 1988), p.6.1.40.

decisions by the U.S.[5] The "binding rule" for binational panel decisions has to date been respected by both Canada and the U.S. There is no equivalent to the FTA's binding review procedures in the GATT. Referrals of countervailing duty disputes to a binational panel of experts, responsible for binding decision making, based on agreed rules and strict time frames are not benefits available through the GATT. However, Ritchie points out that the procedures of the investigative agencies in both Canada and the U.S. remain lengthy; hopefully, they will be shortened as the FTA evolves over time.[6]

Binational panel decisions have in fact been issued considerably quicker than either domestic judicial review or GATT dispute settlement decisions. Binational panels with a Canadian majority have ruled against Canada, while binational panels with a U.S. majority have ruled against the U.S.[7] Furthermore, the decision of the extraordinary challenge committee in the pork case (to uphold the

---

[5] Drew Fagan, "Canada Wins Trade Round: Panel Rules Mainly Against U.S. Stand on Softwood Lumber," in The Globe and Mail, (May 7, 1993), p.A2.

[6] Gordon Ritchie, "To Tony Pagliacci," 5 March 1992, Letter in the Simon Fraser University Archives, The Pagliacci Papers, MG 9, 12 March 1992.

[7] Joseph A. McKinney, "Dispute Settlement Under the U.S.-Canada Free Trade Agreement," in Journal of World Trade, (Switzerland, 1991), p.125.

binational panel's findings) has sent a clear message that the ECC is not to be considered an avenue for repeated appeals of routine trade issues.[8] Whether the U.S. continues to resort to ECC procedures remains to be seen. Nevertheless, extraordinary challenges have only been used on two occasions to this point.[9]

The Canadian and U.S. governments cannot mutually agree to undo an FTA panel decision.[10] The willingness of both Canada and the U.S. to delegate the role of binding decision making to a binational panel augurs well for the effective enforcement of the FTA's rules. Delegating authority to binational panels for binding decision making has meant that both Canada and the U.S. have relinquished some degree of control over domestic trade policy.

---

[8] In fact, after the May 6, 1993 ruling by the binational panel, which Canada hailed as a major move towards the removal of the U.S. lumber duty, U.S. producers have not automatically resorted to an extraordinary challenge. Instead, the possibility of an extraordinary challenge is being carefully reviewed in light of previous ECC decisions.

[9] Michael Wilson, "To Tony Pagliacci," 3 March 1992, Letter in the Simon Fraser University Archives, The Pagliacci Papers, MG 9, 12 March 1992. This has satisfied the Canadian International Trade Minister Michael Wilson, who claims that the dispute settlement provisions of the FTA have been operating in a more than satisfactory manner.

[10] William J. Davey, "Dispute Settlement Under the Canada-U.S. Free Trade Agreement," Trade-Off on Free Trade: The Canada-U.S. Free Trade Agreement, ed. by Marc Gold & David Leyton-Brown, (Toronto, 1988), p.176.

In implementing a supplementary system of rules and decision making procedures for dealing with countervailing duties, Canada and the U.S. also aspired to achieve a common definition of the term "subsidy." However, the FTA is unlikely to achieve improved changes in the definition of contentious terms such as "subsidy" because this would affect the U.S.'s relationship with Japan and the European Community; consequently, Canada and the U.S. will have to look to the GATT for such changes. In addition there have not been any promising indications that Canada and the U.S. are even attempting to fulfill their obligations within the 7 year period provided for in Article 1906 of the FTA.[11] Clearly, legal definitions of contentious terms such as "subsidy" need to be dealt with by the GATT.

Greater confidence in the GATT dispute settlement mechanism could be re-established by incorporating some of the FTA's rules and decision making procedures. The lengthy decision making process for arriving at dispute settlements could be improved by adopting firm time tables, similar to those outlined in the FTA. The ability of GATT regime members to block decisions could also be resolved if the contracting parties could agree on a binding decision

---

[11] NAFTA has deleted any reference to a 5-7 year period to procure a common definition of the term "subsidy."

making rule.[12] However, such changes can occur only if governments are prepared to forfeit more control over their domestic trade policies. This study demonstrates that the FTA's binational panels have sought to achieve thoughtful, articulate and persuasive decisions that have not resulted in the emergence of a "Canadian or U.S." dominated approach. This would tend to refute the perception that the dispute settlement procedures are maintained because they benefit only the major powers.

