

INTERNATIONAL ENERGY TRADE AND THE UNFAIR TRADE LAWS

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1. INTRODUCTION

As interest increases in the prospect that the unfair trade laws could help domestic producers stem the rising tide of energy imports into the United States, it is timely to make a close examination of energy-specific issues pertinent to future potential petitioners and of the federal agencies responsible for investigating their allegations. Imported downstream products, such as petrochemicals, and energy-intensive products, such as aluminum and paper, have also received additional scrutiny. This article surveys the principal issues that investigations of energy imports raise under the antidumping and countervailing duty laws,¹ Section 301 of the Trade Act of 1974,² and Section 337 of the Tariff Act of 1930.³ The article explores the impact that recent developments in Department of Commerce and International Trade Commission practice, recent judicial decisions, the United States-Canada Free-Trade Agreement,⁴ and the major provisions of the Omnibus Trade and Competitiveness Act of 1988⁵ might have on such investigations.

1.1. *Two-Tiered Pricing of Energy Resources*

Much of the concern over energy and downstream product imports arises because several of our major trading partners maintain two-

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The views expressed in this paper are solely those of its authors and do not necessarily represent the position of the United States government or any of its agencies.

¹ See *infra* Parts 2 & 3.

² 19 U.S.C. § 2411 (1982). See *infra* Part 6.

³ 19 U.S.C. § 1337 (1982). See *infra* Part 7.

⁴ The United States-Canada Free-Trade Agreement, *done* Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281, *reprinted in* H.R. Doc. No. 216, 100th Cong., 2d Sess. 113 (1988) [hereinafter Free-Trade Agreement].

⁵ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (to be codified at 19 U.S.C. §§ 2901-3111) [hereinafter 1988 Trade Act].

tiered pricing schemes for energy resources, in which domestic prices remain substantially lower than the world market price. For example, Mexico maintains below-world-market domestic prices for natural gas,⁶ and Canada maintains below-world-market domestic prices for hydroelectric power.⁷ The low domestic prices arguably distort trade with the United States for two reasons: (1) they enable such countries to sell energy selectively to the United States at very low prices without dumping, and (2) they substantially lower the production cost of derivative products, although (as discussed below) they are generally not subsidies to such products under the countervailing duty law.

2. THE ANTIDUMPING LAW

United States antidumping law requires the imposition of an additional duty on products prior to their sale in this country if the imports are priced below fair value—either their price in the home or third-country markets or their fully allocated cost of production.⁸ The Department of Commerce (Commerce) determines the degree of dumping or “margin.”⁹ Antidumping duties are equal to the difference between the foreign market value and U.S. prices or the amount by which the U.S. import price undercuts the fully allocated cost of the product.¹⁰ A U.S. industry that makes a product like the investigated import must also demonstrate injury by the dumped imports prior to the imposition of antidumping duties.¹¹ The International Trade Commission, an independent federal agency, addresses the question of injury to the domestic industry.¹²

Petroleum, its downstream chemical products, and electricity are the most important energy products imported by the United States. As

⁶ *Cabot Corp. v. United States*, 620 F. Supp. 722, 726 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), *vacated in part*, No. 86-09-01109, 87-71 (Ct. Int'l Trade Nov. 20, 1986) [hereinafter *Cabot I*]. Further proceedings have challenged the determinations of the Court of International Trade. *See infra* notes 72-75.

⁷ *See* H. LEE, N. FOSTER & E. PARSON, CANADIAN ELECTRICITY IMPORTS: AN ASSESSMENT OF THE NATIONAL SECURITY, ECONOMIC, AND ENVIRONMENTAL IMPLICATIONS i-vi (Kennedy School of Government Energy and Environmental Policy Center Discussion Paper Series, Apr. 1988); T. CONNELL, CANADA-U.S. ELECTRICITY TRADE: A SURVEY OF CURRENT TRENDS, COSTS, BENEFITS, AND ISSUES ES2 (Edison Electric Institute Power Supply Policy Division, Mar. 1988); M. Rothman, Free Trade and Electricity, Remarks to ICEED Conference on Energy Supply and Trade Policies: Balancing National and Global Imperatives (Apr. 8, 1988).

⁸ *See* Tariff Act of 1930 § 731, 19 U.S.C. § 1673 (1982).

⁹ *See* Tariff Act of 1930 § 731, 19 U.S.C. § 1673(b)(1)(A) (1982).

¹⁰ *See* Tariff Act of 1930 § 731, 19 U.S.C. § 1673(b)(2) (1982).

¹¹ *See* Tariff Act of 1930 § 731, 19 U.S.C. § 1673 (1982).

discussed above, a principal feature of the world market for these products is a two-tiered pricing system, in which producing countries maintain domestic prices substantially below world-market export prices. Selling at a *higher* price in the United States than in the home market is the opposite of dumping. This leaves sales priced below the producer's cost of production as the only potential source of dumping.¹³

It is also unlikely that petroleum or petroleum products are being sold in the United States for less than their cost of production. The world price of petroleum is low in comparison with recent years, yet it is still high by historical levels, and there is no indication that costs have risen commensurately. It is equally unlikely that refinery products are being sold below cost, because inexpensive domestic petroleum results in low production costs for refinery products. That may not be true of highly refined downstream products, because inexpensive crude would be a less significant factor in their total production costs.

A below-cost-of-production investigation of downstream petroleum products could in theory lead to a dumping finding if government provision of cheap crude oil were considered a subsidy and Commerce included the amount of that subsidy in the producer's cost of production. In 1986, the Court of International Trade (CIT) held that such subsidies were to be investigated under the countervailing duty law and may not be taken into account under the antidumping law.¹⁴

Given all of these factors, the antidumping law is an unlikely source of relief for free-world producers claiming injury from two-tiered pricing systems of petroleum and other energy products.

2.1. Exports from Non-market Economies

Dumping investigations in non-market economy countries (NMEs) such as the People's Republic of China and the Soviet Union present a different set of problems. The antidumping law recognizes that domestic prices in such countries are not suitable points of comparison for United States prices because domestic prices in NMEs are not

¹³ Section 731 of the Tariff Act of 1930, 19 U.S.C. § 1673 (1982 & Supp. 1987), provides that anti-dumping duties shall be imposed "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." To determine "foreign market value," Section 773(b) of the Tariff Act of 1930, 19 U.S.C. § 1677b(b) (1982), permits Commerce in certain circumstances to disregard sales made below the cost of production and, if the remaining sales are an inadequate basis for determining foreign market value, to base foreign market value on the constructed value of the merchandise.

¹⁴ *Al Tech Specialty Steel Corp. v. United States*, 651 F. Supp. 1421, 1430 (Ct. Int'l Trade 1986).

set by market forces.¹⁵ Accordingly, in dumping investigations of NMEs, the statute directs Commerce to locate a free-market country with an economy at a stage of economic development comparable to the NME being investigated and to use costs in that country to determine foreign market value.¹⁶

The preferred approach for employing surrogate country data is to construct a foreign market value by quantifying the raw materials, labor, and other factors of production used to produce the exported merchandise in the NME, then obtain corresponding values for those factors from the surrogate country.¹⁷ Standard percentages are added to the total to cover general expenses and profit.¹⁸ Commerce may base foreign market value on the price at which like products from free-market countries with comparable economies are sold in other countries, including the United States if Commerce cannot obtain adequate information to employ the factors-of-production approach.¹⁹

The factors-of-production approach preferred by the Omnibus and Competitiveness Trade Act of 1988²⁰ (1988 Trade Act) should eliminate some of the lottery aspects of previous approaches to using data from surrogate producers. Before the 1988 revisions, Commerce first looked to prices for the subject merchandise in the home (or third-country) markets of the surrogate producer and, absent such information, constructed the value of the merchandise in the surrogate country.²¹ Having little or no incentive to cooperate, potential surrogate producers often refused to furnish Commerce with the requested, highly sensitive, price and cost information. In contrast, much of the information needed under the factors methodology, such as labor rates, raw material costs, and property depreciation rates, should be available from public

¹⁵ See Tariff Act of 1930 § 773(c), 19 U.S.C. § 1677b(c) (1982).

¹⁶ *Id.* This provision was substantially revised by section 1316 of the Omnibus Trade Act, Pub. L. No. 100-418, 102 Stat. 1107, 1186 (1988).

¹⁷ Section 773(c)(1) of the Tariff Act of 1930, 19 U.S.C. § 1677b(c)(1) (1982), provides that if the merchandise under investigation is exported from a nonmarket economy country, and Commerce finds that available information does not permit the foreign market value of the merchandise to be determined under subsection (a), that is, on the basis of home market prices, Commerce shall determine the foreign market value of the merchandise on the basis of the value of the factors of production utilized in producing the merchandise.

¹⁸ Tariff Act of 1930 § 773(e), 19 U.S.C. § 1677b(e) (1982 & Supp. 1987).

¹⁹ Tariff Act of 1930 § 773(c)(2), 19 U.S.C. § 1677b(c)(2) (1982). Because the new approach contains a fallback method which employs information from the United States, it would also enable Commerce to make at least some estimate of foreign market value in all cases according to standards clearly set out in the statute, as opposed to assembling ad hoc the best information otherwise available.

²⁰ 1988 Trade Act § 1316, 102 Stat. 1186.

²¹ See H.R. REP. NO. 576, 100th Cong., 2d Sess. 590 (1988), *reprinted in* 1988

sources.

In a case involving oil, for example, the various factors of production consumed in producing the oil would be tabulated in the NME and then valued in a country with an economy at a comparable stage of development. The cost of production of oil worldwide presently appears to be well below its world market price. It follows logically that the constructed foreign market value for oil would be below the world market price charged in the United States, resulting in a finding of no dumping.

Such assumptions often are unreliable in NME cases involving energy products, given the inherent uncertainties of the factors-of-production method. First, it is difficult to predict which surrogate country will be chosen, although certainty may increase as Commerce gains experience under the new law. In addition, the search is more challenging due to Congress' prescription that Commerce use data based on technological and volume production levels similar to those of the investigated producers.²² Due to these considerations, there is no foolproof method for NME producers to set their prices in the United States to avoid dumping. U.S. petitioners would have similar difficulties anticipating the outcome of cases involving NME producers.

2.2. *Input Dumping by Related Parties*

Another provision of the 1988 Trade Act may affect energy imports.²³ The new provision applies where a major input to the exported product is obtained from a related party and Commerce has reasonable grounds to believe that the nominal price of that input was less than its cost of production. The provision enables Commerce to disregard the nominal price paid by producers to related entities for inputs in such cases and to substitute its own best information as to the cost of the inputs.²⁴ For example, Commerce could disregard the price paid by a

²² See H.R. REP. NO. 576, 100th Cong., 2d Sess. 591 (1988).

²³ 1988 Trade Act § 1318, 102 Stat. 1189 (adding § 773(e)(3) to the Tariff Act of 1930, 19 U.S.C. § 1677b(e)(3) (1982)).

²⁴ While there is no explicit provision for this procedure under the General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 27 U.N.T.S. 19 [hereinafter GATT], it is implicit in the provision of that agreement, and of the Antidumping Code, *infra*, permitting foreign market value to be calculated on the basis of the cost of production. See GATT art. VI(1)(b)(ii), 55 U.N.T.S. 194 (1948). Article 2(4) of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Relating to Antidumping Measures), Apr. 12, 1979, 31 U.S.T. 4919, 4925, T.I.A.S. No. 9650 [hereinafter Anti-Dumping Code], provides for the calculation of foreign market value on the basis of the cost of production when "the particular market situation" does not permit a proper comparison of prices. Article 2(4) thus anticipates that the principal basis for determining foreign market value are those in the country of origin of

chemical manufacturer to its petroleum-producing parent for feedstocks. This would be unlikely to affect cases involving energy products, however, because arm's-length prices for energy products in major energy-producing countries tend to be low.

3. THE COUNTERVAILING DUTY LAW

Another important law administered by Commerce is the countervailing duty law, which provides for the imposition of duties to offset foreign government subsidies supporting the production or export of products exported to the United States.²⁵ Benefits paid on export are (with certain limited exceptions) subsidies *per se*, while benefits granted to domestic producers regardless of export are subsidies in certain circumstances, described below.²⁶

3.1. Preliminary Observations

Several preliminary observations should be made about potential investigations of energy imports under the countervailing duty law. First, the countervailing duty law does not apply to imports from NMEs such as the Soviet Union and the People's Republic of China.²⁷ Accordingly, Commerce would not accept a countervailing duty petition against energy imports from a NME country.

Second, countervailing duty petitions, like antidumping petitions, are accepted only from parties that manufacture a product in the United States that is "like" the imported product.²⁸ It is improbable

the merchandise under investigation.

It would be anomalous for GATT to permit antidumping authorities to disregard the foreign market price of an exported good in favor of the cost of production of that good, yet force Commerce to accept the nominal price paid to a related party for a major component of the exported good.

²⁵ Tariff Act of 1930 §§ 701-709, 19 U.S.C. §§ 1671-1671f (1982 & Supp. 1987).

