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***Softwood Lumber From Canada: Natural Resources and the Search for a Definition of Countervailable Domestic Subsidy***

by

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# SOFTWOOD LUMBER FROM CANADA: NATURAL RESOURCES AND THE SEARCH FOR A DEFINITION OF COUNTERAVAILABLE DOMESTIC SUBSIDY

Francois Tougas\*

## I. INTRODUCTION

Amid the posturing at Lisbon and Punta del Este in the summer of 1986 were attempts to get agriculture and trade in services onto the agenda for the next Round<sup>1</sup> of talks of the Contracting Parties to the General Agreement on Tariffs and Trade (GATT).<sup>2</sup> Despite opposition to the inclusion of agriculture and trade in services, the United States was able to lead the way to a negotiation of both of these very important categories of trade. Also mentioned in the agenda<sup>3</sup> were natural resources. It is to this category of trade that United States legislation, quasi-judicial decisions, and executive discretion have spoken in recent years, aggravating resource-rich nations trading with the United States. As a result of many of these decisions, new barriers have arisen to the successful sale of resource exports. Whether those barriers are justified in combatting "un-fair" trade practices such as government subsidies depends on legal definitions rather than political decisions.

Since the inception of the GATT after World War II, the subsidies which have received the most attention and upon which a wealth of information has been written are those promoting exports. Domestic subsidies received more attention during the negotiations leading to the Subsidies Code<sup>4</sup> at which time working definitions of countervailable "domestic subsidy" seemed to have emerged, but it was not long before U.S. inter-

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1. Loosely known as the Uruguay Round.

2. General Agreement on Tariffs and Trade, Oct. 30, 1947, GI Stat. (5) & (6), T.I.A.S. No. 1700. The current edition of the Agreement as amended can be found at General Agreement on Tariffs and Trade, *Geneva (1979) protocol, and annexed schedules of tariff concessions*, June 30, 1979, 31 U.S.T. 1015, T.I.A.S. No. 9629 (Hereinafter referred to as GATT).

3. From the Draft Ministerial Declaration on the Uruguay Round, GENERAL AGREEMENT ON TARIFFS AND TRADE, Punta del Este, Uruguay, 20 Sept. 1986.

4. General on Tariffs and Trade: Interpretation and Application of Articles VI, XVI, and XXIII, Apr. 12, 1979, 31 U.S.T. 513 T.I.A.S., No. 9619, 26 BISD 56 (Hereinafter referred to as Code).

ests found those definitions deficient. Due to some developments in U.S. countervailing duty case law within the Department of Commerce, many of those perceived deficiencies have been eradicated, but not without making some deep incursions into the countervailability of previously out-of-bounds internal practices and policies of trading partners. Natural resource-based economies have not been alone in facing these developments, but the actions taken by American petitioners have led to new questions concerning what domestic practices should be within the purview of nations investigating the countervailability of those practices. Also, the use of countervailing duty law to investigate these policies, as opposed to other trade remedies, has expanded the notion of "subsidy" so far that the definitions worked out between signatories to the Code may have lost much of their meaning.

In this article, the evolution of the definitions of countervailable domestic subsidy will be examined from its beginning in the General Agreement to the Subsidies Code to its implementation into the national legislation of both Canada and the United States. When applying a definition, reference will be made to natural resources. Further, U.S. case law dealing with those definitions will be examined with a view to presenting justification for the renewal of international negotiations leading to a workable set of definitions which may appease the interests of both consuming and producing nations.

This article may reflect some bias in favour of resource-based economies, but justification for this apparent intellectual dishonesty is presented for scrutiny as well. If there is a bias, however, it will be shown to be one in favour of liberalized trade and against the subtle, but material, constraints engendered by very sophisticated trade barriers.

## II. GATT ARTICLES VI, XVI, AND XXIII AND THE SUBSIDIES CODE

In this section, two sources will be examined to determine the existence of a definition for "countervailable domestic subsidy" and its application to natural resources: the General Agreement on Tariffs and Trade ("GATT") and the Agreement on Interpretation and Application of VI, XVI, and XXIII of the GATT (known as the Subsidies Code—"Code"). This investigation, while tedious, will serve to determine what departures from the GATT or the Code may have occurred and to underscore any evolution in the interpretation of the elusive definition of domestic subsidy. Following is an analysis of the three pertinent GATT Articles and their counterparts in the Code.

### A. *Levying Duties*

#### 1. GATT Article VI

Article VI:3 of the GATT permits the levying of countervailing duties (CVD) against the products of other contracting parties to offset the bounty or subsidy granted "directly or indirectly on the manufacture, production or export" to the exported product "including any special subsidy to the transportation of a particular product." Natural resources, and the processes surrounding their preparation for sale in foreign markets, often benefit from such subsidies. As a result, duties can be imposed to offset the price advantage gained by the recipient industry.<sup>5</sup> Article VI:3 deals with both export and domestic subsidies, without ever clearly defining the difference between the two. Not until the Tokyo Round and the development of the Subsidies Code were domestic subsidies attended to specifically.

#### 2. CODE Article 11

The Code deals with domestic subsidies in Article 11.<sup>6</sup> The signatories to the Code<sup>7</sup> affirmed the value of certain domestic subsidies to eliminate regional disparities, restructure specific economic sectors, sustain employment and retraining, encourage research and development, promote third-world development, and redeploy industry,<sup>8</sup> but recognized that signatories importing goods that receive such aid could be injured in the process.<sup>9</sup> Further, parties with these objectives in mind could target certain industries for development to the detriment of like industries or sectors in the territories of other contracting parties. Article 11.3 of the Code illustrates some of the many possible domestic subsidies that are likely to be conferred, such as grants, loans, below-market utilities financing, among others. Of note, these provisions do not mention the availability of natural resources at prices "inconsistent with commercial considerations"<sup>10</sup> or at prices that are "preferential"<sup>11</sup> to some industries but not

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5. Code, *supra* note 4, art. 6 requires (with exceptions) that contracting parties determine if the allegedly subsidized product materially injures a domestic industry prior to imposing countervailing duties.

6. Examples of export subsidies are contained in the Annex to the Code, entitled "Illustrative List of Export Subsidies".

7. Not all of the Contracting Parties of the GATT are signatories to the Subsidies Code.

8. Code, *supra* note 4, art. 11, para. 1, subparagraphs (a)-(f).—These are only "illustrative and not exhaustive," art. 11 para. 3.

9. Code, *supra* note 4, art. 11, para. 2.

10. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as 19 USC § 2501).

11. *Id.*

to others. Natural resource industries may be the recipients of recognized countervailable subsidies, but that industry may not necessarily be subsidized if the resource itself is being sold at "bargain basement" prices.

### B. *Eliminating Subsidies*

#### 1. GATT Article XVI

Article XVI, Section A, of the GATT deals with the obligation of a subsidizing contracting party to notify other parties of the extent, nature, effect, and circumstances of the subsidy with a view to discuss "serious prejudice to the interests" of other parties.<sup>12</sup> Section A adds two more forms of subsidy, namely, income and price support. Section B advises, however, that "contracting parties should seek to avoid the use of subsidies on the export of primary products."<sup>13</sup> This provision, interpreted liberally, might go beyond the examples provided in Article VI:3 of the GATT and Articles 11.1 and 3 of the Code to include low prices for resources controlled by governments, but to do so is to infer that the intent of the parties was to include subsidies which may not have been considered at the time of contracting since "primary products" is a reference to agricultural products in particular. As with most GATT rules, Art. XVI includes exceptions.<sup>14</sup> If a party does grant a subsidy, "such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product" with reference to previous representative periods of trade. Limiting resource-based economies to an "equitable share" by reference to traditional world market share is similar to the way in which market share is allocated under escape clause actions<sup>15</sup> in domestic markets. These actions often lead to orderly-marketing agreements known as "voluntary export restraint" agreements (VER or VRA). While Article XVI did not specifically define "equitable share," the Subsidies Code did, emerging during the 1979 Multilateral Negotiations (MTN) known as the Tokyo Round.

#### 2. CODE Article 10

Article 10 of the Subsidies Code deals with the interpretation of Article XVI:3 of the GATT. "More than an equitable share of world export trade" includes cases "in which the effect of an export subsidy" displaces

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12. GATT, art. XVI *supra* note 2, at para. 1.

