

# Northwestern Journal of International Law & Business

---

Volume 5

Issue 2 *Summer*

---

Summer 1983

## Can GATT Export Subsidy Standards Be Ignored by the United States in Imposing Countervailing Duties?

David Simon

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [International Law Commons](#)

---

### Recommended Citation

David Simon, Can GATT Export Subsidy Standards Be Ignored by the United States in Imposing Countervailing Duties?, 5 Nw. J. Int'l L. & Bus. 183 (1983-1984)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

## ARTICLES

# Can GATT Export Subsidy Standards Be Ignored by the United States in Imposing Countervailing Duties?

*David Simon\**

### I. INTRODUCTION

Under United States law, the Department of Commerce (Department) and the International Trade Commission (ITC) are authorized to impose countervailing duties on imported merchandise that has been provided with foreign governmental export subsidies which result in, or threaten, material harm to United States industry.<sup>1</sup> The United States is, however, a party to international agreements that contain elaborate "guidelines," and "illustrative" examples, dealing with both prohibited and permitted governmental export subsidies.<sup>2</sup> These international export subsidy rules have been incorporated into the definition of "subsidy" set forth in United States countervailing duty law.<sup>3</sup> Nevertheless, the Department evidently takes the position that it has statutory authority to invoke countervailing duties directed against foreign govern-

---

\* B.A., Cornell University; LL.B., Harvard University. Partner, Barrett Smith Schapiro Simon & Armstrong, New York, New York. The author gratefully acknowledges the assistance of Jeffrey A. Mayer in the preparation of this article.

<sup>1</sup> 19 U.S.C. §1671(a) (Supp. V 1981). *See infra* note 8 and accompanying text.

<sup>2</sup> *See infra* note 16 and accompanying text.

<sup>3</sup> 19 U.S.C. §1677(5)(A) (Supp. V 1981). *See infra* note 13 and accompanying text.

mental export subsidies that are expressly permitted to our trading partners by those international rules.<sup>4</sup> In the Department's view, this result is required by domestic law even though the conduct in question is—as the Department concedes—described as not prohibited by international obligations of the United States that the Congress purported to implement in 1979.<sup>5</sup>

The issue thus presented has important ramifications for international free trade. If the Department is in error in its interpretation of domestic law, then it is flouting a Congressional directive that it implement the international obligations of the United States. On the other hand, if the Department is right, then it is the Congress which is at fault in authorizing the Department to disregard our apparent international obligations. In either event — irrespective of whether the Department is in error or not — United States countervailing duty proceedings directed against internationally permitted export subsidies could threaten the entire international regime of regulated free trade that has been so elaborately negotiated by the United States and its trading partners over many decades.<sup>6</sup>

For private litigants, the proper interpretation of domestic law is especially vital: numerous foreign governmental export subsidy practices now in force, and seemingly licensed by international agreements to which the United States is a party, may conceivably result in heavy countervailing duties that would have to be borne either by industries exporting to the United States or the importers who buy from them. Until the Department's statutory authority to act against imports that utilize such internationally permitted export subsidies has been clarified by our courts, the resulting unpredictability imposes irrational burdens on commerce that can only harm the public interest.

Discussed below are (1) the applicable United States statute, (2) the international agreements incorporated by reference into the statute, (3) the particular export subsidy practices permitted by those agreements, (4) a critique of the Department's position that those practices are not permitted under United States domestic law, in light of the legislative history of that law, and (5) a suggested resolution of the problem on a basis consistent with the international obligations of the United States.

---

<sup>4</sup> See *infra* note 62 and accompanying text.

<sup>5</sup> See *infra* notes 62, 65, 69 and accompanying text.

<sup>6</sup> See *infra* note 56 and accompanying text.

## II. THE UNITED STATES STATUTORY FRAMEWORK

The Trade Agreements Act of 1979<sup>7</sup> (1979 Act) authorizes the imposition of a "countervailing duty" upon imported merchandise of a "class or kind" that has been subsidized "directly or indirectly . . . with respect to its manufacture, production, or exportation" by a "country under the Agreement" or by a citizen, national or corporation of such country, if the requisite test for injury to an industry in the United States is met.<sup>8</sup> For this purpose the definition of "subsidy" reads:

The term 'subsidy' has the same meaning as the term 'bounty or grant' as that term is used in section 1303 of this title, and includes, but is not limited to, the following:

(A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.<sup>9</sup>

---

<sup>7</sup> 19 U.S.C. §1671 (Supp. V 1981).

<sup>8</sup> *Id.* §1671(a). The determination as to subsidy is made by the Department; determination of injury is made by the ITC. The injury test applies where the merchandise is the product of a "country under the Agreement." A "country under the Agreement" means a country (i) to which the Subsidy/CVD Code applies between it and the United States, (ii) which has assumed "substantially equivalent" obligations or (iii) which is entitled to most-favored-nation treatment and meets certain other requirements. 19 U.S.C. §1671(b) (Supp. V 1981). See *infra* text accompanying note 14. In the case of merchandise which is the product of a country other than a "country under the Agreement," the old law provisions dealing with countervailing duty, namely, those set forth in section 303 of the Tariff Act of 1930, 19 U.S.C. §1303 (Supp. V 1981), apply. The term "subsidy" is not contained in section 303; the test there is whether "any bounty or grant" was paid or bestowed. 19 U.S.C. §1303(a) (Supp. V 1981). In addition, under section 303 the requirement of an injury determination applies only to duty-free merchandise where such a determination "is required by the international obligations of the United States." 19 U.S.C. §§1303 (a)(2), (b)(1) (Supp. V 1981).

<sup>9</sup> 19 U.S.C. §1677(5) (Supp. V 1981). The definition of "subsidy" in the 1979 Act is relevant under 19 U.S.C. §§1671(a) (countervailing duty on import if provided with "subsidy"), 1671a(c) (investigation to determine whether "subsidy" is being provided), 1671b(b) (preliminary determination of reasonable basis to believe or suspect "subsidy" is being provided), 1671c(b) (agreement to eliminate the "subsidy"), and 1671d(a) (final determination whether "subsidy" is being provided). See also 19 U.S.C. §§1671b(e), 1671d(a)(2) (Supp. V 1981) (special relevance of findings that

It will be noted that subsection (A) of the "subsidy" definition relates to "export subsidies" and (B) relates to "domestic subsidies." Other than the requirement that "domestic subsidies" be furnished to a "specific" enterprise, industry or "group" thereof, the distinction between the two is not explained.<sup>10</sup> The inference that can be drawn from the parallel structure of the two subsections is that no overlap between them was intended, in other words, that an export subsidy and a domestic subsidy are mutually exclusive.<sup>11</sup> The issue of whether overlap between the two categories was intended is of more than academic in-

---

"subsidy is inconsistent with the Agreement," the "Agreement" being the Subsidy/ CVD Code). See *infra* text at n. 12, 14.

<sup>10</sup> Some guidance on the distinction between the two can be inferred from the Subsidy/CVD Code. See *infra* notes 13, 83 and accompanying text. The Code—which the 1979 Act implements—deals with two categories of "subsidies": "export subsidies" and "subsidies other than export subsidies." See, e.g., AGREEMENT REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, H.R. Doc. No. 153, 96th Cong., 1st Sess., Part I, 276-79 (1979) [hereinafter cited as 1979 HOUSE DOCUMENT]. As to the former, the prohibition is absolute: "Signatories agree not to use export subsidies in a manner inconsistent with [the Code]." *Id.* at 277. As to the latter, the Code is ambivalent. Thus it recites that "[s]ignatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable." *Id.* at 279. These objectives, which are then listed in detail, may be achieved, *inter alia*, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples are: government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and government subscription to, or provision of, equity capital. Some of these examples bear a striking resemblance to the prohibited "domestic subsidies" described in 19 U.S.C. §1677(5)(B). Presumably the interdiction of "domestic subsidies" in the 1979 Act derives from other provisions of the Code, which recognize that "subsidies other than export subsidies . . . may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under [GATT], in particular where such subsidies would adversely affect the conditions of normal competition. Signatories shall therefore seek to avoid causing such effects through the use of subsidies." *Id.* at 280. The Code remedy, where such undesirable effects are believed to be present, is intergovernmental consultations. *Id.* at 282.

<sup>11</sup> It has been suggested that "export subsidy" means a subsidy "conditioned on export of the product or on export performance," and "domestic subsidies—primarily production subsidies—are those granted without respect to output destination." Barcelo, *Subsidies, Countervailing Duties and Anti-Dumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 261 (1980). Note, however, the puzzling reference in the 1979 Act under "domestic subsidies" to subsidies "paid or bestowed directly or indirectly on manufacture, production, or export." 19 U.S.C. §1677(5)(B) (Supp. V 1981). When is a subsidy paid "directly . . . on . . . export" a domestic subsidy rather than an export subsidy? The confusion is compounded by the fact that the phrase has its antecedent in the Tariff Act of 1930, ch. 497, §303(a), 46 Stat. 687 (1930) ("any bounty or grant upon the manufacture or production or export of any article or merchandise"). The original 1897 countervailing duty law covered only bounties on exportation, but in 1922 was amended to cover bounties on manufacture and production as well as exportation. See *Zenith Radio Corp. v. United States*, 437 U.S. 443, 448, 461 (1978). Thus, the language in the 1930 Act, which appeared to cover both

terest, since — as we shall see — the incorporated illustrative list of “export” subsidies contains elaborate rules that are quite different, in significant respects, from the above-quoted statutory tests for “domestic subsidies.” Among other things, the list excludes certain practices from treatment as “export subsidies”; may some of those practices nevertheless be classified under the 1979 Act as prohibited “domestic subsidies”?<sup>12</sup>

For a description of “export” subsidies, the above-quoted subsection (A) of the 1979 Act directs us to “Annex A to the Agreement (relating to illustrative list of export subsidies).” The “Agreement” is in turn defined by the statute as the “Agreement of Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade,” relating to subsidies and countervailing measures.<sup>13</sup> The text of that Agreement — more commonly known as the “Subsidy/CVD Code” — has not been published either in the statutes at large or in the United States Code Annotated, but is set forth in a volume of documents published by the House of Representatives, which accompanied the bill that became the 1979 Act.<sup>14</sup> The published text includes an “Annex,” containing an “Illustrative List of Export Subsidies,” that is unmistakably the “Annex A” referred to in the statutory definition quoted above.<sup>15</sup>

In order to assess properly the full import of the statutory reference to “[a]ny export subsidy described in Annex A,” it will be necessary to review in some detail the terms set forth in that Annex. This provision contains elaborate illustrations that describe not only what is, but also what is not, an export subsidy.