²⁶ See Tariff Act of 1930 § 771(5), 19 U.S.C. § 1677(5) (1982 & Supp. V 1987).

²⁷ *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986). The basic reasoning of *Georgetown* was that, in countries where the entire economy is controlled by the government, it would be arbitrary to classify particular government programs as subsidies, or to place a precise value on the benefits provided under particular programs.

An amendment to the countervailing duty law that would have overturned *Georgetown* in part by requiring Commerce to measure subsidies in nonmarket economies to the extent "reasonably possible" was introduced in the House but not included in the final 1988 trade bill. H.R. REP. NO. 576, 100th Cong., 2d Sess. 628 (1988).

²⁸ Tariff Act of 1930 § 702, 19 U.S.C. § 1671a(b) (1982 & Supp. V 1987), provides that a countervailing duty proceeding shall be commenced whenever an interested party files a petition with Commerce. Tariff Act of 1930 § 771(9), 19 U.S.C. 1677(9)(C) (1982), defines an interested party as one who manufactures a "like product." See *Matsushita Elec. Indus. Co. v. United States*, 529 F. Supp. 664, 667 (Ct. Int'l Trade 1981) (strictly applying the Tariff Act's statutory definition of interested

that different forms of energy would be found to be "like products." It is therefore doubtful that a producer of one form of energy, such as coal or petroleum, would be successful in filing a countervailing duty petition (or, for that matter, an antidumping petition)²⁹ against imports of another form of energy, such as uranium or electricity.³⁰

Third, in contrast to the requirements of the antidumping law, no injury determination would be required in some cases. Only countries that have signed the GATT Subsidies Code³¹ (or a substantially similar bilateral agreement with the United States) are entitled to an injury test for dutiable products, including all forms of energy.³² This excludes most of the major petroleum-producing and -exporting countries, although it includes Canada, Mexico, and European Community member states.³³ Future petitioners will enjoy a substantial head start in obtaining a countervailing duty order if they are not required to prove

parties).

²⁹ Tariff Act of 1930 § 732, 19 U.S.C. § 1673a(b) (1982 & Supp. 1987), on antidumping duty investigations, contains threshold requirements that essentially parallel those of Tariff Act of 1930 § 702, 19 U.S.C. § 1671a(b), involving countervailing duty investigations.

³⁰ The Senate Finance Committee made this clear during its consideration of a provision in the proposed United States-Canada Free-Trade Agreement Implementation Act of 1988, enacted Pub. L. No. 100-449, 102 Stat. 1851 (1989), which would have permitted industries that are especially vulnerable to Canadian subsidies to be identified:

Furthermore, the standing requirements to file a request under this subsection are similar to the requirements under the countervailing duty law. The Committee does not intend that industries be identified because they compete with imports derived from subsidized products. For example, the coal industry could not request to be identified because of increased competition from imports of electricity.

S. REP. NO. 509, 100th Cong., 2d Sess. 43, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 2395, 2438. The point was raised by Senator Moynihan of New York, whose state benefits from imports of low-priced Canadian electricity.

Even if it were possible for a petitioner in a countervailing duty case to bring a case against a product as broadly defined as "energy," the resulting breadth of the "domestic industry" would probably make it impossible to obtain an affirmative injury determination where one is required prior to the imposition of countervailing duties.

³¹ Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Relating to Subsidies and Countervailing Measures), Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter *Subsidies Code*].

³² See Tariff Act of 1930 § 701(a)(1)(A), 19 U.S.C. § 1671(a)(1)(A) (1982 & Supp. 1987), which refers to a "country under the Agreement." The issue of whether signing GATT or a substantially similar bilateral agreement with the United States entitles a country to injury tests for all unliquidated entries of its products (including those previously entered), or only for products entered after they sign is currently before the International Trade Administration. See *Cementos Anahuac del Golfo v. United States*, 689 F. Supp. 1191 (Ct. Int'l Trade 1988); *Cementos Guadalajara v. United States*, 686 F. Supp. 335 (Ct. Int'l Trade 1988) (which raise but leave the issue undecided).

injury.

Fourth, pricing exports to the United States to recoup domestic subsidies may not preclude them from being countervailed. The countervailing duty law is restricted to attempts to identify and value subsidies. It does not take account of the producers' ultimate rate of return on the subsidized product, except in very limited circumstances.³⁴

3.2. *The Major Substantive Issues under the Countervailing Duty Law*

Two basic facts have to be established in order to prove that energy products or their derivatives benefit from domestic, as opposed to export³⁵ subsidies. First, it must be shown that a government program benefits a *specific* set of recipients—that the program benefits a specific company, industry, or industrial sector.³⁶ Second, it must be shown that the government program in question is *preferential*—providing the specific recipients either with goods or services at prices more favorable than those commonly available in that country or with funds on terms inconsistent with commercial considerations.³⁷ Each of these two tests, discussed separately below, has evolved in recent years.

3.2.1. *Specificity*

The countervailing duty law defines subsidies as benefits that are provided by a government to “a specific enterprise or industry, or group of enterprises or industries.”³⁸ The specificity test attempts to

³⁴ See Tariff Act of 1930 § 771(6), 19 U.S.C. § 1677(6) (1982), which provides that Commerce may subtract from the gross subsidy the amount of any “export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the subsidy received.” It is not clear that the existence of a higher export price which recoups the subsidy on exports, rather than passing it through to the customer, would qualify under this provision.

³⁵ Export subsidies are bestowed by reason of the export of particular products. For example, a foreign government could pay the producer of a particular product one dollar for each item exported. By definition, this program would be a benefit to a specific entity: the exporter of the goods. Domestic subsidies are paid regardless of whether the product they benefit is exported and may or may not assist specific firms or industries. See generally J. BARTON & B. FISHER, *INTERNATIONAL TRADE & INVESTMENT* 351-81 (1986).

³⁶ See Tariff Act of 1930 § 771(5), 19 U.S.C. § 1677(5)(B)(ii) (1982).

³⁷ *Id.*

³⁸ 19 U.S.C. § 1677(5) (1982). Prior to 1980, the Department of the Treasury interpreted Section 1303 of the Tariff Act of 1930, which still governs countervailing duty proceedings involving products from countries which have not signed the GATT Subsidies Code, as implicitly containing a specificity test. The specificity test was formally incorporated in the Tariff Act of 1930 § 771(5), 19 U.S.C. § 1677(5) (1982), by the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 177 (1979).

distinguish between those domestic programs of foreign governments that substantially promote the production of specific products and those that favor production generally.³⁹ This distinction theoretically allows protection of U.S. producers from those products which have benefited from substantial government promotion while protecting acts of foreign governments, such as providing schools and telephones and establishing tax rates, from countervailing duties.⁴⁰

In recent years there has been a fundamental dispute about the validity of the Commerce's specificity test for domestic subsidies.⁴¹ Government sales of energy products at prices below world-market levels have been at the heart of that controversy for several reasons. First, although low-priced energy may nominally be available to all producers in a particular country, it may in practice be used only by specific producers. Second, some producers or industries may benefit significantly more than others even if inexpensive energy is used by all producers in a foreign country. Two examples are manufacturers of energy-intensive products, such as paper and aluminum, and manufacturers of downstream products, such as petrochemicals. Finally, even within particular industries where the various producers are receiving exactly the same benefit, subsidized energy still gives each exporting producer an advantage over its U.S. competitors.

Domestic producers have suggested a remedy for each of these problems. First, they have urged Commerce to identify the actual, as opposed to the nominal, distribution of benefits under particular programs and to treat as subsidies all programs which benefit specific en-

³⁹ This goal has been criticized as impossible to achieve in practice. See Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546, 561 (1987) ("Commerce Department efforts to deal with this problem have led to substantial and inevitable arbitrariness in administering the law. . . . Commerce tends to exonerate programs that are in form 'generally available,' even when they seem to concentrate substantive benefits in one or a few industries.").

⁴⁰ To the extent that the specificity test is based on an underlying economic theory, rather than considerations of international politics, the theory is that government programs that promote production generally in a foreign economy have an impact on exports of particular products to the United States that is too small to be of concern under the unfair trade laws.

In addition, broad economic measures ultimately may be balanced by their effect on exchange rates. For example, the provision of all raw materials at subsidized rates in a particular country would lower production costs generally and tend to increase exports. In the long run, however, this would also tend to strengthen that country's currency, which would tend to lower exports and raise imports. Accordingly, economy-wide subsidies may not increase exports. On the other hand, specific programs, such as the provision of subsidized raw materials for the production of a particular product, may not affect exchange rates and, consequently, may increase exports of the targeted product in the long run.

⁴¹ As noted above, benefits tied in one way or another to the export of particular goods, that is, export subsidies, are inherently specific.

terprises or industries *in practice*.⁴² This has been called the “*de facto* benefit” or “use” test. Second, in cases where benefits are in fact distributed to a broad range of industries, petitioners have urged Commerce to identify the users who profit disproportionately and to treat the benefits as subsidies to those producers.⁴³ This might be called the “impact” test. Third, in instances where governments provide inputs (especially natural resources) to exported products at below-world-market prices, petitioners have urged Commerce to abandon the specificity test and to treat the differential between the home and world-market prices of the input as a subsidy *per se*.⁴⁴ This has been called the “competitive advantage” test. It is an exception to the specificity test for inputs priced below world-market levels.

Of these three proposed tests, the “use” test is consistent with long-standing Commerce practice and has been accepted by Department.⁴⁵ The remaining two tests represent radical departures from Commerce’s accepted practice. The “impact” test would continue to focus on the distribution of benefits in the foreign economy. Yet this test attempts to raise that analysis to a level of sophistication which is probably impractical, given the time constraints within which Commerce must complete countervailing duty investigations.⁴⁶ The “competitive advantage” test would obviate an examination of distribution in practice (or even of impact) in cases involving inputs priced below world market levels. The test would substitute a comparison of the relative prices paid by foreign and U.S. producers for those inputs. A brief survey of these developments is set forth below.

⁴² See *infra* notes 53-68 and accompanying text.

⁴³ See, e.g., *Can-Am Corp. v. United States*, 664 F. Supp. 1444, 1447-49 (Ct. Int'l Trade 1987).

⁴⁴ See *Cabot Corp. v. United States*, 620 F. Supp. 722, 733 n.9 (Ct. Int'l Trade 1985); *Can-Am*, 664 F. Supp. at 1448.

⁴⁵ To a substantial extent, Commerce has always considered the actual, as well as nominal, impact of foreign government programs. See, e.g., *Certain Steel Products From the Federal Republic of Germany*, 47 Fed. Reg. 39,345, 39,351 (Dep't Comm. 1982) (final countervailing duty determination):

We verified that ERP [European Recovery Program] funds are disbursed to all branches of industry and that no specific industry, group of industries or industries in particular regions is the main beneficiary of these funds. Therefore, we have determined that this program does not confer benefits which constitute subsidies. . . . Information developed during the verification indicates that this institution makes loans available without regard to specific industries or regions. Therefore, we do not find benefits it may confer to be subsidies on the products under investigation.

Id.

⁴⁶ Normally, countervailing duty investigations must be completed within one year after the petition is filed. See *Tariff Act of 1930* §§ 703, 705, 19 U.S.C. §§ 1671(b), 1671(d) (1982 & Supp. 1987).

The first general attack on the specificity test was brought in *Carlisle Tire & Rubber Co. v. United States*.⁴⁷ In *Carlisle*, the Court of International Trade held that two accelerated depreciation programs under Korean tax law were not countervailable subsidies because they were generally available to the entire business community of Korea.⁴⁸ The court accepted Commerce's arguments that rejection of the specificity test would lead to an absurdly broad definition of subsidies, rendering their measurement extremely difficult and creating an overwhelming administrative burden.⁴⁹

The broad approval which the CIT accorded the specificity test in *Carlisle* was short-lived. The following year, the court retreated from its prior position in *Bethlehem Steel Corp. v. United States*.⁵⁰ *Bethlehem Steel* arose from a final determination on steel from South Africa⁵¹ and centered on the South African government's practice of permitting South African companies to deduct from their taxable income two hundred percent of the cost of certain employee training programs.⁵² Commerce determined that the program was not a subsidy because the deductions were available to all South African industries.⁵³ The CIT agreed that the program was not a subsidy, but the court explicitly refused to embrace Commerce's rationale. Instead, the court affirmed the administrative determination below "solely on the ground that the practice in question was a tax law, and tax laws are not subsidies to the taxpayer if their terms are generally available."⁵⁴

⁴⁷ *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834 (Ct. Int'l Trade 1983). Although *Carlisle* involved a Commerce determination under Section 1303 of the Tariff Act of 1930, the court noted that "Congress specifically provided that the new statutory term 'subsidy' has the same meaning as the term 'bounty or grant' found in Section 1303." *Id.* at 839 (citing Tariff Act of 1930 § 771(5), codified as amended at 19 U.S.C. § 1677(5) (Supp. IV 1980) (current version at 19 U.S.C. § 1677(5) (1982))).

