Department of Foreign Affairs and International Trade
Ministère des Affaires étrangères et du Commerce international

Trade Remedies Division
2002

Direction des recours commerciaux
2002

U.S. TRADE REMEDY LAW

The Canadian Experience
Second Edition
1985-2000

Canada

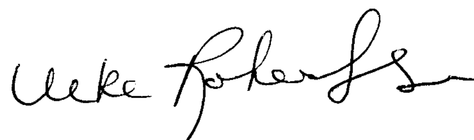
FOREWORD

In March 1993, the Department of Foreign Affairs and International Trade issued a study entitled *U.S. Trade Remedy Law: A Ten Year Experience*. Produced by the Department's U.S. Trade Relations Division, it reviewed Canada's experience with the full range of U.S. trade remedy laws in the 1980s.

The following study, while limited in scope to U.S. anti-dumping, countervailing duty and safeguard investigations, is intended to update and expand on the information regarding Canada's experience with U.S. trade remedy laws as provided in the 1993 study. In contrast with its predecessor, the study includes more detailed information on U.S. anti-dumping and safeguard investigations involving imports from Canada, including discussion of some of the key issues raised in those investigations. It also includes a discussion of the role that the Government of Canada played in the investigations. In addition, there is an updated review of the U.S. countervailing duty investigations involving Canada.

In view of the constraints of time, resources and frequent staff changes first within the U.S. Trade Relations Division and then in the Trade Remedies Division, this study may not be entirely comprehensive. Regardless, the intent is to provide as much information as possible in the hope that it will be as useful a reference document as the original 1993 study.

My thanks to Guy Boileau, Dean Dalke, Eli Feldman, Kimberley O'Reilly, Patrick Thornton, and Chris Wallace for their contributions to this project.



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June 2002

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I United States Anti-Dumping Duty Law

1 Introduction

Dumping is the sale of goods by foreign producers or exporters in an export market, such as the United States, at prices that are lower than the prices received by the producer or exporter for sales of the same or similar products in their home market or a third market, or prices that are below the cost of producing the products. Under the Anti-Dumping Agreement of the World Trade Organization (WTO) and U.S. law, anti-dumping (AD) duties may be applied if two conditions are met: (1) "less than fair value" (LTFV) or dumped sales must be found to exist; and (2) the LTFV sales must be causing or threatening to cause material injury to the U.S. industry producing like products.

If the two conditions are met, an anti-dumping duty order is issued imposing duties equal to the amount by which the normal value (as determined by sales in the home market or third market, or on a constructed value basis) exceeds the export price, as determined by sales to the United States.

1.1 Legislative History and Authority

The Anti-Dumping Act of 1916 was the first U.S. law to specifically target dumping. It provides for criminal and civil penalties for the sale of imported articles at a price substantially lower than the actual market value or wholesale price, with the intent of destroying or injuring an industry in the United States. The Anti-Dumping Act of 1916 remains in place today although it is used very infrequently.[1] Prior to 1980, U.S. dumping measures were also governed by the Anti-Dumping Act of 1921. This act was repealed by the Trade Agreements Act of 1979, which added a new Title VII to the Tariff Act of 1930 to address both anti-dumping and countervailing duty issues, and transferred the responsibility for administering the anti-dumping law from the Department of the Treasury to the Department of Commerce.[2] Title VII was subsequently amended by the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988 and, most recently, the Uruguay Round Agreements Act (URAA) in December 1994.[3] Title II

1 The European Communities successfully invoked WTO dispute settlement procedures in response to two separate attempts by certain U.S. steel producers to use the 1916 law.

2 19 U.S.C. § 1671-1677g.

3 Pub. L. 103-465, 108 Stat. 4809, Dec. 8, 1994.

of the Uruguay Round Agreements Act implements the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994—the Uruguay Round WTO Anti-Dumping Agreement. In addition to amendments required by the Uruguay Round Agreements, the URAA includes several further changes to the anti-dumping law, such as modification of the anti-circumvention provisions. Regulations detailing the practice and procedures used in dumping investigations were subsequently issued.

2 U.S. Anti-Dumping Law: Procedural Framework

The International Trade Administration (ITA) of the U.S. Department of Commerce is the "administering authority" with overall responsibility for enforcing anti-dumping laws, and specific responsibility for determining whether the goods under investigation are being dumped. The International Trade Commission (ITC), an independent federal agency, determines whether the U.S. domestic industry producing that class of products is either injured or threatened with injury by reason of the subject imports. The two agencies perform their responsibilities simultaneously and notify each other of any determinations. A negative final determination by either party or a negative preliminary injury determination by the ITC will terminate the proceedings. All determinations must be reported in the *Federal Register*, with a statement of facts and conclusions of law.[4] An investigation proceeds as follows:

- Within 20 days of the filing of a petition, Commerce determines whether there is sufficient evidence of injurious dumping to warrant an investigation. Commerce has found very few petitions to be insufficient at the initiation stage. The deadline may be extended to 40 days if it is necessary for Commerce to determine whether there is sufficient industry support for the petition.
- If the petition is accepted, the ITC conducts a preliminary investigation to determine whether there is a reasonable indication of material injury. The preliminary determination must normally be issued within 45 days of the date of filing.
- If the ITC preliminary determination is affirmative, Commerce makes a preliminary determination of whether dumping is occurring. The preliminary determination must be released within 160 days after a filing or 140 days after an investigation is initiated, whichever is later. Extensions may be requested by interested parties. If the determination is affirmative, Commerce establishes preliminary dumping margins, resulting in the application of provisional duties. The ITC then commences its final injury investigation.

4 See 19 U.S.C. §§ 1330-13341 for the general organization and powers of the Commission.

- Commerce issues its final determination 75 days after issuing the preliminary determination (or after 135 days upon the request of an exporter when the preliminary determination was affirmative, or of a petitioner when the preliminary determination was negative).
- The ITC final injury determination must be released before the 120th day after Commerce makes its affirmative preliminary determination or the 45th day after Commerce makes its affirmative final determination, whichever is later.
- If both dumping and injury are found, an anti-dumping duty order is issued by Commerce within 7 days of notification by the ITC of its decision.
- Each year on the anniversary of the issuance of an order, the parties have an opportunity to request an administrative review of the dumping margins for the most recent annual period.

3 Initiation

U.S. anti-dumping investigations are initiated on the basis of a petition requesting an investigation, filed by an interested party or parties. Petitions are filed simultaneously with Commerce and the ITC.[5] "Interested parties" may include:

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 is representative of an industry engaged in the manufacture, production or wholesale in the United States of a like product; or
3) a trade or business association, a majority of whose members manufacture, produce or wholesale a like product in the United States.[6]

Commerce is required to initiate an investigation when a petition has been filed "by or on behalf of the domestic industry" and contains the elements necessary for the imposition of an anti-dumping duty, including all information reasonably available to the petitioner.[7] Prior to the URAA, U.S. practice was to assume that the petition was filed on behalf of a domestic industry unless a majority of domestic companies affirmatively opposed the petition.[8] Commerce would determine the extent of such opposition only after it was expressed.

5 While Commerce may initiate anti-dumping investigations itself, it rarely does so. See 19 U.S.C. § 1573a (a) (1).

6 19 U.S.C. § 1677 (9).

7 19 U.S.C. § 1673a (b) (1).

8 See 3.5" Microdisks from Japan, U.S. 54 Fed. Reg., 6435 (February 10, 1989).

In accordance with the standing requirements of the WTO Anti-Dumping Agreement and the URAA, the application is considered to have been made "by or on behalf of the domestic industry" only if it is supported by those domestic producers or workers who account for:

1) at least 25% of the total production of the domestic like product; and
2) more than 50% of the total production of the domestic like product produced by that portion of the domestic industry expressing either support for or opposition to the application.

Where the petition fails to show the support of domestic producers or workers accounting for more than 50% of the total production of the domestic like product, Commerce generally conducts a poll of the industry to determine whether the petitioner has standing. Under U.S. law, labour has a voice equal to management; if a company's management expresses direct opposition to the views of its workers, the firm's production will be treated as neither supporting nor opposing the petition.[9]

The position of U.S. producers that are importers of the goods in question will be disregarded in the determination of support. Similarly, the position of U.S. producers that are related to a foreign producer shall be disregarded, unless they can demonstrate that their interests as domestic producers would be adversely affected by an anti-dumping duty order.[10] Both Commerce and the ITC are required by regulation to provide technical assistance to small businesses in the preparation of petitions, if so requested.[11] The Trade Remedy Assistance Office (TRAO) of the ITC has been established to provide the public with general information on specific U.S. trade laws, and provides technical assistance to eligible small businesses seeking relief under the trade laws.

4 Evidence

4.1 Questionnaires

The information needed to determine whether dumping exists, and to what degree, is obtained by sending importers and exporters requests for information (RFI) or questionnaires. As business structures have become more complicated and the requirements of the relevant WTO agreements more complex, these questionnaires have over time become more detailed and complex. Questionnaires must normally be answered within 30 days, although short extensions may be granted in certain circumstances. Commerce usually examines sales representing

9 19 U.S.C. § 1673a (c) (4) (A) (1994).

10 19 U.S.C. § 732 (c) (4)-(C), (B) (ii), (B) (i).

11 19 CFR § 353.12.

between 60% and 85% of the volume of exports to the United States from the subject country. As a result, small producers or exporters may not receive questionnaires.

If the response to an information request is inadequate, the respondent must be promptly informed of the nature of the deficiency, and be provided an opportunity to remedy or explain it. Commerce may not disregard information submitted within the set time limits if the respondent "acted to the best of its ability" to provide the requested information.[12]

The ITC, like Commerce, uses questionnaires as the principal means of obtaining information. Questionnaires are sent to domestic producers, importers, purchasers and exporters. The questionnaires generally cover a three-year period and request information concerning a wide variety of economic indicators, including production, capacity utilization, shipments, exports, sales, employment, capital expenditures and prices.

In a provision added by the URAA in 1994, Commerce and the ITC are required to provide consumer organizations and industrial organizations with an opportunity to submit relevant information for consideration. Both Commerce and the ITC are also required to take account of difficulties experienced by parties, particularly small firms and firms in developing countries, in providing requested information. The two agencies will provide such assistance as they consider practicable to avoid imposing an unreasonable burden on the respondent.

4.2 Facts Available (Best Information Available)

If a respondent is unable or unwilling to provide the information requested by Commerce or the ITC within the set time limits and in the form requested, the agencies may rely on the "facts available" (formerly known as "best information available," or BIA), including allegations contained in the petition and in previous reviews.[13] When a respondent refuses to cooperate, Commerce will generally claim adverse inference and impose the most adverse rate possible. Commerce and the ITC may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems and computer capabilities, as well as the prior success of the same firm, or other similar firms, in providing requested information. In accordance with the Anti-Dumping Agreement, if "facts available" are relied upon, they must be corroborated where practicable using independent sources.[14]

12 19 U.S.C. § 1677m (e) (4) (1994).

13 19 U.S.C. § 1677e (1994).

14 19 U.S.C. § 1677c (c) (1994).

4.3 Verification

Commerce is required to verify all the information it relies upon in making a final determination in an original investigation or revocation. In an annual review, verification will occur if requested by a domestic interested party and if there has been no verification during the two immediately preceding reviews. Otherwise, verification is discretionary. Commerce must obtain agreement from the foreign persons being verified and must notify the foreign government concerned regarding the verification. If the party being examined or the foreign government objects to the verification, Commerce will not conduct the verification and instead will rely on the facts available to make its determination. Commerce produces a report following the verification process, and offers an opportunity for both the petitioners and respondents to make submissions and offer comments.[15]

4.4 Treatment of Information

Information submitted to either Commerce or the ITC is treated as public unless designated as "proprietary information." Parties asserting proprietary status for their submissions must justify to Commerce or the ITC why each piece of information should not be disclosed.[16] Non-confidential summaries of proprietary information must be filed concurrently with the submissions. If accepted as proprietary information, the material so designated may be released to certain specified individuals under an administrative protective order (APO). Attorneys or other representatives of interested parties may gain access to proprietary submissions of respondents if they have established a sufficient need for the information and can adequately protect its proprietary status. Violation of APOs may result in sanctions or even disbarment from practice before the agency in question.[17]

Notices of initiation and suspension decisions, preliminary and final determinations, and reviews (including the facts and conclusions supporting the determinations) must be published in the *Federal Register*.

4.5 Like Product and Scope Determinations

Issues sometimes arise as to whether a particular product is included within the scope of an anti-dumping investigation. In such cases, Commerce may issue "scope rulings" that clarify the scope of an order with respect to particular goods.

The rulings are intended to ensure that the imported goods are being compared to similar U.S.-produced goods or "like products." A "like product" is defined by the Tariff Act of 1930 as "a product that is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."

15 19 U.S.C. § 1677e (b) (1994).

16 19 U.S.C. § 1677f (b) (1994).

17 19 U.S.C. § 1677f (c) (B) (1994).

Commerce generally examines the following criteria in like product determination: general physical characteristics; the expectations of the ultimate purchasers; the channels of trade in which the product is sold; the manner in which the product is sold and displayed; and the ultimate use of the merchandise. No single factor is determinative and other relevant factors may be examined.[18] Where there are no sales of identical merchandise in the home market to compare to U.S. sales, U.S. sales are compared to the next most similar foreign like product on the basis of characteristics listed in the anti-dumping questionnaire and reporting instructions. As discussed below, adjustments may be made to the normal value to compensate for the physical differences between the merchandise being compared.

While the ITC and Commerce commonly employ the same like product determination, the ITC is not bound by Commerce's determination. The ITC may define the domestic like product more broadly than the class or kind of imported merchandise defined by Commerce, or the ITC may find two or more domestic like products corresponding to the class or kind of imported merchandise. In defining the domestic like product for purposes of injury, the ITC typically considers the following factors: (1) physical appearance; (2) end users; (3) customer perceptions; (4) common manufacturing facilities; (5) production processes and employees; (6) channels of trade; (7) interchangeability of the product; and (8) where appropriate, price. No single factor is determinative and other relevant factors must be examined.[19]

5 Determination of Dumping

Commerce determines dumping margins by comparing the price at which the subject goods are sold in the United States ("export price") with the "normal value" of the goods. "Normal value" is defined as the price, at a time reasonably corresponding to the time of sale used to determine export price or constructed export price, "at which the foreign product is first sold to an unrelated purchaser for consumption in the exporting country, in the usual commercial quantities, in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price."

In identifying the date of sale of the subject merchandise or the foreign like product, Commerce will normally use the date of invoice, as recorded in the exporter's or producer's records. However, a different date may be used if Commerce is satisfied that it better reflects the date on which the material terms of the contract, including price and quantity, are fixed. Determining the exact date of sale may have a significant impact on currency conversions and price comparisons, particularly in highly inflationary or price-volatile markets.

18 19 U.S.C. § 1677 (10).

19 19 U.S.C. § 1677 (4) (A).

For market-economy investigations, Commerce normally examines pricing information for the four most recently completed fiscal quarters as of the month preceding the month in which the petition is filed (i.e. the period of investigation). Commerce may, however, examine any additional or alternate period deemed appropriate.[20]

5.1 Preliminary Determinations

In its preliminary determination, Commerce must determine whether there is a reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at LTFV. If Commerce's preliminary determination is affirmative, liquidation of the subject merchandise is suspended and provisional duties are applied equal to the dumping margin preliminarily determined. The provisional duties usually take the form of a bonding requirement equal to the estimated duty rate for each subsequent entry of the merchandise to ensure payment if dumping duties are ultimately imposed. These measures may normally be in place for a maximum of 120 days. If the preliminary decision is negative, no suspension of liquidation occurs and the Commerce investigation simply continues. However, in such a circumstance the ITC does not commence its final investigation until after, and if, Commerce issues a final affirmative determination. The ITC's final determination is then due within 75 days after Commerce issues its final determination, instead of the usual 45 days.

All parties may comment on Commerce's preliminary determination and on the subsequent verification report (as discussed above). Commerce holds conferences to discuss issues with the parties. Case briefs and rebuttal briefs may be filed before such a conference. All comments received, whether from petitioners or respondents, are addressed in the final determination, and Commerce explains how it has addressed each comment.

5.2 Final Determinations

Commerce must normally issue its final determination within 75 days of the preliminary determination. The final determination must include the factual and legal conclusions on which it is based, and the estimated anti-dumping duty rate for each party investigated. Given that Commerce performs an on-site verification of the questionnaire responses provided by the exporters or producers, it is not unusual for the margins found in the final determination to differ from those found in the preliminary determination. If either final determination is negative, the investigation is terminated, including any suspension of liquidation that may be in effect; all estimated anti-dumping duties are refunded with interest, and all bonds or other security are released. Upon issuance of an affirmative final dumping determination by Commerce and an affirmative final injury determina-

20 19 CFR 351.204 (b).

tion by the ITC, the U.S. Customs Service is instructed to assess definitive anti-dumping duties and collect cash deposits of estimated anti-dumping duties on future entries, in accordance with rates published in the final determination.

6 Normal Value

6.1 Adjustments to Normal Value

In order to ensure that an appropriate comparison is being made, normal value (NV) and the export price (EP) are compared on a common ex-factory basis, with adjustments made for any differences in the terms or circumstances of sales in the two markets. Respondents are responsible for providing the supporting evidence and argumentation required to support an adjustment. Normal value is based on ex-factory prices to unaffiliated customers and prices to affiliated customers where the sales were made at arm's length. Where appropriate, the starting price (gross unit price) is reduced by:

- ***Home-market (or third-country) packing costs and warehouse expenses***. Deductions are made when such costs are included in the price.[21]
- ***Inland freight/delivery costs (movement expenses)***. If the prices in the country of export are delivered prices or reflect delivery charges, the price is reduced by the amount of the foreign inland freight and insurance.[22]
- ***Indirect taxes*** (such as value added taxes). Reductions to normal value are made in the amount of the indirect duties and taxes levied on goods for home consumption where the duties or taxes are included in the price of the like goods and are not borne by the goods sold to the importer-that is, where the exports are relieved of the duties or taxes by exemption, remission or refund.
- ***Cash/quantity/early-payment/loyalty discounts and rebates***. Commerce makes allowance for such discounts and rebates if they are granted and taken in the country of export.

Adjustments to normal value may be made for differences in price that result from:

- ***Differences in quantities sold***. Where the quantities sold in the home market and in the United States differ in volume, price differences may result. Commerce will grant a quantity adjustment if the respondent can demonstrate that the price differential can be at least partially attributed to the differences in quantities sold.

21 19 U.S.C. § 1673 (a) (6) (A), B (i).

22 19 U.S.C. § 1673 (a) (6) (B) (ii).

- ***Physical differences in products sold domestically and for export.*** Commerce will make allowance for differences in physical qualities based upon differences in the variable costs of production. Commerce will not consider differences in cost of production when the compared merchandise has identical physical characteristics.

- ***Differences in circumstances of sale.*** Adjustments are made to account for the differences in selling expenses between the home market and export sales. Of directly related selling expenses for which Commerce will make adjustments to the extent that the costs are assumed by the producer on behalf of the purchaser, examples include: commissions; credit terms; guarantees; warranties; technical assistance; servicing; and product-specific advertising. U.S. direct selling expenses are then added to normal value. Where normal value is compared to constructed export price as opposed to export price, deductions are made for actual home-market indirect selling expenses up to the amount of indirect selling expenses incurred in selling like products in the U.S. market.[23]

- ***Credit terms.*** Adjustments are often made to account for differences in credit costs between the domestic and U.S. markets. This adjustment is necessary because there is usually a period of time between the shipment of merchandise to a customer and payment for the merchandise. An adjustment for imputed credit expense is made even if the exporter does not actually have to borrow funds to carry its accounts receivable. If actual credit cost information is not available, Commerce imputes the cost of credit by determining the number of days that payment is outstanding and the interest rate that the company paid, or would have paid, if it had borrowed the same money (i.e. the same amount in the same currency) to finance its accounts receivable. Imputed credit costs are calculated by dividing the number of days between shipment and payment by 365, then multiplying by the interest rate and unit price.

- ***Differences in the levels of trade (LOT).*** Commerce compares normal value to the export prices at the same level of trade, where possible. If, for example, a product is sold at two levels in the home market—to distributors and end users—and all U.S. sales are to end users, only sales in the home market to end users are considered for comparison purposes. If there is no equivalent level of trade in the home market, modifications to normal value are normally calculated based on the percentage difference in weighted-average prices at each of the two levels of trade used.[24] To claim an adjustment, foreign

23 19 U.S.C. § 1673 (a) (6) (C) (iii) and 19 CFR 351.410.

24 19 U.S.C. § 1677b (a) (7) (A) (1994).

> producers must demonstrate both (a) the performance of different selling activities, and (b) a pattern of consistent price differences in sales of the same goods to different levels of trade in the foreign market.[25]

In identifying dumping from a non-market economy country, Commerce will normally calculate normal value by valuing the non-market economy producers' factors of production in a market economy country most like the non-market economy country.

6.2 Sales Below the Cost of Production / Ordinary Course of Trade

Commerce will exclude sales made at prices below the per unit cost of production from the calculation of normal value when they have been made in substantial quantities and do not permit recovery of all costs within a reasonable period of time. Such sales are excluded because they are considered not to be in the "ordinary course of trade." The interpretation of "substantial quantities" is governed by an 80% rule. If sales below cost of production represent less than 20% of total sales (i.e. above-cost sales represent more than 80% of total sales), all home-market sales, including those made at below-cost levels, will be included in the calculation of normal value. Where more than 20% of total sales (the pre-Uruguay Round threshold was 10%) are made at below-cost prices (i.e. above-cost sales represent less than 80% of total sales), below-cost sales are excluded and the remaining above-cost sales are used to determine normal value. The relative value of the remaining above-cost sales may be quite low, meaning that normal value could conceivably be solely based on a few unusually high-priced sales. Where there are no sales above the cost of production, normal value will be based on the constructed value of the goods in question.[26]

While previous U.S. law required that the below-cost sales be made "over" an extended period of time (interpreted by Commerce to mean a minimum of two months) in order to be excluded, the Uruguay Round Agreement stipulates that such sales must occur "within" a 12-month period. Thus below-cost sales may now be excluded even if they occur entirely within a one-month period.[27]

Commerce will investigate to determine whether home-market sales are below the cost of production if it has reasonable grounds to suspect or believe that such sales have occurred, based on allegations made by the petitioner. The cost of production calculations are based on the exporter's or producer's own records, if kept according to generally accepted accounting principles (GAAP) of the country

25 19 U.S.C. § 1677b (a) (7) (A) (i), (ii) (1994).

26 19 U.S.C. § 1677b (a) (1) (1994).

27 19 U.S.C. § 1677b (b).

of the exporter or producer. Special adjustments to production costs are made to account for costs associated with start-up operations in cases involving new production facilities or new products requiring substantial additional investment.

Beside sales below the cost of production, other types of sales may be excluded from the calculation of normal value because Commerce deems them not to be in the ordinary course of trade. Examples include sales of samples, off-quality merchandise, close-outs, trial sales and very small quantities.

6.3 Home-Market Viability / Third-Country Sales

Normal value is based upon sales of the like product in the producer's or exporter's home market if the sales volume is considered sufficient to provide a "viable" comparison to the export price and the sales are in the "ordinary course of trade." To be considered viable, the volume of home-market sales must be equivalent to at least 5% of the volume of sales of the subject goods to unaffiliated buyers in the United States.

When home-market sales are deemed inadequate according to this standard, or are outside the ordinary course of trade, normal value may be based upon sales to a single third-country ("foreign") market. Commerce is instructed to choose a third country whose market is the most similar in terms of organization and development to the country whose home-market sales are deemed inadequate, and that exports goods most similar to those being exported to the United States. Commerce will match a given U.S. sale to the third-market sales of the most similar foreign like product made in the ordinary course of trade. The volume of sales to the third-country market must also meet the benchmark of 5% of the volume sold to the United States.[28]

Commerce has the discretion not to apply the 5% threshold in "unusual situations," or to decline to use home-market or third-country sales if such sales are deemed not to be representative or if a "particular market situation" exists that does not permit proper comparison.[29] The Statement of Administrative Action (SAA) to the URAA indicates that such "unusual" or "particular market situations" could include cases where: (1) a single sale in a foreign market constitutes 5% of sales to the United States; (2) there are such extensive government controls over pricing in a foreign market that prices in that market cannot be considered competitively set; and (3) there are differing patterns of demand between the United States and a foreign market.

Furthermore, as discussed below, affiliated party sales may not be useable for normal value calculations in certain situations. If neither home-market nor third-country sales are appropriate, constructed value is used.

28 19 U.S.C. §§ 1677b (a) (1) (B) (ii) (II), (a) (1) (C) (1994).

29 19 U.S.C. § 1677b (a) (1) (B) (ii) (III), (C) (iii).

6.4 Constructed Value

Where third country sales cannot be used to establish normal value because such sales are outside of the ordinary course of trade or are inadequate in volume to provide a representative comparison, the U.S. price is compared to constructed value. This is calculated as manufacturing costs in the country of origin, plus reasonable amounts for administrative, selling and general costs, and for profits.

In calculating profit, pre-Uruguay Round law required Commerce to include the higher of actual profit or 8% of the total cost of manufacture and general expenses. Selling, general and administrative expenses (SGA) were calculated as a minimum of 10% of the cost of manufacture, or actual expenses, whichever was higher.[30] In calculating constructed value, Commerce now uses companies' actual general expenses and profits based on sales of the like product at above-cost prices.[31]

When the requisite information is not available to determine actual profit earned on sales of the foreign like product in the ordinary course of trade, Commerce may use one of three alternative means of calculating actual SGA and profit:

1) the actual amount of SGA and profit incurred by the producer/exporter on sales of the same general category of products by the same producer; or
2) the weighted-average, actual amount incurred by other producers/exporters subject to the investigation or review for SGA and profit on sales of the like product made in the ordinary course of business; or
3) the actual amount of SGA and profit incurred by any other reasonable method, not to exceed the amount normally realized by other producers/exporters for sales in the same category as the subject merchandise.

7 Export Price

Export price is the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter outside the United States to an unaffiliated purchaser in the United States or an unaffiliated purchaser for exportation to the United States.[32]

7.1 Adjustments

In order to calculate an accurate ex-factory export price, the starting price (gross unit price) to the first unaffiliated customer in the United States is reduced to account for any:

30 19 U.S.C. § 1677b (c) (1) (B).

31 19 U.S.C. § 1677b (c) (2) (A) (1994).

32 19 U.S.C. § 1672 (a).

- ***movement expenses*** incurred in bringing the merchandise from the factory to the point of sale (this includes expenses for foreign inland freight, foreign warehousing, U.S. inland freight, international freight and insurance, and U.S. brokerage and handling charges, where those charges are included in the price);[33]
- ***special packaging for export transactions***;
- ***import duties and taxes*** imposed by the country of exportation that have been rebated or not collected because of exportation;
- ***countervailing duties*** imposed by the U.S. government to offset the effect of a subsidy offered by a foreign government; or
- ***discounts and rebates*** (Commerce makes allowance for these if they are granted and taken in the home market).[34]

7.2 Sampling and Averaging

The Uruguay Round Agreement allows Commerce to use averaging and statistically valid sampling techniques to determine export price, constructed export price or normal value if there is a significant volume of sales or a significant number or types of products. Commerce has the discretion to select the samples and averages to be used, but is directed to consult with exporters and producers. Furthermore, if determining individual weighted-average dumping margins for each company is not practical, Commerce may determine the weighted-average dumping margin for a sample of exporters, producers or types of products that is statistically valid, or for a sample of exporters and producers accounting for the largest volume of the subject merchandise for the exporting country.

7.3 Affiliated Persons

Commerce modifies its methodologies where the transaction examined involves related parties. Commerce presumes that any transaction between related parties is an unreliable basis for establishing export price or normal value because related parties may offer each other preferential pricing, or transfer products on the basis of cost or cost plus a fixed mark-up. Where Commerce finds that a sale between related parties was not made at a price at which the exporter sells "such or similar merchandise" to unrelated purchasers, the sale is disregarded. The respondent carries the burden of demonstrating that a sale to a related party is made at arm's length. Similarly, Commerce stipulates that the transfer price of a major input between related parties must be greater than the cost of producing the input, and it requires the respondent to report the supplier's actual production costs.

33 19 U.S.C. § 1672 (c) (2) (A).

34 19 U.S.C. § 1672 (b).

Claimed adjustments may also be disallowed where the transfer price is lower than the market price. Parties are considered to be related if:

- one directly or indirectly controls the other;
- a third party directly or indirectly controls both; or
- both directly or indirectly control a third party, and there is reason to believe that the relationship causes the U.S. producer to act differently from a non-producer.[35]

A 5% equity ownership is considered sufficient to give rise to a relationship of "affiliated party" although "control" can be found to exist even in the absence of any equity ownership.

7.4 Constructed Export Price

Constructed export price is a term used for the calculation of the export price when sales to the United States are made through a related party. Sales to related parties are discarded and Commerce instead calculates a constructed export price, based on the price charged by the producer or exporter of the merchandise, or by an affiliated seller, before or after importation, to the first unrelated U.S. buyer.[36] To calculate the equivalent of an ex-factory price for sales made through an affiliated party, in addition to those adjustments used for the calculation of export price, several other adjustments are made.

Constructed export price is further reduced by:

- ***direct selling expenses*** incurred by or for the account of the seller, that result from, and bear a direct relationship to, the sale (such as credit expenses, guarantees and warranties) and any selling expenses that the seller pays on behalf of the purchaser;
- ***other (indirect) selling expenses*** that relate to economic activity in the United States (such as Canadian and U.S. inventory carrying costs and product liability premiums);
- ***cost of any further manufacture or assembly*** in the United States; and
- ***profit allocatable to the selling, distribution and further manufacturing in the United States*** by the affiliated party (the deduction is calculated by multiplying the total actual profit, both on the U.S. and the home market, by the ratio of total U.S. manufacturing and selling expenses to total manufacturing and selling expenses).[37]

35 19 U.S.C. § 1677 (33) (1994).

36 19 U.S.C. § 1672 (b).

37 19 U.S.C. § 1672 (c) and (d),1677a (d) (3).

8 Calculation of Dumping Margins

To determine whether a dumping margin exists, Commerce subtracts the weighted-average export price from the weighted-average normal value for the like merchandise. Any positive difference serves as the basis for a dumping margin, which is then averaged on a weighted basis to find one estimated margin amount for all sales to the United States during the period of investigation.

Under Commerce's pre-Uruguay Round methodology, *average* home market prices were usually compared to *individual* export transaction prices. In accordance with Article 2.4.2 of the Anti-Dumping Agreement, Commerce now normally establishes and measures dumping margins on the basis of a comparison of weighted-average normal value prices and weighted-average export prices (or constructed export prices). Transaction-to-transaction calculations may be used where there are very few sales and the merchandise sold in each market is identical or very similar.[38]

The difference between the old and current U.S. methodologies can have a substantial impact on dumping margins. For example, if on the same day a Canadian manufacturer sells identical quantities of widgets in the U.S. and Canadian markets for $100 a unit, and a week later sells identical quantities of widgets in both markets for $200 a unit, the normal value would be $150. According to previous U.S. methodology, when the two U.S. sale prices are compared to this normal value of $150, the first sale at $100 would be considered dumping. In contrast, under average-to-average or transaction-to-transaction methodology, no dumping would exist.

However, U.S. law retained the use of comparison of individual export prices to the averaged normal value for all administrative reviews until January 1, 2000. This methodology may also be used where there is evidence of a pattern of export prices "that differ significantly among purchasers, regions, or periods of time"—a practice generally known as "targeted dumping." [39]

8.1 All-Others Rate

Commerce normally calculates individual weighted-average dumping margins for the largest foreign exporters and producers, while all other producers or exporters from the same country are subject to an "all-others" rate set in the original investigation or the latest annual review. The all-others rate is calculated as the weighted average of the individually determined dumping margins, excluding zero or *de minimis* margins, and margins based entirely on facts available. Commerce must establish individual duty rates when an exporter or producer not selected for individual examination voluntarily submits the information requested of the

38 19 U.S.C. § 1677f-1 (d) (1) (A) (1994); SAA at 172.

39 19 U.S.C. § 1677f-1 (d) (1) (B) (1994).

other respondents within the date specified for individually examined exporters or producers. If the number of exporters or producers who have submitted such information is so large that individual examinations would be unduly burdensome, Commerce is exempted from this requirement.[40]

8.2 *De Minimis* Margins

In accordance with Article 5.8 of the Anti-Dumping Agreement, the Tariff Act of 1930 has been amended to provide that a dumping margin found to be less than 2% *ad valorem* will be considered to be *de minimis* and will be disregarded. Commerce, however, has interpreted Article 5.8 as applying only to original investigations. For reviews, until January 1, 2000, Commerce retained the practice of considering a margin to be *de minimis* only if it is below 0.5% *ad valorem*.[41]

9 ITC Injury Analysis

As noted above, the role of the ITC in anti-dumping investigations is to determine whether the U.S. domestic industry producing like products is materially injured or threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of the subject imports. The ITC is composed of six members appointed by the President, no more than three of whom can be from the same political party. Determinations are made on the basis of a majority vote. If the members split evenly in a vote on material injury or threat of injury, the ITC will be deemed to have made an affirmative determination.

The ITC determination of injury involves a two-pronged inquiry: first, with respect to the fact of material injury; and second, with respect to whether the dumping is a cause of material injury or threat thereof.

Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." In determining whether the domestic industry is materially injured by reason of the investigated imports, the ITC is directed by statute to consider:

1) the volume of imports and, more specifically, whether the volume of subject imports (either in absolute or relative terms) is significant;

2) the effect of imports on U.S. prices of like merchandise, including evidence of price underselling or price depression attributable to the imports; and

3) the effects that imports have on the U.S. facilities of domestic producers of like products, including but not limited to:

40 19 U.S.C. § 1673d (c) (5) (B) (1994).

41 19 U.S.C. § 1673b (b) (3), SAA at 174-75.

i) actual and potential declines in output sales, market share, profits, productivity, return on investment or utilization of capital;

ii) factors affecting domestic prices;

iii) actual and potential negative effects on cash flow, inventories, employment, wages, growth or ability to raise capital;

iv) actual and potential negative effects on the existing development and production efforts of the domestic industry to develop more advanced versions of the domestic like product; and

v) the magnitude of the margin of dumping.[42]

The ITC is not restricted to these factors, however, and in past cases has considered other economic indices.

In determining whether an industry is threatened with material injury by reason of the subject imports, the ITC considers whether "on the basis of evidence . . . the threat of material injury is real and . . . actual harm is imminent." Such a determination "may not be made on the basis of mere conjecture or supposition."[43]

The ITC considers, among other relevant economic factors:

1) any existing or imminent increase in production capacity, which would be likely to result in increased imports to the United States;

2) a significant rate of increase in the volume or market penetration of imports of the subject goods;

3) whether imports are likely to have a significant depressing or suppressing effect on U.S. prices;

4) inventories of the subject merchandise;

5) the potential for product shifting if foreign production facilities currently producing non-subject merchandise can be used to produce subject merchandise;

6) the likelihood of increased imports, by reason of product shifting, of either raw or processed agricultural products already subject to investigation;

7) the actual and potential negative effects on existing U.S. industry efforts to develop a derivative or more advanced version of the product under investigation; and

42 19 U.S.C. § 1677 (7) (B) (i).

43 19 U.S.C. § 1673d (b) and 1677 (7) (F) (i).

8) any other demonstrable trends indicating the probability that the subject merchandise will cause material injury.

Petitioners may also allege that the establishment of an industry in the United States is materially retarded by reason of imports (or the likelihood of imports) of the subject merchandise. Such allegations have been uncommon.

With respect to the issue of causation, it is important to note that according to the ITC's interpretation of its statute, the dumping need not be the only cause of injury, nor need it be more significant than any other cause of injury.

9.1 Preliminary Determination

In its preliminary determination, the ITC must determine, based on the best information available at the time, whether there is a "reasonable indication" that a domestic industry is materially injured, or threatened with material injury, by reason of the allegedly dumped imports. While a negative preliminary determination results in termination of the investigation, such a finding is relatively infrequent. The ITC is usually inclined to give the petitioners the benefit of the full process unless the complaint is unsubstantiated.[44] The petitioner bears the burden of proof with respect to the injury issue.

9.2 Final Determination

A higher standard of evidence is required in the final determination. The ITC must determine whether a U.S. industry is materially injured or threatened with material injury "by reason" of the subject imports. As part of the determination process, a public hearing is held, usually lasting one day. Parties to an ITC proceeding may file substantial pre-hearing submissions, and have an opportunity to analyze and comment upon the data and analysis compiled by the ITC investigating staff. The hearing process is investigatory rather than adjudicatory in nature, provides no opportunity to offer new evidence, and is limited to cross-examination and argumentation. Following the hearing and deliberations by the Commissioners, the ITC issues a report containing its decision.

9.3 Industry Determination

The ITC is responsible for defining the domestic industry engaged in production of the like product. According to the Tariff Act of 1930, the domestic industry is "the domestic producers as a whole of a like product, or those producers whose collective output of the like products constitutes a major proportion of the total domestic production of that product."[45] U.S. producers of the like product who are related to the exporters or importers, or who are themselves importers of the

44 19 U.S.C. § 1673b (a). ITC procedures are contained in 19 CFR 207.

