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ARTICLES

Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*

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I. Introduction

U.S.-Mexico trade relations are changing at a rapid pace. In 1985, the United States and Mexico entered into a bilateral trade agreement that seeks to eliminate the subsidization of manufactured products.[1] One year later, Mexico became a signatory to the General Agreement on Tariffs and Trade (the "GATT"),[2] the multilateral accord that governs world trade in manufactured and agricultural products. In 1987, the two countries entered into a framework agreement that establishes a consultative mechanism designed to resolve bilateral trade disputes involving such issues as intellectual property protection, direct foreign investment, and trade in goods and services.[3]

In May of 1990, President Carlos Salinas de Gortari received legislative authority from the Mexican Congress to negotiate a free trade agreement with the United States.[4] In June of that year, President Salinas and President Bush issued a joint statement to undertake bilateral consultations to discuss the feasibility of entering into such an agreement.[5] Because the United States is Mexico's largest trading partner,[6] and because Mexico is the third largest trading partner of the United States,[7] a bilateral free trade agreement has the potential to generate handsome trade gains for both countries.

As a result of this trade potential, both Mexico and the United States are poised to enter into free trade negotiations. By a letter dated August 21, 1990, President Salinas formally proposed the initiation of

1 *Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties* (April 23, 1985) United States-Mexico; *see also Determination Regarding The Application of Certain International Agreements*, 50 Fed. Reg. 18,335, 18,336 (1985).

2 *See* General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter "GATT"]. The United States became a signatory to the GATT in 1947. 61 Stat. A 3, T.I.A.S. No. 1700, 55 U.N.T.S. 182. Mexico became a signatory to the GATT on August 24, 1986. *Cementos Guadalajara, S.A. v. United States*, 686 F. Supp. 335, 340 (Ct.Int'l Trade 1988). Today, the GATT comprises 100 signatory countries. GATT, GATT Information and Media Relations Division (1990). For a further discussion of the GATT, *see* Giesse & Lewin, *The Multifiber Arrangement: "Temporary" Protection Run Amuck*, 19 Law and Pol'y. Int'l. Bus. n.1 (1987) ("*'Temporary' Protection Run Amuck*").

3 *Understanding Between the Government of the United States of America and the Government of the United Mexican States Concerning A Framework of Principles and Procedures For Consultations Regarding Trade And Investment Relations*, (Nov. 6, 1987), United States-Mexico, 27 I.L.M. 439 (1988). For a comprehensive discussion of the U.S.-Mexico framework agreement, *see* Smith, *The United States-Mexico Framework Agreement: Implications for Bilateral Trade*, Vol. 20 No. 4, LAW AND POL'Y. INT'L. BUS., 655-681 (1989).

4 N.Y. Times, June 3, 1990, at sec. 3, p.1, col. 5.

5 Int'l. Trade Rep. (BNA) 1,355 (Sept. 12, 1990).

6 Office of Mexico and the Caribbean Basin, U.S. Dep't. of Commerce, OBR 90-09, Marketing in Mexico, 3 (August 1990).

7 *Id.*

such negotiations to President Bush.[8] By official correspondence dated September 25, 1990, President Bush notified the U.S. Senate Committee on Finance and the U.S. House Committee on Ways and Means of the Administration's intention to enter into free trade negotiations with Mexico.[9] The Bush Administration projects that the free trade talks will begin sometime during the spring of 1991.

Although these high profile developments have dominated U.S.-Mexico trade relations recently, other less prominent, but nonetheless critical, trade issues also continue to have a significant impact upon U.S.-Mexico bilateral trade. In particular, many Mexican exporters doing business in the United States have found themselves involved in a growing number of U.S. antidumping actions. Mexican exporters of steel wire rope, porcelain-on-steel cooking ware, steel pails, fresh cut flowers, and gray portland cement have been subject to complex U.S. antidumping proceedings during the past year.[10]

Furthermore, Mexican exporters, until recently, were involved in a relatively large number of U.S. countervailing duty actions. Although the number of these actions has decreased during the past few years, many Mexican exporters still are subject to outstanding U.S. countervailing duty orders. The existence of these orders creates uncertainty for Mexican exporters unfamiliar with U.S. countervailing duty procedures and plays a key role in the business decisions made by these individuals.

As U.S. and Mexican negotiators attempt to unite two radically dis-

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8 136 Cong. Rec. S14,378 (daily ed. Oct. 2, 1990).

9 *Id.*

10 To date, the United States has initiated fifteen antidumping duty investigations covering Mexican imports. *See e.g., Bulk, Crude, Undried Solar Salt From Mexico, Determination of Sales at Not Less Than Fair Value*, 31 Fed. Reg. 10,898 (Aug. 16, 1966); *Elemental Sulphur From Mexico*, 37 Fed. Reg. 12,727 (1972); *Picker Sticks From Mexico, Antidumping*, 39 Fed. Reg. 20,370 (1974); *Portland Hydraulic Cement, Other Than White Non-Staining Cement From Mexico, Antidumping*, 40 Fed. Reg. 54,207 (1975); *Multi-Metal Lithographic Plates From Mexico, Antidumping*, 41 Fed. Reg. 17,581 (April 27, 1976); *Certain Fresh Winter Vegetables From Mexico; Antidumping: Final Determination of Sales at Not Less Than Fair Value*, 45 Fed. Reg. 20,512 (1980); *Carbon Steel Wire Rod From Mexico, Initiation of Antidumping Duty Investigation*, 48 Fed. Reg. 57,579 (1983); *Oil Country Tubular Goods From Mexico: Initiation of Antidumping Investigation*, 49 Fed. Reg. 28,086 (1984); *Initiation of Antidumping Duty Investigation; Welded Steel Wire Fabric For Concrete Reinforcement From Mexico*, 50 Fed. Reg. 51,443 (1985); *Final Determination of Sales at Less Than Fair Value: Porcelain-On-Steel Cooking Ware From Mexico*, 51 Fed. Reg. 36,435 (1986); *Portland Hydraulic Cement (Including Cement Clinker) From Mexico; Initiation of Antidumping Duty Investigation*, 51 Fed. Reg. 42,607 (1986); *Final Determination of Sales at Less Than Fair Value Certain; Fresh Cut Flowers From Mexico*, 52 Fed. Reg. 6,361 (1987); *Certain Steel Pails From Mexico; Final Determination of Sales at Less Than Fair Value*, 55 Fed. Reg. 12,245 (1990); *Final Determination of Sales at Less Than Fair Value: Gray Portland Cement and Clinker From Mexico*, 55 Fed. Reg. 29,244 (1990); *Initiation of Antidumping Duty Investigation; Certain Steel Wire Rope From Mexico*, 55 Fed. Reg. 50,732 (1990).

similar economies during the forthcoming free trade talks, there may exist the tendency to neglect the less prominent issues. The free trade negotiators must be especially alert in the area of dumping and subsidies. Just as similar issues — agricultural export subsidies, in particular — may determine the ultimate fate of the Uruguay Round of multilateral GATT negotiations, so certain dumping and subsidy issues may determine the ultimate success or failure of prospective U.S.-Mexico free trade talks.

For these reasons, this Article discusses the current administration of the U.S. antidumping and countervailing duty laws in proceedings involving products from Mexico. Specifically, this Article begins by providing an overview of the basic statutory and regulatory provisions of the U.S. antidumping duty law, emphasizing the application of certain provisions in cases involving imports from Mexico. The Article then focuses its discussion upon recent developments in the U.S. countervailing duty law that have had a unique effect upon Mexican exporters. The Article continues by highlighting the antidumping and countervailing duty provisions of the recently concluded U.S.-Canada Free Trade Agreement (the "FTA" or "Agreement"). Finally, this Article concludes by offering U.S. and Mexico free trade negotiators a few suggestions to ensure the successful completion of the forthcoming free trade talks.

II. Basic Structure of U.S. Antidumping Actions

A. Introduction

This section of the Article explains the concept of dumping and provides an overview of the U.S. antidumping law.[11] Specifically, this section discusses the basic statutory and regulatory provisions of the U.S. antidumping law, describes the regulatory procedures that govern the administration of U.S. antidumping proceedings,[12] and highlights certain practical considerations unique to these proceedings.

Dumping generally refers to a form of international price discrimination whereby a foreign exporter charges a higher price for goods or services sold in its home market than it charges for comparable goods or

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[11] This Article discusses those statutory and regulatory procedures and requirements that govern the majority of U.S. antidumping duty proceedings. Those procedures and requirements that are applicable in exceptional cases (*e.g.*, material retardation of an infant U.S. industry) are beyond the scope of this Article.

[12] A U.S. antidumping proceeding usually consists of two phases: (1) the initial investigation; and (2) the subsequent administrative review. *See* 19 C.F.R. § 353.2(l),(q) (1989); *Cementos Anahuac Del Golfo, S.A. v. United States*, 689 F.Supp. 1191, 1210-1211 (Ct. Int'l Trade 1988); *aff'd*, *Cementos Guadalajara, S.A. v. United States*, 879 F.2d 847 (Fed. Cir. 1989).

services sold in an export market.[13] The classical theory of dumping provides that price discrimination practices usually occur when tariff and nontariff trade barriers in the foreign exporter's home market create a protective barrier that enables an exporter with market power in that market to earn excessive or monopolistic profits in the home market.[14] Because the exporter reaps the benefits of such profits, it is able to charge a relatively lower price for comparable goods or services sold in an export market, such as the U.S. market.[15] The foreign exporter essentially leverages the lower priced export sales with higher priced home-market sales. Article VI of the GATT[16] and the GATT Antidumping Code[17] authorize signatory countries to impose antidumping duties, in addition to customs duties, upon dumped manufactured and agricultural products that cause or threaten material injury to, or materially retard the establishment of, a domestic industry.[18] Neither the GATT nor the GATT Antidumping Code currently authorizes signatory countries to impose antidumping duties upon services.[19] Title VII, section 731, of the Tariff Act of 1930, as amended[20] (the "Tariff Act"), is the U.S. domestic an-

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13 J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 3-9 (1923).

14 Botluck, *An Economic Analysis of Dumping*, 21 J. World Trade L. 45, 47 (1987). The classical theory of dumping provides that a rational firm will dump its merchandise into an export market in the long run only if the following three conditions exist: (1) separate national markets, along with protective trade barriers, prevent the importation and reimportation of lower priced imports into the exporter's home market; (2) the foreign exporter has market power in its home market; and (3) the exporter faces a more elastic demand curve in an export market, such as the U.S. market, than it faces in its home market. *Id.* If all three of these conditions do not exist, then a rational firm in the long run will charge the same price in an export market and in the home market. *Id.* Even if all three of these conditions do not exist, however, a rational firm still may decide to engage in dumping practices in the short run. For example, a new entrant may decide to dump its merchandise in an export market to build goodwill in order to increase its share of that market. Knoll, Michael, *An Economic Approach To The Determination Of Injury Under United States Antidumping And Countervailing Duty Law*, 22 INTERNATIONAL LAW AND POLITICS, 39, 43 (1989) [hereinafter "*An Economic Approach*"].

15 *Id.*

16 GATT, *supra* note 2, art. VI.

17 Agreement on Implementation of Article VI of the GATT, MTN/NTM/W/232, *reprinted in* House Doc. No. 96-153, pt. I at 311 [hereinafter "GATT Antidumping Code"]. The United States became a signatory to the GATT Antidumping Code in 1979. Trade Agreements Act of 1979, Pub. L. 96-39, Title I, § 101, 93 Stat. 154; Committee on Ways And Means, U.S. House of Representatives: Overview and Compilation of U.S. Trade Statutes, 56 WMCP: 101-14, 101st Cong., 1st Sess. (1989) [hereinafter "*Overview of U.S. Trade Statutes*"]. Mexico became a signatory to the GATT Antidumping Code in 1982.

18 *See supra* notes 16 and 17.

19 *See id.* Whether the ambit of the GATT should be expanded to cover trade in services is currently one of the issues subject to negotiation in the Uruguay Round of multilateral trade negotiations. Wash. Post, Nov. 4, 1990, at H1, H6.

20 19 U.S.C. §§ 1673-1677k (1990). The Trade Agreements Act of 1979 repealed and superseded the Antidumping Act of 1921, which governed the administration of U.S. antidumping actions

tidumping law that implements U.S. international obligations arising under the GATT and the GATT Antidumping Code.[21]

B. Basic Statutory and Regulatory Provisions Governing U.S. Antidumping Duty Actions

Section 731 of the Tariff Act authorizes the United States to impose antidumping duties upon manufactured and agricultural products when two conditions exist. First, the U.S. Department of Commerce ("Commerce"), through the International Trade Administration (the "ITA"), must determine "that a class or kind[22] of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value."[23]

Selling at less than fair value generally refers to the practice of charging a higher price for merchandise sold in the foreign exporter's home market or a market other than the U.S. market (*i.e.*, third-country market) than the price charged for comparable merchandise sold in the U.S. market.[24] Commerce generally determines whether a foreign exporter is selling merchandise at less than fair value by comparing the price of the merchandise sold in the U.S. market, adjusted for differences in production costs or selling expenses (*i.e.*, the U.S. price), with the adjusted price of identical or similar merchandise sold in the exporter's home market or a third-country market (*i.e.*, foreign market value).[25]

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from 1921 until 1979. 42 Stat. 11, 19 U.S.C. § 160 (repealed); Overview of U.S. Trade Statutes, *supra* note 17, at 55-56. The 1979 Trade Act also added new Title VII to the Tariff Act of 1930 to govern U.S. antidumping duty actions. *Id.* Soon after enacting the 1979 trade legislation, Congress transferred the administrative authority to make antidumping determinations from the U.S. Department of the Treasury to the U.S. Department of Commerce. Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,275, eff. Jan 2, 1980, *reprinted in* 19 U.S.C. § 2171 (1988); 93 Stat. 1381 (1979).

21 *See supra* notes 16 and 17.

22 The phrase "class or kind of foreign merchandise" refers to the merchandise described in the petition that the foreign manufacturer exports to, and the U.S. importer imports into, the United States. *See* 19 C.F.R. § 353.2(m) (1989).

23 19 U.S.C. § 1673(1) (1990).

24 *See generally* 19 U.S.C. § 1673 *et seq.* (1990).

25 19 C.F.R. § 353.2(f)(1) (1989). Contrary to a common misperception, only less-than-fair-value sales — not below-cost sales in the U.S. market — are actionable pursuant to Title VII of the Tariff Act. *Compare supra* notes 24 and 25 and accompanying text (only less-than-fair-value sales are actionable pursuant to the U.S. antidumping law) *with e.g.*, Knoll, *An Economic Approach, supra* note 14 at 44 ("Title VII covers two kinds of dumping, *cost dumping* and price dumping")(emphasis added); Lindsey, Brink, *Anti-Dumping's Dirty Secrets . . .*, The Wall Street Journal (Oct. 15, 1990)("Dumping is commonly characterized as an international form of predatory pricing"). If a foreign exporter is selling its merchandise in the U.S. market below its costs of production, then such predatory pricing behavior is subject to a U.S. antitrust statute, the Antidumping Act of 1916. 15 U.S.C. § 72 (1988). This antitrust statute provides for criminal and civil penalties where a foreign exporter is selling at prices below actual market value in the U.S. market. *Id.* To obtain legal relief pursuant to this statute, the U.S. domestic manufacturer must prove that the foreign exporter in-

The second condition necessary for the imposition of antidumping duties is that the U.S. International Trade Commission (the "ITC" or "Commission"), an independent federal agency, must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise."[26] The ITC makes this determination by analyzing a variety of economic factors discussed in a subsequent section of this Article.

If Commerce determines that a foreign exporter or manufacturer is selling its merchandise at less than fair value in the U.S. market, and if the ITC determines that such sales are a cause of, or threaten to cause, material injury to the relevant U.S. domestic industry, Commerce then will publish in the *Federal Register*[27] an antidumping duty order[28] covering the unfairly traded merchandise (the "subject merchandise").[29] Pur-

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tended to destroy or injure the relevant U.S. domestic industry by charging a predatory price in the U.S. market. *Id.* To date, no U.S. plaintiff has mounted a successful case pursuant to the Antidumping Act of 1916. The principal reason for this result is that it is extremely difficult to prove intent. *Id.*

26 19 U.S.C. § 1673(2) (1990).

27 *See* 44 U.S.C §§ 1501-1511 (1988). The *Federal Register* is the official publication of the U.S. Government in which the United States announces certain legal determinations. The equivalent publication in Mexico is *El Diario Oficial.*

28 19 U.S.C. § 1673e(a) (1990); 19 C.F.R. § 353.21 (1989). When more than one antidumping duty order is in effect covering the same class or kind of merchandise, section 732 of the Tariff Act authorizes Commerce, when certain other statutory conditions also exist, to monitor imports of that class or kind of merchandise from an additional supplier country or countries. *See* 19 U.S.C. § 1673a(a)(2)(A) (1990). If, after monitoring such imports for a period not to exceed one year, Commerce concludes that there is "an extraordinary pattern of persistent injurious dumping from one or more additional supplier countries" and that "this extraordinary pattern is causing a serious commercial problem for the domestic industry," then Commerce will initiate a formal antidumping duty investigation concerning the imports from the additional supplier country or countries. *Id.* Commerce recently completed a monitoring program covering televisions from Mexico and Malaysia.

Furthermore, section 780 of the Tariff Act authorizes Commerce, upon the receipt of a petition filed by a U.S. domestic producer, to monitor an imported product (*i.e.*, "downstream product") which incorporates a component part subject to an outstanding antidumping or countervailing duty order. *See* 19 U.S.C. § 1677i (1990); 55 Fed. Reg. 9,047 (1990) (to be codified at 19 C.F.R. § 353.27) (interim final rule). The order must impose a duty rate of at least 15 percent on the component part. *Id.* The component part must be "routinely used as a major part, component, assembly, subassembly, or material in [the] downstream product." 19 U.S.C. § 1677i(d) (1990); *see also* 55 Fed. Reg. 9,048 (1990) (to be codified at 19 C.F.R. § 353.27(f)(2)(ii)) (interim final rule). If Commerce determines that there is a "reasonable likelihood that imports into the United States of the downstream product will increase as an indirect result of any diversion with respect to the component part," (19 U.S.C. § 1677i(a)(2)(A) (1990)) and if the ITC determines that imports of the downstream product have increased by a specified percentage, then Commerce may initiate a formal antidumping duty investigation concerning the imported downstream product (19 U.S.C. § 1677i(b)(1) (1990); 55 Fed. Reg. 9,048 (1990) (to be codified at 19 C.F.R. § 353.27(e)) (interim final rule)).

29 19 U.S.C. § 1673e(a) (1990). The U.S. antidumping law also authorizes Commerce to include

suant to the antidumping duty order, Commerce will direct the U.S. Customs Service ("Customs") to impose antidumping duties equal to the amount by which the foreign market value of the subject merchandise exceeds its U.S. price (the "dumping margin").[30] The U.S. antidumping law requires the U.S. importer, not the foreign manufacturer or exporter, to pay these antidumping duties to Customs.[31]

C. Basis of Comparison: Foreign Market Value and U.S Price

1. *Calculation of Foreign Market Value*

Foreign market value, a term of art, is the price at which a foreign exporter sells, or offers to sell, the subject merchandise in markets outside the United States.[32] Commerce selects, in order of preference, one of three methods[33] to calculate foreign market value: (1) home-market sales;[34] (2) third-country sales;[35] or (3) constructed value.[36]

Regardless of which method Commerce ultimately selects to calculate foreign market value, Commerce generally calculates a weighted-average foreign market value for the entire period under investigation.[37] The investigative period usually covers six months.[38] The exception to this general rule applies when the home-market economy is experiencing hyperinflation.[39] In such a situation, Commerce usually calculates a

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other articles of commerce, in addition to the subject merchandise, within the scope of the antidumping duty order to prevent or address attempts by foreign exporters to circumvent the order. *See* 19 U.S.C. § 1677j (1990). Specifically, section 781 of the Tariff Act authorizes Commerce to include within the scope of an antidumping or countervailing duty order the following additional articles of commerce when certain other statutory conditions exist: (1) parts and components in cases involving U.S. assembly operations; (2) third-country merchandise in cases involving third-country assembly operations; (3) merchandise altered in minor respects before importation into the United States; and (4) later-developed merchandise. *See id.*

30 19 U.S.C. § 1673e (1990); 19 C.F.R. § 353.2(f)(1) (1989).

31 *Id.*; 19 C.F.R. §§ 353.21; 353.26 (1989).

32 19 U.S.C. § 1677b (1990).

33 *Id.*; 19 C.F.R. §§ 353.46 *et seq.* (1989). When a multinational corporation manufactures the subject merchandise in more than one foreign country, a special rule to calculate foreign market value may be applicable. *See* 19 U.S.C. § 1677b(d) (1990); 19 C.F.R. § 353.53 (1989).

34 19 U.S.C. § 1677b(a)(1)(A) (1990).

35 19 U.S.C. § 1677b(a)(1)(B) (1990).

36 19 U.S.C. § 1677b(a)(2), (e) (1990).

37 *See Gray Portland Cement and Clinker From Mexico*, 55 Fed. Reg. at 29,244 (final determination). Section 777A of the Tariff Act also authorizes Commerce to "use averaging or generally recognized sampling techniques" to calculate foreign market value, as well as U.S. price, "whenever a significant volume of sales is involved or a significant number of adjustments to prices is required . . . ." 19 U.S.C. § 1677f-1 (1990); 19 C.F.R. § 353.59 (1989).

38 This period includes the month in which the petitioner files the petition and the five preceding months. *See* 19 C.F.R. § 353.42(b) (1989).

39 *Final Determination of Sales at Less Than Fair Value; Certain Fresh Cut Flowers From Mexico*, 52 Fed. Reg. 6,361 (1987). Hyperinflation exists when the monthly inflation rate in the home-

monthly weighted-average foreign market value.[40] In the antidumping duty investigation of *Certain Fresh Cut Flowers From Mexico*, for example, Commerce calculated a monthly weighted-average foreign market value, because the Mexican home-market economy was experiencing hyperinflation during the relevant period.[41]

If a foreign exporter sells sufficient quantities of the subject merchandise in its home market, then Commerce uses home-market sales to calculate foreign market value.[42] Commerce considers the quantity of home-market sales to be sufficient when such sales constitute five percent or more by volume of identical or similar merchandise sold in third-country markets.[43]

If, however, home-market sales do not exist, or if such sales are less than five percent of third-country sales, then Commerce uses either third-country sales of identical or similar merchandise or the constructed value of the imported merchandise to calculate foreign market value.[44] The Commerce regulations establish a preference for third-country sales, rather than constructed value, to calculate foreign market value.[45]

If third-country sales do not exist, or if Commerce determines that the volume of such sales is so small as to form an inadequate basis for comparison with U.S. sales, then Commerce uses constructed value to calculate foreign market value.[46] The constructed value of the subject merchandise, as imported into the United States, consists of the following cost components: (1) the cost of materials and fabrication (*e.g.*, labor and factory overhead);[47] (2) general expenses (*e.g.*, selling, general, and

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market economy is five percent or higher for a sustained period. *See Administrative Review of Antidumping Order; Certain Iron Construction Castings from Brazil*, 55 Fed. Reg. 26,238, 26,240 (1990).

40 52 Fed. Reg. at 6,361. When hyperinflation exists, Commerce may make other adjustments to price, *id.*, in addition to calculating a monthly weighted-average foreign market value during the investigative stage of the antidumping proceeding. *Final Determination of Sales At Not Less Than Fair Value; Certain Fresh Cut Flowers From Peru*, 52 Fed. Reg. 7,000, 7002 (1987). Commerce also uses under such circumstances replacement costs incurred during the month of sale, rather than historical costs, to calculate constructed value or the cost of production. *See Amended Final Determination of Sales at Less Than Fair Value and Amended Antidumping Duty Order; Tubeless Steel Disc Wheels from Brazil*, 53 Fed. Reg. 34,566 (1988); *see infra* note 46 and accompanying text.

41 52 Fed. Reg. at 6,363 (final determination).

42 19 C.F.R. § 353.46 (1989).

43 *See* 19 C.F.R. § 353.48(a) (1989).

44 *Id.*

45 19 C.F.R. § 353.48(b) (1989).

46 19 U.S.C. § 1677b(a)(2),(e) (1990); 19 C.F.R. § 353.50 (1989).