⁴⁸ *Id.* at 836.

⁴⁹ *Id.* at 838.

⁵⁰ *Bethlehem Steel Corp. v. United States*, 590 F. Supp. 1237 (Ct. Int'l Trade 1984). See also *Agrexco Agricultural Export Co. v. United States*, 604 F. Supp. 1238, 1242 (Ct. Int'l Trade 1985).

⁵¹ See *Certain Steel Products from South Africa*, 47 Fed. Reg. 39,379 (1982) (final determination and countervailing duty order).

⁵² *Bethlehem Steel*, 590 F. Supp. at 1239.

⁵³ *Id.*

⁵⁴ *Id.* The court explicitly rejected "the broader rationale that, as a rule, generally available benefits are not subsidies." *Id.* at 1239. It found that the term "specific" was "simply one of the phrases used to insure that the listed government subsidies are covered in the widest possible range of circumstances." *Id.* at 1241. In effect, the court found that the word "specific" in the statute modifies only the words "enterprise or industry" and not "group of enterprises or industries." The court explained that, in its view, "Congress has covered the full range of possibilities, going from the subsidization of a single firm to all enterprises, including the entire productive sector." *Id.*

3.2.1.1. *The Cabot Decisions*

A Commerce determination that a foreign government program was not a subsidy because it was generally available was reversed for the first time in *Cabot Corp. v. United States (Cabot I)*.⁵⁵ *Cabot I* involved imports from Mexico of carbon black, a form of elemental carbon used in the manufacture of paints, rubber, plastics, and other products. Carbon black is made from "catcracker bottoms," the heavy residue remaining at the bottom of petroleum refining towers after the lighter elements have been distilled. Commerce declined to countervail two Mexican government programs that supplied catcracker bottoms and natural gas to two Mexican carbon black producers below world-market prices, because it determined that those two commodities were generally available at the same prices to any industry in Mexico.⁵⁶

The CIT reversed Commerce's determination in part in *Cabot I*. The court ruled that the Department had erred in focusing on the *nominal* availability of catcracker bottoms and natural gas in Mexico, rather than on whether those commodities were *actually* used only by specific producers.⁵⁷ The court then directed Commerce, if it deter-

at 1242. This interpretation effectively reads the term "specific" out of the statute.

Curiously, after going to some length to explain its comprehensive rejection of the notion that "generally available" benefits were not subsidies, the court carved out an exception for tax benefits. The court justified the exception as supported by certain references in the legislative history and the conclusion that, because taxation was not a subsidy, "equal opportunities to reduce the exaction" could not create a subsidy. *Id.* at 1244-45. In short, the court concluded that the "generally available" test may be applied to government actions that withhold a burden, but not to those which confer a benefit.

This elevation of form over substance is unpersuasive. It would lead, for example, to the conclusion that a foreign government could entirely exempt a specific company from taxes without conferring a subsidy. Logically, the specificity of a benefit cannot depend on whether its form is positive or negative. Such a distinction loses its meaning in economies in which all companies are subject to taxation. In such economies, any positive benefit can easily be transformed into a tax deduction or exemption. The court's refusal to recognize this obvious point suggests that it was unwilling to follow the logic of its rejection of the specificity test, which would have led to the conclusion that the tax deductions in question (like virtually all government activity) were countervailable subsidies.

⁵⁵ *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986), *vacated in part*, No. 86-09-01109, 87-71 (Ct. Int'l Trade Order, Nov. 20, 1986) [hereinafter *Cabot I*].

⁵⁶ Carbon Black from Mexico, 48 Fed. Reg. 29,564, 29,566, 29,568-69 (1983) (final determination and countervailing duty order).

⁵⁷ The court noted that there were only two producers of carbon black in Mexico and that they had specifically located their plants and geared their production processes to use the catcracker bottoms produced by two Petroleos Mexicanos (PEMEX) refineries. *Cabot I*, 620 F. Supp. at 727, 733 n.9. It then pointed out that "[t]he record [did] not show what happens to the catcracker bottoms from the remaining seven refineries and whether these bottoms are suitable for carbon black feedstock." *Id.* at 728. Thus, the court appeared to be concerned that PEMEX might have been able to sell the

mined that there was a "bestowal upon a specific class," to determine whether the bestowal amounted to a "competitive advantage."⁵⁸

There has been considerable dispute about the meaning of the CIT's second direction in *Cabot I*. Commerce evidently understood the direction as establishing a criterion by which to measure the preferentiality of the benefit bestowed by the inputs from the Mexican government's oil monopoly, Petroleos Mexicanos (PEMEX) *if it were established that these inputs specifically benefited the carbon black producers*.⁵⁹ Others have contended that the second instruction of *Cabot I* required Commerce to treat the difference between the price paid by the Mexican carbon black producers and the world-market price for natural gas as a subsidy *per se* and automatically to counter-vail that amount.

There are two critical points to note regarding the latter, expansive interpretation. First, it was explicitly rejected by the CIT: "Plaintiff argues that a price below the world market price is a *per se* countervailable benefit. The matter is more complex. The availability of inputs at low prices to foreign producers may be the result of various non-countervailable factors such as comparative advantage."⁶⁰

Second, if the difference between the home and world-market price of government-supplied inputs is a countervailable subsidy *per se*, then it does not matter whether those inputs were actually used by only one producer or by every company in Mexico. The inputs would be subsidies *per se*, either way. Although the CIT's principal concern in *Cabot I* was to require Commerce to conduct a *de facto* test of the use of natural gas and catcracker bottoms in Mexico,⁶¹ the expansive interpretation would render the results of that test irrelevant. Petitioner's argument, broadly stated, would partially repeal the specificity test. The

catcracker bottoms provided to the carbon black producers to some other industry in Mexico at higher prices.

⁵⁸ *Id.* at 732, 734.

⁵⁹ Because Commerce did not find that natural gas was provided specifically to the carbon black producers, it did not need to address the preferentiality issue with respect to a commodity with a world-market price. *See* Carbon Black from Mexico, 51 Fed. Reg. 13,269, 13,271 (1986) (preliminary administrative review). Commerce has yet to address this issue in such a context.

⁶⁰ *Cabot I*, 620 F. Supp. at 733 n.9. In the subsequent case of *PPG Indus. v. United States*, 662 F. Supp. 258, 265 (Ct. Int'l Trade 1987), the same CIT judge stated that *Cabot I* "held, moreover, that 'the appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits' (citations omitted)."

⁶¹ *See, e.g., Cabot I*, 620 F. Supp. at 732 ("The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits. The case must therefore be remanded for further invest-

court apparently intended a mere refinement.

As noted above, the CIT remanded the carbon black proceeding to Commerce with instructions to determine whether the two programs actually benefited specific recipients in Mexico.⁶² Before the remand was completed, Commerce completed an administrative review of the countervailing duty order on carbon black from Mexico.⁶³ Commerce's determination provided a new deposit rate for carbon black,⁶⁴ thus rendering moot the surviving elements of the controversy concerning Commerce's original determination not to countervail the Mexican government programs.⁶⁵

In the administrative review, Commerce determined that the provision of natural gas to the two carbon black producers was not a specific benefit, because natural gas was generally available at the same price to any industry in Mexico.⁶⁶ The Department reversed its position in the investigation with respect to carbon black feedstock and found that, because it was used by only two producers, the feedstock conferred a specific benefit.⁶⁷

The CIT overturned the results of this administrative review in *Cabot II*.⁶⁸ The court found that Commerce had failed to apply the principles enunciated in *Cabot I* in determining the specificity of low-priced natural gas and catcracker bottoms and remanded the proceeding

⁶² *Id.* at 734.

⁶³ Carbon Black from Mexico, 51 Fed. Reg. 30,385 (1986) (final administrative review).

⁶⁴ *Id.* at 30,388.

⁶⁵ Commerce investigations cover periods prior to the preliminary determinations in those investigations. 19 C.F.R. § 353.38(a) (1989). The deposit rates they establish are only estimated duties for entries. Definitive duties are determined by subsequent administrative reviews. As a result, administrative reviews render moot the deposit rate established by the investigation. *See Fundicao Tupy S.A. v. United States*, 696 F. Supp. 1525 (Ct. Int'l Trade 1988).

⁶⁶ Carbon Black from Mexico, 51 Fed. Reg. 13,269, 13,271 (1986) (preliminary administrative review). The Department still holds that the price differential between PEMEX's low domestic and high export prices of natural gas does not constitute a domestic subsidy because the domestic prices are available to more than a specific group of enterprises or industries.

⁶⁷ Carbon Black from Mexico, 51 Fed. Reg. 30,385, 30,386 (1986) (final administrative review). Commerce stated:

Although [carbon black feedstock] is theoretically available to all industries in Mexico, there is in fact only one industrial use at present and only two actual users. Therefore, we reaffirm our position in the preliminary results that there are too few users of [carbon black feedstock] for us to find that it is provided on a generally-available basis.

Id.

⁶⁸ *Cabot v. United States*, 694 F. Supp. 949 (Ct. Int'l Trade 1988) [hereinafter *Cabot II*]. While noting that the order in *Cabot I* was vacated, the court endorsed the legal reasoning and principle of *Cabot I*. *Id.* at 955.

to Commerce with instructions to redetermine their specificity in accordance with *Cabot I* (which *Cabot II* largely incorporated).⁶⁹

In this second remand, Commerce determined that natural gas was not specifically provided to the carbon black producers, because it was purchased by more than 3,700 Mexican enterprises at the official price.⁷⁰ On the other hand, Commerce determined that catcracker bottoms were supplied specifically to the carbon black producers, because they were sold exclusively to two companies.⁷¹

3.2.1.2. *The PPG Decision*

The CIT addressed the specificity issue again in *PPG Indus. v. United States*,⁷² a case that arose from a countervailing duty investigation of float glass from Mexico.⁷³ Like *Cabot I*, *PPG* involved the provision of natural gas to float glass manufacturers at below-world-market prices. The CIT agreed with Commerce that, in this case, the provision of natural gas at below-world-market prices was not a subsidy because evidence in the record indicated the float glass manufacturers "paid the published price for natural gas that was available to all industries."⁷⁴ The court apparently relaxed the "use" test because the price respondents paid for natural gas was from a published price list and natural gas was available to all industries in Mexico at the published price.

PPG also involved a trust fund established by the Mexican government to assist Mexican firms in paying foreign debts.⁷⁵ Funds from the trust were made available only to Mexican firms with registered long-term debt in foreign currency payable abroad.⁷⁶ Commerce had found the program not to be specific because it was not "targeted to a specific industry or enterprise, group of industries or enterprises, or to companies located in specific regions"⁷⁷ of the country.

Once again, the court did not remand the case and direct Com-

⁶⁹ *Id.* at 955-59.

⁷⁰ *Cabot Corp. v. United States*, No. 86-09-01109, at 6-9 (Ct. Int'l Trade Nov. 21, 1988) (reconsideration pursuant to remand).

⁷¹ *Id.* at 10-12.

⁷² *PPG Indus. v. United States*, 662 F. Supp. 258 (Ct. Int'l Trade 1987) [hereinafter *PPG*]. The decision is currently on appeal to the Court of Appeals for the Federal Circuit. Because the *Cabot I* appeal was dismissed on other grounds, the *PPG* appeal will present the first occasion for the Federal Circuit to rule on the specificity test.

⁷³ Unprocessed Float Glass from Mexico, 49 Fed. Reg. 7,264 (1984) (suspension of countervailing duty investigation).

⁷⁴ *PPG*, 662 F. Supp. at 272.

⁷⁵ *Id.* at 263-67 (FICORCA [Trust Fund for Coverage of Risks] program).

⁷⁶ *Id.* at 263.

⁷⁷ Unprocessed Float Glass from Mexico, 49 Fed. Reg. 23,097, 23,099 (1984).

merce to conduct the "use" specificity test, which would have entailed compiling a list of the enterprises that actually received the Mexican government loans, and then determining whether the class of recipients was sufficiently broad that the benefit was not specific.⁷⁸ Instead, the court focused on the eligibility requirements of the program and concluded that they did not *de facto* render the benefit one which is provided to a discrete class of beneficiaries.⁷⁹

In sum, *PPG* represents a retreat from the "use" test for specificity.⁸⁰ It suggests that use is pertinent only when there is no evidence that the program in question is used by a broad class of enterprises or industries. A more expansive reading of the decision would suggest that use is relevant only when there is an affirmative indication that the program in question is *not* used by a broad class of enterprises or industries. Either meaning limits the use test to special circumstances, aligning the CIT's position with Commerce's more flexible view of the specificity test.⁸¹

The domestic petitioners have appealed the CIT's application of the specificity test in *PPG* to the Federal Circuit.⁸² This will be the first time that the specificity issue has been presented to the Federal Circuit, because *Cabot I* became moot before it could be appealed.⁸³ If

⁷⁸ As an illustration of the "use" test, the foreign debt assistance in *PPG* would have presented a middle case between the two programs at issue in *Cabot I*. It was neither restricted to a few firms, as was the carbon black feedstock, nor used by virtually every sector of the economy, as was natural gas.