### III. ANNEX A TO THE SUBSIDY/CVD CODE

Annex A sets forth eleven specific examples or illustrations of ex-

---

port subsidies and domestic subsidies, was repeated in the 1979 Act’s definition of domestic subsidies.

<sup>12</sup> See *infra* note 89 and accompanying text.

<sup>13</sup> 19 U.S.C. §§1677(8), 2503(c) (Supp. V 1981) (list of executive trade agreements approved and implemented by the 1979 Act).

<sup>14</sup> 1979 HOUSE DOCUMENT, *supra* note 10, at 259.

<sup>15</sup> 1979 HOUSE DOCUMENT, *supra* note 14, at 295. There appears to be no explanation for the statutory reference to the “ANNEX” as “Annex A.” There is no other Annex to the Subsidy/CVD Code. A series of technical “rectifications” to the text of the Subsidy/CVD Code evidently missed this correction. *Id.* at 302-07. Perhaps the mistaken reference may be traced to the fact that a 1960 General Agreement on Tariffs and Trade (GATT) draft that had contained an earlier, somewhat similar list of proposed “forms of export subsidies” and upon which the illustrative list of the Subsidy/CVD Code was based, was “Annex A” to a GATT Working Party report. See GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 185, 186-87 (9th Supp. 1961).

port subsidies, followed by a basket or catch-all clause that refers to "[a]ny other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement [on Tariffs and Trade]." <sup>16</sup>

The eleven examples describe the following governmental export subsidies: <sup>17</sup>

*Item (a):* "Direct subsidies" from governments that are "contingent upon export performance." "Direct subsidy" is undefined.

*Item (b):* "Currency retention schemes" or "any similar practices" involving a "bonus on exports."

*Item (c):* Government provision, or mandating, of "internal transport and freight charges on export shipments . . . on terms more favorable than for domestic shipments."

*Item (d):* Government delivery of "products or services for use in the production of exported goods," on terms or conditions more favorable than "like or directly competitive" products or services delivered for use in domestic production, "if (in the case of products) such terms or conditions are more favorable than those commercially available on world markets to [that government's] exporters." Significantly, in this item we appear to have words of exclusion as well as inclusion: governments may evidently deliver "products" for use in export production on terms more favorable than those delivered for domestic production, so long as they are only matching the commercial terms of "world markets." This exclusion, however, applies only to "products" and not to "services."

*Item (e):* "The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises." This is accompanied by two footnotes, each of which is quite clearly intended to exclude certain tax practices from treatment as export subsidies. The first footnote defines "direct taxes" as meaning various income and real property taxes. <sup>18</sup> The second footnote contains an elaborate gloss on the entire provision, under which the signatories "recognize that deferral need not amount to an export subsidy where, for example, appropri-

---

<sup>16</sup> 1979 HOUSE DOCUMENT, *supra* note 10, at 297. Article XVI of the General Agreement on Tariffs and Trade contains only general precatory language regarding subsidy practices: "including any form of income or price support, which operates directly or indirectly to increase exports of any product." See S. Doc. No. 5, 96th Cong., 1st Sess. 58-59 (1979). It was the very vagueness and ineffectiveness of GATT Article XVI that led to the negotiation of the Subsidy/CVD Code and its specific illustrative list of export subsidy practices.

<sup>17</sup> 1979 HOUSE DOCUMENT, *supra* note 10, at 295-97.

<sup>18</sup> *Id.* at 298.

ate interest charges are collected.”<sup>19</sup> (The words “for example” would suggest that other exceptions are possible as well.) The second footnote then continues with a discussion of intercompany pricing between related entities, which should be on an arm’s length basis;<sup>20</sup> reference is then made to the resolution of differences on this point between signatories through “existing bilateral tax treaties or other specific international mechanisms,” but such resolution is “without prejudice” to “rights and obligations” under GATT (and presumably under the Subsidy/CVD Code as well). Finally, the second footnote then adds the following Delphic indication of a general exception to item (e): “Paragraph (e) is not intended to limit a signatory from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another signatory.”<sup>21</sup>

*Item (f):* “The allowance of special deductions directly related to exports or export performance, over and above those granted in respect of production for domestic consumption, in the calculation of the base on which direct taxes are charged.” Note here that the “special deductions” must be “directly related” to exporting. Presumably we have here another exclusion from export subsidy treatment: “special deductions” that have an impact on exporting but are not “directly related” are not intended to be treated as export subsidies.

*Item (g):* “The exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.” “Indirect taxes” are de-

---

<sup>19</sup> *Id.* at 298-99.

<sup>20</sup> Compare I.R.C. §482 (1982) (U.S. tax requirements regarding intercompany pricing).

<sup>21</sup> Compare I.R.C. §904 (1982) (limitation of foreign tax credit to foreign source income). The exception described in the second footnote to item (e) would not on its face appear to include special tax treatment accorded a domestic firm with a high proportion of export sales, such as that which the United States confers upon a Domestic International Sales Corporation (DISC). See I.R.C. §991 (1982). The United States treatment of DISCs has long been the subject of severe criticism by its trading partners. Among other things, the enactment of the DISC provisions in 1971 precipitated a complaint before GATT by the European Economic Community which alleged that the United States failed to inform other members of GATT, pursuant to Article XVI, of the alleged subsidy. After an investigation, a GATT panel found that the DISC provisions violated Article XVI. See GATT, United States Tax Legislation (DISC), GATT Doc. No. 1/4422 (Nov. 2, 1976), reprinted in GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 98 (1977). It has recently come to light that officials of the United States Treasury Department during the Carter Administration told a secret 1979 gathering of United States, European and GATT representatives that the administration believed DISC was inconsistent with item (e) of the illustrative list of export subsidies annexed to the Subsidy/CVD Code. The position was subsequently renounced by Reuben Askew, President Carter’s Trade Representative. U.S. DEP’T OF THE TREASURY, Tax Notes, Aug. 2, 1982, at 453.



financed by a footnote<sup>22</sup> as meaning sales, value added, franchise and other listed taxes, "and all taxes other than direct taxes and import charges." This item should be read in conjunction with item (e) above, which deals with "direct taxes." It seems clear that the more limited test applied to "indirect taxes" was intentional—unlike direct taxes, indirect taxes may be exempted or remitted so long as the amount involved does not exceed the taxes levied on products sold for domestic consumption.<sup>23</sup>

*Item (h):* This item deals with "prior stage cumulative indirect taxes" on "goods or services" that are "used in the production of exported products." Here the test is whether the amount of the "exemption, remission or deferral" afforded exported products exceeds that afforded products sold for domestic consumption.<sup>24</sup> This test is subject, however, to the following proviso:

provided, however, that prior stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior state cumulative indirect taxes are levied on goods that are physically incorporated (making normal allowance for waste) in the exported product.<sup>25</sup>

A footnote at the end of the proviso then comments that item (h) "does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g)."<sup>26</sup> In view of the quoted "pro-

---

<sup>22</sup> 1979 HOUSE DOCUMENT, *supra* note 10, at 298.

<sup>23</sup> This provision of the Annex is in accord with the longstanding rule, accepted in the United States and internationally, that a non-excessive remission of "indirect" taxes does not constitute subsidization because "such remission was viewed as a reasonable measure for avoiding double taxation of export—once by the foreign country and once upon sales in this country." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 456-57 (1978). *See also* S. REP. NO. 249, 96th Cong., 1st Sess. 85 (1979) (under the definition of "subsidy" set forth in 1979 Act, "... non-excessive rebates of indirect taxes within the meaning of Annex A" are not subsidies if "reasonably calculated" and "directly related to the merchandise exported"). The traditional distinction between direct and indirect taxes is evidently based on the assumption that indirect taxes are fully passed on to a consumer, while direct taxes are not. Today, however, many economists appear to question this working assumption. *See* K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* 214-16 (1970); Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 *LAW & POL'Y INT'L BUS.* 327, 351 (1975). *But see* *Zenith Radio Corp. v. United States*, 437 U.S. at 458:

[E]ven assuming that these arguments are at all relevant . . . they do not demonstrate the unreasonableness of the Secretary's current position. Even "modern" economists do not agree on the ultimate economic effect of remitting indirect taxes, and—given the present state of economic knowledge—it may be difficult, if not impossible, to measure the precise effect in any particular case.

<sup>24</sup> 1979 HOUSE DOCUMENT, *supra* note 10, at 296.

<sup>25</sup> *Id.*

<sup>26</sup> The quoted text reflects a "rectification," evidently clerical in nature. *See* 1979 HOUSE DOCUMENT, *supra* note 10, at 302, 307.

viso" in item (h) and its footnote, we have here clear words of exclusion as well as inclusion. Certain "prior stage" indirect taxes may be remitted on goods "physically incorporated" in the exported product, without regard to what is done for the product that is not exported. Moreover, "value-added taxes" are "exclusively" covered by the more permissive definition of item (g), and are not intended to be treated under the tests of item (h).

*Item (i):* "The remission or drawback of import charges in excess of those levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product." Here again, a proviso qualifies this test by limiting it:

provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, normally not to exceed two years.<sup>27</sup>

A peculiar feature of this proviso is its use of vague, unlawyer-like terminology: "in particular cases" and "normally." No explanation is given of what these terms mean. It is clear, however, that some permitted exception to the subsidy definition is intended.