45 19 U.S.C. § 1677 (4) (A).

allegedly dumped goods, may be excluded from the consideration of the domestic industry "in appropriate circumstances." Parties are considered to be related if one party exercises direct or indirect control over the other party. The ITC's concern in a related-party situation is whether the relation of the producers to the exporters or importers of dumped goods gives them an unusual or sheltered position in the market as compared to other producers.

9.4 Captive Production

The Uruguay Round Agreements Act of 1994 introduced the concept of "captive production" into U.S. methodology for determining material injury in anti-dumping and countervailing duty investigations. The concept was based on the fact that some products subject to trade remedy investigations may be sold both as end products ("the merchant market") or for use in further manufacturing processes. For example, in the flat-rolled steel sector, hot-rolled coils may be sold and used as end products or may be further processed into cold-rolled or corrosion-resistant steel. The issue arises as to whether injury should be assessed on the basis of total production of the product in question or only that portion sold in the "merchant market." In the former case, dumped or subsidized imports would represent a lesser share of total consumption than they would if captive production was included. Accordingly, it could be more difficult for domestic industry to demonstrate injury by dumped or subsidized imports if captive production is included.

The URAA set out criteria[46] for determination of the existence and treatment of captive production. The ITC will normally examine the condition of the U.S. producers of the domestic like product as a whole when determining whether material injury resulted from unfairly traded imports. The ITC will consider the effect that subsidized or dumped imports have had on the total production of the domestic like product. However, if certain conditions are determined to exist, the ITC will focus primarily on the merchant market in determining injury.

9.5 Regional Markets

For purposes of injury determination, the domestic industry may be limited to producers of like products in isolated or regional markets within U.S. territory, even if the domestic industry producing like products as a whole is not suffering injury. In order to establish that a regional market exists, it must be demonstrated that:

- the producers within the regional market sell all or almost all of their production in that market; and
- the demand in the regional market is not supplied to any substantial degree by producers located elsewhere in the national territory.

46 19 U.S.C. § 1671 (c) (iv).

Once a regional market is found to exist, several additional criteria are examined to determine whether the U.S. industry has suffered injury. Before an affirmative determination may be issued, it must be established that:

- there is a concentration of dumped imports into the regional market; and
- the dumped imports are the cause of injury to the producers of all or almost all of the production within that regional market.

9.6 Cumulation

The ITC is directed to cumulatively assess the volume and effect of imports of like products from two or more countries if such imports compete with each other and the domestic like product. Only imports with respect to petitions filed on the same day and for which Commerce has made an affirmative preliminary determination may be cumulatively assessed. For injury determinations, the ITC must cumulate imports if: (1) the anti-dumping duty margin for each country is more than *de minimis*; (2) the volume of imports from each country is not negligible; and (3) all such imports compete with each other and with the domestic like products on the U.S. market. With respect to determinations of threat of material injury, the ITC retains the discretion to cumulate imports.[47] U.S. law is silent with respect to the ITC's practice of "cross-cumulation," in which the ITC cumulates the effects of dumped and subsidized imports.

9.7 Negligible Imports

If the ITC finds that imports from a country under investigation are negligible, the investigation is terminated. Consistent with the Anti-Dumping Agreement, imports are considered negligible if they account for less than 3% of the volume of all subject merchandise imported into the United States in the most recent 12-month period prior to the filing of the petition. However, where the aggregate volume of subject imports from all countries with negligible volumes exceeds 7% of the volume of all subject imports, these imports will not be considered negligible.

10 Reviews

10.1 Administrative Reviews

Administrative reviews of anti-dumping orders and suspension agreements are normally conducted by Commerce once during each 12-month period beginning on the anniversary of the date of the order, if requested by an interested party. The administrative reviews determine actual duty owing for the period under

47 19 U.S.C. § 1677 (7) (G) (ii) (I)-(II).

review, and establish an estimated duty deposit rate for future entries. If duty deposits collected during the period of review (based on the previously estimated duty deposit rate) exceed the actual duty payable for that period as determined by the administrative review, the overpayment is refunded with interest. If the reverse occurs, the U.S. Customs Service will collect any money owing with interest. Procedurally, reviews are conducted in a manner similar to original investigations.

Under pre-Uruguay Round law, Commerce had an obligation to publish the final results of administrative reviews no later than 365 days after the date of their initiation, but this requirement was infrequently met, causing manufacturers and exporters considerable inconvenience and expense.[48] In accordance with Article 9.3.1 of the Anti-Dumping Agreement, Commerce must now complete its preliminary administrative review determination within 245 days after the last day of the anniversary month of the order (or suspension agreement) under review. The final determination must be released within 120 days after the date of publication of the preliminary determination. The deadlines may be extended by Commerce in certain circumstances.[49]

10.2 New Shipper Reviews

As under pre-Uruguay Round U.S. practice, anti-dumping duty orders are applied on a nationwide basis. New shippers are shippers who did not export subject merchandise, or did not export it in sufficient quantities during the period of investigation, or were not specifically investigated. Such shippers are subject to the "all others" rate. As required by Article 9.5 of the Anti-Dumping Agreement, after the original investigation Commerce would conduct an "accelerated" review of new shippers unaffiliated with producers subject to a dumping order, in order to establish individual dumping margins. Such accelerated new shipper reviews are initiated only at the end of the month following the completion of six months from the date of the order, or at the end of the month of the anniversary of the date of the order, whichever is earlier.[50]

10.3 Revocation

Commerce has the discretion to revoke an order as it applies to a specific exporter or producer if certain conditions are satisfied. To grant an applicant the requested revocation in part, Commerce must conclude that:

1) the exporter or producer has sold the merchandise at not less than normal value for a period of three consecutive years;

48 19 U.S.C. § 1675 (a) (2) (1994).

49 19 U.S.C. § 1675 (a) (3) (1994).

50 19 U.S.C. § 1675 (a) (2) (B) (1994).

2) it is not likely that the person will in the future sell the merchandise at less than normal value;[51] and

3) the person agrees in writing to the immediate reinstatement of the order if the Secretary of Commerce concludes that dumping has resumed.[52]

If all exporters and producers covered meet these conditions, the order as a whole may be revoked. These factors are not determinative, and Commerce may request and consider additional relevant evidence in making its revocation decision. In the past, in addition to the respondent's prices and margins in the preceding periods, Commerce has considered such other factors as: conditions and trends in the domestic and home market industries; currency movements; and the ability of the foreign entity to compete in the U.S. marketplace without sales at less than normal value. The petitioner, respondent and other interested parties are offered an opportunity to submit factual information and argumentation pertaining to the issue of likelihood of future dumping.

10.4 Changed Circumstances Reviews

A party subject to a final anti-dumping duty order or suspension agreement can seek its removal by establishing that there are changed circumstances in the U.S. industry sufficient to warrant the revocation of the anti-dumping order or suspension agreement. The ITC must determine whether the revocation of the order or termination of the suspended investigation is likely to lead to the continuation or recurrence of material injury. The party seeking the revocation has a burden of persuasion and must convince the ITC and Commerce that revocation is appropriate.

Section 751(b)(1) of the Tariff Act of 1930 requires a changed circumstances administrative review to be conducted upon receipt of a request containing sufficient information concerning changed circumstances. Commerce's regulations permit the ITC to conduct a changed circumstances administrative review based upon an affirmative statement of no interest from the petitioner in the proceedings. Commerce may also revoke an order, or revoke an order in part, if it determines that the order under review is no longer of interest to interested parties.

51 On January 29, 1999, a WTO dispute settlement panel determined that the "not likely" to dump standard was inconsistent with the United States' obligations under Article 11.2 of the WTO Anti-Dumping Agreement. Therefore, Commerce proposed to amend the "not likely" standard to whether "the continued application of the anti-dumping duty order is no longer necessary to offset dumping."

52 19 CFR 351.222 (b) (1998).

10.5 Five-Year "Sunset" Reviews

As required by the WTO Anti-Dumping Agreement, U.S. law stipulates that anti-dumping duty orders must be reviewed by Commerce and the ITC every five years, and revoked unless it is demonstrated that dumping and material injury would be likely to continue or recur within a reasonably foreseeable time.[53] Determinations will normally be made on an order-wide, as opposed to a company-specific, basis, although there is a firm-specific revocation process as previously discussed. Under the pre-Uruguay Round U.S. law, there was no sunset provision and anti-dumping orders sometimes stayed in place for over 20 years. Special transition sunset review provisions for current orders allow for the grouping and consolidation of reviews in order to achieve efficiency and consider similar products together. These transition orders were reviewed in a staggered fashion beginning July 1, 1998, with the last review initiated on December 1, 1999.

10.5.1 Commerce

Commerce must inform interested domestic parties of their right to participate in the review. If there is no response, the order will be revoked (or the suspended investigation terminated) within 90 days of the initiation of the review. If, in Commerce's discretion, there is an inadequate level of response from interested domestic parties, Commerce will conduct an expedited review based on the facts available. Full reviews are conducted if there is sufficient willingness to participate and adequate indication that parties will submit the requested information.

In making its determination as to whether revocation of the anti-dumping order would be likely to lead to continuation or recurrence of dumping, Commerce is required to consider the weighted-average dumping margins determined in the investigation and subsequent reviews, and the volume of imports of the subject merchandise for the period before and the period after the issuance of the anti-dumping order.[54] More specific guidance on methodological and analytical issues is contained in the Sunset Policy Bulletin of April 16, 1998. Commerce indicated that it would normally determine that revocation of an anti-dumping order is likely to lead to continuation or recurrence of dumping when: (a) dumping continued at any level above *de minimis* after the issuance of the order; (b) imports of the subject merchandise ceased after the issuance of the order; or (c) dumping was eliminated after the issuance of the order, and import volumes for the subject merchandise declined significantly. In addition, Commerce shall determine that revocation of an order is likely to lead to continuation or recurrence of dumping when a respondent interested party waives its participation in the sunset review. Commerce must complete its review within 240 days of initiation. There are provisions for extension of time in extraordinarily complicated cases.[55]

53 19 U.S.C. § 1675 (c) (1) (1994).

54 U.S.C. § 1652 (c) (1).

55 19 U.S.C. § 1675 (c) (1) (1994).

10.5.2 International Trade Commission (ITC)

In five-year reviews, the ITC first determines whether to conduct a full review (which includes a public hearing, the issuance of questionnaires, and other procedures) or an expedited review (where a determination is made based on the facts available, with no hearing or further investigative activity). Specifically, the ITC determines whether individual responses to the notice of institution are adequate and, based on these individually adequate responses, whether the collective responses submitted by two groups of interested parties—domestic interested parties (such as producers, unions, trade associations or worker groups) and respondent interested parties (such as importers, exporters, foreign producers, trade associations or subject country governments)—show a sufficient willingness to participate and provide the requested information, and, if not, whether other circumstances warrant a full review.

The legislation states that, in a five-year review, the ITC shall determine whether revocation of an order or termination of a suspended investigation would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The URAA Statement of Administrative Action indicates that under the likelihood standard, the ITC will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo—the revocation of the order "and the elimination of its restraining effects on volumes and prices of imports."[56] Thus the likelihood standard is prospective in nature.

Although the standard in five-year reviews is not the same as that applied in the original anti-dumping investigations, it contains some of the same elements. The ITC is directed to consider the likely volume, price effect and impact of imports of the subject merchandise on the industry if the order is revoked. The ITC must take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked. The ITC must complete its review within 360 days of initiation. There are provisions for extension of time in extraordinarily complicated cases.[57]

Of the 15 anti-dumping and countervailing duty orders in place on imports from Canada subject to sunset review as of January 1, 1995, five orders were continued (iron construction castings, brass sheet and strip, steel rails, magnesium and corrosion-resistant steel) while the other 10 were revoked.

56 URAA SAA, H.R. Rep. No. 316, 103d Cong., 2d Sess., vol. I at 883-84.

57 19 U.S.C. § 1675 (c) (1) (1994).

11 Other Procedural Issues

11.1 Suspension of Investigations

Commerce may suspend an investigation prior to a final determination by accepting a suspension agreement. In a suspension agreement, the exporters and producers agree to modify their behaviour so as to eliminate dumping or the injury caused thereby. A suspension agreement must include the exporters or producers who account for "substantially all of the merchandise" (interpreted by Commerce to mean at least 85%) under investigation, who agree to eliminate the dumping or cease exports to the United States within six months after suspension of the investigation.[58]

A copy of the proposed agreement must be made available to the petitioner and interested parties, who may then submit their comments. However, Commerce may proceed over the petitioner's objections if the agency deems that the agreement is in the public interest and can be effectively monitored.[59]

The ITC determines whether the injurious effect of the imports is eliminated completely by the proposed agreement. If the injurious effects are not completely eliminated, the investigation is resumed. If Commerce determines that an agreement that resulted in the suspension of an investigation is being violated, the investigation is resumed and an anti-dumping order may be issued after a full investigation is concluded. Few such agreements have been concluded, although one example is *Potassium Chloride from Canada*.[60] More recently, despite the opposition of domestic petitioners, Commerce has suspended investigations involving steel imports from Russia, determining such agreements to be in the public interest.

11.2 Critical Circumstances

At any point at least 20 days prior to Commerce's final determination, the petitioner may allege that "critical circumstances" exist that warrant the retroactive suspension of the liquidation of entries of the subject merchandise either entered or withdrawn from warehouse during the 90 days prior to the preliminary determination. To ascertain whether critical circumstances exist, Commerce determines whether:

1) there is both a history of dumping and material injury by reason of dumped imports in the United States or elsewhere, or whether the importer knew or should have known that the exporter was selling the subject merchandise at less than fair value and that there was likely to be material injury by reason of such sales; and

58 19 U.S.C. § 1673c (b) (1994).

59 19 U.S.C. § 1673c (e) (1994).

60 53 F.R.1393 (1988).

2) there have been massive imports of the subject merchandise over a relatively short period of time (judged by comparing the periods immediately before and immediately after the filing date of the petition).

In its final injury determination, the ITC may also consider whether critical circumstances exist, without making a separate material injury determination regarding the surge in imports. Further, the ITC must determine whether the surge in imports prior to the suspension or liquidation would be likely to seriously undermine the remedial effect of any order that may be issued.

11.3 Termination of Investigations

Commerce may terminate an investigation at any point upon the withdrawal of the petition on which it was based and after notification of all interested parties. If the termination is based on an agreement by the foreign government to limit the volume of imports entering the United States, Commerce must determine whether such a termination is in the public interest by taking into account:

1) whether the agreement would adversely affect U.S. consumers more than would the imposition of anti-dumping duties;

2) the relative impact on U.S. international trade interests; and

3) the relative impact on the competitiveness of the U.S. domestic industry.

The ITC may also terminate an investigation upon withdrawal of a petition.[61]

11.4 Anti-Circumvention

Circumvention issues normally arise when finished products from a country are subject to an anti-dumping order. In order to avoid paying the required duties, an exporter located in the country subject to the order may send its component parts to a third country or to the United States for final assembly. Circumvention may also arise where merchandise has been altered in form or appearance to evade duties. Anti-circumvention provisions were first enacted by the United States in 1988 as part of the Omnibus Trade and Competitiveness Act, and were amended in 1994.

Under the U.S. anti-circumvention provisions, the finished product exported from the third country or the component parts shipped to the United States for assembly may also be subject to the anti-dumping order if certain conditions are met.[62] To be included under the order: (1) the parts or components must be produced in a country subject to an anti-dumping order; (2) the process of

61 19 U.S.C. 1671c, 19 CFR 355.17.

62 19 U.S.C. §§ 1677j (a) (1) (c) and (b) (1) (c).

assembly or completion in the United States (or a third country) must be minor or insignificant; and (3) the value of the parts imported into the United States (or a third country) from the country subject to the order is a significant proportion of the total value of the finished product.[63]

In determining whether the process of assembly or completion is minor or insignificant, Commerce will consider:

- the level of investment in the United States;
- the level of R&D in the United States;
- the nature of the production process in the United States;
- the extent of the production process in the United States; and
- whether the value of processing in the United States (or the third country) represents a small proportion of the total value of the merchandise sold in the United States.

No factor is controlling and the provisions are not intended to create rigid numerical standards. In determining whether to include parts or components within the scope of the order, Commerce will consider:

- the pattern of trade, including sourcing patterns;
- whether the manufacturer or exporter of the parts or components is affiliated with the person who assembles or completes the merchandise sold in the United States (or the third country); and
- whether imports of those parts or components have increased since initiation of the investigation resulting in the relevant order.

11.5 Anti-Dumping Investigations on Behalf of a Third Country

In accordance with Article 14 of the Anti-Dumping Agreement, a WTO member may file a petition with the United States Trade Representative (USTR) alleging that imports into the United States from a third country are being dumped, causing material injury in the petitioning country. The United States may, at its discretion, enact anti-dumping measures directed against the third country if Commerce and the ITC make affirmative findings according to their normal methodologies. The USTR must obtain approval from the WTO Council for Trade in Goods before initiating such an investigation.[64] Thus far, Canada has been the only country to make such a request to the USTR. Canada later withdrew the request after an investigation, further to a domestic petition, was concluded against the same third country.

63 19 U.S.C. §§ 1677j (a) (1) (a)- (D) (1994).

64 19 U.S.C. § 1677n (b) (1994).

12 Judicial Review

12.1 U.S. Domestic Court

An interested party who is dissatisfied with a Commerce or ITC final determination may file an action with the U.S. Court of International Trade (CIT) for judicial review. To obtain judicial review of an administrative action, a summons and a complaint must be filed concurrently within 30 days of publication of the final determination. The standard of review used by the CIT is whether the determination is supported by "substantial evidence on the record" or is "otherwise not in accordance with law." Decisions of the CIT are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

12.2 NAFTA Panel Review

Under the provisions of Chapter 19 of the North American Free Trade Agreement (NAFTA), final determinations by Commerce or the ITC concerning products from NAFTA countries may be appealed to five-member binational panels as an alternative to domestic judicial review. Binational panels determine whether a final determination is in accordance with anti-dumping laws of the NAFTA country in which the decision is made. If a panel finds that the determination was in accordance with the domestic law, the determination is affirmed. Otherwise, the panel remands the case with instructions to the investigating authority for further action. NAFTA Article 1904 stipulates that a panel must be requested within 30 days of the date of appeal of the administrative action. The panel must reach a decision within 315 days of the date of the request.

Annex 1904.13 of the NAFTA provides for an "extraordinary challenge procedure" if either NAFTA party involved in the panel alleges, within a reasonable time, that the integrity of the review process is threatened and that the decision was affected by panellist misconduct, procedural violations, or action manifestly exceeding the power, authority or jurisdiction of the panel. The panel's decision is appealed to a three-member committee of judges or former judges. Within 15 days of the request, the committee must convene and make a prompt decision to affirm, vacate or remand the panel's decision.

NAFTA Article 1903 allows a NAFTA party to request that an amendment to another party's anti-dumping statute be referred to a panel for a declaratory opinion on whether the amendment is consistent with the WTO and the NAFTA. In order for changes in a NAFTA country's anti-dumping or countervailing duty statutes to apply to the other NAFTA countries, the other parties must be identified in the amending statute.

II United States Countervailing Duty Law

1 Introduction

U.S. countervailing duty law is designed to protect domestic industries from imports that unfairly benefit from subsidization provided by a foreign government entity. In essence, the U.S. countervailing duty law provides that, if it is determined that:

1) a country is providing, directly or indirectly, a subsidy to the manufacture, production or exportation of merchandise imported or sold into the United States; and
2) an industry in the United States is materially injured or threatened with material injury, or its establishment is materially retarded by reason of imports or sales of such merchandise;

then a countervailing duty equal to the amount of the net subsidy is imposed upon such merchandise. Simultaneous anti-dumping and countervailing duty investigations with respect to the same product are regularly undertaken.

1.1 Legislative History and Authority

The original countervailing duty law was contained in section 303 of the Tariff Act of 1930 (19 U.S.C. 1303). The section did not require a finding that the subsidized imports were injuring the domestic industry prior to the imposition of countervailing duties. Section 303 was amended in 1974 to require an injury determination against goods from GATT members or other countries to which the United States accorded Most Favoured Nation (MFN) status.

Title VII, Subtitle A of the Trade Agreements Act of 1979 supplemented section 303 of the Tariff Act of 1930.[65] Title VII implemented the GATT Tokyo Round Agreement on subsides (“Subsidies Code”),[66] which created more specific rules on the levying of countervailing duties. Exports from countries that were signatories to the Subsidies Code were investigated under the procedures outlined in Title VII, and were entitled to the benefits of the Code, including an injury determination.

65 Amendment contained in Title I, section 101 of the Trade Agreements Act of 1979.

66 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).

Exports of goods from non-signatory countries were investigated under the procedures outlined in section 303 and were not accorded an injury determination.

Title VII was subsequently amended by the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988 and, most recently, the Uruguay Round Agreements Act in December 1994.[67] Title II of the URAA implements the provisions of the WTO Agreement on Subsidies and Countervailing Measures (hereinafter "Subsidies Agreement"). The URAA also repealed section 303 of the Tariff Act of 1930. Thus, as of December 8, 1994, the United States maintains only one countervailing duty law: Title VII, Subtitle A of the Tariff Act. However, Title VII holds that goods from states other than Subsidies Agreement countries (defined as WTO members representing countries determined by the President to have assumed obligations with respect to the United States that are substantially equivalent to the Subsidies Agreement, or countries to which the United States has granted unconditional MFN treatment) are not entitled to an injury determination. Regulations detailing the practice and procedures used in countervailing duty investigations were subsequently issued.

2 U.S. Countervailing Duty Law: Procedural Framework

The International Trade Administration of the U.S. Department of Commerce is the "administering authority" with overall responsibility for enforcing the countervailing duty laws, and specific responsibility for determining whether the goods under investigation are being subsidized. The International Trade Commission, an independent federal agency, determines whether the U.S. domestic industry producing that class of products is either injured or threatened with injury by reason of the subject imports.[68] The two agencies perform their responsibilities simultaneously and notify each other of any determinations. A negative final determination by either party or a negative preliminary injury determination by the ITC will terminate the proceedings. All determinations must be reported in the *Federal Register*, with a statement of facts and conclusions of law. An investigation proceeds as follows:

- Within 20 days of the filing of a petition, Commerce determines whether there is sufficient evidence of injurious subsidization to warrant an investigation. Commerce has found very few petitions to be insufficient at the initiation stage. The deadline may be extended to 40 days if it is necessary for Commerce to determine whether there is sufficient industry support for the petition.

67 Pub. L. 103-465, 108 Stat. 4809, Dec. 8, 1994.

68 See 19 U.S.C. §§ 1330-13341 for the general organization and powers of the Commission.

- If the petition is accepted, the ITC conducts a preliminary investigation to determine whether there is a reasonable indication of material injury. The preliminary determination must normally be issued within 45 days of the date of filing.
- If the ITC preliminary determination is affirmative, Commerce makes a preliminary determination on the countervailable subsidy. The preliminary determination is normally released within 65 days after an investigation is initiated. Extensions may be requested by interested parties, where the investigation is extraordinarily complicated or where upstream subsidies are alleged. If the determination is affirmative, Commerce establishes estimated net subsidy rates, resulting in the application of provisional duties and the suspension of liquidation of the subject merchandise entered into the United States The ITC then commences its final injury determination.
- Commerce issues its final determination within 75 days of issuing the preliminary determination. The deadline may be extended where the investigation includes allegations of upstream subsidies or a simultaneous anti-dumping investigation is being conducted.
- The ITC final injury determination must be released before the 120th day after Commerce makes an affirmative preliminary determination or the 45th day after Commerce makes its affirmative final determination, whichever is later. If the Commerce preliminary determination is negative, the ITC's determination must be made no later than 75 days after Commerce's affirmative final determination.
- If both subsidy and injury are found, a countervailing duty order is issued by Commerce within 7 days of notification by the ITC of its decision.
- Each year on the anniversary of the issuance of an order, the parties have an opportunity to request an administrative review of the subsidy rate for the most recent annual period.

3 Initiation

Countervailing duty investigations are initiated on the basis of a petition requesting an investigation, filed by an interested U.S. party or parties. Petitions are filed simultaneously with Commerce and the ITC.[69] "Interested parties" may include:

1) a manufacturer, producer, or wholesaler in the United States of a like product;

69 While Commerce may itself initiate countervail investigations, it rarely does so. See 19 U.S.C. § 1573a (a) (1).

2) a certified or recognized union or group of workers that is representative of an industry engaged in the manufacture, production or wholesale in the United States of a like product; or

3) a trade or business association whose members manufacture, produce or wholesale a like product in the United States.[70]

Commerce is required to initiate an investigation when a petition has been filed "by or on behalf of the domestic industry" and contains the elements necessary for the imposition of a countervailing duty, including all information reasonably available to the petitioner.[71] Prior to the URAA, U.S. practice was to assume that the petition was filed on behalf of a domestic industry unless a majority of domestic companies affirmatively opposed the petition.[72] Commerce would determine the extent of such opposition only after it was expressed.

In accordance with the standing requirements of the Subsidies Agreement and the URAA, the application is now considered to have been made "by or on behalf of the domestic industry" only if it is supported by those domestic producers or workers who account for:

1) at least 25% of the total production of the domestic like product; and

2) more than 50% of the total production of the domestic like product produced by that portion of the domestic industry expressing either support or opposition to the application.

Where a petition fails to show the support of domestic producers or workers accounting for more than 50% of the total production of the domestic like product, Commerce generally conducts a poll of the industry to determine whether the petitioner has standing. Under U.S. law, labour has a voice equal to management; if a company's management expresses direct opposition to the views of its workers, the firm's production will be treated as neither supporting nor opposing the petition.[73]

The position of U.S. producers that are importers of the goods in question will be disregarded in the determination of support. Similarly, the position of U.S. producers that are related to a foreign producer shall be disregarded, unless they can demonstrate that their interests as domestic producers would be adversely affected by a countervailing duty order.[74] Both Commerce and the ITC are required by regulation to provide technical assistance to small businesses in the

70 19 U.S.C. 1677 (9).

71 19 U.S.C. §1673a (b) (1).

72 See 3.5" Microdisks from Japan, U.S. 54 Fed. Reg., 6435, (February 10, 1989).

73 19 U.S.C. § 1673a (c) (4) (A) (1994).

74 19 U.S.C § 1673 (c) (4) (C), (B) (ii), (B) (i).

preparation of petitions, if so requested.[75] The Trade Remedy Assistance Office of the ITC has been established to provide the public with general information on specific U.S. trade laws, and provides technical assistance to eligible small businesses seeking relief under the trade laws.

Prior to the publication of a notice of the initiation of an investigation, Commerce notifies and consults with the representative in Washington, D.C., of the foreign country concerned, as required by the Subsidies Agreement.[76]

4 Evidence

4.1 Questionnaires

The information needed to determine whether subsidization exists, and to what degree, is obtained by sending the manufacturers, exporters and foreign government(s) concerned requests for information or questionnaires. As business structures have become more complicated, these questionnaires have over time become more detailed and complex. Questionnaires must normally be answered within 30 days, although short extensions may be granted in certain circumstances. Commerce usually examines sales representing between 60% and 85% of the volume of exports to the United States from the subject country. As a result, small producers or exporters may not receive questionnaires, although Commerce has the discretion to accept voluntarily submitted questionnaires from such parties.

If the response to an information request is deemed inadequate, the respondent must be promptly informed of the nature of the deficiency, and be provided an opportunity to remedy or explain it. Commerce may not disregard information submitted within the set time limits if the respondent "acted to the best of its ability" to provide the requested information.[77]

The ITC, like Commerce, uses questionnaires as the principal means of obtaining information. Questionnaires are sent to domestic producers, importers, purchasers and exporters. The questionnaires generally cover a three-year period and request information concerning a wide variety of economic indicators, including production, capacity utilization, shipments, exports, sales, employment, capital expenditures and prices.

In a provision added by the URAA in 1994, Commerce and the ITC are required to provide consumer organizations and industrial organizations with an opportunity to submit relevant information for consideration. Both Commerce and the ITC are also required to take account of difficulties experienced by parties, particularly small firms and firms in developing countries, in providing requested

75 19 CFR § 353.12.

76 19 U.S.C. 1671a (b) (4) (A); 18 CFR 355.12 (j).

77 19 U.S.C. § 1677m (e) (4) (1994).

information. The two agencies will provide such assistance as they consider practicable to avoid imposing an unreasonable burden on the respondent.

4.2 Facts Available (Best Information Available)

If a respondent is unable or unwilling to provide the information requested by Commerce or the ITC within the set time limits and in the form requested, the agencies may rely on the "facts available" (formerly known as "best information available"), including allegations contained in the petition and previous reviews.[78] When a respondent refuses to cooperate, Commerce will generally make an adverse inference and impose the most adverse rate possible. Commerce and the ITC may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems and computer capabilities, as well as the prior success of the same firm, or other similar firms, in responding to requests for information. In accordance with the Subsidies Agreement, where "facts available" are relied upon, they must be corroborated where practicable using independent sources.[79]

4.3 Verification

Commerce is required to verify all the information it relies upon in making a final determination in an original investigation, administrative review or sunset proceeding. In an annual review, verification will occur if requested by a domestic interested party and if there has been no verification during the two immediately preceding reviews. Otherwise, verification is discretionary. Commerce must obtain agreement from the foreign persons being verified and must notify the foreign government concerned regarding the verification. If the party being examined or the foreign government objects to the verification, Commerce will not conduct the verification and instead will rely on the facts available to make its determination. Commerce produces a report following the verification process, and offers an opportunity for both the petitioners and respondents to make submissions and offer comments.[80]

4.4 Treatment of Information

Information submitted to either Commerce or the ITC is treated as public unless designated as "proprietary" information. Parties asserting proprietary status for their submissions must justify to Commerce or the ITC why each piece of information should not be disclosed. Non-confidential summaries of proprietary information must be filed concurrently with the submissions.[81]

78 19 U.S.C. § 1677e (1994).

79 19 U.S.C. § 1677c (c) (1994).

80 19 U.S.C. § 1677e (b) (1994).

81 19 U.S.C. § 1677f (b)- (d) (1994).

If accepted as proprietary information, the material so designated may be released to certain specified individuals under an administrative protective order (APO). Attorneys or other representatives of interested parties may gain access to proprietary submissions of respondents if they have established a sufficient need for the information and can adequately protect its proprietary status. Violation of APOs may result in sanctions or even disbarment from practice before the agency in question.[82]

Notices of initiation and suspension decisions, preliminary and final determinations, and reviews (including the facts and conclusions supporting the determinations) must be published in the *Federal Register*.

4.5 Like Product and Scope Determinations

Issues sometimes arise as to whether a particular product is included within the scope of a countervailing investigation. In such cases, Commerce may issue "scope rulings" that clarify the scope of an order with respect to particular goods.

The rulings are intended to ensure that the imported goods are being compared to similar U.S.-produced goods or "like products." A "like product" is defined by the Tariff Act of 1930 as "a product that is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." Commerce generally examines the following criteria in like product determination: general physical characteristics; the expectations of the ultimate purchasers; the channels of trade in which the product is sold; the manner in which the product is sold and displayed; and the ultimate use of the merchandise. No single factor is determinative and other relevant factors may be examined.[83]

While the ITC and Commerce commonly employ the same like product determination, the ITC is not bound by Commerce's determination. The ITC may define the domestic like product more broadly than the class or kind of imported merchandise defined by Commerce, or the ITC may find two or more domestic like products corresponding to the class or kind of imported merchandise. In defining the domestic like product for purposes of injury, the ITC typically considers the following factors: (1) physical appearance; (2) end users; (3) customer perceptions; (4) common manufacturing facilities; (5) production processes and employees; (6) channels of trade; (7) interchangeability of the product; and (8) where appropriate, price. No single factor is determinative and other relevant factors may be examined.[84]

82 19 C.F.R. 355.34.

83 19 U.S.C. § 1677 (10).

84 19 U.S.C. § 1677 (4) (A).

5 Determination of Subsidy

Within 85 days of the date of filing of the petition, Commerce must determine whether there is a reasonable basis to believe or suspect that a subsidy is being provided. A preliminary determination is based on the information available to Commerce at the time. At the petitioner's request, in a case involving upstream subsidies or determined by Commerce to be extraordinarily complicated, the time period may be extended. An expedited preliminary determination may be made based on information received during the first 50 days if such information is sufficient and if the parties provide a written waiver of verification as well as an agreement to have an expedited preliminary determination.

The effect of an affirmative preliminary determination is twofold:

1) Commerce must order the suspension of liquidation of all entries of subject merchandise either entered or withdrawn from warehouse, for consumption on or after:

   a) the date of publication of the preliminary determination; or

   b) a date 60 days after the publication of the notice of initiation;

   whichever is later.

Commerce must also order the posting of a cash deposit, bond or other appropriate security for each subsequent entry of the merchandise equal to the estimated amount of the net subsidy. These measures may normally be in place for a maximum of 120 days.

2) The ITC must begin its final injury investigation, and Commerce must make all relevant information available to the ITC. If the preliminary determination is negative, no suspension of liquidation occurs and the investigation continues.

All parties may comment on Commerce's preliminary determination and on the submitted information. If requested, Commerce will hold an informal hearing where the issues can be discussed. Case briefs and rebuttal briefs may be filed before and after the hearing. All comments received, whether from petitioners or respondents, are addressed in the final determination.

5.1 Final Determination

As noted, Commerce must normally issue its final determination on whether a countervailable subsidy is being provided within 75 days of the preliminary determination. The final determination must include the factual and legal conclusions on which it is based, and the estimated individual countervailing duty rate for each party investigated.[85] Given that Commerce performs an on-site verification

85 19 U.S.C. § 1971b (d).

of the questionnaire responses provided by the exporters or producers, it is not unusual for the margins found in the final determination to differ from those found in the preliminary determination. If the final determination is negative, the proceedings are terminated. Suspension of liquidation, if in effect, ceases; all estimated countervailing duties are refunded, and all appropriate bonds or other security are released. If the determination is affirmative, the ITC proceeds to make its final injury determination.

Upon the release of an affirmative final determination by Commerce and an affirmative final injury determination by the ITC, the U.S. Customs Service is instructed to assess definitive countervailing duties and collect cash deposits of estimated countervailing duties on future entries, consistent with rates published in the final determination. The actual duty assessed may vary for future shipments as determined by the results of annual administrative reviews (see below).[86]

6 U.S. Definitions of Subsidies

Articles 3 through 9 of the Subsidies Agreement set out for the first time international rules delineating which subsidies are countervailable and which are permissible.[87] Prohibited subsidies are known as "red light" subsidies; potentially actionable subsidies are known as "amber light" subsidies; and permissible, non-actionable subsidies are known as "green light" subsidies. The 1994 Uruguay Round Agreements Act amended the U.S. definition of subsidy to conform with the Subsidies Agreement.[88]

A subsidy exists where an "authority" (i.e. a government or a public entity within the territory of a country):

1) provides a financial contribution;
2) provides any form of income or price support that operates directly or indirectly to increase exports from, or reduce imports into, the territory of a WTO member; or
3) makes a financial contribution through the use of a funding mechanism or private entity, whereby the provision of contributions would normally be controlled by the government and the practice does not differ in substance from normal government practices;

and a benefit is conferred through one of these above acts.[89]

86 19 U.S.C. § 1671d (c).

87 Articles 1, 2, 8, 14, Subsidies Agreement.

88 19 U.S.C. § 1667 (5).

89 19 U.S.C. § 1677 (5).

A "financial contribution" is defined as:

1) the direct transfer of funds such as grants, loans, and equity infusions, and the potential direct transfer of funds or liabilities such as loan guarantees;
2) forgoing or not collecting amounts due, such as granting tax credits or deductions;
3) government provision of goods and services other than general infrastructure; or
4) government purchase of goods.

A financial contribution can exist where, rather than acting directly, a government makes payments through a funding agency or entrusts a private body to carry out functions normally vested in the government. The definition of subsidies includes actions by governments at the sub-national level, such as state or provincial governments.[90]

To be considered countervailable, a subsidy must not only involve a financial contribution or some form of direct or indirect support, but it must confer a benefit to the recipient. A benefit is conferred:

1) in the case of an equity infusion, if the investment is inconsistent with the usual practice of private investors in the country in which the investment is made;
2) in the case of a government loan, if the cost of the loan to the recipient differs from the amount the recipient would pay to obtain a comparable commercial loan;
3) in the case of a loan guarantee, if the cost of the guaranteed loan to the recipient differs from the amount the recipient would pay for a comparable commercial loan without the loan guarantee; and
4) in a case where goods or services are provided by government for less than adequate remuneration, or where goods are purchased for more than adequate remuneration, with adequate remuneration being measured by prevailing market conditions in the country subject to investigation or review.[91]

In addition to conferring a benefit, in order to be countervailable a domestic subsidy must have been provided to specific companies or industries. Countervailing duties are generally imposed where a benefit accrues to a *specific* industry, but not where it is generally available and evenly distributed throughout all industries in the economy. This approach is based on what is known as the principle of "general availability."

90 19 U.S.C. § 16779 (5) (C).

91 19 U.S.C. § 1671 (5) (E).

6.1 Prohibited ("Red Light") Subsidies

A prohibited subsidy is:

1) an export subsidy—in other words, one contingent on export performance as at least one of its conditions; or
2) an import substitution subsidy—in other words, one contingent on the use of domestic rather than imported goods as at least one of its conditions

For purposes of countervailing duty law, export subsidies are considered specific and therefore countervailable.