47 Factory overhead consists of indirect materials, indirect supplies, depreciation, utilities, repairs, maintenance, heat, light, power, plant and equipment, and the like. *See* Brock and Palmer, COST ACCOUNTING: PRINCIPLES AND APPLICATIONS 1, 5-6, (4th Ed. 1984).

administrative expenses),[48] which cannot be less than 10 percent of material and fabrication costs;[49] and (3) profit, which cannot be less than 8 percent of the sum of the material/fabrication costs plus general expenses.[50] Constructed value also includes packing costs incurred to export the product to the United States.[51]

As discussed above, Commerce typically uses constructed value to calculate foreign market value when both home-market sales and third-country sales do not exist, or when the volume of such sales is so small as to form an inadequate basis for comparison with U.S. sales. Commerce also uses constructed value when the agency finds substantial sales made below the cost of production in either the home-market or the third-country market, and the remaining above-cost sales by themselves constitute an insufficient basis upon which to calculate foreign market value.[52] Similar to constructed value, the cost of production of the merchandise

[48] General expenses (*e.g.*, selling, general, and administrative expenses) consist of the following items: (1) direct selling expenses (*e.g.*, credit, warranty, and advertising expenses); (2) indirect selling expenses (*e.g.*, telephone, rapidfax, stationary, postal charges, and salesmen's salaries); and (3) general and administrative expenses (*e.g.*, salaries of nonsales personnel, rent, heat, and light). Coursey and Binder, *Hypothetical Calculations Under The United States Antidumping Duty Law: Foreign Market Value, United States Price, and Weighted-Average Dumping Margins*, 4 AM. U. J. INT'L & POL'Y, 537, 545-546 (1989) [hereinafter "*Hypothetical Calculations*"].

[49] The U.S. antidumping duty law provides that when Commerce uses constructed value to calculate foreign market value, the amount allocated for "general expenses shall not be less than 10 percent" of the cost of manufacturing the product under investigation. 19 U.S.C. § 1677b(e)(1)(B)(i) (1990); 19 C.F.R. § 353.50(a)(2) (1989).

[50] The U.S. antidumping duty law provides that when Commerce uses constructed value to calculate foreign market value, the amount allocated for "profit shall not be less than 8 percent of the sum of . . . [the] general expenses and cost [of manufacturing]" the product under investigation. 19 U.S.C. § 1677b(e)(1)(B)(ii) (1990); 19 C.F.R. § 353.50(a)(2) (1989).

[51] 19 U.S.C. § 1677b(e)(1)(C) (1988). Commerce also adjusts the constructed value of the imported merchandise, when appropriate, for direct and indirect selling expenses. *Hypothetical Calculations*, at 546-548.

[52] *See Porcelain-on-Steel Cooking Ware From Mexico; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg. 21,061 (1990). Section 773(b) of the Tariff Act authorizes Commerce to institute a cost-of-production investigation only if, as a result of an allegation made by the petitioner, the agency has "reasonable grounds to believe or suspect" that a specific foreign company is selling a specific product in the home market or third-country market below its cost of production. 19 U.S.C. § 1677b(b) (1990); 19 C.F.R. § 353.51 (1989); *Al Tech Specialty Steel Corp. v. United States*, 575 F. Supp. 1277 (Ct. Int'l Trade 1983) (specific and objective evidence needed to trigger cost-of-production investigation). If, after conducting a cost-of-production investigation, Commerce determines that fewer than 10 percent of home-market or third-country sales are below the cost of production (50 percent in the case of highly perishable agricultural products), then Commerce will not disregard any of the below-cost sales for purposes of calculating foreign market value. *Timken Co. v. United States*, 673 F. Supp. 495, 513 (Ct. Int'l Trade 1987). If Commerce determines that more than 10 percent, but fewer than 90 percent, of the home-market or third-country sales are below the cost of production, then Commerce will disregard all such sales and will use the remaining above-cost sales for purposes of calculating foreign market value. *Id.* If the below-cost sales exceed 90 percent of the total home-market or third-country sales, then Commerce usually will use con-

sold in the home market or third-country market includes material/ fabrication costs and general expenses (*e.g.*, selling, general, and administrative expenses).[53] In contrast to constructed value, the cost of production of the subject merchandise does not include profit.[54]

2. *Calculation of U.S. Price*

Commerce uses one of two methods on a sale-by-sale basis to calculate the price of the subject merchandise sold in the United States: (1) purchase price; or (2) exporter's sales price.[55] The term "purchase price" refers to the U.S. sales price at which the imported merchandise "is purchased, or agreed to be purchased, prior to the date of importation" from the foreign exporter.[56] Commerce selects purchase price to calculate U.S. price when the date of the U.S. sale to the first unrelated U.S. customer occurs before the entry of the merchandise into the customs territory of the United States.[57]

The term "exporter's sales price" refers to the U.S. sales price at which the imported merchandise "is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter."[58] Commerce uses the exporter's sales price to

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structed value to calculate foreign market value. *Id.* This so-called "ten-ninety percent" test is currently subject to a judicial challenge. *Id.*

53 19 C.F.R. § 353.51(c) (1989). A foreign exporter's cost of production consists of the cost of materials and fabrication (*e.g.*, labor and factory overhead) incurred by the subject merchandise sold in the home market or third-country market. *Id.* The cost of production also includes general expenses (*e.g.*, general, selling, and administrative expenses), in addition to packing costs, incurred by that merchandise. *Id.* In contrast to the constructed value, the cost of production of the subject merchandise does not include profit. *Compare* 19 U.S.C. § 1677b(e)(1)(B)(ii) (1990) *with* 19 C.F.R. § 353.51(c) (1990). Also, the cost of production includes the cost of packing the subject merchandise for delivery to the home market or third-country market, rather than to the U.S. market. 19 C.F.R. § 353.51(c) (1989). Finally, the cost of production includes general expenses that are based upon the foreign exporter's actual experience, rather than upon a minimum statutory requirement. *Compare* 19 U.S.C. § 1677b(e)(1)(B)(i) (1990) *with* 19 C.F.R. § 19 C.F.R. § 353.51(c) (1989).

54 *See* 19 C.F.R. § 353.51(c) (1989); *supra* note 53.

55 19 U.S.C. § 1677a (1990). Commerce generally uses the adjusted price of each U.S. sale to calculate the U.S. price of the product under investigation. 55 Fed. Reg. at 21,061 (final results of first antidumping duty administrative review). The exception to the general rule applies when the product or commodity under investigation is perishable, and the value of the product or commodity changes rapidly. Commerce calculates a weighted-average U.S. price under such circumstances. *See Certain Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 55 Fed. Reg 12,696 (1990).

56 19 U.S.C. § 1677a(b) (1990); 19 C.F.R. § 353.41(b) (1989).

57 19 U.S.C. § 1677a(b) (1990); 19 C.F.R. § 353.41(b) (1989); *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. 21,061 (1990) (final results of first antidumping duty administrative review). A lease of merchandise can constitute a sale pursuant to section 771(19) of the Tariff Act under certain circumstances. *See* 19 U.S.C. § 1677(19) (1990).

58 19 U.S.C. § 1677a(c) (1990); 19 C.F.R. § 353.41(c) (1989).

calculate U.S. price when the date of the U.S. sale to the first unrelated U.S. customer occurs after the entry of the subject merchandise into the United States.[59]

An exporter's sales price situation typically arises when a foreign exporter ships the subject merchandise to its subsidiary or related-party selling agent located in the United States.[60] The U.S. subsidiary, in turn, first warehouses and then sells the merchandise to an unrelated U.S. customer. Because the price (*i.e.*, transfer price) charged by the foreign exporter to its related-party U.S. subsidiary usually is not an arm's length price — that is, a price set in accordance with free market conditions — Commerce does not use transfer prices to calculate the U.S. price of the subject merchandise.[61] Instead, Commerce uses the arm's length price at which the related-party U.S. subsidiary sells the subject merchandise to the first unrelated U.S. customer to calculate U.S. price and dumping margins.[62]

3. *Adjustments Made to Foreign Market Value and to U.S. Price*

Because the home-market or the third-country merchandise usually incurs production costs and selling expenses different from those of the foreign merchandise imported into the United States, Commerce does not use final selling prices or end-user prices to compare foreign market value with U.S. price. These different costs and expenses necessarily would render such a price comparison asymmetrical and, as a consequence, would distort dumping margins.

Instead, the U.S. antidumping law requires Commerce to make a symmetrical comparison between the merchandise sold in the foreign market and that sold in the U.S. market. To achieve such a comparison, Commerce compares prices at a common point in the distribution sys-

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59 *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. 21,061 (1990) (first antidumping duty administrative review).

60 *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. 21,061 (1990) (first antidumping duty administrative review). Section 771(13) of the Tariff Act considers the following U.S. entities to be related to a foreign exporter for purposes of calculating U.S. price: (1) a U.S. agent or principal of the foreign exporter; (2) a U.S. company that "owns or controls, directly or indirectly, through stock ownership or control or otherwise, any interest [*i.e.*, five percent as interpreted by Commerce] in the business of the [foreign] exporter"; (3) a U.S. company controlled by the foreign exporter through stock ownership of at least five percent (*see Titanium Sponge From Japan: Final Determination of Sales at Less Than Fair Value*, 49 Fed. Reg. 38,687, 38,691 (1984)); and (4) a U.S. company controlled by a foreign parent company that "own[s] or control[s] in the aggregate 20 percent or more of the voting power or control in the business carried on by" both the U.S. company and the foreign exporter. 19 U.S.C. § 1677(13) (1990).

61 *See generally* 19 U.S.C. § 1677a (1990); 19 C.F.R. § 353.41(c),(e) (1989); *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. 21,061 (1990).

62 *See id.*

tem. This common point occurs when the merchandise destined for sale in the home market, third-country market, or U.S. market is at the factory gate (*i.e.*, ex-factory prices).[63]

To make this ex-factory price comparison, Commerce must make a variety of adjustments to foreign market value and to U.S. price. This adjustment process is probably the most critical aspect of the Commerce antidumping investigation. Commerce typically adjusts the foreign market value and the U.S. price of the product under investigation for differences in delivery terms, physical characteristics, quantities sold, and "levels of trade."[64] Commerce also makes adjustments for other circumstances of sale that affect price comparability.[65]

For example, Commerce deducts transportation expenses[66] from both the foreign market value[67] and the U.S. price[68] of the subject merchandise. Similarly, if the merchandise sold in the foreign market and the U.S. market have different physical characteristics, Commerce makes an adjustment to foreign market value to take into account this difference as well.[69] This adjustment is limited to the difference between the material and labor costs incurred by the merchandise sold in the foreign market and that sold in the U.S. market.[70]

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63 *See id*; U.S. Department of Commerce, Study of Antidumping Methodology and Recommendation For Statutory Change, 6 (Nov. 1985); *Hypothetical Calculations, supra* note 48, at 539.

64 19 C.F.R. §§ 353.55-.58 (1989).

65 19 U.S.C. § 1677b(a)(4)(B) (1990).

66 19 U.S.C. §§ 1677a(d)(2)(A), 1677b(a)(1) (1988). Transportation or delivery expenses (*i.e.*, movement charges) include freight, insurance, customs brokerage charges, and the like. *Id*; 19 C.F.R. § 353.41(b).

67 19 U.S.C. § 1677b(a)(1) (1990). Commerce also makes an addition to foreign market value for packing costs incurred as a result of delivering the corresponding U.S. merchandise to the U.S. market. *Id.*; 19 C.F.R. § 353.46(a)(1) (1989). Commerce similarly makes a deduction to foreign market value for home-market packing costs when such costs are included in the final selling price of the merchandise destined for the home market. *Id.*

68 19 U.S.C. § 1677a(d)(2)(A) (1990). Furthermore, Commerce makes an addition to U.S. price for the following items: (1) U.S. packing costs when not included in the final selling price of the U.S. merchandise; (2) import duties or taxes collected on the home-market merchandise, but rebated or not collected on the U.S. export merchandise; and (3) countervailing duties imposed on the same merchandise subject to the antidumping action. 19 U.S.C. § 1677a(d) (1990); 19 C.F.R. § 353.41(d) (1989). Commerce also makes a deduction to U.S. price for any export taxes collected in the country of exportation. *Id.*

69 19 C.F.R. § 353.57 (1989). Commerce attempts to compare merchandise sold in the U.S. market with identical merchandise sold in the home market or third-country market. *Id.* If the foreign exporter does not sell identical merchandise in both the U.S. market and the foreign market, then Commerce compares the U.S. merchandise with the foreign merchandise having the most similar physical characteristics to the U.S. merchandise. *Hypothetical Calculations, supra* note 48, at 542.

70 *See id.* To make a symmetrical comparison between similar, but not identical, merchandise, Commerce makes a difference-in-merchandise ("Difmer") adjustment. 19 U.S.C. § 1677b(a)(4)(c) (1990); 19 C.F.R. § 353.57 (1989). This adjustment is based upon the differences in the cost of

To make a symmetrical comparison between the home-market or third-country merchandise and the merchandise sold in the United states, Commerce also seeks, if feasible, to compare merchandise sold in similar quantities[71] and at the same "level of trade."[72] If, for example, a foreign exporter sells the subject merchandise in relatively large quantities to distributors in both markets, but sells such merchandise in relatively small quantities to retailers in those markets, then Commerce usually will compare distributor sales separately from retail sales.[73] Likewise, if the foreign exporter sells the subject merchandise at one "level of trade" in the foreign market (*e.g.*, distributor sales) and at a different "level of trade" in the U.S. market (*e.g.*, retail sales), then Commerce will attempt to make a price adjustment to recognize this difference as well.[74]

Finally, Commerce makes a variety of circumstance-of-sale adjustments for expenses incurred as a direct result of selling the subject merchandise in both the foreign market and the U.S. market.[75] Direct selling expenses are expenses that a foreign exporter incurs only if it makes a sale of the subject merchandise.[76] Examples include credit costs, com-

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materials, labor, and variable factory overhead incurred to manufacture the merchandise sold in the foreign market and the U.S. market. *Id.* If the merchandise sold in the U.S. market incurs greater manufacturing costs as a result of different physical characteristics than the merchandise sold in the home market or third-country market, then Commerce makes an addition to foreign market value. *Hypothetical Calculations, supra* note 48, at 542. If, however, the merchandise sold in the home market or third-country market incurs greater manufacturing costs, then Commerce makes a deduction to foreign market value. *Id.*

71 19 C.F.R. § 353.55 (1989).

72 19 C.F.R. § 353.58 (1989).

73 19 C.F.R. § 353.55(a) (1989). A foreign exporter often may sell the subject merchandise in relatively large quantities to distributors in both the foreign market and the U.S. market, but in relatively small quantities to retailers in the foreign market only. If the exporter can demonstrate that it charges its foreign distributor and retailer customers different prices because of different quantities sold to these customers, then Commerce usually will exclude the smaller quantity retail sales for purposes of calculating foreign market value. *See NAR, S.p.A. v. United States*, 707 F. Supp. 553 (Ct. Int'l Trade 1989); *Digital Readout Systems and Subassemblies Thereof From Japan; Final Determination of Sales at Less Than Fair Value*, 53 Fed. Reg. 47,844 (1988). Commerce will compare only foreign distributor sales with U.S. distributor sales under such circumstances to calculate a dumping margin. *Id.* If, however, the foreign exporter fails to establish that a correlation exists between prices charged and quantities sold to its foreign distributor and retailer customers, then Commerce will compare both foreign retail sales and foreign distributor sales with U.S. distributor sales to calculate a dumping margin. *See Porcelain-on-Steel Cooking Ware from Mexico*, 55 Fed. Reg. 21,061, 21,065 (1990) (first antidumping duty administrative review); *Certain Steel Pails from Mexico; Final Determination of Sales at Less Than Fair Value*, 55 Fed. Reg. 12,245, 12,246 (1990).

74 19 C.F.R. § 353.58 (1989). Because quantifying such an adjustment is an extremely difficult task, Commerce rarely makes a "level of trade" adjustment to foreign market value.

75 19 U.S.C. § 1677b(a)(4)(B) (1990); 19 C.F.R. § 353.56 (1989).

76 *See Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. 21,061, 21,062 (1990) (first antidumping duty administrative review). A revenue item or expense item must be "directly re-

missions, warranties, and technical services.[77] Commerce, however, does not grant such an adjustment for so-called "exchange-rate gains" that a foreign exporter may realize as a result of receiving payment for its U.S. sales well after the date of sale.[78] An exporter can recognize such gains when its foreign currency is depreciating relative to the U.S. dollar during the period under investigation.[79]

The reason that Commerce does not make a circumstance-of-sale adjustment for exchange-rate gains is that these gains typically are not "directly related" to the sale of the product under investigation.[80] In other words, these gains usually do not constitute one of the material terms of the sales agreement and are not contingent upon exportation.[81] In the antidumping duty investigation of *Porcelain-on-Steel Cooking Ware from Mexico,* Commerce denied the Mexican respondents' claimed adjustment for exchange-rate gains for similar reasoning.[82]

When U.S. price is based upon purchase price,[83] Commerce makes deductions from and additions to foreign market value to reflect any differences in direct selling expenses incurred by the subject merchandise in the foreign and U.S. markets.[84] Commerce generally does not make a circumstance-of-sale adjustment for indirect selling expenses under such circumstances.[85] Indirect selling expenses are those expenses (*e.g.*, salesmen's salaries, office rent) that a foreign exporter incurs regardless of whether it makes a sale of the subject merchandise.[86]

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lated" to the sale of the product under investigation to be entitled to a circumstance-of-sale adjustment. 19 C.F.R. § 353.56 (1989).

77 19 C.F.R. § 353.56(a)(2) (1989).

78 *See Certain Granite Products From Italy; Final Determination of Sales at Less Than Fair Value,* 53 Fed. Reg. 27,187 (1988); *Final Determination of Sales at Less Than Fair Value: Porcelain-on-Steel Cooking Ware From Mexico,* 51 Fed. Reg. 36,435 (1986); *Potassium Permanganate From Spain; Final Determination of Sales at Less Than Fair Value,* 48 Fed. Reg. 53,589 (1983).

79 *See id.*

80 *See id.*

81 *See id.*

82 51 Fed. Reg. at 36,435 (final determination).

83 When there are purchase price and exporter's sales price transactions involved in an antidumping proceeding, Commerce must calculate two foreign market values — one for comparison with purchase price sales and another for comparison with exporter's sales price sales. *Hypothetical Calculations, supra* note 48, at 540. When U.S. price is based upon purchase price, Commerce calculates foreign market value based upon the price at the time the producer or reseller sells the merchandise for exportation to the United States. 19 C.F.R. § 353.46(a)(2) (1989). When U.S. price is based upon the exporter's sales price, Commerce calculates foreign market value based upon the price at the time the related U.S. importer sells the merchandise in the United States to an unrelated U.S. customer. 19 C.F.R. § 353.46(a)(3) (1989).

84 *See* 19 U.S.C. § 1677b(a)(4)(B) (1990); 19 C.F.R. § 353.56(a)(1),(2) (1989).

85 *Hypothetical Calculations, supra* note 48, at 541, 546, 551.

86 *Id.*

When U.S. price is based upon the exporter's sales price, the relevant provisions of the Tariff Act require Commerce to make adjustments for both direct and indirect selling expenses.[87] Accordingly, Commerce deducts from the foreign market value of the subject merchandise direct and indirect selling expenses incurred by that merchandise in the foreign market.[88] Commerce also deducts from the U.S. price of the subject merchandise direct selling expenses (*e.g.*, commissions)[89] and indirect selling expenses[90] incurred by that merchandise in the U.S. market. Finally, Commerce deducts from the U.S. price any value added to the foreign merchandise after importation into the United States.[91]

To be entitled to any of these price adjustments, the foreign exporter must demonstrate to the satisfaction of Commerce that an adjustment is warranted in a particular case.[92] A foreign exporter has the opportunity to satisfy this burden of proof through the submission of written information and data to Commerce.[93] If the foreign exporter fails to satisfy this burden of proof, then Commerce will deny the claimed price adjustment.[94]

One of the final tasks that Commerce must undertake to achieve an ex-factory price comparison is to convert a foreign currency into U.S. dollars.[95] Because the foreign market value of the subject merchandise is originally denominated in a foreign currency, and because the U.S. price of that merchandise is denominated in U.S. dollars, Commerce must con-

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87 19 U.S.C. § 1677a(e)(1),(2) (1990); 19 U.S.C. § 1677b(a)(4)(B) (1990); 19 C.F.R. § 353.56(b)(2) (1989). In an exporter's sales price situation, Commerce deducts from the U.S. price of the subject merchandise the indirect selling expenses that the foreign exporter incurs in the U.S. market. *Hypothetical Calculations*, *supra* note 48, at 541. Commerce also deducts from the foreign market value of the subject merchandise the indirect selling expenses that the foreign exporter incurs in the home market or third-country market. 19 C.F.R. § 353.56(b)(2). This latter adjustment is commonly referred to as the "ESP offset". *Id.*; *Hypothetical Calculations*, *supra* note 48, at 541. This offset is limited or "capped" by the amount of the indirect selling expenses that the foreign exporter incurs in the United States. *Id.* This aspect of the adjustment is commonly referred to as the "ESP cap". *Id.*

88 19 U.S.C. § 1677b(a)(4)(B) (1990); 19 C.F.R. § 353.56(a)(1),(2) (1989).

89 19 U.S.C. § 1677a(e)(1) (1990).

90 19 U.S.C. § 1677a(e)(2) (1990). These expenses are typically those costs incurred by the U.S. subsidiary of a foreign exporter to maintain operations in the United States (*e.g.*, sales offices, warehouse facilities). A foreign exporter, however, can incur such expenses in the country of manufacture (*e.g.*, maintenance of a warehouse located in the country of manufacture that is used for storage of U.S. export merchandise). *Hypothetical Calculations*, *supra* note 48, at 541.

91 19 U.S.C. § 1677a(e)(3) (1990); 19 C.F.R. § 353.41(e)(3) (1989).

92 19 C.F.R. § 353.54 (1989).

93 19 C.F.R. § 353.31 (1989).

94 19 C.F.R. § 353.54 (1989).

95 *See* 19 C.F.R. § 353.60 (1989).

vert foreign market value into U.S. dollars to compare foreign prices with U.S. prices in U.S. dollars.

The Commerce regulations set forth a general rule for currency conversion that the agency typically applies in the majority of antidumping proceedings.[96] This rule requires Commerce to use the exchange rate in effect on the date of the corresponding U.S. sale, as certified by the Federal Reserve Bank of New York ("Federal Reserve") and published by the U.S. Department of the Treasury ("Treasury Department") in the U.S. *Customs Bulletin*.[97]

The exchange rate in effect on the date of the U.S. sale is usually the current *quarterly* exchange rate certified by the Federal Reserve and published by the Treasury Department.[98] If, however, a current quarterly rate does not exist, or if the current quarterly rate varies by at least five percent from the daily exchange rates, as certified by the Federal Reserve, then the general rule for currency conversion requires Commerce to use the certified *daily* exchange rates to convert foreign currency into U.S. dollars.[99]

Application of the general rule for currency conversion has not been a straightforward task for Commerce in antidumping duty proceedings involving products from Mexico. In the antidumping duty investigations involving *Porcelain-on-Steel Cooking Ware From Mexico* and *Certain Fresh Cut Flowers From Mexico*, for example, the Federal Reserve certified, and the Treasury Department published, two exchange rates for Mexico during the periods under investigation.[100] These rates were the official, or the government "controlled," exchange rate and the "free" exchange rate.[101]

Mexican law at the time of these antidumping proceedings required all Mexican exporters to use the official exchange rate, rather than the free exchange rate, to conduct all of their export transactions involving manufactured products.[102] Because the official exchange rate, rather than the free rate, reflected the actual exchange-rate experience of the Mexican exporters subject to the above antidumping proceedings, Commerce selected the official, or "controlled," exchange rate to convert

96 *See* 31 U.S.C. § 5151 (1988); 19 C.F.R. § 353.60(a)(1989).

97 *See id.*

98 *See id.*

99 *See id.*

100 *Porcelain-on-Steel Cooking Ware From Mexico*, 51 Fed. Reg. at 36,435 (final determination); *Certain Fresh Cut Flowers From Mexico*, 52 Fed. Reg. at 6,361 (final determination).

101 *Id.*

102 *Id.*

Mexican pesos into U.S. dollars.[103]

Sometime during 1986, the Federal Reserve discontinued certifying, and the Treasury Department discontinued publishing, exchange rates for Mexico.[104] Commerce has since used the exchange rates published by the International Monetary Fund ("IMF") as a reasonable surrogate for Federal Reserve exchange rates.[105] In the case of Mexico, Commerce generally considers the exchange rates published by the IMF to be the most accurate and reliable substitute for Federal Reserve exchange rates.[106]

The Commerce regulations also set forth a special rule for currency conversion.[107] This special rule authorizes Commerce to use an exchange rate other than that in effect on the date of the U.S. sale to convert foreign market value into U.S. dollars.[108] The purpose of the special rule is to avoid penalizing a foreign exporter when sudden exchange rate movements, beyond the exporter's control, artificially create dumping margins.[109]

Commerce considers invoking the special rule for currency conversion in only two situations: (1) when the foreign currency is experiencing a sudden appreciation, rather than a depreciation, relative to the U.S.

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103 *Id.*; *Cf. Pistachio Group of Ass'n of Food Indus. v. United States*, 685 F. Supp. 848 (Ct. Int'l Trade 1988) (Commerce selects exchange rate that reflects exporter's actual exchange rate experience where multiple exchange rates available to agency); 19 C.F.R. § 159.36(b) (1989) (Customs regulations require Customs to use exchange rate that "is uniformly applicable under the laws and regulations of the country of exportation" where Federal Reserve certifies multiple exchange rates).

104 *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. at 21,061.

105 *See, e.g., Certain Steel Pails From Mexico*, 55 Fed. Reg. at 12,245 (final determination).