*Item (j):* Governmental provision of programmes for export credit guarantees or insurance, or of insurance or guarantee programmes "against increases in costs of exported products or of exchange risk programmes," at premium rates "which are manifestly inadequate to cover the long-term operating costs and losses of the programmes." A footnote explains that in evaluating long-term adequacy of rates, costs and losses, "in principle only such contracts shall be taken into account that were concluded after the date of entry into force of [the Subsidy/CVD Code]."<sup>28</sup> Thus it would seem that if premiums are inadequate, but not "manifestly" inadequate, or if "in principle" (whatever that means) the unfavorable loss experience results from pre-effective date contracts, then no subsidy is to be found.

*Item (k):* This example is of sufficient practical significance to merit setting forth its full text:

The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same

---

<sup>27</sup> *Id.* at 296.

<sup>28</sup> *Id.* at 296-97.

currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories [\*] to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rates [sic] provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.

\* Original signatory to this Agreement shall mean any signatory which adheres ad referendum to the Agreement on or before 30 June 1979.<sup>29</sup>

It seems clear that the first paragraph of the last example was intended to permit the governmental practice of extending export credits at interest rates as low as those at which the government could itself borrow on the international market. Such rates would confer a substantial benefit on a commercial borrower whose own credit rating was such as to prohibit its borrowing at that low rate. Consider, for example, a hypothetical case in which a foreign government makes an export loan to a foreign exporter at a rate of twelve percent at a time when the foreign government actually has to pay eleven percent for the money it borrowed. Assume further that the exporter would have to pay fifteen percent for the same type of commercial loan. The foreign government is surely conferring a benefit on the exporter, which arguably would be a "bounty or grant" within the meaning of section 1677(5)<sup>30</sup> absent any reference in the statute to Annex A. The foreign government's loan—since it is "inconsistent with commercial considerations"—might also qualify as a "domestic subsidy," under the express definition in section 1677(5)(B)(i),<sup>31</sup> if the other requirements for a "domestic subsidy" have been met. The relevant issue here, however, is whether, in the light of the incorporation of the Annex in the statutory definition of "export subsidy," a loan that was clearly permitted by the terms of item (k) of the Annex is subject to countervailing duty as an export subsidy.<sup>32</sup>

The second paragraph of item (k) is of equal significance. It states flatly that an "export credit practice" which is "in conformity" with the provisions of the requisite twelve-signatory international undertaking "shall not be considered an export subsidy prohibited by this Agree-

---

<sup>29</sup> *Id.* at 297.

<sup>30</sup> 19 U.S.C. §1677(5) (Supp. V 1981).

<sup>31</sup> *Id.*

<sup>32</sup> For further discussion of this question see *infra* notes 81-86 and accompanying text.

ment.”<sup>33</sup> It seems clear that the international undertaking thus incorporated by reference is the OECD “Arrangement on Guidelines for Officially Supported Export Credits.”<sup>34</sup>

#### IV. THE OECD ARRANGEMENT

The OECD Arrangement—notwithstanding the cross-reference to it in item (k) of Annex A and its resulting incorporation by reference in our domestic law—appears to be an officially unpublished document, at least in this country. The collection of trade agreements that was forwarded by the President to Congress in 1979 (for approval together with the proposed bill that became the 1979 Act) did not include the text of the OECD Arrangement.<sup>35</sup>

---

<sup>33</sup> A signatory to the Subsidy/CVD Code which is not a party to the OECD Arrangement may nevertheless take advantage of the proviso in item (k) if such signatory “in practice . . . applies the interest rates provisions” of the OECD Arrangement. The proviso applies whenever the export credit practice is “in conformity with those provisions.” See *infra* note 76 and accompanying text.

<sup>34</sup> The “original signatories” to the Subsidy/CVD Code, as defined by footnote 6 to item (k) of the Annex, were Austria, Brazil, Canada, the European Economic Community (which at the time included Belgium, Luxembourg, Denmark, France, West Germany, Ireland, Italy, the United Kingdom and the Netherlands), Finland, Japan, Norway, Sweden, the United States and Uruguay. The parties to the OECD Arrangement (called “Participants”) were, and are, Australia, Austria, Canada, the European Economic Community (including the following member states: Belgium, Denmark, France, West Germany, Greece, Ireland, Italy, Luxembourg, the United Kingdom and the Netherlands), Finland, Japan, New Zealand, Norway, Portugal, Spain, Sweden, Switzerland and the United States. See OECD Arrangement, Annex C. The Department has confirmed that the OECD Arrangement is the twelve-signatory “international undertaking on official export credits” referred to in item (k) of Annex A. See ITA, Preliminary Affirmative Countervailing Duty Determination: Railcars from Canada, 47 Fed. Reg. 53,760, 53,762 (1982) [hereinafter cited as Preliminary Determination]. See also *infra* note 68 and accompanying text.

<sup>35</sup> See 1979 HOUSE DOCUMENT, *supra* note 10, at Part I. The approved trade agreements are listed in 19 U.S.C. §2503(c) and similarly do not include the OECD Arrangement. A reference to predecessors of the OECD Arrangement is, however, contained in a report by the ITC which was submitted to the Senate Finance Committee in 1979. SUBCOMM. ON INT’L TRADE OF THE SENATE COMM. ON FINANCE, 96th Cong., 1st Sess., AGREEMENTS BEING NEGOTIATED AT THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA, UNITED STATES INT’L TRADE COMM’N INVESTIGATION No. 332-101, (Comm. Print 1979) [hereinafter cited as ITC REPORT]. The ITC Report contains the following interpretation of item (k):

Paragraph (k) classifies government export credits at rates below those necessary to obtain private funds as an export subsidy unless the signatory is a party to a separate undertaking on official export credits with at least eleven other signatories, or applies the lowest interest rate provisions provided in that separate agreement. Similar undertakings have been made by the United States, the United Kingdom, West Germany, Japan, Canada, France, and Italy to establish guidelines for interest rates and repayment terms related to the private markets. Such guidelines have not been applied to agricultural commodities, aircraft, or nuclear power plants. Differences in the availability of capital in different national markets, however, will prevent the rigid pegging of interest rates.

*Id.* at 184 (footnotes omitted). While the ITC Report was submitted to the Senate Finance Committee on June 15, 1979, it reflected an ITC staff analysis prepared as part of an ITC investigation

The text of the OECD Arrangement, however, can be obtained without much difficulty, notwithstanding the fact that the OECD evidently continues to consider it to be a classified document.<sup>36</sup> Indeed, the United States Treasury Department has from time to time "unofficially" released the text (or portions thereof) currently, with up to date revisions, along with press releases explaining the advantages of those revisions to the United States.<sup>37</sup>

While the exact terms of the OECD Arrangement have been the subject of periodic revision since 1978, its basic structure has remained unchanged.<sup>38</sup> It sets forth what it describes as "guidelines" to certain "officially supported export credits."<sup>39</sup> As one commentator aptly ob-

---

instituted on Sept. 1, 1978. *Id.* at 89. The investigation evidently overlooked the coming into effect of the OECD Arrangement on Apr. 1, 1978. *See infra* note 57 and accompanying text.

<sup>36</sup> In response to a request under the Freedom of Information Act for release of the text of the OECD Arrangement on Guidelines for Officially Supported Export Credits, Mr. John D. Lange, Jr., Director, Office of Trade Finance, United States Treasury Department, stated in a letter to Jeffrey A. Mayer:

The Arrangement is not a treaty, but an informal undertaking by several of the member states of the OECD which is subject to modification at any time. Therefore, the text has been classified Confidential by the OECD, by agreement of the member countries and cannot be disseminated to the public. This OECD classification is respected by the U.S. Government as "Foreign Government Information" pursuant to Executive Order 12356. Accordingly, the text is exempt from release under the Freedom of Information Act, 5 U.S.C. [§]552(i)(1).

Evidently, there is some sentiment at the OECD to lift these strictures. A revised text of the Arrangement, drafted Sept. 29, 1982 and distributed Sept. 30, 1982 by the Secretariat of the OECD Trade Directorate as a "draft text" to Participants, is accompanied by the following explanatory note:

This draft text is submitted to Participants for approval under item 4 of the Agenda TD/CONSENSUS/82.31 for the 18th Meeting of Participants. Participants on this occasion should also consider the possibility of declassifying this text so as to make it possible for Participants and the Secretariat to meet the requests for this text which judging from previous experience might be very numerous.

OECD Trade Directorate, *Text as of Sept. 30, 1982*, TD/Consensus/82.32, at ii.

<sup>37</sup> *E.g.* U.S. DEP'T OF THE TREASURY, Treasury News, *New International Arrangement on Export Credits*, July 1, 1982, accompanied by a text of the Arrangement marked "Not official OECD Version," with Annexes A through D attached. Notwithstanding this press release, the Treasury Department press office apparently takes the position that the text is not a public document and is not available for release. *See supra* note 36 and accompanying text.

<sup>38</sup> Evidently the document contemplates successive changes and intends their incorporation by reference.

<sup>39</sup> *See* OECD TRADE DIRECTORATE, *Arrangement on Guidelines for Officially Supported Export Credits* at 1, TD/CONSENSUS/81.38 (Nov. 6, 1981) [hereinafter cited as 1981 *Arrangement*]. The credits must have a repayment term of two years or more. *Id.* The original text applied to such credits "regardless of whether they relate to contracts of sale or to leases equivalent in effect to such contracts." OECD TRADE DIRECTORATE, *Arrangement on Guidelines for Officially Supported Export Credits* at 1, TD/CONSENSUS/78.4 (Feb. 22, 1978) [hereinafter cited as 1978 *Arrangement*]. Subsequent versions have broadened this to read: "regardless of whether they relate to contracts for sale of goods and services or to leases equivalent in effect to such contracts or to pure service contracts." OECD TRADE DIRECTORATE, *Arrangement on Guidelines for Officially Supported Export Credits* at 1, TD/CONSENSUS/82.32 (Sept. 30, 1982) [hereinafter cited as 1982 *Arrangement*].

served, by setting forth detailed rules for permitted governmental export credits, the OECD Arrangement "enhances 'transparency' of international export credit operations, by allowing each export credit agency to (1) obtain better knowledge of the export credit offers of its competitors in other countries, and (2) have the opportunity to match the terms offered by competitors in a timely manner."<sup>40</sup>

The "guidelines" cover such matters as cash payments,<sup>41</sup> maximum repayment term,<sup>42</sup> minimum interest rates,<sup>43</sup> special provisions for certain types of financings,<sup>44</sup> local costs,<sup>45</sup> prior commitments,<sup>46</sup> tied aid credits,<sup>47</sup> admonishments regarding endeavors "as far as possible" not to use the guidelines as "norms,"<sup>48</sup> procedures for "derogations" by

---

<sup>40</sup> See 1 Malmgren's World Trade Outlook 2 (Sept. 1979).