6.2 Actionable ("Yellow Light") Subsidies

The category of domestic subsidies may also be considered specific in certain circumstances, and thus actionable and countervailable. A domestic subsidy may be specific in law (*de jure*) or specific in fact (*de facto*). *De jure* specificity exists if the authority providing the subsidy expressly limits access to an enterprise or industry. If the government or public entity sets objective criteria or conditions for eligibility for receipt of the subsidy, the subsidy is not specific provided the eligibility is automatic, and the criteria or conditions for eligibility are neutral, set forth in an official document capable of verification, and strictly followed. *De facto* specificity exists where one or more of the following factors is present:[92]

1) the actual recipients are limited in number when measured by either enterprise or industry;
2) one enterprise or industry is a predominant user of the subsidy;
3) an enterprise or industry receives a disproportionate share of the subsidy; or
4) in granting the subsidy, the authority concerned has exercised discretion indicating that it has favoured one enterprise over another.

The weight given to any of these factors will vary from case to case, and Commerce is no longer required to seek and consider information relevant to all four factors. In particular, Commerce is required to consider the four factors in light of: (1) the extent of diversification of economic activities within the economy in question; and (2) the length of time during which the subsidy program in question has been in operation.[93] The issue of specificity with regard to domestic subsidies is controversial and has been heavily litigated both in the United States and multilateral forums. For further discussion of this issue, see "Postscript," below.

92 19 U.S.C. 1677 (5A) (D) (iii).

93 19 U.S.C. 1677 (5A) (D) (iv).

Subsidies that are provided by a state or province and are not limited to a specific enterprise or industry within the state or province are not considered specific and countervailable. Subsidies provided by the central government and limited to an enterprise or industry within a designated geographic region are considered per se specific and actionable. Similarly, state or provincial subsidies that are limited to particular regions within the state or province are specific.

6.3 Non-Actionable ("Green Light") Subsidies

In addition to subsidies that are generally available, under Article 8 of the Subsidies Agreement and the corresponding U.S. law, certain subsidies, known as "green light" subsidies, are considered non-countervailable or non-actionable. The following categories of subsidies are generally permitted:

1) ***Research subsidies*** to the extent that they are limited to specified costs not exceeding 75% of the cost of industrial research, or 50% of the cost of pre-competitive development activity, or 62.5% of the cost of combined industrial and pre-competitive activity. Examples are the cost of staff employed exclusively in the research activity, the cost of equipment, land or buildings used exclusively and permanently for the research activity, or additional overhead costs incurred directly as a result of the research activity.

2) ***Subsidies to disadvantaged regions*** to the extent that they are not specific within the eligible region (as defined above with respect to actionable subsidies). The subsidies must be granted within a regional development policy in which disadvantaged regions with definable identities are selected on the basis of neutral and objective criteria that include a measure of economic development and set ceilings on the amounts that can be granted to a subsidized project.

3) ***Subsidies to adapt existing facilities to new environmental requirements*** to the extent that the requirement is imposed by law and places a burden on the recipient. The subsidy must be a one-time non-recurring payment limited to 20% of the cost of adaptation; it may not cover the cost of replacing and operating the subsidized investment; it must be directly linked and proportionate to the recipient's planned reduction of pollution, and it must be available to all persons.

A green light subsidy is exempt from investigation under countervailing duty law so long as the WTO member provides advance notification of the subsidy program to the Committee on Subsidies prior to its implementation. The notification has to be updated yearly and must be sufficiently precise so that other WTO members can evaluate the program based on the appropriate criteria. If notification has not been given of the program in question, a country could establish in the context of

a dispute settlement proceeding that a particular subsidy satisfies all of the criteria for non-countervailable treatment.[94] Disputes concerning the non-actionable status of a program may be referred to binding arbitration under the terms of the Subsidies Agreement.

Even if a subsidy program meets the non-actionable criteria, it may be actionable under Article 9 of the Subsidies Agreement if it has "serious adverse effects" on the domestic industry of another member, causing "damage which would be difficult to repair." This standard is higher than the normal "serious prejudice or injury" standard. Within 120 days following unsuccessful consultations between the countries concerned, the Subsidies Committee must determine whether the subsidy has caused serious adverse effects. If the Committee makes an affirmative determination and also finds that the subsidizing government should modify its subsidy program, the subsidizing country must act to eliminate the serious adverse effects within six months.

The green light provisions were to expire 66 months after the WTO Agreement entered into force unless there was an agreement to extend their application (December 31, 1999). There was no such agreement and the U.S. provisions expired on July 1, 2000.

There is an additional category of non-actionable subsidies: Domestic support measures for products listed in Annex 1 to the Uruguay Round Agreement on Agriculture that conform fully to the requirements of Annex 2 of that Agreement are non-countervailable until the end of 2003, unless the USTR sets a different termination date for a particular WTO member in accordance with the terms of the Agriculture Agreement.

6.4 Upstream Subsidies

U.S. law includes provisions allowing countervailing duties to be imposed against upstream subsidies. Upstream subsidies are domestic subsidies:

1) bestowed by a foreign government with respect to "input products" used in the manufacture or production of the goods under investigation;
2) that significantly lower the cost of production and thus bestow a competitive benefit on the goods; and
3) that have a significant effect on the cost of manufacturing or producing the merchandise.

Each of these three elements must be satisfied in order for Commerce to find that an upstream subsidy exists. The law states that a competitive benefit has been bestowed when the price for the input used in manufacture or production of the

94 As required under Article 8.3 the Subsidies Agreement.

merchandise subject to investigation is lower than the price the manufacturer or producer would otherwise pay for the input from another seller in an arm's-length transaction. Upon determining that an upstream subsidy exists, Commerce imposes a countervailing duty equal to the amount of any competitive benefit or the amount of the upstream subsidy being bestowed, whichever is less. Where an upstream subsidy is alleged, the preliminary determination may be extended to permit Commerce to investigate the matter. In 1988, a separate, special rule was added to the law with respect to calculating subsidies on certain processed agricultural products.[95]

6.5 Subsidies to Prior Owners

Provisions were added by the 1994 Uruguay Round Agreements Act to clarify the effect of a change in ownership of all or part of a foreign enterprise or its productive assets on a countervailable subsidy. A subsidy is not automatically extinguished by reason of a transfer of ownership, even if the transaction occurs on an arm's-length basis. Where the sale is from the government to the private sector, Commerce has the discretion to determine on a case-by-case basis the extent to which privatization eliminates or continues previously conferred subsidies.[96]

7 Calculation of Countervailing Duty Rates

Calculating the amount and value of a subsidy presents complex accounting issues that cannot be fully discussed in this summary. Once Commerce establishes that a subsidy is countervailable, intricate formulas are employed to determine how the subsidy should be allocated over the production of the like product. In general terms, the per-unit subsidy is determined by dividing the subsidy by the number of units produced (in the case of domestic subsidies) or exported (in the case of export subsidies). For example, in *Softwood Lumber III*, Commerce followed the same general formula in each province. The numerator in each province consisted of the calculated benefit per cubic metre (i.e. the difference between administered rates and the benchmark), multiplied by the softwood sawlog harvest. The denominator consisted of the value of softwood lumber shipments plus the value of lumber co-products, e.g., chips and sawdust. Conversely, the benefits or effects of a subsidy may extend beyond the amount of subsidization. In this regard, in international discussions the United States has argued the desirability of offsetting the full amount of the effects or benefits of subsidies. This is particularly true in the context of research and development subsidies. Indeed, regardless of whether the program under investigation is an R&D measure, in its own countervailing decisions the United States has adopted a practice of imposing a duty designed to fully offset the net subsidy.

95 19 U.S.C. § 1677-1.

96 19 U.S.C. § 1677 (5) (F).

7.1 Export Subsidies

Loans provided under the federal Program for Export Market Development (PEMD), which provides interest-free loans for the purpose of developing new markets, were found to be countervailable in a number of investigations. In such cases, Commerce determined the amount of the assistance provided and divided it by the value of the subject commodity shipped to the United States It should be noted that the amount of assistance provided is, in the PEMD cases, determined by comparing the PEMD loan rates against a benchmark rate designed to approximate the commercial rate applicable during the period under review (normally the Bank of Canada corporate discount rate), and calculating the extent of the preferential treatment accorded.

7.2 Grants

Since grants represent subsidies by definition under U.S. trade law, the only criterion used in deciding whether they should be countervailed is that of targeting. Targeting may be a matter of intent, as when the legislation concerned specifically singles out certain industries as the only one(s) qualifying for benefits. This de jure specificity has been commonly cited as the cause of countervailability. There are numerous examples in the context of U.S. countervailing cases. For instance, minor and very limited programs have been countervailed because of their specific intent—as happened with the Ontario Greenhouse Energy Efficiency Program (GEEP) in the *Certain Fresh Cut Flowers from Canada* case. GEEP disbursed grants to greenhouses to alleviate the costs of converting to more efficient energy methods. It affected exports valued at only $40,000.

At the same time, larger and more important grant programs have been determined to be countervailable because of their targeted nature. Among these is the Fishing Vessel Assistance Program, which provides funding of up to 60% of the cost of a vessel, to a maximum of $750,000. In this case the grant contributions were divided over the useful life of a vessel (e.g., 12 years for barges and tugs) and then spread out over the value of Atlantic Canadian groundfish production. The preferentiality of the grant was derived by comparing it to the long-term Bank of Canada rate in allocating the benefits over time as an approximation to the normal costs of a commercial capital infusion versus an outright government grant (this is the so-called "declining balance" methodology).

Grants can also be found countervailable because of the practical, *de facto* administration of the program. The exercise of discretion in granting subsidies increases vulnerability to countervail. Perhaps the most striking examples of Canadian programs designed to meet the standard of general availability but found countervailable are the extensive development agreements between the federal and provincial governments. For the most part, these agreements are intended to promote regional development. Such federal–provincial joint programs as General Development Agreements, Agricultural and Regional Development Agreements,

and Economic and Regional Development Agreements have all been found countervailable not because they favour specific enterprises or industries, but rather because their benefits are geographically targeted.

7.3 Capital Grants

The question of the recurrence of a grant is also important in calculating the net subsidy to be countervailed. If a grant is found to be non-recurring, it is treated as a capital infusion, the effects of which can be spread over time. Using the "declining balance" methodology, a non-recurring grant outside the review period of an investigation can still have an impact on the countervailing duty calculations. Conversely, a recurring grant can be treated much the same as a program expenditure. In such circumstances the entire grant will be expensed to the specific period (i.e. fiscal year) of the grant. In this case a recurring grant falling outside the review period of the investigation would have no impact on the countervailing rate calculations.

7.4 Equity Infusions

In the fall of 1982, Commerce conducted a number of countervailing investigations against steel products from the European Community. These cases provided significant insight into Commerce methodology. This is especially true with respect to government equity. According to these cases, Commerce considers that government equity ownership per se does not necessarily confer a subsidy. A subsidy is conferred only when government equity ownership is on terms inconsistent with commercial considerations.

An example of countervailed equity infusions, and indeed of Commerce policy in this regard, is the *Steel Rails from Canada* case. The equity infusions to Sydney Steel Co. (Sysco) were found countervailable on the grounds that Commerce determined Sysco to be not only "uncreditworthy" under commercial conditions, but also "unequityworthy." Commerce considers a company "uncreditworthy" if "it does not have sufficient reserves or resources to meet its costs and fixed financial obligations, absent government intervention." To determine "uncreditworthiness," Commerce examines the company's past operations "as reflected in various financial indicators" calculated from its financial statements. Commerce defines a company as "unequityworthy" if it "is unable to generate a reasonable rate of return within a reasonable time frame." Once again, this determination is based on an examination of the company's financial statement "as reflected in various financial indicators," which reveal that it could not meet its financial obligations.

The particular equity infusions under question here were in the form of the provincial government's conversion of Sysco's debt to equity. Normally, Commerce calculates the benefit conferred by government equity infusions inconsistent with commercial considerations by determining the difference between the average national rate of return on equity and the average rate of

return on equity of the company in question. From there, Commerce would divide this net benefit over the sales value of the commodity to determine a benefit-to-recipient result. However, in this case, Commerce concluded that the calculation of any rate of return for Sysco would be meaningless as the corporation had fully consumed the infusion. Therefore, Commerce treated the equity infusion as a grant.

7.5 Forgiveness of Debt

Where Commerce finds that a government has forgiven an outstanding debt obligation, it treats such forgiveness as a grant to the company equal to the outstanding principal at the time of forgiveness. Where outstanding debt has been converted to equity (that is, where the government receives shares in the company in return for eliminating the company's obligations), subsidy may also result. The existence and extent of such subsidies are determined by treating the conversions as an equity infusion in the account of the remaining principal of the company debt. In the first softwood lumber case, several interest-free loans—such as those provided in a number of subsidiary agreements between New Brunswick and the federal government—were forgivable. Since it appeared that all these loans had in fact been forgiven, the benefits were treated as grants. The methodology used in determining the subsidy inherent in such grants was the previously described "declining balance" approach.

7.6 Loans

As previously noted, the extension of loans by governments is essentially a proprietary function, which might be carried out equally effectively by private entrepreneurs. The most common governmental loan practice giving rise to countervailable subsidies is the offering of preferential rates of interest. Preferential rates may apply when the government itself is the lender, when it directs a private lender to offer such rates, or when it assists in the payment of a commercial rate so that the borrower in effect receives a preferential rate. In such cases, Commerce determines the amount of subsidy by comparing the expenses in principal and interest that the company concerned would incur if it was dealing with a commercial loan, versus what it actually paid as a result of government intervention. There are many instances in which Commerce found such Canadian transactions countervailable. In the 1985 *Live Swine and Fresh, Chilled and Frozen Pork* case, four different provincial programs were found countervailable because they provided favourable loan conditions. In the *Atlantic Groundfish* case, seven programs were identified as countervailable because they provided preferential loan terms. In all these cases, and indeed in many others, Commerce applied the same methodology. In most cases, the competitive benchmark rate used was the "national average" or the Bank of Canada corporate discount rate.

Criticism has been expressed of the manner in which Commerce allocates loan benefits over time. In *Michelin Tire v. the United States* (1981), the U.S. Court of

International Trade found fault in the "exaggerated" nature of the determined benefit of the deferral of the principal. The Court saw this decision as "beyond reason" and rejected Commerce's failure to limit the benefit to a single principal amount. The Court stated, "If benefits exist in years after the year of deferral, they cannot be more than the interest ramifications of an original benefit in the year of deferral. To revive the deferred amount year after year defies reality." In *Bethlehem Steel v. the United States* (1983) the manner by which Commerce determined the present-value calculation of benefits allocated over time was also criticized. These judicial decisions continue to refine the attempts by Commerce to implement administratively its interpretations of U.S. law in the absence of clear legislative guidelines.

Loans can also be found countervailable, even though their terms are compatible with commercial arrangements, if the company in question is considered "uncreditworthy." If the firm has a history of deep or significant continuing losses and of diminishing access to lenders, there are grounds for suggesting that it could not have obtained any commercial loan without government intervention. In cases such as these, comparisons with commercial rates are deemed inappropriate. Such comparisons alone will not capture the full extent of the benefit conferred. Commerce here considers such actions to be equivalent to equity infusions.

7.7 Loan Guarantees

With loan guarantees, the criteria used are similar to those applied to loans. At issue is a government guarantee of repayment to a private lender. Such a guarantee constitutes a subsidy to the extent that it assures more favourable loan terms than would be available under an unguaranteed arrangement. The amount of the subsidy is calculated in the same manner as it would be for a preferential loan.

Once again, there are numerous instances in which loan guarantees were countervailed. In the *Live Swine and Fresh, Chilled and Frozen Pork*, and *Atlantic Groundfish* cases, loan guarantees were found to confer subsidies on four separate occasions.

7.8 R&D Grants and Loans

In the view of Commerce, no subsidy is conferred by grants and preferential loans awarded by governments to research that has a broad application and that yields results made publicly available. Moreover, no countervail is applicable on programs that provide funds to a specific industry to complete research that benefits a whole range of industries. The opposite is true for programs established to finance research affecting only a particular industry or group of industries, and yielding results available only to particular producers in a particular country or group of countries; such programs are considered to confer a subsidy on the products that benefit from the research.

In *Aarexco Agricultural Export Co. v. the United States* (1985), the U.S. Court of International Trade found that the relevant measure of whether government-sponsored research and development is in fact a subsidy turns on whether the benefit of such research is targeted to a specific industry. An example of this approach, as practised by Commerce, is the treatment accorded the Canadian Record of Performance (ROP) Program. This program, which was jointly administered by the federal and provincial governments, was designed to help swine producers improve breeding stock and to encourage the production of uniform and high-quality pork at lower costs. In the 1985 *Live Swine and Fresh, Chilled and Frozen Pork* case, the ROP was determined to improve the profit margins of a specific industry—Canadian hog farmers—largely at the expense of the federal and provincial governments. Accordingly, it was found countervailable. In the first administrative review of this decision, however, Commerce reached a different conclusion. Since Agriculture Canada publishes ROP's results and the methodology used in obtaining these results, Commerce found that the benefits of the program are available publicly, not just to the Canadian hog industry, and hence they do not confer unique or special benefit to that industry. Accordingly, Commerce reversed its earlier decision and removed the countervailing duty applied to this program.

7.9 Tax Credits and Allowances

Since taxation is a "sovereign" role of government, the rule used by Commerce to determine countervailability is that of "preferentiality." On this basis Commerce has countervailed Canada's Investment Tax Credits as a result of investigations into *Atlantic Groundfish*, *Oil Country Tubular Goods*, and the *Lumber I* and *II* cases.

As the Canadian rates of Investment Tax Credits vary depending on both the type of property they are applied to and the region they are applied in, Commerce determined them to be countervailable. Commerce calculated the conferred subsidy by its "standard tax methodology." This methodology is essentially as follows: Commerce allocates an income tax benefit to the year in which the tax return was filed by valuing the taxable property receiving a preferential tax credit (i.e. all the property receiving more than the generally available base tax credit rate, which in Canada is 7%). Commerce then assigns to that property the 7% rate and subtracts the value from the actual property tax levied to calculate the benefit. That benefit is then divided by the subject company's total sales to calculate net subsidy (benefit to recipient).

7.10 Social Welfare Programs and Worker Benefits

The provision of social welfare programs and worker benefits is again a "sovereign role" of government; for countervail to be applicable, there must be preferential benefits for workers in a specific industry or region. Commerce practice has been to determine preferentiality by looking at both program eligibility and participation.

Even when provided to workers in specific industries, such benefits are countervailable only to the extent that the benefits relieve the firm of costs it would ordinarily incur. An example would be government assumption of a firm's normal obligation to partially fund worker pensions. Such labour-related subsidies are generally conferred in the form of grants and are accordingly treated as untied grants.

In a number of cases, U.S. petitioners have attempted to persuade Commerce to find Canadian labour-based social programs countervailable. Commerce has yet to determine any such program countervailable. In the first *Softwood Lumber* case, Commerce found that the federal Local Employee Assistance and Work Sharing Programs and the British Columbia Employment Bridging Assistance Program were not countervailable as the benefits were of an inconsequent magnitude or were not provided in the review period. In the *Atlantic Groundfish* case, section 146 of the Unemployment Insurance Act was alleged to preferentially treat self-employed Atlantic fishermen. Commerce concluded that section 146 authorizes the Canada Employment and Immigration Commission to establish an unemployment insurance scheme for self-employed fishermen, but it also concluded that the benefits of the scheme do not result in preferential treatment. In the final determination Commerce stated, "While terms of the unemployment insurance for self-employed fishermen and general contract workers are very similar, they are not identical." It added, however, "Comparing the terms of the unemployment insurance provided under the Fishermen's Regulations for self-employed fishermen to those provided under the Unemployment Insurance Act and Regulations, we determine that the unemployment insurance provided to self-employed fishermen is not provided on preferential terms and therefore is not countervailable."

7.11 Provision of a Good or Service by the Government

Provision of a good or service by a government can be found to be a countervailable subsidy if the good or service is provided at a rate more favourable to one industry than another. In the first *Softwood Lumber* case, Commerce outlined this preferentiality provision for government-supplied goods or services as "the more favourable treatment to some within the relevant jurisdiction than to others within that same jurisdiction: it does not mean that it is inconsistent with commercial considerations."

Since then, however, it appears that Commerce has re-interpreted this concept of preferentiality. In cases where the provision of goods or services is limited, Commerce has used alternative benchmarks to evaluate preferentiality. The first such instance of the new interpretation was in an administrative review of a countervailing duty order of *Carbon Black from Mexico* (the Cabot case). In that case, Commerce determined that given the limited number of users of carbon black, its standard test for evaluating preferentiality was not appropriate. Commerce therefore considered alternative benchmarks and described them in a so-called "preferentiality appendix."

The usual and preferred test of preferentiality employed by Commerce examines "whether the government (or government directed suppliers) provides a good or service to the producer(s) of a product at a price that is lower than the price the government charges to the same or other users of that product within the same political jurisdiction." This test in effect assesses whether the foreign government practises price discrimination for the good within the domestic economy. However, the choice of the appropriate benchmark to measure preferentiality has been a contentious issue, especially where two-tier pricing policies are involved in the investigation or when the good in question is limited to a few actual users.

From the result of an administrative review of *Carbon Black from Mexico*, Commerce proposed four alternative tests to measure preferentiality in cases where the producers under investigation are the only users within the foreign jurisdiction. It has since introduced a fifth test. In order of preference, the tests[97] are the difference between the price charged by the government for the good and:

1) the price charged by the government to the same or other users of the good within the same political jurisdiction;

2) the price charged by the government for a similar good, adjusted for quality differences;

3) the price charged by private sellers in the same political jurisdiction;

4) the government's cost of producing the good (although cost is inappropriate for natural resources); and

5) the price paid for the identical good outside the political jurisdiction.

The ranking of these alternative tests reflects Commerce's stated belief that comparisons of prices within the foreign jurisdiction are the most appropriate measures of preferentiality. The use of external prices is considered the "least desirable and most deficient because regardless of which external price is chosen for its effect on the domestic market, this test does not measure preference within the economy." In *Lumber II*, Commerce accepted the petitioners' argument that not only was government discretion widely used in the allocation of stumpage rights (i.e. the rights to harvest timber), but also the original conclusion of *de facto* non-specificity was no longer assured. Commerce instead determined that stumpage was provided *de facto* to a specific industry and accordingly was countervailable. The amount of the subsidy, and degree of preferentiality, was calculated using the fourth benchmark from the Preferentiality Appendix (as outlined above). Commerce chose this because it determined that there was no "generally available" benchmark price for stumpage fees.

97 Proposed regulations, 54 Fed. Reg. at 23, 381-82; Preferentiality Appendix, 51 Fed. Reg. at 13, 273.

The countervailable net subsidy was therefore calculated by subtracting all government revenue (i.e. stumpage fees) received in return for provision of this good from government costs associated with forestry maintenance and management. This methodology was essentially the use of a cost-to-government approach.

7.12 Price/Income Supports

Government price and income support programs have not escaped U.S. countervailing action despite Canadian arguments that price or income support does not affect price, production or investment decisions, but rather merely guarantees a minimum price or income level. In the 1985 *Live Swine and Fresh, Chilled and Frozen Pork* case, and again in the 1989 *Fresh, Chilled and Frozen Pork* decision, an income support program was investigated and determined to confer a countervailable subsidy by Commerce.

7.13 All-Others Rate

Commerce normally calculates individual countervailing duty rates for all known foreign exporters and producers of the subject goods. Future and unknown exporters and producers from the same country are subject to an "all others rate." This rate is calculated as the weighted average of the individually determined countervailable subsidy rates, excluding zero or *de minimis* rates, or rates based entirely on facts available.[98] However, as discussed below, individual exporters and producers are entitled to an expedited review to establish an individual rate if they were not actually investigated prior to inclusion in the countervailing duty order. If there are too many exporters or producers to make calculation of individual rates practicable, Commerce may choose to set the rate by: (1) using a statistically valid sampling technique; (2) examining only exporters and producers responsible for the largest volume that can be reasonably examined; and (3) calculating a country-wide countervailing duty rate.[99]

7.14 *De Minimis* Countervailable Subsidies

In accordance with Article 11.9 of the Subsidies Agreement, the Tariff Act of 1930 has been amended to provide that a countervailing duty margin found to be less than 1% *ad valorem* in the case of merchandise from developed countries will be considered to be *de minimis* and non-countervailable. These *de minimis* standards are applied on an aggregate rather than a program-by-program basis. Commerce, however, has interpreted Article 11.9 as applying only to original investigations. For reviews, Commerce has retained the pre-Uruguay Round practice of considering a margin to be *de minimis* only if it is below 0.5% *ad valorem*.[100]

98 19 U.S.C. § 1671d (c).

99 19 U.S.C. § 167d (c) (B) (1994).

100 19 U.S.C. § 1671b (b) (4).

8 ITC Injury Analysis

As noted above, the role of the ITC in countervailing duty investigations is to determine whether the U.S. domestic industry producing like products is materially injured or threatened with material injury, or whether the establishment of an industry in the United States is materially retarded by reason of the subsidized imports. The ITC is composed of six members appointed by the President, no more than three of whom can be from the same political party. Determinations are made on the basis of a majority vote. If the members split evenly in a vote on material injury or threat of injury, the ITC will be deemed to have made an affirmative determination.

The ITC determination of injury involves a two-pronged inquiry: first, with respect to the fact of material injury; and second, with respect to whether the subsidized goods are the cause of such material injury.

8.1 Material Injury

Material injury is defined as "harm which is not inconsequential, immaterial, or unimportant." In determining whether the domestic industry is materially injured by reason of the investigated imports, the ITC is directed by statute to consider:

1) the volume of imports and, more specifically, whether the volume of subject imports (either in absolute or relative terms) is significant;

2) the effect of imports on U.S. prices of like merchandise, including evidence of price underselling or price depression attributable to the imports; and

3) the effects that imports have on the U.S. facilities of domestic producers of like products, including but not limited to:

    i) actual and potential decline in output sales, market share, profits, productivity, return on investment or utilization of capital;

    ii) factors affecting domestic prices;

    iii) actual and potential negative effects on cash flow, inventories, employment, wages, growth or ability to raise capital;

    iv) actual and potential negative effects on the existing development and production efforts of the domestic industry to develop more advanced versions of the domestic like product; and

    v) the magnitude of the margin of subsidy.[101]

The ITC is not restricted to these factors, however, and in past cases has considered other economic indices.

101 19 U.S.C. § 1677 (7) (B) (i).

8.2 Threat of Material Injury

In determining whether an industry is threatened with material injury by reason of the subject imports, the ITC considers whether "on the basis of evidence . . . the threat of material injury is real and . . . actual harm is imminent." Such a determination "may not be made on the basis of mere conjecture or supposition."[102]

The ITC considers, among other relevant economic factors:

1) information provided by Commerce as to the nature of any countervailable subsidy involved;

2) any existing or imminent increase in production capacity, which would be likely to result in increased imports to the United States;

3) any significant rate of increase in the volume or market penetration of imports of the subject goods, indicating the likelihood of substantially increased imports;

4) whether imports are likely to have a significant depressing or suppressing effect on U.S. prices, and are likely to increase demand for further imports;

5) inventories of the subject merchandise;

6) the potential for product shifting if foreign production facilities currently producing non-subject merchandise can be used to produce subject merchandise;

7) the likelihood of increased imports, by reason of product shifting, of either raw or processed agricultural products already subject to investigation;

8) the actual and potential negative effects on existing U.S. industry efforts to develop a derivative or more advanced version of the product under investigation; and

9) any other demonstrable trends indicating the probability that the subject merchandise will cause material injury.

Petitioners may also allege that the establishment of an industry in the United States is materially retarded by reason of imports (or the likelihood of imports) of the subject merchandise. Such allegations have been uncommon.

With respect to the issue of causation, it is important to note that while the importation of the subsidized goods must be an important cause of injury, it need not be the only such cause, nor need it be more significant than any other cause of injury.

102 19 U.S.C. § 1673d (b) and 1677 (7) (F) (i).

8.3 Preliminary Determination

In its preliminary determination, the ITC must determine, on the basis of information available to it at the time, whether there is a "reasonable indication" that a domestic industry is materially injured, or threatened with material injury, by reason of the allegedly subsidized imports. While a negative preliminary determination results in termination of the investigation, such a finding is relatively infrequent. The ITC is usually inclined to give the petitioners the benefits of the full process unless the complaint is unsubstantiated.[103] The petitioner bears the burden of proof with respect to the injury issue.

8.4 Final Determination

A higher standard of evidence is required in the final determination. The ITC must determine whether a U.S. industry is materially injured or threatened with material injury "by reason" of the subject imports. As part of the determination process, a public hearing is held, usually lasting one day. Parties to an ITC proceeding may file substantial pre-hearing submissions, and have an opportunity to analyse and comment upon the data and analysis compiled by the ITC investigatory staff. The hearing process is investigatory rather than adjudicatory in nature, and offers no opportunity for oral argumentation and only very limited opportunity for cross-examination. Following the hearing and deliberations by the Commissioners, the ITC issues a report containing its decision. A negative final determination results in the termination of the investigation and the release of all bonds or other security.

8.5 Industry Determination

The ITC is responsible for defining the domestic industry engaged in production of the like product. According to the Tariff Act of 1930, the domestic industry is "the domestic producers as a whole of a like product, or those producers whose collective output of the like products constitutes a major proportion of the total domestic production of that product."[104] U.S. producers of the like product who are related to the exporters or importers, or who are themselves importers of the allegedly subsidized goods, may be excluded from the consideration of the domestic industry "in appropriate circumstances." Parties are considered to be related if one party exercises direct or indirect control over the other party. The ITC's concern in a related-party situation is whether the relation of the producers to the exporters or importers of the subject goods gives them an unusual or sheltered position in the market as compared to other producers.

103 19 U.S.C. § 1673b (a). ITC procedures are contained in 19 CFR 207.

104 19 U.S.C. § 1677 (4) (A).

8.6 Captive Production

The Uruguay Round Agreements Act of 1994 introduced the concept of "captive production" into U.S. methodology for determining material injury in anti-dumping and countervailing duty investigations. The concept was based on the fact that some products subject to trade remedy investigations may be sold both as end products ("the merchant market") or for use in further manufacturing processes. For example, in the flat-rolled steel sector, hot-rolled coils may be sold and used as end products or may be further processed into cold-rolled or corrosion-resistant steel. The issue arises as to whether injury should be assessed on the basis of total production of the product in question or only that portion sold in the "merchant market." In the former case, dumped or subsidized imports would represent a lesser share of total consumption than they would if captive production was included. Accordingly, it could be more difficult for domestic industry to demonstrate injury by dumped or subsidized imports if captive production is included.

The URAA set out criteria[105] for determination of the existence and treatment of captive production. The ITC will normally examine the condition of the U.S. producers of the domestic like product as a whole when determining whether material injury resulted from unfairly traded imports. The ITC will consider the effect that subsidized or dumped imports have had on the total production of the domestic like product. However, if certain conditions are determined to exist, the ITC will focus primarily on the merchant market in determining injury.

8.7 Regional Markets

For purposes of injury determination, the domestic industry may be limited to producers of like products in isolated or regional markets within U.S. territory, even if the domestic industry producing like products as a whole is not suffering injury. A party may request that a regional analysis be performed, although the decision is left to the ITC's discretion. In order to establish that a regional market exists, it must be demonstrated that:

- the producers within the regional market sell all or almost all of their production in that market; and
- the demand in the regional market is not supplied to any substantial degree by producers located elsewhere in the national territory.

Once a regional market is found to exist, several additional criteria are examined to determine whether the U.S. industry has suffered injury. Before an affirmative determination may be issued, it must be established that:

105 19 U.S.C. § 1671 (c) (iv).

- there is a concentration of subsidized imports into the regional market; and
- the subsidized imports must be the cause of injury to the producers of all or almost all of the production within that regional market.

8.8 Cumulation

The ITC is directed to cumulatively assess the volume and effect of imports of like products from two or more countries if such imports compete with each other and the domestic like product. Only imports with respect to petitions filed on the same day and for which Commerce has made an affirmative preliminary determination may be cumulatively assessed. For injury determinations, the ITC must cumulate imports if: (1) the countervailing duty margin for each country is more than *de minimis*; (2) the volume of imports from each country is not negligible; and (3) all such imports compete with each other and with the domestic like products on the U.S. market. With respect to determinations of threat of material injury, the ITC retains the discretion to cumulate imports.[106]

The amended U.S. law is silent with respect to the ITC's practice of "cross-cumulation," in which the ITC cumulates imports subject to both anti-dumping and countervailing duty investigations. However, in practice, "cross-cumulation" is standard.

8.9 Negligible Imports

If the ITC finds that imports from a country under investigation are negligible, the investigation is terminated. Imports are considered negligible if they account for less than 3% of the volume of all subject merchandise imported into the United States in the most recent 12-month period prior to the filing of the petition. However, if the aggregate volume of subject imports from all concurrently investigated countries with negligible volumes exceeds 7% of the volume of all subject imports, these imports will not be considered negligible.

9 Reviews

9.1 Administrative Reviews

Administrative reviews of countervailing duty orders and suspension agreements are normally conducted by Commerce once during each 12-month period beginning on the anniversary of the date of the order, if requested by an interested party. The administrative reviews determine actual duty owing for the period under review, and establish an estimated duty deposit rate for future entries. If duty deposits collected during the period of review (based on the previously

106 19 U.S.C. § 1677 (7) (G) (ii) (I)- (II).

estimated duty deposit rate) exceed the actual duty payable for that period as determined by the administrative review, the overpayment is refunded with interest. If the reverse occurs, the U.S. Customs Service will collect any money owing with interest. Procedurally, reviews are conducted in a manner similar to original countervailing duty investigations. No further injury determination is required in an administrative review.

Commerce may decline to investigate an alleged subsidy where it has previously determined that the benefit is not countervailable and the party requesting re-examination of the issue has failed to supply new evidence justifying re-examination. Commerce may not impose an increase in the rate of a countervailing duty without making a specific finding on the record that the subsidy is countervailable.

In accordance with Article 24.4 of the Subsidies Agreement, Commerce must complete its preliminary administrative review determination within 245 days after the last day of the anniversary month of the order (or suspension agreement) under review. The final determination must be released within 120 days after the date of publication of the preliminary determination. The deadlines may be extended by Commerce in certain circumstances.[107]

9.2 New Shipper Reviews

Countervailing duty orders are usually applied on a nationwide basis. As under pre-Uruguay Round practice, new shippers (who did not export subject merchandise, or did not export it in sufficient quantities during the period of investigation, or were not specifically investigated) are subject to the "all others" rate. Upon request, Commerce will now conduct an "accelerated" review (normally to be completed within 270 days of initiation) of new shippers unaffiliated with producers subject to a countervailing duty, in order to establish individual duty rates for such shippers. However, new shipper reviews may be initiated only at the end of the month following the completion of six months from the date of the original order, or at the end of the month of the anniversary of the date of the order, whichever is earlier.[108]

9.3 Revocation

Commerce has the discretion to terminate a suspended investigation or revoke an order in whole or as it applies to a specific exporter or producer, as the result of an annual review or a changed circumstances review. The order as a whole may be revoked upon a finding that the government of the affected country has abolished all programs found to be countervailable for a period of at least three years, and is not likely to resume such programs or substitute other countervailable

107 19 U.S.C. § 1675 (a) (3) (1994).

108 19 U.S.C. § 1675 (a) (2) (B) (1994).

programs for the affected merchandise. The order as a whole may also be revoked upon a finding that all the producers and exporters covered at the time of revocation have not applied for or received any net subsidy on the merchandise for a period of at least five consecutive years, and it is not likely that those persons will in the future apply for or receive any net subsidy on the subject merchandise.

The order may be revoked in part if an exporter or producer covered by the order has not applied for or received any net countervailable subsidy on the subject merchandise for at least five years, and it is not likely that the person(s) will in the future apply for or receive any net subsidy on the subject merchandise. The party or parties subject to revocation must agree in writing to the immediate reinstatement of the order if it is determined that the exporter or producer, subsequent to revocation, has received any net countervailable subsidy on the subject merchandise.[109] These factors are not determinative, and Commerce may request and consider additional relevant evidence in making its revocation decision.

9.4 Changed Circumstances Reviews

A party subject to a final countervailing duty order or suspension agreement can seek its removal by establishing that there are changed circumstances in the U.S. industry sufficient to warrant the revocation of the countervailing duty order or suspension agreement. The ITC must determine whether the revocation of the order or termination of the suspended investigation is likely to lead to the continuation or recurrence of material injury. The party seeking the revocation has a burden of persuasion, and must convince the ITC and Commerce that revocation is appropriate.[110] In countervailing duty reviews, the ITC must take into account:

1) its prior injury determination;
2) whether improvements in the state of the industry are related to the order or suspension agreement; and
3) whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement terminated.[111]

Regulations also specify the relevant economic factors and price effects associated with revocation that must be considered by the ITC. The ITC may also conduct a changed circumstances administrative review or revoke an order if it determines that the order is no longer of interest to the petitioner or interested parties.[112] In addition, should Commerce conclude that expedited action is warranted, the notices of initiation and preliminary results may be combined.

109 C.F.R. 355.25.

110 19 U.S.C. § 1675 (b).

