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# Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures

*Alan M. Rugman\**  
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## I. Introduction

The recent trade disputes between Canada and the United States involving exports such as softwood lumber<sup>1</sup> and grain corn<sup>2</sup> have drawn attention to the unfair trade laws of the two countries. The uncertainty, business harassment, and potential adverse economic impact stemming from more than one hundred bilateral unfair trade law cases<sup>3</sup> over the last five years calls into question the nature and administration of both systems. In light of such conflict this Article compares and analyzes the statutory nature and administrative process of antidumping and countervailing duty laws in the United States and Canada.

Partly due to concern over perceived business harassment, the Canada-U.S. Free Trade Agreement (FTA)<sup>4</sup> contains new provisions for the appeal of decisions rendered by the administrative agencies of both countries in their determination of unfair trade laws. Chapter nineteen of the FTA authorizes five-person binational panels to make binding decisions upon appeal of final orders in countervailing duty and antidumping cases.<sup>5</sup> The panels replace domestic judicial review and will consider the administrative record of the case appealed using the standards of judicial review applicable under the

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<sup>1</sup> See, e.g., *Certain Softwood Lumber Products*, 51 Fed. Reg. 37,453 (Int'l Trade Admin. 1986) (prelim. affirm. determination).

<sup>2</sup> See, e.g., 121 Can. Gaz. III 555 (1987) (final determination that U.S. grain corn benefited from subsidy).

<sup>3</sup> See generally 1980-1988 U.S. INT'L TRADE COMM'N ANN. REP. and 1980-1988 CAN. IMPORT TRIBUNAL ANN. REP. Note that the Canadian Import Tribunal's functions have been assumed by the Canadian International Trade Tribunal.

<sup>4</sup> United States-Canada Free Trade Agreement of Jan. 2, 1988 [hereinafter FTA], 27 I.L.M. 293 (1988), implemented in the United States by Pub. L. No. 100-449, 102 Stat. 1851 (1988) (effective Jan. 1, 1989).

<sup>5</sup> FTA, 27 I.L.M. at 386.

law of the appropriate nation.<sup>6</sup>

Certain provisions within Chapter nineteen create the possibility that different decisions will be made in the new binational forum than would have been made under the former system. Under the FTA, five particular aspects of U.S. trade remedy law are subject to binational panel review: U.S. statutes; legislative history; agency regulations; administrative practice; and judicial precedents relevant to the case appealed.<sup>7</sup> This broad definition of unfair trade law, when combined with other clauses in article 1904,<sup>8</sup> provides the panels with considerable discretion to establish their own rules of procedure and jurisprudence, thereby permitting the panel to view the case from a new perspective.

The replacement of domestic judicial review with binational panel review and the opening up of the appeals procedure to the binational panels has created controversy about the potential changes that may occur in the administration of unfair trade law.<sup>9</sup> In order to appreciate this controversy and contribute to a deeper understanding of the actual administrative and judicial processes in each country it is necessary to consider the current nature of the practice of unfair trade law in each nation.

## II. The Administrative Process

Through their respective antidumping and countervailing duty legislation Canada and the United States have sought to ensure that domestic producers have full recourse to rights arising from the Anti-Dumping Code,<sup>10</sup> and the Subsidies and Countervailing Duty Code<sup>11</sup> signed in 1979 as a result of the Tokyo Round of multilateral negotiations. Canada implemented the Tokyo Round codes through

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<sup>6</sup> *Id.* at 387.

<sup>7</sup> *Id.* at 386-87.

<sup>8</sup> *Id.* at 387-90.

<sup>9</sup> For a detailed explanation and interpretation of the dispute settlement mechanisms of the FTA, in light of legal and economic standards, see Anderson & Rugman, *The Canada-U.S. Free Trade Agreement: A Legal and Economic Analysis of the Dispute Settlement Mechanisms*, 13 J. WORLD COMPETITION: L. & ECON. REV. 1, 43-59 (1989). For additional background material on the potential for controversy, and for relevant references, see Rugman & Anderson, *How to Make the Free Trade Agreement Work: Implementing the Dispute Settlement Measures and Subsidies Code*, 11 TRADE MONITOR 1 (C.D. Howe Inst.) (1989). For an explanation of Canadian thinking on the subject of U.S. procedures in the administration of unfair trade law, see Rugman, *A Canadian Perspective on U.S. Administered Protection and the Free Trade Agreement*, 40 MAINE L. REV. 305 (1988). For U.S. views, see Zuidwijk, *Dispute Settlement Mechanism Under the Free Trade Agreement*, 40 MAINE L. REV. 325 (1988).

<sup>10</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, entered into force Jan. 1, 1980, reprinted in 26 GATT Basic Instruments and Selected Documents Supp. 171 (1980) [hereinafter GATT BISD Supp.].

<sup>11</sup> Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, entered into force Jan. 1, 1980, reprinted in 26 GATT BISD Supp. 56 (1980).

the Special Import Measures Act (SIMA);<sup>12</sup> the United States did the same through the Trade Agreements Act of 1979 (TAA).<sup>13</sup> Both acts create a mandatory,<sup>14</sup> two-track,<sup>15</sup> quasi-judicial administrative system<sup>16</sup> for resolving antidumping and countervailing duty complaints.<sup>17</sup>

The process for seeking antidumping or countervailing duty action is similar in both Canada and the United States. Two key determinations are required to support a finding of unfair trading practices: (1) Are the foreign goods being dumped or subsidized? and (2) Has the country's domestic industry producing similar products been materially injured?<sup>18</sup> In both Canada and the United States a governmental department determines the dumping and subsidy issue, whereas an extradepartmental agency or tribunal determines the material injury question.<sup>19</sup> The similarity of the systems is due to a common grounding in the GATT codes.<sup>20</sup>

In the United States the determination of a subsidy or dumping margin is handled by the International Trade Administration (ITA) of the Department of Commerce (DOC).<sup>21</sup> The question of material injury to domestic producers is handled by the International Trade Commission (ITC).<sup>22</sup> The ITC's six commissioners, who are appointed for a term of nine years, are nominated by the President and approved by the U.S. Congress.<sup>23</sup> In Canada the determination of dumping or subsidy is handled by the Assessment Programs Division of the Department of National Revenue, Customs, and Excise (the Department).<sup>24</sup> The newly formed Canadian International Trade Tribunal (CITT) determines the presence of material injury.<sup>25</sup> The

<sup>12</sup> R.S.C. ch. S-15 (1985).