<sup>41</sup> Purchasers of exported goods and services are required to make cash payments of 15%, which are not to receive "official support . . . other than insurance and guarantees against the usual pre-credit risks." 1982 Arrangement, *supra* note 39, at 1.

<sup>42</sup> Maximum terms for repayment range from two years to ten years, depending on the type of country being provided with official financing support. Provision is also made for repayment of principal in "equal and regular" installments every six months or less. *Id.* at ¶ 2.

<sup>43</sup> A schedule of "minimum rates of interest," varying by countries and repayment duration, is specified for "official financing support by way of direct credit, refinancing or interest rate subsidy." *Id.* at ¶ 3. These may be reduced to commercial lending rates for the national currency "increased by 0.3 percentage points per annum." *Id.* In general, however, the specified "minimum rates" fixed by the Arrangement have been substantially lower than commercial rates. See *infra* note 60. Indeed, it is in part because of the disparity between commercial rates and the minimum rates fixed by the Arrangement that the Treasury Department has taken the position that a rate which satisfied the Arrangement but not the Department's own "benchmark" commercial rates might nevertheless be countervailable. See ITA, Final Affirmative Countervailing Duty Determination: Railcars from Canada, 48 Fed. Reg. 6569 (1982) [hereinafter cited as Final Determination].

<sup>44</sup> Special terms apply to financing for commercial power plants, ground satellite communication stations and ships. 1982 Arrangement, *supra* note 39, at 4.

<sup>45</sup> These deal with limitations on financing of "local costs," which are defined as meaning "expenditure for the supply from the buyer's country of goods and services [except for certain commissions] which are necessary either for executing the exporter's contract or for completing the project." *Id.* at 5.

<sup>46</sup> This provision grants a maximum six month grace period for prior commitments that become nonconforming as a result of changes in the guidelines; matching rights are granted to participants who wish to match such nonconforming terms. *Id.* at 6.

<sup>47</sup> This provision deals with credits for "development aid purposes" which include a "grant element." *Id.* at 7.

<sup>48</sup> The guidelines set out in this Arrangement represent the most generous credit terms for which Participants intend in general to give official support. All Participants recognize the risk that in the course of time these guidelines may come to be regarded as norms. They therefore undertake to take, as far as possible, the necessary steps to prevent this risk from materializing.

*Id.* at 8. Where "less generous" terms are "customary," the Participants will "continue to respect such customary terms and will do everything in their power to prevent those terms from being eroded." *Id.* This paragraph is entitled "Best Endeavors," and apparently was intended as merely an admonishment.

the offering of terms "not in conformity with this Arrangement,"<sup>49</sup> procedures for "matching" of any "non-conforming element" by other participants,<sup>50</sup> exceptions for certain types of equipment,<sup>51</sup> definitions,<sup>52</sup> provisions for annual review of the Arrangement,<sup>53</sup> effective date,<sup>54</sup> and withdrawal rights.<sup>55</sup>

#### V. THE INTERPLAY BETWEEN THE OECD ARRANGEMENT AND THE SUBSIDY/CVD CODE

The antecedents of the OECD Arrangement reach back to the 1930s,<sup>56</sup> the current version became effective on April 1, 1978.<sup>57</sup> Thus, in 1979, when the Subsidy/CVD Code was adopted, the OECD Arrangement was already in place with an established set of international rules governing officially supported export trade credits. Indeed, at the very time that the Subsidy/CVD Code was in the process of final negotiation, the United States discontinued talks in which it had sought to

---

<sup>49</sup> A Participant who "intends to take the initiative to support terms not in conformity with this Arrangement" is required to comply with specified notification and discussion procedures. *Id.* at 9. From Oct. 15, 1982 onward, however, Participants have agreed not to avail themselves of the "possibilities" for certain of the "derogations" provided for in paragraph 9. *See id.* (paragraph at page 10 headed "No-Derogation Engagement"). The United States Treasury Department, *supra* note 37, described this non-derogation "pledge" as one of the "highlights" of the new Arrangement.

<sup>50</sup> Where "derogation" occurs, other Participants are given matching rights, subject to certain notification requirements. Matching rights are also available where nonconforming terms are offered by a non-Participant. 1982 *Arrangement*, *supra* note 39, at 9.

<sup>51</sup> The Arrangement does not apply to military equipment, agricultural products, aircraft, nuclear power plants, or ships that are covered by other OECD understandings. *Id.* at ¶ 10.

<sup>52</sup> Many of the more important terms are given special definitions. *Id.* at ¶ 11.

<sup>53</sup> Participants are to review the Arrangement "at least annually." *Id.* at ¶ 13. "The aim would be notably to bring the matrix interest rates closer to market rates." *Id.*

<sup>54</sup> "Participants have put these guidelines into effect on 6th July, 1982." *Id.* at ¶ 14. Earlier versions, of course, had earlier effective dates.

<sup>55</sup> Participants may withdraw on 60 days' notice. *Id.* at ¶ 15.

<sup>56</sup> *See* 1 Malmgren's World Trade Outlook 2 (Sept. 1979):

International guidelines for officially supported export credits were first taken up in the Berne Union during the 1930's, and worked with reasonable success until the late 1960's. In Washington in late October, 1974, a separate, *ad hoc* 'gentlemen's agreement' was worked out among a small number of the leading trading nations, setting a minimum rate of interest (7.5%) and limitations on the time span of credits to healthy or 'wealthy' countries (three years). Separately, in the OECD in Paris, a number of special arrangements were worked out for prior consultation on credit extending over five years, and on certain specific problems. Then in July, 1976, a number of European countries, the U.S., Japan, and Canada reached a Consensus on Converging Export Credit Policies for coordinating regulations relating to export financing. The 1976 Consensus was then replaced by the International Arrangement on Officially Supported Export Credits, which contains more clearly defined guidelines than its predecessor. This was worked up in the framework of the OECD, and it became effective on April 1, 1978. It has been accepted by all 22 OECD countries that operate facilities for financing or guaranteeing export credits.

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

achieve a tightening of the provisions of the OECD Arrangement so as to bring it closer to worldwide commercial practices.<sup>58</sup>

In light of the flexibility accorded by the OECD Arrangement, the interplay between it and the more restrictive provisions of the Subsidy/CVD Code was viewed by some as reflecting "a degree of schizophrenia, or even duplicity, on the part of a number of governments."<sup>59</sup> Faced with the new restrictions of the Subsidy/CVD Code, those governments "saw the need to preserve flexibility in export financing terms. It was considered an area of spillover, or pressure release, in which a large degree of freedom was needed for the foreseeable future."<sup>60</sup>

#### VI. THE DEPARTMENT'S POSITION ON THE ANNEX TO THE SUBSIDY/CVD CODE AND THE OECD ARRANGEMENT

Both the Annex to the Subsidy/CVD Code and the OECD Arrangement contain specific provisions granting international sanction to a wide range of governmental export assistance programs and prohibiting their treatment as export subsidies.<sup>61</sup> The Department's position discussed below appears to be, however, that those sanctioning provisions of the Annex and the OECD Arrangement are not part of United States domestic law. In other words, those internationally permitted programs may nevertheless be characterized as "subsidies" for purposes of imposition of countervailing duties whenever they confer a commercial benefit on an exporter or importer that "tilts the playing field" in his favor. This position, while not directly expressed in any published decision or ruling, can be gleaned from a number of recent rulings by the Department's International Trade Administration (ITA) dealing with the definition of "subsidy."<sup>62</sup>

---

<sup>58</sup> *Id.* at 1, 3.

<sup>59</sup> *Id.* at 2.

<sup>60</sup> *Id.* See also 2 Malmgren's World Trade Outlook 1, 2 (May 1980) (commenting on (1) the continuing concern of the United States Treasury Department over "the recent spreads between market rates of interest and the minimum rates of interest stipulated by the [OECD Arrangement]" and (2) the contrasting views of some European countries, "that the flexibility in official financing provides the conditions necessary for adherence to any serious limitations on other export aids").

<sup>61</sup> See *supra* notes 17-55 and accompanying text.

<sup>62</sup> The position has been expressed unofficially, by the Department's Deputy Assistant Secretary for Import Administration. See *The Commerce Department Speaks on Dumping and Countervailing Duties*, P.L.I. Course Handbook Series No. 398, at 35 (1982) (reproducing a course outline by Gary N. Horlick, "Subsidies and Suspension Agreements in Countervailing Duty Cases," dated Aug. 5, 1982):

The higher degree of international consensus on export subsidies over domestic subsidies is reflected by the structure of the Subsidies Code. Some differences of opinion with the



Thus, in a recent ruling dealing with Mexican government loans to exporters at preferential rates, the Government of Mexico contended that its loans were "comparable" to those authorized by the OECD Arrangement and therefore not countervailable as a result of the proviso to item (k) of Annex A.<sup>63</sup> Since Mexico is not a signatory to the Arrangement, the contention was evidently not available.<sup>64</sup> In rejecting the Mexican contention, however, the ITA chose to rest its ruling on the additional ground that under United States domestic law (a) loans permitted by the OECD Arrangement are countervailable, and (b) the measure of the benefits should be calculated on the basis of commercially available rates, rather than—as item (k) provides—the cost of the funds to the Mexican Government.<sup>65</sup>

Similarly, in two subsequent rulings dealing with the importation of railcars from Canada, the ITA returned to the question of the effect of the export practices sanctioned by the OECD Arrangement.<sup>66</sup> The issue there presented was the treatment of a favorable interest rate proposed to be extended by a Canadian governmental agency in its purchase of bonds issued by the New York City Metropolitan Transportation Authority (MTA) to finance payments for subway cars that

---

Europeans persist on export subsidies, particularly as regards certain items of the Illustrative List to the Subsidies Code (*e.g.*, Item (k), which carved out from condemnation under the GATT certain official export credit practices). The United States position is that such practices, while not actionable under the dispute resolution provisions of the Code ("Track 2"), are not thereby immune from countervailing duties under each signatory's domestic laws ("Track 1").