111 19 U.S.C. § 1675a.

112 19 CFR 353.25 (d) (2).

9.5 Five-Year "Sunset" Reviews

As required by Article 21.3 of the Subsidies Agreement, U.S. law now stipulates that countervailing duty orders and suspension agreements must be reviewed by Commerce and the ITC every five years, and terminated unless it can be demonstrated that subsidization and material injury would be likely to continue or recur within a reasonably foreseeable time.[113] Determinations will normally be made on an order-wide, as opposed to a company-specific, basis, although there is a firm-specific revocation process. Under the pre-Uruguay Round U.S. regulations, there were no sunset provisions and countervailing duty orders sometimes stayed in place for over 20 years. Special transition sunset review provisions for current orders allow for the grouping and consolidation of reviews in order to achieve efficiency and consider similar products together. These transition orders were reviewed in a staggered fashion beginning July 1, 1998, with the last review initiated on December 1, 1999.

9.5.1 Commerce

Commerce must inform interested domestic parties of their right to participate in the review. If there is no response, the order will be revoked (or the suspended investigation terminated) within 90 days of the initiation of the review. If, in Commerce's discretion, there is an inadequate level of response from interested domestic parties, Commerce will conduct an expedited review based on the facts available. Full reviews are conducted if there is sufficient willingness to participate and adequate indication that parties will submit the requested information.

In determining the likelihood of continuation or recurrence of a countervailable subsidy, Commerce will consider:

1) the net countervailable subsidy determined in the investigation and subsequent reviews; and

2) whether, in the program giving rise to the net countervailable subsidy determined in the investigation and subsequent reviews, any changes have occurred that are likely to affect the subsidy.

Where a company has a long track record of not using a subsidy program, Commerce will normally determine that the mere existence of the program does not, by itself, indicate likelihood of continuation or recurrence of a countervailable subsidy. If good cause is shown, Commerce may consider programs found to provide countervailable subsidies in other investigations or reviews, but only if the possibility exists that they can be used by the exporters or producers subject to the sunset review, and if they did not exist when the order was issued or suspension agreement accepted. Commerce may also consider programs newly alleged to provide countervailable subsidies, but only to the extent that Commerce makes an

113 19 U.S.C. § 1675 (c) (1) (1994).

affirmative countervailing duty determination with respect to such programs and with respect to the exporters or producers subject to the sunset review.

Commerce will provide the ITC with the net countervailable subsidy that is likely to prevail if the order is revoked or the suspended investigation terminated. The amount of subsidy provided is normally from a recent review or the original investigation. Commerce must complete its review within 240 days of initiation. There are provisions for extension of time in extraordinarily complicated cases.[114]

9.5.2 ITC

In five-year reviews, the ITC first determines whether to conduct a full review (which includes a public hearing, the issuance of questionnaires, and other procedures) or an expedited review (where a determination is made based on the facts available, with no hearing or further investigative activity). Specifically, the ITC determines whether individual responses to the notice of institution are adequate and, based on these individually adequate responses, whether the collective responses submitted by two groups of interested parties—domestic interested parties (such as producers, unions, trade associations or worker groups) and respondent interested parties (such as importers, exporters, foreign producers, trade associations, or subject country governments)—show a sufficient willingness to participate and provide the requested information, and if not, whether other circumstances warrant a full review.

The legislation states that, in a sunset review, the ITC shall determine whether revocation of an order or termination of a suspended investigation would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The URAA Statement of Administrative Action indicates that under the likelihood standard, the ITC will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future of an important change in the status quo—the revocation of the order "and the elimination of its restraining effects on volumes and prices of imports."[115] Thus, the likelihood standard is prospective in nature.

Although the standard in five-year reviews is not the same as that applied in original investigations, it contains some of the same elements. The ITC is directed to consider whether the likely volume, price effect and impact of imports of the subject merchandise on the domestic industry would be significant if the order is revoked, considering all economic factors. The ITC must take into account its prior injury determination, whether any improvement in the state of the industry is related to the order under review, and whether the industry is vulnerable to material injury if the order is revoked. The ITC may also consider the magnitude of the net countervailable subsidy.

114 19 U.S.C. § 1675 (c) (1) (1994).

115 URAA SAA, H.R. Rep. No. 316, 103d Cong., 2d Sess., vol. I at 883-84.

The ITC may cumulatively assess the volume and effect of imports of the subject merchandise from all countries with respect to reviews initiated on the same day if such imports would be likely to compete with each other and with domestic like products in the U.S. market. If Commerce makes an affirmative final determination, the review by the ITC must be completed within 360 days of initiation. There are provisions for extension of time in extraordinarily complicated cases.[116]

Of the 15 anti-dumping and countervailing duty orders in place on imports from Canada subject to sunset review as of January 1, 1995, five orders were continued (iron construction castings, brass sheet and strip, steel rails, magnesium and corrosion-resistant steel) while the other 10 were revoked.

10 Other Procedural Issues

10.1 Suspension of Investigations

Rather than terminate an investigation, Commerce may suspend it prior to a final determination upon the conclusion of an agreement or agreements meeting certain statutory requirements. Two types of agreements (or "undertakings") are authorized:

1) The foreign government or those exporters or producers who account for "substantially all of the merchandise" (interpreted by Commerce to mean at least 85%) under investigation agree to eliminate or offset completely the net subsidy, or to cease exports of subsidized goods.

2) When the case is complex and extraordinary circumstances exist such that a suspension of agreement will be more beneficial to the domestic industry than continuation of the investigation, an agreement is reached to eliminate the injurious effect of imports. Such an agreement must include either:

    i) assurances that the suppression or undercutting of price levels of domestic products by imports will be prevented, and at least 85% of the net subsidy will be offset; or

    ii) an agreement by a foreign government to restrict the volume of imports of the subject merchandise, subject to consultation with potentially affected U.S. parties.

A suspension agreement must be requested 45 days before the expected date of the final determination. A copy of the proposed agreement must be made available to the petitioner and interested parties, who may submit their comments. However, Commerce may proceed over the petitioner's objections. Commerce

116 19 U.S.C. § 1675 (c) (1) (1994).

may proceed with an agreement only if it is deemed to be in the public interest and can be effectively monitored. If the subsidizing government eliminates the subsidy of its own accord and without negotiations, Commerce is required to suspend the investigation when suspension serves the public interest and the domestic industry affected.[117] Suspension agreements may also be entered into where the ITC has determined to investigate the domestic industry on a regional basis if the exporters who account for substantially all exports for sales in the region offer to enter an agreement.[118]

With respect to an agreement to eliminate the injurious effect of imports, an interested party may file a petition with the ITC seeking review of the suspension. Within 75 days after the petition is filed, the ITC determines whether the injurious effect of the imports is eliminated by the proposed agreement. If the injurious effects are not completely eliminated, the investigation is resumed. If Commerce's determination is negative, the agreement is set aside and the investigation is resumed.

If Commerce determines that a suspension agreement is being violated, it may without comment retroactively suspend liquidation of all entries of the subject merchandise and issue a countervailing duty order. Furthermore, if incomplete, the investigation may be resumed and a countervailing order issued.[119]

10.2 Critical Circumstances

At any point at least 20 days prior to Commerce's final determination, the petitioner may allege that "critical circumstances" exist that warrant the retroactive suspension of the liquidation of entries of the subject merchandise either entered or withdrawn from warehouse during the 90 days prior to the preliminary determination. To ascertain whether critical circumstances exist, Commerce determines:

1) whether there have been massive imports of the subject merchandise over a relatively short period of time, by comparing the periods immediately before and immediately after the filing date of the petition; and if so,

2) whether the alleged countervailable subsidy is inconsistent with the Subsidies Agreement.[120]

To be considered "massive," imports must have increased by at least 15% over the preceding period of comparable duration. A "relatively short period of time" is generally the three-month period starting from when the investigation begins. If an affirmative critical-circumstances determination is reached, the subject

117 19 U.S.C. § 1671c.

118 19 U.S.C. § 1671c (1).

119 19 U.S.C. § 1671c (i).

120 19 U.S.C. § 1671b (e), 19 CFR 355.16.

merchandise is liquidated regardless of whether or not the preliminary determination was affirmative.

The ITC may also consider whether critical circumstances exist without making a separate material injury determination regarding the surge in imports. The ITC includes such evidence in its final injury determination. The ITC must determine whether the surge in imports prior to the suspension or liquidation is likely to seriously undermine the remedial effect of any order that may be issued, taking into account: (1) the timing and value of the imports; (2) any rapid increase in inventories of the imports; and (3) any other relevant circumstances.

10.3 Termination of Investigations

Commerce may terminate an investigation at any point during the investigation upon withdrawal of the petition, or for lack of interest on the part of the domestic industry. If no interested party has requested an administrative review of the order for four consecutive years, the order will automatically be revoked provided no objection is made. If the termination is based on an agreement by a foreign government to limit the volume of imports entering the United States, Commerce must determine whether such a termination is in the public interest by taking into account:

1) whether the agreement would affect U.S. consumers more adversely than would the imposition of countervailing duties;
2) the relative impact of U.S. international trade interests; and
3) the relative impact on the competitiveness of the U.S. domestic industry.[121]

The ITC may also terminate an investigation upon withdrawal of a petition, but not before the preliminary determination by the ITC.[122]

10.4 Anti-Circumvention

Circumvention issues normally arise when finished products from a country are subject to a countervailing order. In order to avoid paying the required duties, an exporter located in the country subject to the order may send its component parts to a third country or to the United States for final assembly. Circumvention issues may also arise where subject merchandise has been slightly altered in form or appearance so as to avoid attracting countervailing duties.

Anti-circumvention provisions were first enacted by the United States in 1988 as part of the Omnibus Trade and Competitiveness Act, and were amended in 1994.

121 19 U.S.C. § 1671c, 19 CFR 355.17.

122 19 U.S.C. § 1671c, 19 CFR 355.17.

Under the U.S. anti-circumvention rules, the finished product exported from the third country or the component parts shipped to the United States for assembly may also be subject to the countervailing duty order if certain conditions are met.[123] To be included under the order: (1) the parts or components must be produced in a country subject to an anti-dumping order; (2) the process of assembly or completion in the United States (or a third country) must be minor or insignificant; and (3) the value of the parts imported into the United States (or a third country) from the country subject to the order is a significant proportion of the total value of the finished product.[124]

In determining whether the process of assembly or completion is minor or insignificant, Commerce will consider:

- the level of investment in the United States;
- the level of R&D in the United States;
- the nature of the production process in the United States;
- the extent of the production process in the United States; and
- whether the value of processing in the United States (or the third country) represents a small proportion of the total value of the merchandise sold in the United States.

No factor is controlling and the provisions are not intended to create rigid numerical standards. In determining whether to include parts or components within the scope of the order, Commerce will consider:

- the pattern of trade, including sourcing patterns;
- whether the manufacturer or exporter of the parts or components is affiliated with the person who assembles or completes the merchandise sold in the United States (or the third country); and
- whether imports of those parts or components have increased since initiation of the investigation resulting in the relevant order.

11 Judicial Review

11.1 U.S. Domestic Court

An interested party who is dissatisfied with a Commerce or ITC final determination may file an action with the U.S. Court of International Trade for judicial review. To obtain judicial review of an administrative action, a summons and

123 19 U.S.C. §§ 1677j (a)91) (c)and (b) (1) (c).

124 19 U.S.C. §§ 1677j (a) (1) (a)- (D) (1994).

complaint must be filed concurrently within 30 days of publication of the final determination. The standard of review used by the Court is whether the determination is supported by "substantial evidence on the record" or is "otherwise not in accordance with law." Decisions of the Court are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

11.2 NAFTA Panel Review

Under the provisions of Chapter 19 of the North American Free Trade Agreement, final determinations by Commerce or the ITC concerning products from NAFTA countries may be appealed to five-member binational panels as an alternative to domestic judicial review. Binational panels determine whether a final determination is in accordance with countervailing duty laws of the NAFTA country in which the decision is made. If a panel finds that the determination was in accordance with the domestic law, the determination is affirmed. Otherwise, the panel remands the case with instructions to the investigating authority for further action. NAFTA Article 1904 stipulates that a panel must be requested within 30 days of the date of appeal of the administrative action. Panel rules are designed to result in final panel decisions within 315 days of the date on which a request for a panel is made. Within the 315-day period, strict deadlines have been established relating to the selection of panel members, the filing of briefs and reply briefs, and the setting of the date for a hearing.

Annex 1904.13 of the NAFTA provides for an "extraordinary challenge procedure" if either NAFTA party involved in the panel alleges, within a reasonable time, that the integrity of the review process is threatened and that the decision was affected by panellist misconduct, procedural violations, or action manifestly exceeding the power, authority or jurisdiction of the panel. The panel's decision is appealed to a three-member committee of judges or former judges. Within 15 days of the request, the committee must convene and make a prompt decision to affirm, vacate or remand the panel's decision.

NAFTA Article 1903 allows a NAFTA party to request that an amendment to another party's anti-dumping statute be referred to a panel for a declaratory opinion on whether the amendment is consistent with the WTO and the NAFTA. In order for changes to a NAFTA country's anti-dumping or countervailing duty statutes to apply to the other NAFTA countries, the other parties must be identified in the amended statute.

Postscript: History of the Specificity Test

Over the past several decades there has been considerable controversy surrounding Commerce's interpretation of the specificity test. Prior to 1985, Commerce determined whether a subsidy was countervailable by analyzing whether the benefit was on its face de jure generally available to all businesses, rather than preferentially available to a specific industry or group. In a 1983 deci-

sion concerning Canadian softwood lumber (Softwood I), Commerce held that Canadian stumpage programs were available within Canada on similar terms regardless of the industry or enterprise of the recipient, and that any limitations on the kinds of industries using these programs resulted from the inherent characteristics of the natural resource rather than government action. Thus, in the opinion of Commerce, these programs were generally available and non-countervailable.[125]

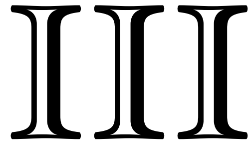
In the 1985 decision on *Cabot Corporation v. United States*,[126] the U.S. Court of International Trade held that Commerce's interpretation of the specificity test "is not an acceptable legal standard for determining the countervailability of benefits." According to the Court, the appropriate standard required Commerce to apply a *de facto* analysis of effect of the benefits provided under a particular program, rather than their nominal general availability. Accordingly, after this decision, Commerce began to examine the extent to which benefits were used by a wide range of industries or only a narrow group.

The Cabot interpretation of the specificity test was applied by the ITA in the second *Canadian Softwood Lumber* case in 1986 (*Softwood II*). In contrast to the 1983 decision, it was found that Canadian stumpage programs were being provided to a specific group of industries notwithstanding the fact that they were nominally generally available and were actually used by more than one industry.[127] In the 1991 softwood lumber investigation (*Softwood III*), Commerce again concluded that a program was specific if there are limitations created by the characteristics of the product such that it can only be used by an enterprise or industry, or a group of enterprises or industries. Since the *Softwood II* case, the use of *de jure* availability of a subsidy to determine the non-existence of a benefit to a specific industry has been prohibited by the U.S. Congress, and the tenets of the Cabot interpretation of specificity have been codified in U.S. law—first by the Omnibus Trade and Competitiveness Act of 1988 and more recently by the 1994 Uruguay Round Agreements Act. As discussed above, Commerce is now required to determine whether a domestic subsidy is *de facto* specific even though under the relevant law or regulation it is nominally available to industries in general.

125 Final Negative Countervailing Duty Determination: Certain Softwood Products from Canada, 48 *Federal Register*, 31 May 1983, 24159, 24167.

126 F. Supp. 722 (CIT 1985).

127 Preliminary Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada, 51 *Federal Register*, 22 October 1986, 37453.



United States Safeguard Law

1 Introduction

U.S. trade legislation contains "escape clause" or "safeguard" provisions, which permit the President to temporarily suspend, withdraw or modify trade concessions (usually by means of import quotas or additional duties), and/or offer adjustment assistance to domestic industries, firms and workers injured by import competition. The intent of these provisions is not to provide permanent protection from foreign imports, but to offer affected industries, firms and workers an opportunity to adjust to import competition. Safeguard actions are available whether the imports are priced "fairly" or "unfairly," although they are generally used in response to increases in fairly traded imports. Remedies used to respond to unfair trade, i.e. dumped or subsidized imports, are invariably exhausted before safeguard action is requested. Despite the fact that safeguard-type actions may be found in several statutes,[128] the primary measure is found in Chapter 1 of Title II (sections 201–203) of the Trade Act of 1974 and is generally known as section 201.

The President determines whether or not to grant import relief after an investigation by the U.S. International Trade Commission and upon receiving a recommendation from it. In its investigation, the ITC determines whether an article is being imported in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article. The Secretaries of Labour and Commerce determine whether to provide adjustment assistance to affected workers and firms/industries respectively.

Import relief granted under Title II largely receded during the mid-1980s to mid-1990s as a declining number of petitions were filed by U.S. industries seeking such relief. However, as exemplified by the 1998 increase in U.S. imports of steel in particular, there was a re-emergence of consideration by U.S. industries of safeguard actions in the late 1990s.

128 There are safeguards in the Uruguay Round Agreement on Textiles and Clothing to be used during the phase-out of the Multi-Fibre Arrangement. There are also special agricultural safeguards discussed below.

1.1 Multilateral Trade Agreements

The import relief authorized in Title II of the Trade Act of 1974 is circumscribed by the WTO and NAFTA obligations and requirements. Article XIX of the GATT 1947 and NAFTA Article 802 both permit signatories to temporarily suspend, withdraw or modify trade concessions to give domestic industries injured by import competition an opportunity to take measures necessary to become more competitive with foreign firms. International concern about the use of import and export restraint agreements outside the scope of Article XIX was perceived to be the primary reason for the establishment of the WTO Agreement on Safeguards in the Uruguay Round of multilateral trade negotiations. This agreement specifically prohibits the use of certain unilateral and bilateral negotiated measures affording import relief, such as voluntary restraint agreements, orderly marketing agreements or export restraint agreements. In such agreements, one country undertakes to limit its exports of a particular product to another importing nation. Like many countries, the United States has concluded such agreements in the past to respond to import competition.

2 Safeguard Investigation Procedures

2.1 Petitions

An entity "representative of an industry," including trade associations, unions or groups of workers, may file a petition with the ITC under section 202 of the Trade Act of 1974. The petition must include a statement describing the purpose of the petition—in other words, the means of adjustment sought—which is invariably protection from allegedly injurious imports. With the petition, or within 120 days of filing it, the petitioner may submit a plan to facilitate positive adjustment to import competition.[129] An ITC investigation may also be initiated upon the request of the President or the U.S. Trade Representative, or upon a resolution of the House Committee on Ways and Means or the Senate Committee on Finance. In addition, it may be self-initiated.

Unless the ITC determines good cause, no investigation may be initiated with respect to the same subject matter as a previous investigation, unless one year has elapsed since the ITC report to the President. If import relief was provided further to a safeguard investigation, no new action may be initiated with respect to the same product for a period of time equivalent to the period of import relief previously granted or for two years, whichever is greater.[130]

129 Sec. 202 (a) (4).

130 Sec. 203 (e) (7).

2.2 Investigations and Determinations

Once the ITC initiates proceedings, it must determine which producers constitute the domestic industry and what products are like or directly competitive with the imported articles. Unlike other trade remedy provisions, there is no statutory deadline between the submission of a petition and the initiation of an investigation. Once such terms are established, the ITC must determine whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[131] For a positive finding to be made, three conditions must be satisfied:

1) imports have increased;
2) the domestic industry is seriously injured or is threatened with serious injury; and
3) such increased imports are a substantial cause of serious injury or threat thereof to the domestic industry.

If the ITC finds that all three conditions are met, it must then recommend to the President "the action that would address the serious injury, or threat thereof, to the domestic industry and be the most effective in facilitating the efforts of the domestic industry to make a positive adjustment to import competition."[132]

2.3 Domestic Industry and Like or Directly Competitive Articles

Unlike anti-dumping and countervailing duty law, there is no mathematical threshold for determining the standing of a domestic industry to request a safeguard investigation. The Trade Act of 1974 defines "domestic industry" as those producers whose collective production of the like or directly competitive article constitutes all or a major portion of the total domestic production of such article.[133] The following factors are generally considered in defining the relevant domestic industry: productive facilities; manufacturing processes; and the markets for the product at issue. In the case of a domestic producer who also imports, the ITC may treat as the domestic industry only the domestic production. The ITC may also define an industry as production in one major geographic area in which the imports at issue are concentrated, when producers in that area constitute a substantial portion of the entire domestic industry and primarily serve markets in that area.

131 Sec. 201 (b) (1) (A).

132 Sec. 202 (e) (1).

133 Sec. 202 (c) (6) (A) (I).

The terms "like article" and "directly competitive article" are defined in the legislative history of the Trade Act of 1974: "'Like' articles are those which are substantially identical in inherent or intrinsic characteristics (i.e. materials from which the article is made, its appearance, quality, texture, etc.), and 'directly competitive' articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable."[134]

The ITC has identified several additional factors to be considered in identifying the like or directly competitive product. Using a "product line" approach, the ITC takes into account such factors as the physical properties of the article, customs treatment, where and how it is made (e.g., in a separate facility), uses and marketing channels. Clear dividing lines are sought between possible products, and minor variations are disregarded.

2.4 Increased Imports

The increased imports requirement provides that the increase must have been either actual or relative to domestic production. The requirement is thus satisfied if imports have increased in actual terms, or if they have remained steady or even declined in actual terms but have increased relative to domestic production (that is, domestic production is falling at a faster rate than imports). In making this determination, the ITC generally examines import trends over the most recent five-year period.

2.5 Serious Injury

The ITC must then find whether the domestic industry is seriously injured or threatened with serious injury. "Serious injury" is defined as a significant impairment in the position of the domestic industry. "Threat of injury" is defined as serious injury that is clearly imminent and not based on conjecture. The ITC is instructed to take into account various economic factors in its determination of injury.

In the case of *serious injury*, these are: significant idling of productive facilities in the industry; the inability of a significant number of firms to conduct domestic production operations at a reasonable profit; and significant unemployment or underemployment within the industry.

In the case of *threat of serious injury*, the economic factors to be taken into account are: a decline in sales or market share; a higher and growing inventory; a downward trend in production, profits, wages, productivity or employment in the domestic industry concerned; the extent to which domestic producers are

134 Trade Act of 1974: Report of the Committee on Finance, United States Senate, on H.R. 10710, S. Rept. No. 93-1298, 93d Cong., 2d Sess. (1974), at 21-22.

unable to generate adequate capital to modernize equipment and facilities, or are unable to maintain existing levels of expenditure on research and development; and the extent to which foreign exports are being diverted to the U.S. market by reason of trade restraints on the part of other countries.[135]

These statutory factors are not all-inclusive or singly decisive. The ITC must make an injury determination within 120 days of receipt of the petition—unless it determines that the case is extraordinarily complicated, in which circumstances there may be an extension of 30 days.

2.6 Substantial Cause

The third condition requires a finding that the increase in imports be a substantial cause of serious injury or threat thereof to the domestic industry. Substantial cause is defined as "a cause which is important and not less than any other cause."[136] The following economic factors guide the ITC in its determination: whether there is an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic industry supplied by domestic producers.

Furthermore, the ITC is directed to consider the condition of the domestic industry over the course of the relevant business cycle. It may not aggregate the causes of declining demand associated with a recession or economic downturn in the economy into a single cause of serious injury or threat of injury.

The ITC also examines factors other than imports that may be a cause of serious injury or the threat thereof to the domestic industry, and it includes such findings in its report. The legislative history of the Trade Act of 1974 includes examples of other causes, such as changes in technology or consumer tastes, domestic competition from substitute products, plant obsolescence or poor management. If such developments are found to be more important causes of injury than increased imports, a negative finding is required.

The third condition of a finding would therefore require a weighing of causes. The increase in imports must be both an important cause and a cause that is equal to or greater than any other cause of serious injury or threat thereof. The legislative history states that the ITC must assure itself that imports are a substantial cause and not simply one of a multitude of equal causes.[137]

135 Sec. 202 (c) (1).

136 Sec. 202 (b) (1) (B).

137 Trade Act of 1974: Report of the Committee on Finance, United States Senate, on H.R. 10710, S. Rept. No. 93-1298, 93d Cong., 2d Sess. (1974), at 121.

2.7 Public Hearings

The ITC is required to hold a public hearing within a reasonable time after the commencement of proceedings. In addition to submissions by the domestic producer(s) and the foreign exporter(s), other interested parties and consumers may present evidence, comment on the adjustment plan if any, respond to presentations of other parties, and otherwise be heard. A separate hearing on the issue of remedy is required if the ITC reaches an affirmative determination.[138]

2.8 ITC Report

The ITC must submit a report to the President, including its findings, remedy recommendations (if any) and reasons for its determination no later than six months from the date of the filing of the petition. The report must also be made available to the public and a summary published in the *Federal Register*.

If the ITC determines that increased quantities of imports of an article are or threaten to be a substantial cause of serious injury to the domestic industry, the Commission is required to make recommendations as to relief, including its type, amount and duration.[139] The report must include the short- and long-term effects of both the implementation and non-implementation of the recommended action on the petitioning domestic industry, its workers, consumers, the communities where production facilities are located, and other domestic industries. If the ITC finds that increased imports are not a substantial cause of serious injury or threat thereof to the domestic industry, the proceedings are terminated.

The ITC may not release information that it considers to be confidential business information unless the party submitting the confidential business information had notice, at the time of submission, that such information would be released by the ITC, or such party subsequently consents to the release of the information. Regulations provide for access to confidential information under protective orders to authorized representatives of interested parties to the ITC investigation.[140]

2.9 Critical Circumstances and Provisional Relief

Critical circumstances exist where there is clear evidence that increased imports are a substantial cause of serious injury or threat thereof to the affected domestic industry, and delay in taking action would cause damage to the domestic industry that would be difficult to repair. If the ITC and the President agree that critical circumstances exist, provisional relief may be granted prior to any final determination. The allegation of critical circumstances must appear in the original petition and be supported with relevant evidence. If provisional relief is warranted,

138 Sec. 202 (e) (5) (A).

139 Sec. 2202 (e) (3).

140 Sec. 202 (f).

the President may proclaim such relief as is necessary, for a period not to exceed 200 days. The President is also directed to give preference to duties over other forms of provisional relief. Where a petition alleges critical circumstances and requests provisional relief, the ITC must determine not later than 60 days after filing whether critical circumstances exist, and the President has 30 days from receipt of the ITC report to decide what provisional action to take, if any. After completing its 60-day critical-circumstances phase, the ITC proceeds to conduct a regular 180-day investigation.[141]

Amendments introduced in 1988 authorize the President to provide emergency import relief for perishable agricultural products. For emergency relief, these products must have been monitored by the ITC for a period of at least 90 days before the filing of a petition.[142] The ITC has 21 days from the filing of a petition to make and report its determination and findings to the President, and the President has seven days to decide what action to take.

2.10 Referrals for Related Agency Action

When the ITC commences an investigation, it must notify the Secretary of Labour, who immediately initiates a study of the number of affected workers likely to be certified as eligible for adjustment assistance, and the extent to which the adjustment of such workers to the import competition may be facilitated through the use of existing programs. The ITC must also notify the Secretary of Commerce, who must undertake a study of the number of domestic firms likely to be certified as eligible for adjustment assistance, and the extent to which adjustment may be facilitated by existing programs. Both Secretaries must submit a report to the President not more than 15 days after the date on which the ITC report is due. If during the investigation the ITC has reason to believe that increased imports are attributable in part to unfair trade practices (e.g., dumping or subsidization), it must promptly notify the agency administering the appropriate trade law.

2.11 Facilitation of Positive Adjustment

Title II of the Trade Act of 1974 also provides for the possibility of government adjustment assistance for workers, firms and industries determined to be adversely affected by import competition. Adjustment assistance may be requested in petitions filed specifically for that purpose and not connected to a safeguard measure, or as part of a section 201 petition filed to facilitate positive adjustment to import competition. Petitions for adjustment assistance for workers, including recognized unions, are filed with the Secretary of Labour, who then initiates an investigation. Workers deemed eligible for adjustment assistance

141 Sec. 202 (d) (1) (C).

142 Sec. 202 (d) (1) (C).

may apply for a trade adjustment allowance of cash benefits or re-employment services, including job training and job search, and relocation allowances.

Prior to 1986, firms certified to be eligible for adjustment assistance by the Secretary of Commerce could apply for direct financial assistance. Since 1986, however, eligible firms may receive only technical assistance for the development and implementation of an economic adjustment proposal. The Secretary of Commerce may also provide technical assistance for industry-wide programs "for new product development, new process development or other uses consistent with the purposes" of Title II.

The law provides that a positive adjustment occurs, and assistance is no longer warranted, when: (1) the domestic industry is able to compete successfully with imports after actions taken under section 204 terminate, or the domestic industry experiences an orderly transfer of resources to other productive pursuits; and (2) dislocated workers in the industry experience an orderly transition to productive pursuits.

The domestic industry may be considered to have made a positive adjustment to import competition even though the industry is not of the same size and composition as it was at the time the investigation was initiated.

2.12 Presidential Action

The Trade Act of 1974 requires the President to take all appropriate and feasible action within his power within 60 days of receiving a report from the ITC containing an affirmative finding. The President, however, retains discretion as to the extent and duration of the action he deems appropriate and feasible, and may choose to entirely disregard the ITC recommendation and take no action at all. In making his decision, the President is advised by the Trade Policy Committee (chaired by a Deputy Trade Representative, this Committee is the U.S. government agency designated to hold hearings pertaining to any matters relevant to trade agreements).

In determining what action is appropriate, the President is required to consider a number of factors, including:

- the ITC recommendations and report;
- the extent to which workers and firms are benefiting from adjustment assistance and similar programs, and are engaged in worker retraining efforts;
- the efforts being made or planned by the domestic industry to make a positive adjustment to import competition;
- the probable effectiveness of action he might take to achieve positive adjustment;

- the economic and social costs and benefits of actions;
- the extent to which there is a diversion of foreign exports to the United States as a result of foreign restraints;
- the potential for circumvention of action taken;
- the national security interests of the United States;
- the factors that the ITC is required to take into account in making its recommendation; and
- factors relating to the economic interest of the United States, including: the economic and social costs that would be incurred by taxpayers, communities and workers if relief were not provided; the effect of action on consumers and on competition in domestic markets; and the impact on domestic industry as a result of international obligations regarding compensation.[143]

2.13 Forms of Relief

Section 203 authorizes the President to provide one or more of the following types of relief:

1) increases in, or imposition of, duties;
2) tariff-rate quotas;
3) quantitative restrictions—i.e. quotas allocated among importers by auctioned licences;
4) adjustment measures, including trade adjustment assistance;
5) agreements limiting exports from foreign countries into the United States;
6) initiation of international negotiations to address the cause or otherwise alleviate the injury;
7) submission of legislative proposals to facilitate positive adjustment by industry;
8) any other action within his power; or
9) any combination of the above.[144]

143 Sec. 203 (a) (2).

144 Sec. 203 (a) (3).

If the remedy provided is tariff adjustment, the increased tariff is generally applied on a Most Favoured Nation (MFN) basis, meaning that there would be one tariff for imports from all WTO members. The President may not increase a rate of duty to more than 50% *ad valorem* above the existing rate.[145]

If quantitative restrictions are used, the concept of MFN application becomes more difficult. Global quotas are the least discriminatory form of quantitative restriction, but they often create problems as importers rush to fill them early in a prescribed time period. One solution is to distribute quotas on a quarterly basis, thereby ensuring that imports are not disproportionately entered. In practice, quotas are usually granted on a country-by-country basis (country reserves). Such quota systems generally establish the amount of the quota for each country, and are usually based on the amount or proportion of trade that each country had during a historical period. If quantitative restrictions are placed on imports, they must permit importations at least equal to the average amount imported in the most recent three-year representative period for which data are available—unless the President finds that the importation of a different quantity or value is clearly justified to prevent or remedy the serious injury.[146]

As a general matter, simple tariff increases are preferred to tariff-rate quotas and quantitative restriction quotas because a tariff tends to be least distortive of trade and easiest to administer. The cumulative impact of any relief afforded must not exceed the amount of relief necessary to prevent or remedy the serious injury caused by imports. Imposition of duties or quotas in effect for more than one year must be phased down at regular intervals during the course of the period for which action is taken.[147]

The Uruguay Round amendments shortened the maximum period for initial relief to four years. The President may extend the relief to eight years upon the recommendation of the ITC if he determines that the relief continues to be necessary to prevent or remedy serious injury, and there is evidence that the domestic industry is making a positive adjustment to import competition.[148]

2.14 Congressional Veto Power

On the day the President takes action, he must submit to Congress a document describing the reasons for his action. If the action taken by the President differs from the action recommended by the ITC, the President shall state in detail the reasons for the difference. Congress may override Presidential action differing from the action recommended by the ITC by passing a joint resolution of both Houses within 90 days of the transmission of the President's report.

145 Sec. 203 (e) (3).

146 Sec. 203 (e) (4).

147 Sec. 203 (e) (5).

148 Sec. 203 (e) (1)- (2).

2.15 Monitoring, Modification, and Termination of Action

If Presidential action is taken, the ITC is required to monitor developments in the industry, including its efforts to adjust, and must report to the President at specified intervals.[149] If the initial period of relief exceeds three years, the ITC must conduct a hearing and submit a report on the results of the monitoring to the President and Congress no later than the mid-point of the initial period of relief.[150] Upon receiving such a report from the ITC, the President may reduce, modify or terminate action if he determines that changed circumstances so warrant.[151] The changed circumstances that warrant reduction, modification or termination include any of the following:

1) The domestic industry has not undertaken adequate efforts to make a positive adjustment.

2) A change in economic circumstances has impaired the effectiveness of the action.

3) The domestic industry has submitted a petition indicating that it has already achieved a positive adjustment to import competition.

4) The WTO Dispute Settlement Body finds that an action under Title II is inconsistent with the Agreement on Safeguards. In such a case the U.S. Trade Representative may ask the ITC to issue an advisory opinion on whether the United States may take steps to make its action consistent with the Agreement. The ITC then advises the President as to whether Title II permits steps to render U.S. action consistent with the Agreement.

Upon request of the President, the ITC must advise him as to the probable economic effects on the domestic industry of any proposed reduction, modification or termination of action.

After any action taken under this title has terminated, the ITC must evaluate the effectiveness of the action in facilitating positive adjustment by the domestic industry to import competition, and must submit a report to the President and Congress within six months of termination.

2.16 North American Free Trade Agreement

Chapter Eight of the North American Free Trade Agreement affects the scope of relief that may be granted by a safeguard action as it relates to imports from NAFTA parties. That is, when global safeguards are imposed as the result of a

149 Sec. 204 (a) (1).

150 Sec. 204 (a) (2)-(3).

151 Sec. 204 (c).

section 201 investigation, the relief against NAFTA imports may be constrained by the Agreement. Section 311 (a) of the NAFTA Implementation Act provides that if the ITC makes an affirmative injury determination in an investigation under section 202 of the Trade Act of 1974, the ITC must also determine whether:

1) imports of the article from a NAFTA country, considered individually, account for a substantial share of total imports; and

2) imports of the article from a NAFTA country considered individually or (in exceptional circumstances) imports from NAFTA countries considered collectively contribute importantly to the serious injury, or threat thereof, caused by imports.

Thus, in order to make an affirmative finding with respect to imports from Canada or Mexico, the ITC must make an affirmative finding on both conditions. If the ITC finds that either condition is not satisfied, it must recommend to the President that NAFTA-origin goods be excluded. The President may subsequently include such imports in the action if he determines that a surge in imports from a NAFTA country or countries is undermining the effectiveness of the action. Section 311 (b) (1) states that imports from a NAFTA country "normally" will not be considered to account for a substantial share of total imports if that country is not among "the top five suppliers of the article subject to the investigation, measured in terms of import share during the most recent three-year period."

Section 311 (c) defines "contribute importantly" as to be "an important cause, but not necessarily the most important cause." In determining whether imports have contributed importantly to the serious injury or the threat thereof, the ITC is directed to consider such factors as the change in the import share of the NAFTA country or countries, and the level and change in the level of imports from a NAFTA country or countries. Imports from a NAFTA country or countries "normally" will not be considered to contribute importantly to the serious injury or the threat thereof "if the growth rate of imports from such country or countries during the period in which an injurious increase in imports occurred is appreciably lower than the growth rate of total imports from all sources over the same period."

In exceptional circumstances, imports from NAFTA countries may be considered collectively in determining whether NAFTA imports have contributed importantly to the serious injury or threat. The NAFTA Implementation Act Statement of Administrative Action states, "The ITC is likely to consider imports from NAFTA countries collectively when imports from individual NAFTA countries are each small in terms of import penetration, but collectively are found to contribute importantly to the serious injury or threat of serious injury."

2.17 Compensation and Compliance

One of the reasons safeguards have been used infrequently is that the importing country must generally offer affected countries some form of compensation in order to avoid being subjected to retaliatory measures brought by the exporting countries. The WTO does not use the terms "sanction" or "retaliation," but it has a structure for requiring "payment" from a country that departs from its scheduled obligations in the context of the escape clause of Article XIX. Article XIX of the GATT 1947 and Article 8 of the Agreement on Safeguards require the member proposing the safeguard to grant a substantially equivalent level of concessions and other obligations to the exporting members that would be affected by such a measure.