13. GATT, art. XVI *supra* note 2, at para. 3.

14. GATT, art. XVI *supra* note 2, at para. 3.

15. GATT, art. XIX *supra* note 2 justifies such actions when the level of imports is disruptive enough to cause substantial injury to the domestic industry. North American examples of such actions have occurred with respect to textiles, automobiles, steel, and in 1986, cedar shakes and shingles.

the exports of other parties "bearing in mind the developments on world markets."<sup>16</sup> This would seem to alleviate the concerns of resource economies so as to permit increases in world market share. Where there are new markets, however, "traditional patterns of supply" are to be considered in determining "equitable share."<sup>17</sup> While this provision could be to the advantage of some resource economies, assuming an existing "pattern of supply," recently-discovered resources seem to fall outside of the Code provisions. This point is buttressed by the fact that "previous representative period" means "the three most recent calendar years in which normal market conditions existed."<sup>18</sup>

The value of these provisions is not denied: the spirit of the GATT is undeniably to confer some order upon world trade through flexible self-regulation.<sup>19</sup> That is a benefit accruing to developing and developed countries alike. It could also be argued that resource-based economies would be forced to develop secondary and tertiary industry around primary extraction industries while limited to a fixed market share for primary products. Of course, these are not legal but economic arguments. The broader issue is whether rules should be enacted to impose standards governing the rate at which countries seek to develop certain industries.<sup>20</sup> It seems inconsistent to limit a country's comparative advantage in primary resources at one stage of other nations' economic development when, at an earlier point, those same nations would have been in need, if not dependent upon, the development of resources now sought to be limited. Admittedly, what the GATT and the Code have to say on the matter may only reflect world trade as developed by those signatories most likely to influence the agenda of the Rounds so that developing country needs are not necessarily well represented. But the GATT does deal with governmental assistance in developing countries in Article XVIII and Part IV. These, along with the Tokyo Round Codes, have permitted protection for development purposes in less-advanced economies. All of these beneficent provisions in the GATT are praiseworthy. Often, the effect of rules implemented through the GATT and subsequent domestic trade legislation, however, is to impose systemic barriers to the trade-ability of natural resources. We are here more concerned with subsidies, specifically domestic subsidies.<sup>21</sup> Before passing on to the distinction between domestic and export subsidies, one Code provision dealing with export subsidies will be examined.

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16. Code, *supra* note 4, art. 10, para. 2(a).

17. *Id.* at para. 2(b).

18. *Id.* at para. 2(c).

19. Code, *supra* note 4, art. 10 para. 3.

20. HUFBAUER AND ERB, *SUBSIDIES IN INTERNATIONAL TRADE*, 98 (1984).

21. For the distinction between export and domestic subsidies, see *infra* part II.C.

Article 10.3 of the Code restricts the granting of export<sup>22</sup> subsidies on primary products specifically destined for export which results in prices materially below those of other suppliers to the same market. As a result, these export subsidies are not prohibited outright, but are limited by their effect upon markets. While the regulation of world trade is maintained and injurious incursions into competitors' markets are prevented,<sup>23</sup> it is an untenable position to permit subsidies for some countries but not for others. Such is the effect of this provision. Moreover, such a provision invites monopolization of resource sectors within economies seeking foreign exchange as nations are apt to exempt export cartels from national competition laws.<sup>24</sup>

### C. *The International Treatment of Domestic Subsidies*

It should be pointed out at this juncture that both the GATT and the Subsidies Code grant preferential treatment to developing countries<sup>25</sup> by assuming that domestic subsidies are granted for the purpose of protecting infant industries.<sup>26</sup> There is another recognition of the importance of domestic subsidies in developing countries: that such subsidies "are more likely to serve a corrective function than export subsidies."<sup>27</sup> Indeed, smoothing out regional disparity within national jurisdictions is not only economically desirable but politically expedient for both developed and developing countries. This bias in favour of preserving domestic economic planning, however, conflicts with the desirability of undisruptive trade practices in competing for world markets.

When a country provides domestic subsidies to a disparate region within its territory with the aim of, for example, extracting minerals, that subsidy is meant to create or sustain employment (a politically-expedient goal) and provide revenues—sometimes to pay for the subsidies, but if not that, then to recapture some of the subsidy in taxes and to increase consumer spending or saving or both (depending on the business cycle and countless other variables). If that subsidized industry is too successful abroad, in the sense that it penetrates and substantially injures a for-

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22. Export subsidies are defined in GATT, art. VI *supra* note 1, as bounties or grants going to the export of products in the country of origin.

23. HUFBAUER AND ERB, *supra* note 20, at 23.

24. An interesting sidenote to Code, *supra* note 4, art. 10, at para. 3 is that only "export" subsidies are mentioned in this context, not domestic subsidies such as those mentioned in Code, art. 11, *supra* note 4.

25. Quite apart from the point mentioned in this article are: Generalized System of Preferences treatment of goods and the inclination of developed countries to see to the progress of less-developed countries.

26. HUFBAUER AND ERB, *supra* note 20, at 23.

27. *Id.*

ign market too quickly, it will be subject to Article XIX of the GATT, and most likely the domestic subsidy will be construed as being export related, rather than solely domestic, under Article 11 in the Code. Nothing will have changed at home for the employee and the subsidy-granting government will not have changed the nature of the subsidy, yet "domestic" may take on an "export" meaning. The narrower question of which domestic subsidies can be construed as export-related must be examined further. First, however, the implementation of the GATT and the Code into Canadian and American law will be considered to see how far both countries have taken the definition of "countervailable domestic subsidy" into their respective trade statutes. The movement away from a strict interpretation of what was agreed to at the Tokyo Round has led to a breakdown in the certainty that the definition was thought to have achieved. This in turn has allowed significant discretion to be exercised to determine what are and what are not considered to be reviewable practices such as two-tier pricing structures.

### III. COUNTERVAILING DUTY LAW COMPARED: CANADA AND THE UNITED STATES

#### A. *Canada*

As of 1984, the Canadian Department of National Revenue, Customs and Excise (DNR) has been able to investigate subsidies under the Special Import Measures Act<sup>28</sup> (SIMA). Prior to that time, an allegation of subsidy was issued by Order-in-Council instead of being directly alleged by private parties. This procedure was deliberately politicized<sup>29</sup> but whether it was a negative aspect of Canadian trade law is certainly arguable.<sup>30</sup> A cursory survey of decisions involving subsidies demonstrates that the *allegation* of subsidy did not necessitate defining the word or determining which type of subsidy (export or domestic) was being conferred.<sup>31</sup> A development of what "subsidy" might mean was therefore largely non-existent prior to 1984. In any case, the statutory definition as found in SIMA has clarified the Canadian position somewhat, although the defini-

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28. Special Import Measures Act, Can. Stat. Ch. 25 (1984).

29. Hence the allegation that trade rules were enforced by ministerial declaration, not by administrative procedure, never mind quasi-judicially.

30. See Smith, *International Trade Law in the United States and Japan*, in R.K. PATERSON, *CANADIAN REGULATION OF INTERNATIONAL TRADE AND INVESTMENT* (1986). The author argues that the application of international trade "principles within a judicialized legal process has led to a rigidity in response to trade issues not experienced in, for instance, Canada and Japan." He then goes on to say that the flexibility of the Japanese administrative structure has led to allegations of unfairness on its part by Americans.

31. Canned Ham et al. from Denmark and the Netherlands 7 CER 53 (1985).



tion is still very vague and may reflect the tendency of Canadian trade law formulation to vest discretion in the arbiter as a matter of policy preference or out of a reluctance to redefine international regulations as found in the GATT and the Subsidies Code.

The "Interpretation" heading of SIMA<sup>32</sup> defines subsidy as including:

any financial or other commercial benefit that has accrued or will accrue, directly or indirectly, to persons engaged in the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of goods, as a result of any scheme, program, practice or thing done, provided or implemented by the government of a country other than Canada, but does not include the amount of any duty or internal tax imposed on goods by the government of the country of origin or country of export from which the goods, because of their exportation from the country of export or country of origin, have been exempted or have been or will be relieved by means of refund or drawback.

The French definition of "subvention" is not as specific, but includes the "commercialization" of merchandise as well as some catch all-phrases alluded to in the English.

'Subsidized goods' means (a) goods in respect of the production, manufacture, growth, processing, purchase, distribution, transportation, sale, export or import of which a subsidy has been or will be paid, granted, authorized or otherwise provided, directly or indirectly, by the government of a country other than Canada, and (b) goods that are disposed of at a loss by the government of a country other than Canada, and includes any goods in which, or in the production, manufacture, growth, processing or the like of which, goods described in paragraph (a) or (b) are incorporated, consumed, used, or otherwise employed.<sup>33</sup>

These definitions seem to provide for natural resource subsidies in general, but may implicitly omit domestic subsidies unless the goods are targeted for export, and certainly do not try to distinguish between transportable<sup>34</sup> and nontransportable natural resources.<sup>35</sup> On the other hand, because section 2(5) of the Act directs the Deputy Minister of National Revenue to take into account Articles 9 and 11 of the Code when defining subsidy, it could be argued that domestic subsidies must be distinguished from export subsidies since Article 11 deals with domestic subsidies.<sup>36</sup> On

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32. Special Import Measures Act, *supra* note 28, at § 2 (1).