106 *Id.*; *Porcelain-on-Steel Cooking Ware from Mexico*, 55 Fed. Reg. at 21,063 (first antidumping duty administrative review); *Final Determination of Sales at Less Than Fair Value, Gray Portland Cement and Clinker From Mexico*, 55 Fed. Reg. at 29,244 (final determination).

107 19 C.F.R. § 353.60(b) (1989).

108 *See id.* If the foreign currency has experienced a sudden appreciation relative to the U.S. dollar during the period of investigation, and if the foreign exporter has made a good faith effort to revise its prices in response to such an exchange-rate movement, then Commerce typically will use the exchange rate in effect during the previous calendar quarter (*i.e.*, a so-called "90-day lag") to convert foreign market value into U.S. dollars. *Melamine in Crystal Form from the Netherlands; Antidumping: Amendment of Final Determination*, 45 Fed. Reg. 29,619 (1980), *aff'd*, *Melamine Chemical, Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984); *Certain Iron Metal Castings from India; Antidumping: Final Determination of Sales at Not Less Than Fair Value*, 46 Fed. Reg. 39869 (1981). If the foreign currency is experiencing a temporary fluctuation relative to the U.S. dollar during the relevant period, and if dumping margins are due solely to Commerce's using the daily exchange rates, instead of the current quarterly exchange rate, to convert currencies, then Commerce usually will use the current quarterly exchange rate, rather than daily exchange rates, to convert foreign market value into U.S. dollars. *See* 19 C.F.R. § 353.60(b) (1989). Commerce makes this adjustment, because it is usually beyond the control of the foreign exporter to revise its prices when a temporary exchange-rate fluctuation exists. *See Melamine*, 732 F.2d at 924.

109 *Melamine Chemical Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984).

dollar during the period of investigation; or (2) when the foreign currency is experiencing a temporary fluctuation (*i.e.*, an uncertain shift back and forth) during that period.[110] Commerce systematically declines invoking the special rule when a foreign currency is depreciating relative to the U.S. dollar.[111] The rationale underlying this administrative practice is that only an appreciating foreign currency has the potential to create artificial dumping margins.[112] By contrast, a foreign currency that is depreciating relative to the U.S. dollar tends to eliminate dumping margins.[113]

In the antidumping duty investigations of *Porcelain-on-Steel Cooking Ware From Mexico* and *Certain Fresh Cut Flowers From Mexico*, Commerce declined to invoke the special rule for currency conversion.[114]

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110 *See* 19 C.F.R. § 353.60(b) (1989); *Porcelain-on-Steel Cooking Ware From Mexico*, 51 Fed. Reg. at 36,435; *Certain Iron Metal Castings from India; Antidumping: Final Determination of Sales at Not Less Than Fair Value*, 46 Fed. Reg. 39,869 (1981).

111 *See, e.g., Pads for Woodwind Instrument Keys from Italy; Final Determination of Sales At Less Than Fair Value*; 49 Fed. Reg. 28295, 28297 (1984), *rev'd on other grounds, Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 640 F. Supp. 255, 260 (Ct. Int'l Trade 1986)(where Commerce declined to invoke special rule because foreign currency depreciated relative to U.S. dollar during period of investigation); *Porcelain-on-Steel Cooking Ware From Mexico*, 51 Fed. Reg. at 36,435 (final determination)(same).

112 The following hypothetical illustrates this point. Assume, for example, that 10 Mexican pesos exchange for one U.S. dollar. Assume, further, that, after taking into account price adjustments, a Mexican exporter charges the same price for its merchandise in the Mexican home market and the U.S. market: 50 pesos (U.S. $5.00) in the Mexican home market and U.S. $5.00 in the United States. Commerce would find no dumping margins under such circumstances. *See infra* note 117 and accompanying text. If the Mexican peso were to *appreciate* by 50 percent relative to the U.S. dollar, so that five pesos could be exchanged for one U.S. dollar, and if the Mexican exporter were to maintain the same home-market and U.S. prices, then the price of the home-market merchandise, as expressed in U.S. dollars, would increase on a per unit basis from U.S. $5.00 to U.S. $10.00. Meanwhile, the U.S. price would remain unchanged at U.S. $5.00. Commerce would calculate a dumping margin of 100 percent under such circumstances. *See id.* The net result is that the dumping margin in this hypothetical is due solely to the 50 percent *appreciation* of the Mexican peso relative to the U.S. dollar. *See also* Palmeter, *Exchange Rates and Antidumping Determinations*, 22 J. WORLD TRADE 73 (1988).

113 Now assume that 10 Mexican pesos exchange for one U.S. dollar. Assume, further, that, after taking into account price adjustments, a Mexican exporter charges 100 pesos (U.S. $10.00) for its merchandise in the Mexican home market and U.S. $5.00 in the United States. Commerce would calculate a dumping margin of 100 percent under such a scenario. *See infra* note 117 and accompanying text. If the Mexican peso were to *depreciate* by 100 percent relative to the U.S. dollar, so that 20 Mexican pesos could be exchanged for one U.S. dollar, and if the foreign exporter were to maintain the same home-market and U.S. prices, then the price of the home-market merchandise, as expressed in U.S. dollars, would decrease on a per unit basis from U.S. $10.00 to U.S. $5.00. Meanwhile, the U.S. price would remain unchanged at U.S. $5.00. Commerce would find no dumping margins under such circumstances. *See id.* The net result is that a 100 percent *depreciation* of the Mexican peso relative to the U.S. dollar is the sole cause of the elimination of dumping margins in this hypothetical.

114 51 Fed. Reg. at 36,435; 52 Fed. Reg. at 6,365.

In those investigations, Commerce found that the Mexican peso had experienced a steady and sustained *depreciation*, rather than an *appreciation* or temporary fluctuation, relative to the U.S. dollar during the relevant periods.[115] As a result, Commerce converted Mexican pesos into U.S. dollars in accordance with the general rule for currency conversion.[116]

4. *Hypothetical Dumping Calculation*

The following example illustrates the adjustments that Commerce makes to foreign market value and to U.S. price to calculate a dumping margin. Assume the following scenario: a Mexican producer of tequila, Compañía Giezzero, exports the subject merchandise to the United States; the peso is the official currency of Mexico; Compañía Giezzero sells each pint of tequila at 1,500 pesos in the Mexican home market and at U.S. $1.20 in the U.S. market; and the date of the relevant U.S. sales to the first unrelated U.S. customer occurs before importation of the subject merchandise into the United States (*i.e.*, purchase price sales).

Assume, further, that the Mexican peso has depreciated by 100 percent relative to the U.S. dollar over the past two calendar quarters from 5 pesos/1 U.S. dollar on the first day of the previous calendar quarter to 10 pesos/1 U.S. dollar on the first day of the current calendar quarter. Assume, moreover, that the value of the Mexican peso relative to that of the U.S. dollar remains stable throughout the current calendar quarter and that all sales of the subject merchandise occur during the current calendar quarter. Finally, assume that Compañía Giezzero incurs only credit costs in the amount of 250 pesos in the Mexican home market and transportation costs in the amount of U.S. $0.20 in the U.S. market.

Commerce would reduce the foreign market value (*i.e.*, the home-market price) under such circumstances by 250 pesos, the credit costs incurred by Compañía Giezzero in the Mexican home market, to arrive at an ex-factory price of 1,250 pesos. Commerce also would reduce the U.S. price by U.S. $0.20, the transportation costs incurred by Compañía Giezzero in the U.S. market, to arrive at an ex-factory price of U.S. $1.00. Commerce then would convert foreign market value, as denominated in Mexican pesos, into U.S. dollars to calculate a dumping margin.

Because the Mexican peso in this example experienced a depreciation, rather than an appreciation or fluctuation, relative to the U.S. dollar during the relevant period, Commerce would not invoke its special rule

115 *Id.*
116 *Id.*

for currency conversion. Instead, Commerce would apply its general rule for currency conversion to convert Mexican pesos into U.S. dollars to calculate foreign market value in U.S. dollars.

Because the *current* quarterly exchange rate was stable and, as a result, did not vary by at least five percent from the daily exchange rates, Commerce would use the current quarterly exchange rate of 10 pesos/1 U.S. dollar to convert foreign market value into U.S. dollars. Such a currency conversion would yield a foreign market value of U.S. $1.25. Because Commerce calculates dumping margins by dividing the difference between the foreign market value and the U.S. price of the subject merchandise (*i.e.*, U.S. $0.25 in this example) by the U.S. price (*i.e.*, U.S. $1.00), Commerce would calculate a dumping margin of 25 percent for Compañía Giezzero in this hypothetical.[117]

D. The ITC Injury Determination

The ITC must determine whether the imports sold at less than fair value in the United States are a cause of or threaten material injury to a U.S. domestic industry.[118] A majority of the Commissioners employ a three-step analysis to make this determination. In accordance with this analysis, the ITC first must define the relevant U.S. domestic industry, then must ascertain whether this industry is experiencing material injury or the threat of material injury, and finally must determine whether the imports sold at less than fair value in the U.S. market are a cause of this injury.[119]

To define the relevant U.S. domestic industry, the ITC must determine which domestically manufactured product or products are "like" or "in the absence of like, most similar in characteristics and uses with, the [imported] article subject to an [antidumping] investigation."[120] The definition that the ITC gives to the term "like product" defines the U.S. domestic industry for purposes of U.S. antidumping proceedings.[121]

The Tariff Act authorizes the ITC to define the U.S. domestic indus-

117 For a detailed discussion of all the adjustments that Commerce makes to foreign market value and to U.S. price, *see* U.S. Department of Commerce, Study of Antidumping Methodology and Recommendations For Statutory Change (November 1985); *see also Hypothetical Calculations, supra* note 48, at 537-553.

118 19 U.S.C. § 1673(2) (1988). The standard of injury under the U.S. antidumping law is the same as that under the U.S. countervailing duty law. *See* 19 U.S.C. § 1671(a); 1677(7) (1990). Section 771(7) of the Tariff Act defines "material injury" as harm that is "not inconsequential, immaterial or unimportant." 19 U.S.C. § 1677(7)(A) (1990).

119 19 U.S.C. § 1677(4),(7) (1990).

120 19 U.S.C. § 1677(10) (1990); *see also Porcelain-on-Steel Cooking Ware From Mexico, the People's Republic of China, and Taiwan*, U.S. ITC Pub. 1911, 4-7 (Nov., 1986) (Final).

121 *See id.*; 19 U.S.C. § 1677(4) (1990).

try on a national basis[122] or, "[i]n appropriate circumstances,"[123] on a regional basis.[124] The "regional industry" provision enables the ITC to render an affirmative injury determination "even if the [U.S.] domestic industry as a whole"[125] is not experiencing material injury or the threat of such injury by reason of dumped imports.[126] If the U.S. domestic producers that comprise the regional industry can demonstrate that "there is a concentration of . . . dumped imports into . . . an isolated [regional] market,"[127] and if these producers also can establish to the satisfaction of the ITC that they are experiencing injury by reason of such imports, then the ITC may render an affirmative injury determination.[128]

In the recent injury investigation involving *Gray Portland Cement and Cement Clinker From Mexico,* the ITC defined the U.S. domestic cement industry on a regional basis to include only the following U.S. states: Alabama, Arizona, California, Florida, Louisiana, Mississippi, New Mexico, and Texas.[129] Partly because the ITC analyzed data from only this geographic region, rather than from the entire United States, and partly because these data demonstrated that this regional industry was experiencing material injury by reason of dumped imports of Mexican origin, the ITC issued an affirmative final determination.[130]

To determine whether a U.S. domestic industry is experiencing material injury, the ITC typically analyzes information covering a three-year period regarding such factors as U.S. domestic output, sales, market

122 19 U.S.C. § 1677(4)(A) (1990).

123 19 U.S.C. § 1677(4)(C) (1990).

124 *Id.* The Tariff Act authorizes the ITC to divide a U.S. national market into two or more regional markets and to treat the U.S. producers within each such market as a separate industry when the following statutory conditions exist:

> (i) the producers within such market sell all or almost all of their production of the like product in question in that market, and
> (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.

19 U.S.C. § 1677(4)(C)(i),(ii) (1990).

125 19 U.S.C. § 1677(4)(C) (1990).

126 *Id.*

127 *Id.*

128 *Id.*

129 *Gray Portland Cement and Cement Clinker From Mexico,* USITC Pub. No. 2305, Inv. No. 731-TA-451 (1990)(Final). This determination is currently subject to a judicial challenge. CEMEX Summons, Ct. No. 90-10-00509 (Sep. 28, 1990).

130 USITC Pub. No. 2305, Inv. No. 731-TA-451 (1990)(Final). Another factor that contributed to the affirmative final injury determination in the Mexican cement investigation was that the Tariff Act required the ITC to cumulate the volume of dumped imports from Mexico with the volume of dumped imports from Japan. *Id.* at 25; 19 U.S.C. § 1677(7)(C)(iv) (1990). Imports of Japanese cement were the subject of a concurrent antidumping duty investigation at the time that the ITC rendered its final determination in the Mexican investigation. USITC Pub. No. 2305 at 25. For a further discussion of the concept of cumulation, *see infra* note 135 and accompanying text.

share, profit, production, return on investment, capacity utilization, cash flow, inventory levels, employment, wages, ability to raise capital, and investment.[131] A downward trend in these factors usually is an indicator of injury.[132] No one factor in and of itself, however, is determinative of a material injury finding.[133]

To determine whether imports sold at less than fair value in the U.S. market are a *cause* of material injury to a U.S. domestic industry, the ITC analyzes the volume of such imports, as well as the effect that such imports have upon U.S. producers' prices of the "like product" and upon the economic health of such producers.[134] If "like" imports from two or more foreign countries are subject to the antidumping duty investigation, and if such imports compete with one another and with the "like product" manufactured by the U.S. domestic industry, then the ITC must cumulate the volume and effect of such imports to determine material injury.[135] In the injury investigation involving *Porcelain-on-Steel Cooking Ware From Mexico, the People's Republic of China, and Taiwan*, for example, the ITC cumulated the volume of Mexican imports with the volume of imports from the People's Republic of China and Taiwan.[136] In undertaking its causation analysis, the ITC also seeks to ascertain whether the imports sold at less than fair value in the United States have contributed to price depression or price suppression of the "like product" manufactured and sold by the U.S. industry in the U.S. market.[137] If a positive relationship exists between such imports and depressed U.S. prices of the "like product," and if the economic health of the U.S. domestic industry is simultaneously deteriorating, then the ITC may conclude that such imports are a cause of material injury to a U.S. domestic industry.[138]

To determine whether a U.S. domestic industry is *threatened* with material injury by reason of imports sold at less than fair value in the

131 19 U.S.C. § 1677(7) (1990).

132 *See id.*

133 19 U.S.C. § 1677(7)(E)(ii) (1990).

134 19 U.S.C. § 1677(7)(B) (1990).

135 19 U.S.C. § 1677(7)(C)(iv) (1990). Additionally, the ITC must cumulate the volume of imports, if any, from countries subject to a concurrent but separate antidumping or countervailing duty proceeding with the volume of imports subject to the antidumping duty proceeding actually before the ITC. *See Bingham & Taylor Div., Virginia Indus., Inc. v. United States*, 815 F.2d 1482 (Fed. Cir. 1987). If, however, imports from a country under investigation are negligible and have no discernible adverse impact upon the U.S. industry, then the ITC is not required to cumulate such imports with imports from other countries. 19 U.S.C. § 1677(7)(C)(v) (1990).

136 51 Fed. Reg. 42,946 (1986)(Final).

137 19 U.S.C. § 1677(7)(C)(ii) (1990).

138 19 U.S.C. § 1677(7)(B),(C) (1990).

U.S. market, the ITC evaluates the following factors: excess capacity, if any, in the country of exportation; the potential for increasing the production of the subject merchandise in the exporting country; a rapid increase, if any, in U.S. market penetration; and a substantial increase in U.S. inventories.[139] The ITC also examines the ability of the U.S. domestic industry to develop a derivative or more advanced version of the "like product," as well as the probability that imports of the subject merchandise will depress or suppress U.S. prices of the "like product" in the future.[140] No one factor, in and of itself, is dispositive of threat of material injury.[141]

E. Statutory And Regulatory Procedures Governing Antidumping Duty Investigations

1. *Initiation of Investigation*

The Tariff Act authorizes Commerce to self-initiate[142] an antidumping investigation or to initiate such an investigation based upon the filing of a petition by a U.S. "interested party" (the "petitioner").[143] A U.S. "interested party" can include, among other entities, a U.S. domestic manufacturer, trade union, or trade association engaged in the manufacture, production, or wholesale of the "like product" in the United States.[144] When the petitioner files an antidumping petition with Commerce, it also must file the petition simultaneously with the ITC.[145]

Upon the filing of an antidumping petition, the ITC typically issues

139 19 U.S.C. § 1677(7)(F) (1990).

140 19 U.S.C. § 1677(7)(F)(i)(IV),(X) (1990).

141 *See* 19 U.S.C. § 1677(7)(F)(ii) (1990).

142 19 U.S.C. § 1673a(a) (1990); 19 C.F.R. § 353.11 (1989); *see Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan; Initiation of Antidumping Duty Investigation*, 50 Fed. Reg. 51,450 (1985).

143 19 U.S.C. § 1673a(b)(1) (1990). The U.S. antidumping duty law authorizes the following entities to file a petition: (1) a manufacturer, producer, or wholesaler in the United States of a "like product"; (2) a certified or recognized union or group of workers that represents an industry engaged in the manufacture, production, or wholesale of the "like product" in the United States; (3) a U.S. trade or business association the majority of whose members manufacture, produce, or wholesale the "like product" in the United States; or (4) a coalition of firms or trade associations that is engaged in the manufacture of the "like product." *Id.*; 19 U.S.C. § 1677(9)(C)-(F) (1990); 19 C.F.R. § 353.2(k)(3)-(k)(6) (1989). In the case of agricultural products, a U.S. coalition or trade association of "processors and producers" or "processors and growers" may file a petition so long as such action is consistent with U.S. international obligations arising under the GATT. *See* 19 U.S.C. § 1677(9)(G) (1990). Furthermore, the U.S. antidumping duty law requires Commerce and the ITC to provide technical assistance to small U.S. businesses to enable such entities to prepare and file antidumping duty petitions. 19 U.S.C. § 1339(b) (1990); 19 C.F.R. § 353.12(h) (1989).

144 *See id.*

145 19 U.S.C. § 1673a(b)(2) (1990).

a questionnaire (*i.e.*, request for information)[146] to the U.S. domestic manufacturers or producers of the "like product" and to the U.S. importers of the subject merchandise.[147] The ITC generally does not send questionnaires to the foreign exporters subject to the antidumping duty action.[148] Rather, the ITC requests the U.S. embassy in the exporting country to gather economic information concerning such exporters.[149]

In addition, the ITC requests the representatives of any foreign exporters that are participating in the investigation to submit the following information: the volume of imports of the subject merchandise entered into the United States; shipments of that merchandise in the home market or third-country market; and capacity utilization and actual production capabilities in the country of manufacture.[150] The ITC requests these exporters to provide the information for the most recent three-year period.[151] The ITC also requests information concerning any plans of these exporters to expand production capacity in the country of manufacture, third countries, and the United States.[152]

Within 20 days after the filing of the petition, Commerce must determine whether the petition is legally sufficient to warrant the initiation of an investigation.[153] If Commerce initiates an investigation, then it usually will issue a questionnaire to the foreign exporters that account for at least 60 percent of the imports of the subject merchandise to the United States.[154]

The Commerce questionnaire requests detailed transactional data

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146 Interview with Mr. Edward Easton, former Assistant General Counsel, U.S. ITC (Nov. 5, 1990) [hereinafter "Easton Interview"].

147 *Id.* The "subject merchandise" is the merchandise that the foreign manufacturer exports to, and the U.S. importer imports into, the United States. 19 C.F.R. § 353.2(m) (1989). The "like product" is the domestically manufactured product that is "like" or "in the absence of like, most similar in characteristics and uses with, the [imported] article subject to an [antidumping] investigation." 19 U.S.C. § 1677(10) (1990).

148 Easton Interview.

149 *Id.*

150 *Id.* The foreign exporter and its legal representatives, if any, must certify that all factual information submitted to the ITC is accurate and complete to the best of the exporter's or counsels' knowledge. 19 C.F.R. § 207.3 (1989).

151 Easton Interview.

152 If the foreign exporter refuses or simply is unable to provide the requested information in a timely manner, or if the foreign exporter significantly impedes the completion of the antidumping duty investigation, then the ITC may rely upon the "best information otherwise available" to render an injury determination. 19 U.S.C. § 1677e(c) (1990); 19 C.F.R. § 207.8 (1989). Reliance upon the "best information otherwise available" may influence the ITC to render an automatic affirmative determination with regard to the threat of material injury. Easton Interview.

153 19 U.S.C. 1673a(c) (1990); 19 C.F.R. 353.13 (1989). For a description of the petition requirements, *see* 19 C.F.R. § 353.12 (1989).

154 19 C.F.R. § 353.42(b) (1989).

for all home-market sales, third-country sales, if any, and U.S. sales during the period of investigation.[155] Completing the Commerce questionnaire is probably the single most important task that a foreign exporter will undertake during the course of an antidumping duty proceeding. A foreign exporter usually has 30-45 days to complete this questionnaire accurately.[156] A foreign exporter, however, has the opportunity to submit a supplemental questionnaire response to correct any deficiencies identified by Commerce in the original response.[157]

Failure to complete the questionnaire accurately and in a timely manner may cause Commerce to rely upon the "best information otherwise available"[158] to calculate dumping margins. Commerce typically selects under such circumstances the dumping margin alleged by the petitioner in the petition.[159] Because the dumping margin in the petition is usually quite high, reliance upon the "best information otherwise available" usually has an adverse impact upon a foreign exporter.

Foreign exporters usually are reluctant to disclose their business proprietary (*i.e.*, confidential) information to a foreign agency. To safeguard an exporter's business proprietary information submitted in the questionnaire responses, Commerce and the ITC maintain such information in the strictest confidence in accordance with an administrative protective order ("APO").[160]

Pursuant to an APO, only the following individuals can gain access to a foreign exporter's business proprietary information: those Commerce or ITC employees directly involved in the antidumping duty proceeding; the exporter's own legal representatives; and the petitioner's legal representatives.[161] The corporate officials of the U.S. domestic petitioner gen-

155 *See, e.g.*, Commerce Questionnaire issued to *Troqueles y Esmaltes* (February, 16, 1989) in *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. 39,186 (1990) (second antidumping duty administrative review). The foreign exporter and its legal representatives, if any, must certify that all factual information submitted to Commerce in the questionnaire response is accurate and complete to the best of the exporter's or counsels' knowledge. 19 U.S.C. § 1677e(a) (1990); 19 C.F.R. § 353.31(i) (1989).

156 *See Troqueles y Esmaltes Questionnaire, supra* note 155.

157 19 C.F.R. § 353.31(b) (1989).

158 19 U.S.C. § 1677e(c) (1990). Section 776(c) of the Tariff Act empowers Commerce to rely upon "the best information otherwise available" to establish dumping margins when a foreign exporter refuses or simply is unable to provide to Commerce complete, timely, or accurate information. *Id*; 19 C.F.R. § 353.37(a)(1) (1989). Section 776(b) also empowers Commerce to rely upon such information when the agency is unable to verify the accuracy or completeness of the information submitted by the foreign exporter in the questionnaire response. *See* 19 U.S.C. § 1677e(b) (1990); 19 C.F.R. § 353.37(a)(2) (1989).

159 19 C.F.R. § 353.37(b) (1989).

160 *See* 19 U.S.C. § 1677f (1990); 19 C.F.R. §§ 353.31 - .34; 19 C.F.R. § 207.7 (1989).

161 *See* 19 U.S.C. § 1677f(b),(c) (1990); 19 C.F.R. § 353.34; 19 C.F.R. § 207.7 (1989).

erally cannot gain access to such information.[162] Furthermore, a foreign exporter has the legal right, pursuant to the U.S. antidumping law, to request that only Commerce or ITC officials be permitted to examine extremely confidential information, such as trade secrets.[163]

To guard against the unauthorized use or release of a foreign exporter's business proprietary information, Commerce and the ITC have the legal authority pursuant to the Tariff Act to impose severe sanctions upon a violating party.[164] Such sanctions include the termination of an antidumping duty investigation already in progress, the disbarment of the violators from practicing before Commerce or the ITC, and the denial of further access to a foreign exporter's business proprietary information.[165]

2. *Preliminary ITC and Commerce Determinations*

Both the ITC and Commerce must render preliminary determinations based upon the information contained in the questionnaire responses submitted to those agencies.[166] To render an affirmative preliminary determination, the ITC must be satisfied that there exists a "reasonable indication" of material injury or the threat of material injury to the relevant U.S. domestic industry.[167]

The "reasonable indication" standard is relatively lenient.[168] In other words, the quantum of injury information needed to trigger an affirmative preliminary determination is quite low. Significantly less information is needed to trigger an affirmative preliminary determination than is needed to trigger an affirmative final determination.[169]

If the ITC determines that a "reasonable indication" of injury or the threat of injury does not exist and, as a result, renders a negative preliminary determination, then the entire antidumping duty investigation is terminated.[170] In 1986, for example, the ITC rendered a negative preliminary determination in the antidumping duty investigation of *Port-*

162 19 C.F.R. § 207.7(a)(3)(ii) (1989). An in-house corporate counsel of the petitioner may gain access to a foreign exporter's business proprietary information under certain very limited circumstances. *See id.*

163 *See* 19 U.S.C. § 1677f(c)(1) (1990); 55 Fed. Reg. 9,051-9,052 (1990) (to be codified at 19 C.F.R. § 353.34(a)) (interim final rule); 19 C.F.R. § 207.7(a)(1) (1989).