<sup>13</sup> Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 19 U.S.C.).

<sup>14</sup> R.S.C. ch. S-15, §§ 31, 33, 42 (1985) and 19 U.S.C. §§ 1671a, 1673a (1988) (an investigation shall be commenced whenever the administering authority determines that a formal investigation is warranted).

<sup>15</sup> See *infra* notes 18-20 and accompanying text.

<sup>16</sup> R.S.C. ch. S-15, §§ 63-77 (1985) and 19 U.S.C. § 1675 (1988). See *infra* notes 21-26 and accompanying text.

<sup>17</sup> In Canada the adoption of SIMA reflects a desire, in part, to ensure that all the possible protectionist measures available to other nations are retained for use as bargaining chips in future trade negotiations. See Can. House of Commons, Finance Standing Comm. on Trade and Economic Affairs, 32d Parl., 1st Sess. 28 (1981-82) (import policy).

<sup>18</sup> Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, amended by Trade Agreement Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 150 and SIMA, ch. 25, 1984 Can. Stat. 739, amended by ch. 14, 1985 Can. Stat. 165 and ch. 1, 1986 Can. Stat. 1.

<sup>19</sup> See *infra* notes 21-26 and accompanying text.

<sup>20</sup> See General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A11, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1947) [hereinafter GATT].

<sup>21</sup> See Antidumping Duties, 19 C.F.R. pt. 353 (1988); see also Countervailing Duties, 19 C.F.R. pt. 355 (1988).

<sup>22</sup> 19 U.S.C. § 2251(b)(1) (1988).

<sup>23</sup> 19 U.S.C. § 1330(a) (1988).

<sup>24</sup> SIMA, R.S.C. ch. S-15, § 31(1) (1985).

<sup>25</sup> It should be noted that the Canadian International Trade Tribunal Act, ch. 56,

nine CITT members are appointed for their five year terms by the Government through an order-in-council.<sup>26</sup>

One interesting difference between the two systems is the composition of the tribunals hearing cases on the issue of material injury. Although the CITT has appointed six of its nine members, a three-member panel almost always decides the case and a deadlock is very unusual.<sup>27</sup> On the other hand, ties are possible in the ITC because the votes of all six of its permanent members are recorded.<sup>28</sup> When such a deadlock occurs the ITC determination is affirmative and favors the domestic plaintiff.<sup>29</sup> Table 1 summarizes the steps taken in the two countries from the filing of a complaint in an unfair trade case to the imposition of definitive antidumping or countervailing duties.

**Table 1**  
**Stages in Unfair Trade Law Investigations in the United States and Canada**

Decision	Decision-maker	
	United States	Canada
Initiation or Rejection of complaint	ITA	National Revenue
Preliminary injury determination	ITC	National Revenue
Preliminary determination on dumping or subsidy	ITA	National Revenue
Final dumping or subsidy determination	ITA	National Revenue
Final injury determination	ITC	CITT

1988 Can. Stat., reprinted in 11 Can. Gaz. II (No. 10) I (1988), united the functions of the Canadian Import Tribunal (CIT), the Tariff Board, and the Textile Board. *Id.* at 22-26, §§ 50-58. Although the newly-formed Canadian International Trade Tribunal (CITT) is more than just the sum of its parts, the procedure followed by the CITT in countervailing duty and antidumping actions will probably remain unchanged.

<sup>26</sup> *Id.* at 2, § 3.

<sup>27</sup> The CITT did sit with four members in Countertop Microwave Ovens Originating in or Exported from Japan, Singapore, and The Republic of Korea (R-6-88) (1988), but the vote was unanimous and no difficulty arose. To the authors' knowledge, this is the only case in which the CITT sat with an even number of members.

<sup>28</sup> 19 U.S.C. §§ 1330(d)(3), 2251(d) (1988).

<sup>29</sup> See generally 19 U.S.C. § 1330(d) (1988).

### III. Differences in Administrative Practices

#### A. *The Departments of Commerce and National Revenue*

##### 1. *Standing*

To acquire standing in both Canada and the United States trade complainants must represent a majority of producers of like goods in that country.<sup>30</sup> The two countries have, however, handled this requirement differently. In the United States the complainant enjoys a presumption of standing.<sup>31</sup> The DOC assumes that the complainants represent a majority of producers and the respondent must rebut this presumption.<sup>32</sup> In Canada, the Department is much more active in determining whether the complainant actually represents a majority of producers of similar goods. In Canada and other relatively small economies in which an industry may be comprised of one or two companies it is common to find that the complainant represents a majority of producers. Thus, although the role of the agencies in determining standing is different, the results are substantially the same.

##### 2. *The Definition of Subsidy*

The U.S. and Canadian definitions of subsidy are vague enough to leave the administering authorities wide latitude to determine what will be considered a countervailable subsidy.<sup>33</sup> In the United States the issue is determined through the specificity test. Section 771(5)(B) of the TAA provides that a domestic subsidy is a benefit "provided [by government action] to a specific enterprise or industry, or group of enterprises or industries."<sup>34</sup> This section has been read to stand for the proposition that generally available subsidies will not be considered countervailed.<sup>35</sup> For example, the DOC has considered subsidies to broadly based groups of industries such as agriculture to be generally available and therefore not subject to a countervailing duty.<sup>36</sup> Generally available subsidies benefit a wide

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<sup>30</sup> SIMA, R.S.C. ch. S-15, § 42(1) (1985) and 19 U.S.C. § 1671a(b) (1988).

<sup>31</sup> 19 U.S.C. § 1671a(b)(1) (1988).

<sup>32</sup> See *Certain Fresh Atlantic Groundfish from Canada*, 51 Fed. Reg. 10,041, 10,043 (Dep't Comm. 1986) (final affirm. determination).

<sup>33</sup> The Canadian Deputy Minister of Revenue in antidumping and countervailing duty cases allows the binational panel review of "definitive decisions" concerning U.S. goods. FTA, R.S.C. ch. C-2, § 77.11 (1988). Definitive decisions include final determinations of dumping or subsidization, the definition of goods to which the final determination applies, and the decision to renew or not to renew an undertaking. *Id.* § 77.1(1).