33. *Id.*

34. HUFBAUER AND ERB, *supra* note 20, at 128. As examples of "transportable" resources, the authors cite timber and iron ore. "Non-transportable" resources are only alluded to indirectly, but presumably include the availability of water and the use of land, etc.

35. The terms have an economic, as opposed to a legal, meaning.

36. Code, *supra* note 4, art. 9, prohibits export subsidies on other than primary

another front, there is no express or implied reference to the granting of natural resources at prices that ignore commercial considerations or world market value, although the argument could be made that "(a) goods in respect of the . . . purchase" reflects such a reference,<sup>37</sup> but in French the reference would have to be caught by the word "commercialization."<sup>38</sup>

How "subsidy" will be further elaborated in the near future is difficult to tell. Subsidy cases before DNR in the past have focused on export subsidies<sup>39</sup> and, more currently, some domestic subsidies for targeted industries.<sup>40</sup> A recent case before the DNR concerned grain corn from the United States.<sup>41</sup> The *allegations* by the Ontario Corn Producers Association that about 78 U.S. agricultural programs are countervailable subsidies conferred upon U.S. farmers are seen to be a precedent-setting complaint.<sup>42</sup> Out of those seventy-eight programs, eight were found to confer subsidies approximately equal to two-thirds of the selling price of grain corn at Chicago. One of the eight programs, a scheme providing deficiency payments to farmers, represented close to sixty percent of the selling price. It should be pointed out that American opinion with regard to the preliminary determination was mixed. While opposition to the decision was expected, some trade officials openly stated that the U.S. expansion of the definition of subsidies which led to duties against Canadian pork and fish products may be blamed for the Canadian investigation of American farm subsidies. Many countries are interested in the outcome, most notably those within the EEC, as the long-standing U.S.-EEC subsidies war includes the investigation of domestic subsidies. How natural resources will be ultimately affected by this case is as yet uncertain, but the possibility is that the "subsidized goods" definition of SIMA<sup>43</sup> will expand the classes of goods and subsidies that are deemed to be

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products.

37. Special Import Measures Act, *supra* note 28, at § 2 (1) "subsidized goods."

38. Special Import Measures Act, *supra* note 28, at § 2 (1) "merchandises subventionées."

39. *Dry Pasta from the EEC*, Statement of Reasons in Preliminary Determination of Subsidizing by the Deputy Minister for National Revenue, Customs and Excise. The allegations of subsidy involved the investigation of export refunds whereby the difference between EEC and world market prices is paid back to exporters by the EEC in ECUs.

40. *Carbon Steel Seamless Pipe from Brazil*, Statement of Reasons in Initiation of Countervailing Investigation by the Deputy Minister for National Revenue, Customs and Excise. While all of the subsidy programs being investigated were export subsidies, the Department did consider certain domestic subsidies, but found that they were not used by the respondent exporters and manufacturers.

41. Canada Gazette, Part I, July 12, 1986, at 3241; Preliminary Determination rendered 7 Nov. 1986 (Canada Gazette, Part I, 29 Nov. 1986, at 5934); Final Determination rendered 2 Feb. 1987 (Canada Gazette, Part I, 14 Feb. 1987, at 555).

42. This was the first countervailing duty case ever brought against the United States.

43. Special Import Measures Act, *supra* note 28, at § 2.

countervailable.

### B. *The United States*

As is to be expected, U.S. law concerning subsidies is considerably more precise<sup>44</sup> than is the Canadian law and any arguments about the preference for the flexibility<sup>45</sup> of Canadian law over U.S. law can be refuted by demonstrating the ability of the U.S. Administration to deal with its laws flexibly and of the U.S. Congress to enact laws when new problems arise. "Subsidy" is defined as "bounty or grant" in the Tariff Act of 1930,<sup>46</sup> which means<sup>47</sup> but is not limited to:

- (A) Any export subsidy described in Annex A<sup>48</sup> to the Agreement<sup>49</sup>
- (B) The following domestic subsidies,<sup>50</sup> 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,
  - (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.<sup>51</sup>

Amendments added by the Trade and Tariff Act of 1984<sup>52</sup> added a new section 771A<sup>53</sup> to include "upstream subsidies."<sup>54</sup> The effect of the new section is to render countervailable a domestic or export subsidy on input products used by a country to produce goods where the input prod-

44. That precision demands a fuller explanation than is possible in this short article. For more information, see generally, the new Title 7, 19 U.S.C. §§ 1671b-1677 and HURBAUER AND ERB, *supra* note 20, with reference to subsidies.

45. *See supra* note 30.

46. 19 U.S.C. § 303.

47. §, Trade Agreements Act of 1979, Pub. L. No. 96-39, 19 U.S.C. § 1677(5) (amending the Tariff Act of 1930).

48. *See supra* note 6.

49. Tariff Act of 1930.

50. Notice the use of wording lifted right out of Art. VI:3 of the GATT.

51. Tariff Act of 1930, 19 U.S.C. § 771(5)(i)-(iv) (Supp. 1988).

52. Pub. L. No. 98-573, 98 Stat. 2948 (1984) (codified as amended at 19 U.S.C. § 1671 (Supp 1988)).

53. *Id.* at § 613.

54. *See* Price, *The Trade and Tariff Act of 1984: An Analytical Overview*, 19 INT'L LAW. 321, 334 (1985).

uct bestows a competitive benefit on those goods by affecting significantly the cost of production. The implications for natural resources need no expansion: domestic manufacturing of resources as an input into a value-added product when those resources are beneficiaries of subsidies are countervailable.<sup>55</sup>

Subsidies, as defined under U.S. law, confer preferential benefits. Export subsidies induce the sale of exported products in preference over domestic sales. Domestic subsidies have a more positive connotation, but when one industry benefits more than another under such a program, then the benefiting industry may be viewed as "targeted" for export development. Conversely, a benefit accruing to all industries equally (for example, a national investment tax credit program) is not a "preferential" benefit, assuming the benefit is domestic and not an export subsidy. This is known as the "generally available" principle or the "specificity" test. Decisions by the U.S. Court of International Trade have upheld the notion that benefits by way of domestic subsidy conferred upon the entire business community cannot be viewed as "preferential," but are rather "generally available" and therefore, not countervailable.<sup>56</sup>

The application of that principle to the *Softwood Lumber* case is seen as crucial to its outcome. For that reason, a discussion of cases involving the principle will ensue.

#### IV. CASE ANALYSIS AND THE DEFINITION OF SUBSIDY: RE "PREFERENTIAL" BENEFIT

While the 1986 *Lumber* dispute<sup>57</sup> involved more than the evolution of the meaning of "preferential" under section 771(5)(B)(ii) of the Tariff Act of 1930, that evolution was considered germane to the outcome of that case. In fact, largely as a result of decisions leading up to the 1986 *Lumber* case and since the 1983 *Lumber* decision,<sup>58</sup> a U.S. coalition of lumber interests decided to pursue the action that had ended in favour of the Canadian respondents three years earlier.<sup>59</sup> In these cases, "preferential" refers not only to natural resources, but the subsection<sup>60</sup> from which an

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55. However, there are some uncertainties as to the range of the effect of the 1984 amendment. See *Live Swine and Pork from Canada*, 7 I.T.R.D. 1995, 50 Fed. Reg. 25,097 (1985).

56. *Carlisle Tire and Rubber Co. v. United States*, 5 C.I.T. 229, 564 F. Supp. 834 (1983).

57. 51 Fed. Reg. 19,422 (1986).

58. 47 Fed. Reg. 49,878 (1982). The ensuing discussion is limited to cases since 1982. See *infra* note 161.

59. 48 Fed. Reg. 24,159 (1983)—Final Negative Countervailing Duty Determination.

60. Tariff Act of 1930, 93 Stat. 177, § 771 (5)(B)(ii) (codified as amended at 19 U.S.C.

example of subsidy derives has been instrumental in defining whether foreign (to the United States) pricing systems, sometimes arising out of comparative advantages, will be subject to countervailing duties under U.S. law.

A. *The 1982 Softwood Lumber Decision*<sup>61</sup>

On October 7, 1982 a U.S. petitioner brought action against certain softwood lumber products from Canada, alleging that certain benefits received by the Canadian industry (comprising manufacturers, producers, and exporters) constituted subsidies within U.S. trade law. These alleged subsidies included tax credits, export credits, grants, regional development incentives, employment programs, stumpage deferrals, preferred loans, etc. The International Trade Administration (an agency within the U.S. Dept. of Commerce—"ITA") determined that all subsidies conferred in this regard were *de minimis*. At that time, bargain stumpage was a "program determined not to confer a subsidy."<sup>62</sup> The petitioners alleged that stumpage conferred both a domestic and an export subsidy. The ITA rejected the allegation that stumpage conferred an export subsidy because stumpage did not stimulate sales of exports over domestic sales and the "mere fact that significant quantities of products made from stumpage" were exported did not mean that stumpage conferred an export subsidy.<sup>63</sup>

The ITA dealt with the domestic subsidy issue at some length. The allegation raised was that stumpage was provided to a specific group of industries within the meaning of section 771(5)(B).<sup>64</sup> Instead of arguing within section 771(5)(B)(ii), the "preferential rates" subsection, the petitioner tried to have stumpage declared an assumption of cost of production within subsection (iv). This would have broadened the meaning of that subsection to include any absorption of production costs by government on terms inconsistent with commercial considerations.