⁷⁹ *PPG*, 662 F. Supp. at 266.

⁸⁰ The court emphasized that "the mere fact that a program contains certain eligibility requirements for participation does not transform the program into one which has provided a countervailable benefit." *Id.*

⁸¹ See Certain Softwood Products from Canada, 48 Fed. Reg. 24,159, 24,169 (1983) (final negative determination) [hereinafter *Softwood Products*].

The CIT reinforced the *Cabot I* and *PPG* decisions in *Can-Am Corp. v. United States*, 664 F. Supp. 1444 (Ct. Int'l Trade 1987). In *Can-Am*, the court sustained Commerce's determination that the Mexican government's provision of fuel oil to Mexican lime producers at a price below that offered to exporters of fuel oil was not a subsidy. The court pointed out that the fuel oil program was very similar to the natural gas program at issue in *Cabot I*, and ruled that the mere exclusion of exporters did not render the program sector-specific. *Can-Am*, 664 F. Supp. at 1448.

In *Al Tech Specialty Steel Corp. v. United States*, 661 F. Supp. 1206 (Ct. Int'l Trade 1987), the CIT ruled that the right of a Spanish steel producer to extend repayment of principal without interest on loans under the Spanish bankruptcy law was not a countervailable subsidy. The *Al Tech* decision is significant because there was no evidence on the record regarding the actual distribution of benefits under the Spanish bankruptcy law. The CIT ruled that, in the absence of facts tending to establish the existence of a discrete class of beneficiaries, Commerce was not required to look behind the actions of the Spanish bankruptcy tribunal and investigate the distribution of those benefits. *Id.* at 1213.

⁸² *PPG Indus. v. United States*, 662 F.Supp. 258 (Ct. Int'l Trade 1987), *appeal docketed*, No. 86-12-01546 (Fed. Cir. 1986).

⁸³ See *Cabot I*, 620 F. Supp. 722 (Ct. Int'l Trade 1985).

the Federal Circuit sustains the CIT's decision, then the specificity test will stand as it has been described. On the other hand, should *PPG* be reversed, a very broad range of government activity, so far treated by Commerce as non-sector-specific, could become countervailable. In that case, benefits bestowed in a period covered by a Commerce proceeding initiated before August 23, 1988, could be countervailable.⁸⁴

3.2.1.3. *Specificity and the 1988 Trade Act*

Battle over the specificity test was waged anew in Congress during hearings on the 1988 Trade Act.⁸⁵ The House of Representatives bill proffered a streamlined definition of "subsidy" consistent with the existing statutory definition.⁸⁶ The legislative history of the House provision contains some passages, however, that have been interpreted to imply that the amendment intended to codify the self-contradictory "competitive advantage" interpretation of *Cabot I* discussed above.⁸⁷

The Senate bill contained a different specificity provision, simply

⁸⁴ Benefits bestowed in later periods will be covered by the amended definition of "subsidy" in the 1988 Trade Act, *supra* note 5, which codifies the "use" test of *Cabot I* and, by implication, the specificity test itself. See the discussion of the 1988 Trade Act, *infra* notes 115-152 and accompanying text.

⁸⁵ Pub. L. No. 109-418, 102 Stat. 1107 (1988) (to be codified at 19 U.S.C. §§ 2901-3111).

⁸⁶ H.R. 3, § 153, 100th Cong., 1st Sess. (1987). The proposed amendment would have removed the passage in the definition of a subsidy subject to U.S. countervailing duties, which then read:

- (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.

and replaced it with the following passage:

- (i) The provision of capital, loans, loan guarantees, goods, or services at preferential rates or on terms inconsistent with commercial considerations.

⁸⁷ See H.R. REP. NO. 40, 100th Cong., 1st Sess. pt. 1, at 123-24 (1987). Again, the bulk of this passage consists of a description of the "use" test which *Cabot I* ordered Commerce to perform on remand. Although the words "competitive advantage" appear, they are immediately followed by a passage which, like *Cabot I*, suggests that "competitive advantage" can be an issue only where the specificity test has been satisfied:

There are, for example, instances where a government provides an input product, such as a natural resource, to its industries in a manner that has actually conferred benefits to a specific enterprise, industry, or group thereof. For example, if a government restricts access to a product such as natural gas and offers it for consumption at prices below free market rates, an artificial competitive advantage is provided to the consuming industries and such practice could be countervailable. On the other hand, if the resource is freely available on a nondiscriminatory basis to all purchasers within a country without government restriction, such as Venezuelan natural gas, then a countervailable subsidy is not likely to exist.

Id. at 124 (1987).

adding a "special rule" to the existing definition of subsidy. The provision required Commerce to determine the actual use of benefits under particular programs by a specific enterprise or industry.⁸⁸ The Senate report accompanying the bill makes clear the intent to codify the "use" test of *Cabot I*: "The Committee intends that this provision codify the holding by the United States Court of International Trade in [*Cabot I*] that, in order to determine whether a domestic subsidy is countervailable, the Commerce Department must examine on a case-by-case basis whether the benefits provided by a program are bestowed upon a specific enterprise or industry, or group of enterprises or industries."⁸⁹ The more carefully restricted Senate bill, rather than the House bill, was adopted in the 1988 Trade Act.⁹⁰ Several Senators made statements attempting to influence interpretation of the amendment during the floor debate.⁹¹ Congress' adoption of the Senate bill, as explained in

⁸⁸ See S. 490, 100th Cong., 1st Sess. § 333, 133 CONG. REC. 1851 (1987), which proposed to add the following language to the Tariff Act of 1930 § 771(5), 19 U.S.C. § 1677(5) (1982):

(B) SPECIAL RULE — In applying subparagraph (A), the administering authority, in each investigation, shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulations, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof.

⁸⁹ S. REP. NO. 71, 100th Cong., 1st Sess. 122 (1987).

⁹⁰ See 1988 Trade Act § 1312; H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 587, reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 1547, 1620.

⁹¹ For example, Senator Bentsen, Chairman of the Senate Finance Committee, stated, "Because of the importance of this issue in the administration of the countervailing duty law, I want to clarify that the conference agreed to the Senate provision." 134 CONG. REC. S4903 (daily ed. Apr. 27, 1988). Similarly, Senator Packwood stated, "The Finance Committee report rejected the notion that the Commerce Department must determine the individual competitive benefit of a governmental program that is generally available both in law and in fact." 134 CONG. REC. S4912 (daily ed. Apr. 27, 1988).

Congressman Gibbons offered a contrasting interpretation:

[T]he Ways and Means Committee report . . . clearly states the committee's intent to codify the Cabot rule requiring the examination of whether competitive benefits are conferred by a government program on identifiable recipients—as opposed to society at large. In my judgment, the Senate report . . . also clearly embraced the Cabot rule.

134 CONG. REC. H5522 (daily ed. July 13, 1988) (citations omitted). While no one would quarrel with Congressman Gibbons' statement that the Senate bill and report "embraced the [*Cabot I*] rule," the complete legislative history indicates that it was the "use" rule which the Senate embraced and incorporated in the bill ultimately enacted into law.

Congressman Gibbons has introduced a bill dealing with "resource input subsidies" in each of the last several years, e.g., H.R. 2451, 99th Cong., 1st Sess. (1985), that would have radically changed the definition of a subsidy and have specifically

the Senate report, however, establishes that the amendment is limited to codifying the "use" test of *Cabot I*.

Just as it would be illogical to interpret *Cabot I* in a self-contradictory manner, it would be unsound to interpret Congress' refinement of the specificity test to render refinement irrelevant in an entire class of cases. Congress' refinement of the specificity test (by directing Commerce to look at the actual use of foreign government programs) confirms that Congress intends Commerce to examine the distribution, or specificity, of such programs. It would be unreasonable to draw a contrary conclusion from an isolated phrase or two in a legislative history which, taken as a whole, strongly emphasizes the importance of the "use" test.

3.2.1.4. *Commerce's Practice*

The 1988 amendment to the specificity test applies to all Commerce proceedings initiated after the date the 1988 Trade Act was enacted.⁹² Should the Federal Circuit in *PPG* overturn the specificity test in favor of some broader analysis, the expanded test will apply only to countervailing duty investigations and reviews initiated before August 23, 1988. For new investigations and reviews, the specificity test will continue to be the *de facto* "use" test endorsed by the CIT in *Cabot I* and Congress in the 1988 Trade Act.

Commerce will almost certainly continue to employ the current "use" test for specificity in new investigations in accordance with the 1988 Trade Act, regardless of the outcome of the *PPG* appeal. Potential petitioners in energy import countervailing duty cases should therefore take a close look at the actual benefits of government programs involving production of energy or derivative products. There would seem to be little doubt under the present test, for example, that oil from

overturned Commerce's treatment of Mexican natural gas in *PPG*. His proposal would have made the government provision of natural resources such as crude oil or natural gas countervailable if the government price was lower than the "fair market value," unless the resource was made available to U.S. producers at the low price. The "fair market value" of the resource input would have been measured against the export price, world price, or other arm's-length commercial measure. The proposal contained no specificity requirement and thus would have applied even if every domestic industry received the lower price. The Gibbons bill did not become part of the final House trade bill. See H.R. 3, 100th Cong., 1st Sess. (1988). For a general analysis of the Gibbons bill, see Bello & Holmer, *Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test*, 18 GEO. WASH. J. INT'L L. & ECON. 297 (1984). See also 134 CONG. REC. S10,576 (daily ed. Aug. 2, 1988) (statement of Senator Baucus, incorporating a statement by Congressman Gibbons).

⁹² Section 1337(b) of the 1988 Trade Act, 102 Stat. 1211, provides that § 1312 (the recodified specificity test) "shall only apply with respect to investigations and reviews initiated after the date of enactment of this Act [Aug. 23, 1988]".

major producing countries is generally sold to all domestic industries at below-world-market prices and, accordingly, is not a countervailable subsidy to domestic producers of downstream products.

Commerce's adoption and application of the "use" test of *Cabot I* is best illustrated by two Canadian lumber cases. In the first case, Commerce considered the prices charged for the right to harvest timber in the "stumpage" programs of the Canadian federal and provincial governments and determined the programs were not specifically provided to the softwood products industry because they were generally available.⁹³ In the second case, Commerce reversed its determination regarding the benefits' specificity, based partly on application of the *Cabot I* "use" test.⁹⁴ In addition to the "use" test, Commerce considered the extent to which the Canadian government affirmatively targeted benefits to the particular industry.⁹⁵ Accordingly, while Com-

⁹³ See Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 10,395, 10,403 (1983) (preliminary negative determination):

[W]e preliminarily determine that stumpage programs are not provided only to a "specific enterprise or industry, or group of enterprises or industries." Rather, they are available within Canada on similar terms regardless of the industry or enterprise of the recipient. The only limitations as to the types of industries that use stumpage reflect the inherent characteristics of this natural resource and the current level of technology. As technological advances have increased the potential users of standing timber, stumpage has been made available to the new users. Any current limitations on use are not due to the activities of the Canadian governments; there is no evidence of governmental targeting regarding stumpage.

⁹⁴ Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 57,453, 38,455-56 (1986) (preliminary affirmative determination).

We also note that the specificity test has been closely examined and questioned by the Court of International Trade. [In *Cabot I*], the court rejected the Department's specificity test That decision has prompted a re-evaluation of the specificity test within the Department. . . . Thus, contrary to our determination in *Softwood Products*, the industries actually using provincial stumpage do not include the furniture manufacturing industries.

Id. at 37,455-56.
⁹⁵

Based on our six years of experience in administering the law, we have found thus far that the specificity test cannot be reduced to a precise mathematical formula. Instead, we must exercise judgment and balance various factors in analyzing the facts of a particular case in order to determine whether an "unfair" practice is taking place.

Among the factors we consider are: (1) The extent to which a foreign government acts to limit the availability of a program; (2) the number of enterprises, industries, or groups thereof which actually use a program, which may include the examination of disproportionate or dominant users; and (3) the extent to which the government exercises discretion in making the program available.

Id. at 37,456.

merce examines the actual use of programs it investigates, the specificity test has not been reduced to a mere analysis of use.⁹⁶

3.2.1.5. *Summary of Specificity*

Foreign government programs are not countervailable unless they benefit a specific enterprise or industry. Programs used by a particular industry, such as electricity generation, would appear to satisfy the specificity test. Programs providing energy at below-world-market rates to a broad class of users within an economy would not satisfy the specificity test. The outcome of the *PPG* appeal may affect the specificity test for investigations and reviews initiated before August 23, 1988. Investigations and reviews initiated after that date, however, will be governed by the specificity test as amended by the 1988 Trade Act, codifying the "use" test of *Cabot I*.