<sup>34</sup> 19 U.S.C. § 1677(5)(b) (1988).

<sup>35</sup> See, e.g., *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (Ct. Int'l Trade 1983); *Bethlehem Steel Corp. v. United States*, 590 F. Supp. 1237 (Ct. Int'l Trade 1984).

<sup>36</sup> See *Live Swine and Fresh Chilled and Frozen Pork Products from Canada*, 50 Fed. Reg. 25,097 (Dep't Comm. 1986) (final affirm. determination) (listing subsidies to agriculture considered both generally available and targeted).

range of industry groups within the political region offering the subsidy.

The DOC has narrowly construed the principle of general availability for industries exporting to the United States. For example, in *Groundfish*<sup>37</sup> and in *Softwood Lumber*<sup>38</sup> the DOC indicated that it will be increasingly difficult to convince U.S. authorities that a subsidy is generally available and therefore should be considered noncountervailable.<sup>39</sup> Another U.S. practice proving most unsettling to Canadian authorities is that the United States has defined as countervailable certain federal government programs that are only available in certain regions of Canada.<sup>40</sup> Subjecting Canada's federal government programs to countervailing action could lead to Canada's regional development programs being countervailed. These programs are used by Canada in order to promote equity and redistribution of income from rich regions to poorer ones.

Canadian treatment of the subsidy issue is also ambiguous. The Department's final determination of *Grain Corn*<sup>41</sup> is notable because it included Appendix I which lists the criteria used to determine whether a program confers a countervailed subsidy with respect to grain corn.<sup>42</sup> The listed criteria are similar to those used by the DOC: "whether the program provided a financial or other commercial benefit . . . and . . . whether the program was targeted."<sup>43</sup> The appendix to *Grain Corn* also describes the Canadian view on generally available versus targeted government programs. A generally available program is not countervailed whereas targeted programs are countervailed. Criteria used to determine general availability include:

[A]vailability to all persons in an industrial sector, *e.g.*, agriculture; availability to similar persons across a range of industrial sectors, *e.g.*, small business development; availability to more than one industrial sector; and general availability within the jurisdiction of the granting authority. If a program is available only to certain enterprises or access to the program is limited, either by specifically including or excluding certain enterprises, then the program may be targeted depending on the eligibility conditions or criteria of the program.<sup>44</sup>

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<sup>37</sup> Certain Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041 (Dep't Comm. 1986) (final affirm. determination).

<sup>38</sup> Certain Softwood Lumber Products, 51 Fed. Reg. 37,453 (Int'l Trade Admin. 1986) (prelim. affirm. determination).

<sup>39</sup> See Rugman & Porteous, *The Softwood Lumber Decision of 1986: Broadening the Nature of U.S. Administered Protection*, 2 REV. INT'L BUS. L. 35, 47-48 (1988).

<sup>40</sup> *Id.* at 55.

<sup>41</sup> CAN. DEP'T NAT'L REVENUE, CUSTOMS, AND EXCISE, STATEMENT OF REASONS: FINAL DETERMINATION OF SUBSIDIZING RESPECTING GRAIN CORN (1987) [hereinafter FINAL DETERMINATION].

<sup>42</sup> *Id.*, app. 1, p. 1.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

Regarding Canada's regional development programs the Department of National Revenue stated that "if a program is directed to a certain region within the granting authorities jurisdiction because that region possessed certain characteristics which are unique in the jurisdiction, then the program may not be considered to be targeted."<sup>45</sup> The Department applied this distinction in *Grain Corn* and held that the Great Plains Conservation Program<sup>46</sup> was a targeted regional program because other areas of the United States, beyond the ten states targeted for assistance, could benefit from such an anti-erosion program.<sup>47</sup>

Ideology has also been an influential factor in the U.S. subsidy determination process.<sup>48</sup> The pattern of subsidy determinations by the DOC has paralleled what is considered proper government practice in the United States.<sup>49</sup> Government programs that tend to be vindicated in countervailing duty cases include free government information services for exporters, loan guarantees from export-import banks, price controls on natural resource inputs, wide-ranging aid to agriculture, and certain tax depreciation schedules.<sup>50</sup> Not surprisingly, these acceptable subsidies are also provided by the U.S. government to its exporters.

Although Canada and the United States may differ on what constitutes a countervailable subsidy, ultimately the subsidy definition of the United States is of greater significance. Canadian companies with market interests in the United States may forego a program offered by the Canadian Government out of fear that it may leave them vulnerable to a countervailing duty action from the United States.<sup>51</sup> On the other hand, due to the size difference of the two markets, U.S. companies are very unlikely to react the same way to U.S. Government programs that may be considered subsidies by the Canadian Government.<sup>52</sup>

The impact of the U.S. unfair trade legislation is clearly asymmetrical. In 1986 more than \$4 billion of Canadian exports to the United States were affected by unfair trade laws, yet only \$384 million of U.S. exports to Canada were similarly affected.<sup>53</sup> The value

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<sup>45</sup> *Id.*

<sup>46</sup> 7 C.F.R. § 631 (1989).

<sup>47</sup> FINAL DETERMINATION, *supra* note 41, at app. 2, p. 1.

<sup>48</sup> See Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 547, 556-70 (1987).

<sup>49</sup> *Id.* at 569.

<sup>50</sup> *Id.* at 567.

<sup>51</sup> R. GREY, TRADE POLICY IN THE 1980'S: AN AGENDA FOR CANADIAN-U.S. RELATIONS 66-67 (1981).

<sup>52</sup> *Id.* at 98.