To achieve this objective, the parties hold consultations in an attempt to arrive at an agreement. Generally, the importing country offers interested exporting countries concessions on other products by way of compensation. One of the problems in recent years, as the general average of tariffs has declined to low levels, is that it has become increasingly difficult for countries invoking safeguard measures to be able to effectively compensate affected countries by way of granting tariff concessions. Usually the amount of requested compensation is sufficiently large that it becomes difficult to find any products with a high enough tariff to make concession meaningful, except for products that are already very sensitive and therefore subject to higher tariffs.

If no agreement is reached within 30 days of consultations, then the affected exporting members shall be free, not later than 90 days after the measure is applied, to suspend, 30 days from the day on which written notice of such suspension is received by the WTO Council for Trade in Goods, the application of substantially equivalent concessions or other obligations to the trade of the member applying the safeguard measure. This right of suspension cannot be exercised for the first three years that a safeguard measure is in effect, provided that the safeguard measure has been taken as a result of an absolute increase in imports and that such a measure conforms to the provisions of the Agreement on Safeguards. Furthermore, Article XIX gives exporting countries having a substantial interest in the product concerned an opportunity to consult on the matter. NAFTA Article 802:6 also contains a "compensation" or "retaliation" provision very similar to that found in the WTO agreements.

U.S. law makes no explicit reference to compensation in the context of safeguards but section 123 of the Trade Act of 1974 gives the President a certain amount of compensation authority. That provision allows that whenever import relief has been provided by increasing or imposing any duty or other import restriction, the President may enter into trade agreements with foreign countries to grant concessions as compensation in order to maintain the general level of reciprocal and mutually advantageous concessions. To carry out such an agreement, the President may proclaim modification or continuance of any existing duty or treatment, as appropriate.

2.18 Uruguay Round Special Agricultural Safeguards

The Uruguay Round Agreement on Agriculture contains provisions permitting the designation of import-sensitive agricultural goods as "special safeguard agricultural goods." Imports of such goods may be subject to an imposition of safeguards in the form of additional duties when their import level reaches a designated trigger point. Either price-based or volume-based trigger points may be used. The President is required to publish a list of the designated goods, determine the appropriate volume and price trigger levels, and reset the volume-based trigger levels on an annual basis. Finally, the President may exempt from any special safeguards goods that originate in any NAFTA country.

2.19 Miscellaneous Provisions

No safeguard investigation may be initiated with respect to an article that is the subject of the WTO Agreement on Textiles and Clothing unless and until the United States has integrated the specific product or article into GATT 1994. Thus, such articles are no longer subject to import or export restraints concluded under the WTO Agreement on Textiles and Clothing.

Section 406 of the Trade Act of 1974 establishes separate safeguard procedures for non-market economies. These apply to any non-market country regardless of whether Most Favoured Nation treatment has been accorded. The provisions are very similar to the safeguard provisions outlined in sections 201–203, but section 406 provides for a lower standard of injury determination and faster import relief procedures, and the investigation focuses on imports from a specific country as opposed to all imports.

IV United States Anti-Dumping Duty Investigations regarding Imports from Canada: Case Histories, 1985–1999

1 Rock Salt from Canada

1.1 Original Investigation

On January 25, 1985, the International Salt Company filed a petition alleging injurious dumping of rock salt from Canada. An investigation was initiated by the U.S. Department of Commerce on February 26, 1985. On March 20, 1985, the U.S. International Trade Commission issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of Canadian rock salt. On July 15, 1985, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of subject imports from Canada. This was followed by a December 4, 1985, affirmative final dumping determination by Commerce, in which it found anti-dumping duty margins of 8.15% and 4.39% respectively for the two Canadian producers specifically investigated (Domtar and Morton). The average rate was 6.35%. On January 24, 1986, the ITC made a final negative injury determination. Citing increasing levels of production, relatively high capacity utilization, an increasing number of workers and rising labour productivity, as well as improving financial conditions, the ITC concluded that the U.S. domestic rock salt industry was not materially injured or threatened with material injury by dumped imports from Canada. The petitioner had alleged the existence of a regional market. On this point, the ITC found that while the proposed region satisfied the statutory criteria for a regional industry, the particular circumstances of this industry were such that it was not appropriate to apply a regional industry analysis. The ITC found that the alleged regional industry was discretionary and shifted in response to particular conditions.

1.2 Key Issue

The Canadian respondents argued that Commerce should use a weighted average rather than a transaction-by-transaction method to calculate U.S. prices. Respondents alleged that the statutory criteria had been met since the investigation involved an extraordinarily large number of individual sales and a significant number of complex adjustments. Commerce rejected this argument, finding that section 777A (a) did not require a departure from normal methodology but was intended to expand the instances in which the administering authority could use sampling and averaging techniques in order to reduce costs and administrative burden. In this regard, Commerce did not find the number of sales or adjustments to be so large as to make a transaction-by-transaction analysis of U.S. price an onerous burden.

1.3 Canadian Government Activity

Aside from monitoring and providing general advice to industry representatives involved in the investigation, no specific interventions were made by the Canadian government.

2 Heavy Walled Rectangular Welded Carbon Steel Pipes from Canada

2.1 Original Investigation

On March 25, 1985, a petition alleging injurious dumping of certain welded carbon steel pipes from Canada was filed by the following companies: Bull Moose Tube; Copperweld Tubing Group; Kaiser Steel Corp.; Maruichi American Corp.; UNR-Leavitt; and Welded Tube Co. of America. On April 22, 1985, Commerce initiated the investigation.

On May 15, 1985, the ITC issued a preliminary affirmative determination, finding that there was a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of Canadian carbon steel pipes. On September 10, 1985, Commerce released a negative preliminary determination, with only two Canadian respondents under investigation being assessed *de minimis* dumping margins. On November 22, 1985, Commerce released an affirmative final determination. Foreign market value for Titan Industrial Corp., whose exports accounted for approximately 80% of the products under investigation, was based on constructed value as there were insufficient sales in the home market or in third countries to provide viable comparisons. The margin for Titan was calculated to be barely over the *de minimis* level at 0.65%. A voluntary questionnaire response submitted by Welded Tube of Canada was rejected because it was found to be untimely and inadequate.

On February 12, 1986, the ITC released a negative final determination. Because of continuing improvement in the U.S. industry—including an increase in domestic production, an increase in capacity utilization, an improvement in the general financial condition of the industry, a declining level of market share held by imports, a lack of an overall pattern of underselling by imports and the extremely low dumping margin found—the ITC concluded that dumped imports of the subject goods were not causing or threatening to cause injury to the U.S. industry.

2.2 Key Issues

In its preliminary determination, Commerce calculated constructed value for Titan based on costs incurred for fiscal year 1984. For its final determination, Commerce followed its normal practice and used costs incurred for the sales of the product during the period of investigation, which involved part of the 1985 fiscal year. Under a long-term contract with a third-party tube converter and exporter affiliate of Titan, Dominion Steel was required to pay a penalty if it did not order a specific amount of fabrication work each year. Dominion argued that this penalty payment should not be included in the cost of production because it had no effect on its income during the period of investigation. Commerce rejected the argument and included the penalty in the "cost of manufacture" since it was directly related to production.

2.3 Canadian Government Activity

On April 8 and May 1, 1985, the Canadian Embassy in Washington, D.C., made written representations to Commerce regarding the general weakness of the injury allegation as well as a Commerce decision to enlarge the product scope of the investigation on initiation.

3 Iron Construction Castings from Canada (and Brazil, India and People's Republic of China)

3.1 Original Investigation

On May 13, Commerce and the ITC received a petition filed by the Municipal Castings Fair Trade Council, which is a trade association representing 15 U.S. producers of iron construction castings. On June 7, 1985, Commerce initiated an investigation against all four named countries.

On July 3, 1985, the ITC issued a preliminary affirmative determination, finding a reasonable indication that U.S. industry was materially injured by reason of allegedly dumped imports of certain heavy and light iron construction castings from all four countries, including Canada. On October 28, 1985, Commerce issued a preliminary affirmative determination and ordered the suspension of

liquidation of imports from all four countries. On January 16, 1986, Commerce issued its final affirmative determination, finding that certain iron construction castings from Canada were being sold, or were likely to be sold, in the United States at less than fair value. This was followed by the February 16, 1986, release of the final ITC affirmative determination. The ITC found that U.S. industry was materially injured and threatened with material injury by reason of dumped imports of heavy iron construction castings. On March 5, 1986, Commerce published its anti-dumping duty order. Anti-dumping duty margins were assessed as follows:

Manufacturer	Weighted Average Margin
Mueller Canada Inc.	9.8%
LaPerle Foundry Ltd.	3.9%
Bibby Ste. Croix Foundries	8.6%
All Others	7.0%

On September 25, 1986, Commerce amended the margin for LaPerle to 4.4% because of clerical errors made in the final determination. As a result, the "all others" rate was also amended to 7.5%.

3.2 Key Issues (Original Investigation)

Commerce agreed to the petitioner's request not to use average U.S. prices for Bibby. The petitioner's position was that the legislative history of section 777A of the Tariff Act of 1930 did not require the use of weighted-average U.S. prices when weighted-average foreign market value is used. Commerce asserted that it had the authority to use sampling and averaging methodologies at its discretion. Commerce also refused to consider light and heavy construction castings as two distinct products, again citing its discretion to define the "class or kind" of merchandise subject to an investigation.

3.3 Canadian Government Activity

The Canadian Embassy in Washington, D.C., made several representations on behalf of Canadian producers/exporters. It submitted a formal diplomatic note shortly after the receipt of the petition, presenting arguments against the injury allegations advanced by the petitioners. The Embassy also supported Canadian industry's 1994 request for a changed circumstances review with representation and advice. In addition, the Embassy made specific representations with respect to several administrative reviews.

3.4 Canada–U.S. Free Trade Agreement Panel Review

On June 20, 1991, LaPerle Foundry and Mueller Canada filed a request for a review of the final determination in the administrative review covering the period 1985–1987 by a panel established under Chapter 19 of the Free Trade Agreement (FTA). On July 1, 1991, both Canadian producers filed a Notice of Motion Requesting Dismissal of the Panel Review. All parties consented to this motion and the panel review was terminated.

3.5 Administrative Reviews

Administrative reviews were conducted by Commerce for the periods of 1985–1987, 1987–1988, 1991–1992, 1992–1993, 1997–1998 and 1999–2000. As a result of the last initiated review concerning the period between March 1, 1999, and February 28, 2000, Commerce released a preliminary determination on December 7, 2000. The ITC determined that the dumping margin concerning the imports of one producer, Canada Pipe Company Limited, amounted to 7.07%.

3.6 Changed Circumstances Reviews

On June 8, 1994, the four Canadian producers formally requested that Commerce review its anti-dumping duty order in light of changed circumstances, pursuant to section 751 (b) of the Tariff Act of 1930. The Canadian petitioners maintained that a large share of the market was closed to foreign producers because of the subsequent extension of the "Buy America" provisions. Since U.S. producers were protected from import injury through Buy America, the Canadian petitioners argued that the anti-dumping duty orders directed against Canada and possibly other countries should be revoked. On August 25, 1994, the respondents' request was denied because Commerce concluded that there was a lack of evidence of changed circumstances having a significant impact on the market.

In response to an April 30, 1998, request by the U.S. petitioner, Commerce initiated a changed circumstances review. Based on the lack of further interest by domestic parties, Commerce initially issued a preliminary determination of its intent to revoke the order with respect to light iron construction castings. On September 17, 1998, Commerce released its final determination, revoking the order as it applied to all entries of light iron construction castings.

3.7 Sunset Review

On November 2, 1998, a five-year sunset review of the order was initiated. The ITC determined that it would conduct a full review, while Commerce conducted an expedited review. On June 7, 1999, Commerce made a final determination that revocation of the anti-dumping duty order would be likely to lead to the continuation or recurrence of dumping. This determination was based upon a finding of dumping margins above *de minimis* in each of the administrative reviews

conducted by Commerce, the existence of continuing deposit rates above *de minimis* and the fact that respondent interested parties waived their right to participate in the review. Commerce determined that the margins calculated in its original investigation (4.40% to 9.80%) were probative of the behaviour of Canadian producers and exporters of certain iron construction castings. On October 20, 1999, the ITC made an affirmative determination that revocation of the order would be likely to lead to a continuation or recurrence of injury to the U.S. industry by reason of dumped imports. As a result, the order was continued.

4 Oil Country Tubular Goods from Canada (and Argentina and Taiwan)

4.1 Original Investigation

On July 22, 1985, Lone Star Steel and CF&I Steel filed a petition alleging injurious dumping of oil country tubular goods (OCTG) from three countries, including Canada. Oil country tubular goods are hollow steel products of circular cross-sections intended for use in the drilling for oil and gas. These products include oil well casing, tubing and drill pipe of carbon or alloy steel, whether welded or seamless, manufactured to either American Petroleum Institute (API) or non-API (such as proprietary) specifications, and are in either finished or unfinished condition. Commerce initiated an investigation concurrent with a countervailing duty investigation on August 19, 1985.

On September 11, 1985, the ITC issued a preliminary affirmative determination, finding a reasonable indication that U.S. industry was materially injured by reason of allegedly dumped and subsidized imports of oil country tubular goods from the three countries. On January 7, 1986, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of imports of OCTG from Canada and Taiwan. Commerce issued a preliminary determination of dumping with respect to imports from Argentina on January 27, 1986. On April 22, 1986, Commerce issued an affirmative final determination of dumping regarding imports from Canada and Taiwan. The investigation regarding Argentina was terminated after a negative final determination. In its final determination, Commerce found that "critical circumstances," as alleged by petitioners, did not exist with respect to OCTG from Canada as imports during the period subsequent to receipt of the petition were not massive when compared to recent import levels. On June 11, 1986, the ITC made an affirmative final injury determination regarding imports from Canada and Taiwan. Based on the existence of a general decline in the domestic industry, an apparent decline in the U.S. consumption level for 1985 (31% below the 1982 level), a 22% decrease in U.S. production, a 41.9% decrease in the number of U.S. workers, over $100 million in operating losses for the three years of 1983, 1984 and 1985, imports accounting for a substantial and growing market share, and evidence of under-

selling, the ITC concluded that the U.S. industry was being materially injured by dumped and subsidized imports from Canada and dumped imports from Taiwan.

The anti-dumping duty order was issued on June 18, 1986, and then amended on October 10, 1986. The final anti-dumping margins for imports from Canada were as follows:

Manufacturer	Estimated Dumping Margins
Algoma	13.09%
Ipsco	38.78%
Sonco	3.18%
Welded Tube	0.00% (excluded from order)
All Others	18.65%

4.2 Key Issues (Original Investigation)

For most respondents, the allocation of costs for prime and non-prime OCTG was a matter of considerable concern. The Court of International Trade in *Ipsco Inc. and Ipsco Steel Inc. v. United States* (1989) eventually directed Commerce to "find a reasonable means of allocating the combined costs of production between [prime and non-prime OCTG] which takes into account differences in value." On a related issue, Commerce did not treat off-spec or non-prime goods any differently in terms of its calculation of normal values or in its treatment of costs. In addition, Commerce calculated respondents' freight costs using average costs because only average costs could be verified. Commerce rejected the petitioners' position that the responses submitted by some Canadian producers were so deficient that they should be disregarded and instead best information available be used. Commerce stated that where responses were deficient, it sought and obtained the clarification necessary to make a determination. Many other company-specific issues arose during the investigation.

4.2.1 Algoma

Commerce found that Algoma had improperly reclassified certain manufacturing expenses as part of selling, general and administrative expenses. In this regard, such expenses were associated with the production of OCTG and should be treated as manufacturing overhead. Within its expense calculations, Algoma had also improperly allocated expenses between different varieties of OCTG. Commerce further determined that Algoma must include interest on long-term

debt in SGA. Commerce determined that Algoma's depreciation, fixed overhead costs and SGA should be included in the U.S. manufacturing cost adjustment.

Commerce rejected Algoma's assertion that long-term interest expenses should be excluded, finding that the debt was incurred as part of the corporate long-term capitalization. Therefore, an allocation of the expense was included in the final determination. Commerce stated that in determining whether there are differences in sales at varying levels of trade affecting price comparability, information must be submitted and verified substantiating that the differences in the price were the result of differences in the cost of selling. Algoma's claim for an adjustment in this regard was therefore disallowed.

In determining whether to disregard below-cost sales in the home market. Commerce relied upon recent cases as precedents. In such cases, below-cost sales were disregarded when they amounted to 10% or more of the home market sales. More than 10% of the home market sales were below cost for several of Algoma's products. Consequently, they were disregarded in the calculation of foreign market value.

4.2.2 IPSCO

Commerce disallowed IPSCO's bad debt expense adjustment to fair market value because Commerce's practice was to only consider bad debt losses when the company wrote them off in accordance with its own practices. In IPSCO's case, the debt in question was to be settled in court and was therefore not considered a loss. IPSCO incurred abnormally high costs for certain products that it had recently started producing. Commerce stated that while it may make allowances for extraordinary costs, the normal costs data submitted by IPSCO were not sufficiently substantiated.

4.2.3 Welded Tube

Commerce adjusted Welded Tubes' cost of production data by re-allocating labour and overhead costs to accurately account for the differences in costs of producing pipe products of different diameters.

4.2.4 Sonco

A Sonco raw material supplier, Algoma, was not found to be a related party, despite the fact that Algoma had an option to purchase 50% to 100% of Sonco's shares. Because of this relationship, the petitioner had asserted that Commerce should not presume that sales occurred at arm's-length prices and that Commerce should therefore use best information available. Commerce did find, however, that the raw material prices were valid and supported by documentation. On a related issue, Commerce did not use Sonco cost allocations because they did not reflect the firm's usual cost allocation practices. As a result, best information

available was used. In accordance with established practice, Commerce treated cash discounts offered to U.S. customers not as an offset to credit expenses as calculated by the respondent but as reductions in price. Commerce determined that Sonco improperly allocated several expenses incurred in further processing its materials in the United States, resulting in an understatement of costs.

4.3 Canadian Government Activity

Since a countervailing duty investigation regarding oil country tubular goods from Canada was initiated simultaneously with the anti-dumping duty investigation, it is difficult to isolate Canadian government representations related solely to the anti-dumping investigation. That being said, the Canadian Embassy in Washington, D.C., made a number of interventions with U.S. authorities:

- In August 1985, the Embassy discussed with Commerce the reconciliation of U.S. and Canadian statistics regarding OCTG to deal mainly with misclassification problems. Commerce subsequently revised its statistics.
- Ambassador Gotlieb wrote Secretary of Commerce Baldridge to propose an expedited review of the issue of the treatment of prime and non-prime material in the investigation.
- In February 1988, the scope of the anti-dumping duty order was raised by the Embassy with Commerce and U.S. Customs. In this regard, the scope was first expanded and then reduced by Commerce.
- In March 1988, the Embassy raised the matter of delays in the conduct of administrative reviews of the order by Commerce. On August 17, 1988, the Embassy met with Commerce about delays in the conduct of reviews.
- About delays more specifically, the Embassy wrote Commerce in December 1988 concerning reviews for Christianson Pipe.
- On June 21, 1989, the Embassy submitted a diplomatic note regarding Commerce's April 13, 1988, scope ruling, which had placed a heavy documentation burden on Canadian exporters.
- Ambassador Burney wrote Secretary of Commerce Mosbacher on October 6, 1989, again concerning delays in administrative reviews.

4.4 Canada–U.S. Free Trade Agreement Panel Review

On November 5, 1990, Stelco filed a request for an FTA Chapter 19 Panel Review of Commerce's notice clarifying the scope of the order and abolishing the end-use certification procedure. The panel review was eventually terminated. On May 16,

1991, Algoma also filed a request for panel review of the scope ruling. On August 8, 1991, Algoma's request to have the panel review terminated was accepted.

4.5 Administrative Reviews

Eight administrative reviews were conducted with respect to the anti-dumping duty order on OCTG, the most active exporters being Christianson Pipe and IPSCO. In September 1996, after IPSCO received its third successive zero dumping margin, the order was revoked for that company.

4.6 Sunset Review

On May 3, 1999, a five-year sunset review of the order was initiated. The ITC determined that it would conduct a full review, while Commerce conducted an expedited review. On December 1, 1999, Commerce made a final determination that revocation of the anti-dumping duty order would be likely to lead to the continuation or recurrence of dumping. However, on July 22, 2000, the ITC determined that the revocation of the anti-dumping duty order would not be likely to lead to a continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. The order was therefore revoked.

5 Brass Sheet and Strip from Canada (and Brazil, France, Italy, South Korea, Sweden and West Germany)

5.1 Original Investigation

On March 10, 1986, Commerce and the ITC received a petition filed by American Brass, Bridgeport Brass, Chase Brass & Copper, Hussey Metals Div (Copper Range Co.), Miller Co., Olin Corp., Revere Copper Products and several industrial unions, all alleging injurious dumping of brass sheet and strip from seven countries, including Canada, as well as subsidized imports from Brazil. An investigation was initiated on April 7, 1986. On May 1, 1986, the ITC issued a preliminary affirmative determination, finding that there was a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of brass sheet and strip.

On August 22, 1986, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of subject imports. On December 9, 1986, Commerce made its final affirmative determination of dumping. On December 31, 1986, the ITC made an affirmative final determination of injury. Because of a sharp decline in the U.S. industry's financial condition from 1983 to 1985—as indicated by significant declines in sales, gross profit, operating income,

cash flow, employment and domestic prices—the ITC concluded that subsidized imports from Brazil and dumped imports from Brazil, Canada and Korea were injuring the domestic industry. On February 26, 1987, the ITC made affirmative determinations regarding imports from the other four countries of France, Italy, Sweden and West Germany. The anti-dumping duty order regarding Canada was issued on January 12, 1987, with the following margins being assessed:

Manufacturer/Exporter	Estimated Dumping Margins
Arrowhead	2.51%
Noranda	11.54%
All Others	8.10%

5.2 Key Issues (Original Investigation)

Canadian respondents requested Commerce to exclude "tolled" sales from its calculation because they were only performing a conversion service rather than selling a finished product. Where U.S. purchasers provide material for the manufacture of the merchandise under investigation, Commerce considers it appropriate to include such sales in its investigation notwithstanding that they may arguably be sales of service.

Commerce refused to accept Ratcliffs' voluntary response, submitted in order to allow for a calculation of a company-specific margin. In its refusal, Commerce cited regulations that require the examination of only 60% of merchandise exported to the United States during the period of investigation. Exports from Arrowhead and Noranda constituted more than 60% of exports to the United States. Voluntary responses from other affected exporters are accepted provided there are no deficiencies. Citing deficiencies in Ratcliffs' response, Commerce rejected it.

Noranda claimed that a level of trade adjustment should have been made based on prior differential between customers who slit the material and those who do not. Level of trade adjustments may be made under certain circumstances in order to compare sales at the same commercial level of trade in the United States and the home market. Here, however, Commerce determined that sales were made at the same commercial level of trade in both markets.

5.3 Anti-Circumvention Inquiry

On June 18, 1993, Commerce determined that a Canadian brass producer and a U.S. brass importer were circumventing the anti-dumping order by importing Canadian brass plate (a product not included within the order) into the United

States, where it was then rolled into brass sheet and strip. Commerce determined that the difference in value between the imported brass plate and the brass sheet and strip sold in the United States was insignificant. Accordingly, it determined that brass plate used in the production of brass sheet and strip fell within the scope of this order. The respondents requested Commerce to calculate the difference in value on the basis of fabrication costs alone, contending that the price of the base material was such a significant component that, if included, it would distort the value calculations. Commerce rejected this request, stating that both statute and practice required them to include the value of the metal and the fabrication when calculating the value of a single product.

5.4 Administrative Reviews

There were nine administrative reviews between 1988 and 1999. On November 8, 1991, an administrative review determined that the dumping margin for Ratcliffs was 0.46%, a *de minimis* rate. Because Ratcliffs had sold merchandise covered by the order at not less than foreign market value for a period of three consecutive years and there was no information to suggest that the company was likely to sell at dumped prices in the future, the anti-dumping duty order was revoked with respect to Ratcliffs.

The order as it applied to Noranda and Wolverine Tube, Noranda's successor company, was also subject to nine complete administrative reviews. The reviews for Wolverine covering 1994 and 1995 found *de minimis* rates. The preliminary determination in the review for 1996 was also found *de minimis* (0.042%). As a result, Commerce made a preliminary determination to revoke the order as it applied to Wolverine based on three consecutive years of no sales below normal value. Further, Commerce rejected the petitioner's request that the respondent be obligated to provide additional data covering its activities over the past five years in support of its request for revocation. However, in its final determination for the 1996 review, which was released on June 17, 1998, Commerce determined that a dumping margin of 0.67% existed for Wolverine for 1996. Commerce therefore determined not to revoke the anti-dumping duty order as it applied to Wolverine. However, Commerce acknowledged that it had inadvertently failed to make certain adjustments in calculating cost of production, thereby incorrectly calculating an above *de minimis* margin. Despite strong representations by both Wolverine and the Canadian government, Commerce would not amend its determination.

5.5 Canadian Government Activity

During the course of the original investigation, the Canadian government made a formal representation questioning the basis for initiation of the investigation. It also made a number of representations regarding various administrative reviews on a number of issues, including delays in conducting administrative reviews, the use of unverified information in calculating cost of production, the information burden on respondents requesting revocation, and Commerce's failure to make a

timely correction in its final determination in the 1996 review. The most recent representation was submitted to Commerce on March 9, 2000, with respect to Wolverine Tube.

5.6 NAFTA Binational Panel Review

On July 15, 1998, Wolverine Tube filed a request for a NAFTA Panel Review of Commerce's final determination in the administrative review determination for the 1996 period. While Commerce acknowledged its calculation error on remand and lowered the margin for the 1996 period to below the *de minimis* level, it did not partially revoke the order because the 1997 review for Wolverine, the review for the immediate subsequent period, had resulted in an above *de minimis* finding (0.71%).

5.7 Sunset Review

On November 2, 1998, a five-year sunset review of the order was initiated. The ITC determined that it would conduct a full review, while Commerce conducted an expedited review. On June 7, 1999, Commerce made a final determination that revocation of the anti-dumping duty order would be likely to lead to the continuation or recurrence of dumping. This determination was based upon a finding of dumping margins above *de minimis* in each of the four administrative reviews conducted by Commerce, the existence of continuing deposit rates above *de minimis* for all respondents and the fact that respondent interested parties waived their right to participate in the review. Commerce determined that the margins calculated in its Department's original investigation (4.40% to 9.80%) were probative of the behaviour of Canadian producers/exporters of brass sheet and strip.

On October 29, 1999, the ITC made an affirmative determination that revocation of the order would be likely to lead to a continuation or recurrence of injury to the U.S. industry by reason of dumped imports. One of the primary issues that the ITC had to address in this review was whether to cumulate imports from all countries subject to the review. While cumulation is discretionary in a five-year review, the ITC is directed by statute not to cumulate imports if it determines that such imports are likely to have no discernible impact on the domestic industry. In view of the low countervailing duties found to prevail, as well as the fact that imports from India had increased over the life of the order, imports from India—which had been subject to a countervailing duty order since 1980—were not cumulated and the order was revoked. It is interesting to note that of the three remaining countries subject to cumulation, the anti-dumping duty margins found for Canada were well below those for Brazil (5.95% to 58.73%) and China (92.74%).

The ITC found that imports from Canada, which showed by far the largest volume among the countries under investigation, had increased significantly in the years immediately preceding the order but that, along with imports from Brazil and

China, the Canadian-source imports fell over the life of the order, probably reflecting the remedial effect of the order. On the other hand, the ITC found that all three countries (Brazil, Canada and China) had ample production capacity to increase shipments to the United States absent the order. In addition, the ITC found that there was no evidence that all three countries would not resume significant exports to the United States if the order was revoked. Regarding price effects, the ITC found that it was likely, given the price competitiveness of the market, that all three countries would price aggressively to regain lost market share, depressing and suppressing prices in the market. In assessing material injury, the ITC found that, while the domestic industry had shown some improvement during the period in which the orders were in place, six of the 15 domestic producers reported operating losses over that period despite increases in domestic consumption, production and shipments. Furthermore, the domestic share of the market in 1998 was comparable with the domestic share recorded in 1983, the beginning of the period under review.

In conclusion, the ITC found that the likelihood of increased imports, combined with expected adverse price effects of such imports, would have a significant adverse impact on the production, shipments, sales and revenue levels of the domestic industry. Accordingly, the ITC concluded that, if the anti-dumping duty orders were revoked, subject imports would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time. As a result of this finding, the order was continued.

6 Fresh Cut Flowers from Canada (and Chile, Colombia, Costa Rica, Ecuador, Kenya, Mexico and Peru)

6.1 Original Investigation

On May 21, 1986, the Floral Trade Council of Davis, California, filed a petition alleging dumping of fresh cut flowers from Canada and other countries. On June 17, 1986, an anti-dumping duty investigation was initiated. Countervailing duty investigations were initiated at the same time.

On July 16, 1986, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of fresh cut flowers from all eight countries. On November 3, 1986, Commerce issued a preliminary affirmative determination of dumping and ordered the suspension of liquidation of subject imports. Regarding imports from Canada, the questionnaire responses submitted to Commerce by the three Canadian growers exporting subject flowers to the United States during the period of investigation were determined to be deficient. Commerce requested additional information from the three companies with a deadline of October 28, 1986.

The amended responses were not received by Commerce until November 20, 1986. As the stated deadline had passed, Commerce used best information available for both the U.S. price and foreign market value in making its final determination, which it issued on January 20, 1987.

On March 19, 1987, the ITC issued its final injury determination. Standard carnation imports were determined to be causing material injury to a U.S. industry, while imports of miniature carnations were found not to be causing injury. Despite apparent U.S. consumption increases and increases in U.S. producers' net sales and total income, the ITC concluded that declines in domestic price increases coupled with a decline in U.S. producers' income and market share (from 33.5% in 1983 to 28.8% in 1985) resulted in injury to the domestic industry attributable to underselling by dumped and subsidized imports from Canada, Chile, Colombia, Costa Rica and Ecuador. On the same day, March 19, 1987, Commerce amended its anti-dumping duty margin on imports from Canada to 7.76%, revised from the 6.80% margin found in its January 20, 1987, final dumping determination. The amendment to the anti-dumping duty margin was made pursuant to the decision in *Badger-Powhatan v. United States* (U.S. Court of International Trade, April 2, 1986), in which Commerce was required to recalculate the weighted-average dumping margin for the remaining products by excluding that portion of the margin attributable to the products for which the ITC had made a negative injury determination.

6.2 Key Issues (Original Investigation)

The information contained in the petition was used to calculate the foreign market value because Commerce had determined that Canadian respondents had not provided full and complete responses to the anti-dumping duty questionnaires. As a result, there were few, if any, additional issues to be considered in the investigation.

6.3 Canadian Government Activity

Since a countervailing duty investigation on flowers from Canada was initiated simultaneously with the anti-dumping duty investigation, it is difficult to isolate Canadian government representations related solely to the anti-dumping investigation. That being said, the Canadian Embassy in Washington, D.C., in particular made the following interventions with U.S. authorities:

- The Embassy provided trade statistics to the ITC in an effort to correct data indicating that Canadian exports to the United States totalled approximately $250,000 annually. The actual figure was under $50,000; the difference was due to an "origin" misclassification by U.S. Customs.

- Representations were made to the U.S. Trade Representative in October 1987 suggesting that the finding in this case was inconsistent with U.S. obligations under the GATT in view of the negligibility of the imports involved. The issue was also raised on a number of occasions in the GATT Subsidies Committee in both 1986 and 1987.

6.4 Administrative Reviews

On June 18, 1993, the anti-dumping duty order was revoked. Since administrative reviews had not been requested for four successive years, Commerce concluded that the order was no longer of any interest to the parties.

7 Colour Picture Tubes from Canada (and Japan, Korea and Singapore)

7.1 Original Investigation

On November 26, 1986, a petition alleging the injurious dumping of colour picture tubes (CPTs) from four countries was filed by the following: the International Association of Machinists & Aerospace Workers; the International Brotherhood of Electrical Workers; the International Union of Electronic, Electrical, Technical, Salaried & Machine Workers, AFL-CIO-CLC; the United Steelworkers of America; and the Industrial Union Department of the AFL-CIO. On December 22, 1986, an investigation directed against all four countries was initiated.

On January 22, 1987, the ITC issued a preliminary affirmative determination, finding a reasonable indication that U.S. industry was materially injured by reason of allegedly dumped imports of colour picture tubes from the four countries. On June 30, 1987, after two postponements, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of imports from all four countries. On November 18, 1987, Commerce made its final dumping determination. This was followed by the December 22, 1987, release by the ITC of its affirmative final determination of injury. The ITC concluded that the U.S. colour picture tube industry was suffering material injury by reason of dumped imports from the four named countries. The finding was based on the following indicators: a decline in U.S. capacity and capacity utilization from 1985 to 1987, a steady decline in intra-company shipments, a rise in U.S. inventories, declines in the number of workers and hours worked, substantial operating and net losses over the entire period of investigation, a near doubling of imports, an increase in import market penetration from 8.2% to 12.4%, and a decline in average prices for all screen sizes between 1984 and 1986.

As noted, on November 18, 1987, Commerce had issued its final affirmative determination. However, counsel for the Canadian producer/exporter Mitsubishi

had pointed out several clerical and computer errors made by Commerce. As a result, a duty rate of 0.63% for Mitsubishi and all other exporters from Canada was assessed and published on January 7, 1988.

7.2 Key Issues

Petitioners argued that CPTs shipped and imported, together with all parts necessary for assembly into a complete television set or receiver (i.e. as a “kit”), should be included in the order. Commerce disagreed and excluded such CPTs from the scope of the order. Kits and fully assembled televisions were considered by Commerce to be a separate class or kind of merchandise if: (1) the CPT is “physically integrated” with the other television receiver components in such a manner as to constitute one inseparable amalgam; and (2) the CPT does not constitute a significant portion of the cost or value of the items being imported.

7.3 Canadian Government Activity

The Canadian Embassy in Washington, D.C., filed a diplomatic note challenging the allegation of injury caused by imports from Canada to the U.S. industry. The government also monitored the investigation and provided general advice to Canadian exporters.

7.4 Administrative Reviews

At the request of U.S. petitioners, there were two administrative reviews initiated with respect to the order as it pertained to Canada. They covered the 1993 and 1995 review periods, respectively. Both were terminated at the request of the petitioners before determinations were made.

7.5 Anti-Circumvention Inquiry

On August 27, 1990, upon the request of the petitioners, Commerce initiated an inquiry to determine whether Mitsubishi Electronics Industries Canada was circumventing the anti-dumping duty order by means of use of assembly facilities in Mexico. After a negative preliminary determination, on March 7, 1991, Commerce issued a negative final determination in the circumvention inquiry. At issue was the methodology Commerce used to measure the difference in value between the colour picture tubes imported into Mexico and the value of the finished television sets exported from Mexico to the United States. Commerce rejected the petitioners’ request to measure the value of a CPT as an incomplete television assembly. Commerce also found that differences in the value between the tube and the completed television set ranged from 55% to 70%. As a result, these differences in value were not found to be small, which is a necessary element for a finding of circumvention.

7.6 NAFTA Panel Review

On July 5, 1995, Mitsubishi filed a request for Panel Review under Chapter 19 of NAFTA. The panel was asked to consider Commerce's May 25, 1995, determination not to revoke the anti-dumping duty order. On June 14, 1996, the panel affirmed Commerce's determination not to revoke the order. The panel found that as five years had passed since the imposition of the order without an administrative review, Commerce was required, by regulation, to publish a Notice of Intent to Revoke by January 1, 1993, the month of the fifth anniversary of the publication of the order. If there were no objections at that point, the order would be lifted. However, Commerce did not publish the required notice until December 28, 1994. The trade union petitioners at that point objected to the revocation, and on May 25, 1995, Commerce published a Notice of Determination Not to Revoke the anti-dumping duty order. Mitsubishi argued that because no interested party objected by the last day of the month of the fifth anniversary, the order should have been revoked regardless of the fact that the necessary notice was not published. On the other hand, Commerce and the unions argued that notice of intent to revoke must be published in order to give interested parties an opportunity to object prior to revocation.

The panel based its decision on the language of the relevant regulations and the decision of the Court of Appeals for the Federal Circuit in *Kemira*. The regulations and the *Kemira* case both suggest that the complainant has the burden of demonstrating significant prejudice directed against its interests as a result of the error, a burden that was not discharged in the opinion of the panel. Furthermore, evidence suggested that the demonstrated vigilance of the unions would have resulted in a timely objection had the notice been published in a timely manner.

7.7 Sunset Review

On March 1, 1998, a five-year sunset review of the order was initiated. The ITC determined that it would conduct a full review, while Commerce conducted an expedited review. On August 27, 1999, Commerce made a final determination that revocation of the anti-dumping duty order would be likely to lead to the continuation or recurrence of dumping. In this context, Commerce accepted the petitioners' arguments that, in view of the fact that imports of subject goods fell steadily since the imposition of the order, they could not be imported without being dumped. However, on March 30, 2000, the International Trade Commission found that revocation of the order would not lead to continuing injury to the domestic industry. The order was therefore revoked.