The FTA's rule oriented approach combined with strict decision making procedures for dispute settlement are a further improvement over the GATT. The GATT regime has not been a sufficient mechanism for managing and further advancing the trade liberalization norm; consequently, the GATT and the FTA will function as two interrelated entities, under the auspices of the global trade regime. A binational body of experts reviewing final domestic investigative agency determinations, should serve to reduce the Canadian sentiment that U.S. trade laws are unfairly applied. One of the key reasons Chapter 19 has been hailed as a huge success is because panelists have been

---

[12] Gary N. Horlick and F. Amanda DeBusk, "The Functioning of U.S.-Canada Free Trade Agreement Dispute Resolution Panels," 21 June 1991, pp.40-41, in the Simon Fraser University Archives, The Pagliacci Papers, MG 9, 12 March 1992.

knowledgeable trade experts, such as private lawyers and professors.[13]

Although satisfaction with the FTA's binational panels will serve as an inspiration for reforms at future GATT negotiations, there is room for improvements to the dispute settlement rules and decision making procedures of the FTA. For example, the FTA's time limits could be made even shorter and Chapter 19 type panels could be expanded to include customs interpretations and other technical areas.[14]

It is important not to raise unrealistic expectations or to overemphasize the usefulness of the FTA. For example, in the face of a "hard-line" U.S. position it would seem to be more desirable to have a GATT panel decision which would have the "moral force" of all the "...GATT regime members behind it...."[15] What has been made clear, by both Canada and the U.S., is that promoting economical and prompt decision making procedures is a necessary condition in the pursuit of advancing the

---

[13] Gary N. Horlick, "The U.S.-Canada FTA and GATT Dispute Settlement Procedures: The Litigant's View," in Journal of World Trade, (April 26, 1992), p.10.

[14] Ritchie, "To Tony Pagliacci," 12 March 1992.

[15] Horlick, "The U.S.-Canada FTA and GATT Dispute Settlement Procedures: The Litigant's View," p.9.

fundamental GATT norm of trade liberalization. A legal or rule oriented approach to dispute settlement should result in more precise decision making. With the FTA's introduction of a rule oriented approach and strict decision making procedures for settling disputes both Canadian and U.S. petitioners (and respondents) can expect to benefit.[16] Furthermore, an adjudicative approach is premised on the principle of due process and fairness that is likely to favour Canada--which does not possess considerable political and economic strength in order to force a particular agenda.

Although the FTA's dispute settlement mechanisms go beyond those of the GATT, in some important respects the GATT regime provides a necessary framework within which the FTA's provisions need to develop and operate.[17] In essence, both the GATT and the FTA are necessary but not sufficient in themselves for moving further along the continuum of trade liberalization. Nevertheless, potential improvements at both the regional and global levels will be facilitated by the fact that the Canada-U.S. FTA and the GATT Articles of Agreement are "living" documents that are

---

[16] Horlick and Valentine, "Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement," p.6.1.12.

[17] Also, changes in the GATT Uruguay Round could have significance for the FTA's dispute settlement procedures.

expected to continue evolving over time. A regime analysis approach to the study of how the GATT and the FTA's dispute settlement procedures deal with countervailing duties, is accommodated by the room afforded for amplification and interpretation of various principles, norms, rules and decision making procedures. Regime analysis provides insight into both the GATT and the FTA's strengths and weaknesses in a manner that could otherwise not be attained.

The GATT regime's trade liberalization and non-discrimination norms have been discussed as interdependence norms while reciprocity has been viewed as a sovereignty norm. As is pointed out by Finlayson and Zacher, norms do not exist in isolation, but are often either mutually supportive or in conflict.[18] Tensions between trade liberalization and reciprocity threaten to undermine the basic pillars of trade arrangements. For example, while reciprocity on the one hand is viewed as politically necessary if trade barriers are to succeed, it does tend to constrain progress toward trade liberalization.[19] When such tensions escalate into disputes, the FTA's binational

---

[18] Jock A. Finlayson and Mark W. Zacher, "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," in International Regimes, ed. by Stephen D. Krasner (United States, 1983), p.305.

[19] Ibid., p.306.

panels will serve to increase the perception of fair and impartial decision making. Modified structuralists view this aspect of the FTA as one of the functional benefits to emerge from cooperation on trade management issues.