<sup>53</sup> In preparation for the FTA negotiations, the TNO, Revenue Canada, and the Department of Finance examined antidumping and countervailing duty actions taken by Canada and the United States against one another from 1980 to mid-1987. Canada initiated one countervailing duty action against the United States and eventually applied definitive



of affected Canadian exports comprised 3.1% of Canada's merchandise exports in 1986; only 0.12% of U.S. merchandise exports over the same period were similarly affected.<sup>54</sup>

*B. The Administrative Agencies: The ITC and CITT*

*1. Material Injury*

Under the GATT system it is not sufficient for a domestic producer simply to establish that certain imports are being dumped or subsidized; the producer must also show material injury to the domestic production of like goods as a result of the imports.<sup>55</sup> To show material injury the Canadian producer or industry usually presents evidence of loss of sales to dumped or subsidized goods, price competition, and a decline in employment, market share and profitability.<sup>56</sup>

During the early stages of an investigation the Canadian process differs from the U.S. procedure in that the Department of National Revenue makes the *initial* determination of the existence of a reasonable threat of material injury *and* decides whether a subsidy or dumping has occurred. The Department's inquiry into material injury at this stage is less formal and more perfunctory than the ITC's preliminary determination. Canada's less formal process at this stage has been criticized because duties are levied following a preliminary determination of unfair trade practices.<sup>57</sup> Recent legal developments in the United States, however, have so constrained the ITC's ability to find a lack of material injury that the practical difference between

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duties. CAN. DEP'T FINANCE, THE CANADA-U.S. FREE TRADE AGREEMENT: AN ECONOMIC ASSESSMENT 22 (1987). U.S. imports valued at \$9 million (Canadian) were affected. *Id.* The six countervailing duty cases resulting in action against Canadian exports to the United States affected \$4.172 billion (Canadian) of Canadian exports. *Id.* This huge figure is largely the result of the *Softwood Lumber* case of 1986 which resulted in the imposition of an export tax by the Canadian government to avoid U.S. countervailing duties. *Id.*

In a paper using data from the period 1980 to 1985, Chong-Hyun Nam found only 0.9% of Canada's exports to the United States were under countervailing duties as compared to 11.9% for Argentina and 7.5% for Korea during the same period. Nam, *Export-Promoting Subsidies, Countervailing Threats, and the General Agreement on Tariffs and Trade*, 1 WORLD BANK ECON. REV. 727, 736 (1986). However, once softwood lumber is added to 1986 data the amount of Canadian trade to the United States subject to countervailing duty rises to 4.6%.

<sup>54</sup> U.S. DEP'T COMMERCE, 68 SURVEY OF CURRENT BUSINESS 516-17 (May 1988) and STATISTICS CANADA, QUARTERLY ESTIMATES OF THE CANADIAN BALANCE OF INTERNATIONAL PAYMENTS (No. 67-001) (fourth quarter 1987).

<sup>55</sup> See GATT, *supra* note 20, art. VI(5).

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to prevent or materially retard the establishment of a domestic industry.

*Id.*

<sup>56</sup> R. GREY, *supra* note 51, at 59.

<sup>57</sup> *Id.* at 103.

the two systems may be negligible.<sup>58</sup> Currently, the ITC will find a reasonable indication of injury in all cases except where there is clear and convincing evidence that no material injury, or threat thereof, exists, and where there is no potential that evidence to the contrary would arise if ITC pursued the case.<sup>59</sup>

Canadian firms may face a stricter standard for material injury at the tribunal stage than their U.S. counterparts.<sup>60</sup> In assessing the requisite causal link between the dumped or subsidized imports and material injury the CITT has set a particularly onerous standard for domestic producers to overcome. Factors such as declining markets, lack of reputation, limited production ranges, and start up and production difficulties have all been cited as the relevant cause of injury where domestic producers claimed injury from dumped or subsidized goods.<sup>61</sup> In the United States the ITC has been criticized for not analyzing causality in any meaningful way.<sup>62</sup> The causal analysis of the ITC often consists only of simple data correlations.<sup>63</sup> For example, the ITC has found sufficient causality if imports are seen to increase at the same time the industrial performance of the petitioning industry declines.<sup>64</sup>

The presence of a growing pro-economics faction within the ITC may lead to changes in the ITC's simplistic attitude towards causality. Commissioner Ronald Cass advocates the use of improved economic analysis and seeks to define more accurately the causal link between subsidy and injury.<sup>65</sup> This can be done through analysis of the actual size of the subsidies involved and elasticities of import supply, domestic supply, and domestic demand.<sup>66</sup>

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<sup>58</sup> Anderson & Rugman, *supra* note 9, at 8; see also R. CASS, *ECONOMICS IN THE ADMINISTRATION OF U.S. INTERNATIONAL TRADE LAW* (Ontario Centre for International Business Working Paper No. 16, 1989).

<sup>59</sup> See *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986).

<sup>60</sup> Herman, *Injury Findings by the Canadian Import Tribunal: The Decisive Elements*, 1 REV. INT'L BUS. L. 373, 395 (1987).

<sup>61</sup> See CAN. ANTI-DUMPING TRIBUNAL: 1980 ANNUAL REPORT 28 (citing Sporting Ammunition (ADT-8-80) (1980)); see also CAN. IMPORT TRIBUNAL: 1984 ANNUAL REPORT 33 (citing Plywood Concrete Forming Panels (CIT-17-84) (1985)); CAN. ANTI-DUMPING TRIBUNAL: 1983 ANNUAL REPORT 27 (citing Toilet Seats (ADT-5-83) (1983)); CAN. ANTI-DUMPING TRIBUNAL: 1980 ANNUAL REPORT 27 (citing Chelating Agents (ADT-5-81) (1981)).

<sup>62</sup> Rugman and Anderson, commenting on the ITC's treatment of the causality issue in their study of the *Groundfish* case, found that "at no point in the case was such a linkage established." A. RUGMAN & A. ANDERSON, *ADMINISTERED PROTECTION IN AMERICA* 62 (1987).

<sup>63</sup> A. SYKES, *COUNTERVAILING DUTY LAW: AN ECONOMIC PERSPECTIVE* 15 (University of Toronto Law and Economics Workshop Series No. 7, 1989).

<sup>64</sup> *Id.*

<sup>65</sup> R. CASS, *supra* note 58.

<sup>66</sup> For an example of this analysis, see *Live Swine and Pork from Canada*, 7 I.T.R.D. 2285, 2293 (1985).

## 2. *Public Interest*

One very unique provision of the Canadian enactment of the FTA is section forty-five of SIMA, which introduces a consideration of public interest into the unfair trade law process.<sup>67</sup> Neither the European Community nor the United States have such a provision.<sup>68</sup> The public interest component of SIMA stemmed from complaints that its predecessor, the Anti-Dumping Act, was overly concerned with domestic producer interests and ignored the effect of duties on downstream users of the goods and consumers.<sup>69</sup>

If the CITT decides it is appropriate, the Tribunal has the authority under section forty-five to examine the impact on the public interest of its finding of material injury and the subsequent assessment of duties.<sup>70</sup> The CITT must submit a report to the Minister of Finance if it determines that collection of such duties would not be in the public interest.<sup>71</sup> The Minister then has discretion to lower or to

<sup>67</sup> SIMA, R.S.C. ch. S-15, § 45 (1985).