In 1979 the ITC appeared to take a contrary position regarding the effect of the Subsidies/CVD Code under domestic law. *See supra* note 35.

<sup>63</sup> ITA, Final Affirmative Countervailing Duty Determination: Ceramic Tile from Mexico, 47 Fed. Reg. 20,012, 20,014 (1982).

<sup>64</sup> *See* 19 U.S.C. §1671 (Supp. V 1981) (applicability to product of a "country under the Agreement"); *cf.* 19 U.S.C. §1303(a) (Supp. V 1981) (continued applicability of old law to product not of a "country under the Agreement").

<sup>65</sup> 47 Fed. Reg. at 20,014:

Mexican Government terms and rates are different from those under the OECD Arrangement, Mexico is not a member of the Arrangement, and the U.S. government has not recognized loans under the Arrangement as noncountervailable. There are a large number of precedents in previous cases before the Department supporting a determination that similar preferential loans are countervailable, and the benefits should be calculated on the basis of commercially [sic] available rates.

We believe that regardless of what effects the Illustrative List of Prohibitive Export Subsidies may have on U.S. law otherwise, the uniform past practices on this issue in comparison with the legislative history of the Trade Act requires us to calculate the bounty or grant provided under a preferential loan program on the basis of a comparison between the preferential rate and the commercially [sic] available rate rather than on the basis of a comparison with the cost of the funds to the government.

<sup>66</sup> Preliminary Determination, *supra* note 34, at 53,760; Final Determination, *supra* note 43, at 6569. The reader should be aware of the author's possible bias on the issues raised in these cases, since the author's firm represented the Metropolitan Transportation Authority in seeking to resist the imposition of countervailing duties.

were to be assembled by a Canadian exporter from components produced in both Canada and the United States.<sup>67</sup>

In rejecting the MTA's contentions that the tests set forth in the OECD Arrangement for permitted export credit practices were applicable, the ITA conceded that the OECD Arrangement was "an 'international undertaking' of the type referenced in the second paragraph of item (k)."<sup>68</sup> The ITA initially concluded, however, that notwithstanding this apparent incorporation by reference into the statutory definition of an "export subsidy," the OECD Arrangement was not a part of United States domestic law but, rather, bound the United States only internationally. Thus, in its "preliminary" decision to this effect, the ITA reasoned:

The MTA contends that only the difference between the EDC [Canadian government agency] rate and the rate specified in the [OECD] Arrangement constitutes a countervailable benefit because item (k) provides that government-funded export credit practices which conform to such international undertakings as the OECD Arrangement are not 'considered an export subsidy prohibited by this Agreement' (the Subsidies Code). Thus, the MTA reasons that only benefits conferred at interest rates below the OECD Arrangement rate are countervailable. We reject this contention because it fails to distinguish between those unfair trade practices which are 'prohibited by the Agreement' and those practices which are countervailable under the United States countervailing duty law. If a country engages in 'prohibited' conduct, the affected country may pursue its dispute settlement rights under Part II of the Subsidies Code in addition to acting under its countervailing duty laws. By contrast, if a country implements a nonprohibited subsidy practice, the Department may nevertheless be required to take the latter course. Therefore, we have concluded that our benchmark for export credits is not limited by the rate set in the Arrangement.<sup>69</sup>

In effect, this restrictive reading would mean that the 1979 Act, in incorporating item (k) into its definition of "export subsidy," did not intend to incorporate the all-important proviso to item (k). On its face this seems improbable, especially in light of the fact that the announced purpose of the 1979 Act — as confirmed by its legislative history — was to "approve and implement" the Subsidy/CVD Code and the other international agreements entered into by the United States in the "Tokyo Round."<sup>70</sup>

Moreover, the ITA's reading of the proviso to item (k) disregards

---

<sup>67</sup> Preliminary Determination, *supra* note 34, at 53,760-61.

<sup>68</sup> *Id.* at 53,762.

<sup>69</sup> *Id.*

<sup>70</sup> 19 U.S.C. §§2502(1), 2503(a) (Supp. V 1981). For the legislative history, see *infra* note 93 and accompanying text.

the explicit provisions of the Subsidy/CVD Code itself, which in General Part VII makes the Annex an "integral part" of the entire Code and, in the same provision, prohibits any "specific action against a subsidy of another signatory" except pursuant to GATT "as interpreted by [the Code]."<sup>71</sup> By reading the proviso to item (k) as relating only to Part II of the Code, rather than to the entire Code, the ITA in effect attempted to rewrite the Code in a manner which, while perhaps reflective of the negotiating position of the United States, is flatly contrary to the language of the Code itself.

Interestingly enough, this final decision of the ITA in the Canadian subway car case narrowed the ground on which the ITA rejected the applicability of the OECD Arrangement. In place of the earlier preliminary ruling that the OECD Arrangement was not binding under United States domestic law, the ITA held in its final decision that on the facts before it the issue had not been raised.<sup>72</sup> Thus, since the Canadian Government's financing arrangement "was in derogation of the OECD Arrangement on several points," the ITA observed, "we need not now address item (k)'s applicability to an export credit transaction which is in conformity with the minimum interest rate provisions of the OECD Arrangement."<sup>73</sup>

A more difficult question was presented, however, by the MTA's contention to the ITA that the Canadian Government's financing was permitted under the "matching" provisions of the OECD Arrangement.<sup>74</sup> Those provisions recognize that, subject to certain conditions, a participant has "the right to match the terms supported by another Participant under a prior commitment."<sup>75</sup> In rejecting the contention that the Canadian offer was a permitted "matching" of an offer by a French government agency, the ITA observed in its final decision:

Regardless of whether EDC was trying to match a prior commitment under Article 6 of the OECD Arrangement, it is clear that item (k) was not intended to condone export credits offered to match other credits which were in derogation from the minimum interest rate provisions of

---

<sup>71</sup> 1979 HOUSE DOCUMENT, *supra* note 10, at 291.

<sup>72</sup> Final Determination, *supra* note 43, at 6578-79.

<sup>73</sup> 47 Fed. Reg. at 65, 78-79. Even assuming that the interest rate made available by a foreign government is lower than either the cost of the funds to that government (as permitted by item (k)) or the minimum rate permitted by the OECD Arrangement, it would seem, as a matter of logic, that the amount of the subsidy should be limited to the spread between the rate actually furnished and the lesser of those two permitted rates. Compare the Subsidy/CVD Code prohibition against imposing a countervailing duty "in excess of the amount of the subsidy found to exist . . ." *See infra* notes 106-111 and accompanying text.

<sup>74</sup> *See supra* note 50 and accompanying text.

<sup>75</sup> 1982 Arrangement, *supra* note 39, at 5.

the OECD Arrangement. Item (k) exempts only 'an export credit practice which is in conformity with' the minimum interest rate provisions of the OECD Arrangement from the prohibitions of the Subsidies Code. By contrast, the matching provisions of the OECD Arrangement deal exclusively with offers which are *not* in conformity with the Arrangement. A provision which allows one party to follow the derogation of another cannot somehow make the second derogation into "an export credit practice which is in conformity with" the Arrangement when both offers are identical derogations.<sup>76</sup>

This argument for ignoring the matching rights expressly granted by the OECD Arrangement seems based upon two separate textual contentions: (1) the provisions of the OECD Arrangement dealing with the matching of interest rates are not "interest rates provisions" within the meaning of the proviso to item (k); and (2) matching in accordance with the "right" thereto granted by the OECD Arrangement is not "in conformity with" the OECD Arrangement.

Both of these somewhat strained arguments appear to be contrary to the plain meaning of the proviso to item (k). Moreover, they ignore the patent purpose of the OECD Arrangement, which was to permit participants to protect themselves by matching interest rates of others — participants or non-participants — who departed from its standards. Such protection could hardly be achieved if the matching rate could then be subjected to countervailing duties. Here again, one is confronted with a case where the Department's dislike for the permissive features of the OECD Arrangement appears to have led it, improperly, to disregard the incorporation of the Arrangement into United States law via the proviso to item (k).

The Canadian subway car case is evidently the only instance to date in which the ITA expressly considered the applicability of the matching provisions contained in the OECD Arrangement. It strongly suggests that the ITA is disinclined to follow the OECD Arrangement, whatever the grounds.

It is less clear whether, or to what extent, the ITA would decline to follow permissive provisions that are contained in the Annex to the Subsidy/CVD Code itself (as distinguished from the OECD Arrangement). In a number of instances the ITA has referred to the Annex definitions as supporting a finding of "subsidy."<sup>77</sup> In one case the ITA

---

<sup>76</sup> Final Determination, *supra* note 43, at 6569, 6579.

<sup>77</sup> See, e.g., Preliminary Determination, *supra* note 34, at 53,761: "Included in the List, under item (k), are government-funded export credits used to secure a material advantage with respect to export credit terms." Cf. *Certain Steel Products from France*, 3 INT'L TRADE REP. DEC. (BNA) 2099, 2102 (1982) (failure to charge premiums for export insurance in amounts "sufficient to cover long-term operating costs and losses" is an export subsidy within the meaning of the counter-

appears to have looked to the Annex for its test in determining when non-excessive rebates of indirect taxes will be permitted.<sup>78</sup>

Yet on one issue, the ITA clearly has chosen to depart from a requirement of the Annex: the specification in item (k) that government grants of export credits constitute export subsidies if they are "at rates below those which [the governments] actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit)."<sup>79</sup> As previously noted,<sup>80</sup> use of the government's own borrowing rate confers a commercial benefit if the commercial borrower would have to pay a higher rate in the market.<sup>81</sup> It is in that instance that the ITA has frequently decided, without mentioning the Annex, simply to ignore entirely the benchmark rate specified in item (k) and to look instead to the rate available from a "normal commercial lender" as the benchmark for an export credit giving rise to a finding of subsidy.<sup>82</sup>

---

vailing duty law); Prestressed Concrete Steel Wire from South Africa, 3 INT'L TRADE REP. DEC. (BNA) 2274, 2277 (1982) (export credit insurance not subsidy where agency "made a profit" for five years and "no evidence that [its] rates are preferential").