The ITA first dealt with subsection (ii) and determined that stumpage was *not* provided to a specific industry; rather, stumpage was available to all industries on similar terms. Any limitation on use reflected "the inherent characteristics of this natural resource and the current level of technology" and was not the result of government activity.<sup>65</sup> While admitting that nominal general availability did not shut out subsection (ii), the

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§ 1303).

61. 48 Fed. Reg. 24,159 (1983).

62. 48 Fed. Reg. 24,167 (1983).

63. *Id.*

64. Tariff Act of 1930 (codified as amended at 19 U.S.C. § 771 (5)(B)(ii) (Supp. 1988)).

65. 48 Fed. Reg. 24,167 (1983).

ITA went on to find several other industries benefiting from stumpage. Without governmental limitation on what industries could benefit from the stumpage pricing practices there could be no preference to a specific group of industries.

The agency went on to add that subsections (i)-(iv) were mutually exclusive although not an exhaustive list of domestic subsidies and further decided that subsection (ii) was the governing provision, not subsection (iv). Subsection (iv)'s "assumption" provision refers to government activity "which relieves an enterprise or industry of a pre-existing statutory or contractual obligation." This is a very limited view of subsection (iv), but is buttressed by the ITA's position that a liberal rendition would encompass subsections (i)-(iii).

The ITA went on at some length to dismiss the subsection (iv) argument, exploring differing meanings of "assumption." Even if subsection (iv) could be used, the agency said<sup>66</sup> it could not adhere to the petitioners' suggestion that stumpage prices in Canada and the United States be compared to determine if stumpage costs were assumed by the Canadian government. Four reasons were cited for the undesirability of comparing stumpage, but even if such a comparison was rational, the ITA determined that "the value of stumpage derives from a number of factors, including the price of the end products made from it, *and not from any intrinsic value of the standing timber,*" (emphasis added) a finding which was reversed in the 1986 case.<sup>67</sup> Back on the subsection (ii) issue, the ITA said that "preferential" meant "more favorable to some within the relevant jurisdiction than to others within that jurisdiction," *not* "inconsistent with commercial considerations" which is the standard used in subsection (i), a provision presumably not applicable to stumpage.

It appeared at the time that stumpage had been dealt with quite thoroughly and that the ITA had gone out of its way to consider matters that were appealable, even going so far as to assume error in some of its judgment, thus giving credence to the petitioners' arguments. But because of sawmill closures within the United States and, concurrently, an increase in Canadian market share in the U.S. involving billions of dollars in trade, the time to reconsider the "generally available" test was imminent.

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66. 48 Fed. Reg. 24,168 (1983).

67. 51 Fed. Reg. 37,453 at 37,457 (1986)-Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada.

### B. Carbon Black from Mexico

Shortly after the negative ruling in the *Lumber* decision, a case with some of the problems faced in the *Lumber* case came out in *Carbon Black from Mexico*.<sup>68</sup> The petitioner, Cabot Corporation (Cabot), alleged<sup>69</sup> that Mexican producers, exporters, or manufacturers received subsidies within the meaning of section 303 of the Tariff Act of 1930.<sup>70</sup> The list of alleged subsidies was quite long, but only three were determined by the ITA to be used by the respondents and to be conferred by the Mexican government upon producers of carbon black feedstock. One was clearly an export subsidy, but the other two were domestic. One of the domestic programs was "preferential pricing on natural gas and electric power used to produce carbon black."<sup>71</sup>

PEMEX, a state entity, owned and controlled the production of petroleum products such as carbon black feedstock (CBFS) and natural gas, both of which were used to produce carbon black. The allegation by Cabot was that PEMEX administered a two-tiered price structure for the input products into carbon black, CBFS and natural gas. Under the first-tier benefit, CBFS and natural gas prices for sale in the export market were substantially higher than in the domestic market. The ITA decided that such a pricing differential conferred neither an export nor a domestic subsidy. "The pricing differential does not confer a benefit contingent upon export performance, or stimulate export sales of carbon black over domestic sales. Nor does it benefit a 'specific enterprise or industry.'"<sup>72</sup> However, the ITA could not stop there. It went on to say that "all industrial users of natural gas can obtain this good at the same price,"<sup>73</sup> so that no question of benefit at preferential rates<sup>74</sup> to a specific industry or group of industries could arise.<sup>75</sup> Cabot argued<sup>76</sup> that the transfer of value of carbon black from the government to the industry, "through the sale of

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68. 48 Fed. Reg. 29,564 (1983) Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: International Trade Administration.

69. 47 Fed. Reg. 54,526 (1982) Initiation of Countervailing Duty Investigation.

70. Because Mexico had not acceded to the GATT, no determination of injury to the U.S. industry by the International Trade Commission was necessary therefore § 303 was the applicable procedural provision. By § 103(b) of the Trade Agreements Act of 1979, however, analyses of programs are governed by § 771(5)(b) of the Tariff Act of 1930.

71. 48 Fed. Reg. 29,565 (1983).

72. 48 Fed. Reg. 29,566 (1983).

73. *Id.*

74. Tariff Act of 1930, 93 Stat. 177 (codified as amended at 19 U.S.C. § 1677 (5)(B)).

75. The second-tier benefit dealt with a regional development subsidy which, while interesting and certainly worth developing further, is not amenable to a study of these proportions. Incidentally, this benefit did confer a subsidy and dealt with "preferential rates", but must be understood within the context of regional development subsidies.

76. 48 Fed. Reg. 29,568 (1983).

government-owned raw materials . . . at a price below that which the government could have obtained in an open world market transaction” constituted a subsidy. Consistent with its previous ruling that carbon black price differentials were available to any industry wanting to benefit from them, the ITA deemed the preferential rates to be “generally available.” Since the benefit alleged to be a subsidy was more amenable to the subsection (ii)<sup>77</sup> description of the list of countervailable subsidies, the standard applicable to that provision required “preferentiality.” This did *not* mean, to be consistent with the *Lumber* case, “inconsistent with commercial considerations.”<sup>78</sup> Therefore an “open world market transaction” was not the appropriate standard.

Cabot argued, in addition, that foreigners could not buy at the domestic price and the fact that only two possible users of CBFS existed compelled the inference that CBFS was *not* “generally available.” The ITA used the same response to this assertion as it had in the *Lumber* case: “The only limitations as to the types of enterprises or industries which use this material reflect the inherent nature of the product and the current level of the technology.” The allegation that foreigners could not buy at domestic prices was “not relevant to the question of whether carbon black feedstock” was or was not generally available.<sup>79</sup>

While the ITA determined countervailing duties were exigible (on different grounds), the determination did not satisfy Cabot Corporation. Cabot appealed the ruling of the ITA to the U.S. Court of International Trade.<sup>80</sup> The USCIT found that the ITA had erred in deciding that upstream subsidies (natural gas and CBFS) were not being conferred through bounties and grants inasmuch as the ITA had used the inappropriate legal standard to make such a determination and remanded the case for reinvestigation.<sup>81</sup> Administrative review of the ITA’s 1983 decision began on 27 November 1985.<sup>82</sup> Preferential pricing of natural gas and CBFS was reinvestigated with a preliminary determination issuing on 18 April 1986.<sup>83</sup>

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77. Tariff Act of 1930, 93 Stat. 177, § 771(5)(B) (codified as amended at 19 U.S.C. § 1677 (5)(B)).

78. Subsection (i) language.

79. 48 Fed. Reg. 29,568 (1983).

80. *Cabot Corp. v. United States*, 9 Ct. Int’l Trade 989, 620 F. Supp. 722, 7 I.T.R.D., 1337 (1985), *appeal dismissed*, 788 F.2d 1539 (Cir. 1986).

81. The ITA was to report back to the USCIT within 90 days, but apparently never did. Meanwhile, the U.S. Government appealed to have the USCIT’s reversal of the upstream subsidy issue quashed, but was not successful. 788 F.2d 1539 (Cir. 1986), 7 I.T.R.D. 2185.

82. 50 Fed. Reg. 48,825 (1985).

83. 51 Fed. Reg. 13,269 (1986).