164 19 U.S.C. § 1677f(c)(1)(B) (1990); 19 C.F.R. § 354.3; 19 C.F.R. § 207.7(d) (1989).

165 *Id.*

166 *See* 19 U.S.C. § 1673b(a),(b) (1990).

167 19 U.S.C. § 1673b(a) (1990).

168 *See* H. Rep. No. 317, 96th Cong., 1st Sess. 52 (1979); *see also American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986).

169 *See id.*; *compare* 19 U.S.C. § 1673b(a) (1990) *with* 19 U.S.C. § 1673d(b) (1990).

170 19 U.S.C. § 1673b(a) (1990); 19 C.F.R. § 207.18 (1989).

land Hydraulic Cement and Cement Clinker From Colombia, France, Greece, Japan, Mexico, the Republic of Korea, Spain, and Venezuela.[171] As a result, the ITC terminated the entire antidumping proceeding in accordance with the statutory scheme.[172] If, however, the ITC determines that a "reasonable indication" of material injury does exist and, accordingly, renders an affirmative preliminary determination, then the antidumping investigation continues at both Commerce and the ITC.[173]

If Commerce preliminarily determines that the foreign exporter is selling the subject merchandise in the United States at less than fair value, then Commerce directs Customs to "order the suspension of liquidation."[174] "Liquidation" is a term of art which means the "final computation or ascertainment of the duties or drawback accruing on an entry" of imported merchandise.[175] "Suspension of liquidation," therefore, simply means that Customs suspends the "final computation" of customs duties, including antidumping duties, until Commerce determines, as discussed below, the actual amount of antidumping duties owed to Customs.[176] Because suspension of liquidation has no impact on the movement of the imported merchandise in the U.S. market, the foreign exporter may continue to sell its merchandise in that market.

Customs must suspend the liquidation of all entries of the subject merchandise that enter into the customs territory of the United States on or after the date of publication in the *Federal Register* of Commerce's affirmative preliminary determination.[177] In exceptional circumstances, Commerce may direct Customs to suspend the liquidation of entries made 90 days before the publication date of the affirmative preliminary determination.[178]

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171 *Portland Hydraulic Cement and Cement Clinker From Colombia, France, Greece, Japan, Mexico, the Republic of Korea, Spain, and Venezuela*, 51 Fed. Reg. 46,945 (1986)(Preliminary).

172 *Id.*

173 19 U.S.C. § 1673b(a),(b) (1990).

174 19 U.S.C. § 1673b(d) (1990). This procedure is in accordance with Article 10 of the GATT Antidumping Code, which authorizes signatory countries to impose provisional measures for a period not to exceed 120 days upon a preliminary finding of dumping. *See* GATT Antidumping Code, *supra* note 17, art. 10.

175 19 C.F.R. § 159.1 (1989).

176 *Id*; 19 U.S.C. §§ 1673(a), 1675(a) (1990).

177 19 U.S.C. § 1673b(d)(1) (1990).

178 19 U.S.C. § 1673b(e)(2) (1990). The U.S. antidumping law authorizes Commerce to suspend liquidation retroactively if, as a result of an allegation made by the petitioner, Commerce preliminarily determines that critical circumstances exist. *Id.*; 19 C.F.R. § 353.16 (1989). For critical circumstances to exist, Commerce must find that (1) there is a history of dumping in the United States or elsewhere of the same class or kind of merchandise subject to the antidumping investigation, or the importer knew or should have known that the foreign exporter was making sales of the subject merchandise at less than fair value, and (2) there have been massive imports of the subject merchan-

When Commerce directs Customs to suspend liquidation upon a preliminary determination of dumping, the U.S. importer[179] — not the foreign exporter — must make a cash deposit of estimated antidumping duties with Customs, or post a bond or other security, for each entry of the subject merchandise to cover any potential antidumping duty liability.[180] The amount of the cash deposit or the bond must be equal to the estimated amount by which the foreign market value of the subject merchandise exceeds its U.S. price.[181] A U.S. importer usually posts a bond or other security, because that procedure is usually less expensive.

If Commerce preliminarily determines that the foreign exporter is not selling the subject merchandise at less than fair value in the United States and, consequently, issues a negative preliminary determination, then no suspension of liquidation occurs, and the antidumping duty investigation simply continues toward a final determination at Commerce.[182] In contrast to a negative preliminary determination rendered by the ITC, a negative preliminary determination issued by Commerce does not result in the termination of the entire antidumping duty investigation.[183]

3. Verification of Information Submitted in the Commerce Questionnaire Response

The U.S. antidumping law requires Commerce to verify all information upon which it relies in making a final determination.[184] Specifically, Commerce must verify the information contained in the foreign exporter's questionnaire response.[185] To verify this information, Commerce officials visit the exporter's premises to examine the company's

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dise over a relatively short period. *See id.* If Commerce concludes in its final determination that critical circumstances exist, and if the ITC concludes in its final determination that the retroactive imposition of antidumping duties is necessary to prevent the recurrence of material injury, then any suspension of liquidation ordered applies retroactively to any unliquidated entries of the subject merchandise entered 90 days before the publication date of the Commerce affirmative preliminary determination. 19 U.S.C. § 1673d(a)(3),(b)(4),(c)(4) (1990); 19 C.F.R. § 353.16(d); 19 C.F.R. § 207.25(d)(1),(2) (1989).

179 The U.S. "importer of record" is legally responsible for paying antidumping duties to Customs. *See* 19 C.F.R. § 353.26 (1989). An "importer of record" is usually the U.S. importer, its agent, or a customs broker. Foreign manufacturers or exporters also have the option of establishing related U.S. subsidiaries that can operate as "importers of record". *See* 19 C.F.R. § 159.58(a) (1989).

180 19 U.S.C. § 1673b(d)(2) (1990); *see supra* note 174.

181 *Id.*

182 19 U.S.C. § 1673b(b),(d) (1990).

183 *Compare* 19 U.S.C. § 1673b(a) (1990) *with* 19 U.S.C. § 1673b,(d) (1990).

184 19 U.S.C. § 1677e(b) (1990).

185 *See id.*

financial books and records.[186]

Participation in the verification process is probably the second most important task that a foreign exporter will undertake during the course of an antidumping duty proceeding. The foreign exporter must ensure that the Commerce officials can trace and tie all the information that Commerce decides to verify to the company's books and records. Failure to do so may cause Commerce to rely upon, as discussed above, the "best information otherwise available"[187] to establish dumping margins.

4. *Final Commerce and ITC Determinations*

If Commerce finds that the foreign exporter is not selling the subject merchandise in the United States at less than fair value and, as a result, renders a negative final determination, then the entire antidumping duty investigation is terminated.[188] Commerce directs Customs under such circumstances to terminate any suspension of liquidation that may be in effect and to refund any estimated antidumping duties already deposited or release any security posted.[189] If, however, Commerce finds that the foreign exporter is selling the subject merchandise in the United States at less than fair value and, accordingly, issues an affirmative final determination, then the antidumping duty investigation will continue at the ITC.[190]

The legal standard evaluated by the ITC to determine the existence of material injury or the threat of material injury during the final stage of the injury investigation is more rigorous than that evaluated during the preliminary stage of the investigation.[191] Consequently, it is not uncommon for the ITC to render a negative final determination and, thereby, terminate the entire antidumping proceeding.[192] In a recent antidumping duty investigation involving *Certain Steel Pails From Mexico*, the ITC concluded in its final determination that dumped imports of Mexican steel pails were not a cause of material injury, or did not threaten material injury, to the relevant U.S. domestic industry.[193] As a result, the ITC terminated the antidumping investigation.[194]

If, however, the ITC concludes that dumped imports are a cause of

186 *See* 19 C.F.R. § 353.36(c) (1989).
187 19 U.S.C. § 1677e(c) (1990); 19 C.F.R. § 353.37(a)(2) (1989).
188 19 U.S.C. § 1673d(c)(2) (1990).
189 *Id.*
190 19 U.S.C. § 1673d(c)(1) (1990).
191 *See supra* note 168.
192 19 U.S.C. § 1673d(c)(2),(3) (1990); 19 C.F.R. § 207.25 (1989).
193 55 Fed. Reg. 20,316 (1990) (Final).
194 *Id.*

material injury, or threaten material injury, to the U.S. domestic industry and, as a result, issues an affirmative final determination, then Commerce must publish in the *Federal Register* an antidumping duty order covering the subject merchandise.[195] The antidumping duty order directs Customs to require the U.S. importer to make a cash deposit of *estimated* antidumping duties.[196] The U.S. importer no longer has the option of posting a bond or other security after the publication date of the antidumping duty order.[197] The assessment or calculation of actual antidumping duties, as discussed below, does not occur until Commerce calculates *actual* dumping margins in a subsequent administrative review.[198]

5. *Termination or Suspension of Investigation*

The Tariff Act authorizes Commerce to *terminate* an antidumping duty investigation based upon its own initiative if Commerce self-initiated the investigation.[199] The Tariff Act also authorizes Commerce to terminate an antidumping investigation based upon the withdrawal of the petition by the petitioner.[200] Commerce may not authorize a termination of the investigation under either scenario, unless the agency is satisfied that such action is in the public interest.[201]

Commerce may terminate an antidumping duty investigation by entering into a quantitative restriction agreement with the foreign exporter or exporters — provided that such a termination similarly is in the public interest.[202] Because these agreements are extremely difficult to administer and also raise issues under Article XI of the GATT,[203] Commerce

195 19 U.S.C. §§ 1673d(c)(2), 1673e (1990); 19 C.F.R. § 353.21 (1989).

196 19 U.S.C. § 1673e(a)(3) (1990).

197 *Id.*; 19 C.F.R. § 353.21 (1989). If, however, Commerce is satisfied that it can calculate actual or final antidumping duties within 90 days after the publication date of the antidumping duty order, and if certain other statutory conditions exist, Commerce "may permit, for not more than 90 days after the date of publication of an order . . . the posting of a bond or other security in lieu of the deposit of estimated antidumping duties." 19 U.S.C. § 1673e(c) (1990).

198 19 U.S.C. §§ 1673e(a)(1), 1675(a) (1990).

199 19 U.S.C. § 1673c(a)(1) (1990).

200 *Id.*

201 19 C.F.R. § 353.17(a) (1989).

202 19 U.S.C. § 1673c(a)(2) (1990). Section 734(a)(2)(B) of the Tariff Act sets forth the factors that Commerce must evaluate to determine whether a quantitative restriction agreement is in the public interest. 19 U.S.C. § 1673c(a)(2)(B) (1990); 19 C.F.R. § 353.17(b)(2) (1989). Such factors include (1) whether the agreement would have a greater adverse impact upon U.S. consumers than the imposition of antidumping duties, (2) the relative impact that such an agreement would have upon the international economic interests of the United States, and (3) the relative impact that such an agreement would have upon the competitiveness of the relevant U.S. domestic industry. *Id.*

203 Article XI of the GATT generally proscribes the imposition of quantitative restraints unless one of the limited exceptions is applicable. GATT, *supra* note 2, art. XI. One such exception autho-

often has declined to enter into such agreements with foreign exporters. In the recent antidumping duty investigation of *Portland Hydraulic Cement and Clinker From Mexico*, for example, Commerce declined to enter into a quantitative restriction agreement with Mexican exporters of cement for precisely these reasons.[204]

Commerce also may *suspend* an antidumping duty investigation based upon one of three kinds of agreements.[205] First, Commerce may enter into a cessation agreement with the foreign exporters that account for at least 85 percent of all of the imports of the subject merchandise to the United States.[206] The foreign exporters must pledge, pursuant to such an agreement, to "cease exports of the merchandise to the United States within 6 months after the date on which the investigation is suspended."[207] Because a cessation agreement removes the foreign exporters from the U.S. market, foreign exporters rarely find such an agreement to be an attractive option. Second, Commerce may enter into a price-revision agreement with the foreign exporters that account for virtually all of the imports of the subject merchandise.[208] In accordance with such an agreement, the foreign exporters must agree to "revise their prices to eliminate completely any amount by which the foreign market value of the [subject] merchandise exceeds the United States price of that merchandise."[209]

Finally, if "extraordinary circumstances"[210] are present, Commerce

rizes a contracting importing country to impose on a nondiscriminating basis quantitative import restraints upon agricultural and fishery products. *Id.* art XI, para. 2. Similarly, Article XII of the GATT authorizes an importing country that is experiencing a balance-of-payments crisis to impose quotas to safeguard its foreign exchange reserves. *Id.* art. XII.

204 55 Fed. Reg. at 29,244.

205 19 U.S.C. § 1673c(b)(1),(2),(c) (1990). The U.S. antidumping law also authorizes Commerce to *suspend* an antidumping duty investigation by means of a quantitative restriction agreement when the investigation covers imports from a "nonmarket economy country" (*e.g.*, the Soviet Union). 19 U.S.C. § 1673c(l) (1990). The U.S. antidumping law defines the term "nonmarket economy country" to include "any foreign country that... does not operate on market principles of cost or pricing structures." 19 U.S.C. § 1677(18)(A) (1990).

206 19 U.S.C. § 1673c(b)(1) (1990); 19 C.F.R. § 353.18(a)(2) (1989).

207 *Id.*

208 19 U.S.C. § 1673c(b)(2) (1990); 19 C.F.R. § 353.18(a)(1) (1989); *see, e.g.*, *Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan*, 51 Fed. Reg. 29,707 (1986)(suspension of antidumping investigation based upon price-revision agreement); *Erasable Programmable Read Only Memories (EPROMs) From Japan*, 51 Fed. Reg. 29,708 (1986)(same).

209 *Id.*

210 19 U.S.C. § 1673c(C)(2) (1990). Section 734(c)(2) of the Tariff Act defines the phrase "extraordinary circumstances" to mean circumstances in which (1) the suspension of the investigation will be more beneficial to the U.S. domestic industry than the continuance of the investigation, and (2) the investigation is complex (*i.e.*, large number of transactions, novel issues, or large number of firms involved). *Id.*; 19 C.F.R. § 353.18(d) (1989).

may enter into another kind of price-revision agreement whereby the foreign exporters agree to "eliminate completely the injurious effect" of the unfairly traded imports.[211] Commerce may not enter into any of the above suspension agreements unless it determines that such action is in the public interest.[212]

F. Assessment or Imposition of Antidumping Duties

Based upon a request from an "interested party," Commerce will conduct an administrative review of the antidumping duty order each year beginning on the anniversary of the publication date of the order.[213] An "interested party" for purposes of requesting an administrative review includes, among other entities, a foreign exporter, a U.S. importer, or a U.S. domestic petitioner.[214]

The purpose of the administrative review is to determine the *actual* or *exact* dumping margin in order to carry out the "final computation" of antidumping duties.[215] In conducting the first administrative review, Commerce usually examines entries of the subject merchandise made during the twelve-to-eighteen-month period between the date of the initial suspension of liquidation (*i.e.*, the Commerce affirmative preliminary determination) and the month preceding the one-year anniversary of the publication date of the antidumping duty order.[216] Subsequent administrative reviews usually cover twelve-month periods.[217]

Commerce's final results of administrative review establish the *actual* or *exact* amount by which the foreign market value of the subject merchandise exceeds its U.S. price (*i.e.*, the *actual* dumping margin).[218] Upon publication of the final results in the *Federal Register*, Commerce directs Customs to assess or compute final antidumping duties in the amount of the actual dumping margin for those unliquidated entries

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211 19 U.S.C. § 1673c(c) (1990); 19 C.F.R. § 353.18(b) (1989).

212 19 U.S.C. § 1673c(d)(1) (1990).

213 19 U.S.C. § 1675(a)(1) (1990); 19 C.F.R. § 353.22(a) (1989).

214 19 U.S.C. § 1677(9) (1990). Specifically, the term "interested party" for purposes of requesting an administrative review includes a foreign respondent (*i.e.*, foreign manufacturer, exporter, or producer), a U.S. importer, as well as those entities set forth in note 143, *supra*.

215 *See* 19 U.S.C. § 1675(a) (1990).

216 *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. at 21,061 (first antidumping duty administrative review). If Commerce and the ITC were to render affirmative final determinations with respect to critical circumstances in the underlying antidumping duty investigation, then Commerce would examine entries of the subject merchandise made during the fifteen-to-twenty-one-month period beginning 90 days before the publication date of the Commerce affirmative preliminary determination. *See supra* note 178.

217 *Porcelain-on-Steel Cooking Ware From Mexico*, 55 Fed. Reg. at 39,186 (1990) (second antidumping duty administrative review).

218 19 U.S.C. § 1675(a)(2) (1990).

made during the twelve-to-eighteen-month period discussed above.[219] For each entry of the subject merchandise made on or after the publication date of the final results of the administrative review, Commerce also instructs Customs to collect a cash deposit of *estimated* duties in the amount of the rate calculated in the final results.[220]

If the amount of actual antidumping duties owed by the U.S. importer to Customs is greater or less than the amount of estimated duties previously deposited with Customs *before* the publication date of the antidumping duty order, then no interest accrues on any underpayment or overpayment of estimated duties.[221] If, however, the amount of actual antidumping duties owed by the U.S. importer is greater than the amount of estimated duties previously deposited with Customs *on or after* the publication date of the order, then the U.S. importer must pay interest, in addition to actual duties owed, to Customs.[222]

If the amount of actual antidumping duties owed by the U.S. importer is less than the amount of estimated duties previously deposited with Customs *on or after* the publication date of the order, then Commerce must direct Customs to refund the difference, together with interest, to the U.S. importer.[223] Commerce regulations prohibit a foreign manufacturer or exporter from reimbursing the U.S. importer for any antidumping duties paid to Customs.[224]

G. Right To Contest Final Determinations: Judicial Review

A "party to the proceeding"[225] may contest in the U.S. Court of

219 *See id.*; *Porcelain-on-Steel Cooking Ware From Mexico,* 55 Fed. Reg. at 21,061 (first antidumping duty administrative review). The GATT prohibits the United States from either collecting or assessing both antidumping duties and countervailing duties on the same subject merchandise. Specifically, the GATT provides that "[n]o product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization." GATT, *supra* note 2, art. VI, para. 5. To comply with U.S. international obligations pursuant to the GATT, Commerce makes certain adjustments when an imported product is subject to both kinds of orders. *See* 19 U.S.C. § 1677a(d)(1)(D) (1990); *see also Final Determination of Sales At Less Than Fair Value: Portland Hydraulic Cement and Clinker From Mexico,* 55 Fed. Reg.29,244 (1990).

220 19 U.S.C. § 1675(a)(1) (1990); *Porcelain-on-Steel Cooking Ware From Mexico,* 55 Fed. Reg. at 21,061 (first antidumping administrative review).

221 19 U.S.C. § 1677g (1990); 19 C.F.R. § 353.24 (1989).

222 *Id.*

223 *Id.*

224 19 C.F.R. § 353.26 (1989).

225 19 C.F.R. § 353.2(o) (1989). A "party to the proceeding" includes any "interested party," as described in note 143, *supra,* in addition to a foreign exporter or U.S. importer of the subject merchandise, that "actively participates, through written submissions of factual information or written argument," in the initial investigation or subsequent administrative review. 19 C.F.R. § 353.2(o) (1989).

International Trade (the "CIT") the factual findings, as well as the legal conclusions, that form the basis of the Commerce or ITC *final* determinations rendered during the original investigation.[226] For example, after Commerce had rendered its final determination in the antidumping duty investigation involving *Porcelain-on-Steel Cooking Ware From Mexico*, both Mexican respondents filed suit in the CIT.[227] These respondents challenged, among other things, the exchange rate selected by Commerce in the underlying investigation to convert Mexican pesos into U.S. dollars.[228] A judicial decision in favor of the Mexican respondents could result in the complete revocation of the antidumping duty order with respect to one of the Mexican respondents.[229]

A "party to the proceeding" also may challenge a subsequent administrative review issued by Commerce.[230] Regardless of whether a party is challenging an initial Commerce or ITC investigation or a subsequent Commerce administrative review, only those determinations that are *final* — that is, determinations that cannot be changed at the administrative level — are entitled to judicial review.[231] A party that is dissatisfied with a decision issued by the CIT may appeal that adverse decision to the U.S. Court of Appeals for the Federal Circuit (the "Federal Circuit").[232]

H. Revocation Of Outstanding Antidumping Duty Orders

An antidumping duty order remains in force as long as the foreign exporter in question continues to sell the subject merchandise in the United States at less than foreign market value, and such sales continue to be a cause of material injury, or threaten material injury, to a U.S. domestic industry.[233] The foreign exporter, however, has the opportunity through the administrative review process described above to revise its prices in order to eliminate dumping in the U.S. market.

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226 *See id.*

227 CINSA and *Troqueles y Esmaltes* Complaint at ¶ 32 Ct. No. 87-01-00220 (January 30, 1987).

228 *Id.*

229 *Id.*

230 19 U.S.C. § 1516a(a)(2)(B)(iii) (1990).

231 19 U.S.C. § 1516a(a)(1),(2)(B) (1990). The Tariff Act considers the following determinations to be final for purposes of judicial review: (1) a determination by Commerce not to initiate an antidumping duty investigation; (2) a negative preliminary determination rendered by the ITC; (3) final determinations rendered by the ITC or Commerce; (4) a scope determination issued by Commerce; or (5) a final results of an administrative review. *Id.* To obtain judicial review, a "party to the proceeding" must file a summons with the CIT within 30 days after the date of publication in the *Federal Register* of a notice of a final determination. 19 U.S.C. § 1516a(a)(2)(A) (1990).

232 28 U.S.C. §§ 1292(c)(1), 1295(a)(5) (1990).

233 *See* 19 U.S.C. § 1675 (1990); 19 C.F.R. § 353.25 (1989).

If the foreign exporter has eliminated dumping, it can request Commerce to revoke, in whole or in part, the outstanding antidumping duty order.[234] Commerce may revoke an outstanding order, in whole or in part, if all the "producers and resellers" covered by the order have satisfied the following two conditions: (1) they have discontinued making sales of the subject merchandise at less than foreign market value "for a period of at least three consecutive years;"[235] and (2) "it is not likely that these persons will, in the future, sell the merchandise" at less than foreign market value.[236]

Commerce also may revoke an antidumping order, in whole or in part, because of "changed circumstances."[237] The party seeking revocation of an antidumping duty order based upon "changed circumstances" bears the burden of persuasion regarding whether there exist circumstances sufficient to warrant the revocation of the order.[238] One example of "changed circumstances" is that the subject merchandise covered by the antidumping duty order no longer is a cause of, or threatens to cause, material injury to a U.S. domestic industry.[239] Another example is that the U.S. domestic industry is no longer interested in maintaining the antidumping duty order.[240]

I. Conclusion

Title VII, section 731, of the Tariff Act provides for the imposition of antidumping duties only when imports of the subject merchandise are sold at less than fair value in the United States, and such imports are a cause of, or threaten to cause, material injury to the relevant U.S. domestic industry. Selling at less than fair value generally refers to the practice of charging a higher price for the merchandise sold in the foreign exporter's home market or a third-country market (*i.e.*, foreign market value) than the price charged for comparable merchandise sold in the U.S. market (*i.e.*, U.S. price).

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234 19 C.F.R. § 353.25 (1989).

235 19 U.S.C. § 1675(c) (1990); 19 C.F.R. § 353.25 (1989).

236 *Id.*

237 19 U.S.C. § 1675(b),(c) (1990); 19 C.F.R. § 353.25(d) (1989).

238 *See id.*

239 *See* 19 U.S.C. § 1675(b) (1990); 19 C.F.R. § 353.25(d)(1)(ii) (1989).

240 19 C.F.R. § 353.25(d)(1)(i) (1989). Commerce will revoke an outstanding antidumping duty order, in whole or in part, if it receives an "affirmative statement of no interest from the petitioner." 19 C.F.R. § 353.25(d)(2) (1989). Commerce will presume a lack of interest in maintaining the antidumping order when no "interested party" requests an administrative review for a period of five consecutive years. 19 C.F.R. § 353.25(d)(4)(i) (1989). Commerce will revoke an order under such circumstances unless an "interested party" objects in writing to the revocation. 19 C.F.R. § 353.25(d)(4)(iii) (1989).

Both Commerce and the ITC must render affirmative final determinations before Commerce acquires the legal authority pursuant to the Tariff Act to publish an antidumping duty order that triggers the imposition or assessment of antidumping duties. Certain Mexican exporters found in the past to be dumping have been able to avoid the imposition of such duties by convincing the ITC that their merchandise was not a cause of, or did not threaten to cause, material injury to the relevant U.S. domestic industry.