3.2.2. *Preferentiality*

The second test Commerce applies to foreign government programs to determine countervailability is the preferentiality test. The preferentiality test attempts to determine the value of subsidies granted to specific enterprises or industries. Preferentiality is measured by comparing the value of the benefit bestowed with a "benchmark" value for that benefit.⁹⁷ The benchmark will be the price of comparable goods or

⁹⁶ Cases involving government provision of infrastructure to domestic producers present issues similar to those which would be presented in an energy imports case. A leading determination on infrastructure is *Carbon Steel Wire Rod from Saudi Arabia*, 50 Fed. Reg. 47,788 (1985) (preliminary affirmative determination), where Commerce found that roads, ports, utilities, and training centers in two Saudi industrial estates were not sector-specific, because the industrial estates were available to, and used by, a broad range of Saudi industry.

On the other hand, in a recent investigation of industrial phosphoric acid from Israel, Commerce found the provision of a railway line to a particular industry to confer a specific benefit. Commerce based its decision on the fact that the railway line had been built especially for, and was used almost exclusively by, a few chemical companies located in the desert region of Israel. *Industrial Phosphoric Acid from Israel*, 52 Fed. Reg. 25,447 (1987) (final affirmative determination) [hereinafter *Industrial Phosphoric Acid*].

Close questions would be presented by regional energy projects used primarily by local industry. See, e.g., *Industrial Nitrocellulose from France*, 53 Fed. Reg. 7,776 (1988) (preliminary determination), in which Commerce found a regional grant for infrastructure to be countervailable. In cases where the energy produced by the project is used by all local industry, Commerce would most likely find that the benefit was not specific. Where the project was built for a particular industry (for example, an electricity-generation facility built specifically to power a large aluminum plant), the facility would most likely be treated as a specific benefit to that plant.

⁹⁷ The statutory basis for the preferentiality test is the definition of "subsidy" in Section 771(5) of the Tariff Act of 1930, 19 U.S.C. § 1677(5) (1982). Once the cash equivalent of the subsidy has been determined, it is allocated over an appropriate pe-

services in the same country where the government has supplied goods or services.⁹⁸ The benchmark will be a relevant commercial standard where the government has provided capital, loans, or loan guarantees.⁹⁹ Preferentiality may be easy to determine if an objective benchmark, such as prices of comparable products or the prevailing commercial interest rate, is available. Conversely, if no such standard is at hand (e.g., for valuing shares which are not publicly traded), then preferentiality may be difficult to determine.

Commerce was required to determine the degree of preferentiality of the feedstock supplied to carbon black producers in the first administrative review of carbon black from Mexico.¹⁰⁰ Because two companies exclusively purchased all of the carbon black feedstock in Mexico, there were no other sales against which to compare the price charged to the two producers. In order to establish a method for choosing an alternative standard, Commerce promulgated a draft "preferentiality appendix." The appendix sets out a hierarchy of benchmarks for government-supplied goods and services prices where identical product sales by the same seller are unavailable.¹⁰¹ The alternatives are, in order of preference: (1) prices charged by the same seller for a similar or related good; (2) prices charged within the jurisdiction by other sellers for an identical good or service; (3) the same seller's cost of producing the good or service; (4) external prices.¹⁰² The preferentiality appendix re-

riod of time. See *Cold-Rolled Carbon Steel Flat-Rolled Products from Argentina*, 49 Fed. Reg. 18,006, 18,016 (1984) (final determination).

⁹⁸ In *Softwood Products*, 48 Fed. Reg. at 24,167, Commerce stated:

[S]tumpage programs clearly involve the provision [sic] of a good (raw timber), and thus clearly fall within subsection [sic] (ii) The standard contained in subsection (ii) is "preferential," which normally means only more favorable to some within the relevant jurisdiction than to others within that jurisdiction. *Id.* (footnote omitted). In this context, it does not mean "inconsistent with commercial considerations," a distinct term used in subsection 771(5)(B)(i).

⁹⁹ *Id.* Commerce stated, "In our opinion, subsections 771(5)(B)(i)-(iv) are mutually exclusive. We recognize that subsections (i)-(iv) are not an all-inclusive list of domestic subsidies. However, we maintain that where a particular subsection clearly covers a given program, the determination whether that program is a subsidy must be based upon the standard provided in the relevant subsection." *Id.*

¹⁰⁰ *Carbon Black from Mexico*, 51 Fed. Reg. 13,269 (1986).

¹⁰¹ *Id.* at 13,272.

¹⁰² *Id.* at 13,272-73. The preferentiality appendix was not designed as a major departure from Commerce's traditional application of the preferentiality rule. For example, Commerce continues to define subsidies in relation to standards *within* the country operating the program under investigation. Comparisons to external standards are permitted only as a last resort. *Id.*

Applying the appendix to the carbon black review, Commerce used the price charged by the same seller (PEMEX) for a similar or related good (heavy fuel oil) which it determined to be a reasonable substitute for to the feedstock (with certain

mains the best indicator of Commerce's approach to determining the degree of preferentiality of government-provided goods and services. However, it is not a formal regulation and is therefore subject to change.

The potential benefits to production of energy or its derivative products are varied, and the range of potential benchmarks is so great, that no comprehensive survey of preferentiality will be attempted in this article. Where the program provides goods and services, Commerce will look to sales of the same good by the same producer, then to similar transactions according to the hierarchy set forth in the preferentiality appendix. Where the program provides funds or their equivalent,¹⁰³ Commerce will look for a reasonable commercial benchmark.

It may be safe to assume that no major legislative changes in the preferentiality test are forthcoming, because the 1988 Trade Act did not contain any provisions which would affect the test.¹⁰⁴ The major obstacle to obtaining a countervailing duty order on energy products would be showing that the benefits were granted to a specific enterprise or industry, rather than measuring the benefits concerned.

4. THE STATUS OF CANADIAN ELECTRICITY UNDER THE FAIR TRADE LAWS

Canada has vast untapped hydroelectric potential. Hydroelectric generation of electricity is significantly cheaper than coal generation, which is the least expensive alternative available in the United States. Given hydroelectric power's substantial comparative price advantage

adjustments). The subsidy amount would have been the amount by which the price of the feedstock undercut the price of heavy fuel oil. In fact, Commerce found that the price of carbon black feedstock was not preferential in comparison with the price of heavy fuel oil and, therefore, did not confer a countervailing subsidy. *Id.* at 13,271.

¹⁰³ Cases involving government infrastructure provision may again be useful in analyzing the provision of energy at below-world-market rates. In *Industrial Phosphoric Acid*, for example, involving a railway line built specifically for the producer being investigated, Commerce compared the rates charged by the Israeli government for use of the line to the rail rates prevailing in other areas of Israel. Commerce found that the rates on the special lines were actually higher than average, and therefore did not provide a preferential benefit. 52 Fed. Reg. at 25,447. It may be argued, however, that Commerce should have compared the rate of cost recovery on the two lines. The desert line may have been far more expensive to build, and a cost-recovery test might have uncovered a subsidy to the plant.

¹⁰⁴ The House bill preceding the 1988 Trade Act contained a provision that would have incorporated a hierarchy of benchmarks for measuring preferentiality into the countervailing duty law. See OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, CONFERENCE REPORT TO ACCOMPANY H.R. 3, H.R. REP. NO. 576, 100th Cong., 2d Sess. 587 (1988) [hereinafter TRADE ACT CONFERENCE REPORT]. The Senate bill did not contain a preferentiality hierarchy, however, and the House proposal was ultimately dropped. *Id.*

over electricity generated from fossil or atomic fuels, it is not surprising that U.S. imports of Canadian electricity have grown steadily in recent years. This is particularly true in New England, distant from the major U.S. coal fields, yet relatively close to the enormous hydroelectric resources of Quebec. The coal producing states, the U.S. coal industry, and certain utilities do not share New England's enthusiasm for Canadian hydroelectric power and have formulated a number of charges against Canada. The allegations include the charge that Canadian electricity is priced on a two-tiered system.¹⁰⁵

The status of electricity under the antidumping and countervailing duty laws has become a significant issue due to imported Canadian electricity.¹⁰⁶ The laws apply to imported "merchandise,"¹⁰⁷ and their legislative histories indicate that the term "merchandise" refers to articles, goods, and products.¹⁰⁸ The customs laws similarly define merchandise as "goods, wares, and chattels."¹⁰⁹ Although customs classifications are not automatically dispositive of scope questions under the antidumping and countervailing duty laws, Congress has indicated that they are an important guide.¹¹⁰ The antidumping and countervailing duty laws have commonly been thought to extend to fuels consumed to manufacture electricity (such as petroleum, natural gas, coal, and uranium) but not to electricity itself.¹¹¹

Article 901(2) of the United States-Canada Free-Trade Agreement treats electricity as an "energy good."¹¹² Under Article 902, the parties affirm their "respective rights and obligations under the General Agreement on Tariffs and Trade [GATT]."¹¹³ Taken together, the

¹⁰⁵ See generally AD HOC COALITION ON INTERNATIONAL ELECTRIC POWER TRADE, IMPORTS OF CANADIAN POWER A GROWING CONCERN (1987).

¹⁰⁶ The authors gratefully acknowledge the contribution of Robert E. Nielsen, Esq., on this issue.

¹⁰⁷ Tariff Act of 1930 §§ 701, 731, 19 U.S.C. §§ 1671, 1673 (1982).

¹⁰⁸ See, e.g., S. REP. NO. 249, 96th Cong., 1st Sess. 43-45, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS, 381, 429-31.

¹⁰⁹ Tariff Act of 1930 § 401, 19 U.S.C. § 1401 (1982).

¹¹⁰ For example, when Congress wished to render certain monetary instruments, listed as intangibles under the tariff schedules, subject to the provisions of the Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986), it specifically reclassified them in the tariff schedules.

¹¹¹ Of course, the term "good" does not necessarily refer to a physical object which can be put into a box. The term can best be understood in contradistinction to services.

¹¹² Free-Trade Agreement art. 901(2), 27 I.L.M. at 343. Article 901(2) defines "energy goods" as those goods classified in the Harmonized System under Chapter 27. U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, USITC PUB. NO. 2030, ch. 27 (1st ed. 1988) [hereinafter HTS]. This includes electricity, which is classified under heading 2716. HTS at 27-7.

¹¹³ Free-Trade Agreement art. 902, 27 I.L.M. at 343.

two provisions indicate that the rights of each party under GATT (including antidumping and countervailing duty remedies) apply to imports of electricity from the other party.¹¹⁴

The enactment of the new harmonized tariff schedules has clouded the picture. The harmonized schedules¹¹⁵ specifically list electricity as a good.¹¹⁶ However, a disclaimer in the legislative history of the 1988 Trade Act suggests an intent to block the interpretation that this classification subjects electricity to the antidumping and countervailing duty laws.¹¹⁷ Due to the conflicting implications of the harmonized tariff schedules, it is uncertain whether electricity is subject to the countervailing duty law. Commerce has not considered the issue, the Customs precedents are not dispositive, and the legislative history of the 1988 Trade Act is not clear enough to settle the issue. Defining electricity as a good in the United States-Canada Free-Trade Agreement is a clear statement that U.S. negotiators intended to apply the countervailing duty law to imports of Canadian electricity.

If electricity is treated as a good subject to the countervailing duty laws, imports of electricity from Canada constitute a potentially significant issue. Because any countervailing duties imposed on electricity from Canada would offset only the amount of any net subsidy, how-

¹¹⁴ This conclusion is reinforced by a comment from the U.S. Negotiating Team: Certainly, it was the intention of the U.S. negotiators that all disciplines of the GATT regarding trade in goods should apply to all energy commodities covered by Chapter Nine of the FTA [Federal Trade Administration], including electricity. U.S. spokesmen so stated during the negotiations, as well as publicly subsequently to the FTA's signing; Canada has at no time disputed this view.

United States-Canada Free-Trade Agreement Energy Provisions: Negotiating History and Interpretive Notes (Negotiating Team July 28, 1988).

¹¹⁵ See 1988 Trade Act § 1204, 102 Stat. 1148-50.

¹¹⁶ HTS at 27-7, heading 2716.00.

¹¹⁷ See TRADE ACT CONFERENCE REPORT, *supra* note 104, at 550:

Electricity and Electrical Energy

Electricity and electrical energy were considered to be "intangibles" under the existing TSUS [Tariff Schedules of the United States] and therefore not subject to the entry requirements applicable to imported articles. Although the HTS [Harmonized Tariff Schedule] has a specific heading for "electrical energy," additional U.S. legal note 8(b) in chapter 27 of the HTS provides that electrical energy shall continue to be exempt from statutory entry requirements, but instead "shall be entered on a periodic basis in accordance with regulations to be prescribed by the Secretary of the Treasury." This provision will facilitate the collection of import statistics on electrical energy without otherwise affecting its legal status under U.S. trade laws.

While the body of this statement is concerned with ensuring that entry papers do not have to be presented every time a kilowatt of electricity crosses the border, the last sentence implies legal scholarship of the harmonized tariff system should not change the status of electricity under the countervailing duty law.

ever, the presumed comparative advantage enjoyed by Canadian hydroelectric power would remain unaffected.