The ITA was steadfast in upholding its previous decision concerning natural gas, because there were so many users, but admitted that it placed "excessive emphasis on the inherent nature test articulated in the lumber case."<sup>84</sup> Instead, the agency determined that there were "too few users of CBFS for [it] to find" that CBFS was provided on a "generally available" basis.<sup>85</sup> By adhering to the finding of the USCIT, the ITA now had to consider whether CBFS was provided at a "preferential" price. This would normally have required comparing the PEMEX price given to carbon black producers to the price generally available to other purchasers. Since there were no other purchasers, an alternative test was needed. While several tests were at the disposal of the ITA, the agency preferred the "Prices Charged by the Same Seller for a Similar or Related Good" test. A similar, generally available, government-provided good was found<sup>86</sup> and compared. The ITA primarily determined that the alternate product, when compared to the CBFS price, was not sold at a preferential price and so did not confer a subsidy.<sup>87</sup>

By the time of the order of the *Final Results of Countervailing Duty Administrative Review*, however, the ITA found a "benefit from preferentially-priced" CBFS.<sup>88</sup> This was contrary to the finding in the preliminary determination.<sup>89</sup> The agency maintained its stance on the general availability of No. 6 Fuel Oil, but justified its new decision by measuring "the benefit conferred on Mexican carbon black producers by constructing a benchmark price for CBFS in Mexico through references to the differences in the cost of producing those related products."<sup>90</sup> The ITA maintained that it had not compared the American CBFS price to the Mexican price. Instead, it used the difference in price between the two products in the United States to determine a benchmark cost of the production for the CBFS in Mexico.

The real issue was, therefore, not whether the "general availability" test (also known as the "specificity" test) applied, but whether the agency, when applying that test, had to look at *de facto* as well as *de jure* (or nominal availability). While it was true that only one industry and two producers used CBFS, that may have been due to the level of technology available to produce quality CBFS. The Mexican respondents argued that there were several users for CBFS, but the fact that Mexican

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84. See *supra* note 66 and accompanying text.

85. 51 Fed. Reg. 13,271 (1986).

86. No. 6 Fuel Oil.

87. 51 Fed. Reg. 13,271 (1985).

88. 51 Fed. Reg. 30,385 (1986).

89. 51 Fed. Reg. 13,269 (1986).

90. 51 Fed. Reg. 30,386 (1986).

CBFS was of such poor quality due to the infant stage of the industry precluded its use in other processes. In other words, the *Lumber* test should apply. It would seem, in retrospect, that the Mexican argument to use the *Lumber* decision was more likely to succeed in the case of a developing country than for a developed country like Canada. In other words, to argue that the Canadian forest industry's level of technology explained why there were so few different types of industries taking advantage of low stumpage prices (thereby allowing stumpage to be viewed as "generally available") would be somewhat dangerous. Such a policy would permit governments to target an industry and thereby suppress the economic evolution of the natural resource causing the resource to remain unused or to be diverted to other purposes.

It would seem, then, that the application of the specificity test to two very different economies was not the best solution. While the ITA may be a second generation policy-maker, it exceeds its jurisdiction when it purports to decide cases according to nations' stages of economic development. The principle of specificity would more properly be addressed within the confines of the GATT.

### C. *Certain Carbon Steel Products from Brazil*<sup>91</sup>

While the *Brazil* case occurred prior<sup>92</sup> to the evolution of the specificity test as used in the *Carbon Black Administrative Review*,<sup>93</sup> it offers an insight into government-controlled sales of raw materials and how they should be addressed. In the Preliminary Determination, the ITA distinguished the *Brazil* case from *Lumber* in that the steel industry was the dominant user of the input,<sup>94</sup> although available to everyone, private or public, on similar terms. The *de facto* use test was already being applied since the steel industry was the only "dominant" industry (implying other users). A preferential price was available and controlled for the benefit of a specific industry. The ITA went on to use international prices as the benchmark for measuring the level of subsidy.<sup>95</sup>

In the Final Determination<sup>96</sup> the ITA reversed itself and said the provision of iron ore at government-controlled rates did not confer a subsidy. It found that four producers exploited the controlled-price iron ore and sold below the government's ceiling price. Also, producers not subject

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91. 49 Fed. Reg. 5,157 (1984), Preliminary Affirmative Countervailing Duty Determination.

92. Feb. 10, 1984.

93. 51 Fed. Reg. 30,385 (1986).

94. The input product in this case was iron ore.

95. 49 Fed. Reg. 5,160 (1984).

96. 49 Fed. Reg. 17,988 (1984).

to price controls sold iron ore at even lower prices. One mill owned its own mine and sold all its excess on the open market. The ITA was unable, therefore, to consider government-controlled iron ore prices as "preferentially-priced," and did not have to determine the correctness of its preliminary determination on the "specificity" issues because of the large role the free market played in setting prices.<sup>97</sup>

Applied to the *Lumber* case, one might have thought that the availability of stumpage prices to such a large number of users, although in one industry, would have enabled the ITA to conclude that market forces were at play in such a way as to render less meaningful the regulated price of stumpage. Also, the fact that stumpage prices differed so much from region to region and even intra-regionally according to a number of factors might demonstrate that market forces were at play.

Of course, the *Brazil* case differed from the *Lumber* case in that the ceiling price for iron ore was rarely met, while in Canada the stumpage price is derived by subtracting from the appraised value of a stand of timber the costs of production plus profit and risk allowance.<sup>98</sup> Essentially, the stumpage fee is a royalty. Calling it "controlled" is largely a matter of conjecture and is, in any event, used for a different purpose than Brazil's ceiling price for iron ore.

#### D. Comment

While it is true that domestic pricing systems may be found in violation of U.S. countervailing duty law, the emphasis behind the U.S. law is to distinguish between government-controlled pricing systems that provide some good or service to commercial entities at preferential rates to some industries and those that make the goods or services generally available at one price. To be considered generally available, those goods or services must not only be nominally available but must be used in fact by more than one industry. There certainly are flaws with these requirements.

First, developing countries are prone to be assailed under the specificity test (general availability) due to the lack of diversification of their economies.<sup>99</sup> Second even developed countries dependent upon the extraction of natural resources are prone to run afoul of the test, especially those countries richest in natural resources that have little incentive to

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97. 49 Fed. Reg. 17,992 (1984). While subsidies did exist in other areas, the petitioners eventually revoked their complaint. The subsidies ranged between 17%-62%.

98. Business Review (Bank of Montreal), July 1986, p. 5.

99. E.g., Mexico and Brazil in the cases discussed *supra*, text accompanying notes 68-98.

diversify until the extraction industries evolve to allow a multiplicity of users. In Canada's case, the forest industry is so large that the current market demand for supply leaves little room for other industries to become "users" of stumpage to satisfy the *de facto* use aspect of the specificity test. Third, a government may regulate input product prices by a law applying generally to all industries, yet because some industries do not take advantage of this particular benefit (the *de facto* issue), the industry that does (even though an "industry" may be comprised of hundreds of users) will be subject to countervailing duties.<sup>100</sup>

The real problems of economic development leading to diversification are not addressed under the present law. As previously mentioned it is not the role of the ITA to set up rules for the amelioration of international economic relations, but addressing development problems is within its sphere of influence. This need could largely be met by redefining which types of subsidies are countervailable while taking stock of the needs of developing countries and less diversified economies.

#### V. THE TRADE AND TARIFF ACT OF 1984

The following discussion deals with provisions of the Trade and Tariff Act of 1984,<sup>101</sup> that affect, or would have affected, if enacted, natural resources and whether certain domestic practices are or should be countervailable. The present law includes provisions dealing with upstream subsidies, but does not contain those dealing with natural resource subsidies, input dumping, targeting, and the elimination of suspension agreements.

##### A. *Upstream Subsidies*

Reminiscent of pre-election posturing in 1986, the Omnibus Trade Bill of 1984 dealt with many issues facing a nation with a growing trade deficit, among which were those dealing with natural resources. One of them was the countervailability of upstream subsidies: the value of a raw product which benefits from subsidies when added to the value of a manufactured or processed product added to the overall benefit that will be countervailed.<sup>102</sup> "The basic test adopted is whether the subsidization of a significant input or component of the exported product enables the manufacturer of the exported product to purchase that input or component at a lower price than the manufacturer would otherwise pay for the product

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100. See *infra* text accompanying notes 138-40.

101. Pub. L. No. 98-573, 98 Stat. 2948 (codified as amended at 19 U.S.C. § 1671 (Supp. 1988)).

102. Price, *supra* note 54.

in an arm's length transaction."<sup>103</sup> This sounds like the argument raised by Cabot in *Carbon Black* to apply pricing standards "consistent with commercial considerations,"<sup>104</sup> language which is really more amenable to section 771 (5)(B)(i)<sup>105</sup> and which only applies to loans, capital, and guarantees on loans. Even if "commercial considerations" is the appropriate standard, however, who is to determine what a raw product is worth when a government owns it? The question is really one of political philosophy, for where is there a truly "free" market that would determine what price a government could get. Nevertheless, Congress saw fit to pass this provision. The next two provisions met a different fate, but still offer insights into what a workable definition might include.