8 Potassium Chloride from Canada

8.1 Original Investigation

On February 10, 1987, Lundberg Industries and New Mexico Potash Corp. filed a petition alleging injurious dumping of potassium chloride (potash) from Canada. On March 5, 1987, Commerce initiated an investigation.

On April 2, 1987, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of potassium chloride from Canada. On August 26, 1987, Commerce released an affirmative preliminary determination. Commerce also determined that critical circumstances did not exist as alleged by the petitioner, finding no evidence of massive imports over a relatively short period. In its preliminary determination, Commerce found preliminary margins of 51.90% for the Potash Corporation of Saskatchewan, 9.14% for International Minerals & Chemical Corporation, 29.27% for PPG/Kallum, 85.60% for Central Canada Potash, and 77.44% for Potash of America. The provisional all-others rate was 36.62%.

On January 19, 1988, Commerce suspended its investigation because an agreement had been reached with the Canadian producers/exporters accounting for substantially all of the known imports of potassium chloride from Canada. The Canadian producers/exporters agreed to revise their prices so as to eliminate the injurious effects of exports of the merchandise to the United States. At the request of the Olin Corporation (a U.S. interested party), Commerce excluded potassium chloride from Canada containing 0.5% or less of sodium chloride (“low-sodium potash”) from the scope of the investigation.

8.2 Canadian Government Activity

The Canadian Embassy in Washington, D.C., was very active in facilitating discussions among the parties regarding the conclusion of a suspension agreement. The Embassy also made several representations on the standing of the petitioners to request an investigation.

8.3 Sunset Review

On April 1, 1999, Commerce and the ITC initiated a five-year review of the suspended investigation in order to determine whether termination would be likely to lead to continuation or recurrence of dumping and material injury to the domestic industry within a reasonably foreseeable time. On May 28, 1999, Commerce published notice that it was terminating the investigation because no domestic interested party had responded to the notice of initiation. The order was therefore revoked.

9 Certain Welded Carbon Steel Line Pipe from Canada

9.1 Original Investigation

On February 11, 1987, a petition was filed by Tex-Tube Div., Cyclops Corp. (Houston, Texas) and Maverick Tube Corp. (Chesterfield, Missouri), all alleging the injurious dumping of certain welded carbon steel line pipe from Canada. Commerce initiated the investigation on March 10, 1987. On April 8, 1987, the ITC made a negative preliminary injury determination and the investigation was terminated. The ITC found that there was no reasonable indication that an industry in the United States was materially injured or threatened with material injury, or that the establishment of an industry in the United States was materially retarded, by reason of imports from Canada. In particular, Commissioners Lodwick and Rohr considered that although some of the essential economic indicators showed declines over the period of investigation, these declines had to be viewed in the context of the declining market for line pipe. Furthermore, the ITC found that the domestic industry enjoyed relative stability and increasing market share.

In addition, the data clearly indicated that Canadian imports were not the cause of any material injury that might have been suffered, being stable and low in absolute and relative terms with no indication of price suppression or depression. In fact, the small increases in imports were due to the shutdown of a number of U.S. mills and the close proximity of Canadian mills. Other alleged lost sales arose from special market circumstances, including industry-wide restructuring and a lengthy work stoppage at USX. In addition, ITC Chairman Liebler employed a rebuttable presumption (which was never rebutted) that cumulated import penetration of less than 2.5% of U.S. consumption was too insignificant to be a cause of material injury.

9.2 U.S. Court of International Trade Review

The ITC negative determination was appealed to the U.S. Court of International Trade. On May 24, 1988, the CIT rendered its decision in *Maverick Tube Corp. v. United States*, sustaining the negative determination.

9.3 Canadian Government Activity

Prior to initiation of the investigation, the Canadian Embassy in Washington, D.C., submitted a diplomatic note challenging the injury allegation by the petitioners.

10 Fabricated Structural Steel from Canada

10.1 Original Investigation

On January 11, 1988, the American Institute of Steel Construction, Inc. filed a petition on behalf of U.S. producers of fabricated structural steel, alleging injurious dumping of fabricated structural steel from Canada. On February 5, 1988, Commerce initiated an investigation.

On March 2, 1988, the ITC made a negative preliminary injury determination and the case was terminated. It found that there had been a 12% increase in domestic shipments from 1984 to 1986, and a 13% increase in the value of shipments from 1984 to 1985, followed by 3% increases in 1986 and 1987; there had also been a rise in capacity utilization, increased net sales, low import volumes, a recent rise in domestic producers' market share and correspondingly decreasing import market penetration. For these reasons the ITC held that there was no reasonable indication that the U.S. industry was materially injured by reason of allegedly dumped imports from Canada.

10.2 Canadian Government Activity

A diplomatic note was filed by the Canadian Embassy in Washington, D.C., prior to initiation, asserting that the petition did not contain sufficient information of injury or dumping to warrant an investigation.

11 New Steel Rails from Canada

11.1 Original Investigation

On September 26, 1988, Commerce and the ITC received a petition filed by Bethlehem Steel Corporation, alleging that dumped imports of new steel rails were injuring U.S. industry. On October 21, 1988, an investigation was initiated. A countervailing duty investigation was initiated at the same time.

On November 23, 1988, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of new steel rails from Canada. On March 13, 1989, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of subject imports. On August 3, 1989, Commerce issued a final affirmative determination.

On September 8, 1989, the ITC issued a final affirmative determination with respect to the threat of material injury. Based upon net income and operating losses, declining employment, declining wages between 1986 and 1988, a negative return on assets throughout the period of investigation and a negative cash flow through 1988, the ITC found a threat of material injury from Canadian imports.

The ITC did not, however, make any finding with respect to present material injury, despite a substantial increase in imports and market share. There was little evidence of price underselling as the initial Canadian price in most instances was in the mid-range of U.S. domestic bid prices. On September 15, 1988, an anti-dumping duty order was issued with margins as set out below. Because of the ITC finding that U.S. industry was threatened with material injury, all provisional anti-dumping duties collected subsequent to the determination of preliminary dumping were refunded.

Manufacturer	Estimated Dumping Margins
Algoma Steel Corp. Ltd.	38.79%
All Others	38.79%

11.2 Key Issues (Original Investigation)

Commerce rejected the information provided by Algoma with respect to cost of production, and instead used best information available as submitted by the petitioner. Specifically, Commerce alleged that Algoma misinterpreted Commerce's questionnaire and provided the wrong cost data, and that the company developed unverifiable and undocumented information for the investigation rather than using an existing cost accounting system. Furthermore, the reported costs were not tied to the company's financial records and could not be reconciled with the company's actual inventory costs. Algoma categorically denied all of Commerce's allegations, contending that it used the most reliable information available and kept Commerce fully informed of its approach throughout the response and verification process.

11.3 Canadian Government Activity

Since a countervailing duty investigation regarding new steel rails from Canada was initiated simultaneously with the anti-dumping duty investigation, it is difficult to isolate Canadian government representations related solely to the anti-dumping investigation. The Canadian Embassy in Washington, D.C., in particular made a number of interventions with U.S. authorities:

- On October 13, 1988, a diplomatic note was filed with U.S. authorities concerning the anti-dumping investigation. It was the Canadian position that U.S. import statistics used by Commerce and the ITC contained information on scrap rail. This overestimated sales and undervalued prices. The note also argued that declining use of rail service affected demand.

- In January 1989, representations were made objecting to Commerce's consideration of late allegations by the petitioner.
- In correspondence dated September 18, 1989, the Embassy suggested that Algoma had not been given an opportunity to address any alleged or apparent deficiencies uncovered during or after verification.

11.4 Canada–U.S. Free Trade Agreement Panel Review (Dumping)

On September 1, 1989, both Algoma Steel Corp. and Sydney Steel Corp. filed a request for an FTA Panel Review of the ITA's final affirmative determination of dumping. On August 30, 1990, the binational panel affirmed Commerce's final dumping determination. Details on the specific issues under consideration by the panel follow.

11.4.1 Commerce's Rejection of Algoma's Cost Data

Commerce had rejected the cost of production (COP) information submitted by Algoma and used best information available to construct a home market value. Commerce alleged that Algoma had misinterpreted Commerce's questionnaire, therefore providing cost data based on unverifiable and undocumented information as opposed to using a standard cost accounting system. Furthermore, Commerce alleged that costs reported by Algoma were not tied to the company's financial records, were unreconcilable with the company's actual inventory costs and were based on data for times outside the period of investigation.

Algoma had categorically denied all of Commerce's allegations, contending that it used the most reliable information available and had kept Commerce fully informed of its approach throughout the response and verification process.

The panel found that Commerce could not verify that Algoma's reported costs were accurate reflections of the actual costs of producing each product. In effect, Algoma's inability to provide documentation establishing how these standard costs were derived constituted non-compliance with an information request, which in turn was judged to be sufficient reason to reject the submission. The panel therefore found that Commerce had acted in accordance with law in rejecting Algoma's standard cost data as the basis for costs of production.

11.4.2 The Issue of Notice

Algoma asserted that Commerce had failed to provide timely notice that its cost information data was inadequate. The panel found that there was a great deal of confusion surrounding the issue but that Algoma had adequate notice that it was required to produce verifiable cost data. Algoma was also made aware that if the

data did not conform to the request, Commerce would resort to best information available. Furthermore, the panel rejected Algoma's claim that Commerce did not give the company a reasonable opportunity to correct the alleged inadequacies, noting that in its brief Algoma itself conceded that verification of a second cost submission would have been impossible.

11.4.3 Selection of the Best Information Available

Algoma contended that after Commerce rejected its cost information, Commerce should have used inventory values as the most reasonable form of best information available rather than relying on the petitioner's data. The panel found no basis for reversing Commerce's selection of the petitioner's data. Here, it was noted by the Panel that best information available does not need to be the "best" of all information available but need only be supported by substantial evidence on the record. Algoma presented no evidence that cast doubt on the reliability of the petitioner's data, and had itself detailed problems with using the inventory values as a basis for foreign market value.

11.5 Canada–U.S. Free Trade Agreement Panel Review (Injury)

On October 11, 1989, a request for a review of the ITC final affirmative determination of injury was filed by Sydney Steel Corp. On August 13, 1990, the binational panel affirmed the ITC's final affirmative threat of injury and negative material injury determinations, including cumulation of dumped and subsidized imports (Sydney Steel). Other issues considered by the panel included the following:

11.5.1 Whether the ITC May Consider Threat of Material Injury

Algoma argued that the U.S. legislation mandates the ITC to find that either a U.S. industry is materially injured or that a U.S. industry is threatened with material injury, i.e. that it cannot find both. Therefore, if the ITC finds that an industry has been materially injured by causes other than the subject imports, the ITC is precluded from finding that the industry is threatened with material injury.

The panel found that while Algoma's argument could be supported by the statutory language, it was not supported by legislative history and Congressional intent, which is to provide relief from dumped or subsidized imports before material injury actually occurs. The panel also held that an affirmative finding by the ITC that an industry in the United States is experiencing material injury, without regard to its causation, does not preclude consideration of whether the industry is threatened with material injury.

11.5.2 ITC Threat Determination

For a finding of threat of material injury to be legitimate when there is no finding of material injury by reason of imports, the record must reveal, in the absence of

any evidence of deterioration in the condition of the domestic industry, the effect of the imports on that industry. In order to prevail, the appellants have the burden of demonstrating that the threat finding is not based on substantial evidence of record or is not otherwise in accordance with law. The panel found the ITC reasoning to be adequate in this regard. The panel also found that it had not been demonstrated that the ITC had erred in determining that the unused capacity of the Canadian producers had increased substantially. Furthermore, the panel agreed with the ITC finding that over the period of investigation, an increasing proportion of Canadian production was dedicated to export to the United States, and market conditions in Canada would continue to exert pressure to increase exports to the United States. In addition, the panel rejected Algoma's argument that imports must rise in order for there to be a valid determination that there is a threat of material injury.

11.5.3 ITC Negative Injury Determination

Petitioner Bethlehem Steel challenged the ITC finding that any material injury was not by reason of the subject imports. The panel affirmed the determination of the ITC. Because the ITC did not explain its findings as required by U.S. law, Bethlehem asserted that a remand to the ITC was required. The panel agreed with the ITC position that there is no Congressional intent to require the Commission to discuss every factor or argument presented in an investigation. The panel found that there was no inconsistency in the ITC opinion regarding the possibility of future price suppression and price depression, and the absence of present causation of material injury.

Bethlehem further alleged that the pricing data reported by railroads, and later used by the ITC, were inconsistent with the pricing data reported by producers. The panel found that there was nothing unusual about conflicting data of record in an investigation; so long as the ITC made reasonable choices among the conflicting data, the fact that the data might support other choices in a new review was immaterial. Bethlehem asserted that the ITC had committed errors in its analysis of the volume of imports and in the market share held by the Canadian imports, and that it had failed to take into account the margins of dumping and subsidization. On the latter point, the panel found that U.S. law permits the ITC to examine the margins of dumping and subsidization, but does not require it to do so.

11.5.4 Changed Circumstances / Administrative Reviews

In November 1990 and May 1993, administrative reviews for the periods 1989–1990 and 1991–1992 were initiated and then terminated at the request of the respondent Algoma. In 1996, two changed circumstances reviews were conducted. One resulted in a determination to revoke the anti-dumping order as it applies to a specific variety of new steel rail (100 pounds per yard [100ARA-A]), excepting light rail. The other review was terminated after a scope clarification was issued.

11.6 Sunset Review

On June 1, 1999, Commerce and the ITC initiated a sunset review of the anti-dumping and countervailing duty orders on steel rails from Canada. Both Commerce and the ITC determined that they would conduct expedited reviews since neither body received a substantive response from any respondent party. On December 29, 1999, Commerce made a final determination that revocation of the anti-dumping duty order would be likely lead to the continuation or the recurrence of dumping. This determination was based upon a finding that although Algoma had ceased to produce new steel rail, Sydney Steel still was doing so; Commerce noted that about 40% of Sydney Steel's production went into rail, and that its five-year business plan called for an increase in rail production and rail exports.

Furthermore, Commerce noted that there was a significant drop in exports to the United States after the order and that there had been no increase since, suggesting that Sydney could not export to the United States without dumping. As for the magnitude of the margin that Commerce took into account, the original margin of 38.79% was used because there had been no administrative review concluded since the order went into force in 1989.

On January 13, 2000, the ITC made an affirmative determination that revocation of the order would be likely to lead to a continuation or recurrence of injury to the U.S. industry by reason of dumped imports. The order was therefore continued.

12 Thermostatically Controlled Appliance Plugs and Internal Probe Thermostats from Canada (and Hong Kong, Japan, Malaysia and Taiwan)

12.1 Case History

On April 15, 1988, Triplex Inter Control (USA) Inc. of St. Albans, Vermont, filed a petition alleging injurious dumping of appliance plugs and internal probe thermostats from Canada. On June 8, 1988, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of appliance plugs and internal probe thermostats from the named countries.

On September 28, 1988, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of imports from all five named countries. On December 13, 1988, Commerce released an affirmative final determination with the following anti-dumping margins for imports from Canada.

Manufacturer/Exporter/Seller	Estimated Dumping Margins
ATCO Controls	9.27%
All Others	9.27%

On February 1, 1989, the ITC released a negative final determination. Despite the petitioner's mixed record of profitability during the period of investigation, the domestic production of thermostats increased from 1.70 million units in 1985 to 2.32 million in 1987, and capacity utilization rose from 38% in 1985 to 52% in 1987; also increasing were wages, hours worked and productivity. This led the ITC to rule that the domestic industry was not threatened by reason of dumped imports from Canada. The ITC also found that, as the majority of the domestic producers also purchased the subject imports themselves and/or did not compete with the imports for open market sales, it could not conclude that direct competition existed between importers and domestic manufacturers.

12.2 Key Issues

Commerce rejected the respondents' request for a suspension agreement, finding that such an arrangement would not be in the public interest, nor would effective monitoring of the suspension agreement be practicable. ATCO stated that its Canadian sales fell into two categories: (1) certain models meeting Canadian technical specifications were sold to Canadian appliance manufacturers and packaged with small appliances to be sold in Canada; and (2) other models meeting U.S. specifications were sold to Canadian appliance manufacturers and packaged with small appliances to be sold in the United States. Commerce refused ATCO's request to treat the second category as sales to the United States for fair market value purposes because the subject merchandise as such was sold in Canada, while the products ultimately sold to the United States were small appliances, and thus were merchandise not covered by this investigation.

12.3 Canadian Government Activity

A diplomatic note dated May 4, 1988, expressed the Canadian government's concern over the apparent low initiation standard. The note also objected to the potential use of constructed value in anti-dumping investigations when Canadian home market prices were available. The government also assisted the company in its unsuccessful attempt to obtain a suspension agreement.

13 Generic Cephalexin Capsules from Canada

13.1 Case History

On October 27, 1988, Commerce and the ITC received a petition filed by Biocraft Laboratories of Elmwood Park, New Jersey, and an investigation was initiated. On December 12, 1988, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of generic cephalexin capsules from Canada.

On April 12, 1989, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of imports. On June 26, 1989, Commerce released an affirmative final determination with the following rates:

Manufacturer/Exporter/Seller	Estimated Dumping Margins
Novopharm, Ltd.	7.50%
All Others	7.50%

On August 16, 1989, the ITC released a negative final determination. The ITC concluded that—given increased competition between generic cephalexin producers, increased consumption, dramatically increased capacity after 1987, increased employment and profitability—the domestic industry had not suffered material injury as a result of dumped imports from Canada. The Canadian producer was found to have higher levels of capacity utilization than its U.S. counterparts, with no evidence of intended product shifting. Evidence of mixed selling with trends toward overselling provided no proof of price suppression or depression.

13.2 Key Issues

The petitioner argued that because of the dominant buying role played by the Canadian government in the home market (i.e. sales to government agencies and hospitals), such sales should be excluded from face market value calculation because they were not made under "free market conditions." Commerce rejected this argument, finding that there is no foundation for finding "state control" of only certain sales to certain purchasers in a market economy.

The respondent argued that its payments to a distributor in its home market should be categorized as rebates, not commissions as originally reported. Commerce agreed with the respondent because the payment to the distributor was a fixed percentage of the original invoice and was made regardless of whether the merchandise was resold.

The respondent requested Commerce to make allowances for quantity discounts. U.S. regulations require the respondent to prove that it has granted comparable quantity discounts on at least 20% of its home market sales, and to show that the discounts are related to economies of scale associated with larger production quantities. Commerce chose to compare sales of home market buying groups and government agencies with sales to purchasers of large quantities in the United States, and did not apply a quantity discount adjustment.

The petitioner argued that Commerce should exclude variable factory overhead, and direct labour and materials costs from the adjustment for physical differences between merchandise sold in the United States and in the home market. Commerce adjusted only for the net variable costs associated with differences in the costs of materials, finding that the respondent was unable to demonstrate that other cost variables were associated with physical differences in merchandise.

13.3 Canadian Government Activity

The Canadian Embassy in Washington, D.C., filed a diplomatic note dated November 14, 1988, with U.S. authorities expressing the view that the petitioner did not represent the industry and that the petition did not contain sufficient evidence of injury to the U.S. industry. Embassy officials wrote in July 1989 urging the ITC not to cumulate Canadian exports with those of Israel and Portugal,[152] arguing that cumulation without prior investigation was in violation of the GATT.

14 Limousines from Canada

14.1 Case History

On July 24, 1989, Southampton Coach Works, Ltd. of Farmingdale, New York, filed a petition alleging injurious dumping of limousines from Canada. Commerce initiated an investigation. A concurrent countervailing duty investigation was also initiated. On September 13, 1989, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of limousines from Canada.

On January 9, 1990, Commerce issued a preliminary affirmative determination and ordered a suspension of liquidation of imports. On March 26, 1990, Commerce released an affirmative final determination with the following rates:

152 Biocraft also petitioned for an investigation into Portugese and Israeli exports. This was terminated on August 9, 1989.

Manufacturer/Exporter/Seller	Estimated Dumping Margins
A.H.A. Manufacturing, Ltd.	5.76%
All Others	5.76%

In response to a request from the petitioner, the investigation was terminated on April 9, 1990.

14.2 Key Issues

The petitioner contended that critical circumstances existed because the respondent had entered receivership following the preliminary determination and was likely to liquidate existing inventory at "fire sale" prices. However, Commerce found that none of the three necessary conditions for a finding of critical circumstances existed.

AHA claimed that those limousines it manufactured using U.S.-origin Lincoln Town Car and Cadillac chassis were outside the scope of the investigation because they were "non-Canadian" in origin. Commerce found that AHA performed a sophisticated limousine conversion process, which transformed the base vehicle into a new and different article of merchandise with an increase in value of over 100%.

AHA contended that its U.S. fleet sales were made at the same level of trade as sales to distributors in Canada. However, Commerce found that the fleet customers were a type of end-user, while distributors acted as wholesalers and therefore were at a different level of trade. As such sales made up a small proportion of AHA's U.S. sales and there was a lack of comparable sales in Canada, they had not been included in the final determination.

The petitioner argued that Commerce should disallow deductions from the foreign market price for expenses related to AHA's after-sales service plan and after-sales rebates. Commerce found the service plan to be part of the total package purchased by the customer and therefore directly related to the sales under consideration, while the rebates were consistent with AHA's practice prior to the petition and did not constitute an attempt to circumvent the anti-dumping investigation.

14.3 Canadian Government Activity

As this was also a countervailing duty investigation, it is difficult to isolate Canadian government representations related solely to the anti-dumping investigation. However, in its diplomatic note of April 9, 1989, the Canadian Embassy in Washington, D.C., questioned aspects of the petition as it applied to anti-dumping.

15 Magnesium from Canada (and Norway)

15.1 Case History

On September 5, 1991, the Magnesium Corporation of America filed a petition alleging the injurious dumping and subsidization of imports of magnesium from Canada, as well as dumping from Norway. On September 25, investigations were initiated.

On October 30, 1991, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of Canadian magnesium. On February 20, 1992, Commerce issued an affirmative preliminary determination. Norsk Hydro Canada Inc. (NHCI) did not complete a portion of Commerce's questionnaire, resulting in the use of best information available as provided by the petitioner. For the other Canadian respondent, Timminco, home market sales were considered insufficient to determine foreign market value; accordingly, sales to a third country, Japan, were used to establish fair market value.

On July 13, 1992, Commerce issued an affirmative final determination with respect to Canadian producers of pure magnesium. The portion of the investigation relating to alloy magnesium was terminated because the evidence supporting the petitioner's dumping allegations was found to be insufficient. In the course of its investigation, Commerce determined that pure and alloy magnesium constituted two separate classes of merchandise. Commerce determined that similar channels of distribution existed for the two products, but that the product characteristics, ultimate uses and customer expectations demonstrated that pure and alloy magnesium were two distinct classes of merchandise.

Commerce found that critical circumstances existed with regards to NHCI, as the company's dumping margin exceeded 25% and there existed evidence of a massive surge in NHCI's imports of pure magnesium over a relatively short period of time. The final anti-dumping duty margins were determined as follows:

Manufacturer/Producer/Exporter	Estimated Dumping Margin
Timminco Ltd.	00.00% (excluded)
Norsk Hydro Canada Inc. (NHCI)	31.33%
All Others	31.33%

On August 26, 1992, the ITC issued an affirmative final injury determination. Unlike Commerce, the ITC determined that pure and alloy magnesium constitute one like product, not two distinct products. This conclusion was based on a finding of physical similarities, similar core production processes and similar

distribution channels. It was found that the volume and market penetration of the subject imports increased dramatically during the period of investigation. Coincident with this large increase, U.S. producers' domestic shipments and market share declined steadily in both quantity and value. Correspondingly, the prices for both U.S.- and Canadian-produced magnesium steadily declined during the period of investigation.

With regard to critical circumstances, the ITC was required to determine whether an imposition of duties, applied on a 90-day retroactive basis from the date of the final determination, was necessary to prevent the recurrence of material injury caused by a massive import surge over a relatively short period of time. While such a surge occurred in the three-month period beginning with the month the petition was filed (September 1991), the retroactive imposition of duties would not have covered most of the imports that accounted for the post-petition surge. Therefore, the ITC concluded that the effectiveness of the anti-dumping order on pure magnesium would not be materially impaired by a failure to impose retroactive duties, and it accordingly made no determination.

15.2 Key Issues

The petitioner represented only 22% of the U.S. magnesium industry and there was no showing of support by other industry members. Despite these factors, Commerce decided that the petition was filed "on behalf of" the domestic industry. Commerce asserted that neither statute nor legislative history indicated the degree of support that must be shown before Commerce may accept a petition as filed on behalf of domestic industry. Furthermore, judicial decisions have in the past upheld Commerce's interpretation of "on behalf of" as a permissible interpretation of the statute. (This issue would be settled with the implementation of the Uruguay Round Agreements Act on January 1, 1995.)

Norsk Hydro argued that pure and alloy magnesium should be separated into two classes of merchandise. According to Norsk Hydro, its argument was supported by the factors typically considered by Commerce when making a class or kind determination: (1) physical appearance and characteristics; (2) ultimate use; (3) channels of distribution; and (4) customer perception. The petitioner maintained that pure and alloy magnesium should remain one class or kind. While the two-class argument was successful on the Commerce side, the ITC rejected it for purposes of determining injury.

15.3 Canada–U.S. Free Trade Agreement Panel Review (Dumping)

On August 10, 1992, NHCI filed a request for a Binational Panel Review of Canada's final dumping determination. The company identified constructed value calculations for: material costs; depreciation expenses; average wage rates; and selling, general and administrative expenses. After the parties filed their respec-

tive briefs for this review, the panel remanded the final determination back to Commerce, upon Commerce's request, in order to address the issues raised by NHCI. On May 27, 1993, Commerce filed its Redetermination Pursuant to Remand, in which the anti-dumping duty was reduced from 31.33% to 21%. NHCI was satisfied with respect to redetermined material costs and depreciation expenses, and restricted its appeal to the appropriate wage rates and SGA attributed to NHCI. Best information available was used to calculate these expenses as NHCI had failed to complete the relevant parts of Commerce's questionnaire. NHCI did not challenge the use of BIA but argued that Commerce should adjust certain elements in the petitioner's constructed value calculations because they were not reasonably quantified or valued.

On October 6, 1993, the panel upheld Commerce's BIA methodology, stating that since NHCI chose not to answer the questionnaire, Commerce was justified in making a "reasonable adverse inference" with regard to NHCI's costs. Furthermore, a determination based on BIA should be upheld if there was reasonable evidentiary support in the record for the BIA.

15.4 Canada–U.S. Free Trade Agreement Panel Review (Injury)

On September 25, 1992, a Binational Panel Review of the ITC's final affirmative injury determination was requested by NHCI and the Government of Quebec. The Government of Canada subsequently filed a notice of appearance in support of Quebec and NHCI, as the review also related to the simultaneous countervailing duty investigation.

On August 27, 1993, the panel concluded that pure and alloy magnesium constituted two classes of merchandise, and that the record did not support the ITC's determination that there are significant physical and price similarities between pure and alloy magnesium. Furthermore, the existence of similar distribution channels was found to be of no significance. The panel did concur with the ITC's determination with regard to the similarities of the core production processes, but it found this similarity insufficient to reasonably conclude that only one like product existed. The panel also took issue with the ITC's alternative conclusion that, even if two separate products existed, it would have reached an affirmative material injury determination with respect to each of these industries; the panel held that the conclusion was not supported by adequate analysis concerning the impact of imports on the domestic industry. The determination was remanded to the ITC for separate injury determinations for pure and alloy magnesium.

On January 27, 1994, the panel upheld the ITC's remand finding of injury with regard to pure magnesium. The ITC also found, on remand, that there was no injury with respect to alloy magnesium as it applied to dumping. The panel found that the ITC's determination, which stated that there was an absolute increase in imports from Canada relative to consumption and a steady decline in prices for both U.S.- and Canadian-produced alloy magnesium, was adequately stated and

supported by substantial evidence. With regard to the impact of imports on domestic producers, the ITC based its determination on several factors: (1) the injury caused by imports from Canada to the U.S. industry as indicated by a high degree of substitutability between imported and domestic magnesium; (2) the relatively inelastic demand for the product; and (3) the significant increase in such imports, coinciding with a decline in market share and revenues for U.S. producers. The complainants argued that non-price factors in the market were responsible for the growth in imports from Canada and the difficulties experienced by U.S. producers. The panel conceded that there was evidence to support this position, but it held that the ITC had properly acted within its discretion in finding that non-price factors did not negate the significance of price in buyers' purchasing decisions.

15.5 Administrative Reviews

Seven administrative reviews have been completed. During the first two administrative reviews, cumulatively covering the period 1992–1994, no U.S. sales were made and thus Commerce determined that there was no basis for re-assessing duties on these entries. Margins for the last three administrative reviews, cumulatively covering the period 1994–1999, were found to be in the *de minimis* range for NHCI.

Based on three consecutive years of no dumping, NHCI requested that the order be revoked with respect to its exports of pure magnesium. On March 16, 1999, in its final determination of the administrative review covering the period 1998–1999, Commerce concluded that NHCI did not qualify for revocation of the order on pure magnesium. Commerce determined that NHCI did not sell the subject merchandise in the United States in commercial quantities in any of the three years cited by NHCI to support its request for revocation. Specifically, NHCI made one sale in two of the relevant years and two sales in the other. A volume of one or two sales to the United States during a one-year period was not consistent with NHCI's selling activity prior to the order, nor was it consistent with NHCI's selling activity in the home market. The abnormally low level of sales activity did not provide a reasonable basis for determining that the discipline of the order was no longer necessary to offset dumping.

The last administrative review was conducted in May 2000; the period examined was August 1, 1998, to July 31, 1999. Commerce determined that magnesium sales from NHCI had not been made below normal value.

15.6 Sunset Review

On August 2, 1999, Commerce and the ITC initiated a sunset review of the antidumping and countervailing duty orders on pure and alloy magnesium from Canada. Both Commerce and the ITC determined that they would conduct a full review. On July 5, 2000, Commerce made a final determination that a revocation

of the countervailing and anti-dumping duty orders would be likely to lead to the continuation or recurrence of subsidization and dumping.

With respect to dumping, Commerce determined that Norsk Hydro had eliminated dumping over a period of four consecutive administrative reviews, but it also noted that imports of pure magnesium had declined by 97% in the first year of the order from import levels of pre-order years, and since then had never reached more than 10% of pre-order levels. In accordance with statute and regulation, Commerce found that the existence of a zero dumping margin did not require Commerce to find that revocation would not lead to continuation or recurrence of dumping. As for the 21.0% duty rate that it reported to the ITC, Commerce noted that it was directed by the Statement of Administrative Action (Uruguay Round Agreements Act of 1994) to select a rate reflecting the behaviour of exporters without the discipline of the order. Since import volumes had declined so significantly as of the date of the order and since the dumping margin from the original investigation was the only margin calculated for a period in which Norsk was shipping commercial quantities, Commerce concluded that it was necessary to select that specific margin.

As directed by statute, the ITC investigated the likely impact of subject imports on the domestic industry if the orders were revoked. As in the original investigation, the ITC segregated its examination into pure and alloy magnesium, although it did note that both pure and alloy magnesium are very similar and are produced at common production facilities, and that production can easily be switched between the two.

15.6.1 Pure Magnesium

The ITC found that revocation of the anti-dumping and countervailing duty order as it applied to pure magnesium would be likely to lead to continuation or recurrence of injury to the domestic industry. The ITC noted that there had been significant changes in the U.S. industry with the exit of the largest producer, Dow Chemical, from the market, leaving only two producers, Northwest Alloys and the petitioner, Magcorp. However, the ITC also found that conditions in the U.S. market, which it described as price-competitive, had not changed since the original investigation. Further, it found that while imports from third countries had increased, a number of factors (including availability, price and quality) limited the ability of such imports to be substitutable for North American products. The ITC also noted the imminent entry of Canadian firm Magnola into the market, which at full capacity would be the largest North American producer, and it observed that Magnola had already began to solicit U.S. customers. Regarding likely volume of imports, the ITC noted the significant market share that Norsk Hydro was able to achieve prior to the order, the substantial additional capacity to be added by Magnola and Norsk (with plans by the latter to double capacity within two years), the two companies' ability to shift from alloy to pure magnesium, and their proximity to the U.S. market; according to the ITC, all these

factors supported the view that imports would increase significantly absent the order. Regarding price, the ITC noted the significant price declines prior to the imposition of the original orders, the likelihood that Magnola would lower prices to gain U.S. customers, and the recent trend toward contracts of no more than one year. All of these trends led the ITC to conclude that revocation would be likely to lead to underselling and price suppression. As for the impact of these factors on the U.S. industry, which had made recent efforts to improve its competitiveness, the ITC concluded that price and volume declines by U.S. producers, combined with a stagnant U.S. market for pure magnesium, would have a negative effect on the industry's production, sales and revenue levels, as well as its ability to raise capital and employment levels.

15.6.2 Alloy Magnesium

The ITC found that the flexibility of Canadian producers, enabling them to switch from pure to alloy magnesium, was such that if the order on one product was revoked, they would simply increase exports of that product. The significant market presence of subject imports from Canada, the stated focus of both Norsk and Magnola on the alloy market, their ability to shift production from one product to another, their size and proximity all argued for the conclusion that there would be a significant increase in imports from Canada if the order was revoked. Regarding price, the ITC repeated much of the reasoning used in its analysis for the pure magnesium market but added that a small change in pricing would have an effect. As for the overall impact of imports from Canada, the ITC concluded, as it did regarding pure magnesium, that revocation of the orders would result in losses in sales by the domestic industry and price suppression in the U.S. market. Revocation, the ITC concluded, would adversely impact the industry's production, sales and revenue levels, which in turn would have an adverse effect on the industry's profitability, its ability to raise capital, and ultimately employment levels.

Based on this analysis, the ITC made an affirmative determination and the order was continued.

15.7 Canadian Government Activity

The Government of Canada invested most of its efforts in helping the Government of Quebec and Norsk Hydro to present a defence of the government programs involved in the concurrent countervailing duty investigation. It also assisted in attempts to negotiate a suspension agreement and to have a changed circumstances investigation initiated. In the years after the order went into effect, the Government of Canada made a number of specific representations regarding elements of the various administrative reviews conducted by Commerce on Norsk Hydro.

16 Ball Bearings, Mounted or Unmounted, from Canada (and Argentina, Austria, Brazil, Hong Kong, Hungary, Mexico, People's Republic of China, Poland, Korea, Spain, Taiwan, Turkey and Yugoslavia)

16.1 Case History

On February 13, 1991, Commerce and the ITC received a petition filed by Torrington Co. of Torrington, Connecticut, alleging injurious dumping of ball bearings from Canada. After investigation was initiated, the ITC released a negative preliminary determination on April 10, 1991, and the investigation was subsequently terminated with respect to all countries. The ITC found that increases in shipments, employment, compensation and consistent profitability demonstrated that the U.S. ball bearing industry was in good condition. This was confirmed by the lack of any serious erosion of the industry's market share despite significant increases in imports. Moreover, the industry was able to devote increasing sums to capital and R&D expenditures, and had significantly increased capacity in recent years. On the basis of these factors, the ITC concluded that there was no reasonable indication of material injury to the domestic industry.

For the purposes of threat analysis, the ITC did not cumulate imports from the 14 subject countries, citing the lack of uniformity in pricing trends and the extremely low market shares of the majority of the countries. Canadian penetration of the U.S. market decreased during the period of investigation, and the prices of imported Canadian ball bearings generally increased substantially. In light of the downward trend in market penetration, high capacity utilization rates and the lack of a discernible effect on U.S. prices, the ITC concluded that there was no reasonable indication of a threat by reason of dumped imports from Canada.

16.2 Canadian Government Activity

The Canadian Embassy in Washington, D.C., filed a diplomatic note supporting the position that there was no evidence of harm caused to the U.S. industry by imports from Canada.

17 Nepheline Syenite from Canada

17.1 Case History

On July 12, 1991, Commerce and the ITC received a petition filed by Feldspar Corporation of Asheville North Carolina. After an investigation was initiated, the ITC issued a preliminary affirmative determination on September 5, 1991, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of nepheline syenite from Canada. On September 19, 1991, Unimin, the respondent, proposed a suspension agreement. On November 20, 1991, Unimin submitted a draft suspension agreement for Commerce to consider. A suspension agreement was not ultimately concluded.

On December 27, 1991, Commerce issued a preliminary affirmative determination and ordered a suspension of liquidation of imports. Pittsburgh Corning, an interested party in the investigation, claimed that the petitioner lacked standing because it was not a manufacturer of a like product, despite the ITC's finding to the contrary. Commerce agreed that it was not bound by the ITC's determination of like product but it found no basis to disagree with the ITC's determination.

On March 17, 1992, Commerce released a final affirmative determination. Commerce amended the scope of the investigation after soliciting comments from interested parties. The following margins were issued:

Producer/Manufacturer/Exporter	Weighted Average Margin
Unimin Corp.	9.36%
All Others	9.36%

On May 6, 1992, the ITC released a negative final determination, and the investigation was subsequently terminated. A portion of the hearing was held in camera because most of the information collected by the ITC was business proprietary information. Because of the presence of "appropriate circumstances" (as previously identified by Commerce), the ITC conducted a regional industry analysis. Such circumstances involve injury in an industry located in an area in which production is necessarily isolated and insular. Canadian imports were found to be sufficiently concentrated within the Northeast Corridor region to warrant a regional industry injury determination. Unlike the case of a national industry analysis, in order for the ITC to arrive at a finding of injury, "all, or almost all" of the production within the region must be materially injured by reason of the subject imports.