5. THE CANADIAN CONNECTION: UNITED STATES-CANADA FREE-TRADE AGREEMENT

The United States-Canada Free-Trade Agreement (Agreement) signed January 2, 1988,¹¹⁸ is expected to have a significant positive effect on energy trade in the new free trade area.¹¹⁹ By prohibiting volume and price controls and price discrimination, the Agreement should bolster energy exports from Canada, particularly of natural gas and electricity, both currently important to U.S. consumption.¹²⁰ Industries on both sides of the border will experience fluctuations in their operating profits as a result of the changing import situation and will be likely to consider seeking relief under the trade laws.

Canada placed a high priority on exemption or favorable treatment under U.S. "contingency protection"¹²¹ laws throughout the negotiations. The countervailing duty law presented a particular concern to the Canadians. As one Canadian official stated:

Given the dominance of the United States in the practice of countervail, the United States has had a virtual monopoly in defining what are and what are not countervailable subsidies. (The GATT code does not define what is a subsidy.) Through its preferentiality and specificity tests . . . , the US [sic] unilaterally determines what foreign practices it will and will not tolerate. As Canadian exporters have learned

¹¹⁸ The agreement was approved in the United States on September 28, 1988, and implemented by the United States-Canada Free-Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449, 102 Stat. 1851 [hereinafter FTA Implementation Act] and in Canada on December 30, 1988, by the Canada-United States Free-Trade Agreement Implementation Act, Bill C-2.

¹¹⁹ Crowe, *Energy*, in ABA NAT'L INST. ON UNITED STATES/CANADA FREE TRADE AGREEMENT 215,229 (1988); M. Rothman, *supra* note 7.

¹²⁰ Crowe, *supra* note 119, at 217-22. Crowe reports that electricity exports from Canada have increased sevenfold since 1970 and that for three decades Canada has been an important supplier of natural gas to the United States. *Id.* at 222.

¹²¹ The phrase "contingency protection" is attributed to Canada's trade negotiator during the GATT Tokyo Round, Rodney Grey. The term refers to the antidumping, countervailing duty, and safeguard (escape clause) laws whose relief is "contingent" on proof of relevant situations, such as dumping, subsidies, and injury from global imports. These laws are looked upon by those enamored of the term as the new protectionist weapons, and are in this view to be contrasted with tariffs, which are not subject to such eventualities and are much less capable of being used as administered protection laws. See Hart, *Trade Remedy Law and the Canada-United States Trade Negotiations*, in ABA NAT'L INST. ON UNITED STATES/CANADA FREE TRADE AGREEMENT 273, 283 (1988).

over the years, these tests have proven increasingly flexible of application and the ambit of the countervailing duty statute has expanded every year.¹²²

Canada's perception that U.S. countervailing duty law is unpredictable and represents "administered protection" arises in large part from Canada's experience with a single import: lumber. In 1983, the Department of Commerce found that the prices charged by the Canadian federal and provincial governments for stumpage rights were not countervailable subsidies.¹²³ Three years later, the Department determined preliminarily that stumpage rights conferred a fifteen percent subsidy.¹²⁴ The issues of specificity and preferentiality are complex, and simplistic comparisons of the two lumber cases lead quickly to inaccurate conclusions. Nevertheless, from a *perception* standpoint, the difference in outcomes suggest to some Canadian observers substantial discretion in administration of the countervailing duty law in the United States.

The perception that U.S. administrators wielded great discretion led Canadian negotiators to demand that Canadian goods be treated differently under a free-trade agreement than imports from other countries are treated under U.S. law. With this thought in mind, the two sides negotiated the substance of unfair pricing and subsidies, with no intention of resolving disputes other than by national court review. Some progress was made in the negotiations, particularly promising approaches for dealing with dumping, as tariffs and other barriers come down between Canada and the United States.

Subsidies presented the greater challenge, and it proved impossible to resolve on the negotiation timetable for the Free-Trade Agreement. This is not at all surprising. The key to a bilateral agreement on subsidies is an agreement on what constitutes a subsidy, or at least on what

¹²² *Id.*

¹²³ Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 10,395 (1983).

¹²⁴ Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (1986).

Before the Department of Commerce issued a final determination, the petitioners withdrew their petition on the basis of a Memorandum of Understanding reached December 30, 1986, between the governments of Canada and the United States, by which Canada agreed to impose a 15% export tax on lumber shipped to the United States until the provinces increased their stumpage charges sufficiently to overcome the alleged subsidization. 52 Fed. Reg. 315 (1987); Memorandum of Understanding Concerning Trade in Certain Softwood Lumber Products, United States-Canada, 52 Fed. Reg. 233 (1987). British Columbia and Quebec have since increased the prices charged to their lumber industry for stumpage rights to offset the export tax either fully or in part. Amendments to Memorandum of Understanding concerning trade in certain softwood lumber products, United States-Canada (Dec. 16, 1987 & Apr. 7, 1988)(amending Memorandum of Understanding, Dec. 30, 1986, United States-Canada)(texts available through Office of the United States Trade Representative).

constitutes a prohibited or actionable subsidy. In forty years, the signatories to the GATT have been unable to agree on that point, so it did not come as a surprise that U.S. and Canadian negotiators could not find a solution in a few short months.

In addition, the United States was interested in negotiating real and enforceable discipline over Canadian subsidies. That raised questions of national sovereignty for Canada. In general, negotiating a free-trade agreement with the United States raised highly emotional and political concerns over national sovereignty in some quarters in Canada,¹²⁵ and the subsidies issue in particular attracted highly volatile sentiment.

Canada believed that, despite the controversy, a new way to deal with unfair trade cases was critical to bilateral relations and to bilateral commitment to the Agreement. Ultimately, the two governments agreed to allow independent review of antidumping and countervailing duty decisions in a forum created by the Free-Trade Agreement.

5.1. Provisions of the Free-Trade Agreement

The Agreement does not call for substantive modification of the antidumping or countervailing duty laws in either country.¹²⁶ Each government reserved the right to continue applying its antidumping and countervailing duty laws to imports from the other country. The governments also agreed that these laws could be modified even after the Agreement enters into force, on the condition that any such change expressly state its application to imports from the other country and be subject to a nonbinding dispute settlement process.¹²⁷ The centerpiece of the Agreement is the provision that review of final determinations made under the antidumping and countervailing duty laws of the two countries will be subject to binding dispute settlement by independent binational panels, rather than by national courts.¹²⁸

Thus, under the Agreement, the Department of Commerce and the International Trade Commission investigate allegations of dumping

¹²⁵ A telling illustration is that the Progressive Conservative Party of Prime Minister Brian Mulroney was forced by the raging debate on the free-trade agreement to call national elections to gain public sanction for bringing the agreement into force in Canada.

¹²⁶ Free-Trade Agreement, 27 I.L.M. at 386-87.

¹²⁷ *Id.* arts. 1902(2), 1903, 27 I.L.M. at 386. If the dispute settlement panel finds that the statutory amendment is inconsistent with GATT or with the purposes of the Free-Trade Agreement, the panel may recommend modifications to bring the amended statute into conformity. If consultations to reach a mutually satisfactory solution are unsuccessful, the government that requested the panel may either enact mirror legisla-

¹²⁸ *Id.* art. 1904, 27 I.L.M. at 387.

and government subsidization and injury to domestic industry, in accordance with current U.S. antidumping and countervailing duty laws (including relevant court decisions, legislative history, regulations, and administrative precedent). The Agreement's terms are triggered only if a party seeks review of a final determination of Commerce or the Commission. In that event, a party otherwise entitled to bring an appeal to the United States Court of International Trade, as provided by current law,¹²⁹ may seek review before a panel composed of five U.S. and Canadian citizens chosen for their "good character, high standing and repute, . . . objectivity, reliability, sound judgment, and general familiarity with international trade law."¹³⁰ The majority of a panel, including the chair, must also be lawyers.¹³¹

The requirements that most of a panel be lawyers and that even the nonlawyers have a general familiarity with international trade law follow naturally from the standards to be applied by a panel in its review. The panel's function is to determine whether the investigating authority has properly applied domestic antidumping or countervailing duty law in reaching the challenged determination, based solely on the administrative record that was before the agency and on the standard of review and general legal principles that would apply in the courts of the importing country.¹³² If the panel decides that the investigating authority incorrectly applied that country's antidumping or countervailing duty law, the panel will remand the determination for action not inconsistent with the panel's decision within a specified time limit.¹³³

As a safety valve, the Agreement gives the governments access to an "extraordinary challenge" before a committee of judges or former judges if unusual circumstances jeopardize the integrity of the binational panel review process. An extraordinary challenge may be sought if: a panelist has a serious conflict of interest; if the panel has deviated seriously from a fundamental rule of procedure; or if the panel has manifestly exceeded its authority (for instance, by basing its decision on

¹²⁹ Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a (1982). The party must meet the statutory definition of an "interested party," Tariff Act of 1930 § 771(9), 19 U.S.C. § 1677(9) (1982), and have participated in the administrative proceeding below. Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a(a) (1982).

¹³⁰ Free-Trade Agreement Annex 1901.2(1), (2), (4), 27 I.L.M. at 393. Each government chooses two panelists. If the governments cannot agree on the fifth panelist, the four appointed panelists will attempt to reach agreement and, if they do not, the fifth panelist is chosen by lot from the roster of panelists previously developed by the two governments. *Id.* Annex 1901.2(3), 27 I.L.M. at 393.

¹³¹ *Id.*

¹³² Free-Trade Agreement art. 1904(2)-(3), 27 I.L.M. at 387. Article 1911 of the Agreement defines "standard of review," "general legal principles," and "administra-

¹³³ *Id.* art. 1904(8), 27 I.L.M. at 388.

matters outside the administrative record).¹³⁴ Because these actions are extraordinary measures to ensure the continued viability of the process, only governments have authority to establish an extraordinary challenge committee.¹³⁵

Despite the legalistic and detailed nature of these procedures, they are not to be permanent appendages of the antidumping and countervailing duty laws. The governments have seven years to develop a substitute system of rules governing unfair pricing and government subsidization in their bilateral trade.¹³⁶ This essentially means vigorous continuation of the discussions already begun during the free-trade area negotiations, and anticipates substantially greater discipline over Canadian subsidy practices. The Agreement does not contemplate failure in this effort. If the governments are unable to agree, the only remedy is the option to terminate the Agreement.¹³⁷

5.2. Implications for Antidumping and Countervailing Duty Litigants

Practitioners must consider a variety of factors when weighing the potential impact of this new, albeit temporary, review mechanism for the antidumping and countervailing duty decisions, regardless of the product involved. The most obvious area for concern is panel selection. The method by which Canada and the United States place candidates on a selection roster when a panel is requested, as well as the selection process for a particular review, will indicate whether panels can be expected to reach "judicious" decisions. Panelists will not be subject to the usual presidential appointment and Senate confirmation process under the procedure agreed upon in the United States. After extensive consultation with the Administration under the fast-track procedure of the Trade Act of 1974,¹³⁸ the United States agreed that the panelists will be appointed from a roster recommended to the United States Trade Representative. Nominations will be made by an interagency committee without regard to political affiliation. Prospective panelists will provide financial and other disclosures to the interagency committee in order to ensure qualification for service and no conflict of interest

¹³⁴ *Id.* art. 1904(13), 27 I.L.M. at 388-89.

¹³⁵ *Id.*

¹³⁶ *Id.* arts. 1906, 1907, 27 I.L.M. at 390.

¹³⁷ *Id.* art. 1906, 27 I.L.M. at 390. Under the Agreement, the binational panel review system would not end unless the agreement was amended or terminated. The implementing legislation in the United States shows the strong interest of the U.S. Congress in early and successful conclusion of the negotiations and sets very specific negotiating objectives. See FTA Implementation Act § 409, 102 Stat. 1851, 1894-97.

¹³⁸ Trade Act of 1974 § 151, 19 U.S.C. § 2191 (1982).

due to financial holdings and employment affiliations.¹³⁹ The Trade Representative then will present a preliminary roster to Congressional committees and develop a final roster of individuals eligible to be selected should a binational panel or committee be requested. This process would be repeated each year.¹⁴⁰

The complicated procedure of panel appointment is obviously the product of compromise. We believe the practitioner can expect that U.S. panelist appointees will be chosen on the basis of their understanding of the legal principles involved in an antidumping or countervailing duty determination review. Considerations such as whether the determination was reached by the U.S. or Canadian authorities, or whether the panelist will "vote the flag" are unlikely to affect appointment. The specific method of selection in Canada remains unclear, but the objective prerequisites are set out in the Agreement.¹⁴¹ The tenor of Chapter 19 as a rule-driven, not a political, process creates optimism that political considerations in both countries will be subordinated to the common interest in carefully analytical, legally sound, credible panel decisions. Only an objective method of panel selection justifies the high confidence governments have placed in these binational arbitral bodies.

Practitioners can take comfort in the requirement that panels must base their consideration of a determination on the same standard of review used in judicial review. In the United States, this means the determination would be upheld unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with law.¹⁴² Again, this is a rule-driven process, and panelists may not consider nongermane factors such as foreign affairs considerations, the national economic interest, or similar factors.