<sup>68</sup> Other jurisdictions have attempted to deal with the public interest issue. The EEC antidumping and subsidization code requires authorities to assess that in the event the "interests of the Community call for Community intervention, a definitive anti-dumping or countervailing duty shall be imposed by the Council, acting by qualified majority on a proposal submitted by the Commission after consultation." 22 O.J. EUR. COMM. (No. L 339) art. 12(1), at 10 (1979) (Council regulation to protect against dumped or subsidized imports from non-EEC members). The Commission recommendation, however, implies that the larger interests of the Community must be taken into account since its recommendation on protection against dumped or subsidized imports from countries not members of the European Coal and Steel Community states that "[if] interests of the Community call for Community intervention; the Commission, *after consultation*, shall recommend that a definitive anti-dumping or countervailing duty be imposed." 22 O.J. EUR. COMM. (No. L 339) art. 12(1), at 24 (1979) (emphasis added) (Commission recommendation).

<sup>69</sup> Anti-Dumping Act, ch. 10, 1968-69 Can. Stat. 75, *repealed by* SIMA, ch. 25, 1984 Can. Stat. 739, § 110. See Can. House of Commons, Finance Standing Comm. on Trade and Economic Affairs, 32d Parl., 1st Sess. 23 (1981-82) (import policy). For Canadian treatment of public interest, see SIMA, R.S.C. ch. S-15, § 45(1) (1985), which provides:

Where, as a result of an inquiry referred to in section 42 arising out of the dumping or subsidizing of any goods, the Tribunal makes an order or finding described in any of sections 3 to 6 with respect to those goods and the Tribunal is of the opinion that the imposition of an anti-dumping or countervailing duty, or the imposition of such a duty in the full amount provided for by any of those sections, in respect of the goods would not or might not be in the public interest, the Tribunal shall, forthwith after making the order or finding,

(a) report to the Minister of Finance that it is of that opinion and provide him with a statement of the facts and reasons that caused it to be of that opinion; and

(b) cause a copy of the report to be published in the *Canada Gazette*.

*Id.*

<sup>70</sup> SIMA, R.S.C. ch. S-15, § 45(1) (1985).

<sup>71</sup> A report is presented to the Minister of Finance by the Tribunal. Financial Administration Act, R.S.C. ch. F-10, § 17 (1985). However, "should the Tribunal determine that, on balance, the public interest, encompassing non-producer private interests, is not being served by the imposition of the full or partial amount of an anti-dumping or countervailing duty, [then] section 45 requires the Tribunal to so report to the Minister." CAN. IMPORT TRIBUNAL: REPORT ON PUBLIC INTEREST GRAIN CORN 3 (Oct. 20, 1987) [hereinafter REPORT ON GRAIN CORN].

eliminate the duty.<sup>72</sup>

Section forty-five imposes two responsibilities on the Tribunal. First, the Tribunal must determine the nature and extent of the impact on interested parties of the countervailing or antidumping duty.<sup>73</sup> This parallels the scope of the Tribunal's past duties. The CITT here is merely required to advise the Minister whether consumers' and users' claims of injury are valid. Second, the Tribunal must advise the Minister as to the level of duty best serving the public interest.<sup>74</sup> This requirement presents the Tribunal with new responsibilities.<sup>75</sup> To meet these new responsibilities the Tribunal has indicated that it may employ tests based upon cost-benefit methodologies.<sup>76</sup> To this end the Tribunal would be prepared to examine

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<sup>72</sup> A weakness of § 45 is that the CITT is not required to consider the public interest in each case. The Canadian legislators saw difficulty in straying too far from the criteria set out in the GATT codes. This was clear when the legislators failed to recommend that SIMA include a consideration of consumer interests in the Tribunal's criteria.

First, it is important that the Tribunal, in deciding whether injury is present, be guided exclusively by the criteria set out in the GATT Codes. If the Tribunal was guided by criteria other than those set out in the GATT, then Canadian industry would not receive the same level of protection against unfair trade practices as comparable industries in other countries. The inquiry into producer injury is too important to introduce any other consideration which may inadvertently interfere with this decision.

As the Tribunal must render its decisions within strict time limits, any additional criteria reflecting consumer interest could lengthen the time required for an inquiry. A lengthening of the time required for an inquiry (or a hastily prepared decision) could deny legitimate protection to an industry suffering injury from dumped imports.

Can. House of Commons, Finance Standing Comm. on Trade and Economic Affairs, 32d Parl., 1st Sess. 28 (1981-82) (import policy).

<sup>73</sup> SIMA, R.S.C. ch. S-15, § 45(2) (1985) states:

Where any person interested in an inquiry referred to in subsection (1) makes a request to the Tribunal for an opportunity to make representations to the Tribunal should, if it makes an order described in any of sections 3 to 6 with respect to any goods in respect of which the inquiry is being made, make a report pursuant to paragraph (1)(a) with respect to those goods, the Tribunal shall afford such person an opportunity to make representations to the Tribunal on that question orally or in writing, or both, as the Tribunal directs in the case of that inquiry.

*Id.*

<sup>74</sup> *Id.* § 45(1).

<sup>75</sup> The Tribunal stated in *Grain Corn* that in the future, broader arguments of the public interest may be placed before them. It indicated that in future public interest inquiries it would also be open to arguments concerning the possible effect of the countervailing duty on other Canadian exports due to retaliation by the foreign government affected.

The Director of Investigations and Research under the Competition Act might seek leave to appear before the Tribunal in order to present evidence to the effect that a full imposition of the countervailing duty would, because of certain structural or behavioral features of the cosmetic product market, or its downstream markets, result in a serious reduction of competition and, possibly efficiency, to the detriment of various classes of producers and consumers.

REPORT ON GRAIN CORN, *supra* note 71, at 5.

<sup>76</sup> *Id.* at 4-5.

evidence regarding the economic variables relevant to the case, such as prices, income, and costs.