Despite these favorable determinations, Mexican exporters recently have found themselves involved in a growing number of complex U.S. antidumping duty proceedings. These exporters, like other foreign exporters, have discovered that a working knowledge of the statutory and regulatory procedures and requirements of the U.S. antidumping duty law is essential for continued commercial success in the U.S. market. For this reason, the current administration of the U.S. antidumping duty law *vis-a-vis* Mexican exporters should play one of the leading roles in future U.S.-Mexico free trade talks.

Application of Commerce's general and special rules for currency conversion, the feasibility of quantitative restriction agreements and their implications under the GATT — as well as the ITC's injury standard and its concomitant authority to define the relevant U.S. domestic industry on a regional basis — should be just a few of the many technical antidumping issues that dominate future U.S.-Mexico free trade negotiations. If the U.S.-Canada experience can serve as a model for future U.S.-Mexico trade relations, then U.S. and Mexican trade negotiators and administrators may be grappling with antidumping issues even after a U.S.-Mexico free trade agreement is in place.

III. Current Administration of U.S. Countervailing Duty Laws in Proceedings Involving Products from Mexico

A. Introduction

Until recently, U.S. countervailing duty actions comprised the majority of U.S. unfair trade proceedings involving imports of Mexican origin. Although the number of countervailing duty actions covering Mexican products has declined during the past few years, while the number of antidumping actions has increased, certain countervailing duty issues continue to have a significant commercial impact upon the daily business activities of many Mexican exporters. Some of these is-

sues, which already have spawned several lawsuits in U.S. courts, should also play a significant role in forthcoming U.S.-Mexico free trade talks.

This section of the Article first chronicles the historical origins of the international obligation recently undertaken by the United States to grant Mexican products an injury test in countervailing duty proceedings. In particular, this section analyzes the legal consequences and discusses the lawsuits arising out of Mexico's entering into a bilateral agreement with the United States in 1985 and acceding to the GATT one year later. This section then examines a novel administrative procedure currently employed by the United States to grant certain duty-free imports of Mexican origin an injury test, discusses certain aspects of the 1985 U.S.-Mexico bilateral trade accord, and concludes by exploring one of the more controversial issues arising under the U.S. countervailing duty law today — namely, the so-called "*de facto* specificity test".

B. The Injury Test Requirement In U.S. Countervailing Duty Actions Involving Dutiable And Duty-Free Products From Mexico

1. *Historical Origins Of The Injury Test Requirement Pursuant To The GATT And The U.S. Countervailing Duty Laws*

GATT contracting parties typically initiate countervailing duty proceedings to counteract the trade distorting effects of subsidies. A subsidy is generally the bestowal of goods or services by a government upon the manufacture, production, or exportation of a product on terms that are preferential or inconsistent with commercial considerations.[241]

Article VI of the GATT[242] and the GATT Subsidies Code[243] authorize signatory countries to impose countervailing duties, in addition to customs duties, upon subsidized products that cause or threaten *material injury* to, or materially retard the establishment of, a domestic industry. Neither the GATT nor the GATT Subsidies Code currently authorizes signatory countries to impose countervailing duties upon services.[244]

The United States currently administers two countervailing duty laws to offset any unfair benefits that foreign exporters might enjoy over U.S. producers in the U.S. market as a result of receiving subsidies from

241 19 U.S.C. §§ 1677(5), 1303(a)(1) (1990).

242 GATT, art. VI, para. 6(a).

243 Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures), MTN/NTM/W/236, *reprinted in* House Doc. No. 98-153, pt I at 257 (hereinafter "GATT Subsidies Code").

244 *See supra* notes 241 and 242; *see also supra* note 19.

their foreign governments.[245] Section 303 of the Tariff Act implements U.S. international obligations arising under the GATT.[246] Title VII, section 701, of the Tariff Act implements U.S. international obligations arising under the GATT Subsidies Code.[247]

As previously discussed, the GATT authorizes contracting parties to impose countervailing duties only if the subsidized merchandise is causing, or threatening to cause, *material injury* to a domestic industry.[248] Article VI, paragraph 6(a), of the GATT provides in relevant part:

> No contracting party shall levy any . . . *countervailing duty* on the importation of any product of the territory of another contracting party unless it determines that the effect of the . . . *subsidization* . . . is such as to *cause or threaten material injury* to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.[249]

Even though the United States acceded to the GATT in 1947,[250] Article VI of the GATT did not require the United States to conduct an injury investigation in U.S. countervailing duty proceedings until 1974.[251] In other words, the GATT essentially authorized the United States for more than two decades to impose countervailing duties in the absence of an affirmative injury determination. The reason for this apparent anomaly stems from the Protocol of Provisional Application of the GATT (the "GATT Protocol"), the legal instrument pursuant to which the United States acceded to the GATT.[252]

The relevant language of the GATT Protocol required certain signatory countries, including the United States, to apply certain provisions of the GATT, including Article VI, "to the fullest extent not inconsistent with existing legislation."[253] The U.S. countervailing duty law in effect at the time that the United States acceded to the GATT — section 303 of the Tariff Act of 1930 — covered only dutiable merchandise and did not require an affirmative injury determination to trigger the imposition of

245 Overview of U.S. Trade Statutes at 45. The United States imposes countervailing duties equal to the amount of the "net subsidy" conferred upon the subject merchandise. 19 U.S.C. § 1671(a) (1990). For a definition of the term "net subsidy," *see* 19 U.S.C. § 1677(6) (1990).

246 19 U.S.C. § 1303 (1990).

247 19 U.S.C. §§ 1671 *et seq.* (1990).

248 *See supra* note 242.

249 *See id.*

250 *See supra* note 2.

251 S. Rep. No. 1298, 93d Cong., 2d Sess. 185, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7320; *Cementos Guadalajara, S.A. v. United States*, 686 F. Supp. 335, 344 (Ct. Int'l Trade 1988), *aff'd*, *Cementos Guadalajara, S.A. v. United States*, 879 F.2d 847 (Fed. Cir. 1989).

252 55 U.N.T.S. 308 (1947).

253 *Id.*

countervailing duties.[254] The GATT Protocol, therefore, "grandfathered" under the GATT existing U.S. legislation that, on its face, was inconsistent with Article VI of the GATT.[255]

In 1974, Congress enacted the Trade Act of 1974 which, among other things, amended section 303 of the Tariff Act.[256] In exchange for granting certain imports from certain Lesser Developed Countries ("LDCs") duty-free treatment pursuant to the U.S. Generalized System of Preferences ("GSP"), the Trade Act of 1974 expanded the purview of the U.S. countervailing duty law to cover duty-free merchandise.[257] Because Congress enacted this amendment well after the formation of the GATT, the provision for duty-free merchandise fell outside the GATT "grandfather" clause.[258] Accordingly, Article VI of the GATT required the United States for the first time to conduct an injury investigation in a countervailing duty proceeding.[259]

This requirement to grant an injury test applied only to duty-free merchandise, however, and only when the "international obligations of the United States" mandated the application of such a test.[260] The term "international obligations," as appearing in section 303(a)(2) of the Tariff Act, refers to the GATT or any bilateral agreement pursuant to which the United States has pledged to grant another country most favored nation treatment.[261] Thus, only duty-free imports from GATT signatory countries, or countries that have entered into a bilateral agreement described above, are entitled to an injury test pursuant to section 303(a)(2) of the Tariff Act.[262]

At the conclusion of the Tokyo Round of multilateral trade negotiations that took place during the mid-to-late 1970s, the United States, together with several other GATT signatory countries, became a signatory to the GATT Subsidies Code.[263] The Subsidies Code, a subsidiary agreement to the GATT, established for the first time on a multilateral basis specific rules and procedures designed to counteract the trade distorting effects of export subsidies.[264]

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254 46 Stat. 687.

255 *See supra* note 251.

256 *See id.*; Pub. L. 93-618, Title III, section 331(a), 88 Stat. 2049.

257 *See id.*

258 *See supra* note 251.

259 *See id.*

260 *See id.*; 19 U.S.C. § 1303(a)(2) (1990).

261 *See supra* note 251.

262 *See id.*; 19 U.S.C. § 1303(a)(2) (1990).

263 Overview of U.S. Trade Statutes at 46.

264 *Id.* at 46-47.

To implement the United States' international obligations arising under the GATT Subsidies Code, the U.S. Congress passed the Trade Agreements Act of 1979 (the "Trade Agreements Act") and, thereby, enacted a new U.S. countervailing duty law.[265] In so doing, the U.S. Congress did not repeal the U.S. countervailing duty law in effect at that time, section 303 of the Tariff Act.[266] The two countervailing duty statutes have coexisted since 1980.

The new U.S. countervailing duty law, which appears in Title VII, section 701, of the Tariff Act, requires the United States to conduct an injury investigation for both duty-free and dutiable imports in a countervailing duty proceeding.[267] Before the United States grants an injury test pursuant to Title VII, however, the foreign country from which the imports originated first must acquire "country under the Agreement" status within the meaning of section 701 of the Tariff Act.[268]

Section 701 offers foreign countries two options to acquire "country under the Agreement" status. First, the United States can accept the accession by a foreign country to the GATT Subsidies Code.[269] Second, a foreign country can enter into a bilateral agreement with the United States.[270] Pursuant to such an agreement, the foreign sovereign must pledge to assume obligations *vis-a-vis* the United States that are "substantially equivalent" to the international obligations arising under the GATT Subsidies Code.[271]

If a particular foreign country acquires "country under the Agreement" status, then section 701 of the Tariff Act is the governing countervailing duty statute in the event of a countervailing duty investigation.[272] If, however, a foreign country does not acquire "country under the Agreement" status, then section 303 of the Tariff Act is the controlling countervailing duty law.[273] The principal difference between these countervailing duty laws is that section 303 does not authorize the United States to conduct an injury investigation for dutiable imports.[274]

Mexico decided to acquire "country under the Agreement" status by entering into a bilateral agreement with the United States. In 1985,

265 Trade Agreements Act of 1979, Pub. L. 96-39, Title I, § 101, 93 Stat. 151.
266 19 U.S.C. § 1303 (1990).
267 19 U.S.C. § 1671 (1990).
268 19 U.S.C. § 1671(b) (1990).
269 19 U.S.C. § 1671(b)(1) (1990).
270 19 U.S.C. § 1671(b)(2) (1990).
271 *Id.*
272 19 U.S.C. § 1671(a) (1990).
273 19 U.S.C. § 1303 (1990).
274 *Compare* 19 U.S.C. § 1303(a)(2) (1990) *with* 19 U.S.C. § 1671 (1990).

the United States and Mexico signed the "Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties" (the "Understanding").[275] Pursuant to the Understanding, Mexico assumed obligations "substantially equivalent" to those arising under the GATT Subsidies Code.[276] Accordingly, dutiable and duty-free imports of Mexican origin became entitled to an injury test in U.S. countervailing duty investigations pursuant to section 701 of the Tariff Act.[277]

The Understanding, at paragraph 5, requires the United States to grant an injury test in all prospective countervailing duty investigations involving Mexican products, as well as in countervailing duty investigations that were already "in progress" when Mexico and the United States entered into the bilateral accord.[278] Paragraph 5 of the Understanding provides in relevant part:

> With respect to *all United States countervailing duty investigations in progress* concerning products of Mexico *as of the date of entry into force of this Understanding*, the United States shall ensure that no countervailing duties shall be imposed upon any product of Mexico unless it is determined that the subsidized imports are, through the effects of the subsidy, causing or threatening to cause material injury to an established domestic industry, or retard materially the establishment of a domestic industry.[279]

In *Porcelain-on-Steel Cooking Ware From Mexico, the People's Republic of China, and Taiwan*, the first U.S. countervailing duty investigation initiated against Mexican imports after Mexico had entered into the Understanding, the ITC granted Mexican products an injury test for the first time in a U.S. countervailing duty proceeding.[280]

On August 24, 1986, one year after Mexico had entered into the Understanding, Mexico acceded to the GATT.[281] This event similarly entitled certain Mexican imports to an injury test in U.S. countervailing duty actions. Specifically, duty-free imports of Mexican origin became entitled to an injury test pursuant to section 303(a)(2) of the Tariff Act and Article VI of the GATT.[282]

Although the relevant language appearing in the Tariff Act, the Understanding, and the GATT demonstrates that Mexican imports in general became entitled to an injury determination in U.S. countervailing duty proceedings, an issue arose concerning the effective date of this U.S.

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275 *See supra* note 1.
276 *See supra* note 1, at paras. 1 and 2.
277 *See id.* at para. 5; 19 U.S.C. § 1671(a),(b)(2) (1990).
278 *See supra* note 1, at para. 5.
279 *Id.* (emphasis added).
280 *See supra* note 136.
281 *See supra* note 2.
282 19 U.S.C. § 1303(a)(2) (1990); GATT, art. VI, para. 6(a).

obligation. This issue ignited intense controversy in both the United States and Mexico and resulted in the filing of several legal actions in U.S. courts, including the U.S. Supreme Court.[283]

2. *Judicial Resolution Of The Injury Test Obligation Arising Under the U.S.-Mexico Bilateral Understanding And The GATT*

The legal challenges concerning the effective date of the injury test obligation arising under the U.S.-Mexico bilateral Understanding and the GATT find their genesis in the initial countervailing duty investigation of *Portland Hydraulic Cement and Cement Clinker from Mexico.*[284] In that investigation, Commerce found that the Government of Mexico had bestowed countervailable subsidies upon Mexican producers and exporters of portland hydraulic cement.[285] Because, at the time of the initial investigation, Mexico had not acquired "country under the Agreement" status and had not acceded to the GATT, the ITC did not conduct an injury investigation.[286] Accordingly, Commerce published both its affirmative final determination and the countervailing duty order in the *Federal Register* on September 21, 1983.[287]

In December 1985, after Mexico had signed the Understanding and acquired "country under the Agreement" status, Commerce completed the first administrative review of the countervailing duty order covering Mexican cement.[288] This administrative review covered imports of the subject merchandise entered into the United States during the period July 1, 1983 - December 31, 1983.[289] Because Mexico had not acquired "country under the Agreement" status until after the investigation and publication of the countervailing duty order, Commerce concluded that an injury determination, pursuant to the Tariff Act and the Understanding, was not warranted in the first administrative review.[290]

In December, 1986, after Mexico had acceded to the GATT, Commerce completed the second administrative review covering the subject merchandise.[291] This administrative review covered imports entered

283 110 S.Ct. 1318 (1990).

284 *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Portland Hydraulic Cement and Cement Clinker From Mexico,* 48 Fed. Reg. 43,063 (1983).

285 *Id.*

286 *Id.* at 43,064.

287 *Id.*

288 *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Administrative Review of Countervailing Duty Order,* 50 Fed. Reg. 51,732 (Dec. 19, 1985).

289 *Id.*

290 *See id.*

291 *Portland Hydraulic Cement and Cement Clinker From Mexico; Final Results of Countervailing Duty Administrative Review,* 51 Fed. Reg. 44,500 (1986).

during the period January 1, 1984 - December 31, 1984.[292] Although imports of Mexican cement entered into the United States duty free during the administrative review period, all of these entries had occurred before Mexico acceded to the GATT.[293] Accordingly, Commerce reasoned that an injury determination, pursuant to section 303(a)(2) of the Tariff Act and Article VI of the GATT, was not warranted in the second administrative review either.[294]

Mexican producers and exporters of portland hydraulic cement challenged both of these administrative determinations by filing three separate lawsuits in the CIT. In the lawsuit challenging the first administrative review, *Cementos Anahuac Del Golfo, S.A. v. U.S.* ("*Cementos Anahuac I*"), the Mexican litigants contended that the Understanding proscribed the United States from continuing to impose countervailing duties upon Mexican cement in the absence of an affirmative injury determination.[295] The Mexican plaintiffs further contended that because the ITC had not rendered such a determination in the initial countervailing duty investigation, Commerce should revoke the outstanding countervailing duty order.[296]

To support their contentions, the Mexican exporters argued that the phrase "investigations in progress," as appearing in paragraph 5 of the Understanding, warranted a broad construction.[297] Specifically, the Mexican plaintiffs contended that this language encompassed all phases of an administrative proceeding, including an administrative review.[298] Because the first administrative review covering Mexican cement was already "in progress" when Mexico entered into the Understanding, paragraph 5 of the Understanding, in conjunction with sections 701 and 303(a)(2) of the Tariff Act, prohibited the further imposition of countervailing duties in the absence of an affirmative injury determination.[299]

By contrast, the United States contended that the plain language of the Understanding, at paragraph 5, requires an injury investigation in only two situations: (1) where a countervailing duty "investigation," rather than an administrative review, was already "in progress" when

292 *Id.*

293 *Id.*

294 *Id.*

295 *Cementos Anahuac del Golfo, S.A. v. United States*, 687 F. Supp. 1558, 1566 (Ct. Int'l Trade 1988); *rev'd*, *Cementos Guadalajara, S.A. v. United States*, 879 F.2d 847 (Fed. Cir. 1989); *cert. denied*, 110 S.Ct. 1318 (1990).

296 687 F. Supp. at 1559, 1566.

297 687 F. Supp. at 1566 (R. Doc. 60).

298 *Id.*

299 *Id.* at 1565-1566.

Mexico signed the Understanding; and (2) where a countervailing duty "investigation" is initiated after Mexico became a signatory to the bilateral accord.[300] In other words, if a countervailing duty order covering Mexican imports was already in effect as of the date that the parties entered into the Understanding, then none of the imports subject to that order (*i.e.*, imports subject to a prospective administrative review) would be entitled to an injury test.[301]

To support its contention, the United States directed the court's attention in *Cementos Anahuac I* to the Commerce regulations in effect during the period in which the United States and Mexico entered into the Understanding, as well as the period covered by the first administrative review.[302] The relevant regulation defined the term "investigation" to include only that judicially reviewable segment of the administrative proceeding that takes place before, among other events, the publication of an order.[303] In other words, the term "investigation," as defined by the Commerce regulations in effect at that time, did not encompass an administrative review.[304]

The United States then proceeded to argue that because identical terms used in similar, if not identical, contexts should have the same meaning, the term "investigations," as appearing in paragraph 5 of the Understanding, did not encompass an administrative review either.[305] Therefore, neither the Understanding nor the Tariff Act, according to the United States, required an injury determination in the first countervailing duty administrative review covering cement imported from Mexico.[306]

Despite this argument, the CIT rejected the interpretation advanced by the U.S. Government in *Cementos Anahuac I* and ruled in favor of the Mexican exporters.[307] The court's opinion states in relevant part:

> Here, Mexico met the standard(s) of section 701(b) before any countervailing duties were sought to be imposed on entries for the period at issue, July 1-December 31, 1983. The change in [Mexico's] status [under section 701], as the country of origin, altered the status of the merchandise emanating therefrom insofar as imposition of those duties was concerned.[308]

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300 *Id.* at 1563-1564.

301 *Id.*

302 *Id.*; 19 C.F.R. § 353.6(b) (1985); *Cf.* 19 C.F.R. § 353.11(b) (1985) (definition of antidumping proceeding).

303 *Id.*

304 *See id.*

305 *Id.*

306 *Id.*

307 687 F. Supp. at 1569.

308 *Id.* at 1562.

As a result, the CIT remanded the matter to Commerce.[309]

In the lawsuits challenging the second administrative review described above, *Cementos Guadalajara, S.A. v. U.S.* and *Cementos Anahuac Del Golfo, S.A. v. U.S.* ("*Cementos Anahuac II*"), Mexican exporters of the subject merchandise once again sought revocation of the outstanding countervailing duty order.[310] In these lawsuits, the Mexican plaintiffs marshalled essentially the same arguments that they had advanced in *Cementos Anahuac I* with regard to the Understanding.[311]

Furthermore, the Mexican exporters advanced an alternative argument. The Mexican litigants contended that Mexican imports of cement, a duty-free product pursuant to U.S. law, were entitled to an injury test pursuant to section 303(a)(2) of the Tariff Act and Article VI of the GATT.[312] The Mexican plaintiffs emphasized that by the time Commerce completed the second administrative review of the subject merchandise, Mexico already had acceded to the GATT:

> [S]ince the date of Mexico's GATT accession in 1986, Mexico has become entitled to all the privileges of GATT membership. This, of course, includes that its products not be subject to the imposition of countervailing duties where there has been no related injury determination by the ITC.
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> * * * * * * *
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> After GATT accession or other qualifying action, [Commerce] is without authority to issue any order directing the Customs to *impose* final countervailing duties and liquidate entries absent an affirmative injury requirement. The fact that the entries in question were made prior to GATT accession is not dispositive; the fact the order directing imposition or final liquidation of provisional duties collected on those entries was issued *after* GATT accession is.[313]

The United States contended, in accordance with a well settled principle of U.S. customs law, that liability for duties, including countervailing duties, attaches at the time of entry of the imported merchandise into the customs territory of the United States.[314] Because the entries at issue had occurred before Mexico acceded to the GATT, plaintiffs' argument, according to the United States, necessarily would give Mexico's newly acquired GATT privileges retroactive effect.[315]

The United States further contended that this result would conflict

309 *Id.* at 1569.

310 *Cementos Guadalajara*, 686 F. Supp. at 336, 337; *Cementos Anahauc Del Golfo, S.A. v. United States*, 689 F. Supp. at 1192, 1193, *aff'd*, 879 F.2d at 847; *cert. denied*, 110 S.Ct. at 1318.

311 686 F. Supp. at 342-353; 689 F. Supp. at 1205-1214.

312 *Id.*

313 686 F. Supp. at 348-349 (citations omitted)(emphasis supplied in original).

314 *Id.* at 351-352.

315 *Id.*

with a well established principle of statutory and treaty construction.[316] This principle provides that, absent a contrary intent manifested by Congress or the international agreement in question, international agreements, such as the GATT, have only prospective, rather than retroactive, effect.[317]

The United States then parried the plaintiffs' arguments concerning the Understanding by stressing that plaintiffs were attempting to apply the terms of the Understanding retroactively as well.[318] The United States also reiterated its earlier argument from *Cementos Anahuac I* that the term "investigations," as appearing in paragraph 5 of the Understanding, did not encompass an administrative review.[319]

In two separate opinions written by a different judge of the CIT, the court ruled against the Mexican exporters in *Cementos Guadalajara* and *Cementos Anahuac II*.[320] In disagreeing *sub silentio* with the reasoning of *Cementos Anahuac I*, Judge Carman endorsed all of the arguments advanced by the U.S. Government concerning the Understanding and the GATT.

In particular, the court agreed with the U.S. Government's interpretation of the term "investigations," as appearing in paragraph 5 of the Understanding.[321] The CIT emphasized that, just as the term "investigation," as defined by the Commerce regulations in effect during the relevant period, does not encompass an administrative review, so the identical term appearing in the Understanding does "not include reviews as plaintiff has argued."[322]

Furthermore, the CIT fully agreed with the U.S. position that plaintiffs' legal theory would result in the improper, retroactive application of paragraph 5 of the Understanding and Article VI of the GATT.[323] Underscoring that "the liability for [countervailing] duties is established at the time of entry of the goods into the United States,"[324] Judge Carman explained:

> The [terms of the] Understanding did not provide for retroactive applica-

316 *See generally* 689 F. Supp. at 1212-1214.
317 *See id.*
318 689 F. Supp. at 1209-1214.
319 *Id.*
320 686 F. Supp. at 353; 689 F. Supp. at 1216.
321 689 F. Supp. at 1210-1211.
322 *Id.*
323 *Id.* at 1213-1214.
324 686 F. Supp. at 351, *citing Zenith Radio Corp. v. United States*, 509 F. Supp. 1282, 1286 (Ct. Int'l Trade 1981), *rev'd and rem'd on other grounds*, 710 F.2d 806 (Fed. Cir. 1983), *rev'd and rem'd on other grounds*, 764 F.2d 1577 (Fed. Cir. 1985), *aff'd on other grounds*, 823 F.2d 518 (Fed. Cir. 1987).

> tion of an injury determination prior to the effective date of the Understanding.
>
> The Court further holds the determinations by [Commerce] not to treat [the subject merchandise] *entered* in 1984 as effectively retroactive on account of the accession of Mexico to the GATT on August 24, 1986 was supported by substantial evidence on the record and was otherwise in accordance with law. *There is no provision in U.S. domestic countervailing duty law or in the GATT providing for retroactive effect.*[325]

Judge Carman subsequently affirmed the second administrative review issued by Commerce and, accordingly, denied the plaintiffs' request for revocation of the outstanding countervailing duty order.[326]

All of the parties involved in the three lawsuits before the CIT appealed the conflicting final judgments to the Federal Circuit. The Federal Circuit consolidated all of the appeals and, in a *per curiam* opinion issued in *Cementos Guadalajara, S.A. v. U.S*, ruled in favor of the U.S. Government.[327] In so doing, the Federal Circuit reversed the CIT's decision in *Cementos Anahuac I* and affirmed both of Judge Carman's decisions.[328] The United States Supreme Court then denied the Mexican exporters' subsequent petition for a *writ of certiorari* and, thereby, conclusively settled the legal disputes arising from the three lawsuits.[329]

As the dust settles on these judicial decisions, a few general principles emerge that may guide Mexican exporters and U.S. importers during the immediate future. Dutiable and duty-free imports of Mexican origin that are subject to an outstanding countervailing duty order that was in effect as of April 23, 1985, the effective date of the Understanding, are not entitled to an injury test pursuant to section 701 of the Tariff Act and paragraph 5 of the Understanding. Duty-free imports of Mexican origin that entered into the customs territory of the United States before August 24, 1986, the date that Mexico acceded to the GATT, similarly are not entitled to an injury test pursuant to the Tariff Act and the GATT. As discussed in the next subsection, however, duty-free imports of Mexican origin that entered into the United States on or after August 24, 1986, are entitled without qualification to an injury test pursuant to U.S. law.