Another practical incident of panel review is that a panel be requested by one of the parties to the administrative proceeding below.¹⁴³ The provision recognizes that disputes arise in the context of private concerns over unfair pricing and government subsidization, despite the fact that the binational panel system was crafted to resolve trade disputes between two nations. The implementing legislation in the United States goes beyond the Agreement in prohibiting the United States from

¹³⁹ FTA Implementation Act § 405(a), 102 Stat. 1851, 1888 (1988).

¹⁴⁰ *Id.*

¹⁴¹ See Free-Trade Agreement ch. 19, 27 I.L.M. at 386-94.

¹⁴² Free-Trade Agreement arts. 1904(3), 1911, 27 I.L.M. at 387-91. If the review concerns a Commission determination not to initiate a changed circumstances review, the standard is whether the determination is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

¹⁴³ Free-Trade Agreement art. 1904(5), 27 I.L.M. at 387.

requesting panel review unless an interested party wants a panel.¹⁴⁴ This has two effects, neither of which amounts to a significant problem. First, the United States cannot "sue" itself, and the Administration cannot seek to have a Commission determination overturned by a panel. Second, the United States cannot opt for panel review over court review if no other party (and the Government of Canada) objects to court review. This latter possibility otherwise exists because the Agreement permits review of antidumping and countervailing duty determinations in the Court of International Trade if no panel request is made within the thirty-day period following publication of a determination.¹⁴⁵ Private parties are entitled to appear before panels and be represented by their own counsel, another important aspect of current judicial review that is carried over to the binational panel system.¹⁴⁶

Another notable aspect of the binational panel process is that the courts will continue to hear constitutional claims.¹⁴⁷ The constitutionality of the Agreement's implementing legislation and the substitution of binational panel review for court review should be subject to challenge in the courts. The courts will also review any constitutional claims arising out of the determination itself after a particular binational panel's consideration of the other alleged defects in the determination has been completed.¹⁴⁸ Consistent with current judicial practice, courts will not reach the constitutional claims unless the matter cannot be resolved on other grounds.

The binational panel process resolves issues considerably faster than the courts. The panel's final decision must be issued within 315 days after the request for convening a panel is made.¹⁴⁹ The require-

¹⁴⁴ FTA Implementation Act § 401(c), 102 Stat. 1878 (1988).

¹⁴⁵ Free-Trade Agreement art. 1904(12)(a), 27 I.L.M. at 388. Because this thirty-day time period coincides with the current period provided by Tariff Act of 1930 § 516A, 19 U.S.C. § 1516a(a) (1982), for commencement of review in the Court of International Trade, the period for court review has been amended for determinations involving Canadian goods to begin on the thirty-first day after publication of the determination at issue. FTA Implementation Act § 401(a), 102 Stat. 1878 (1988).

¹⁴⁶ Free-Trade Agreement art. 1904(7), 27 I.L.M. at 388.

¹⁴⁷ FTA Implementation Act § 401(c), 102 Stat. 1878-83 (1988).

¹⁴⁸ *Id.* Dozens of legal opinions have been written addressing constitutional issues raised by the Agreement. We will mention two: Statement of Joseph P. Griffin, Chairman, Section of International Law and Practice, American Bar Association, before the Subcommittee of Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary 2 (Apr. 28, 1988); Letter from Professor David L. Shapiro, Harvard Law School, to Honorable Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 12-13 (Feb. 22, 1988). See H.R. REP. NO. 816, 100th Cong., 2d Sess. pt. 4, at 12 (1988).

¹⁴⁹ Free-Trade Agreement art. 1904(14). As is the case for judicial review, the

ment should lead to business certainty much earlier than is possible under judicial review procedures.

Potential litigants before binational panels should be aware that final decisions of binational panels will not bind other panels, and *a fortiori* they will not bind courts.¹⁵⁰ Panel decisions could be considered by a court, to the extent that the decisions are well-reasoned and persuasive. The implementing legislation makes this clear.¹⁵¹ Conversely, in deciding whether the determination at issue was made in accordance with the antidumping or countervailing duty law of the importing country, panels are explicitly bound by judicial precedent.¹⁵²

U.S. exporters finding themselves subject to an antidumping or countervailing duty proceeding in Canada should take note of another incident of the binational panel process. United States notions of due process are incorporated into the Agreement, allowing binational panel review of Canadian determinations which previously were not reviewable at all.¹⁵³ The investigating authority will be required to file with the panel the administrative record containing all material before the decisionmaker at the time of decision. The U.S. producer or exporter may request a timely redetermination of the duty applicable to a particular entry without first paying the duty assessed, an additional change from current Canadian law.¹⁵⁴

The binational panel process created by the Free-Trade Agreement is not a model to be emulated in future negotiations. The negotiators from both countries explicitly recognized the transitory nature in the five-to-seven-year duration clause of article 1906.¹⁵⁵ Practitioners should be aware of the advantages as well as the disadvantages of the panel process for as long as it remains available. On balance, binational panel review should not result in decisions materially different than those otherwise reached by the courts.

was found wanting. *Id.* art. 1904(8), 27 I.L.M. at 388.

¹⁵⁰ *Id.* art. 1904(9), 27 I.L.M. at 388.

¹⁵¹ FTA Implementation Act § 401(d), 102 Stat. at 1883 (1988).

¹⁵² Free-Trade Agreement art. 1904(2), 27 I.L.M. at 387.

¹⁵³ *Id.* art. 1911, 27 I.L.M. at 392 (definition of "final determination" in the case of Canada); *id.* art. 1904(15)(f), 27 I.L.M. at 390. For example, while injury determinations of the Canadian Import Tribunal are currently reviewable, determinations of dumping and subsidization by the Deputy Minister for Revenue following the original investigation are not. Review of the dumping or subsidy margin, or its application to particular goods, is now subject to review only at the time of entry of particular merchandise, only after the duty determined by the customs appraiser has been paid, and only at the instigation of the Canadian importer. See Special Import Measures Act, §§ 41, 56, 61, R.S.C. ch. 5-15 (1985).

¹⁵⁴ Free-Trade Agreement art. 1904(15)(a), 27 I.L.M. at 389. See Special Import Measures Act, §§ 56, 61, R.S.C. ch. 5-15 (1985).

¹⁵⁵ *Id.* art. 1906, 27 I.L.M. at 390.

6. SECTION 301

Section 301 of the Trade Act of 1974 is potentially the most powerful trade statute. It empowers the President to take "appropriate and feasible action" to "enforce the rights of the United States under any trade agreement" or to respond to a foreign government action that is "unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce."¹⁵⁶ A 1984 amendment broadly defined the term "unreasonable" to include such actions denying fair and equitable market access or opportunities to establish an enterprise.¹⁵⁷

Like the antidumping and countervailing duty laws, relief claimed on Section 301 grounds can be imposed on imports from a single country and is based on unfair trading practices.¹⁵⁸ Unlike those laws, action lies within the discretion of the President.¹⁵⁹ Action usually will not be taken unless the federal agencies with trade responsibilities agree.¹⁶⁰ The injury test of whether the government practice "burdens or restricts" U.S. commerce may not be as onerous as those under the other trade laws addressed here, because there is no formalized procedure to determine injury before the International Trade Commission under Section 301, as exists in the case of the antidumping and countervailing duty laws.¹⁶¹

Until recently, the potential for using Section 301 as a weapon against unfair trade practices was limited by the requirement that all federal agencies with trade responsibilities agree to take action, and by the great discretion of the President. Also, GATT members who were targets of retaliatory actions could counter-retaliate against U.S. exports by seeking the sanction of GATT. As a result, past use of Section 301 was almost exclusively for its original purpose of bringing recalcitrant trading partners to the bargaining table or as the beginning of a GATT dispute settlement process.

In 1985 and 1986, however, the Administration took the unusual action of self-initiating a series of cases, ranging from Brazil informatics policy¹⁶² to Korean insurance and intellectual property rights,¹⁶³

¹⁵⁶ Trade Act of 1974 § 301, 19 U.S.C. § 2411 (a)(2)(B) (1982).

¹⁵⁷ Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 304(f)(2), 98 Stat. 3005 (1984) (codified as amended at 19 U.S.C. § 2411(e)(3) (1982 & Supp. V 1987)).

¹⁵⁸ 19 U.S.C. § 2253(a) (1988).

¹⁵⁹ *Id.* § 2252(a).

¹⁶⁰ *Id.* § 2252(c).

¹⁶¹ *Id.* § 2251(b).

¹⁶² The Office of the United States Trade Representative (USTR) self-initiated an investigation into Brazil's informatics policy on September 16, 1985. Brazil's Informatics Policy, 50 Fed. Reg. 37,608 (1985). On November 23, 1987, the President announced his intention to impose retaliatory measures and public comments were re-

and Japanese tobacco products.¹⁶⁴ In addition, in 1986 the Administration entered into important agreements involving Canadian softwood lumber¹⁶⁵ and Japanese semiconductors.¹⁶⁶ The agreements rely heavily on Section 301 to ensure that their terms are met bringing the full potential of Section 301 to the forefront.

Dual pricing of natural resources, especially schemes denying low domestic prices to potential U.S. purchasers, could be actionable under Section 301. Section 301 may offer the best solution to the dual-pricing problem in light of the difficulties addressing the dual-pricing problem through anti-dumping or countervailing duty proceedings.¹⁶⁷

7. SECTION 337: UNFAIR IMPORT PRACTICES

7.1. Background

Section 337 of the Tariff Act of 1930¹⁶⁸ gives the U.S. International Trade Commission authority to investigate whether "unfair methods of competition and unfair acts" in the importation or sale of articles in the United States have the "effect or tendency" of substantially injuring a domestic industry or, in the case of statutory intellec-

quested. 52 Fed. Reg. 44,939-40, 47,071 (1987). On June 17, 1988, in light of new software regulations in Brazil, USTR announced that it would not pursue retaliation, but would continue to monitor the access to the Brazilian market of U.S. software products.

¹⁶³ The USTR self-initiated an investigation of Korean practices that restrict the ability of U.S. insurers to provide insurance services in Korea on September 16, 1985. Korea's Restrictions on Insurance Services, 50 Fed. Reg. 37,609 (1985). An agreement settling the action by increasing the access of U.S. firms to the Korean insurance market was reached on August 14, 1986. 51 Fed. Reg. 29,443 (1986). An investigation into Korea's lack of protection for U.S. intellectual property rights was initiated on November 4, 1985, 50 Fed. Reg. 45,883 (1985), and settled through an agreement with Korea improving the protection accorded U.S. intellectual property rights reached on August 14, 1986. 51 Fed. Reg. 29,445 (1986).

¹⁶⁴ USTR initiated an investigation into Japan's import barriers to U.S. tobacco products on September 16, 1985. 50 Fed. Reg. 37,609 (1985). The investigation was suspended on October 6, 1986, after an agreement was reached under which Japan agreed to reduce its tariff on cigarettes to zero, and to eliminate discriminatory taxation and distribution practices. Determination under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 35,995-96 (1986).

¹⁶⁵ Proclamation No. 5595, 52 Fed. Reg. 229 (1986).

¹⁶⁶ Determination under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 27,811 (1986).

¹⁶⁷ Barshefsky, Diamond & Ellis, *Foreign Government Regulation of Natural Resources: Problems and Remedies Under United States International Trade Laws*, 21 STAN. J. INT'L L. 29 (1985); Subcommittee on Proposed Trade Barriers to the Importation of Products Into the United States, ABA Section on International Law and Practice, *The Natural Resource Subsidy Debate: A Critique of Proposed Legislative Action*, 21 INT'L LAW 285 (1987).

tual property rights, whether methods or acts infringe upon the protected intellectual property right.¹⁶⁹ The Commission can issue a cease and desist order to the parties involved in the unfair acts or ban the articles from import if it finds an unfair trade practice.¹⁷⁰ The Commission's determination is final unless disapproved by the President "for policy reasons" within sixty days after its issuance.¹⁷¹

The language of Section 337 of the Tariff Act of 1930 is patterned after Section 5 of the Federal Trade Commission Act.¹⁷² Section 337 is regarded as an intellectual property infringement remedy, because the majority of investigations brought under Section 337 involve patent (process as well as product), trademark, or copyright infringement. The broader reach of Section 337 language was evidenced recently, when the section was used as a weapon against high technology products violating trade secrets or involving predatory pricing, false labeling, group

¹⁶⁹ *Id.* For statutorily-based intellectual property cases (patent, copyright, registered trademark, or semiconductor mask work), 1988 Trade Act § 1342, 102 Stat. 1212, eliminated the requirement that complainant show injury to a domestic industry and, in the case of other unfair methods or acts, that the complainant establish that the domestic industry is "efficiently and economically operated." These changes were made despite testimony that "using our trade statutes and border control enforcement in a situation where the domestic industry is inefficient and will not be economically viable is a waste of resources [and that it] is not in the public interest that relief be given to an industry unable to utilize it." *Intellectual Property and Trade: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary*, 99th Cong., 2d Sess. 26 (1986) (statement of Paula Stern, Chairwoman, International Trade Commission) [hereinafter *Intellectual Property and Trade Hearings*]. See H.R. REP. NO. 576, 100th Cong., 2d Sess. 633 (1988), reprinted in 1988 U.S. CODE CONG. & ADMIN. NEWS 1666 [hereinafter CONFERENCE REPORT].