Section forty-five was originally viewed as a safeguard for Canadian consumers and intermediate producers.<sup>77</sup> It was an attempt to offset the significant producer bias of SIMA through an examination of the impact on the public interest of countervailing and antidumping duties. In practice, however, this attempt seems to have failed. Countervailing and antidumping duties are seen by many economists as contrary to the public interest because the costs incurred by society at large far outweigh the benefits to domestic producers.<sup>78</sup> In addition, there have been only three public interest hearings in the four years that section forty-five has been in existence.<sup>79</sup> In only one of these cases, *Grain Corn*, was a report made to the Minister.<sup>80</sup> *Grain Corn* may represent a turning point in the use of section forty-five because the ultimate result in the case was an immediate reduction in the countervailing duty on U.S. corn imports.<sup>81</sup>

*Grain Corn* demonstrates that the CITT will attempt to limit the use of section forty-five to exceptional circumstances. Given the success of the *Grain Corn* hearing this may prove difficult. *Grain Corn* was exceptional only to the extent that consumers, intermediate producers, and users organized to fight the countervailing duty.<sup>82</sup> The result in *Grain Corn* will probably encourage future requests for public interest hearings.

If public interest hearings do become more common, *Grain Corn* indicates that the CITT will attempt first to determine whether the countervailing or antidumping duty assessed by the Tribunal is capable of being fully captured by the domestic producers. Second, if the full amount of the duty cannot be captured, the CITT will determine the level of duty that can be captured. Third, the CITT will determine whether this reduced level of duty is "unduly burdensome" to

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<sup>77</sup> A. RUGMAN & A. ANDERSON, *supra* note 62, ch. 3.

<sup>78</sup> For an overview of § 45, see K. STEGEMANN, REPORT OF THE POLICY FORUM OF SPECIAL IMPORT MEASURES LEGISLATION (John Deutch Institute for the Study of Economic Policy Forum Series No. 4, 1984). For an analysis of the strategic responses of firms to unfair trade laws, see Porteous & Rugman, *Canadian Unfair Trade Laws and Corporate Strategy*, 3 REV. INT'L BUS. L. 237 (1989).

<sup>79</sup> Fresh Whole Onions, Originating in or Exported from the United States (CIT-1-87) (1987); Grain Corn (CIT-7-86) (1986); and Surgical Adhesive Tapes and Plasters, Excluding Plastic Tapes and Plasters, Originating in or Exported from Japan (CIT-8-85) (1985).

<sup>80</sup> REPORT ON GRAIN CORN, *supra* note 73, at 11.

<sup>81</sup> According to confidential conversations with various Finance Department officials the slightly higher duty announced by the Minister of State for Finance resulted from a difference in views between the International Economic Relations Division and the studies reviewed by the CIT.

<sup>82</sup> *Grain Corn* was atypical in that it was both a subsidy case and an agriculture case. It involved special considerations about possible strain on the treasury. However, it is unlikely that future cases will be distinguished from *Grain Corn* on the basis of these atypical characteristics.

consumers and users of the affected good. The CITT hopes, in the public interest hearing, to advise the Minister on a reduction of duty without having to determine how the burden of "unfair trading" should be borne. Public interest hearings provide domestic producers with the benefits of government protection and consumers with the benefits of reduced uncertainty with regard to price.

This approach, however, is troublesome. Using economic tests of cost-benefit analysis, the Tribunal will have to decide how injury and net benefits should be distributed between domestic interests. If such adjudications become common the Tribunal will face a challenging decision involving normative and ethical factors in order to determine the optimal distribution of the unfair trade burden.<sup>83</sup>

### *C. The Use of "Undertakings" to Avoid the Antidumping and Countervailing Duty Process*

Exporters facing unfair trade actions may enter an undertaking, that is, they may negotiate an agreement with the complaining country rather than face antidumping and countervailing duties.<sup>84</sup> This apparently brings an element of flexibility to the world's unfair trade law regimes, but there are a number of obstacles in the United States and Canada limiting the use of undertakings.

One tactical hurdle is that exporters to Canada faced with an antidumping action must decide prior to a preliminary determination by the Department whether or not to submit an undertaking.<sup>85</sup> This explains why there is a certain lack of appeal in Canada for the undertakings option. Another factor discouraging undertakings in Canada is that an exporter accounting for less than a majority of a category of goods must cooperate with other exporters to submit an undertaking.<sup>86</sup> Currently there are only ten undertakings in force in Canada.<sup>87</sup>

Before Canada will allow an undertaking to replace an antidumping or countervailing duty case, the producers seeking the undertaking must account for nearly all exports to Canada of the dumped or subsidized goods and completely eliminate either the

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<sup>83</sup> The social costs and benefits of a duty cannot be evaluated in any precise or meaningful fashion since the technique of cost-benefit analysis, being derived from the theoretical welfare of general equilibrium systems, does not lend itself readily to the measurement of intangible political goals such as the "public interest." A. RUGMAN, *MULTINATIONALS IN CANADA: THEORY, PERFORMANCE AND ECONOMIC IMPACT* 37 (1980).

<sup>84</sup> SIMA, R.S.C. ch. S-15, § 2(1) (1985); *see also id.* § 49 (explanation of the use of undertakings).

<sup>85</sup> *Id.* § 49(2)(b).

<sup>86</sup> *Id.* § 2(1).

<sup>87</sup> Price Undertakings in force as of May 24, 1989, are as follows:

dumping or the injury to Canadian production.<sup>88</sup> Before accepting an undertaking the Department of National Revenue consults with importers and Canadian producers.<sup>89</sup> Once an undertaking is accepted by the Deputy Minister, the antidumping or countervailing duty investigation is suspended and no duties are collected while the undertaking is in force.<sup>90</sup>

In the United States the Tariff Act of 1930<sup>91</sup> authorizes undertakings offered by a government or a group of exporters to terminate antidumping and countervailing duty actions.<sup>92</sup> Exporters dealing with the U.S. system are not confronted with the draconian timing requirement of the Canadian undertaking system. "Suspension agreements," the U.S. term for undertakings, can be negotiated at any time up to thirty days before the final decision.<sup>93</sup> Despite this favorable aspect of the U.S. system, undertakings are not used proportionately more often than in the Canadian system. One reason for this is that section 734 narrowly limits the use of undertakings by requiring that "imports make up at least eighty-five percent of the imports subject to investigation."<sup>94</sup> Currently there are twenty-two suspension agreements in force under U.S. law.<sup>95</sup>

GATT figures indicate that undertakings are a common resolu-

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<u>Country</u>	<u>Commodity</u>
Brazil	Carbon Steel Pipe
F.R.G.	Porcelain Insulators
G.D.R.	Carbon Steel Plate
Japan	Oil and Gas Well Casting
Luxembourg	Carbon Steel Pipe
U.S.	Frozen Pies and Prepared Dinners
U.S.	Metal Storage Cabinets
U.S.	Tile Backer Board
U.S.	Grinding Balls
Yugoslavia	Carbon Steel Pipe

List supplied by Can. Dep't of Nat'l Revenue, Customs, and Excise upon request.