<sup>78</sup> Certain Fasteners from India, 2 INT'L TRADE REP. DEC. (BNA) 5166, 5168 (1980), *rev'd on other grounds*, Industrial Fasteners Group v. United States, 3 INT'L TRADE REP. DEC. (BNA) 1289, 1292 (Ct. Int'l Trade 1981). Compare *supra* note 23 and accompanying text.

<sup>79</sup> See *supra* note 32 and accompanying text.

<sup>80</sup> *Id.*

<sup>81</sup> See Gary N. Horlick, *supra* note 62, at 39-40:

[W]hen a [government] loan is extended to a firm on terms more favorable than it would otherwise be able to obtain, there would likely be a subsidy. Again, the subsidy would be the difference between the free market rate and the government-provided one. Some of our trading partners have publicly differed with our quantification of such a subsidy, stating that it should be based on the cost to the government of providing the benefit. This position does not make economic sense given that the extent of the distortion introduced in the market by the government program is the full difference between the government-provided and free market rates. National governments can almost always obtain credit more cheaply than any other actor in a country's economy, so the rates available to them are not relevant.

<sup>82</sup> See, e.g., Certain Steel Products from Belgium, 3 INT'L TRADE REP. DEC. (BNA) 2078 (1982) (Appendix B describes "general principles" applicable to a series of steel product cases):

In these investigations, various loan activities give rise to subsidies. The most common practice is the extension of a loan at a preferential rate where the government is either the actual lender or directs a private bank to lend at a preferential rate. The subsidy is computed by comparing what a company would pay a normal commercial lender in principal and interest in any given year with what the company actually pays on the preferential loan in that year. We determine what a company would pay a normal commercial lender by constructing a comparable commercial loan at the appropriate market rate (the 'benchmark'). If the preferential loan is part of a broad, national lending program, we use a national average commercial rate as our benchmark. If the loan program is not generally available — like most large loans to respondent steel companies — the benchmark used instead, where available, is the company's actual commercial credit experience (e.g., a contemporaneous loan to the company from a private commercial lender). If there were no similar loans, the national commercial rate is used as a second-best alternative.

*Id.* at 2093-94. To the same effect, see *id.* at 2096-97 (Appendix C deals generally with programs administered by organizations of the European Economic Community):

In arriving at this result for export credits, the Department seems to be applying the general concept of a subsidy as "bounty or grant," within the meaning of §303(a) of the Tariff Act of 1930<sup>83</sup> which is incorporated by reference as part of the definition of "subsidy" contained in the 1979 Act.<sup>84</sup>

Thus, in a decision rendered under §303(a) of the 1930 Act, the United States Court of International Trade expressly rejected the contention that it was the cost of money to the lending government agency which establishes the benchmark rate for measuring the subsidy attrib-

---

With respect to ECSC borrowings, the ECSC enjoys a very high credit rating because of its quasi-governmental nature. It is therefore able to raise funds at interest rates lower than those which would be available to European steel companies. When the ECSC re-lends these borrowed funds to a company without increasing the interest rate, any difference between the lower interest rate passed on and the rate otherwise available to the steel company in the commercial financial market (the "benchmark") is a benefit to the company. For this reason we preliminarily determine that ECSC loans raised through capital market funding are countervailable insofar as they offer preferential interest rates to steel companies.

Consequently any loan involving ECSC funds borrowed on international capital markets, provided under an ECSC assistance program, confers countervailable benefits if the loan is at a preferential interest rate.

The same test has been employed by the ITA in numerous other cases, in each instance without making any reference whatever to the benchmark laid down in item (k) of the Annex. *E.g.*, Certain Steel Products from France, 3 INT'L TRADE REP. DEC. (BNA) 2099, 2103-04 (1982); Certain Steel Products from South Africa, 3 INT'L TRADE REP. DEC. (BNA) 2278, 2281-82 (1982); Certain Steel Products from West Germany, 3 INT'L TRADE REP. DEC. 2134, 2139-40 (1982); Litharge, Red Lead and Lead Stabilizers from Mexico, 4 INT'L TRADE REP. DEC. (BNA) 1179, 1182 (1982); Pactin from Mexico, 4 INT'L TRADE REP. DEC. (BNA) 1183, 1184 (1982); *cf.* Certain Steel Wire Nails from Korea, 4 INT'L TRADE REP. DEC. (BNA) 1139, 1141 (1982) (private bank loans to exporters mandated by government).

<sup>83</sup> 19 U.S.C. §1303(a) (Supp. V 1981). Another theory would be that the Department is applying the definition of "domestic subsidy" found in 19 U.S.C. §1677(5)(B)(i), but this would have required findings that the loan was furnished to a "specific" enterprise or industry or group thereof. *See infra* note 89 and accompanying text. The Department appears to be aware of the distinction between a domestic subsidy and an export subsidy, in view of the possible boomerang effects of extending the prohibition against domestic subsidies too broadly. *See, e.g.*, Gary N. Horlick, *supra* note 62, at 32-33:

The authors of subsidy laws have consistently avoided labeling nationwide government economic policies as countervailable. To countervail against such policies would risk impinging on the sovereign prerogatives of nations, placing severe political strains on the current international trade regime. There is also a self-interested reason for the United States to maintain this posture: If it countervails against nationwide programs benefiting foreign industries then its natural gas price controls, for instance, may be deemed by foreign nations to be a subsidy on the production of all U.S. exports using natural gas as an artificially cheap input. Thus, Congress in 1979 required that for domestic subsidies to be countervailable they must be to 'a specific enterprise or industry, or group of enterprises or industries' rather than to *all* industry in a country (section 771(5)(B) of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979). This follows the language of the 1979 Subsidies Code (Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade), Article 11.3 of which speaks of '... subsidies granted with the aim of giving an advantage to certain enterprises . . . .'

<sup>84</sup> 19 U.S.C. §1677(5) (Supp. V 1981).

utable to a low-interest loan.<sup>85</sup> The court held instead that the amount of the "bounty or grant" derived from the loan should be "the benefit experienced by the recipient," and looked therefore to the "most favorable terms available" to the particular recipient in the commercial market in which it could have borrowed.<sup>86</sup>

## VII. A CRITIQUE OF THE DEPARTMENT'S POSITION IN REGARD TO THE ANNEX AND THE OECD ARRANGEMENT

It appears to be the Department's position that any permissive provisions embodied in the definition of "export subsidy" that is set forth in either the Annex or the OECD Arrangement must be disregarded if those provisions are in conflict with prior precedent or practice defining "bounty or grant" under domestic law as it existed prior to the 1979 Act.<sup>87</sup>

The only theory under which this narrow interpretation of the 1979 Act would appear to be legally justifiable would be one which (a) looked to the opening words of the "subsidy" definition in the 1979 Act ("the term 'subsidy' has the same meaning as the term 'bounty or grant' as that term is used in [Section 303 of the 1930 Act]"<sup>88</sup>) and (b) narrowed the balance of the "subsidy" definition to the opening words because of the phrase ". . . and includes, but is not limited to, the following. . . ."<sup>89</sup> To put it another way, the theory is that any additional or new subsidy practice described in the Annex or the OECD Arrangement could be added to subsidy practices previously determined under

---

<sup>85</sup> *Michelin Tire Corp. v. United States*, 3 INT'L TRADE REP. DEC. (BNA) 1177, 1182-83 (Ct. Int'l Trade 1981).

<sup>86</sup> *Id.* at 1183. In rejecting the cost of money to the lender as a benchmark, the court observed: The law is not concerned with the sacrifice made by the party supplying a financial resource but rather with the benefit experienced by the recipient. The making of a loan at a rate of interest below the cost of money to the lender would not assure the existence of a bounty any more than the making of the loan above the cost of money to the lender would assure the absence of a bounty. For a company lacking creditworthiness in its national setting even a loan yielding profit to the lender could be a bounty. On the other hand, a company with the ability to finance from international sources would not necessarily receive a bounty from a loan which appeared preferential within a particular national financial market.

*Id.* (emphasis in the original).

<sup>87</sup> See *supra* notes 62-69 and accompanying text.

<sup>88</sup> See *supra* note 11.

<sup>89</sup> It could also be argued that, even if the definition of "export subsidy" contained in the Annex were to be viewed as excluding a practice from subsidy treatment, the definition of "domestic subsidy" contained in subsection (B) of 19 U.S.C. §1677(5) might nevertheless include it for subsidy treatment. The one clear-cut case of possible inconsistency between subsection (B) and the Annex is the furnishing of a loan or loan guaranty "on terms inconsistent with commercial considerations," which constitutes a domestic subsidy when furnished to a "specific" enterprise or industry or "group" thereof. The test for an export credit subsidy is quite different under item (k) of the Annex. See *supra* note 30 and accompanying text.

the old law, but any prohibition or restriction against subsidy treatment found in the Annex or OECD Arrangement would have to be disregarded whenever in conflict with the old law as previously construed. Even though such a prohibition or restriction against subsidy treatment was contained in an international agreement to which the United States had bound itself, the argument goes, it would nevertheless not be binding as a matter of domestic law because it was inconsistent with the express provision of the 1979 Act that looks to the definition of "bounty or grant" contained in the old law.<sup>90</sup>

In short, under this theory the incorporation of the Annex and the OECD Arrangement into the definition of "subsidy" contained in the 1979 Act has resulted in a "heads I win, tails you lose" situation for the United States. If the Annex or the Arrangement benefits the position of the United States (results in a finding of subsidy), then it is part of our domestic law; but if the Annex or Arrangement benefits a trading partner of the United States (exempting that partner's challenged practice from subsidy treatment), then it is not part of our domestic law. This theory, however, is, in my view, (i) contrary to the language of the 1979 Act, and (ii) inconsistent with its legislative history and avowed purpose.