### B. Natural Resource Subsidies

The House version of the bill<sup>106</sup> had targeted natural resources for attack when subsidized. Basically, if a controlled-price resource was (1) "lower for domestic use than the export price or the fair market value, (2) [was] not freely available to U.S. purchasers for export, and (3) [constituted] a significant component cost of the product under investigation" then that constituted a subsidy. There was no question that *Carbon Black* was the target,<sup>107</sup> although the larger-target was the specificity test as it had been used in *Lumber*, *Carbon Black*, *Anhydrous and Aqua Ammonia from Mexico*,<sup>108</sup> and *Portland Hydraulic Cement and Cement Clinker from Mexico*.<sup>109</sup> The House Trade Subcommittee was apparently willing to violate, or was ignorant of, the meaning of subsidy when it acceded to the statement of Representative Gillis W. Long concerning the "rationale" of the proposed law:

When a foreign government supplies a key production input at preferential prices to more than one of its domestic industries, it is subsidizing each of these industries. A subsidy does not cease to be a subsidy because it is produced [sic] to more than one beneficiary—particularly when in each case the subsidy dramatically reduces production costs.<sup>110</sup>

103. *Id.* at 334-335.

104. *Supra* note 80.

105. Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1677 (Supp. 1988)).

106. H.R. 4784, The Trade Remedies Reform Act 98th Cong., 2d Sess. § 130 Cong. Rec. H652 (1984).

107. However, the attempted reform points to several important features of *Carbon Black* that distinguished it from *Lumber*. First, stumpage was not sold at different prices for export and import. Second, stumpage is available to foreigners. Third, stumpage may or may not constitute a significant component cost of a final product, depending on a host of variables.

108. 48 Fed. Reg. 28,522 (1983).

109. 48 Fed. Reg. 43,063 (1983).

110. As quoted in Holmer and Bello, *The Trade and Tariff Act of 1984: The Road to*

Fortunately, the Administration was able to rebut the value of such legislation with five reasons going to the very heart of natural resource subsidy issues.

First, generally available domestic subsidies should not be countervailable because they do not distort the allocation of resources within a country. Second, absent such distortion, foreign governments would perceive as unfair the United States' sitting in judgment on the fairness of others' purely internal policies and practices. Third, other countries would likely retaliate against U.S. exports made using price-regulated natural gas (such as textiles and petrochemicals). Fourth, it would be unfair to preclude countries with abundant natural resources from capitalizing on their comparative advantages. Fifth, the proposal would depart significantly from the international consensus on what constitutes a subsidy.<sup>111</sup>

While these are rational principles by which to abide in dealing with natural resource subsidies, it was certain that the issue would be dealt with again.<sup>112</sup> Indeed, echoes of the 1984 hearings in the Trade Subcommittees of both Houses of the United States Congress, were to be heard again in the 1986 attempt to revive natural resource legislation. While the 99th Congress and the Omnibus Trade Bill came to an abrupt end, new legislation dealing with the matter was being produced in the 100th Congress.<sup>113</sup>

### C. *Input Dumping*

Input dumping is very closely related to the natural resource subsidies issues. If country A dumps widgets in country B and B sells a product containing those widgets in country C, then B is benefitting from a dumped item to the detriment of C. For three main reasons the United States Congress was unable to enact legislation that would have done away with this problem: its violation of GATT and Anti-Dumping Code provisions, difficulty of administration, and anticipated trading partner retaliation.<sup>114</sup> It was clear that U.S. exporters themselves engaged in the practice and that international trading rules had not yet dealt with the matter. In any event, the proposed amendment was meant to deal with steel products entering the United States in an increasingly protected

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*Enactment*, 19 INT'L LAW. 287, 308 (1985).

111. Holmer and Bello, *supra* note 110, at 308.

112. *Id.* at 312-13.

113. Pressure to do so was unbearable with the \$170 billion (U.S.) trade deficit. Also, statements by Senators Danforth (R-Missouri) and Baucus (D-Montana) to the effect that lumber would be dealt with specifically were widely publicized.

114. HOLMER AND BELLO, *supra* note 110, at 314-15.

market, much like the resources legislation was meant to deal with its own special interests.<sup>115</sup>

Other provisions not included in the Act<sup>116</sup> were targeting,<sup>117</sup> and one of particular interest to Canada,<sup>118</sup> the prohibition of "suspending a CVD investigation based upon the foreign government's agreement to impose export taxes to offset any subsidies found."<sup>119</sup>

The effect of these deleted provisions (natural resource pricing, input dumping, targeting, and export taxes) and the enacted upstream subsidies provision is still to be felt. Even the deleted provisions seem to affect how we think about natural resources.

#### VI. THE 1986 *SOFTWOOD LUMBER DETERMINATION*<sup>120</sup>

Without reciting all of the history *behind* this case, it should be stated nevertheless that the politicizing *surrounding* the case did little to have the issues resolved on their merits. With Senate fast-track approval for discussions on a free-trade agreement between Canada and the United States being tied to the special interests of key lumber-state senators on the Senate Finance Committee, threats from the House to deal with Canadian lumber through legislation, threats from at least one Senator<sup>121</sup> to attach a Canadian lumber amendment to whatever Omnibus Trade Bill left the Senate, a mid-term election in which Republicans were vying to maintain control of the Senate,<sup>122</sup> attempts by the Democrats to show the nation that the Republicans had been unable to resolve trade irritants (highly arguable) and to stop the growth of the trade deficit, and a few other side issues,<sup>123</sup> it is difficult to believe that the *Lumber* case results were not politically motivated.

115. *Id.* at 308.

116. Pub. L. No. 98-573, 98 Stat. 2948 (codified as amended at 19 U.S.C. § 1671 (Supp. 1988)).

117. Holmer and Bello, *supra* note 110, at 294.

118. *Id.* at 319.

119. On 30 Dec. 1986, Canada and the United States signed a *Memorandum of Understanding*, which forms part of the new Softwood Lumber Products Export Charge Act, S.C. 1987, c. 15. The Act imposes a 15% surcharge, collected in Canada, on certain softwood lumber products destined for export. The problem with this proposed answer to the lumber dispute was that exports going to third markets now competed at higher prices. The export tax has, in some Canadian jurisdictions, been replaced with higher stumpage fees, although the U.S. Coalition for Fair Lumber Imports continues to seek additional protection.

120. 51 Fed. Reg. 37,453 (1986).

121. Max Baucus (D-Montana).

122. Prior to November 4, 1986 there were 53 Republicans to 47 Democrats with 22 of 34 Senators up for election being Republican.

123. The unwillingness of the Administration to steer a trade bill through Congress despite demands from business and Republicans and Democrats alike.

On the Canadian side, opposition members in the House of Commons tied several unrelated issues together, including lumber, to demonstrate the uselessness of seeking out a comprehensive trade agreement when the purpose of that agreement, or at least one of them, was to seek exemption for Canada from contingency protection measures. The prevailing attitude not only in the House, but also in the press, was that bilateral trade negotiations had focussed attention on several trade irritants that had gone unnoticed prior to the talks and that all discussions should end. For its part, the Government side of the House was unable to exert as much influence on the U.S. Administration as it had<sup>124</sup> during the 1984 deliberations over the Omnibus Trade Bill of that year, and was unable to allay Canadian fears that a trade agreement between the two countries was too much of a capitulation. The opposition cries may have actually fueled U.S. protectionism, those cries acting as a sounding board for potential American petitioners to find out how the Canadian government would respond. Multilateral trade negotiations may have been the best way to deal with some of the bilateral trade problems, but negotiations would have had to occur to settle the individual irritants, leading to ad-hoc orderly-marketing agreements, managed trade of other types, and perhaps postponing the creation of a forum in which to settle disputes in the future.

In any event, lumber was to be settled amid this brouhaha. One can only suspect that the ITA wished that November 4, 1986<sup>125</sup> had come and gone, but it seems that any decision it issued would be deemed political. As it turns out, the preliminary determination,<sup>126</sup> while eighty pages long, did not deal with the stumpage aspect of the decision in a satisfactory manner,<sup>127</sup> although interim duties were imposed.<sup>128</sup> The petitioner alleged that stumpage programs were provided to a specific group of industries<sup>129</sup> and that stumpage provided goods at preferential rates.<sup>130</sup> The ITA said it would continue to "adhere to the position that specificity is a

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124. Holmer and Bello, *supra* note 110, at 310.

125. The date of the mid-term election.

126. 51 Fed. Reg. 37,453 (1986).