The majority of currently available literature on regimes tends to focus only on global trade management issues. However, important regional free trade agreements can establish rules and decision making procedures that have a demonstrative effects on GATT. As a result it becomes necessary to examine how global and regional arrangements interact. This thesis has shown that the present GATT dispute settlement procedures are inadequate for resolving trade disputes between highly interdependent partners. For this reason regional trade agreements, such as the Canada-U.S. FTA, have emerged. Regime analysis, therefore, should be extended to an examination of regional as well as global arrangements in issue areas such as trade. Furthermore, modified structuralism provides a perspective which permits us to examine trade arrangements from a regional as well as global perspective. This is particularly the case since modified structuralists see the development of regimes as necessary for conflict resolution among highly interdependent countries such as Canada and the U.S.

Canada and the U.S. negotiated a FTA that addressed their dissatisfaction with the dispute settlement procedures of the GATT. For modified structuralists, this type of cooperation is necessary for the advancement of trade liberalization, particularly between highly interdependent countries such as Canada and the U.S. Modified structuralists see trade arrangements as instruments perpetuating interdependence which usually results in mutual benefits.

The modified structuralist perspective emphasizes the importance of cooperation between countries that are highly interdependent. Consequently, in order for Canada to prosper it must continue to strengthen dispute settlement mechanisms towards a common law of regional commerce. The global dispute settlement mechanisms, available through the GATT regime, have not provided Canada with an effective voice against U.S. protectionist measures. In the 1986 phase of the softwood lumber dispute, Canada felt that there was little point in applying to the GATT. From the Canadian standpoint, the GATT sanctioned right to retaliate is really no option because retaliation would only endanger Canada's access to U.S. markets. Furthermore, retaliation could invite a further retaliatory response by the U.S.

During the 1986 phase of the softwood lumber case, Canada made a strategical error by proceeding in the same manner as it had during the 1982-1983 phase, which Canada had won. Canadian strategists failed to recognize the potential impact of the protectionist winds blowing in the U.S. Canada also misjudged the influence of the U.S. lumber lobby, believing that the 1986 phase would be judged on its merits. However, interest groups politicized the issue by raising the profile of the softwood lumber dispute and linking it to the FTA negotiations. Concerned that the ongoing dispute over softwood lumber would jeopardize the FTA negotiations, Canada agreed to impose an export tax on Canadian softwood lumber. Underestimating the political dynamics and the effect that U.S. interest groups could have on the ITA and ITC decisions, Canada was left with little choice but to sign the MOU.[20] The GATT did not offer Canada an effective mechanism for settling the softwood lumber dispute.[21] As a result the modified structuralists perspective would support supplementary regional agreements, submitting that they become necessary

---

[20] Roger Hayter, "International Trade Relations and Regional Industrial Adjustment: The Implications of the 1982-86 Canadian-US Softwood Lumber Dispute for British Columbia," in Environment and Planning A, (Great Britain, 1992), p.162.

[21] Now that the FTA offers tangible solutions through chapter 19's dispute settlement procedures for countervailing duties, the softwood lumber dispute is being pursued through the FTA.

for perpetuating the interdependence norm of trade liberalization.

The FTA is expected to reduce the potential for highly politicized solutions to trade disputes. The danger of highly politicized solutions is their increased potential for retaliation and protectionism. In fact, the political environment that pressed Canada to impose an export tax on softwood lumber has changed and the export tax has now been lifted since 1991. This triggered an immediate response by the U.S., setting into action another phase of the most acrimonious trade dispute between Canada and the U.S. The softwood lumber dispute is an example of why dispute settlement procedures, that provide arbitration in a depoliticized environment, is needed.

The FTA was only a few days old when the first dispute was initiated against Canadian pork producers. Canada is highly dependent on the U.S. market for selling fresh, chilled and frozen pork. On the other hand the U.S. is concerned with its imports of Canadian pork because Canadian government programs appear to grant Canadian pork producers an advantage over U.S. producers. Since 1985 when the ITA ruled that certain government programs provide subsidies to Canadian pork exporters, Canada has argued that the problems of the U.S. industry are in fact caused

by market conditions and the high value of the U.S. dollar.[22]

After years of lobbying from the U.S. pork industry, Congress amended U.S. law to facilitate *de novo* petitions against Canada. By the time the FTA came into effect the NPPC was armed with a new law and was ready to file a countervailing duty petition against Canada. With both the ITA and ITC making final determinations against Canadian pork in 1989, Canada invoked a "twin tracks" approach to dispute settlement by requesting that both the GATT and the FTA examine the dispute. This provides a basis for comparison of the GATT and the FTA with the pork dispute as well as the softwood lumber dispute.