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325 689 F. Supp. at 1213-1214 (citations omitted) (emphasis added).

326 686 F. Supp. at 353; 689 F. Supp. at 1216.

327 *Cementos Guadalajara, S.A. v. United States*, 879 F.2d 847 (Fed. Cir. 1989).

328 *Id.*

329 110 S.Ct. at 1318.

3. *Mexico's Entitlement To An Injury Test For Post-GATT Accession Entries Of Duty-Free Merchandise*

Duty-free imports of Mexican origin that entered into the customs territory of the United States on or after the date that Mexico acceded to the GATT are entitled to an injury determination pursuant to section 303(a)(2) of Tariff Act and Article VI of the GATT.[330] These duty-free imports, as opposed to dutiable imports, are entitled to an injury test even if they are subject to an outstanding countervailing duty order that was in effect as of that date.[331] In other words, the United States must conduct an injury investigation for such duty-free imports even during the administrative review stage of a countervailing duty proceeding.

These legal conclusions follow from a careful analysis of section 303 of the Tariff Act and Article VI of the GATT. Section 303(a)(2) of the Tariff Act proscribes, in the absence of an affirmative injury determination, the imposition of countervailing duties upon duty-free imports from GATT contracting parties that have not signed, or assumed obligations "substantially equivalent" to, the GATT Subsidies Code.[332] Section 303(a)(2) provides in relevant part:

> In the case of any imported article or merchandise which is free of duty, duties may be *imposed* under this section only if there are affirmative [injury] determinations by the Commission . . . except that such a determination shall not be required unless . . . required by the *international obligations of the United States.*[333]

Mexico's entitlement to an injury test pursuant to section 303(a)(2) turns upon the meaning of the term "imposed," as underscored above, and the nature of the "international [GATT] obligations" codified into that statutory provision.

Although the Tariff Act does not define the operative term "imposed," the relevant legislative history demonstrates that Congress intended this term to have the same meaning as the term "levy," as appearing in the relevant provisions of the GATT.[334] The term "levy,"

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330 19 U.S.C. § 1303(a)(2) (1990); GATT, art. VI, para. 6(a); *Lime From Mexico; Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order*, 54 Fed. Reg. 49,324, 49,325-49,329 (1989); 54 Fed. Reg. 51,340-51,341 (1989).

331 *Id.*

332 *Id.*; S. Rep. No. 1298, 93 Cong., 2d Sess. 185, *reprinted in* 1974 U.S. Code Cong. & Admin. News 7186, 7320.

333 19 U.S.C. § 1303(a)(2) (1990) (emphasis added).

334 The Senate report accompanying section 303(a)(2) of the Tariff Act, which expanded the purview of the U.S. countervailing duty law to cover duty-free merchandise, provides in relevant part:

> The inclusion of an injury standard [in section 303(a)(2) of the Tariff Act] is appropriate in light of the general countervailing duty rule in Article VI of the GATT which requires a finding of

as appearing in Article VI of the GATT, refers to the final legal assessment or collection of a countervailing duty.[335] Therefore, Congress intended the term "imposed," as appearing in section 303(a)(2) of the Tariff Act, to refer to the final legal assessment or collection of a countervailing duty.[336] This legal conclusion is consistent not only with U.S. customs law[337] but also with the CIT's decision in *Serampore Industries Pvt. Ltd. v. Commerce Department.*[338]

Additionally, Article VI of the GATT, by requiring contracting parties to conduct an injury investigation before *"levy[ing]* any . . . counter-

> injury before such duties may be *levied* on subsidized product imports. Section 303 of the 1930 Tariff Act does not [currently] provide for an injury test. However, because the present U.S. countervailing duty law, which applies only to dutiable items, predates the GATT, it is within the permitted exceptions to the GATT under the so-called "grandfather clause." However, the [current] extension of such law to nondutiable items is not covered by any such exception and so the nondutiable items should be subject to an injury test.

S. Rep. No. 128, 93d Cong., 2d Sess. at 185 (emphasis added).

This language demonstrates that Congress intended the term "imposed," as appearing in section 303(a)(2) of the Tariff Act, to have the same meaning as the term "levy," as appearing in Article VI of the GATT. Furthermore, although not dispositive of the issue, the title of section 303 of the Tariff Act — "*Levy* of countervailing duties" — supports this conclusion. 19 U.S.C. § 1303 (1990).

335 Paragraph 6(a) of Article VI of the GATT provides that "[n]o contracting party shall *levy* any . . . countervailing duty" upon imports from another contracting party in the absence of an affirmative injury determination. GATT, art. VI, para. 6(a)(emphasis added). Although the GATT does not define the term "levy," the GATT Subsidies Code defines that term to refer to "the definitive or final legal assessment or collection of a duty or tax." GATT Subsidies Code, art. 4, n. 14. Because the GATT Subsidies Code is an interpretative agreement of the GATT, it is reasonable to conclude that the term "levy," as appearing in Article VI of the GATT, has the same meaning as the identical term in Article 4 of the GATT Subsidies Code.

In fact, Article 31 of the Vienna Convention On The Law Of Treaties (the "Vienna Convention") compels this conclusion. Article 31 provides in relevant part that "[a]ny subsequent agreement between the parties regarding the *interpretation* of the treaty or the *application* of its provisions . . . shall be taken into account" when interpreting the terms of "the treaty." Vien. Conv., art 31, para. 3(a)(emphasis added). The GATT Subsidies Code constitutes such a "subsequent agreement" within the meaning of Article 31 of the Vienna Convention. The official name or title of the GATT Subsidies Code is the "Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade." *See supra* note 243. Furthermore, just as "[i]t is true that the views of a subsequent [U.S.] Congress . . . are entitled to some weight, particularly when the precise intent of the enacting Congress is obscure," *Carlisle Tire and Rubber Co. v. United States,* 564 F. Supp. 834, 839 (Ct. Int'l Trade 1983), so the views of subsequent GATT drafters should likewise be entitled to some weight. Therefore, the term "levy," as appearing in Article VI of the GATT, also refers to the "final legal assessment or collection of a duty." GATT Subsidies Code, art. 4, n.14.

336 *See supra* notes 334, 335.

337 *See supra* note 175.

338 675 F. Supp. 1354 (Ct. Int'l Trade 1987). In *Serampore,* the CIT endorsed Commerce's interpretation of the term "imposed," as appearing in the phrase "the amount of any countervailing duty imposed," contained in section 772 of the Tariff Act. *Id.* Commerce interpreted the operative term to refer to the final legal assessment of a countervailing duty. *Id.* It is a well settled canon of statutory construction that identical terms in the same statute have the same meaning. Sutherland Stat. Const. § 51.01 - .03 (4th Ed. 1984).

vailing dut[ies],"[339] necessarily requires such parties to render an injury determination each time they seek to assess or collect duties pursuant to an outstanding order.[340] In other words, this international obligation to grant an injury test does not terminate with the issuance of a countervailing duty order, but continues for the life of the order. As explained by Commerce in the final results of the "changed circumstances" administrative review involving *Lime from Mexico*:

> The GATT has always recognized that a contracting party has a continuing obligation to review and update the original determinations that resulted in the countervailing duty order; the issuance of an order does not establish a basis for collecting [or assessing] duties indefinitely.[341]

Because Congress intended the operative term "imposed," as appearing in section 303(a)(2) of the Tariff Act, to refer to the final legal assessment or collection of a countervailing duty, and because Congress codified all of the Article VI requirements of the GATT into section 303(a)(2), Congress necessarily codified into that statutory provision the GATT's continuing obligation to grant an injury test throughout the life of a countervailing duty order.[342] In other words, Congress intended an injury investigation for duty-free imports from, among other countries, a GATT contracting party that has not signed the GATT Subsidies Code each time Commerce directs Customs, pursuant to section 303 of the Tariff Act, to assess or collect countervailing duties.[343]

When Mexico acceded to the GATT on August 24, 1986, duty-free imports of Mexican origin were subject to ten separate U.S. countervailing duty orders.[344] In light of the legal analysis presented above, both Commerce and the Office of the United States Trade Representative concluded that U.S. law proscribed the imposition of countervailing duties upon such post-GATT accession imports in the absence of an affirmative

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339 GATT, art. VI, para. 6(a) (emphasis added).

340 *See supra* note 330. Specifically, Article VI of the GATT provides that "[n]o contracting party shall *levy* any . . . countervailing duty on the importation of any product . . . unless it determines that the effect of the . . . subsidization . . . is such as to cause or threaten material injury to an established domestic industry . . . . " GATT, art. VI, para. 6(a) (emphasis added). Because the term "levy" refers to the "final legal assessment or collection of a [countervailing] duty," *see supra* note 335, Article VI of the GATT necessarily requires contracting parties to conduct an injury investigation each time the party seeks to "assess" or "collect" countervailing duties pursuant to an outstanding order. *See supra* note 330.

341 *Supra* note 330, 54 Fed. Reg. at 49,326.

342 *See supra* notes 330, 334, 335, 337; 19 U.S.C. 1303(a)(2) (1990).

343 *See id.*

344 Status Report of Outstanding Countervailing Duty Orders, U.S. Department of Commerce, International Trade Administration, Import Administration, Office of Countervailing Duty Compliance (Oct. 1990).

injury determination.[345] As a result, the Assistant Secretary for Import Administration at Commerce requested the ITC to conduct an injury investigation for such duty-free imports.[346]

Consistent with its previous legal position in *Certain Fasteners From India* ("*Indian Fasteners*"),[347] the ITC responded that the relevant provisions of the Tariff Act did not authorize the Commission to conduct an injury investigation for such duty-free imports of Mexican origin.[348] In *Indian Fasteners*, India was a signatory to the GATT when Commerce conducted the initial countervailing duty investigation.[349] The merchandise subject to the investigation, however, was dutiable, rather than duty free, in accordance with U.S. law.[350] Accordingly, the subject merchandise in *Indian Fasteners* was not entitled to an injury determination pursuant to section 303(a)(2) of the Tariff Act during the initial

345 Letter From Assistant Secretary for Import Administration to the Chairperson of the ITC (Oct. 15, 1987); Memorandum to Ambassador Yeutter from USTR General Counsel Alan F. Holmer (May 28, 1987).

346 *Id.*

347 47 Fed. Reg. 44,129 (1982); ITC General Counsel Memorandum GC-82-101 (Jan. 25, 1982); *see also* ITC General Counsel Memorandum GC-85-010 (Jan. 24, 1985) (identical issue involving duty-free imports from Trinidad and Tobago).

348 Letter From The Secretary of the ITC to the Assistant Secretary for Import Administration (Dec. 17, 1987)("Letter From ITC Secretary"). The ITC took the position that section 303(a)(2) of the Tariff Act did not authorize an injury investigation for the duty-free imports of Mexican origin at issue. *Id.* The ITC emphasized that the language of the statute did not contemplate an injury investigation for products already subject to outstanding countervailing duty orders. *Id.* Similarly, the ITC interpreted section 751(b) of the Tariff Act literally so as to authorize the Commission only to "review" a previous injury determination. *Id.*; 19 U.S.C. § 1675(b) (1985). Because the ITC had not conducted a previous injury investigation for any of the duty-free imports of Mexican origin at issue, the agency reasoned that it lacked the legal authority to conduct an injury "review" pursuant to section 751(b) of the Tariff Act. Letter From ITC Secretary.

The Commission also concluded that section 104(b) of the Trade Agreements Act did not authorize the agency to conduct an injury investigation either. *Id.* Section 104(b) — which established the transition rules for granting an injury test to foreign countries that signed, or assumed obligations "substantially equivalent" to those of, the GATT Subsidies Code — provides in relevant part:

> In the case of a countervailing duty order issued under section 303 of the Tariff Act of 1930 (19 U.S.C. 1303)—
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> (C) which is in effect on January 1, 1980 . . . the Commission, *upon request* of the government of such a country or of the exporters accounting for a significant portion of exports to the United States of merchandise which is covered by the order, *submitted [by January 1, 1983]* shall make [an injury] determination under paragraph 2 of this subsection.
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> Pub. L. 96-39, Title I, § 104(b), 93 Stat. 151 (emphasis added).

Mexico did not assume obligations "substantially equivalent" to those of the GATT Subsidies Code until 1985, when it entered into the Understanding with the United States. *See supra* note 275 and accompanying text. Because Mexico assumed such obligations after the statutory deadline date of January 1, 1983, the ITC concluded that it lacked the legal authority pursuant to the transition rules of the Trade Agreements Act to conduct an injury investigation. Letter From ITC Secretary.

349 *Certain Fasteners From India; Final Results of Administrative Review and Partial Revocation of Countervailing Duty Order*, 47 Fed. Reg. 44,129, 44,130-131 (1982).

350 47 Fed. Reg. at 44,130-131.

countervailing duty investigation.[351]

After Commerce had published the countervailing order in the *Federal Register*, some of the subject merchandise became duty free pursuant to the GSP program.[352] Commerce concluded that this change in status entitled India to an injury determination for the duty-free merchandise in question.[353] When the ITC informed Commerce that the relevant provisions of the Tariff Act did not authorize an injury investigation under such circumstances, Commerce concluded that "absent an affirmative injury determination, [the agency] lacks the legal authority to impose countervailing duties on . . . duty-free fasteners from India."[354] Commerce determined that the partial revocation of the order was warranted under those circumstances.[355]

When Commerce revisited this issue in the context of the ten outstanding countervailing duty orders covering duty-free imports from Mexico, the agency concluded that "it would be inappropriate . . . as [the Mexican] respondents would have it, [to] revoke the order[s] for want of [an injury] determination."[356] In the "changed circumstances" administrative review involving *Lime From Mexico*, mentioned above, Commerce explained that clear Congressional intent warranted a departure from the *Indian Fasteners* approach:

> Congress has not specifically addressed the anomalous situation faced in [the Mexican] case. However, Congress made clear its intent to provide an injury determination for merchandise entered duty-free from a contracting party to the GATT in the legislative history of the Trade Act of 1974. *See*, S. Rep. No. 1298, 93d Cong., 2d Sess. 185.[357]

Commerce further explained in *Lime From Mexico*:

> [Although] section 303(a)(2) [of the Tariff Act] does not contemplate conducting an injury investigation pursuant to a specific provision of the statute . . . [p]rior to [the 1979 Trade Agreements Act], section 303(b)(A) [of the Tariff Act], which has since been repealed [by the 1979 Act], required the ITC to conduct "*such investigation as it deemed necessary*, whether an industry in the United States is being or is likely to be *injured*, or is prevented from being established, by reason of the importation of such article or merchandise into the United States" in order to fulfill U.S. international

351 *Id.*
352 *Id.*
353 *Id.*
354 *Id.* at 44,131.
355 *Id.*; *Cf. Carbon Steel Wire Rod From Trinidad and Tobago*, 50 Fed. Reg. 19,561 (1985), 52 Fed. Reg. 45,982 (1987) (although Commerce preliminarily determined to revoke outstanding countervailing duty order based upon circumstances similar to those of *Indian Fasteners*, Commerce ultimately revoked order based upon U.S. industry's lack of interest in maintaining the order).
356 54 Fed. Reg. at 49,327.
357 *Id.*

obligations for an injury determination . . . .[358]

Based upon Congress' clear intent, Commerce determined that Mexico's accession to the GATT did not entitle post-GATT accession entries of duty-free merchandise from Mexico to an automatic revocation of the relevant countervailing duty orders.[359] Although it appeared that the United States lacked the legal authority pursuant to its domestic law to provide an injury test for such merchandise, Commerce, the ITC, and the Office of the United States Trade Representative engaged in several inter-agency discussions to find a solution to comply with U.S. legal obligations *vis-a-vis* Mexico.

The Executive Branch of the U.S. Government ultimately decided to avail itself of a unique administrative procedure to comply with its international GATT obligations. Instead of attempting to conduct a traditional injury investigation pursuant to Title VII of the Tariff Act, the United States decided to undertake an injury investigation pursuant to section 332(g) of the Tariff Act.[360] Section 332(g), never before used to conduct an injury investigation in a U.S. antidumping or countervailing duty proceeding, authorizes the ITC to "make such investigations and reports as may be requested by the President [of the United States]"[361] and to "investigate the operation of the customs laws."[362]

Before availing itself of this novel administrative procedure, the United States first had to overcome certain procedural obstacles. The most important of these obstacles involved the availability of judicial review in a section 332(g) investigation. When enacting the Trade Agreements Act in 1979, Congress conferred a statutory right of judicial review upon "interested parties" participating in U.S. antidumping and countervailing duty proceedings.[363] Section 332(g) of the Tariff Act, however, does not provide for judicial review.[364]

To preserve an "interested party's" statutory right to judicial review for this section 332(g) injury investigation, the Executive Branch of the U.S. Government decided that "[Commerce], not the ITC, [would be] the decision maker in the [section 332(g)] injury investigation."[365] In other words, the ITC first would conduct a section 332(g) injury investigation by adhering as closely as practicable to the traditional procedures

358 *Id.* (emphasis added).
359 *Id.*
360 *Id.*; 19 U.S.C. § 1332(g) (1990).
361 19 U.S.C. § 1332(g) (1990).
362 *Id.*
363 *See* 19 U.S.C. § 1516a *et seq.* (1982).
364 19 U.S.C. § 1332(g) (1990).
365 54 Fed. Reg at 49,329.

and substantive requirements of Title VII of the Tariff Act. Specifically, the ITC would conduct an investigation into, and report to the President on, "whether (1) an industry in the United States would be materially injured, or would be threatened with material injury, or (2) the establishment of an industry would be materially retarded, if [Commerce] were to revoke"[366] a particular countervailing duty order covering duty-free imports from Mexico.[367]

After performing the section 332(g) injury investigation, the ITC would present its findings of fact to Commerce.[368] Commerce then would draw the legal conclusion, based upon the ITC's findings, concerning whether the revocation of the relevant countervailing duty order would cause, or threaten to cause, material injury to the relevant U.S. domestic industry.[369] An "interested party" dissatisfied with Commerce's injury conclusion could contest the final Commerce determination at the CIT.[370]

The United States explained its decision to resort to this novel administrative procedure in the following manner:

> Given that we are faced with a circumstance that can best be described as a "gap" in the law, we are persuaded that the current procedure is appropriate in light of the settled principle of administrative law that where the intent and object of a statute are manifest, agency action consistent with the intent [of the statute] is a proper exercise of an agency's authority.
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> * * * * * * * * * * *
>
> The courts have held that [Commerce] has the authority to implement the intent of legislation designed to fulfill the international obligations of the United States, even where the legislation itself contains a gap with regard to meeting those obligations and the general intent of Congress. *See, Matsushita Electric Industrial Co. Ltd. v. United States*, 529 F. Supp. 670 (Ct. Int'l Trade 1981), and *United States Steel v. United States*, 618 F. Supp. 496 (Ct. Int'l Trade 1985), appeal dismissed as moot, 792 F.2d 1101.[371]

Although duty-free imports of Mexican origin were subject to ten outstanding countervailing duty orders when Mexico acceded to the GATT, the United States has not had to resort to section 332(g) in all ten cases. Commerce has been able to revoke seven of the outstanding orders based upon the relevant U.S. domestic industry's lack of interest in main-

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366 55 Fed. Reg. 32,672, 32,673 (1990).

367 *Id.*

368 54 Fed. Reg. at 49,329-330.

369 *See, e.g., Lime From Mexico*, 54 Fed. Reg. at 49,329-49,330 (Commerce injury determination).

370 The CIT also might have jurisdiction of a final Commerce injury determination pursuant to the court's residual jurisdictional authority. *See* 28 U.S.C. § 1581(i) (1990).

371 54 Fed. Reg. at 49,327.

taining the relevant orders.[372]

As of the writing of this Article, the President of the United States, through the United States Trade Representative, has requested the ITC, pursuant to section 332(g) of the Tariff Act, to conduct an injury investigation in *Lime From Mexico, Fabricated Automotive Glass From Mexico,* and *Portland Hydraulic Cement and Cement Clinker from Mexico.*[373] The ITC completed its section 332(g) injury investigations in the first two administrative proceedings and, as of the writing of this Article, is still conducting an injury investigation in *Portland Hydraulic Cement and Cement Clinker.*[374]

In *Lime* and in *Fabricated Automotive Glass*, the ITC's factual findings demonstrated that the revocation of the relevant countervailing duty orders would not cause material injury, or the threat of injury, to the relevant U.S. domestic industry.[375] Based upon these findings, Commerce revoked the countervailing duty order covering lime from Mexico in a "changed circumstances" administrative review conducted pursuant to section 751(b) of the Tariff Act.[376] The effective date of the revocation was August 24, 1986, the date of Mexico's accession to the GATT.[377] As of the writing of this Article, Commerce is conducting a "changed circumstances" administrative review in *Fabricated Automotive Glass From Mexico* to determine whether the ITC's negative injury finding warrants the revocation of the relevant countervailing duty order as well.[378]

C. International Obligations Assumed By Mexico In The U.S.-Mexico Understanding

The U.S-Mexico bilateral Understanding granted Mexico an injury test in U.S. countervailing duty investigations "in exchange for a Mexi-

372 *Carbon Black from Mexico,* 54 Fed. Reg. 53,163 (1989); *Bricks from Mexico,* 54 Fed. Reg. 53,163 (1989); *Certain Textile Mill Products from Mexico,* 55 Fed. Reg. 5,641 (1990) (partial revocation); *Toy Balloons Including Punchballs and Playballs from Mexico,* 55 Fed. Reg. 4,217 (1990); *Litharge, Red Lead, and Lead Stabilizers,* 55 Fed. Reg. 5869 (1990) (partial revocation); *Iron-Metal Construction Castings From Mexico,* 55 Fed. Reg. 39,498 (1990); and *Polypropylene Film From Mexico,* 55 Fed. Reg. 5,643 (1990).

373 54 Fed. Reg. at 49,327; 55 Fed. Reg. at 32,672; — Fed. Reg. — (1991).

374 *Conditions of Competition Between U.S. and Mexican Lime in the United States Market,* USITC Pub. No. 2210 (1989); *Conditions of Competition Between U.S. and Mexican Fabricated Automotive Glass in the United States Market,* Inv. No. 332-286 (1990); Letter From USTR To Chairman Of ITC Requesting Section 332(g) Injury Investigation In Portland Hydraulic Cement And Cement Clinker From Mexico (Nov. 2, 1990).

375 *Id.*

376 *Lime from Mexico; Final Results of Changed Circumstances Countervailing Duty Administrative Review and Revocation of Countervailing Duty Order,* 54 Fed. Reg. 49,324 (1989).

377 *Id.* at 49,330.

378 55 Fed. Reg. at 32,672.

can commitment to eliminate export subsidies"[379] and to refrain from bestowing certain domestic subsidies that "would adversely affect the conditions of normal competition."[380] This commitment is analogous to the obligations undertaken by the signatories to the GATT Subsidies Code.[381] In particular, Mexico obligated itself to discontinue granting export subsidies through two programs: the program of *Certificados de Devolucion de Impuestos* ("CEDI") and the Fund for the Promotion of Exports of Mexican Manufactured Products ("FOMEX").[382]

A CEDI is a tax certificate issued by the Mexican government to a Mexican exporter in an amount equal to a set percentage of the annual value of the company's export sales.[383] The Mexican company can use this certificate to pay taxes due within a given year.[384] Because the receipt of the tax certificate is contingent upon export performance, the CEDI program *per se* is countervailable in accordance with the Tariff Act and the GATT Subsidies Code.[385] By signing the Understanding, the Government of Mexico pledged "not to grant [or reintroduce] the export subsidy elements of the [CEDI] program."[386]

Recent countervailing duty administrative reviews issued by Commerce demonstrate that Mexico has adhered to this obligation.[387] Specifically, Commerce has determined that no Mexican exports subject to U.S. countervailing duty orders have received benefits pursuant to the CEDI program after the effective date of the Understanding.[388] Furthermore, Commerce has determined, based upon information supplied by the Government of Mexico, that the CEDI program for Mexican manufacturers was abolished in 1982.[389] Although these administrative findings have been the subject of recent court challenges brought by U.S. producers and manufacturers, the CIT, as of the writing of this Article, has sustained all of these findings.[390]

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379 *See supra* note 1, at 1.

380 *See id.* at para. 3.

381 *See supra* note 243.

382 *See supra* note 1, at para. 2.