Arguably, the injury requirement has not been a significant factor in Section 337 cases. Commissioner Ronald Cass outlines the parameters of the debate in R. Cass, *Changes in Section 337 Under the 1988 Trade Act*, in PRACTISING LAW INSTITUTE, THE NEW TRADE LAW—THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 219, 228 (1988).

The requirement to prove that an industry exists or is in the process of being established (without having to show that it is being injured) would be retained, presumably because nearly half of modern U.S. patents are held by foreign entities. As Dr. Stern put it "[T]he absence of a domestic industry requirement could leave the Commission arbitrating among importers jockeying for market share in the United States with no appreciable impact on production capability or workers' jobs in the United States." *Intellectual Property and Trade Hearings, supra*, at 22. See CONFERENCE REPORT, *supra*, at 633-34.

Notably, however, Section 1342 adds a definition of "industry" to apply to Section 337 investigations involving infringement of a patent, registered trademark, copyright, or mask work. The new definition presents a very low threshold for example, "significant investment in plant and equipment," without stating that the investment must be in the United States. CONFERENCE REPORT, *supra*, at 634.

¹⁷⁰ 19 U.S.C. § 1337(d), (f) (1982).

¹⁷¹ 19 U.S.C. § 1337(g)(2) (1982).

¹⁷² 15 U.S.C. § 45 (1982). Paragraph (a)(1) declares unlawful "unfair methods of competition in . . . commerce, and unfair or deceptive acts or practices in . . . com-

boycotts, false advertising, and false designation of origin.¹⁷³ The statutory language of Section 337 potentially reaches dumping and subsidization investigations. However, Congress provided that the Commission shall not investigate complaints based solely on acts which arise under the antidumping or countervailing duty laws, thus avoiding the creation of duplicate remedies.¹⁷⁴

Section 337 is a powerful trade tool due both to the breadth of business activity it may reach and to its procedural advantages over judicial alternatives. Unusually effective remedies await the successful complainant after relatively short statutory deadlines. Because the Commission's jurisdiction in a Section 337 investigation is *in rem*, i.e., over the products being imported, meaningful relief does not rely on the Commission's ability to obtain personal jurisdiction over a party.¹⁷⁵ The Commission's principal remedy is an exclusion order against the products found to be involved in the unfair act. An exclusion order may be entered even while the investigation is underway—prompt relief indeed!¹⁷⁶

Reaching a Commission determination on a Section 337 unfair trade practice claim generally takes considerably less time than reaching a decision on a claim filed in a federal district court.¹⁷⁷ The Commission must conclude its investigation within one year (eighteen months if the case is complicated), and the President has sixty days thereafter to notify the Commission of any disapproval for policy reasons.¹⁷⁸ Since Section 337 was substantially strengthened in 1974, more than half of the 240 investigations initiated have been settled.¹⁷⁹ This is

¹⁷³ See Palmeto, *The U.S. International Trade Commission at Common Law: Unfair Competition, Trademark, and Section 337 of the Tariff Act*, 18 J. WORLD TRADE L. 497, 503-04 (1984).

¹⁷⁴ 19 U.S.C. § 1337(b)(3) (1982). If the complaint is based only *in part* on such acts, the Commission need not discontinue its course, although the statute encourages the Commission in such instances to consider notifying the Department of Commerce and suspending its investigation until an antidumping or countervailing duty investigation can be concluded. Avoiding overlap in these instances is in the Commission's interest since, of course, it has a joint role with Commerce in antidumping or countervailing duty investigations.

¹⁷⁵ Certain Steel Rod Treating Apparatus and Components Thereof, USITC Pub. 1210, Inv. No. 337-TA-97, 215 U.S.P.Q. (BNA) 229, 234 (June 30, 1981). For this reason, a foreign respondent gains little by ignoring the Commission's orders during an investigation, e.g., discovery requests.

¹⁷⁶ 19 U.S.C. § 1337(d), (e) (1982). Temporary exclusion orders under paragraph (e) in effect during an investigation permit entry under a bond determined by the Commission.

¹⁷⁷ Note, however, that Commission determinations are subject to judicial challenge under 19 U.S.C. § 1337(c) (1982).

¹⁷⁸ 19 U.S.C. §§ 1337(b)(1), (g)(2) (1982).

a clear sign of the intimidating nature of the remedy and of the low injury threshold applied to such clearly unfair trade practices as those addressed by Section 337.

An exclusion order can reach the imports of a company that was not even shipping to the United States at the time of the order (and is not from the same country as the company that was), if the company's goods infringe the U.S. patent, trademark, or copyright at issue. This is because an exclusion order applies to the articles being imported that are within its scope, as opposed to particular named respondents.¹⁸⁰ However, since the President's disapproval of the broad exclusion order issued by the Commission in a case involving headboxes,¹⁸¹ the Commission has refused to penalize new exporters with the same sanctions applied to the respondents involved in the investigation. Unless the evidence shows a pattern of unauthorized use, along with business conditions that would justify the conclusion that other companies will attempt to engage in similar practices, the Commission will narrowly tailor the scope of its exclusion order to affect only the respondents investigated.¹⁸²

The Commission has authority to order any person found to be violating Section 337 to cease and desist from the violation,¹⁸³ and to enforce these orders by civil penalties in the federal courts (normally, the District Court for the District of Columbia).¹⁸⁴ A cease and desist order might be more appropriate than an exclusion order for violations such as false advertising, which generally occurs within the United States. Both an exclusion order and a cease and desist order could issue

¹⁸⁰ At the Commission's discretion, exclusion orders can be limited to articles imported from particular foreign respondents. 19 U.S.C. § 1337(d) (1982). See *Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper and Components Thereof*, USITC Pub. 1179, Inv. No. 337-TA-82A (Nov. 1981). This was the first case involving a limited exclusion order. It followed the Presidential disapproval of the exclusion remedy in the first headboxes case, *Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper and Components Thereof*, USITC Pub. 1138, Inv. No. 337-TA-82 (Apr. 1981).

¹⁸¹ *Certain Headboxes*, USITC Pub. 1138, Inv. No. 337-TA-82 (Apr. 1981). The President's disapproval is found at 46 Fed. Reg. 32,361 (1981).

¹⁸² *Certain Airless Paint Spray Pumps and Components Thereof*, USITC Pub. 1199, Inv. No. 337-TA-90, at 18 (Nov. 1981). Nonetheless, nearly four times as many general exclusion orders are outstanding as limited exclusion orders (39 to 10). Conversation with Tim Yaworski, Assistant General Counsel for Section 337 Investigations, International Trade Commission (Dec. 27, 1988).

¹⁸³ 19 U.S.C. § 1337(f)(1) (1982).

¹⁸⁴ 19 U.S.C. § 1337(f)(2) (1982). Despite the *in rem* nature of Section 337 proceedings, personal jurisdiction over respondents against whom civil penalties were proposed would, of course, be required. Failing such jurisdiction, the Commission could

as remedies for the same or separate Section 337 violations.¹⁸⁵

7.2. *Application to the Energy Trade*

Section 337 of the Trade Act of 1974 has not been used to prevent entry of primary energy imports, although that statement applies with equal force to the trade laws generally.¹⁸⁶ Primary natural resource products are not subject to patent. However, gasoline and other petroleum blends and products are candidates for the protection afforded by Section 337 to a patented process.¹⁸⁷ A fuel additive could be patented, thereby bringing protection to any blend that contained the additive. Section 337 could also be used to obtain relief in the case of a counterfeit trademark that protects a particular petroleum product.

Complaints instituted by the Commission involving energy trade and Section 337 have been limited to petroleum derivatives.¹⁸⁸ An intriguing complaint which the Commission declined to investigate alleged unfair methods of competition in the importation or sale of Mexican anhydrous ammonia, a fertilizer with natural gas as its principal cost element. The complaint alleged a cost-price squeeze by the Mexican government's petroleum monopoly (PEMEX), which was said to have conspired with the Organization of Petroleum Exporting Countries (OPEC) to drive up the cost of natural gas and then undercut U.S. ammonia producers by selling ammonia for "artificially low prices."¹⁸⁹ The Commission's General Counsel viewed the complaint as

¹⁸⁵ 19 U.S.C. § 1337(d), (f)(1) (1982). See *Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation*, USITC Pub. 1246, Inv. No. 337-TA-99 (1982). Paragraph (f)(1) was amended by Section 1342(a)(4) of the 1988 Trade Act, 102 Stat. 1213, explicitly to authorize both remedies even for the same violation. See CONFERENCE REPORT, *supra* note 169, at 636. The same provision increased the maximum daily penalty from the greater of \$10,000 or the domestic value of the articles entered or sold in violation to the greater of \$100,000 or twice the value of such articles. *Id.*

¹⁸⁶ Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (1982), has a rich history of being used as the basis for restricting importation of petroleum and petroleum products, but Section 232 is not, of course, a trade law, even though it is administered by the Department of Commerce. See S. POWELL & V. SLATER, *RAMIFICATIONS FOR PETROLEUM IMPORTS OF U.S. TRADE AND NATIONAL SECURITY LAWS* (1988) (proceedings of International Research Center for Energy & Economic Development, Boulder, CO, Apr. 7-8, 1988).

¹⁸⁷ 19 U.S.C. § 1337(a) (1982). See Herrington, *U.S. International Trade Commission: Imported Articles Made by Patented Process*, 14 J. WORLD TRADE L. 549 (1980) (explaining history of Section 337 in protecting patented processes).

¹⁸⁸ A recent example of a complaint involving petroleum derivatives is *Certain Moldable/Extrudable Polyetheresteramide Copolymers*, Inv. No. 337-TA-258, slip op. (July 15, 1987) (terminated by withdrawal of complaint).

¹⁸⁹ International Trade Commission General Counsel Op. No. GC-G-022 at 1 (Jan. 21, 1983) [hereinafter ITC/GC Op.] (available in the Agency's law library). A second count, claiming illegal price discrimination in the sale of natural gas in the

fatally defective under the antitrust laws for failing to allege that PEMEX has a monopoly over natural gas or "strategic dominance" over the pricing of natural gas *in the United States*.¹⁹⁰ It remains to be seen whether a future complainant can develop a fruitful competition law theory to reach under Section 337 dual-pricing policies of countries rich in petroleum resources.

Nothing in the cases mentioned above or in the international trade of energy indicates that an energy-related good would be subjected to special treatment under Section 337.

8. CONCLUSION

The continuing growth in energy product imports has caused domestic firms to consider laws that can provide relief from the harmful effects such imports may cause. Unfair trade laws are among the laws under consideration. The range of relief available under unfair trade laws includes increased border duties to offset the effects of dumping or subsidization, embargoes prohibiting entry of goods infringing the intellectual property rights of U.S. industries, and quotas and other measures retaliating against unreasonable practices of foreign governments that remain uncurd by negotiation.

This essay has touched upon a number of current issues relevant to obtaining relief in response to energy imports under the antidumping and countervailing duty laws, as well as Section 301 of the Trade Act of 1974 and Section 337 of the Tariff Act of 1930. The article considered the potential impact of the United States-Canada Free-Trade Agreement's provision for binational panel review of antidumping and countervailing duty determinations involving Canadian goods instead of judicial review because Canada is an important supplier of energy goods to this country.

These issues will be among the first to surface if the domestic industry begins to seek relief under the unfair trade laws (as it has, for example, under the national security clause¹⁹¹). The discussion gives

United States at a high price and "natural gas in the form of ammonia" for a very low price, was dismissed as frivolous because ammonia and natural gas are not items of "like grade and quality" within the meaning of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982). ITC/GC Op. at 23. *See Atlanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958).

¹⁹⁰ ITC/GC Op., *supra* note 189, at 8-9 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)).

¹⁹¹ On December 1, 1987, an application was filed with the Department of Commerce under the Trade Expansion Act of 1962 § 232, 19 U.S.C. § 1862 (1982), by a coalition of independent producers, royalty owners, drilling equipment manufacturers, and others involved in the domestic petroleum industry. 52 Fed. Reg. 49,059 (1987).

the authors reason to believe that energy cases will present especially difficult issues to decisionmakers.

Section 232 authorizes the President to take action to adjust imports if imports threaten to impair the national security. On January 3, 1989, President Reagan, while agreeing that oil imports threaten the national security, decided against import adjustments because such action would, "in the long run, impair rather than enhance the national security." Letter to the Congress from the President, 25 WEEKLY COMP. PRES. DOC. 7 (Jan. 3, 1989). Instead, the President urged the Congress to act on a number of recommendations to improve U.S. energy security, including deregulation of natural gas prices, permitting development of oil reserves of the outer continental shelf and the Arctic National Wildlife Refuge, and streamlining of nuclear power licensing. *Id.*