When the FTA's binational panel remanded the ITC's final determination, Crosbie noted that, "Canada sought, during the FTA negotiations, an improved procedure which affords Canadian exporters an opportunity to obtain timely redress in...countervail cases [and] this decision today demonstrates the efficacy of the Chapter 19 process."[23]

---

[22] Department of External Affairs, "U.S. Commerce Department Decision on Subsidies Affecting Canadian Live Swine and Fresh, Chilled or Frozen Pork," in Communiqué, No. 80, June 11, 1985, p.2.

[23] External Affairs and International Trade Canada, "FTA Injury Panel on Pork," in News Release, No. 180, August 24, 1990, p.1.

The reversal of the ITC decision to comply with the FTA's binational panel decision was welcome news for the Canadian side. The ITC's reversal was made possible because of the unique dispute settlement procedures provided for by the FTA which supplements the GATT regime. The ITC's reversal demonstrates the effect and value of the Chapter 19 procedures in dealing with disputes in a fair, expeditious and binding review of countervailing duty determinations.[24]

As is pointed out by Cohn, the FTA does not prevent Canada or the U.S. from using the GATT dispute settlement procedures. In fact the FTA acts to supplement the GATT because they both pass judgment on different questions. The FTA binational panels are only permitted to examine whether a country's countervailing duty decisions are made in accordance with its own laws. On the other hand "..the GATT can determine whether or not a country's laws are consistent with the..." GATT Articles of Agreement. In contrast, the FTA cannot pass judgment on the laws themselves, instead, the FTA was only able to question the accuracy of U.S. methodology and statistics. In addition the FTA and the GATT complement each other as is evident in the pork case, since both dispute settlement panels reached

---

[24] External Affairs and International Trade Canada, "Government Welcomes Latest Pork Ruling," in News Release, No. 35, February 12, 1991, p.1.

similar decisions.[25] However, the U.S. did not implement the GATT decision until 11 months later because it was awaiting the FTA decision.

Although Canada was disappointed with the U.S. decision to file an extraordinary challenge in the pork case, the U.S. did not satisfy the grounds necessary under Article 1904.13. The FTA has provided some control over U.S. behaviour and perhaps reduced the degree of Canada's asymmetrical interdependence on the U.S. Many experts could not have predicted that the U.S. would have agreed to a binational panel mechanism for settling trade disputes. Richard Lipsey expressed his surprise when he stated, "If anyone had told me in 1985 that the U.S. would allow an international panel, on which there would not necessarily be a majority of U.S. citizens, to judge the fairness with which U.S. agencies administer U.S. laws, I would have told them they were hallucinating."[26]

Although the FTA would not have prevented a court interpretation widening the application of a "specificity

---

[25] For the information presented in this paragraph, I am indebted to Theodore H. Cohn, "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," Series, University of Maine, Number 10 (June, 1992) p.26.

[26] "Verbatim," in The Vancouver Sun, (March 27, 1993), p.B3.

test" as was the case during the softwood lumber dispute; it would have made changing the law, which was used in the pork case, more difficult. When negotiating the FTA, Canada was not concerned with new precedents acting to form new laws, rather Canada was concerned with U.S. interest groups filing petitions to bring new cases. The FTA's notification and consultation process could have altered or interrupted the imposition of a U.S. law against pork, before harmful measures could be applied. Through consultations mutual agreements on the language of a U.S. law against Canadian pork could have prevented the pork dispute altogether. In the softwood lumber case the change in law was due to a court interpretation, while in the pork case the change in law was a result of an amendment to a statute. Nevertheless, the effect for Canada was the same. Although the pork case was dealt with under the FTA the change in law occurred before the FTA was implemented. In the pork case, unlike the softwood lumber case, Canada persevered through all the channels available in the FTA, including the extraordinary challenge. In the end Canada was able to carry the day. The difference between the softwood lumber case and the pork case that made this possible, was the FTA.