Despite the historically high volume of imports in the Northeast Corridor region, there was no indication that dumped imports depressed or suppressed domestic prices, reduced domestic volume or resulted in lost sales. Therefore, the regional

industry was not materially injured by reason of dumped imports. There was found to be no threat of material injury to the regional industry because Unimin's share of the regional market had declined overall, while exports to non-U.S. markets accounted for an increasing share of its shipments. Nothing on the record indicated that there would be a change in this consistent trade pattern. Furthermore, Unimin's production capacity had increased slightly while its inventory levels were nearly non-existent throughout the period of investigation. There was no indication that future imports would have a discernible adverse impact on domestic prices.

17.2 Key Issues

The petitioner asserted that commission payments made by Unimin to its U.S. parent should be the basis for a price adjustment because they were directly related to the sales in question. Petitioner argued that the payments met the arm's-length transaction test set by the U.S. Court of Appeal, which requires consideration of the full circumstances of the transaction in question. Commerce did not deduct the commission in question as there was no evidence to suggest that the commission was in fact an arm's-length payment for services rendered. Commerce rejected the petitioner's argument that Unimin improperly allocated leased railcar costs by allocating the total lease cost over total tonnage shipped, rather than by allocating total cost over the number of days that leased cars were in service. Commerce concluded that it would be unduly burdensome to require Unimin to provide the information in the manner proposed by the petitioner.

17.3 Canadian Government Activity

The Canadian Embassy in Washington, D.C., filed a diplomatic note supporting the position that there was no evidence of injury to the U.S. industry caused by imports from Canada.

18 Steel Wire Rope from Canada

18.1 Case History

On June 28, 1991, the Committee of Domestic Steel Wire Rope and Speciality Cable Manufacturers filed a petition alleging injurious dumping of steel wire rope from Canada.

After an investigation was initiated, on August 21, l991, the ITC released a negative preliminary determination and the investigation was subsequently terminated. The ITC found that capacity, production, capacity utilization, domestic shipments and employment indicators were all basically steady throughout the review period, with slight dips and rises from year to year. At the same time, the domestic industry's financial indicators improved steadily. Although a comparison of the interim 1990 and 1991 data showed some downward movement, these

changes were marginal and seen as typical of the slight up-and-down trend during the three-year period of investigation.

Furthermore, the ITC found no causal link between the condition of the domestic industry and the cumulated subject imports from Canada and the six other countries subject to concurrent investigations. The cumulated market share of the subject imports was relatively small and any increase during the period of investigation was attributable to displacement of Korean products, which were not subject to investigation. The ITC concluded that although there was evidence of underselling by the subject imports, there was no reasonable indication of material threat by reason of allegedly dumped imports from Canada. There was no indication that the imports would have a depressing or suppressing effect on U.S. prices, which in fact increased during the period of investigation. Furthermore, the record did not indicate that there had been sales lost, or revenues reduced, as a result of Canadian imports.

18.2 Key Issues

Based on the commonality of production processes and facilities, the overlap of general uses, and employee/producer/customer perceptions, the ITC determined that the like product consisted of all steel wire rope regardless of composition or end use. The domestic industry was found to be composed of all producers of steel wire rope.

18.3 Canadian Government Activity

The Canadian Embassy in Washington, D.C., filed a diplomatic note supporting the position that there was no evidence of injury to the U.S. industry caused by imports from Canada.

19 Potassium Hydroxide, Liquid and Dry, from Canada (and Italy and United Kingdom)

19.1 Case History

On January 2, 1992, LinChem, Inc. of Ashtabula, Ohio, filed a petition alleging injury from dumped imports from three countries. After an investigation was initiated, on February 26, 1992, the ITC released a negative preliminary determination and the investigation was subsequently terminated.

The ITC found that increases in domestic production, shipments, consumption, compensation and overall profitability demonstrated that the U.S. industry was in good condition. The expansion by some domestic producers increased competition and had an adverse effect on other domestic potassium hydroxide producers. Moreover, the industry overall had devoted significant sums to capital expenditures.

The ITC found that even if the domestic industry had been injured, such injury was not "by reason of" cumulated allegedly dumped imports from Canada, Italy and the United Kingdom. Most important, market penetration levels were very low and subject imports were not significant in volume. In addition, the collected pricing data did not show any significant import underselling. On the basis of these factors, the ITC concluded that there was no reasonable indication of material injury to the domestic industry. Furthermore, it found no reasonable indication that future imports would have a discernible adverse impact on domestic prices in the near future. Accordingly the ITC concluded that there was no reasonable indication of threat of material injury.

19.2 Canadian Government Activity

Aside from monitoring and general advice to industry representatives involved in the investigation, no specific interventions were made by the Canadian government.

20 Medium Voltage Underground Distribution Cable from Canada

20.1 Case History

On January 31, 1991, Commerce and the ITC received a petition filed by the U.S. Cable Trade Action Group, a trade association. After an investigation was initiated, on March 25, 1992, the ITC released a negative preliminary determination and the investigation was subsequently terminated. During the period of investigation, decreases occurred in net sales, operating income, U.S. producers' domestic shipments and employment. However, the ITC attributed these declines to the poor state of the U.S. housing market rather than Canadian imports; it noted that the domestic producers' market share remained consistently greater than 95%. The majority of the responding domestic producers stated that Canadian imports had not had any actual negative effects on their investment, ability to raise capital, or existing development and production efforts. Furthermore, the Canadian producers had little capacity to increase their level of exports to the United States. The ITC concluded that the record as a whole contained clear and convincing evidence that there was neither material injury nor threat of material injury by reason of allegedly dumped imports from Canada.

20.2 Canadian Government Activity

Aside from monitoring and general advice to industry representatives involved in the investigation, no specific interventions were made by the Canadian government.

21 Certain Flat-Rolled Carbon Steel Products from Canada (and 19 Other Countries)

21.1 Case History: Original Investigation

On June 30, 1992, Commerce and the ITC received a petition filed by the following companies: Armco Steel Co., L.P.; Bethlehem Steel Corp.; Geneva Steel; Gulf States Steel, Inc. of Alabama; Inland Steel Industries, Inc.; Laclede Steel Co.; LTV Steel Co., Inc.; Lukens Steel Co.; National Steel Corp.; Sharon Steel Corp.; USX Corp./U.S. Steel Group; and WCI Steel, Inc. All alleged that the dumping and subsidization of imports of four specific flat-rolled steel products[153] from 20 countries,[154] including Canada, were injuring U.S. industry. The investigations were initiated on July 20, 1992.

On August 21, 1992, the ITC issued a preliminary affirmative determination, finding that there was a reasonable indication of material injury to the U.S. industry by reason of allegedly dumped imports of all four carbon steel flat products from all named countries, including Canada.

On February 4, 1993, Commerce released an affirmative preliminary dumping determination, which it subsequently amended on March 18, 1993. Five Canadian companies,[155] representing at least 60% of the subject merchandise exported from Canada during the period of investigation, were individually investigated and assessed individual preliminary anti-dumping duty margins.

On June 21, 1993, after several postponements, Commerce released its final affirmative dumping determination. Commerce collapsed Stelco with its related party, Continuous Colour Coat (CCC), and collapsed Dofasco with its related party, Sorevco. Further, because of the inadequacy of questionnaire responses, best information available was used for Stelco's plate sales, and partial BIA was applied with respect to the company's cold-rolled, hot-rolled, and corrosion-resistant steel sales. Partial BIA was also applied to certain sales of cold-rolled steel by Cold Metal Products, certain of Sidbec-Dosco's hot-rolled, cold-rolled and corrosion-resistant steel sales, and certain of IPSCO's hot-rolled steel sales. Following allegations by petitioners, cost-of-production investigations were conducted with respect to all of the companies.

153 The products covered by this investigation were four separate "classes or kinds" of merchandise: certain hot-rolled carbon steel flat products; certain cold-rolled carbon steel flat products; certain corrosion-resistant carbon steel flat products; and certain cut-to-length carbon steel plate.

154 The other countries were Argentina, Australia, Austria, Belgium, Brazil, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom.

155 Cold Metal Products, Dofasco, IPSCO, Sidbec-Dosco and Stelco.

On August 18, 1993, the ITC made its final injury determination. While it found that the U.S. industry was injured or threatened with injury by reason of dumped imports of cut-to-length steel plate and corrosion-resistant sheet from Canada, it made a negative finding with respect to imports of hot-rolled and cold-rolled steel from Canada.

For both plate and corrosion-resistant steel, the ITC determined that it was appropriate to cumulate the exports from all of the investigated countries because it found a reasonable overlap in competition between the imports of the various countries and the domestic like product. On plate, the ITC found evidence of significant underselling and price depression or suppression by the cumulated imports. Unit production costs for domestic plate producers rose steadily while the market prices for plate declined, resulting in significant loss of profitability for the domestic industry. The underselling and increasing volume of imports contributed to the inability of U.S. producers to increase their prices.

On corrosion-resistant steel, the ITC found that while the recession of the early 1990s had had some effect on the performance of the U.S. industry, prices for corrosion-resistant plate continued to decline even after the recession began to recede. Because of the significant volume and price effects of the cumulated imports, the ITC found the domestic industry to be materially injured by reason of the cumulated imports. The ITC rejected the respondents' argument that Canadian imports, which are sold primarily in the automotive and appliance sector, did not compete in the same channels of distribution as the imports of the other investigated countries. The ITC also rejected the respondents' argument that purchasers preferred Canadian over U.S. products because of differences in quality.

Average margins were calculated of 61.95% for plate and 22.29% for corrosion-resistant steel; Stelco (plate and corrosion-resistant), Dofasco (corrosion-resistant) and IPSCO (plate) were assessed specific margins. Following review by a Binational Panel established under Chapter 19 of the Canada–U.S. Free Trade Agreement, average margins were revised to 61.88% for plate and 18.71% for corrosion-resistant steel.

Following the original finding on corrosion-resistant steel, there has been a succession of administrative reviews and other proceedings, including scope determinations, remand determinations further to FTA/NAFTA panel findings, and partial revocations. The most recently completed administrative review of the order regarding corrosion-resistant steel covered the period from August 1997 to July 1998, and was issued on March 30, 2000. It assessed the following margins for that period: 1.01% for Continuous Colour Coat, 0.20% for Dofasco, 5.65% for National Steel, and 4.24% for Stelco. On September 8, 2000, Commerce published the preliminary results of its administrative review for the period from August 1998 to July 1999. It determined dumping margins of 2.94% for Continuous Colour Coat and 0.51% for Dofasco. No other specific margins for National Steel and Stelco were calculated in this review, both companies having requested that the review be rescinded with respect to their sales.

21.2 Changed Circumstances Reviews

On November 3, 1995, Sidbec-Dosco and Canberra Industries requested that Commerce conduct a changed circumstances administrative review to determine whether to partially revoke the order with regard to cobalt-60-free cut-to-length carbon steel plate. On November 13, 1995, the petitioners informed Commerce that they did not object to the changed circumstances review. On November 30, 1995, Commerce published a notice of initiation and preliminary result of a changed circumstances anti-dumping duty administrative review to determine whether to revoke the order in part. Commerce received no comments from interested parties, and consequently revoked the order in part on February 28, 1996.

Pursuant to a subsequent request by a U.S. product, Commerce revoked the order in part with respect to Canadian imports of other types and sizes of certain cut-to-length carbon steel plate that is free of cobalt-60 and other radioactive nuclides (cobalt-60-free carbon steel plate), on March 29, 1999. The petitioners indicated that they had no interest in the importation or sale of this particular product.

21.3 Scope and Anti-Circumvention Inquiries

On March 14, 1997, Commerce initiated a scope inquiry to determine whether certain cut-to-length carbon steel plate used to make grader blades and draft keys containing small amounts of boron (approximately 0.0016% by weight) fell within the scope of the order on certain cut-to-length carbon steel plate from Canada. On January 16, 1998, Commerce concluded that, because the petition relied on the Harmonized Tariff Schedule (HTS) definition of carbon steel, which excluded other-alloy steel (i.e. steel containing more than 0.0008% boron), and because the petition equated the term "carbon steel" with the HTS term "non-alloy steel," variants of grader blade and draft key steel containing at least 0.0008% boron by weight fell outside the scope of the order.

On January 30, 1998, Kentucky Steel requested that Commerce conduct an anti-circumvention inquiry to determine whether imports of certain cut-to-length steel plate—used to make grader blades and draft keys containing small amounts of boron (approximately 0.0016% by weight), and falling within the physical dimensions outlined in the scope of the order—were circumventing the anti-dumping duty order on certain cut-to-length carbon steel plate from Canada. According to Kentucky Steel, the inclusion of 0.0016% boron by weight in high-carbon grader blade and draft key steel constituted a minor alteration. On May 20, 1998, Commerce initiated a formal anti-circumvention inquiry; this ended on January 24, 2001, with a final determination stating that certain blade and draft key steel were circumventing the anti-dumping duty order and therefore, were included within the scope of the order.

21.4 Canadian Government Activity / Key Issues

Prior to the filing of the petitions on June 30, 1992, the Canadian government and Canadian steel producers expended considerable effort to ensure that restrictions, including anti-dumping duties, were not introduced at the border. Given the scope and complexity of the investigations, key issues and government activities are here discussed together. The issues involved the following elements:

1) Ensuring that the U.S. administration and industry clearly understood that Canada had no intention of acquiescing with either formal or informal restraints on exports of steel to the United States, and that in the integrated North American market envisaged by the Free Trade Agreement, market forces alone should determine Canada's share of the U.S. steel market. This theme was aggressively pursued with the administration and Congress at the highest levels.

2) Efforts by the government, working closely with the Canadian industry, to ensure that the then-new U.S. administration and Congress were considering the steel issue on the basis of the facts of the Canada–U.S. steel trade.

3) Coordinated government-industry efforts to mobilize opposition in the United States to restrictions on imports of steel from Canada. This effort was coordinated through the Canadian consulates in the United States.

In pursuing this action plan to safeguard access for Canadian steel to the U.S. market, a number of specific themes were developed. They included the following:

1) Trade restrictions on imports from Canada, whether formal or informal, would be contrary to the provisions of the Canada–U.S. Free Trade Agreement.

2) Canadian steel exports were running at slightly over 3% of the U.S. market—the same level as in 1984, when the voluntary restraint agreements (VRAs) with many other countries were first concluded. Canada had not been asked for a VRA in 1984, and the Canadian industry had lived up to its commitment not to exploit a situation in which other steel suppliers were restrained.

3) In an integrated North American market, Canada's share in the U.S. market should be determined by market forces. A surge in Canadian exports was, however, unlikely as the increased value of the Canadian dollar had made our exports less competitive in the U.S. market.

4) Blanket filings of unfair trade cases against the full range of Canadian steel products would be flagrant abuse of legitimate trade remedy action. Canada recognized, however, that a specific petition could be brought against a particular Canadian product, and was prepared to contest such a petition on its merits.

In the wake of the expiration of the U.S. Steel Program in the spring of 1992 (the original 1984 program having been extended in 1988), prospects increased for the massive filing of petitions for anti-dumping and/or countervailing duty action. To persuade industries in both countries not to take such action or to discontinue actions already initiated (between 1992 and 1994, the Canadian steel industry successfully petitioned for trade action on the same flat-rolled steel products as did its U.S. counterparts in 1992), industries in both countries were encouraged to successfully conclude a North American Steel Sector Agreement, providing new trade remedy rules for the steel trade between the two countries. Through direct representations by both industries, their workers and the Government of Canada, efforts were made to convince potential U.S. allies to discontinue the trade actions. Contacted as principal advocacy targets were U.S. suppliers of goods and services to the Canadian steel industry, U.S. customers for Canadian steel, members of Congress and State legislatures representing districts benefiting from the Canada–U.S. steel trade, and U.S. steel producers caught in the simultaneous Canadian investigations.

Once the anti-dumping duty investigations themselves were initiated by Commerce, there were numerous personal contacts by the Canadian Embassy in Washington, D.C., with Commerce officials on key issues of concern to Canadian exporters caught in the investigations.

Among the more notable representations, Minister Wilson and other ministers (including the Prime Minister) raised the steel issue with their counterparts in both the Bush and Clinton administrations on numerous occasions in the first six months of 1992.

In addition to informal contacts between the Embassy and Commerce in particular, the Government of Canada made a number of formal representations on various elements of the steel investigations. These included the following:

- In a June 26, 1992, letter to Deputy U.S. Trade Representative Moscow, the Canadian Embassy provided a document developed by the Canadian steel industry on possible elements of a potential Canada–U.S. steel accord.
- On July 17, 1992, the Embassy delivered a diplomatic note urging Commerce to dismiss petitions for anti-dumping investigations on imports of flat-rolled steel from Canada.

- On October 8, 1992, the Embassy submitted a letter to Commerce supporting the Department's proposal to exclude certain classes of merchandise from the investigations.
- On October 14, 1992, the Embassy submitted a letter to Commerce urging a deadline extension for submission of the questionnaire responses.
- On December 8, 1992, the Embassy submitted a letter to Commerce objecting to the proposed expansion of the scope of investigations to include non-rectangular products.
- On December 11, 1992, Minister Wilson sent a letter to U.S. Trade Representative Hills proposing a blue-ribbon binational panel on the Canada–U.S. steel trade.
- On December 16, 1992, the Embassy submitted a letter to Commerce urging the use of continuous entry bonds for imports from Canada should preliminary determinations be made and provisional duties be applied.
- On February 17, 1993, Minister Wilson submitted letters to U.S. Trade Representative Kantor and Commerce Secretary Brown, again proposing a binational panel on the Canada–U.S. steel trade.
- On February 19, 1993, the Embassy submitted a letter to Commerce urging the issuance of amended preliminary determinations of dumping in cases where ministerial errors had been made, and seeking an extension of the deadline for responses to cost-of-production questionnaires.

In addition, after the imposition of anti-dumping duties on U.S. imports of steel plate and corrosion-resistant steel in 1993, the Canadian Embassy continued to make representations regarding the conduct of subsequent administrative reviews of the orders on plate and corrosion-resistant steel. Between 1995 and 2000, almost two dozen such representations were made on issues such as the liquidation of entries by resellers, verification standards and the treatment of transactions between related parties.

21.5 Sunset Review: Plate and Corrosion-Resistant Steel

On September 1, 1999, Commerce and the ITC initiated a sunset review of the countervailing and anti-dumping duty orders on plate and corrosion-resistant steel from a number of countries,[156] including Canada, as part of a grouped review of the 1993 orders on four flat-rolled steel products.[157] Both Commerce and the

156 Australia, Canada, France, Germany, Japan and Korea.

157 Plate, hot-rolled, cold-rolled and corrosion-resistant steel.

ITC determined that they would conduct a full review of the anti-dumping duty order on plate and corrosion-resistant steel from Canada.

On July 27, 2000, Commerce determined that revocation of the anti-dumping duty order on imports of plate and corrosion-resistant steel from Canada would be likely to lead to continuation or recurrence of dumping. In addition, Commerce determined that while respondents' anti-dumping duty margins had fallen significantly since the assessment of margins in the original investigation, it still reported the anti-dumping duty margins of the original investigation to the ITC.

According to Commerce, imports of corrosion-resistant steel decreased dramatically immediately after the issuance of the order in 1993. Furthermore, it found that the share of the U.S. market accounted for by Dofasco, which was responsible for over 50% of the imports from Canada, had decreased and that Dofasco itself had not demonstrated or argued that its market share had increased or even remained constant despite the fact that its anti-dumping duty margin had fallen to a *de minimis* level in the intervening years. Accordingly, on the basis mainly of the declining market share achieved by Dofasco since the order went into effect, Commerce concluded that the original margins reflected the behaviour of the respondents absent the discipline of the order. Furthermore, Commerce found that in the 1995–1996 and 1997–1998 administrative reviews, Dofasco (1995–1996 only), Stelco and Continuous Colour Coat had absorbed duties. Consistent with Commerce policy to adjust margins in sunset reviews to reflect duty absorption findings, Commerce reported the original rates as those likely to prevail if the order were revoked.

After its investigation, the ITC found that subject imports from all named countries had remained in the U.S. market since the orders were imposed, that the corrosion-resistant steel producers in the subject countries devoted considerable resources to export markets, and that excess capacity was available in each of the subject countries. It found that a likelihood existed that even a small post-revocation increase in imports from each of these countries into the United States would have a discernible impact on the domestic corrosion-resistant steel industry. The ITC also found that the conditions of competition in the U.S. market were not likely to change significantly in the foreseeable future and that therefore the current market conditions for corrosion-resistant steel provided a basis for assessing the likely effects of revocation of the anti-dumping duty orders within the foreseeable future.

In its assessment of the likelihood of the recurrence of material injury, the ITC first considered the likely volume of subject imports. It concluded that there was substantial excess capacity in the subject countries, that the producers in the subject countries relied heavily on export markets[158] and had an incentive to

158 The record indicates that for Canada in 1999, 12.3% of the production of corrosion-resistant steel was exported.

utilize production because of high fixed production costs, and that they were therefore likely to commence significant exports to the United States in the event that the orders were revoked. Furthermore, the ITC concluded that the increased sales of imported corrosion-resistant steel would most likely be achieved by means of aggressive pricing. Cumulatively, the increased imports would result in significant effects on domestic prices, including the significant underselling of the domestic like products, and price depression and suppression.

The ITC examined the likely impact of the cumulated subject imports and concluded that the domestic industry was vulnerable to material injury if the orders were revoked. It examined net sales volumes and values, operating income, capacity utilization, unit sales values, cost of goods sold, and operating margins. It found that the domestic industry was in a weakened state. It concluded that the price and volume declines that the domestic industry would be likely to experience would have a significant adverse impact on the production, shipment, sales and revenue levels of the domestic industry. This would affect the industry's profitability, ability to raise capital and ability to maintain the necessary level of capital investments, and would be likely to result in commensurate employment declines.

On this basis, the ITC concluded that the revocation of the anti-dumping orders concerning corrosion-resistant steel, including the order relating to Canada, would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time. The order was therefore continued with regard to corrosion-resistant steel by the ITC determination of December 1, 2000.

However, on the same date the ITC determined that revocation of the anti-dumping duty order on carbon steel plate was not likely to cause injury to an industry in the United States within a reasonably foreseeable time. The order was therefore revoked.

22 Certain Steel Wire Rod from Canada (and Brazil, Japan, and Trinidad and Tobago)

22.1 Case History

On April 23, 1993, Commerce and the ITC received a petition filed by the following companies: the Connecticut Steel Corp. of Wallingford, Connecticut; North Star Steel, Texas, Inc. of Beaumont, Texas; Keystone Steel & Wire Corp. of Peoria, Illinois; Raritan River Steel Company of Perth Amboy, New Jersey; and Georgetown Steel Corp. of Georgetown, South Carolina. After an investigation was initiated on November 29, 1993, the ITC issued a preliminary affirmative determination finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of steel wire rod from Canada, Brazil and Japan (Trinidad and Tobago was dropped from the investigation).

On November 29, 1993, Commerce issued a preliminary affirmative determination and ordered a suspension of liquidation of imports from Canada, Brazil and Japan. On April 20, 1994, Commerce released an affirmative final determination with respect to Canada, in which the following margins were established.

Producer/Manufacturer/Exporter	Weighted Average Margin
Ivaco Inc.	10.25%
Stelco Inc.	13.20%
All Others	11.36%

On February 9, 1994, Commerce released an affirmative final determination with respect to Brazil and Japan. On April 6, 1994, the ITC released an affirmative final injury determination with respect to Brazil and Japan.

On May 4, 1994, Commerce terminated the investigation regarding Canada upon the petitioner's withdrawal of the petition. On May 10, the ITC terminated its investigation.

22.2 Key Issues

Ivaco and Stelco asserted that statute and judicial precedent required that, in determining fair market value, if Commerce found sales of the identical or most similar product to be below cost of production, Commerce should use the next most similar product to determine fair market value, rather than immediately resorting to constructed value. Commerce disagreed with the respondents, stating that whether a model is sold in the home market at below-cost prices is not a criterion for determining what is the most similar merchandise under the statute.

22.3 Canadian Government Activity

The Canadian Embassy in Washington, D.C., filed a diplomatic note questioning the evidence of injury from Canadian imports included in the petition. The Canadian government also monitored the investigation and gave general advice to industry representatives involved in it.

23 Certain Steel Wire Rod from Canada (and Germany, Trinidad and Tobago, and Venezuela)

23.1 Case History

On February 26, 1997, a petition alleging injurious dumping of steel wire rod from Canada was filed by the following companies: Connecticut Steel Corp. of Wallingford, Connecticut; North Star Steel Texas of Beaumont, Texas; Co-Steel Raritan of Perth Amboy, New Jersey; Keystone Steel & Wire Co. of Peoria, Illinois; and GS Industries of Georgetown, South Carolina. After an investigation was initiated, the ITC issued a preliminary affirmative determination on April 30, 1997, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of steel wire rod from the named countries.

On October 1, 1997, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of imports from the named countries. On February 23 and 24, 1997, Commerce released affirmative final determinations with respect to the named countries. The dumping margins for Canadian companies were as follows:

Producer/Manufacturer/Exporter	Weighted Average Margin
Ispat-Sidbec Inc.	11.94%
Ivaco Inc.	6.95%
Stelco Inc.	0.91%
All Others	11.62%

Ivaco's rate was amended by Commerce on April 1, 1998, to account for the exclusion of wire rod used for manufacturing Class III pipe wrapping wire from the scope of the investigation.

On March 25, 1998, the ITC released a negative final determination with respect to imports from all the named countries. For the purposes of its determinations with respect to Canada, Germany, Trinidad and Tobago, and Venezuela, the ITC cumulated dumped imports from all four subject countries. Despite the rising volume and market share of imports, most notably between 1995 and 1996, the ITC did not find the volume of imports or the increase in volume to be significant either in absolute terms or relative to production or consumption in the United States. Moreover, it found that the domestic industry was not able to satisfy all domestic demand for certain steel wire rod. The ITC further concluded that there was no causal connection between prices for subject imports and the declines in domestic producers' prices that occurred between mid-1995 and mid-1996.

The ITC did not find the frequency or the margins of underselling by the subject imports to be significant, nor price always to be the determining factor in making a sale. The ITC did not find that the subject imports depressed domestic prices for wire rod to a significant degree. While the domestic industry's financial performance declined precipitously between 1995 and 1996, the ITC stated that it could not attribute this condition to subject imports.

The ITC determined that the domestic industry was not threatened with material injury by reason of subject imports on the basis of: (1) a continuous decline in subject import volumes since 1996; (2) foreign producers' lack of additional or unused productive capacity; (3) lack of potential for product shifting; and (4) lack of any other demonstrable adverse trends indicating the likelihood of material injury to the domestic industry by reason of the subject imports.

23.2 Key Issues

Petitioners argued that Stelco reported home market sales of subject merchandise that were neither made in commercial quantities nor made in the ordinary course of trade. Commerce rejected the petitioners' assertion, finding that in fact over 10% of Stelco's home market sales were of quantities comparable to the sale of a product subject to the petition. Therefore, there was nothing aberrational about such sales.

Commerce agreed with Stelco that the company's capital tax credit should be included in the general and administrative expense calculation, but it did not agree with Stelco that the total amount of the capital tax credit should be included in the calculation of general and administrative expenses. Instead, Commerce included the capital tax credit only to the extent of Stelco's current capital tax expenses.

Commerce conducted a level of trade adjustment with respect to Ivaco's sales after examining the selling functions performed by IRM and Sivaco (both owned by Ivaco) at each stage in the marketing process and identifying substantial differences in the services performed. Commerce concluded that these were attributable to selling at different points in the chain of distribution. The LOT methodology was applied to all above-cost home market sales. Commerce did not perform a difference-in-merchandise adjustment, as requested by the respondents, as LOT adjustments were intended to address differences in services provided, not differences in products.

23.3 Canadian Government Activity

Since this case investigation also involved allegedly countervailable subsidies, it is difficult to isolate Canadian government participation in the anti-dumping case. Aside from monitoring and general advice to industry representatives involved in the investigation, no specific interventions were made by the government.

24 Certain Stainless Steel Plate from Canada (and Belgium, Italy, Korea, South Africa and Taiwan)

24.1 Original Investigation

On March 31, 1998, Commerce and the ITC received a petition filed on behalf of the following companies: Armco, Inc. of Pittsburgh, Pennsylvania; J&L Specialty Steel, Inc. of Pittsburgh, Pennsylvania; Lukens Inc. of Coatesville, Pennsylvania; North American Stainless of Ghent, Kentucky; and the United Steelworkers of America, AFL-CIO-CLC. The petition alleged material injury by reason of subsidized and/or dumped imports of hot-rolled and cold-rolled steel from Belgium, Canada, Italy, Korea, South Africa and Taiwan.

After an investigation was initiated, the ITC issued a preliminary affirmative determination on June 4, 1998, finding a reasonable indication that an industry producing certain hot-rolled stainless steel plate in coils in the United States was materially injured by reason of imports of certain hot-rolled stainless steel plate in coils from Belgium, Canada, Italy, Korea, South Africa and Taiwan. On November 4, 1998, Commerce issued a preliminary determination of dumping regarding imports from the named countries. On March 31, 1999, Commerce issued its final determination of dumping, in which it assessed the following margins (based entirely on "facts available" since the Canadian producer/exporter refused to respond to the questionnaire):

Producer/Exporter	Weighted Average Margin
Atlas Stainless Steel	15.35%
All Others	11.10%

On May 12, 1999, the ITC made a final negative injury determination for imports of certain cold-rolled stainless steel plate in coils from Belgium and Canada. The ITC further made the determination that imports of cold-rolled stainless steel plate from Italy, Korea, South Africa and Taiwan were negligible. The ITC determined that during the period under investigation, both the Belgian and Canadian producers operated at high rates of capacity utilization and had no plans for capacity expansion in the near future. Consequently, the ITC found that further dumped or subsidized imports were not imminent. The ITC did not find that the subject imports (despite their rising volumes, large market share and declining average unit values) had an adverse effect on the domestic industry.

The ITC did, however, find that the U.S. industry producing hot-rolled stainless steel plate was materially injured by subsidized imports from Belgium, Italy and South Africa, and by dumped imports from Belgium, Canada, Italy, Korea, South Africa and Taiwan. The ITC found that over the period of investigation, the volume of imports increased dramatically, outpacing the increase in consumption. Even while domestic consumption increased over the period of investigation, the ITC found that the U.S. industry's market share did not increase. The ITC found the volume of imports to be significant. The ITC also found that the price of imports was lower at the end of its investigation than it was at the beginning, reaching lowest levels for the period in 1998—the same time when the market share of imports was at its peak. The ITC found that the imports caused domestic sales values to decline. Imports forced the domestic industry to lower prices, to such an extent that it was unable to maintain profitability.

24.2 Key Issue

The ITC did find a single domestic like product in its preliminary investigation, but indicated at that time that it would reconsider the like product issue in its final determination. In particular, it considered whether to include stainless steel sheet and strip as domestic like product, and whether hot-rolled and cold-rolled stainless steel plate should be considered separate domestic like products. The ITC eventually concluded that, as no new information had been tabled since the preliminary investigation, there was no basis for altering the preliminary determination that stainless steel sheet and strip not be included in the scope of the domestic like product.

With respect to hot- and cold-rolled stainless steel plate, the ITC concluded that they should be considered separate domestic like products on the basis of its application of a six-factor test. The six factors examined were: physical characteristics and uses; interchangeability; channels of distribution; customer and producer perceptions; manufacturing facilities, production processes and production employees; and prices. Given the differences outlined in the six-factor test, the ITC concluded that hot-rolled and cold-rolled plate were two separate domestic like products for the purposes of its investigation.

24.3 Canadian Government Activity

The Government of Canada monitored the investigation. However, since the only Canadian company with an interest in the investigation did not cooperate with or make any responses to Commerce or the ITC, the government did not make any representations on this basis.

25 Certain Stainless Steel Round Wire Rod from Canada (and India, Japan, Korea, Spain and Taiwan)

25.1 Case History

On March 27, 1998, Commerce and the ITC received a petition filed by the following companies: ACS Industries of Woonsocket, Rhode Island; Al Tech Specialty Steel Corp. of Dunkirk, New York; Branford Wire & Manufacturing Co. of Mountain Home, North Carolina; Carpenter Technology Corp. of Reading, Pennsylvania; Handy and Harmen Specialty Wire Group of Cockeysville, Maryland; Industrial Alloys of Pomona, California; Loos & Company of Pomfret, Connecticut; Sandvik Steel Company of Clark Summit, Pennsylvania; Sumiden Wire Products Corp. of Dickson, Tennessee; and Techalloy Company of Mahwah, New Jersey. After an investigation was initiated on June 18, 1998, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped imports of steel round wire from all of the named countries.

On November 18, 1998, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of imports from Canada, India, Japan, Spain and Taiwan. On April 9, 1999, Commerce released an affirmative final determination with respect to Canada, India, Japan, Spain and Taiwan. Canadian company dumping margins were as follows:

Producer/Manufacturer/Exporter	Weighted Average Margin
Central Wire	10.25%
Greening Donald	13.20%
All Others	11.36%

On May 26, 1999, the ITC released a negative final determination. The ITC cumulated imports from all six named countries. The ITC found that although there were sizeable increases in the volume and value of subject imports, such increases were not significant. Domestic demand had increased by almost the same amount as the cumulated subject imports between 1996 and 1998. While the prices for subject merchandise and the domestic like product had decreased, there was also evidence of underselling. Hence the ITC found that imports did not adversely affect prices for the domestic like product to a significant degree. The ITC found that all of the relevant indicators of the domestic industry's performance changed only slightly over the investigation period, and that many had improved.

The ITC also found that there was no threat of material injury to the domestic industry because the rate of increase in subject imports had levelled off and a further significant increase was unlikely. Furthermore, there was no indication of increased capacity or excess production capacity in the subject countries, and there was unlikely to be a significant degree of product shifting.

25.2 Key Issues

Respondents argued that the subject of stainless steel round wire did not originate in Canada. The respondents contended that the wire was classified as both "Canadian" and "foreign" under essentially identical Customs[159] and Commerce substantial transformation tests. The respondents further contended that the rod imported into Canada was not physically or chemically substantially transformed into a Canadian product subject to dumping duties.

However, Commerce found that stainless steel wire rod imported into Canada undergoes a cold-drawing process, which results in a product with physical properties and end uses that are distinct from those of the stainless steel wire rod. Furthermore, the stainless steel round wire industry is distinct from the stainless steel wire rod industry, and the value added by the cold-drawing process is significant. Therefore, for purposes of dumping duties, Commerce determined that stainless steel wire rod was substantially transformed in Canada, making it a Canadian product within the scope of the investigation.

25.3 Canadian Government Activity

The Canadian Embassy in Washington, D.C., filed a diplomatic note questioning the evidence of injury to the industry. The Government of Canada also engaged in monitoring and gave general advice to industry representatives involved in the investigation. In addition, it made several representations to Commerce, supporting the respondents' request to exclude from the calculation of normal value any home market sales said to be clearly outside the "ordinary course of trade."

26 Cattle from Canada

26.1 Case History

This investigation was instituted in response to a petition filed on November 12, 1998, by the Ranchers-Cattlemen Action Legal Foundation (R-Calf), and supporting individuals and trade associations. On November 10, 1998, counsel for R-Calf had withdrawn a petition it had filed several weeks previously. On November 12, 1998,

159 NAFTA rules of origin did not confer origin to the transformation of wire from foreign wire rod.

a second petition for anti-dumping and countervailing duty investigations was filed, and the previous petition was incorporated by reference. On January 20, 1999, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry in the United States was materially injured by reason of dumped and subsidized imports of live cattle from Canada.

On June 30, 1999, Commerce issued a preliminary affirmative determination and ordered the suspension of liquidation of imports from Canada. On July 23, 1999, Commerce amended its preliminary affirmative determination on the basis of revised data filed with Commerce. This amendment resulted in an increase in the provisional anti-dumping duty rate. In its preliminary determination, Commerce found that there were "reasonable grounds to believe or suspect" that sales of live cattle from Canada were made below their respective cost of production. The margin calculations in the petitions, as revised, indicated dumping margins ranging from 6.42% to 10.72% for live cattle from Canada. On October 21, 1999, Commerce released an affirmative final determination. Company-specific dumping margins were established as follows:

Producer/ Exporter	Weighted Average Margin
Cor Van Raay	4.53%
Groenenboom	3.86%
JGL Group	5.10%
Pound-Maker	0.62% (*de minimis*)
Riverside/Grandview	5.34%
Schaus	15.69%
All Others	5.63%

On November 12, 1999, the ITC issued a negative injury determination, thereby terminating the investigation. While the ITC found that the domestic industry had experienced declines expected to improve as the industry consolidated, in a number of key indicators it could not find that any injury to the industry was caused or threatened by imports from Canada. It found that imports from Canada, which had declined over the period of investigation both in absolute and market-share terms, were entering the United States in small volumes that did not significantly depress or suppress domestic prices.