383 *Unprocessed Float Glass From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44,503 (1986); *Ceramic Tile from Mexico; Preliminary Results of Administrative Review of Countervailing Duty Order*, 49 Fed. Reg. 43,735 (1984).

384 *Id.*

385 *Id.*

386 *See supra* note 1, at 2(A).

387 *See supra* note 383; *Fabricated Automotive Glass From Mexico; Final Results Of Countervailing Duty Administrative Review*, 51 Fed. Reg. 44,652 (1989).

388 *Id.*

389 *Id.*

390 *PPG Industries, Inc. v. United States*, 712 F. Supp. 195 (Ct. Int'l Trade 1989)("*PPG II*"); *PPG Industries, Inc., v. United States*, Slip Op. 90-75 (Ct. Int'l Trade 1990) ("*PPG III*").

The FOMEX program is a trust created by the Government of Mexico to promote the sale of manufactured products.[391] The Mexican Treasury Department — in conjunction with the Banco de Mexico, Mexico's central bank, acting as trustee — administers the program.[392] The FOMEX program provides pre-export and export financing to Mexican exporters at preferential interest rates.[393] Because the bestowal of both pre-export and export loans is based upon export activity, the FOMEX loan program *per se* is countervailable pursuant to U.S. law and the GATT Subsidies Code.[394]

Pursuant to the Understanding, the Government of Mexico obligated itself to phase out the export subsidy element of this program.[395] The government pledged to set FOMEX interest rates "at a rate [no] lower than the yield on the most recent auction of 90-day Treasury Bills of the Government of the United Mexican States . . . ."[396] Although Mexico generally has adhered to the terms of this obligation, Commerce consistently has directed Customs in recent administrative reviews to impose countervailing duties upon Mexican products to offset countervailable benefits derived from the FOMEX loan program.[397]

The principal reason for these determinations is that, in accordance with its long-standing administrative practice, Commerce focuses exclusively upon the benefit, if any, derived by the recipient of a foreign government loan to determine whether the loan is countervailable.[398] Certain Mexican exporters, however, have contended that the application of this standard or benchmark to FOMEX loans violates the express terms of the Understanding.[399] These exporters contend that the Understanding, at paragraph 2, requires the United States to apply the cost-to-government standard to determine whether "FOMEX financing is a countervailable subsidy and [to] measur[e] the benefit from such financing . . . ."[400]

The United States has defended the use of the benefit-to-the-recipi-

391 *Certain Textile Mill Products from Mexico; Preliminary Results of Countervailing Duty Administrative Review*, 55 Fed. Reg. 20,504 (1990); *Fabricated Automotive Glass from Mexico*, 51 Fed. Reg. at 44,652.

392 *Id.*

393 *Id.*

394 *Id.*

395 *See supra* note 1, at 2(c).

396 *Id.*

397 *See, e.g., Certain Textile Mill Products from Mexico; Final Results of Countervailing Duty Administrative Review*, 54 Fed. Reg. 36, 841, 36,843 (1989).

398 *Id.*

399 *Id.*

400 *Id.*; *see supra* note 1, at para. 2(c).

ent standard in the context of evaluating FOMEX loans. In a recent administrative review involving *Certain Textile Mill Products From Mexico*, for example, Commerce emphasized that the "cost-to-the-government standard in the Understanding applies only to whether Mexico is in compliance with the Understanding and does not limit the United States in applying its own national countervailing duty law with regard to subsidized imports from Mexico."[401] In this regard, the Understanding, at paragraph 6, provides in relevant part that "[n]o provision of this Understanding shall be construed to prevent the United States from finally imposing countervailing duties *pursuant to its national law* on products of Mexico receiving subsidies of any kind . . . ."[402]

Commerce traditionally has used the benefit-to-the-recipient standard, rather than the cost-to-the-government standard, to measure the value of countervailable benefits derived from a foreign government loan. The policy underlying this administrative practice is that, in order to determine whether a foreign manufacturer or exporter has received countervailable benefits from such a loan, Commerce must ascertain whether the terms of that loan are inconsistent with commercial considerations.[403]

Even though a government loan may satisfy the cost-to-the-government standard, because the interest rate of that loan is higher than the costs incurred by the government to obtain the funds, the terms of that loan still may be inconsistent with commercial considerations.[404] If, for example, the interest rate of the foreign government loan is lower than the national average commercial borrowing rate to which the loan recipient has access, the recipient will enjoy a countervailable benefit.[405]

Despite Commerce's recent findings that the FOMEX loan program continues to provide countervailable benefits, these findings have sparked relatively little controversy. The principal reason for this result is that assessment rates for U.S. imports of Mexican origin benefitting from FOMEX loans have declined significantly as a direct consequence of Mexico's adherence to the Understanding.[406] Moreover, the Mexican government's recent announcement to "terminate"[407] the FOMEX loan

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401 54 Fed. Reg. at 36,843.

402 *See supra* note 1, at para. 6 (emphasis added).

403 54 Fed. Reg. at 36,843.

404 *See id.*

405 *See id.*

406 *Compare* 50 Fed. Reg. at 1,906 *with* 51 Fed. Reg. at 44,652.

407 Letter From Dr. Herminio Blanco Mendoza, Mexico's Under Secretary for Foreign Trade, to The Honorable J. Michael Farren, Under Secretary for International Trade, U.S. Department of Commerce (June 1, 1990).

program should quell any remaining controversy surrounding Commerce's application of the benefit-to-the-recipient standard.

As demonstrated by the parties' decision in 1988 to extend the life of the Understanding for an additional period of three years,[408] both the United States and Mexico generally are satisfied with the implementation of this bilateral agreement. Although the implementation of the Understanding with regard to the CEDI and FOMEX programs has stirred some debate in both countries, such debate has not reached the level of that surrounding Mexico's right to an injury test in U.S. countervailing duty proceedings and the application of the so-called "specificity test," as discussed in the next subsection.

D. Countervailability Of Domestic Subsidies: The So-Called "Specificity Test"

1. Background

National governments historically have provided certain goods and services to their citizenry either free of charge or at prices substantially below free market rates. The bestowal of goods and services upon such terms constitutes a subsidy.[409] Governments typically grant subsidies to specific individuals, enterprises, industries, or specific groups of enterprises or industries, that comprise a particular society (*i.e.*, "specific subsidies"). Governments also grant subsidies to all members of their society (*i.e.*, "general subsidies").

"Specific subsidies," as their name implies, usually enable specific corporate individuals to gain an arguably unfair competitive advantage over other domestic producers or foreign manufacturers. "General subsidies," on the other hand, typically do not give individuals an unfair advantage over their domestic or foreign rivals. These subsidies are usually necessary because of the inability of the price system to distribute or supply certain essential goods and services to all members of a society.[410] These goods and services, often referred to as public goods, include national defense, education, public health, basic infrastructure, and the like.[411]

The Tariff Act classifies subsidies into two categories: export subsidies and domestic subsidies.[412] Export subsidies are government pro-

408 Letter From USTR Yeutter to Mexico's Secretary of Commerce and Industrial Development (April 21, 1988).
409 19 U.S.C. §§ 1303, 1677(5) (1990).
410 *Cabot Corp. v. United States*, 620 F. Supp. 722, 731-732 n.8 (Ct. Int'l Trade 1985) ("*Cabot I*").
411 *Id.*
412 19 U.S.C. § 1677(5) (1990).

grams that grant benefits to domestic manufacturers based upon export activity or export performance.[413] These subsidies are analogous to "specific subsidies" in that they usually enable specific corporate individuals to gain a competitive advantage over, among other entities, U.S. manufacturers in the U.S. market. As stated in the previous subsection, export subsidies *per se* are countervailable pursuant to the Tariff Act and the GATT Subsidies Code.[414]

Domestic subsidies, on the other hand, are foreign government programs that provide goods or services either to specific members or groups in a society or to all members in a society.[415] In contrast to export subsidies, domestic subsidies are not contingent upon export activity or export performance.[416] Only those domestic subsidies that grant a preference to "a *specific* enterprise or industry, or group of enterprises or industries,"[417] within the meaning of section 771(5) of the Tariff Act, are countervailable.[418] A so-called "preference" is a foreign government program that provides specific recipients with goods, services, or financing at prices or on terms more favorable than those available to other recipients in exporting country.[419] Examples of countervailable domestic subsidies include equity infusions and loan guaranties on noncommercial terms.[420]

In order to determine whether a particular domestic subsidy promotes the production of *specific* products and, therefore, is countervailable pursuant to the Tariff Act, Commerce originally employed the so-called "general availability" test.[421] The term "general availability," as articulated by the CIT, "means that what is available is accessible to all who are similarly situated."[422] After first endorsing this test, the CIT later rejected it in *Cabot Corp. v. United States* ("*Cabot I*").[423] As a result of this judicial decision, Commerce adopted the so-called "*de facto* specificity test."[424]

413 19 U.S.C. § 1677(5)(A)(i) (1990); Illustrative List of Export Subsidies, GATT Subsidies Code Annex, *supra* note 243. A tax rebate based upon export performance is one example of an export subsidy. Illustrative List at (e).

414 *Id.*

415 19 U.S.C. § 1677(5)(A)(ii) (1990).

416 *See id.*

417 *Id.* (emphasis added).

418 *See id.*

419 *Id.*

420 *Id.*; Knoll, *An Economic Approach*, at 45.

421 *See Carlisle Tire and Rubber Co. v. United States*, 564 F.Supp. 834 (Ct. Int'l Trade 1983).

422 *United States Steel Corp. v. United States*, 566 F.Supp. 1529, 1537 (Ct. Int'l Trade 1983).

423 620 F. Supp. 722.

424 *PPG Indus. v. United States*, 662 F. Supp. 258 (Ct. Int'l Trade 1987), *appeal pending*, 88-1175 ("*PPG I*").

Two decisions recently issued by the CIT, however, have called into question Commerce's application of this test.[425] One of these decisions apparently has introduced yet another approach to determine whether a domestic subsidy is countervailable.[426] As a result of these decisions, it appears that the Federal Circuit ultimately may have to settle the variety of legal issues concerning the countervailability of domestic subsidies pursuant to the Tariff Act.

2. *The Demise Of The "General Availability" Test And The Emergence Of The So-Called "De Facto Specificity Test"*

In the lawsuits stemming from the countervailing duty proceedings involving *Carbon Black From Mexico,* the CIT explained Commerce's "general availability" test in the following manner:

> The generally available benefits rule as articulated by [Commerce] is essentially that benefits available to all companies and industries within an economy are not countervailable subsidies. [Commerce's] conclusions are primarily drawn from 19 U.S.C. § 1677(5)(B), which refers to countervailable domestic subsidies as being those provided to "a *specific* enterprise or industry, or group of enterprises or industries. . . ." (emphasis added). Thus, argues [Commerce], benefits "generally available" to all enterprises or industries are not subsidies under section 1677(5)(B), and therefore do not fall within the meaning of "bounty or grant" as used in section 1303.[427]

Even though the CIT embraced this test in *Carlisle Tire and Rubber v. United States,*[428] the court began to retreat from this position in *Bethlehem Steel Corp. v. United States*[429] and in *Agrexco, Agricultural Export Co., Ltd. v. United States.*[430] In *Cabot I,* mentioned above, Judge Carman unequivocally struck down Commerce's application of the "general availability" standard.[431] In so doing, Judge Carman explained:

> Apparently [Commerce] and the court in *Carlisle* view the noncountervailability of generally available benefits as the opposite side of the coin from the countervailability of benefits conferred upon a specific class. There is a distinction, however, which has not been clearly deciphered by [Commerce] or in prior judicial opinions, but which disrupts the apparent symmetry of the two sides of the coin.
>
> The distinction that has evaded [Commerce] is that
> not all so-called generally available benefits are alike — some are benefits

425 *Armco, Inc. v. United States,* 733 F. Supp. 1514 (Ct. Int'l Trade 1990); *Roses, Inc., California Floral Trade Council v. United States,* Slip Op. 90-64 (Ct. Int'l Trade 1990).

426 733 F. Supp. 1514.

427 *Cabot I,* 620 F. Supp. at 731 (emphasis supplied in original).

428 564 F. Supp. 834.

429 590 F. Supp. 1237 (Ct. Int'l Trade 1984).

430 604 F. Supp. 1238 (Ct. Int'l Trade 1985).

431 *Cabot I,* 620 F. Supp. at 731-732.

> accruing generally to all citizens, while others are benefits that when actually conferred accrue to specific individuals or classes. Thus, while it is true that a generalized benefit provided by government, such as national defense, education or infrastructure, is not a countervailable bounty or grant, a generally available benefit — one that may be obtained by any and all enterprises or industries — may nevertheless accrue to specific recipients. General benefits are not conferred upon any specific individuals or classes, while generally *available* benefits, when actually bestowed, may constitute specific grants conferred upon specific identifiable entities, which would be subject to countervailing duties.[432]

Judge Carman then proceeded to explain the appropriate legal standard that Commerce must use to determine whether a domestic subsidy is countervailable pursuant to the Tariff Act. In the words of Judge Carman:

> The appropriate standard [for determining the countervailability of domestic benefits] focuses on the *de facto* case by case effect of [such] benefits provided to recipients rather than on the nominal availability of benefits.
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>
> This definition [of bounty or grant or subsidy] requires focussing only on whether a benefit or "competitive advantage" has been actually conferred on a "specific enterprise or industry, or a group of enterprises or industries."
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> * * * * * *
>
> Once it has been determined that there has been a bestowal upon a specific class, *the second aspect of the definition of bounty or grant requires looking at the bestowal and determining if it amounts to an additional benefit or competitive advantage. If so, the benefit might fit within one of the illustrative examples of 19 U.S.C. [section] 1677(5)(B).*[433]

The legal standard enunciated by Judge Carman in *Cabot I* became known as, for want of a better term, the "*de facto* specificity test."[434] In a subsequent decision involving the same parties in *Cabot I*, *Cabot v. United States* ("*Cabot II*"), Judge Carman reaffirmed the same legal principles and legal standard laid down in *Cabot I*.[435]

The language quoted above from *Cabot I* requires Commerce to undertake a two-pronged analysis to determine whether a domestic subsidy is countervailable pursuant to the Tariff Act. First, Commerce must determine on a case-by-case basis whether a specific domestic enterprise or industry *in fact* received any benefits from a foreign government program during the period under investigation. This analysis appears to require the compilation of a list of all the domestic firms that participated in the

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432 *Id.* at 731 (emphasis supplied in original).

433 *Id.* at 732 (emphasis added).

434 662 F. Supp. at 258.

435 *Cabot Corp. v. United States*, 694 F. Supp. 949 (Ct. Int'l Trade 1988)("*Cabot II*").

program during the relevant period. Nominal general availability is not, in and of itself, determinative of a finding of nonspecificity in accordance with this analysis.

Second, once Commerce has determined that "there has been a bestowal upon a specific class,"[436] the agency apparently must ascertain whether, in the words of Judge Carman, the subsidy in question confers a "competitive advantage"[437] upon the domestic recipient. Although the meaning of the term "competitive advantage" has been subject to some debate, the use of this term, as demonstrated by the relevant passages in *Cabot I* and *Cabot II*, seems to constitute nothing more than a restatement of the preference test set forth in the countervailing duty statute.[438]

In other words, Commerce, as explained above, must determine whether the government program provides specific recipients either with funds on terms inconsistent with commercial considerations in the exporting country or with goods or services at prices more favorable than those available to other recipients in that country.[439] To determine whether a foreign government program is preferential, Commerce compares the terms of the government loan or the value of the government supplied goods or services with an objective "benchmark" value calculated for such loans, goods, or services.[440] This comparison enables Commerce to determine not only whether a countervailable benefit exists but also the value of that benefit.[441]

For example, Commerce typically compares the terms of a loan (*e.g.*, interest rate) provided by a foreign government to a specific recipient with the terms offered by the government to other recipients in the exporting country.[442] Commerce also may compare the government terms with the terms offered by private commercial lenders in the exporting country.[443] Similarly, Commerce usually compares the price of goods or services supplied by a foreign government to a specific recipient with the price of identical or comparable goods and services sold by the government to other recipients in the exporting country.[444] Commerce

436 620 F. Supp. at 732.
437 *Id.*
438 *Id.*; 694 F. Supp. at 957.
439 19 U.S.C. § 1677(5)(A)(ii) (1990).
440 *See id.*
441 *Id.*
442 19 U.S.C. § 1677(5)(A)(ii)(I) (1990); Powell & McInerney, *International Energy Trade and the Unfair Trade Laws*, 11 U. PA. J. INT'L. BUS. L. 359-360 (1989) [hereinafter "*International Energy Trade*"].
443 *See id.*
444 19 U.S.C. § 1677(5)(A)(ii)(II) (1990); Preferentiality Appendix, 51 Fed. Reg. at 13,272-13,273 (1986).

also may compare under certain circumstances the price of the government supplied good or service with the price of identical or comparable goods or services sold by private companies in the exporting country.[445]

In the remand determination resulting from the first administrative review involving *Carbon Black From Mexico*, the CIT specifically required Commerce to apply the exacting principles laid down in *Cabot I* and *Cabot II*.[446] Accordingly, the CIT required Commerce to conduct a rigorous *de facto* or "use" analysis to determine whether the bestowal of carbon black feedstock and natural gas by the Mexican government at below-world-market prices constituted countervailable domestic subsidies.[447]

Commerce found that even though the carbon black feedstock supplied by the Government of Mexico was nominally available to all producers and industries in Mexico, only two domestic producers of carbon black, in fact, had participated in that program.[448] Commerce determined under these circumstances that the program provided a domestic benefit to a "specific enterprise or industry" within the meaning of section 771 of the Tariff Act.[449] Commerce also determined that the prices charged by the Government of Mexico to the two Mexican producers of carbon black were preferential.[450] Therefore, Commerce determined that the provision of carbon black feedstock constituted a countervailable domestic subsidy.[451] The CIT affirmed these remand results.[452]

In the same remand determination, however, Commerce found that the Government of Mexico had sold natural gas to more than 3,700 Mexican enterprises at the same price during the relevant period.[453] Commerce determined under these circumstances that the government program did not satisfy the specificity requirement of the statute and,

445 *See id.*

446 694 F. Supp. at 955-959.

447 *Id.*

448 *Cabot Corp. v. United States*, No. 86-09-01109, at 10-12 (Ct. Int'l Trade Nov. 21, 1988)(reconsideration pursuant to remand); *Carbon Black From Mexico; Preliminary Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 13,269, 13,271-73 (1986); *Carbon Black From Mexico; Final Results of Countervailing Duty Administrative Review*, 51 Fed. Reg. 30,385, 30,386 (1986).

449 *Id.*

450 *Id.* To determine whether the price of the carbon black feedstock supplied by the Government of Mexico to the two Mexican producers of carbon black was preferential, Commerce compared that price with the price of a similar product supplied by the government to other recipients in Mexico. *Id.* This comparison yielded a countervailable benefit in the amount of 1.90 percent *ad valorem*. 51 Fed. Reg. at 30,386.

451 *See supra* note 448.

452 *Cabot Corp. v. United States*, No. 86-09-01109 (Ct. Int'l Trade Nov. 21, 1988).

453 *Id.* at 6-9.

therefore, did not constitute a countervailable domestic subsidy.[454] The CIT affirmed these remand results as well.[455]

In *PPG Industries, Inc. v. U.S.* ("*PPG I*"), another case involving the alleged bestowal of domestic benefits, the CIT again reaffirmed the *de facto* standard established in the earlier *Cabot* decisions.[456] In so doing, the court also sought to clarify certain aspects of that standard. First, Judge Carman noted in *PPG I* that neither *Cabot I* nor *Cabot II* had eliminated altogether Commerce's "general availability" test. Rather, nominal general availability, according to Judge Carman, is still a factor that Commerce must evaluate when determining whether a domestic subsidy is countervailable:

> Although *general availability* may be a manifestation that a program has not conferred a benefit upon a specific recipient, general availability is not the statutory test. It *is merely one of the several relevant factors to be considered in determining whether or not a benefit or competitive advantage has been conferred upon a "specific enterprise or industry, or group of enterprises or industries."*[457]

Second, and more important, Judge Carman apparently relaxed the application of the *de facto* or "use" standard established in the *Cabot* decisions. Specifically, the CIT in *PPG I* did not require Commerce to compile a list of the domestic enterprises that actually had participated in the foreign government programs at issue. Instead, the court focused upon the eligibility requirements of one of the Mexican government programs and concluded that the requirements did not "*de facto* render the benefit one which is provided to a specific enterprise or industry or group of enterprises or industries."[458]

The CIT also accepted Commerce's explanation with regard to the other Mexican government program at issue and similarly did not require the compilation of the number of firms that had participated in that program either. Rather, the court was satisfied with Commerce's determination that the Mexican respondent companies "received no countervailable benefit[s],"[459] because the record evidence demonstrated that the companies had "paid the published price for [the government supplied] natural gas that was available to all industries" in Mexico.[460]

The CIT's decision in *PPG I* is currently subject to an appeal before

454 *Id.*
455 *Id.*
456 662 F. Supp at 258.
457 *Id.* at 265.
458 *Id.* at 266.
459 *Id.* at 272.
460 *Id.*

the Federal Circuit.[461] As of the writing of this Article, this appeal has been pending in the appellate court for more than two years. If the Federal Circuit affirms the CIT's decision in *PPG I*, then Commerce's current administrative practice with regard to domestic subsidies should remain relatively unchanged. If, however, the Federal Circuit reverses this decision, then a broad range of previously noncountervailable domestic programs might become countervailable. In that case, foreign products subject to a U.S. countervailing duty investigation or administrative review initiated before August 23, 1988 — the effective date of the Omnibus Trade and Competitiveness Act of 1988 (the "1988 Trade Act") — might be subject to additional countervailing duties.[462]

3. *Current Status Of The De Facto "Specificity Test"*

In 1988, the U.S. Congress codified Judge Carman's *de facto* or "use" standard into the U.S. countervailing duty law by passing the 1988 Trade Act. Specifically, Congress enacted a "special rule" to govern domestic subsidies (the "1988 amendment") and, thereby, amended the Tariff Act.[463] The "special rule" provides:

> In applying [the general definition of a domestic subsidy], [Commerce], in each investigation, shall determine whether the bounty, grant, or subsidy *in law [de jure analysis] or in fact [de facto analysis]* is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, program, or rule establishing a bounty, grant, or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant, or subsidy is not, or has not been, *in fact* provided to a specific enterprise or industry, or group thereof.[464]

The Senate Finance Committee report accompanying this amendment further provides:

> The [Senate] Committee [on Finance] intends that this provision codify the holding of the U.S. Court of International Trade in [*Cabot I*, as clarified by the CIT's decision in *PPG I*] that, in order to determine whether a domestic subsidy is countervailable, the Commerce Department must examine on a case-by-case basis whether the benefits provided by a program are bestowed upon a specific enterprise or industry, or group of enterprises or industries.
>
> * * * * * * * * *
>
> A subsidy provided in law to a specific industry is clearly countervailable.

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461 *See supra* note 424.

462 Section 1337(b) of the 1988 Trade Act provides that section 1312, which codified the *Cabot* and *PPG* decisions regarding the specificity test for domestic subsidies, "shall only apply with respect to investigations and reviews initiated after the date of enactment of this Act [August 23, 1988]." 102 Stat. 1211.

463 19 U.S.C. § 1677(5)(B) (1990); Pub. L. 100-418, § 1312, 102 Stat. 1211 (1988).

464 19 U.S.C. § 1677(5)(B) (1990) (emphasis added).

The issue addressed in Cabot is whether a subsidy provided in fact to a specific industry is countervailable.[465]

This "special rule" for domestic subsidies, along with its accompanying *de jure* and *de facto* analysis, governs all countervailing duty investigations and administrative reviews commenced on or after the effective date of the 1988 Trade Act — that is, August 23, 1988.[466] Accordingly, if, as explained above, the Federal Circuit reverses *PPG I* and adopts a statutory test that favors U.S. domestic petitioners, then, because of the effective date of the 1988 amendment, such a test will apply only in those countervailing duty proceedings initiated before August 23, 1988.[467]

By the time Congress codified this "special rule" into the statute, Commerce already had been conducting a *de jure* and *de facto* analysis to evaluate specificity.[468] In accordance with this two-part analysis, which constitutes the agency's current administrative practice,[469] Commerce first seeks to determine on a *de jure* basis whether a particular foreign government program appears on its face to confer specific benefits[470]. In this regard, Commerce examines the language of the enacting legislation and implementing regulations of the foreign government program to determine the extent to which the government limits the availability of the program.[471]

If, after undertaking this *de jure* analysis, Commerce is able to conclude that the program is limited to specific recipients, then the agency usually will forego undertaking a *de facto* analysis.[472] Instead, Commerce will proceed to determine whether the program grants a preference to the specific recipients.[473] If Commerce concludes that the program is preferential, then it will countervail the program in the amount of the measured benefit.[474]

If, however, this *de jure* analysis does not enable Commerce to determine that the program is limited to specific recipients, then the agency

465 S. Rep. No. 71, 100th Cong., 1st Sess. 122-123 (1987) (emphasis added).

466 *See supra* note 462; Powell & McInerney, *International Energy Trade*, at 354-355, 357.