I believe that studying the Canada-U.S. trade relationship from a regime analysis perspective provides us

with the greatest insight into global and regional trading arrangements. Historically, Canadian foreign policy strategies have been driven by Canada's relationship with the U.S. One of the principal features of Canadian foreign policy has been Canada's support of international organizations. The principal concern of Canadians remains Canada's vulnerability to U.S. power and influence. The method Canada chose to manage its relationship with its sometimes insensitive neighbour to the south has been through diplomacy. As a result, it is difficult to explain why Canada was so long in warming to the idea of a regional FTA. Historically, of course, there have been fears that a FTA would endanger Canadian sovereignty and compromise Canada's control over foreign affairs.

Although Canada worked hard through the GATT regime to reduce international tariff barriers, by the 1980's Canada was facing increased use of non-tariff barriers by the U.S. The GATT was a valuable institution for reducing tariff barriers, however, it proved ineffective for settling disputes, particularly disputes over countervailing duties. Canada's asymmetrical interdependence with the U.S., combined with concerns over the effect protectionism would have on its economic well being, inspired Canada to initiate talks to negotiate a FTA. The most important aspect of the FTA for Canada was the inclusion of dispute

settlement procedures for dealing with countervailing duties.[27]

As the voice of special interests in the U.S. continues to grow, Canada will turn more and more to the rule of law for dealing with countervailing duties. The rule of law and the FTA's Chapter 19 panels are mechanisms that will continue to benefit Canada for abridging asymmetrical interdependence and political interference, through more objective forums. In view of the inadequacies of the GATT trade regime with regard to dispute resolution mechanisms, the FTA rules and decision making procedures in this area have supplemented the GATT measures. The FTA dispute resolution mechanisms in turn may have a positive demonstrative effect on a GATT Uruguay Round agreement; however, the FTA (and NAFTA) cannot arrive at a common definition of a subsidy. This will depend on a GATT Uruguay Round agreement. Consequently, the global trade regime may in future depend on a balancing between multilateral and regional institutions, such as the GATT and the FTA. While the multilateral agreement will provide

---

[27] Negotiations on a Canada-U.S. FTA began while Canada and the U.S. were embroiled in a bitter dispute over countervailing duties on Canadian softwood lumber. Powerful protectionist lobbies in the U.S. threatened to persuade U.S. investigative agencies to impose unilateral decisions against Canada, thus threatening to cause injury to Canada's economy.

a broad framework to the rules and decision making procedures of regional agreements, the regional decision making mechanisms may go well beyond those of the multilateral organizations in some respects. Regime analysis will have to take more account of this "balancing act" between the global and regional levels if it is to remain relevant in the study of the international political economy.

# Bibliography

## Journals and News Articles

Bliss, Julia C. "GATT Dispute Settlement Reform in the Uruguay Round: Problems and Prospects," Stanford Journal of International Law. 23 (Spring, 1987), 31-55.

"Canadian Lumber Ruled Possible Threat to U.S.," The Globe and Mail, 18 November 1982, p.B16.

Cohn, Theodore H. "Emerging Issues in Canada-U.S. Agricultural Trade Under the GATT and FTA," Canadian-American Public Policy. Series. University of Maine. Number 10 (June, 1992), 1-57.

Coughlin, Cletus C. "U.S. Trade-Remedy Laws: Do They Facilitate or Hinder Free Trade?" Federal Reserve Bank of St. Louis. (July/August, 1991), 3-18.

Fagan, Drew, "Canada Wins Trade Round: Panel Rules Mainly Against U.S. Stand on Softwood Lumber," The Globe and Mail. 7 May 1993, pp.A1-A2.

Haggard, Stephan and Beth A. Simmons. "Theories of International Regimes," International Organization. 41 (Summer, 1987), 491-517.

Hayter, Roger. "International Trade Relations and Regional Industrial Adjustment: The Implications of the 1982-86 Canadian-US Softwood Lumber Dispute for British Columbia," Environment and Planning A, 24 (Great Britain, 1992), 153-170.

Horlick, Gary N. "The U.S.-Canada FTA and GATT Dispute Settlement Procedures: The Litigant's View," Journal of World Trade. 26 (April, 1992), 5-15.

Howlett, Michael. "The Threat of U.S. Protectionism and the U.S.-Canada Free Trade Agreement Reconsidered: The Questionable Precedent of the 1986 Softwood Lumber Case," in World Competition. 12 (No. 4, 1989), 65-81.