<sup>88</sup> SIMA, R.S.C. ch. S-15, §§ 2(1), 49 (1985).

<sup>89</sup> *Id.* § 49.

<sup>90</sup> *Id.* § 50(a). For an interesting view on undertakings and other voluntary export restraints, see generally D. YOFFIE, *POWER AND PROTECTIONISM, STRATEGIES OF THE NEWLY INDUSTRIALIZED COUNTRIES* (expressing the notion that undertakings should be seen as opportunities rather than admissions of guilt). According to Yoffie, the key to success for the exporter in undertakings is to negotiate for loopholes; "the optimal agreement for an exporting state to seek is one that is impermeable and restrictive in form (thus satisfying potential political problems) but porous and unrestrictive in substance—an agreement so filled with loopholes that it is impossible to implement." *Id.* at 27. Yoffie has found this to be a successful strategy for small third world countries when dealing with protectionist actions from the United States. *Id.*

<sup>91</sup> Pub. L. No. 71-361, 46 Stat. 590 (as codified in 19 U.S.C. §§ 1202-1677k).

<sup>92</sup> 19 U.S.C. § 1673c (1988).

<sup>93</sup> 19 U.S.C. § 1673c(e)(1) (1988).

<sup>94</sup> S. REP. No. 96-249, 96th Cong., 1st Sess. 71 (1979).

<sup>95</sup> U.S. Dep't Commerce, Import Admin. Countervailing Duty and Antidumping Compliance List (Nov. 1, 1989) (on file in the offices of N.C.J. INT'L L. & COM. REG.) (there are 16 countervailing duty cases and 6 antidumping cases).

tion to unfair trade cases in all countries except the United States and Canada.<sup>96</sup> This can be explained by the DOC's and National Revenue's belief that suspension agreements are exceedingly difficult to monitor. Thus, they are to be avoided.<sup>97</sup>

#### IV. Data on Use of Unfair Trade Laws in Canada and the United States

Having examined the procedures of the U.S. and Canadian systems it is now useful to analyze their results. Tables 2 and 3 summarize all antidumping and countervailing duty actions reported to the GATT for the period 1985 to 1987. These tables place the unfair trade law practices of the United States and Canada in both a bilateral and a global perspective.

##### A. Antidumping

Table 2 indicates that enthusiasm for antidumping actions in Canada, as measured by the imposition of definitive duties, was second only to that of the United States in the period from 1985 to 1987. Canada is either second or third to the United States in the categories of initiations, provisional duties, and definitive duties. The United States leads all other GATT countries with the greatest number of actions in these categories.<sup>98</sup> Canada imposed approximately twenty-five percent of all definitive antidumping duties imposed by GATT members in the period between 1985 and 1987.<sup>99</sup> Impositions by the United States accounted for approximately fifty percent of all such actions.<sup>100</sup> Given the larger size of the U.S. economy it is safe to say that it is much more likely that any particular Canadian company will resort to antidumping actions than a U.S. company.<sup>101</sup> From 1985 to 1987, the European Community and the United States accounted for fifty-eight percent of definitive duty impositions, whereas Canada and Australia accounted for another

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<sup>96</sup> For example, 100% of the antidumping actions initiated in Finland and Sweden over the period July 1, 1985, to June 30, 1987, resulted in undertakings. Over the same period, over 55% of EC antidumping cases were initiated this way. See 34 GATT BISD Supp. 1, 201-03 (1987) (referring to chart summarizing antidumping actions between July 1, 1985, and June 30, 1987); see also Nam, *supra* note 53, at 732 (citing the proposition that the EC has relied heavily on undertakings to deal with subsidized imports).

<sup>97</sup> The congressional view of undertakings was expressed clearly in a Senate Report: "suspension is an unusual action which should not become the normal means for disposing of cases." S. REP. NO. 96-249, 96th Cong., 1st Sess. 71 (1979). The Senate Report describes an onerous list of conditions as compared to Canada that have to be met before an undertaking will be considered acceptable. *Id.*

<sup>98</sup> 34 GATT BISD Supp. at 201-03.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The Canadian affinity for dumping legislation may be seen as part of its heritage. In 1903 Canada was the first country unilaterally to legislate against dumping. See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 551 (1977).



forty-two percent of those actions.<sup>102</sup>

**Table Two**  
**Summary of Anti-Dumping Actions July 1, 1985 - June 30, 1987**  
**(Percent)<sup>103</sup>**

COUNTRY	INITIATION	PROVISIONAL MEASURES	DEFINITIVE DUTIES	PRICE UNDERTAKINGS <sup>1</sup>
AUSTRALIA	94 (31.3)	49 (23.9)	23 (17.3)	6 (14.3)
CANADA	51 (17.0)	35 (17.07)	33 (24.8)	4 (9.5)
E.C. <sup>2</sup>	40 (13.33)	18 (8.8)	14 (10.5)	22 (52.4)
FINLAND	5 (1.6)	3 (1.5)	0 (0.0)	4 (9.5)
KOREA	4 (1.4)	0 (0.0)	0 (0.0)	2 (4.8)
SWEDEN	2 (0.67)	2 (0.98)	0 (0.0)	2 (4.8)
U.S.	104 (34.7)	98 (47.8)	63 (47.4)	2 (4.8)
TOTAL <sup>3</sup>	300 (100)	205 (100)	133 (100)	42 (100)

<sup>1</sup> In the U.S. these are called "Suspension Agreements."