#### A. The Statutory Language

In order to give effect to all the words of the statute (including the texts incorporated by reference into the definition of "export subsidy"), it is necessary to read the introductory words "includes, but is not limited to,"<sup>91</sup> as importing something other than a right to disregard the terms of the incorporated texts. Since the incorporated Annex list itself, both on its face and by the terms of the statute, is merely "illustrative," the statutory phrase "includes, but is not limited to" should be interpreted as follows: The broad definition of "subsidy" as a "bounty or grant" may be employed to expand the "illustrative" Annex list to include items falling in categories not specifically covered by those illustrations, but as to categories that they do cover, the exclusions as well as the inclusions apply.

Put another way, on this reading the term "includes, but is not limited to," when used in section 1677(5), must be construed to mean:

---

<sup>90</sup> See 19 U.S.C. §2504(a) (Supp. V 1981): "No provision of any trade agreement approved by the Congress under section 2503(a) of this title, nor the application of any such provision to any person or circumstance, which is in conflict with any statute of the United States shall be given effect under the laws of the United States."

<sup>91</sup> 19 U.S.C. § 1677(5) (Supp. V 1981).



includes the rules set forth in the illustrative categories of items referred to in the Annex list, but is not limited to such categories of items. Such a reading would be far more consistent with the language of the statute because it gives effect to all its terms and provisions.<sup>92</sup>

### B. The Legislative History

As the Senate Report to the 1979 Act explains, that piece of legislation was the product of a "unique Constitutional experiment."<sup>93</sup> Pursuant to the procedures set forth in Section 102 of the Trade Act of 1974 (1974 Act)<sup>94</sup>, a complex international negotiation was successfully concluded, and enabling legislation was eventually enacted within the 1979 Act, on the basis of full cooperation between the legislative and executive branches of the government.

The principal object of those international negotiations known as the "Tokyo Round," which began officially in 1973 and were not concluded until 1979, was to achieve uniformity in international treatment of certain nontariff barriers, such as subsidies and countervailing duties.<sup>95</sup> This was to be accomplished by a series of international trade agreements, agreements which were then required by the 1974 Act to be submitted to the Congress for approval, together with (1) proposed implementing bills (since the agreements were not to be self-executing) and (2) an official statement of proposed administrative action.<sup>96</sup>

The Subsidy/CVD Code was among the international trade agreements submitted to Congress in 1979 for approval.<sup>97</sup> It was accompanied by enabling legislation (the 1979 Act) designed to meet the

---

<sup>92</sup> In the latest draft of the American Law Institute's Restatement of the Law of Foreign Relations, the Reporters observe:

It is not clear that the Subsidies Code requires an importing state to define subsidies for purposes of its countervailing duty legislation in the same way as GATT defines them for purposes of an exporting state's obligation not to grant subsidies . . . . The Code illustrations of subsidies [the illustrative list] include only forms of government assistance that treat exports differently from goods destined for domestic consumption. However, Article 11 of the Code lists other kinds of benefits that may cause injury to a domestic industry of another state, such as government retraining projects, research and development programs or aid to disadvantaged regions.

Restatement (Revised) of Foreign Relations Law § 806 (Reporters' Note 1) (Ten. Draft No. 4, 1983). Thus, presumably the United States may expand upon the list of prohibited subsidies without violating the provisions of the Subsidies Code. It does not follow, however, that the United States may disregard the provisions of the list in areas where it applies.

<sup>93</sup> S. REP. NO. 249, 96th Cong., 1st Sess. 5, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 391 [hereinafter cited as SENATE REPORT].

<sup>94</sup> 19 U.S.C. §102 (1974).

<sup>95</sup> SENATE REPORT, *supra* note 93, at 1-3, U.S. CODE CONG. & AD. NEWS at 387-89.

<sup>96</sup> *Id.* at 5, U.S. CODE CONG. & AD. NEWS at 391.

<sup>97</sup> *See* 1979 HOUSE DOCUMENT, *supra* note 14. The Subsidy/CVD Code was the result of a lengthy, difficult international negotiation. *See Rivers & Greenwald, The Negotiation of a Code on*

obligations of the United States by appropriately including the terms of those agreements in our domestic law. The process was summarized as follows in the presidential "Statement of Administrative Action" that accompanied the bill:

The Trade Agreements Act of 1979 approves and implements the trade agreements negotiated in the [Tokyo Round]. The trade agreements negotiated are not self-executing and accordingly do not have independent effect under United States law. However, the provisions of the Trade Agreements Act and the provisions of this statement regarding the administration of United States law have been developed to be fully consistent with the trade agreements negotiated in the [Tokyo Round], *and when the Act becomes effective, will permit the United States to carry out fully its obligations under the agreements.*<sup>98</sup>

In order to make certain that the text of the enabling legislation would be the governing law, and that future changes in or international interpretations of the trade agreements would not be given effect under United States law until appropriately approved by Congress, Section 3 of the 1979 Act<sup>99</sup> provided that in the event of any inconsistency between a trade agreement and a United States statute, the latter would govern. In commenting on this provision, the Senate Committee pointed out that the 1979 Act was drafted so as to be consistent with the obligations of the United States under the trade agreements as the United States viewed them. Thus the Senate Report observes:

The committee is aware that some major trading partners are concerned that particular elements of this bill do not repeat the precise language of the agreements. *This bill is drafted with the intent to permit United States practice to be consistent with the obligations of the agreements, as the United States understands those obligations. The bill implements the United States understanding of those obligations.*<sup>100</sup>

---

*Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences*, 11 LAW & POL'Y INT'L BUS. 1447, 1465 (1979).

<sup>98</sup> 1979 HOUSE DOCUMENT, *supra* note 10, Part II, at 392 (emphasis added).

<sup>99</sup> 19 U.S.C. §2504(a) (Supp. V 1981). See SENATE REPORT, *supra* note 93, at 36, U.S. CODE CONG. & AD. NEWS at 422:

The committee specifically intends section 3 to preclude any attempt to introduce into U.S. law new meanings which are inconsistent with this or other relevant U.S. legislation and which were never intended by the Congress. This bill has been developed by the committee, other committees, and the President, to implement under United States law the obligations assumed by the United States in the MTN [Tokyo Round] trade agreements. If, in the future, amendments to, or interpretations of, any MTN agreement should be adopted internationally which are inconsistent with U.S. legislation, the President may, upon approval by Congress under section 3 (c) of the bill, accept such amendments or interpretations. No such amendment or interpretation shall be given effect under U.S. law until it is approved and the necessary or appropriate changes to U.S. legislation have been enacted.

<sup>100</sup> SENATE REPORT, *supra* note 93, at 36, U.S. CODE CONG. & AD. NEWS at 422 (emphasis added). It appears that the quoted reference as to the concern of our trading partners over the language of the Act reflected a debate regarding the correct definition of "material injury." Rivers & Greenwald, *supra* note 97, at 1491-92. While the definition formulated by Congress in the Act

With respect to the Subsidy/CVD Code, numerous changes in our domestic law were required in order to carry out the obligations of the United States under the Code, particularly so in view of the following provision in the Code itself:

Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the *conformity of its laws, regulations and administrative procedures with the provisions of this Agreement* as they may apply to the signatory in question.<sup>101</sup>

Pursuant to the 1979 Act, the requisite changes in United States domestic law were made to conform to the Subsidy/CVD Code.<sup>102</sup> Since existing domestic law contained no definition of "subsidy" other than the terms "bounty or grant," and the Subsidy/CVD Code contained an elaborate "illustrative list," it was necessary to amend domestic law to conform to the list. This was accomplished by incorporating the Code list in the statute as "part of the law."<sup>103</sup> These new provisions were then made applicable only to "countries under the Agreement" (those which are signatories to the Code), which "substantially" assume its obligations, or which are entitled to equal treatment under most-favored-nation clauses.<sup>104</sup>

The legal issue here presented is whether the incorporation of the Code list in section 1677(5) also resulted in incorporation of the prohibitions the list contains against treating certain practices as countervailable subsidies. Since the Congress intended the 1979 Trade Act to carry out the obligations of the United States under the Code as the United States viewed them,<sup>105</sup> the text of the Subsidy/CVD Code itself is relevant on this point.

Examination of the Code reveals that: (1) the Annex constitutes "an integral part [of this Agreement]"<sup>106</sup> and (2) no "specific action" can be taken "against a subsidy of another signatory" except "in ac-

---

departed somewhat from that found in the Subsidy/CVD Code, it was evidently the view of Congress that its definition was in accord with our obligations. As this history indicates, in those instances where the language of the Act varies from that of the Subsidy/CVD Code, Congress was attempting to interpret our international obligations in a manner acceptable to it, but was not seeking to avoid or disregard those obligations.

<sup>101</sup> 1979 HOUSE DOCUMENT, *supra* note 10, Part I, at 292 (emphasis added); *see also, e.g.*, 1979 HOUSE DOCUMENT, *supra* note 10, Part II, at 393.

<sup>102</sup> *See also* SENATE REPORT, *supra* note 93, at 87, 103, 107, 108, 234, 236-37, 239, 240, 241-42, U.S. CODE CONG. & AD. NEWS at 473, 489, 493, 494, 619-28 (changes summarized).

<sup>103</sup> 1979 HOUSE DOCUMENT, *supra* note 10, Part II, at 393 (presidential statement that "an illustrative list of subsidy practices will be part of the law").

<sup>104</sup> *See supra* note 8 and accompanying text.

<sup>105</sup> 19 U.S.C. §2502(1), 2503(a) (Supp. III 1979). *See supra* note 100 and accompanying text.