Hudec, Robert E. "GATT Dispute Settlement After the Tokyo Round: An Unfinished Business," Cornell International Law Journal. 13 (Summer, 1980), 146-203.

King, John, "Lumber Decision Eases U.S.-Canada Tension," The Globe and Mail, 9 March 1983, p.20.

McKinney, Joseph A. "Dispute Settlement Under the U.S.-Canada Free Trade Agreement," Journal of World Trade. 25 (Switzerland, 1991), 117-125.

McQueen, Rod, "NAFTA will Likely be Pushed Through in U.S. Next Year," Financial Post, 14 November 1992, p.1.

Morton, Peter, "U.S. Leads Move to Salvage GATT," Financial Post, 20 October 1992, p.1.

Noble, Kimberley, "How Lumber Firms Lost Lobbying War: Lumber Lobby Fell Short in Failing to Sway Public," The Globe and Mail, 15 December 1987, p.B4.

Noble, Kimberley, "An Industry at War," The Globe and Mail, 6 November 1991, p.B18.

O'Meara, Richard L. "Regimes and Their Implications for International Theory," Millennium: Journal of International Studies. 13 (No.3, 1984), 245-264.

Pease, David A. "Conversation: Coalition Prospects Never Better," Forest Industries. (July, 1986), p.2.

Pescatore, Pierre. "The GATT Dispute Settlement Mechanism: Its Present Situation and its Prospects," Journal of World Trade. 27 (February, 1993), 5-20.

Sasges, Mike, "Hurricane Brewing as Protectionism Gains Favor in U.S.," The Vancouver Sun, 26 February 1982, p.E7.

"The Positives in NAFTA Deal," Editorial in the Financial Post, 1 December 1992, p.10.

"Verbatim," The Vancouver Sun, 27 March 1993, p.B3.

**Books**

Cohn, Theodore H. The International Politics of Agricultural Trade: Canadian-American Relations in a Global Agricultural Context. Vancouver: University of British Columbia Press, 1990.

Cohn, Theodore H. "Canada and the Ongoing Impasse Over Agricultural Protectionism," Canadian Foreign Policy and International Economic Regimes. Edited by A. Claire Cutler and Mark W. Zacher. Vancouver: University of British Columbia Press, 1992.

Davey, William J. "Dispute Settlement Under the Canada-U.S. Free Trade Agreement," Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement. Edited by Marc Gold & David Leyton-Brown. Toronto: The Carswell Company Limited, 1988.

Destler, I.M. American Trade Politics. 2nd ed. Washington: Institute for International Economics, 1992.

Doran, Charles F and Timothy J. Naftali. U.S.-Canadian Softwood Lumber: Trade Dispute Negotiations. Washington: The Johns Hopkins University, 1987.

Easton, Edward R. and William E. Perry. "Countervailing Duty Investigations," Law & Practice of United States Regulation of International Trade. Edited by Charles R. Johnston, Jr., New York: Oceana Publications, Inc., 1989.

Finlayson, Jock A. and Mark W. Zacher. "The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions," International Regimes. Edited by Stephen D. Krasner. United States: Cornell University Press, 1983.

Gifis, Steven H. Law Dictionary. 3rd ed. New York: Barron's Educational Series, Inc., 1991.

Hilf Meinhard. "EC and GATT: A European Proposal for Strengthening the GATT Dispute Settlement Procedures." GATT and Conflict Management: A Transatlantic Strategy for a Strong Regime. Edited by Reinhard Rode. Boulder: Westview Press, 1990.

Horlick, Gary N. and Debra A. Valentine. "Improvements in Trade Remedy Law and Procedures Under the Canada-United States Free Trade Agreement," The Continuing Legal Education Society of British Columbia. Vancouver: The Continuing Legal Education Society of British Columbia, 1988.

Hudec, Robert. "Comments," The Canada-United States Free Trade Agreement: The Global Impact. Edited by Jeffrey J. Schott and Murray G. Smith. Washington: Institute For International Economics, 1988.

Kelleher, Stephen. "Trans-Border Business Planning After Free Trade," The Continuing Legal Education Society of British Columbia. Vancouver: The Continuing Legal Education Society of British Columbia, 1989.

Keohane, Robert O. "The Demand for International Regimes," International Regimes. Edited by Stephen D. Krasner. United States: Cornell University Press, 1983.