127. Although an action had been brought by the petitioners in 1983 and settled in favour of the respondents, the ITA saw fit to give standing to the petitioners again. Canada took this *res judicata* issue to the GATT for a Tribunal to rule in favour of the Canadian lumber industry on grounds that the second U.S. action constituted "unjustifiable trade harassment," but withdrew the complaint as part of the negotiated settlement.

128. Final determinations from both the ITA and the ITC were forthcoming, but suspended as a result of the 30 Dec. 1986 agreement. See *supra* note 119.

129. Tariff Act of 1930, 93 Stat. 177, § 771(5)(B) (codified as amended at 19 U.S.C. § 1677 (1985)).

130. *Id.*



prerequisite for a domestic subsidy"<sup>131</sup> despite the U.S. Court of International Trade's qualification of that test in the *Carbon Black Administrative Review*.<sup>132</sup> However, the petitioner did not argue that the test was invalid; rather, it used the test to argue that stumpage was "specific" and not generally available—the very opposite of the conclusion the ITA reached in 1983. The Department agreed. Citing insufficient direction from Congress in interpreting specificity, the ITA said it used three factors in deciding whether a program is generally available. The applicable factor in this case was "(3) the extent to which the government exercises discretion in making the program available."<sup>133</sup> The agency found that the provincial governments exercised "considerable discretion in the allocation of stumpage licenses," and that the provinces had not rebutted that finding in their responses.<sup>134</sup>

Several factors went to the discretion issue: The provincial legislation granted a wide degree of discretion to administering ministries in "determining the actual recipients of licenses" and instead of providing licenses on a "first come, first serve basis . . . they consider the creation of employment, status of the applicant, the furthering of provincial development projects," etc.<sup>135</sup> The agency went on at great lengths in pointing out the discretions, which led to the decision that so much discretion, while not *per se* evidence that a benefit is specific, resulted in the targeting of an industry. Such targeting, in its view, was countervailable, despite the fact that an amendment to include targeting as part of U.S. countervailing duty law was eliminated from the final version of the Trade and Tariff Act of 1984.<sup>136</sup> To give the benefit of the doubt to the agency, however, it could be said that the discretion exercised in this case was not "targeting," a practice which might have been best dealt with under section 301 of the Trade Act of 1974<sup>137</sup> or at the GATT.<sup>138</sup> What the ITA was really getting at was that the discretion did not have to limit use to one industry only, i.e., a dominant user of stumpage could fall within the limits of the definition of "specific industry."<sup>139</sup>

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131. 51 Fed. Reg. 37,455 (1986).

132. *Cabot Corp. v. United States*, 620 F. Supp. 722, 7 I.T.R.D. 1227 (1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986).

133. 51 Fed. Reg. No. 37,456 (1986). The other two factors were: (1) the extent to which a foreign government acts to limit the availability of a program, and (2) the number of enterprises, industries, or groups thereof which actually use a program, which may include the examination of disproportionate or dominant users.

134. 51 Fed. Reg. 37,456 (1986).

135. *Id.*

136. Pub. L. No. 98-573, 98 Stat. 2948. See Holmer and Bello, *supra* note 110, at 294.

137. 19 U.S.C. § 2411 (1978).

138. Holmer and Bello, *supra* note 110, at 301.

139. 51 Fed. Reg. 37,456 (1986).

The next step was to determine whether the lumber industry is the beneficiary of the discretion. Several points of evidence were raised to show that lumber was "targeted" in this fashion and that trade was thereby "distorted." Among them were agreements between governments and lumber companies empowering the latter to use timber stands to produce certain products, and to several other practices leading to labour-intensive uses of the timber base, especially the creation of sawmills leading to inordinately high output<sup>140</sup> considering the economic feasibility of such projects. It should be pointed out that such practices are not uncommon in any country dedicating itself to a purpose found worthy within the Subsidies Code, i.e., smoothing out regional disparities.<sup>141</sup> However, one must concede the point that they are trade-distorting practices.

The ITA included a review of its 1983 *Lumber* decision and stated that upon further investigation, the furniture industry in Canada did not benefit from stumpage and so one could not argue that the lumber industry was not the sole recipient of the benefit of low stumpage prices. The agency added that the pulp and paper industry, while classified as a different industry, was virtually owned and operated by the lumber industry since wood chips, a by-product of the lumber industry, was the main input product into pulp and paper.<sup>142</sup> The main criticism here is that it is quite an incursion into a country's sovereignty to countervail its industries' products because the natural economic development of a secondary industry's resemblance to and reliance on primary industry. After all, a requirement of countervailability is the subsidy to "like products made domestically."<sup>143</sup> What the ITA has stated here is a principle extending the concept of "like products" to include by-products, something best left to agreement by the Contracting Parties.<sup>144</sup>

At last, the ITA reached the point where it had to determine whether stumpage rights were provided at preferential rates.<sup>145</sup> To do so, it used an alternative test (the government's cost of producing the good or service) instead of the preferred test of measuring government price discrimination within the jurisdiction. The preferred test was found wanting in this case due to the unsatisfactory information the ITA obtained in determining whether competitively-bid sales were an accurate reflection of cost and sale price.<sup>146</sup> The alternatives, though, were all wanting of particular

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140. *Id.*

141. Subsidies Code, articles 8 and 11.

142. 51 Fed. Reg. 37,456 (1986).

143. GATT, art. VI, *supra* note 2, at para. 1(a).

144. Holmer and Bello, *supra* note 110, at 314.

145. Tariff Act of 1930 (codified as amended by 19 U.S.C. § 1677 (1985)).

146. 51 Fed. Reg. 37,457 (1986).

relevance to the situation at hand. The alternative chosen, however, led the ITA into an area that, in the writer's opinion, is far beyond its scope and capacity.

In applying the alternative test, the agency found that the four provinces under investigation<sup>147</sup> "do not recover the costs of providing standing timber to stumpage holders" in that harvesting expenditures exceed related revenues. This shortfall goes to stumpage license holders.<sup>148</sup> If there is a *ratio decidendi* to this case, that was it; however, further explanation was due since the explanation begged the question. What is the value of a standing tree? The ITA divided the issue further by saying that stumpage rights were benefits being conferred preferentially. That right was separated from the primary input—"the tree itself." The ITA admitted that the provincial governments incurred "no direct costs for the trees and the land on which they are situated,"<sup>149</sup> but said that "an imputed or indirect cost is associated with the *intrinsic value* of the tree and the land," adding that this value had to be added to all direct costs to determine whether the governments had higher costs than revenues. So, stumpage payment revenues were compared to expenditures arising out of maintaining commercial timberland and administering stumpage programs as well as the "imputed cost" representing the "intrinsic value of standing timber."<sup>150</sup> Since no information was provided reflecting the "exact value of provincial timber resources" the agency had to revert to the use of surrogate prices.<sup>151</sup> Here, the ITA decided that the use of competitively-bid sales was warranted as an appropriate surrogate for comparisons in British Columbia and Alberta. For Quebec and Ontario, private prices for sales in New Brunswick were used for comparison purposes. So, while competitively-bid sales were not an accurate measure of price discrimination because of lack of information on price adjustments between competitive and non-competitive bids,<sup>152</sup> for the purposes of surrogate pricing in determining costs to the government they were sufficient.

In the end, the amount by which costs exceeded revenues per cubic metre was multiplied by the total lumber production per cubic metre, divided by the sales in the four provinces, totaled a 14.542 percent *ad valorem* subsidy.

The obvious problems that the ITA faced in imputing the cost of a

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147. British Columbia, Alberta, Ontario, and Quebec.

148. 51 Fed. Reg. 37,457 (1986).

149. *Id.*

150. *Id.*

151. *Id.*

152. 51 Fed. Reg 37,458 (1986).

tree to the governments and using the surrogate competitively-bid prices led to outcries in Canada. What, after all, is a tree worth? One can appreciate the difficulty of the issues the ITA specifically had to grapple with in this case by taking on the investigation of primary, resource-based input products. But, in the writer's opinion, internal policies and practices<sup>153</sup> going to the exploitation of comparative advantages<sup>154</sup> are a matter for either internal or international, not unilateral, regulation.

It seems that the ITA faltered in another area, too. Stumpage pricing already contained the costs that the agency imputed to the intrinsic value of a tree, thereby apparently calculating that cost twice. While there might have been several grounds of appeal for the Canadian side, the broader issue is whether the ITA should be engaging in this type of investigation at all. It would seem that no domestic pricing practice would be exempted from the purview of the ITA after this case.