<sup>106</sup> 1979 HOUSE DOCUMENT, *supra* note 10, Part I, at 294.

cordance with” the provisions of GATT “as interpreted by this Agreement.”<sup>107</sup> The Code further provides that signatories are to take “all necessary steps to ensure that the imposition of a countervailing duty on any product . . . is in accordance with the provisions of Article VI of [GATT] and the terms of [the Code].”<sup>108</sup> A footnote to “countervailing duty” explains that it means “a special duty levied for the purpose of off-setting any bounty or subsidy.”<sup>109</sup> Elaborate procedures for investigation of “subsidy” are set forth in the Code, with a direction that the “investigation shall be terminated when the investigating authorities are satisfied . . . that no subsidy exists. . . .”<sup>110</sup> There is also a flat prohibition against imposing a countervailing duty “in excess of the amount of the subsidy found to exist . . . .”<sup>111</sup>

Clearly, the signatories to the Subsidy/CVD Code must have intended the prohibitions and other specific terms of the Code’s illustrative export subsidy list to apply to the determination of countervailing subsidies under domestic law. No other reasonable way of reading the Code is possible. Since Congress indicated its intent to modify our laws consistent with the Subsidy/CVD Code, it follows that the incorporation of this list in the new statutory definition of “subsidy” must have been intended to bring the prohibitions and other specific terms of the list into our domestic law, by way of a definition of “subsidy” that was to be applicable with respect to the specific categories covered by the list. This reading of the statute is partially reinforced by comments

---

<sup>107</sup> *Id.* at 291. In commenting on the above-quoted Code provision, the ITC observed in its Report that it “limits unilateral action by the United States against export subsidies of other signatories under section 301 of the Trade Act of 1974.” ITC Report, *supra* note 35, at 213. *See also id.* at 111 (above-quoted Code provision “could limit the applicability of section 301 of the Trade Act of 1974”).

<sup>108</sup> 1979 HOUSE DOCUMENT, *supra* note 10, Part I, at 261. In its 1979 report to the Senate Committee on Finance, the ITC observed generally that “[t]he Code commits a signatory to employ enforcement measures only in accordance with the strictures of the document.” ITC Report, *supra* note 35, at 101.

<sup>109</sup> *Id.* at n.2.

<sup>110</sup> *Id.* at 265.

<sup>111</sup> *Id.* at 267. All of the provisions referred to above, *supra* notes 107-11, can be viewed as embodied in the 1979 Act. In one significant respect, however, the Code appears to differ from the 1979 Act. The Code contains only a qualified prohibition against the granting of export subsidies on agriculture, lumber and fishery products (“certain primary products,” which are defined for this purpose as products “of farm, forest or fishery”). These are barred under the Code “if they result in the signatory granting such subsidy having more than an equitable share of world export trade in such product,” or if they result in “prices materially below those of other suppliers to the same [particular] market.” *Id.* at 278, 279. In the case of other products (manufactured products and minerals) the Code prohibition is absolute: “Signatories shall not grant export subsidies on [such] products . . .” and “[t]he practices listed in points (a) to (1) in the Annex are illustrative of export subsidies.” *Id.* at 278.

suggesting the binding effect of the Subsidy/CVD Code's list, in those categories where it applies, that are found in both the President's Statement of Administrative Action<sup>112</sup> and in the Senate Report.<sup>113</sup>

### VIII. A SUGGESTED RESOLUTION OF THE PROBLEM

In my view, the export subsidy standards set forth in the Annex and the OECD Arrangement are undoubtedly binding as a matter of law under the definition of "export subsidy" incorporated in the 1979 Act. Such a view is consistent with the international obligations assumed by the United States in entering into the Subsidy/CVD Code and it also carries out the intention of Congress in implementing that Code as part of the 1979 Act. Thus, the Department should retreat from the contrary position that it has seemingly adopted. In order to avoid any possible confusion, the Department should publish regulations announcing its revised position, setting forth the text of the Annex as well as the latest effective version of the OECD Arrangement, and

---

<sup>112</sup> See 1979 HOUSE DOCUMENT, *supra* note 10, Part II, at 432:

The term 'subsidy' is to have the same meaning as the term 'bounty or grant' used in Section 303 of the Tariff Act of 1930. The concept is further illustrated by reference to the list of export subsidies included in Annex A to the Subsidy/CVD Code and some types of common domestic subsidy practices. (statute) The list in Annex A is not exhaustive and may be supplemented from time to time. (practice).

<sup>113</sup> SENATE REPORT, *supra* note 93, at 84-85, U.S. CODE CONG. & AD. NEWS at 470:

The definition of 'subsidy' is intended to clarify that the term has the same meaning which administrative practice and the courts have ascribed to the term 'bounty or grant' under section 303 of the Tariff Act of 1930, *unless that practice or interpretation is inconsistent with the bill*. . . . The reference to specific subsidies in the definition is not all inclusive, but rather is illustrative of practices which are subsidies within the meaning of the word as used in the bill. The administering authority may expand upon the list of specified subsidies consistent with the basic definition (emphasis added).

*Compare*, however, H.R. REP. NO. 317, 96th Cong., 1st Sess. (1979) at 73-74:

Definition of 'Subsidy.' — The meaning of 'subsidy' under this title retains the meaning which practice and the courts have ascribed to the term 'bounty or grant' under section 303 of the Tariff Act of 1930. In particular, but not exclusively, a 'subsidy' includes those export subsidies enumerated or described in Annex A to the Agreement on Subsidies and Countervailing Measures and such practices which may be added by regulation by the Authority.

Regarding non-export subsidies, sub-paragraph (B) of section 771(5) enumerates specific domestic practices which will constitute a subsidy if provided or required by government action to a specific enterprise or industry, publicly or privately owned, paid or bestowed, directly or indirectly, with respect to the manufacture, production or export of any class or kind of merchandise. The Committee does not intend for this to be a comprehensive, exclusive enumeration of domestic practices which will be considered subsidies. It is a minimum list, an identification, for purposes of clarification, of those practices which are definitely subsidies. In deciding whether any other practice is a subsidy, the standard remains that presently used with regard to a 'bounty or grant' under section 303. However, to the extent the enumerations under this provision might provide a basis for expanding the present standard consistent with the underlying principles implicit in these enumerations, then the standard shall be so altered.

The Committee expects that as new practices become internationally recognized, the Authority will, by regulation, augment the enumerations under subparagraphs (A) and (B) of subsection (5).

describing the manner in which they will be applied in countervailing duty cases.

In the event, however, the Department refuses to adopt this position, it should nevertheless exercise its regulatory powers by publishing regulations on the subject.<sup>114</sup> Regulations announcing the Department's position are essential in order to clarify a variety of thorny issues, thereby assuring consistency and predictability in the enforcement of the 1979 Act. Thus, regulations should cover such matters as: (1) Which portions of the Annex and the OECD Arrangement are viewed by the Department as properly expanding or clarifying the definition of "export subsidy" within the bounds set by prior law antecedents dealing with "bounty or grant"? (2) Which portions of the Annex and the OECD Arrangement are viewed by the Department as inconsistent with the term "bounty or grant" and therefore not applicable under the 1979 Act? (3) Are the definitions of "export subsidy" and "domestic subsidy" mutually exclusive? May a given practice fall within both categories? (4) What is the distinction between an "export subsidy" and a "domestic subsidy"?

If the Department continues to disagree with the position that the export subsidy standards in the Annex and the OECD Arrangement control the definition of "export subsidy" in the 1979 Act, then it is incumbent upon it to propose that the United States appropriately inform its trading partners of the portions of its international agreements

---

<sup>114</sup> See 19 U.S.C. §2504(b) (Supp. V 1981):

Regulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action submitted to the Congress under [19 U.S.C. §2112] to implement each agreement approved under [19 U.S.C. §2503(a)] shall be issued within 1 year after the date of the entry into force of such agreement with respect to the United States.

The "Statement of Administrative Action" submitted by the President to Congress with the proposed text of the 1979 Act recited that "as experience is gained in administering the legislation additional regulations may be issued." 1979 HOUSE DOCUMENT, *supra* note 10, Part II, at 389. "This statement indicates where a certain administrative practice is intended, as well as summarizing the key provisions of the statute and regulations that will be proposed under it." *Id.* In regard to the definition of "subsidy," the Statement made no reference to regulations but did contain the following with respect to administrative practice:

The list in Annex A is not exhaustive and may be supplemented from time to time. The nature and effect of a particular subsidy, rather than its nominal title or purpose, shall be determinative with respect to the question of whether it will be regarded as 'export subsidy' [as distinguished from 'domestic subsidy'].

The Authority will develop guidelines with regard to the calculation of subsidies, building on existing case law consistent with the new legislation.

*Id.* at 432-33.

To date, the Department has issued regulations, called Administrative and Interpretive Guidelines for Determination and Calculation of Subsidies, governing the rebate or remission of indirect taxes, certain lump sum export payments as an estimate of indirect taxes paid, drawback of duties, and the rebate of income and social security taxes. 19 C.F.R. ch. III, Annex I (1982).

that it believes are unenforceable under existing United States law. As part of that process the United States should urge revision of its international obligations to conform to the 1979 Act or, failing that, the President should submit to the Congress enabling legislation to conform United States domestic law to its international obligations.<sup>115</sup>

No doubt it is tempting for an administrative agency charged with enforcement of domestic law that carries out international obligations, to seek to conform its interpretation of that law to the negotiating position of the United States. The temptation is particularly powerful when the United States' trading partners themselves seem to be disregarding their reciprocal obligations. In the long run, however, this type of *sub rosa* rejection of solemn international obligations cannot possibly be in the best interests of the United States. If reprisals are called for, then let them be taken openly and in accordance with law. No matter how sympathetic one may be with the goals the Department has been seeking to achieve, or how understanding one is of the inevitable difficulties and frustration the Department has experienced in negotiations with trading partners, the misapplication of the United States' own law cannot be the answer.

---

<sup>115</sup> This is the very mechanism contemplated by the 1979 Act for future changes in our domestic law to conform to international trade agreements entered into by the United States. 19 U.S.C. §2504(c) (Supp. V 1981).