Keohane, Robert O. After Hegemony: Cooperation and Discord in the World Political Economy. New Jersey: Princeton University Press, 1984.

Krasner, Stephen D. "Structural Causes and Regime Consequences: Regimes as Intervening Variables," International Regimes. Edited by Stephen D. Krasner. United States: Cornell University Press, 1983.

Lazar, Fred. The New Protectionism: Non-Tariff Barriers and Their Effects on Canada. Toronto: James Lorimer & Company, Publishers, 1981.

Leyton-Brown, David. Weathering the Storm: Canadian-U.S. Relations, 1980-83. Toronto: C.D. Howe Institute, 1985.

Lipsey, Richard G. and Robert York. Evaluating the Free Trade Deal: A Guided Tour Through the Canada-U.S. Agreement. Toronto: C.D. Howe Institute, 1988.

Percy, Michael B. and Christian Yoder. The Softwood Lumber Dispute and Canada-U.S. Trade in Natural Resources. Nova Scotia: The Institute for Research on Public Policy, 1987.

Plano, Jack C. and Roy Olton. The International Relations Dictionary. 4th ed. Oxford: CLIO Press Ltd., 1988.

Rode, Reinhard. ed., "Introduction," GATT and Conflict Management: A Transatlantic Strategy for a Strong Regime. Boulder: Westview Press, 1990.

Rugman, Alan M. and Andrew D.M. Anderson. Administered Protectionism in America. New York: Croom Helm, 1987.

Smith, Margaret. Subsidies and United States Trade Law: The Application to Canada. Ottawa: Library of Parliament Research Branch, 1990.

Spero, Edelman Joan. The Politics of International Economic Relations. 4th ed. New York: St. Martin's Press, 1990.

Steger, Debra P. "Dispute Settlement," Trade-Offs on Free Trade: The Canada-U.S. Free Trade Agreement. Edited by Marc Gold & David Leyton-Brown. Toronto: The Carswell Company Limited, 1988.

Stein, Arthur A. "Coordination and Collaboration: Regimes in an Anarchic World," International Regimes. Edited by Stephen D. Krasner. United States: Cornell University Press, 1983.

Stone, Frank. "Institutional Elements and Dispute Resolution Under the FTA," The Canada U.S. Free Trade Agreement: Implications, Opportunities, and Challenges. Edited by Daniel E. Nolle. New York University Press, 1988.

Tyakoff, Sharn. The Canada-U.S. Softwood Lumber Dispute: An Interdependence Approach. Burnaby: Simon Fraser University, 1988.

Yogis, John A. Canadian Law Dictionary. 2nd ed. New York: Barron's Educational Series, Inc., 1990.

**Government and Special Documents**

"Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement," Memorandum Opinion and Remand Order. USA 89-1904-11. August 24, 1990.

"Article 1904 Binational Panel Review under the United States-Canada Free Trade Agreement," Memorandum Opinion and Order Regarding ITC's Determination on Remand. USA 89-1904-11. January 22, 1991.

"Article 1904.13 Extraordinary Challenge Committee United States-Canada Free Trade Agreement," Memorandum Opinion and Order Regarding Binational Panel Remand Decision II. ECC-91-1904-01USA. June 14, 1991.

Canadian Softwood Lumber Committee. "U.S. Countervailing Duty Investigation: March 8, 1983 Report #18," Vancouver: Canadian Softwood Lumber Committee, 1983.

Canadian Softwood Lumber Committee. "U.S. Countervailing Duty Investigation: March 23, 1983 Report #19," Vancouver: Canadian Softwood Lumber Committee, 1983.

Canadian Softwood Lumber Committee. "Chronology of Events Regarding U.S. Actions Against Canadian Softwood Lumber Industry," Vancouver: Canadian Softwood Lumber Committee, 1986.

Canadian Forest Industries Council. "Chronology: United States/Canada Trade Actions 1982-1987 Re Lumber and other Forest Products," Vancouver: Canadian Forest Industries Council, 1987.

Christie, Leonard A. "Livestock: Issues in the Canadian Pork Industry," Research Branch of the Library of Parliament. Ottawa: The Research Branch of the Library of Parliament. November, 1991.

Department of External Affairs. "U.S. Commerce Department Decision on Subsidies Affecting Canadian Live Swine and Fresh, Chilled or Frozen Pork," in Communiqué, No. 80, Ottawa: Department of External Affairs, June 11, 1985.