<sup>2</sup> GATT documents state these are actions taken with respect to the Parties only.

<sup>3</sup> Due to rounding, percentages may not total exactly 100.

It is understandable that two relatively small economies such as Australia and Canada would account for a large proportion of antidumping actions given the fact that they are often targeted for the excess output of larger producers in the triad (United States, Japan, and the European Community) and low-cost producers in Korea, Hong Kong, and Taiwan. In such cases Canadian manufacturers or manufacturers in other small industrial countries are likely to be much more affected by imports than are producers in the United States, Japan, or even in the European Community.

#### *B. Countervailing Duties*

Table 3 reveals the isolation of the United States in its use of countervailing duty laws. It also shows that the availability of similar institutions and processes does not always result in similar use or results. The United States imposed ninety-two percent of all definitive countervailing duties in the period between 1985 and 1987. The United States also accounted for seventy percent of all countervailing duty initiatives and seventy-six percent of all provisional countervailing duties imposed.<sup>104</sup> In contrast, Canada imposed only eight percent of all definitive countervailing duties.<sup>105</sup> Canada and the United States were the only two countries to impose definitive

<sup>102</sup> 34 GATT BISD Supp. at 201-03.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 191-92.

<sup>105</sup> *Id.*

countervailing duties during this period.<sup>106</sup> This is especially significant given the intrusive nature of a countervailing duty action. In countervailing duty actions policy decisions made by sovereign nations are evaluated and sanctioned by the imposition of definitive duties.<sup>107</sup> United States policy decisions have been relatively immune from similar scrutiny by other nations, but this may not long remain the case. In the 1987 *Grain Corn* decision, Canada found that a U.S. irrigation program provided a countervailed subsidy and levied countervailing duties. This was the first time a U.S. export was assessed with countervailing duties.<sup>108</sup>

**Table Three**  
**Summary of Countervailing Duty Actions July 1, 1985 - June 30, 1987 (Percent)<sup>109</sup>**

COUNTRY	INITIATION	PROVISIONAL MEASURES	DEFINITIVE DUTIES	PRICE UNDERTAKINGS <sup>1</sup>
AUSTRALIA	6 (7.8)	8 (15.1)	0 (0.0)	6 (60.0)
CANADA	5 (6.5)	4 (7.5)	3 (8.3)	1 (10.0)
CHILE	11 (14.3)	1 (1.9)	0 (0.0)	0 (0.0)
NEW ZEALAND	1 (1.3)	0 (0.0)	0 (0.0)	0 (0.0)
U.S.	54 (70.1)	40 (75.5)	33 (92.0)	3 (30.0)
TOTAL <sup>2</sup>	77 (100)	53 (100)	36 (100)	10 (100)

<sup>1</sup> In the U.S. these are called "Suspension Agreements."

<sup>2</sup> Due to rounding, percentages may not total exactly 100.

## V. Conclusions

Though the U.S. and Canadian unfair trade laws are both rooted in GATT, their administration results in procedural biases favoring the domestic producer. Although there are notable differences in such areas as standing, subsidy definition, analysis of material injury, and the integration of public interest considerations into the process, the two systems of unfair trade law are essentially similar in structure. This is particularly true with regard to the "undertaking" practices of both countries which, while similar to each other, are in

<sup>106</sup> *Id.*

<sup>107</sup> In many ways the U.S. application of its countervailing duty laws parallels its attitude toward the extraterritorial application of U.S. law and has led to similar reactions of offense by affected parties. See Porteous & Verbeke, *The Implementation of Strategic Export Controls in Canada*, 15 CAN. PUB. POL'Y 12, 20 (1989). For discussions of the extraterritorial application of U.S. law and reactions to it, see Marcus, *Soviet Pipeline Sanctions: The President's Authority to Impose Extraterritorial Controls*, 15 L. & POL'Y INT'L BUS. 1163, 1163-67 (1983).

<sup>108</sup> 34 GATT BISD Supp. at 191.

<sup>109</sup> *Id.* at 191-92, 201-03.

contrast to the practices of other GATT members, namely the European Community.<sup>110</sup> While the procedures and definitions of one system seem no worse than the other, they differ significantly in practice. Canada seems as eager as the United States to use the antidumping mechanism, but the United States marches alone when it comes to its extensive use of the much more intrusive countervailing duty law.<sup>111</sup>

Canada's greater concern about potential misuse of the administrative process by the United States reflects the larger economic impact of U.S. unfair trade law on Canadian business. Canada insisted that the appeals mechanisms of the FTA be added to address this concern.<sup>112</sup> Now the binational panels face the challenge of making binding decisions based on the administrative record of each case. It is apparent that some asymmetry will exist in the conduct of the binational panels.<sup>113</sup> The U.S. standard of administrative review is much broader than that in Canada. For example, Canada's Department of National Revenue has rarely filed detailed reasons for a ruling. In contrast the Department of Commerce makes available to the public all of its rulings and its reasoning in reaching these rulings. This may begin to change, but it is clear that, on average, the binational panels will probably give less deference now than in the past to the administrative agencies in the United States when they review Canadian cases. Because countervailing duty actions are major bilateral irritants the net outcome should be greater discipline in the administration of this aspect of U.S. trade law. This should result in an overall improvement in bilateral economic relations.

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See generally Rugman & Anderson, *Business Concerns About Implementing the Free Trade Agreement*, 53 *Bus. Q.* (No. 4) (1989).

<sup>113</sup> See *supra* note 9. In the context of the FTA, the potential review of National Revenue's decision is reportedly due to Canada's success in bringing the U.S. Department of Commerce's decisions under binational review. It will be interesting to see what will come of broadening the grounds of appeal for Revenue Canada's decisions. Prior to the FTA, none of the trade decisions by the Deputy Minister were appealable. John Coleman, Chairman of the CITT, stated in a recent speech that "[t]here is a clear possibility binational panels will overturn from time to time Revenue Canada's decisions on questions such as the definition of subsidy or the margins of subsidizing or dumping." Coleman, *New Rules, New Institutions: The CITT 14* (paper prepared for the University of Ottawa/Carleton University conference "Living With Free Trade," May 5, 1989). Hopefully, this new expanded form of review will exert greater discipline on the Department of Commerce and Revenue Canada, thus improving the quality of the decisions made by both countries.