It is suggested that a better approach at this point would be that the ITA revert to its practice of detecting whether discrimination as to preferential pricing within a relevant jurisdiction exists and that it refrain from imputing value upon raw materials which are not directly subsidized until an international norm is agreed upon. The Uruguay Round appears to have provided the means whereby this might be done as the agenda, for the Round included a provision to liberalize "trade in natural resource-based products, including [sic] in their processed and semi-processed forms."<sup>155</sup>

#### VII. THE NEED FOR UNIFORMITY IN THE DEFINITION OF DOMESTIC SUBSIDIES

By its very name, the subtitle to this section presupposes a thesis: that a lack of uniformity in national definitions stemming from one international source, the GATT and its subsequent Subsidies Code, exists and that such inconsistency is counterproductive to a larger, preferred objective. That a lack of uniformity exists is hardly disputable in light of the discussion on the American "resource" cases. The fact that regulated pricing structures exist in the United States for public utilities, agriculture, and a host of other schemes, does not by itself mean that Canadian or Japanese law is not able to reach within the U.S. system and determine whether certain of those schemes confer countervailable subsidies, but the law in those latter two nations probably had not conceived of the

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153. Holmer and Bello, *supra* note 110, at 308.

154. *Id.*

155. From the Draft Ministerial Declaration on Uruguay Round, General Agreement on Tariffs and Trade, Punta del Este, Uruguay, 20 Sept. 1986, *supra* note 3, at 10.

desirability of such a practice until the U.S. experience. There is no indication as yet that either will pursue the U.S. definition of subsidy.

Meanwhile, the U.S. predicament is that trading partners have found ways to enhance their position by taking advantage, either actively or passively, of government programs, practices, or policies which fall outside of what has been agreed to in Rounds of the GATT. Explaining to the plant worker in Michigan or the timber feller in Oregon that the U.S. federal government is able to deal with foreign practices that seem unfair (because of their unavailability in the U.S.), but that it is unwilling to do something about it because it might be in violation of a non-binding international agreement that countries regularly violate (when it is economically feasible to do so) is not in the best interests of those who are in the position to change those laws. During periods of high unemployment, a general downturn in competitiveness, the oft-mentioned trade deficit, and numerous other factors, not the least of which is the apparent openness of the U.S. economy, the push to insulate domestic industries from foreign competition can become quite aggressive. Imagining a world full of protectionists, in the mode of the 1930's, seems almost bizarre, even far-removed, but in many ways world trading behaviour appears to be headed towards insulation of national industries, despite pronouncements to the contrary by the Reagan administration.<sup>156</sup>

The current development of a Comprehensive Trade Agreement (CTA) between the United States and Canada is unabashedly an attempt by Canada, *inter alia*, to be exempted from U.S. contingency protected measures.<sup>157</sup> The perceived rise in the use of those measures by the United States appeared to have been the driving force behind that push. A result of such an Agreement may be that subsidies will be more narrowly defined; however, that definition will be bi-national.<sup>158</sup> The multi-lateral approach is the preferred, though cumbersome, way of reaching an internationally acceptable set of norms to define subsidies and as such, the Uruguay Round presents some timely possibilities, especially as resources are on the agenda. Realistically though, a bilateral definition should be arrived at more easily and, in the case of Canada and the United States, would be even more timely. While the CTA may yet turn out to be an example of how open two economies can become without surrendering sovereignty to a supra-national body or to just one of the parties, setting up a world trading regime under the auspices of the

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156. See the proposed Trade, Employment and Productivity Act of 1987, U.H. Doc. No. 100-33, reprinted in, 1987 U.S. Code Cong. and Admin. News 044.

157. The Globe & Mail, 18 Oct. 1986, at A1 and D1; also, 20 Oct. 1986, at B3.

158. Defining subsidies is a major part of the U.S. negotiating position. The intent is to broaden the scope of countervailability.

GATT ensures fuller, more competitive participation on the part of other nations.

Defining subsidies uniformly is just one of the issues facing the GATT signatories, but it may be one of the most complex and critical, as foreign treasuries seek to compete with open, private, and competitive economies. Leaving the definition to be written by U.S. case law,<sup>159</sup> while attractive in the sense that resort can be had to a definition within a single jurisdiction, has the disadvantage of permitting one country's state of economic progress to dictate what terms of reference will be used in defining "domestic subsidy." Therefore, to avoid a multiplicity of definitions obtained from a proliferation of case law in the territories of the contracting parties and to prevent one nation from exerting undue influence on that definition through a rapid succession of cases involving domestic subsidies, a multilaterally agreed-upon set of standards is to be preferred.<sup>160</sup> Of course, an international definition might be no more than the codification of existing practices in one particular country, but that downside aspect is negated by what is more likely to happen without codification, namely, industry-by-industry responses to countervailing duty actions.

Each industry dispute in CVD cases adds to or amends the definition of subsidy. Responses by the losing party, assuming no negotiated settlement or undertaking (large enough issues in themselves), range from legislative to more private, tactical approaches to resolving a perceived wrong. This may further distort trading patterns. After all, if stumpage is a subsidy, then perhaps many other resource-allocation practices also are subsidies. Where does it end?

### VIII. CONCLUSION

Throughout this article, reasons for pursuing a definition of domestic subsidies which are countervailable have been emphasized. The GATT Articles represent a starting point for the definition(s), and the subsequent agreement to clarify those definitions resulting in the Subsidies Code is the greatest international effort yet mounted to arrive at a workable set of standards in which to find the meaning of "domestic subsidy."

The Canadian and American definitions are further refined within

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159. For an excellent treatise on the development of that definition up to 1983 see HUFBAUER AND ERB, *supra* note 20, at 89.

160. *Cf.* HUFBAUER AND ERB, *supra* note 20, at 90 who argue that "for the rest of this decade, international discipline on national countermeasures will depend on internationally agreed trade-impact tests, not on internationally agreed standards for defining and calculating potentially troublesome subsidies."

domestic legislation.

The U.S. cases which have been studied<sup>161</sup> point to some uncertainty as to what "subsidy" should include, while demonstrating an evolution in the American definition. Those cases, however, provide examples of what an international definition might include. Attempts to go beyond the already liberal steps taken in the cases were encountered in the Trade and Tariff Act of 1984.<sup>162</sup> As a result of the 1986 *Lumber* investigation, new questions are being raised as to the propriety of digging into the inner reaches of domestic policies and practices.

Hufbauer and Erb<sup>163</sup> set out a laundry list of items to be included in the definition of those subsidies, many of which reflect the issues faced by U.S. domestic industries up to and including the *Carbon Black*<sup>164</sup> case and which were addressed in representations before the Senate and House Trade Subcommittees prior to the enactment of the Trade and Tariff Act of 1984.<sup>165</sup> But this list does not deal with the matter of the sovereignty of internal practices adequately. While attempts to set up a trading regime affecting such practices as targeting and upstream subsidies is to be commended (assuming their fair treatment and giving full weight to the recognition of comparative advantages), treating natural resources in the same way as other products for CVD purposes (with the exception of nontransportable natural resources) may not be allowing for the full benefit of comparative advantage.

It is submitted that the sale of natural resources at what may be considered bargain basement prices, when generally available to users within a relevant jurisdiction, should be viewed not as a potentially troublesome subsidy, but as a policy choice to develop certain industries at an accelerated pace. If limits are placed (by a government) upon those who can take advantage of those prices then that could be viewed as discriminatory as long as those limits do not reflect the expected order of economic development within extraction economies. In that event, however, CVD law is probably not as appropriate in dealing with the domestic practice as safeguards or trade agreements legislation.

The implications of such a submission are that countries such as Canada would be faced with imports from developing countries relying upon the cheap sale of state-owned resources, which is not necessarily a compe-

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161. Domestic subsidies were really opened up to investigation in *X-Radial Belted Tires from Canada* (the *Michelin* case), 38 Fed. Reg. 1,018 (1973).

162. Codified at 19 U.S.C. § 1654 (Supp. 1988).

163. *Supra* note 20, at 127.

164. 48 Fed. Reg. 29,564 (1983).

165. Codified at 19 U.S.C. § 1654 (Supp. 1988).

tition with foreign treasuries, as is the case with the huge domestic subsidies accorded agricultural products. For developed countries dealing in the same manner, targeting prevention mechanisms could be used to halt injurious practices if indeed below market resource pricing was provided for the sole purpose of export. In the event of upstream subsidies, provisions could be enacted where input products are particularly likely to receive the benefits of pricing structures controlled or regulated by governments.

Practices which are purely internal may be regarded as outside of the law regarding subsidies as long as there is nothing prejudicial in the nature of the sale of those goods which would discriminate in favour of sales geared toward export as opposed to domestic sales. In this regard, the sale of abundant supplies outside of the home market should not be immediately typecast as targeted for export; certainly the size of the domestic market should be considered.

In the end, it will be seen that there may be purely internal policies which by their nature discriminate in their availability to foreigners or to certain industries targeted for export. Those should be dealt with as efficiently as possible, but not totally outside of what is agreed to internationally. Perhaps the Uruguay Round holds something in store for natural resources which will be in the best interests of both producing and consuming nations.