External Affairs Canada. The Canada-U.S. Free Trade Agreement. 2nd ed. Ottawa: The International Trade Communication Group, 1988.

External Affairs and International Trade Canada. Canadian International Relations Chronicle. Ottawa: External Affairs and International Trade Canada. July-September, 1989.

External Affairs and International Trade Canada. "FTA Injury Panel on Pork," News Release. No. 180. August 24, 1990.

External Affairs and International Trade Canada. Canadian International Relations Chronicle. Ottawa: External Affairs and International Trade Canada. July-September, 1990.

External Affairs and International Trade Canada. "Ministers Pleased with Pork Ruling," News Release. No. 219. September 28, 1990.

External Affairs and International Trade Canada. "DOC Responds to FTA Panel," News Release. No. 282. December 7, 1990.

External Affairs and International Trade Canada. Canadian International Relations Chronicle. Ottawa: External Affairs and International Trade Canada. January-March, 1991.

External Affairs and International Trade Canada. "Government Welcomes Latest Pork Ruling," News Release. No. 35. February 12, 1991.

External Affairs and International Trade Canada. "Extraordinary Challenge Committee Upholds Canadian Position in Pork Case," News Release. No. 139. June 14, 1991.

Focus GATT Newsletter. "Canada/United States: US Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada," October, 1990.

General Agreement on Tariffs and Trade. Basic Instruments and Selected Documents: Text of the General Agreement 1969. Vol. IV. Geneva: Switzerland, 1969.

General Agreement on Tariffs and Trade. GATT Activities in 1980. Geneva: Switzerland, 1981.

General Agreement on Tariffs and Trade. GATT Activities 1989: An Annual Review of the Work of the GATT. Geneva: Switzerland, 1990.

General Agreement on Tariffs and Trade. "United States-Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada," Report by the Panel. September 5, 1990.

"Preliminary Affirmative Countervailing Duty Determination; Fresh, Chilled, and Frozen Pork from Canada," Federal Register. Vol. 54. No. 87. May 8, 1989.

"Review the Inspection and Increased Importation of Canadian Market Swine and Pork Products," Hearing before the Subcommittee on Livestock, Dairy, and Poultry of the Committee on Agriculture. Serial No. 101-16. Washington: U.S. Government Printing Office. May 19, 1989.

The Bureau of National Affairs. "Countervailing Duties: Analysis," Washington: The Bureau of National Affairs Inc., 1982.

The Bureau of National Affairs. U.S.-Canada Free Trade Agreement: The Complete Resource Guide. Vol. I., Washington: The Bureau of National Affairs Inc., 1988.

United States Department of Commerce International Trade Administration. "United States Department of Commerce International Trade Administration Preliminary Negative Countervailing Duty Determination Certain Softwood Products From Canada," Washington: Department of Commerce, 1982.

United States Department of Commerce News. "Commerce Finds No Significant Subsidies on Canadian Softwood Lumber Imports," Washington: Department of Commerce, 1983.

"United States-Canada Binational Panel Review," Memorandum Opinion and Order. USA 89-1904-06. September 28, 1990.

**Interviews: Letters: Manuscripts: Archival Sources**

Horlick, Gary N. and F. Amanda DeBusk. "The Functioning of U.S.-Canada Free Trade Agreement Dispute Resolution Panels," 21 June, 1991. In the Simon Fraser University Archives. The Pagliacci Papers. MG 9. 12 March 1992.

Kiss, Leslie. Telephone Interview. 16 April 1993. In the Simon University Archives. The Pagliacci Papers. MG 9. 12 March 1992.

Lowenfeld, Andreas F. "Binational Dispute Settlement Under Chapter 18 and 19 of the Canada-United States Free Trade Agreement: An Interim Appraisal," Administrative Conference of the United States. April, 1991. In the Simon Fraser University Archives. The Pagliacci Papers. MG 9. 12 March 1992.

Ritchie, Gordon. "To Tony Pagliacci," 5 March 1992. Letter in the Simon Fraser University Archives. The Pagliacci Papers. MG 9. 12 March 1992.

Wilson, Michael. "To Tony Pagliacci." 3 March 1992. Letter in the Simon Fraser University Archives. The Pagliacci Papers. MG 9. 12 March 1992.