467 *See id.*

468 *Certain Softwood Lumber Products From Canada*, 51 Fed. Reg. 37,453 (1986)(preliminary determination).

469 *Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Steel Wire Rod From Malaysia*, 53 Fed. Reg. 13,303, 13,304 (1988); *Armco, Inc. v. United States*, 733 F. Supp. 1514, 1528 (Ct. Int'l Trade 1990).

470 *Armco*, *supra* note 469, at 1528.

471 *Id.*

472 *Id.*

473 *Id.*

474 *Id.*

will conduct a *de facto* analysis.[475] This analysis entails focussing upon "whether there is a disproportionate level of use by the industry under investigation or evidence of government discretion in the award of the benefit."[476] If, after undertaking this *de facto* analysis, Commerce determines that the program is not limited to specific recipients, then the agency will not countervail the foreign government program.[477]

Although this analysis seems to be in harmony with the *Cabot* and *PPG I* decisions, in addition to the 1988 "special rule" for domestic subsidies, two recent decisions issued by the CIT apparently have questioned this analysis. In *Armco, Inc., v. U.S.*, the CIT stated that the above analysis "appears to be substantially identical to the 'generally available benefits' test rejected by the Court in *Cabot*; apparently only the name is changed."[478] The CIT further stated in *Armco* that "[a]s the *Cabot* Court rejected the 'generally available benefits' test, so this Court rejects the 'specificity' test relied upon by the government in this case."[479]

According to the CIT in *Armco*, the appropriate legal standard should focus upon the inherent "unfair[ness]" of the domestic subsidy at issue.[480] The *Armco* decision suggests that Commerce may be required in certain circumstances to analyze specificity by comparing the benefits received by a firm in the exporting country with the benefits, if any, received by its U.S. competitor.[481] This approach, however, conflicts with Commerce's long-standing administrative practice of comparing the benefits received by a firm in the exporting country with the benefits received by other firms in that country.[482]

Despite this conflict, it appears that the CIT may have followed the *Armco* approach in a subsequent decision. In *Roses, Inc., California Floral Trade Council v. United States*, the CIT stated that Commerce "must always focus on whether an *advantage in international commerce* has been bestowed on a discrete class of grantees" to determine whether a domestic subsidy is countervailable.[483] Accordingly, the CIT ordered the agency to determine upon remand whether the Mexican flower industry had "received benefits, bestowed on a discrete class, which gave it a

475 *Id.*
476 *Id.*
477 *Id.*
478 733 F. Supp. at 1529.
479 *Id.*
480 *Id.* at 1530.
481 *See id.*
482 Powell & McInerney, *International Energy Trade*, at 359-360.
483 Slip Op. 90-64 at 25.

comparative advantage in international commerce."[484]

Such an approach to evaluate specificity not only deviates from long-standing Commerce practice, but also appears to be in conflict with a long line of judicial decisions and the 1988 "special rule" for domestic subsidies. In the *Cabot* cases, *PPG I*, and *PPG Industries, Inc. v. U.S.*, ("*PPG II*"), the U.S. domestic petitioners contended that the bestowal of goods or services by a foreign government to its domestic clientele at below-world-market prices *per se* is a countervailable subsidy (*i.e.*, the so-called "*Cabot* rule").[485] In categorically rejecting this contention, Judge Carman stated in *PPG II* that "[t]here is no such rule as the '*Cabot* rule' "[486] and also declared in *PPG I*:

> [I]t is well established that the mere existence of a price differential between exported and domestic prices, does not in and of itself confer a bounty or grant under [section] 1303. *See, e.g., United States v. Zenith Radio Corp.*, 64 CCPA 130, 138, C.A.D. 1195, 562 F.2d 1209, 1216 (CCPA 1977), *aff'd*, 437 U.S. 443, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978)("Congress has not statutorily required that every governmental action distinguishing between products consumed at home and those exported shall be deemed the bestowing of a bounty or grant.")[487]

In *Can-Am Corp. v. United States* the CIT quoted with approval this language from *PPG I* and, consequently, embraced Judge Carman's rationale.[488] The CIT in *Can-Am Corp* sustained Commerce's determination not to countervail a Mexican government program simply because the program bestowed fuel oil at below-world-market prices.[489]

The U.S. Congress apparently endorsed the Judge Carman view when enacting the "special rule" governing domestic subsidies. Congress appears to have done so by "codifying the holding of . . . *Cabot I*"[490] and by rejecting the version of the "special rule" passed by the U.S. House of Representatives.[491] Significantly, the conferees rejected the accompanying House report that contained language that might have required Commerce to analyze specificity by determining whether a particular government program conferred a "competitive advantage in international commerce."[492]

484 *Id.* at 25-26 (emphasis added).

485 620 F. Supp. at 733, n.9; 694 F. Supp. at 958, n.9; 662 F.Supp. at 270-272; 712 F. Supp. 195, 200-201 (Ct. Int'l Trade 1989).

486 712 F. Supp. at 201.

487 662 F. Supp. at 272.

488 664 F. Supp. 1444, 1448 (Ct. Int'l Trade 1987).

489 *Id.*

490 *See supra* note 465.

491 *See* Powell & McInerney, *International Energy Trade*, at 355-356, n.91.

492 H.R. Rep. No. 40, 100th Cong., 1st Sess. 124 (1987).

Although it is not altogether certain that the *Armco* and *Roses* decisions have introduced yet a third legal standard to evaluate specificity, these cases do suggest that the statutory test is currently in a state of flux. If this state of flux continues, then certain foreign government programs that are currently noncountervailable may become countervailable. Those Mexican government programs potentially at risk might include the bestowal of natural gas and fuel oil at prices below the world market price.

F. Conclusion

Even though the United States has been a member of the GATT since 1947, the GATT only recently required the United States to grant an injury test in countervailing duty proceedings involving products from Mexico. Dutiable and duty-free imports of Mexican origin became entitled to an injury test in U.S. countervailing duty proceedings for the first time in 1985, when Mexico entered into the Understanding with the United States.

Duty-free imports of Mexican origin also became legally entitled to an injury investigation pursuant to a second grant of authority in 1986, when Mexico acceded to the GATT. Even though a "gap" in U.S. law has prevented the United States from conducting a traditional injury investigation pursuant to Title VII of the Tariff Act for such imports, the United States has been able to comply with its international obligations *vis-a-vis* Mexico by resorting to another statutory provision of the Tariff Act. To date, the U.S. Government has withstood all legal challenges concerning its interpretation of the obligations that it assumed *vis-a-vis* Mexico concerning the injury test requirement.

In addition to requiring the United States to grant an injury test in U.S. countervailing duty proceedings, the Understanding obligated Mexico to eliminate certain export subsidy programs and to refrain from bestowing certain domestic subsidies. Although both countries appear to be generally satisfied with the implementation of the Understanding, two recent judicial decisions addressing the countervailability of domestic subsidies demonstrate that the relevant statutory test is currently in a state of flux. This state of flux might ultimately have serious implications for Mexico's natural gas program.

The countervailability of certain Mexican domestic programs is just one of the many subsidization issues that should spark interest during the forthcoming U.S.-Mexico free trade talks. Although the issues that will dominate such talks should be qualitatively different from those that characterized the U.S.-Canada free trade negotiations, U.S. and Mexican

free trade negotiators would be wise to examine the countervailing duty provisions of the U.S.-Canada FTA. Even though the U.S.-Canada FTA may not serve as a carbon copy model for a prospective U.S.-Mexico free trade accord, the U.S.-Canada experience should provide U.S. and Mexican free trade negotiators with a valuable reference point as they begin their challenging negotiations.

IV. The United States-Canada Free Trade Agreement

A. Introduction

Article XXIV of the GATT — an exception to the fundamental GATT principle of unconditional most-favored-nation treatment[493] — authorizes GATT contracting parties to enter into free trade agreements or customs unions.[494] To receive GATT approval, such an agreement must establish a plan or schedule to eliminate "duties and other restrictive regulations of commerce"[495] on "substantially all the trade between the constituent territories in products originating in such territories."[496] In 1988, the United States and Canada entered into a free trade agreement pursuant to Article XXIV of the GATT.[497]

The U.S.-Canada FTA, which took effect on January 1, 1989,[498] is unique among trade agreements negotiated pursuant to the GATT. In particular, the Agreement covers trade in services and direct foreign investment.[499] Additionally, the U.S.-Canada FTA establishes quasi-judicial fora, similar to arbitration panels, to resolve bilateral trade disputes.[500] Chapter XIX of the Agreement covers antidumping and countervailing duty matters.[501]

Because Chapter XIX may serve as a reference point for an analogous chapter appearing in a prospective U.S.-Mexico FTA, this section of the Article highlights the most important provisions of Chapter XIX of the U.S.-Canada bilateral accord. Specifically, this section examines

493 GATT, art. I. This principle of nondiscrimination provides that a GATT contracting importing country shall accord to a contracting exporting country treatment no less favorable than that accorded to all other GATT contracting parties. *Id.*

494 GATT, art. XXIV.

495 *Id.* at para. 8(b).

496 *Id.*

497 United States-Canada Free Trade Agreement, Communication from the President of the United States, H. Doc. 100-268, 100th Cong., 2d. Sess. (III) (1988) (hereinafter "U.S.-Canada Communication").

498 "U.S.-Canada Free Trade Agreement: Implementation On Target," Business America 3 (Feb. 12, 1990).

499 FTA, arts. 1401, 1601.

500 FTA, arts. 1801, 1904.

501 FTA, arts. 1901 *et seq.*

the creation of a binational panel review process designed to hear appeals of final U.S. or Canadian antidumping or countervailing duty determinations. This section also discusses the establishment of a U.S.-Canada Working Group which has as its central purpose the task of "seek[ing] to develop a substitute system of rules for dealing with unfair pricing and government subsidization."[502]

B. Binational Panel Review of Final Antidumping And Countervailing Duty Determinations

The centerpiece of Chapter XIX of the U.S.-Canada FTA is the creation of a unique binational panel review process. This review process is, in effect, a substitute for judicial review by the national courts of the United States and Canada.[503] It is also very similar in concept to international arbitration. U.S. or Canadian private parties, however, have the option of foregoing binational panel review altogether and, instead, can pursue legal redress in their national courts.[504]

A decision rendered by a U.S.-Canada binational panel is binding upon the governments of both countries and upon the private parties that originally requested binational panel review.[505] Such a decision, however, cannot serve as a binding precedent in future binational panel reviews or in legal actions prosecuted in U.S. or Canadian courts.[506] Moreover, a binational panel decision cannot be appealed to the national courts of either country.[507]

In accordance with Article 1904 of the Agreement, independent binational panels consisting of U.S. and Canadian trade experts review final antidumping and countervailing duty determinations rendered by the relevant U.S. or Canadian administrative agencies.[508] The purview of the panel's inquiry is limited to whether the relevant administrative agency applied its national antidumping or countervailing duty law correctly during the underlying administrative proceeding.[509] National

502 FTA, art. 1907, para. 1(b).
503 U.S.-Canada Communication at 258.
504 *Id.*
505 *Id.*; FTA, art. 1904, para. 9.
506 FTA, art. 1904, para. 9 and 10.
507 FTA, art. 1904, para. 11.
508 U.S.-Canada Communication at 258-259. Because the binational panel performs quasi-judicial functions, the majority of panelists, including the chairman, must be U.S. and Canadian attorneys in good standing. FTA, Annex 1901.2(2). Nonattorneys, such as economists and political scientists, however, may participate as panelists. *Id.* Each country can select two panelists from a roster of pre-selected candidates. *Id.* The two countries typically select a fifth panelist through mutual agreement. *Id.* at para. 3.
509 FTA, art. 1904, para. 2.

law for purposes of binational panel review includes statutes, legislative history, regulations, judicial decisions, and administrative determinations.[510]

A binational panel established pursuant to Chapter XIX must apply the same standard of review and the same general legal principles that the relevant national court would apply if the legal dispute were before that tribunal.[511] For example, a binational panel reviewing an administrative determination rendered by Commerce or the ITC would have to apply the same standard of review that the CIT would have to apply in legal actions commenced pursuant to section 516A of the Tariff Act.[512] This standard is not one of *de novo* review,[513] but rather is based upon whether the contested administrative determination was supported by substantial evidence on the administrative record as a whole and was otherwise in accordance with law.[514]

If the binational panel finds that the relevant administrative agency applied its national antidumping or countervailing duty law correctly, then the panel will affirm the underlying administrative determination.[515] If, however, the panel finds that the administrative agency erred in its application of its national law, then, as do U.S. and Canadian courts, the panel will remand the matter to the administrative agency for action not inconsistent with the panel's decision.[516]

A decision rendered by a binational panel conclusively settles the legal dispute at issue under typical circumstances.[517] Accordingly, a private party dissatisfied with a binational panel decision generally cannot appeal that decision to a higher forum.[518] The exception to this general rule applies when a party alleges that (1) a panel member was guilty of gross misconduct, (2) the panel "seriously departed from a fundamental rule of procedure,"[519] or (3) the panel "manifestly exceeded its powers, authority, or jurisdiction"[520] and that such action has "materially affected the panel's decision and threatens the integrity of the binational

510 *Id.*

511 FTA, art. 1904, para. 3.

512 19 U.S.C. §§ 1516a *et seq.* (1990).

513 *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 965 (Ct. Int'l Trade 1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

514 19 U.S.C. § 1516a(b)(1)(B) (1990).

515 FTA, art. 1904, para. 8.

516 *Id.*

517 FTA, art. 1904, para. 9.

518 *See id.*

519 FTA, art. 1904, para. 13.

520 *Id.*

panel review process."[521] The Canadian or U.S. Government can avail itself of a three-member extraordinary challenge committee under such circumstances.[522]

To date, binational panels convened pursuant to Chapter XIX of the U.S.-Canada FTA have rendered eight decisions.[523] None of these decisions has been subject to the extraordinary challenge procedure described above.[524] In *Red Raspberries From Canada*, for example, the first case filed before a U.S.-Canada binational panel, the panel affirmed Commerce's determination to exclude the home-market sales of one of the Canadian exporters for purposes of calculating foreign market value in an antidumping duty administrative review.[525] The panel, however, remanded Commerce's determinations concerning the two remaining Canadian exporters.[526]

C. Creation Of U.S.-Canada Working Group

Article 1906 and Article 1907 contemplate the replacement of Chapter XIX of the U.S.-Canada FTA with a new system of rules to govern subsidization and dumping practices.[527] Specifically, Article 1907 of the Agreement provides for the establishment of a U.S.-Canada Working Group which has as its chief purpose the task of developing such a new regime.[528]

Pursuant to Article 1906, the Working Group must develop this new system within five years of the effective date of the FTA.[529] If such a system is not in place by the end of this five-year period, the parties may extend the provisions of Chapter XIX for an additional period of two

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521 *Id.*

522 *Id.*; FTA, Annex 1904.13.

523 *Red Raspberries From Canada*, USA-89-1904-01 (1989); *Replacement Parts For Self-Propelled Bituminous Paving Equipment From Canada*, USA-89-1904-02 (1990)(challenge to Commerce scope determination); *Replacement Parts For Self Propelled Bituminous Paving Equipment From Canada*, USA-89-1904-03 (1990)(challenge to Commerce administrative review); *Fresh, Chilled and Frozen Pork From Canada*, USA-89-1904-06 (1990)(Commerce countervailing duty determination); *New Steel Rail, Except Light Rail, From Canada*, USA-89-1904-07 (1990)(Commerce countervailing duty determination); *New Steel Rail, Except Light Rail, From Canada*, USA-89-1904-98 (1990)(Commerce antidumping duty determination); *New Steel Rails From Canada*, USA-89-1904-09/10 (1990)(ITC injury determination); *Fresh, Chilled or Frozen Pork From Canada*, USA-89-1904-11 (1990)(ITC injury determination).

524 *See id.*

525 USA-89-1904-01.

526 *Id.*

527 FTA, arts. 1906 and 1907.

528 FTA, art. 1907.

529 FTA, art. 1906.

years.[530] If, by the end of this two-year extension, the parties still have not implemented a new regime, then Article 1906 authorizes either party to terminate the FTA.[531]

Establishing a new regime to govern subsidy and dumping practices should prove to be a difficult task for the Working Group. This task should be especially difficult with respect to subsidization practices. Neither the United States nor Canada currently has an alternative body of laws that governs such unfair trade practices. As a result, the wholesale replacement of the current countervailing duty system probably would require the enactment of a new set of laws and the implementation of an untested regime. The complete repeal of the current countervailing duty system, therefore, seems highly unlikely, particularly in the immediate future.

Likewise, the task confronting the U.S.-Canada Working Group with regard to dumping practices should prove to be no less difficult. One suggestion that has generated some appeal among economists is to replace the national antidumping laws of the United States and Canada with anticompetitive laws — that is, the antitrust laws.[532] If the U.S.-Canada FTA achieves its objective of eliminating tariff and nontariff trade barriers in the United States and Canada, then, according to the classical theory of dumping, U.S. and Canadian exporters may have a disincentive to dump their merchandise in each other's markets.[533] As a result, the national antidumping laws of both countries might become obsolete under such circumstances.

As explained in the first section of this Article, the classical theory of dumping provides that tariffs and nontariff trade barriers in the foreign exporter's home market create a protective barrier that usually enables an exporter with market power in that market to earn excessive or monopolistic profits in the home market.[534] The foreign exporter then can use such profits to charge a relatively lower price for comparable merchandise sold in an export market, such as the U.S. market.[535] This the-

530 *Id.*

531 *Id.*

532 *See also* Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW AND POL'Y. INT'L. BUS. 86-87 (1973); Powell, *Antidumping Law and the United States-Canada Free Trade Agreement: Possible Next Steps*, UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC IMPLICATIONS, 420-426 (1988)(*"Possible Next Steps"*).

533 J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE, 146 (1966 ed.); Address by Calvin S. Goldman, Assistant Deputy Minister, Bureau of Competition Policy, Consumer, and Corporate Affairs, before Canada/United States Law Institute of Case Western Reserve University School of Law, 6 (1987).

534 *See id.*; *see supra* note 14 and accompanying text.

535 *See id.*

ory further provides that the complete elimination of such barriers in the home market prevents the foreign exporter from segmenting its home market from a particular export market and, thereby, eliminates one of the economic conditions necessary for dumping to occur.[536]

An example illustrates this point. Assume that a Canadian exporter is charging the equivalent of U.S. $ 10.00 for its merchandise in the Canadian home market and U.S. $ 6.00 in the U.S. market. Absent trade barriers in the two markets, a U.S. buyer may be able to purchase the dumped Canadian merchandise in the U.S. market and resell that merchandise in the Canadian home market at a price that is less than U.S. $ 10.00. So long as the transportation costs incurred by the U.S. buyer/reseller are lower than U.S. $ 4.00, the Canadian exporter's dumping margin, the U.S. buyer/reseller can undersell the Canadian exporter in the Canadian home market. In this manner, the U.S. buyer/reseller can arbitrage away any price differential that exists in the two markets and discourage the Canadian exporter from dumping its merchandise into the U.S. market.[537]

Whether this economic theory of dumping has any validity is a debatable proposition. First, sufficient empirical evidence is not currently available to test the validity of this economic theory. Second, even assuming its validity for long-term dumping, this theory would not apply to short-term dumping or dumping from third countries. The elimination of trade barriers in both countries would not dissuade new entrants or exporters from other foreign countries with heavily protected home markets from dumping their merchandise into either Canada or the United States. Moreover, a significant amount of time would have to elapse before the arbitrage process could equalize selling prices in both the United States and Canada.[538]

If, despite these theoretical considerations, the U.S.-Canada Working Group were to recommend that the parties replace their national antidumping statutes with antitrust laws, the antitrust laws would have to provide, at a minimum, effective and speedy relief for short-term dumping and dumping from third countries. Both Canada and the United States already have promulgated antitrust laws that provide legal remedies for anticompetitive pricing practices that arguably encompass dumping practices or price discrimination.

In Canada, section 34(1)(c) of the Competition Act is the principal

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536 *See id.*
537 *See id.*
538 *See id.*

antitrust statute.[539] In the United States, the Sherman Act[540] and the Clayton Act, as amended by the Robinson-Patman Act,[541] are the principal antitrust statutes. Although these anticompetitive laws in theory can address price discrimination or dumping practices,[542] none of these laws, as currently drafted, could serve as an effective substitute for the national antidumping laws of the United States or Canada.

Because of the variety of legal defenses available under these antitrust statutes, together with their rigorous legal standards, the antitrust laws of both countries would provide relief for only the most egregious types of dumping practices.[543] Furthermore, because antitrust proceedings in both countries are significantly more protracted than antidumping proceedings, a domestic industry might be defunct by the time it secured relief pursuant to the antitrust laws. Finally, foreign countries may not be receptive to the extra-territorial reach of discovery requirements that accompany antitrust proceedings.

If, in spite of these practical considerations, the Working Group still were to recommend replacing the national antidumping laws of both countries with national antitrust laws, then both countries would have to modify their current antitrust statutes. In the end, the Working Group may discover that the superior approach with regard to developing a substitute system of rules to govern both dumping and subsidy practices is to refine the current regime, rather than recommend the wholesale abandonment of that regime.

D. Implications For Prospective U.S.-Mexico Free Trade Talks

It is not certain at this moment what role, if any, Chapter XIX of the U.S.-Canada FTA will play in shaping a future U.S.-Mexico FTA. If the U.S. and Mexican free trade negotiators do decide to rely upon the provisions of that chapter as a reference point during forthcoming free trade talks, then they may be interested in the current progress of the U.S.-Canada Working Group. The Working Group's findings may become particularly relevant if, during the U.S.-Mexico talks, circumstances require the free trade negotiators to grapple with the issue of modifying the existing U.S. and Mexican antidumping and countervailing duty regime.

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539 Powell, *Possible Next Steps*, at 423.
540 15 U.S.C. § 2 (1982).
541 15 U.S.C. § 15 (1982).
542 *See supra* notes 540, 541.
543 *See id.*; Powell, *Possible Next Steps*, at 422-426.

V. CONCLUSION

On April 23, 1985, William E. Brock III, then United States Trade Representative, and Hector Hernandez Cervantes, then Mexico's Secretary of Commerce and Industrial Development, signed the U.S.-Mexico Understanding. "This agreement,"[544] said United States Trade Representative Brock, "is an important first step forward in our bilateral trade relations and should guarantee that trade flows more smoothly across our common border."[545] Secretary Hernandez added: "After fruitful negotiations between officials of both countries, we have achieved more stable market opportunities for Mexican exports, based on fair trade principles."[546]

United States Trade Representative Brock and Secretary Hernandez also announced on that date that the United States and Mexico would take a second step forward in bilateral trade relations by commencing negotiations to conclude a general trade and investment agreement. In 1987, the United States and Mexico consummated this second step by entering into the "Framework Agreement." The chief contribution of this agreement was the establishment of a consultative mechanism designed to resolve bilateral trade disputes.

By 1990, U.S.-Mexico bilateral trade relations have come full circle. The United States and Mexico are ready to take the last step forward to forge an historic economic partnership. Both countries are poised to enter into complex and difficult negotiations to unite a relatively capital-intensive economy with a relatively labor-intensive economy. The Government of Canada also has expressed a strong interest in participating in these negotiations. It appears that the Canadians are seeking to unite the economies of Mexico, the United States, and Canada to establish a so-called "North American Trade Pact."

The "big" issues that should play a major role during forthcoming U.S.-Mexico free trade negotiations include trade in services, labor flows, immigration policies, direct foreign investment, and intellectual property protection. Although these high profile issues have dominated the headlines during the past year in the American and Mexican trade press, U.S. and Mexican negotiators should not overlook other less prominent, but nonetheless critical, trade issues.

U.S. and Mexican free trade negotiators should place a particular emphasis upon the current administration of the U.S. antidumping and

544 *See supra* note 1, at 1.
545 *Id.*
546 *Id.*

countervailing duty laws. In that regard, U.S. and Mexican negotiators would be wise to draw several important lessons from past experiences, including that involving the interpretation of the U.S.-Mexico Understanding. Free trade negotiators should ensure that they fully understand all the crucial terms of a prospective U.S.-Mexico FTA before leaving the bargaining table. Otherwise, U.S. or Mexican exporters may find themselves involved in needless, costly, and time consuming legal battles.

As the United States and Mexico attempt to unite, either with or without Canada, two radically different economies, the free trade negotiators should avoid making the mistake of neglecting the less prominent, but nonetheless critical, dumping and subsidization issues. Indeed, just as similar issues — agricultural export subsidies, in particular — may determine the ultimate fate of the Uruguay Round of multilateral negotiations, so certain dumping and subsidization issues may determine the ultimate success or failure of prospective U.S.-Mexico free trade talks.

If the U.S-Canada experience can serve as a model for future U.S.-Mexico economic relations, then the manner in which these critical issues are resolved during the forthcoming free trade talks may set the tone for U.S.-Mexico relations well into the 21st Century. The challenge for U.S. and Mexican free trade negotiators will be to resolve certain dumping and subsidization issues in a manner that benefits both countries; otherwise, a potential U.S.-Mexico free trade accord may not survive the 20th Century.