26.2 Key Issues

26.2.1 Date of Sale

According to the respondents, Commerce regulations established a rebuttable presumption for the use of the date of invoice as the date of sale; there was thus no reason to depart from the use of the date of invoice (or, as appropriate, the date of shipment) in this case. The respondents contended that contracts are entered into for future delivery months in advance, and the month of delivery is an essential factor in establishing the price of cattle. According to the respondents, two contracts entered into on the same date would have different prices depending on the month of delivery, since monthly cattle prices varied according to seasonal trends. Furthermore, the respondents argued that the material terms of sale were subject to change even after prices are "locked in."

In their rebuttal comments, the petitioners argued that the respondents' concerns about monthly price fluctuations were irrelevant since Commerce's practice in anti-dumping investigations is to compare average prices. The petitioners contended that if Commerce rejected the date of contract as the date of sale, it should continue to rely on the date that prices were "locked in," since the terms of sale were specified on that date.

As in the preliminary determination, Commerce continued to rely on the lock-in date as the date of sale for the transactions in question. Commerce continued to believe that the lock-in date was the date on which the essential terms of sale were set. Commerce regulations provide that the date of invoice is the presumptive date of sale, except where the material terms of sale are established on some other date.

26.2.2 Reimbursement of Anti-Dumping Duty Deposits

The petitioners alleged that U.S. packers were forcing Canadian producers and exporters of subject merchandise to absorb the costs of anti-dumping duty deposits, and that such deposits should be deducted in calculating export value. According to the petitioners, Canadian producers of subject merchandise had indicated at meetings in Canada that an anti-dumping duty order on cattle would have no effect because the Canadian producers would absorb the cost of any duties. The petitioners contended that reimbursement of the deposits would be considered a reduction to price in any future review, and that the cash deposit rate applied in the investigation should reflect such reimbursements even if they did not occur during the period of investigation. The Canadian Cattlemen's Association (CCA) successfully argued that reimbursement concerns were not applicable to investigations since reimbursement applied only to duties assessed after the imposition of an anti-dumping duty order. According to the CCA, there was no legal basis to adjust cash deposit rates at this stage of the proceedings in order to account for alleged pricing changes after the investigation.

26.3 Other Issues

There were a number of company-specific issues on which Commerce was compelled to make a determination. Selected examples follow.

26.3.1 Schaus

Schaus was one of the six Canadian producers/exporters selected to be specifically investigated by Commerce. The company submitted supplemental information on which the Department was scheduled to make its preliminary determination. Commerce had no opportunity to take account of the information in its preliminary determination. After examining the information, Commerce revised the rate for Schaus from 5.43% to 15.69%. Schaus then withdrew from participation in the investigation. Commerce did not, however, allow the information submitted by Schaus to be withdrawn, and continued to rely on it to calculate a rate for Schaus and to use it in the calculation of the "all others" rate. Commerce indicated that the information was reliable and that to do otherwise would be to allow manipulation of the "all others" rate.

26.3.2 JGL Group

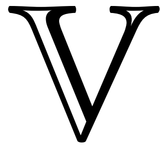
Commerce declined to use "facts available" to account for certain sales that were excluded from the list of domestic sales. Commerce did not, however, differentiate (as requested by the respondent) between feeder cows/bulls and regular cull cattle in its determination. Commerce agreed to correct a unit price error that overstated the normal value. Commerce also declined to establish separate rates for cattle that JGL produced and cattle that it purchased and then resold. Commerce also collapsed JGL and Kirk Sinclair.

26.3.3 Pound-Maker

Commerce disagreed with petitioners that certain sales of cattle should be subject to an average rate of shrinkage, as opposed to the actual rate. Commerce did not, however, adjust selling expenses to account for sales to affiliated parties. Commerce did not apply adverse inference for errors made on reported sales.

26.4 Canadian Government Activity

Since a concurrent countervailing duty investigation was being conducted, it is difficult to isolate Government of Canada activity with reference to the anti-dumping duty investigation. It appears that specific representations on dumping were not made. However, WTO consultations on the countervailing duty investigation covered at least one issue relevant to the dumping investigation: that of whether the petitioner had standing to request an investigation.



United States Countervailing Duty Investigations regarding Imports from Canada: Case Histories, 1991–1999

Note: Unlike the summaries covering the U.S. anti-dumping duty investigations regarding imports from Canada, the summaries with respect to U.S. countervailing duty investigations involving Canada do not include a separate section on Canadian government participation in these proceedings. By definition, countervailing duty investigations concern government programs, both federal and provincial. Accordingly, the provincial and/or federal governments are direct participants in the proceedings. For the most part it has become standard for the Government of Canada to participate not only as a direct respondent but as occasional coordinator of overall strategy for all Canadian parties, both governments and industry, involved in the investigation. Participation by the Government of Canada in the proceedings has thus become an essential element of the investigations.

In view of their economic significance and role in the evolution of U.S. countervailing duty law, policy and practice, case summaries are included of all three countervailing duty investigations conducted by the Department of Commerce over the past two decades regarding softwood lumber from Canada.

1 Softwood Lumber I

1.1 Summary

On October 7, 1982, three countervailing duty petitions were filed alleging that imports from Canada of the following products were injuriously subsidized: softwood lumber; softwood shakes and shingles; and softwood fence. The main programs alleged to provide subsidies were the stumpage systems maintained by the federal and several provincial governments. The investigation was terminated when, in its final determination of May 31, 1983, Commerce found stumpage programs to be generally available and therefore not countervailable. In support of its finding, Commerce determined that the only limitation as to type of industry using stumpage was the inherent characteristic of the resource itself and the current level of technology. Furthermore, Commerce found that current limitations on use of stumpage were not due to any government action.

1.2 Case History

On October 7, 1982, the ITC and Commerce accepted three petitions filed on behalf of the United States Coalition for Fair Canadian Lumber Imports, a group composed of eight trade associations and more than 350 U.S. producers of softwood lumber products. The scope of the investigation was as follows: softwood lumber; softwood shakes and shingles; and softwood fence (picket, stockade and rail). On December 1, 1982, the ITC released a preliminary affirmative determination of injury, finding a reasonable indication that the domestic industry was threatened with material injury by reason of allegedly subsidized imports from Canada. The ITC found that Canadian spruce-pine-fir products competed with American yellow pine products despite differences in sizes, shapes and preferred applications. While the ITC acknowledged that the steep decline in consumption of softwood products was due in large part to the drop in residential housing construction, it found a reasonable indication that allegedly subsidized Canadian imports had caused or had threatened to cause injury. The absolute volume of Canadian imports had declined, while the percentage of the U.S. market held by imports had increased slightly.

On March 11, 1983, Commerce released a preliminary negative countervailing duty determination, in which the estimated net subsidy rates for each of the three investigated products were found to be *de minimis*.

Product	Total Estimated Net Subsidy
Softwood lumber	0.32%
Softwood shakes and shingles	0.24%
Softwood fence	0.29%

On May 31, 1983, Commerce released a final negative countervailing duty determination as follows. Again, estimated net subsidy rates for each of the three investigated products were found to be *de minimis*.

Product	Total Estimated Net Subsidy
Softwood lumber	0.349%
Softwood shakes and shingles	0.260%
Softwood fence	0.304%

1.3 Key Issues

The high value of Canadian softwood lumber exports to the United States (approximately $3.0 billion) gave this case an unprecedented political profile. Furthermore, a key element in the case was the decision to investigate a Canadian natural resource management program (stumpage programs) as potentially countervailable. Commerce determined that stumpage programs "were not provided to a specific enterprise or industry [or group thereof] and did not entail the provision of goods at preferential rates."

With respect to stumpage programs, Commerce determined that any limitations on their use were "not due to the actions of the Canadian governments" and that "the actual users of stumpage spanned a wide range of industries." Furthermore, the programs were found not to constitute a domestic subsidy because they did not provide goods at preferential rates to softwood producers. As a result, stumpage programs were not found countervailable.

1.4 Programs Determined to Confer Subsidies

While the following programs were determined to be subsidies and were therefore countervailable under U.S. trade law, the total estimated net subsidy for each product under investigation was found to be *de minimis* (i.e. less than 0.5% of the value of the production).

1.4.1 Canadian Federal Programs

1.4.1.1 Investment Tax Credit

Product	Total Estimated Net Subsidy
Softwood lumber	0.030% *ad valorem*
Softwood shakes and shingles	0.030% *ad valorem*
Softwood fence	0.018% *ad valorem*

The Investment Tax Credit incentive was available to all secondary industries purchasing new buildings, machinery and equipment for use in manufacturing and processing activities. For qualified property, the basic Investment Tax Credit was 7%, with an additional 3% or 13% for qualified property in certain economically depressed regions. For "certified property" (i.e. qualified property in regions characterized with high unemployment and low per capita income), the Investment Tax Credit rate reached 50%. Since Investment Tax Credits of up to 7% were available to all companies on equal terms, Commerce determined that such credits did not confer a subsidy. However, credits over 7% were limited to compa-

nies in specific regions, and therefore were found to confer a subsidy. Commerce allocated the benefits offered by the Investment Tax Credit program according to capital investment information pertaining to the sawmill, planing mill and wood products industries, and their production volumes.

1.4.1.2 Program for Export Market Development (PEMD)

Product	Total Estimated Net Subsidy
Softwood lumber	0.001% *ad valorem*
Softwood shakes and shingles	0.000% *ad valorem*
Softwood fence	0.009% *ad valorem*

PEMD was a program administered by the Department of External Affairs. It facilitated the development of export markets for Canadian products by sharing with exporters the costs of travel and promotional activities. PEMD assistance was in the form of interest-free loans with forgivable repayment terms. Two small projects were funded to develop U.S. market opportunities for softwood fence and lumber. Commerce found that the sole purpose of PEMD was to stimulate exports; the assistance provided under the program thus conferred benefits that constituted export subsidies and that therefore were automatically deemed specific.

Accordingly, a specificity analysis and finding was not necessary. The funds disbursed were treated as grants and expensed in the year of their receipt.

1.4.1.3 Forest Industry Renewable Energy Program (FIRE)

Product	Total Estimated Net Subsidy
Softwood lumber	0.003% *ad valorem*
Softwood shakes and shingles	0.003% *ad valorem*
Softwood fence	0.003% *ad valorem*

The FIRE program was administered by the Department of Energy, Mines and Resources, and was intended to encourage the substitution of biomass energy sources for fossil fuels by companies that would otherwise have no incentive to take such action. The program provided taxable grants tied to the purchase of capital equipment. Prior to April 1, 1981, the benefits of this program were determined to be limited to “forest industry firms” and thus countervailable.

1.4.1.4 Regional Development Incentives Program (RDIP)

Product	Total Estimated Net Subsidy
Softwood lumber	0.180% *ad valorem*
Softwood shakes and shingles	0.070% *ad valorem*
Softwood fence	0.151% *ad valorem*

This program provided development incentives (grants or loan guarantees) to attract capital investments to designated regions where employment and economic opportunity were chronically low. Commerce found this program countervailable because its benefits were limited to companies located within specific regions.

1.4.1.5 Federal Employment Program—Community Based Industrial Adjustment Program (CIAP)

Product	Total Estimated Net Subsidy
Softwood lumber	0.001% *ad valorem*
Softwood shakes and shingles	0.000% *ad valorem*
Softwood fence	0.000% *ad valorem*

This program was designed to alleviate the distress caused in designated communities by large-scale permanent industry dislocation in a given sector. Commerce determined that the list of depressed communities eligible for CIAP assistance was designated at the discretion of the federal government. One softwood producer received a small grant in 1982 under this program. The program was found to be limited to companies in specific regions, and therefore countervailable.

1.4.2 Federal-Provincial Programs

1.4.2.1 Agricultural and Rural Development Agreements (ARDA)

Product	Total Estimated Net Subsidy
Softwood lumber	0.005% *ad valorem*
Softwood shakes and shingles	0.005% *ad valorem*
Softwood fence	0.005% *ad valorem*

The ARDA resulted from joint determinations by the federal and provincial governments that action was needed to promote economic development and alleviate conditions of economic and social disadvantages in certain rural areas. Of the six programs under ARDA, only the Alternative Income and Employment Opportunities in Rural Development Region program was relevant to this investigation. The program provided grants in Ontario and British Columbia to establish, expand or modernize production facilities. The Special ARDA program provided funds aimed at improving employment and income opportunities for people of Native ancestry in rural areas. As this program was limited to companies in specific rural areas, both the provincial and federal benefits provided by the program were found to be countervailable.

1.4.2.2 General Development Agreements (GDAs)

The GDAs were comprehensive development agreements between the federal and provincial governments aimed at spurring regional development. Within each GDA, specific subsidiary agreements were negotiated with individual provinces. These mainly funded general planning, infrastructure and community development, although some assistance was provided to individual companies. Both the federal and provincial benefits provided under the GDAs were countervailed as eligibility for funds was limited to areas within a province.

1.4.2.2.1 British Columbia: Assistance to Small Enterprise Program (ASEP)

Product	Total Estimated Net Subsidy
Softwood lumber	0.002% *ad valorem*
Softwood shakes and shingles	0.044% *ad valorem*
Softwood fence	0.010% *ad valorem*

ASEP offered interest-free, forgivable loans to companies in the manufacturing and processing sector with annual revenue of less than $500,000. The program was found to be specific because it was limited to companies located outside the Lower Mainland and Southern Vancouver Island.

1.4.2.2.2 New Brunswick: Northeast, Kent and Industrial Development Agreements

Product	Total Estimated Net Subsidy
Softwood lumber	0.001% *ad valorem*
Softwood shakes and shingles	0.008% *ad valorem*
Softwood fence	0.007% *ad valorem*

These programs offered interest-free, forgivable loans to companies located within specific regions with average sales of less than $1 million. The amount of the funding provided could not exceed 50% of the cost of new manufacturing or processing facilities, or 30% for modernization or expansion of such facilities. Loans were dispersed pursuant to this program between 1978 and 1981. Since the programs were limited to companies located in specific regions, they were determined to be specific and therefore countervailable.

1.4.2.2.3 Canada–Nova Scotia Forestry Subsidiary Agreement—Grants

Product	Total Estimated Net Subsidy
All products	0.008% *ad valorem*

The sawmill improvement component of this program provided grants of up to $5,000 per mill to encourage the adoption of improved sawmilling technology, better safety and improved conditions. The program was found to confer a subsidy on softwood lumber producers because eligibility was limited to sawmills.

1.4.3 Provincial Programs

1.4.3.1 Alberta: Stumpage Payment Deferral

Product	Total Estimated Net Subsidy
All products	0.003% *ad valorem*

In 1982, the Government of Alberta deferred the payment of stumpage dues for one year without interest charges. Commerce concluded that the program was countervailable because the government restricted the program of payment deferral to a specific industry or group.

1.4.3.2 British Columbia

1.4.3.2.1 Low Interest Loan Assistance (LILA)

Product	Total Estimated Net Subsidy
All products	less than 0.001% *ad valorem*

Loans received by softwood producers between 1978 and 1979 were found countervailable because their availability was limited to specific regions within British Columbia. Commerce determined that the terms of the loans were inconsistent with commercial considerations.

1.4.3.2.2 Stumpage Payment Deferral

Product	Total Estimated Net Subsidy
All products	less than 0.001% *ad valorem*

As logging in the Fort Nelson swamplands could be undertaken only in winter, the B.C. government allowed a deferral of the stumpage payments without interest charges until that period. The program was found to be regionally specific and inconsistent with commercial considerations.

1.4.3.3 Ontario

1.4.3.3.1 Stumpage Prices for Non-Integrated Licensees

Product	Total Estimated Net Subsidy
All products	0.015% *ad valorem*

Integrated licensees were stumpage users who also owned or operated pulp mills. The stumpage fees for non-integrated licensees were found to be 90% of those for integrated licensees. Commerce found that there was insufficient evidence to explain this differential. Consequently, the price charged to non-integrated licensees was found to be specific and to constitute preferential treatment, and was therefore countervailable.

1.4.3.3.2 Stumpage Payment Deferral

Product	Total Estimated Net Subsidy
All products	0.005% *ad valorem*

In 1982, the Government of Ontario deferred stumpage payments for one year. Commerce concluded that the benefits of this program were limited to sawmill operators and were inconsistent with commercial considerations, and thus countervailable.

1.4.3.4 Quebec

1.4.3.4.1 Stumpage Pricing on Timber Limits

Product	Total Estimated Net Subsidy
All products	0.061%

Commerce determined that there was a price differential between government charges for stumpage rights on "timber limits" and general pulpwood rights. It found that the lower timber limits prices were specific and conferred a preferential benefit, and hence were a countervailable subsidy.

1.4.3.4.2 Aide à la promotion des exportations (APEX)

Product	Total Estimated Net Subsidy
Softwood lumber	less than 0.001%
Softwood shakes and shingles	less than 0.001%
Softwood fence	0.002%

Under APEX, grants were awarded to companies for the promotion of Quebec goods and services outside Canada. Commerce concluded that APEX was a countervailable export subsidy, and that the products under investigation had benefited from this program.

1.4.3.4.3 Société de récupération, d'exploitation et de développement forestiers du Québec (REXFOR) (Forest Salvage, Management and Development Corporation of Quebec)

REXFOR was a provincial Crown corporation funded by the Ministère des Finances du Québec; it owned sawmills and pulp and paper mills producing the softwood products under investigation. As any funds provided by the government were directed toward a specific industry, Commerce found them countervailable.

Commerce calculated REXFOR's net subsidies to be as follows:

Loans and loan guarantees	All products under investigation:	0.001%
Grants	All products under investigation:	0.001%
Loss coverage	Softwood lumber:	0.017%
	Softwood shakes and shingles, and softwood fence:	0.014%
Equity purchases	All products under investigation:	0.005%
Tax abatement program	All products under investigation:	0.005%
Export expansion program	Softwood lumber:	0.019%

1.5 Programs Determined Not to Confer Subsidies

1.5.1 Federal and Provincial Stumpage Programs

Commerce determined that since access to stumpage programs was not contingent upon export performance, they could not be found to be export subsidies. It indicated that the mere fact that significant quantities of softwood were exported did not mean that stumpage programs conferred an export subsidy. Commerce also found that stumpage programs did not confer a domestic subsidy because they were not provided to a specific enterprise or industry, or group of enterprises or industries. It found that the only limitations as to the types of industries that used stumpage reflected the inherent characteristics of the natural resource and the current level of technology. Commerce noted that several different Canadian industries utilized stumpage programs. These included producers of lumber, wood products, veneer, plywood, pulp and paper, furniture, turpentine processors, charcoal, wood alcohol, and even food additives.

Commerce also found that even if stumpage programs were being provided to a "specific group of industries," they would not confer a domestic subsidy because they did not provide goods at preferential rates—the standard required by the Tariff Act of 1930 for a finding of preferentiality.[160] Furthermore, the stumpage programs "do not assume a cost of producing the goods under investigations." "Assumption" was statutorily defined as the relief from a pre-existing statutory or contractual obligation.

In addition, Commerce rejected the petitioner's request to conduct cross-border price comparisons to establish commercial benchmarks. It had been Commerce's policy not to use such comparisons. In addition, it was found that there was not a unified North American market and that there was not a unified price for stumpage.

1.5.2 Federal Programs

1.5.2.1 Deductible Inventory Allowance

The Canadian federal Income Tax Act authorized a deduction equal to 3% of the opening value of inventories. Commerce did not find this program countervailable as it was not limited to a specific industry.

1.5.2.2 Capital Cost Allowance (CCA)

The federal income tax regulations allowed a CCA for businesses that purchased assets used in pollution abatement, manufacturing or energy conservation. Commerce did not find this program countervailable as it was not limited to a specific industry.

160 § 775(B)(ii).

1.5.2.3 Export Development Corporation (EDC) (now Export Development Canada)

EDC, a Crown corporation, offers financial services to Canadian exporters, including export credit insurance (which was the focus of the petitioners' allegations). EDC was found to be charging premiums sufficient to cover long-term operating costs and losses. The export credit insurance was found to be consistent with commercial considerations, and thus was not an export subsidy. The program was also found to be generally available.

1.5.2.4 Federal Employment Programs

1.5.2.4.1 Local Employment Assistance Program (LEAP)

LEAP aimed to increase the self-sufficiency of chronically unemployed/underemployed persons (e.g., persons with disabilities) through grants for job creation and worker retraining. Commerce found that this program was not limited to any specific industry/industries or region(s).

1.5.2.4.2 Work Sharing Program

This program was designed to avert temporary layoffs during short-term economic downturns by reducing work weeks, encouraging shared work and providing unemployment benefits when no work was available. Employees of producers of products under investigation received benefits under this program. Commerce found that the program was not limited to any specific industry/industries or region(s).

1.5.2.5 Regional Development Incentives Program (RDIP)—Loan Guarantees

Although RDIP was found countervailable in this investigation, the loan guarantee element of the program was exempted from the net subsidy determination as it was determined to be consistent with commercial considerations.

1.5.2.6 Enterprise Development Program (EDP)

The EDP was developed to promote productivity enhancement. The tools through which it pursued this goal included:

- *Loan Insurance*
  The federal government provided loan insurance to private lenders for loans to companies approved for productivity projects.
- *EDP Contributions (i.e. grants)*
  The federal government shared the cost of approved projects with companies.

Commerce found that the loan insurance element of the EDP was fully consistent with commercial considerations, and that neither element was limited to any specific industry/industries or region(s).

1.5.2.7 Transportation Programs

1.5.2.7.1 Rail Freight Rates

Commerce examined the Canadian rail freight charges paid by softwood lumber companies. Commerce concluded that not only was there no countervailable subsidy conferred through these charges, but that the fees paid by lumber companies were markedly higher than those for other commodities. Furthermore, shipping rates were agreed upon after arm's-length negotiations between the Canadian railways and the shippers, with no government involvement.

1.5.2.7.2 Currency Exchange Rate Tariff

The currency exchange rate tariff was implemented in 1921 on all rail shipments to the United States, and was intended to adjust for differences in the value of the U.S. and Canadian currencies. Because of currency fluctuations, the railroads agreed that the value of the rail haul taking place in the United States should be reflected in U.S. currency, and the value of the Canadian haul should be reflected in Canadian currency. Since 1977, U.S. currency had been at a premium in relation to Canadian currency. As a result, Canadian shippers were paying a surcharge on exports to the United States.

Because Canadian shippers were paying a surcharge, Commerce found that no benefits were being bestowed through the currency exchange rate tariff on exports of softwood lumber. Furthermore, Commerce found that the tariff was not intended nor did it operate to stimulate exports. Rather, it was a mechanism for maintaining Canadian rail carrier revenue.

1.5.2.7.3 Fuel Tax Refund and Exemption

This program ensured that all U.S. states and Canadian provinces collected taxes equal to the actual fuel consumed by motor carriers operating in their jurisdiction, but purchased from outside that jurisdiction. Commerce found that the program did not relieve shippers of any tax and was not specific to an industry.

1.5.3 Joint Federal–Provincial Programs

1.5.3.1 Forestry Subsidiary Agreements

1.5.3.1.1 Long-Term Forest Management

Funding was provided for long-range resource management on public lands and public infrastructure development (i.e. silviculture camps, tree nurseries).

These activities were conducted by the provinces on provincial land and did not relieve any companies of obligations incurred in their licensing arrangements. Furthermore, the benefits of the program accrued to the government, as owner of the land, and not the short- or medium-term licensees. Commerce found that federal government payments for the construction of forest access roads did not constitute a subsidy because the roads were open to the public.

1.5.3.1.2 Saskatchewan: Opportunity Identification and Technological Assistance

Commerce concluded that the results of the research and feasibility studies funded by the provincial government under this program were publicly available and thus not countervailable.

1.5.3.1.3 Forestry Job Program—Employment Bridging Assistance Program (EBAP)

EBAP provided funds to qualifying industries to retrain skilled workers during times of recession. The program was not limited to a specific group or industry, and thus was not countervailable.

1.5.3.1.4 Canada–Nova Scotia and Canada–New Brunswick Grants for Private Woodlot Owners

These grants were designed to provide technical assistance in effective management of forest resources. As they were available to all private landowners, the grants were not countervailable.

1.5.4 Provincial Programs

1.5.4.1 Alberta

The following two Alberta programs were found not to be countervailable as they were not limited to a specific enterprise or industry, or group thereof.

- *Timber Salvage Incentive Program*
  This program was designed to provide incentives for the harvesting of timber damaged by forest fires or diseases.
- *Alberta Opportunity Company*
  This provincial Crown corporation provided assistance to a variety of processing and manufacturing sectors.

1.5.4.2 British Columbia: Section 88 Roads

Under section 88 of British Columbia's Forest Act, certain licensee expenditures for constructing approved roads on crown lands were credited against total stumpage dues payable to the province. Commerce found that as the quality of the roads had to be above that required for logging operations and they had to be accessible to the public, the program did not benefit a specific industry.

1.5.4.3 Ontario

The following two Ontario programs did not provide benefits limited to a specific enterprise or industry, or group thereof, and thus were found not countervailable:

- *Employment Development Fund (EDF)*
  This program was designed to promote long-term employment by providing grants to job-creating investment projects.

- *Non-Forestry Subsidiary Agreement Roads*
  Under this program, the province reimbursed companies building primary and secondary roads on crown lands. Commerce found that as the quality of these roads had to be above that required for logging operations and they had to be accessible to the public, the program did not benefit a specific industry.

1.5.4.4 Quebec

The following five Quebec programs were found not to preferentially benefit a specific enterprise or industry, or group thereof.

- *Caisse de dépot et placement du Québec (CDPQ)*
  Commerce confirmed that the CDPQ managed several pension funds and insurance programs, and invested over a broad range of sectors on commercial terms.

- *FRI Industrial Incentives Fund for Small and Medium-Sized Businesses*
  This program allowed small and medium-sized businesses to deposit up to half their income tax owed to the province into an escrow fund, from which they could withdraw up to 25% of the cost of approved development projects.

- *Programme expérimental de création d'emplois communautaires*
  This program provided cash payments to entrepreneurs to assist them in maintaining and creating jobs for the chronically unemployed.

- *PME Innovation*
  This program assisted small and medium-sized businesses in obtaining capital for production or marketing projects.

- *Société de développement industriel du Québec (SDI)*
  Quebec Industrial Development Corporation Programs
  Commerce found that the SDI-administered development grant programs and loan guarantee programs were neither region-specific nor inconsistent with commercial considerations.

1.6 Programs Determined Not to be Used

1.6.1 Federal Programs

- Enterprise Development Program—Loans

1.6.2 Federal-Provincial Programs

- Canada–Nova Scotia Forestry Subsidiary Agreement Grants

1.6.3 Provincial Programs

- Alberta: Inventory Financing
- British Columbia: Marketing Development Assistance
- Quebec: SDI Financial Assistance to Advanced Technology Firms

2 Softwood Lumber II

2.1 Summary

On May 19, 1986, Commerce initiated a second countervailing duty investigation on imports of softwood lumber from Canada. Unlike in *Softwood I*, softwood fence and softwood shakes and shingles were not subject to investigation. As in *Softwood I*, the main programs under investigation were the stumpage systems maintained by four provinces: Alberta, British Columbia, Ontario and Quebec. In this investigation, the petitioners presented new evidence indicating that the use of stumpage may have been limited by certain government policies. In addition, petitioners contended that there had been an evolution in Commerce's interpretation of both the specificity and preferentiality tests since *Softwood I*.

In its preliminary determination of October 22, 1986, Commerce found that the government exercised considerable discretion in allocating stumpage rights. Accordingly, Commerce found stumpage to be specific and therefore countervailable. Furthermore, unlike its finding in *Softwood I*, Commerce found that certain industries did not in fact have stumpage rights (e.g., furniture producers) and that, since lumber and pulp and paper producers tended to be horizontally integrated into single enterprises, they could not be used to show that stumpage was not limited to one group of industries. A preliminary countervailing duty rate of 15.0% was calculated for stumpage.

Prior to the final determination, Canada and the United States entered into a memorandum of understanding (MOU) in which Canada agreed to collect a 15% charge on lumber exports; the charge could be reduced or eliminated for provinces initiating replacement measures (i.e. increasing stumpage). On December 30, 1986, the petition was withdrawn and the investigation terminated.

2.2 Case History

On May 19, 1986, a petition was filed by the Coalition for Fair Lumber Imports, a group composed of U.S. trade associations and producers of softwood lumber products. The scope of investigation was softwood lumber, rough, dressed or worked (including softwood flooring classified as lumber).

On July 16, 1986, the ITC released an affirmative preliminary injury determination, finding a reasonable indication that the domestic industry was materially injured by reason of allegedly subsidized imports from Canada.

The preliminary Commerce determination was postponed to October 16, 1986, because the investigation was deemed to be extraordinarily complicated as a result of the large number of Canadian producers and the broad range and complex nature of the alleged subsidy practices.

On October 22, 1986, Commerce preliminarily determined that countervailable benefits were being provided to manufacturers, producers or exporters in Canada of certain softwood lumber products. Twenty Canadian exporters were excluded from the order because Commerce was satisfied that the firms either did not participate, or only participated at a de minimis level, in all programs under investigation. The estimated net subsidy was calculated to be 15% *ad valorem*.

On December 30, 1986, Canada and the United States signed the Softwood Lumber Memorandum of Understanding, under which Canada imposed a temporary export tax of 15% on certain softwood lumber entering into the United States from Canada. The agreement retained the export charge revenues in Canada rather than sending them to the United States in the form of countervailing duties. The charge could be reduced or eliminated for lumber from provinces that instituted replacement measures increasing stumpage or other charges on the harvest of timber. The Commerce final determination was to be issued on December 31, 1986. In a letter dated December 30, 1986, the petitioner withdrew its petition as filed on May 19, 1986. Based on the withdrawal, Commerce terminated the investigation effective January 5, 1987.

2.3 Key Issues

The significant value of Canadian softwood lumber exports to the United States (approximately $3 billion) and the fact that *Softwood I* had resulted in a de minimis finding again gave this investigation a heightened public profile. The key element in the investigation was the decision to investigate a Canadian natural resource management program (i.e. provincial stumpage) as potentially countervailable for the second time in four years.

Unlike in the previous softwood lumber case, Commerce preliminarily found Canadian stumpage programs countervailable. The stated reasons for this reversal were as follows:

- The stumpage programs were nominally generally available but, as a result of government discretion in the program design and delivery, the actual or *de facto* benefits were limited to a specific industry.
- Stumpage rights were provided at preferential rates as the governments of Alberta, British Columbia, Ontario and Quebec did not recover the costs of providing standing timber to stumpage holders; expenditures directly related to commercial timber harvesting exceeded directly related revenue.

Commerce's determination of specificity was based upon a change in policy further to the U.S. Court of International Trade's 1985 decision, *Cabot Corp. v. United States*.

In that decision, the CIT rejected Commerce's specificity test and its application in *Carbon Black from Mexico* (June 27, 1983). The Court stated, "The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits." In its preliminary determination of October 22, 1986, Commerce noted that, based on its experience with the specificity test, it concluded that it had to balance various factors in analyzing the facts of a particular case (i.e. a test to determine "*de facto*" specificity). These factors included: (1) the extent to which a government acts to limit the availability of a program; (2) the number of enterprises, industries or groups actually using a program (possibly involving the examination of disproportionate or dominant use); and (3) the extent to which government exercises discretion in making programs available.[161]

To determine whether stumpage rates were provided at preferential rates, Commerce used the Preferentiality Appendix as contained in the Preliminary Results of the Administrative Review of *Carbon Black from Mexico* (51 FR 13269) (April 18, 1986). Here, Commerce found that the government's cost of producing the good, i.e. standing timber, exceeded the revenues received through stumpage payments. The benefit was measured by comparing the costs of maintaining timberland and administering stumpage programs (including an imputed cost representing the value of standing timber) with stumpage payments. In *Softwood I*, the Preferentiality Appendix did not yet exist and Commerce had found that stumpage programs were non-preferential according to the standard contained in the Tariff Act of 1930.

161 Current law provides for a finding of "*de facto*" specificity if one or more of the following factors is present: (1) actual recipients are limited in number when measured by either enterprise or industry; (2) one enterprise or industry is a predominant user; (3) an enterprise or industry receives a disproportionally large amount; or (4) the authority providing the subsidy exercises discretion in granting the subsidy.

2.4 Programs Determined to Confer Subsidies

2.4.1 Stumpage Programs of the Alberta, British Columbia, Ontario and Quebec Provincial Governments

Countervailable Net Subsidy: 14.542% *ad valorem*

In *Softwood Lumber I,* Commerce had found that these programs were not limited to "a group of enterprises or industries" because: (1) any limitations on use were due to the physical characteristics of the products, and not the actions of the government; and (2) the actual users of stumpage programs spanned a wide range of industries.

In *Softwood Lumber II*, Commerce found that a re-examination of the provincial stumpage programs was warranted in view of new evidence presented by the petitioners and an evolution of the interpretation of countervailing duty law with respect to the specificity test and the measure of preferentiality.

Commerce listed three factors it considered when applying the specificity test:

1) the extent to which a foreign government acts to limit the availability of a program;
2) the number of enterprises, industries or groups thereof that actually make use of a program (possibly involving examination of disproportionate or dominant users); and
3) the extent to which the government exercises discretion in making the program available.

Commerce used best information available with respect to the specificity of the provincial stumpage programs because inadequate responses were received from the respondents.

Commerce preliminarily reversed its *Softwood I* finding and found that the stumpage programs were *de facto* specific. Commerce concluded that while the stumpage legislation allowed any potential user to apply, the four provincial governments in fact exercised discretion in the allocation of stumpage licences. While the existence of discretion does not per se make a benefit specific, significant evidence indicated that the discretionary allocation of stumpage rights resulted in targeting and distortion of the programs' benefits. Contrary to the findings in *Softwood I*, it was concluded that there were not many industries utilizing the programs.

In attempting to determine whether stumpage rights were provided at preferential rates, Commerce concluded that there was no generally available reference price to use as a benchmark. Therefore, the Preferentiality Appendix to the Preliminary Results of the Administrative Review of Carbon Black from Mexico

was used. The alternative tests contained in Carbon Black were designed to determine whether a government had provided a good or service at preferential rates for a limited number of users.

The tests, in hierarchical order, were as follows:

1) prices charged by the government for a similar good or service;
2) prices charged within the jurisdiction by other sellers of an identical good or service;
3) the government's cost of producing that good or service; or
4) external prices.

By using alternative (3) and determining that the government expenditures involved did not recover the costs of providing standing timber to stumpage rights holders, Commerce found that these programs did provide goods at preferential rates. As the measure of the net subsidy, Commerce used the difference between provincial government expenditures in providing stumpage rights and the revenues directly derived from stumpage payments, divided by lumber sales.

2.4.2 Federal Programs

2.4.2.1 Certain Types of Investment Tax Credits

Countervailable Net Subsidy: 0.047% *ad valorem*

For investment in "qualified property" (i.e. new plant and equipment used in processing) the basic Investment Tax Credit was 7%, with an additional 3% or 13% for qualified property in certain designated regions. For investment in "certified property" (i.e. property in regions characterized by high unemployment and low per capita income), the Investment Tax Credit rate was 50%.

For expenditures on "scientific research" (i.e. cost of capital equipment used for scientific research and expenses related to scientific research) the basic Investment Tax Credit rate was 20%. The rate was 35% for small Canadian companies and 30% for expenditures made in designated regions.

A "research and development" Investment Tax Credit of 10% was available to all companies in Canada (20% for small businesses).

Commerce found that the basic Investment Tax Credit rates were not limited to a specific enterprise or industry, and hence were non-countervailable. However, the Investment Tax Credit rates limited to specific regions were found to be specific and thus countervailable.

2.4.2.2 Program for Export Market Development (PEMD)

Countervailable Net Subsidy: less than 0.001% *ad valorem*

PEMD was a program administered by the Department of External Affairs. It facilitated the development of export markets for Canadian products by providing assistance for project bidding, market identification, export consortia, sustained export market development, participation in foreign trade fairs, and bringing in foreign buyers. PEMD assistance was in the form of interest-free loans with repayment terms dependent upon the success of the export promotion activity. Since PEMD loans were provided for export activities at preferential rates, Commerce found them to be interest-free loans specifically for export promotion, and therefore countervailable.

2.4.2.3 Regional Development Incentives Program (RDIP)—Grants

Countervailable Net Subsidy: 0.048% *ad valorem*

This program provided development incentives (grants or loan guarantees) to attract capital investments to designated regions where employment and economic opportunity were chronically low. Although the program was terminated in 1983, RDIP grants were provided through 1985. Commerce found this program countervailable because its benefits were limited to companies located within specific regions.

2.4.2.4 Industrial and Regional Development Program (IRDP)

Countervailable Net Subsidy: 0.145% *ad valorem*

IRDP was established in 1983 as the successor to RDIP. The goal of the program was to increase industrial development through the provision of grants to encourage the development of new and/or more productive industrial processes and products in less developed areas. The program classified each of Canada's 260 census districts into one of four tiers. Tier IV districts were the most economically disadvantaged regions, and were eligible for the highest share of assistance under IRDP. Tier I districts were the most economically developed regions, and were therefore eligible for a lesser share of IRDP assistance. Commerce concluded that while benefits available in the Tier I region were not countervailable because of their general availability, benefits provided above and beyond Tier I (i.e. benefits available in Tiers II to IV) were countervailable because of regional specificity.

2.4.2.5 Community-Based Industrial Adjustment Program (CIAP)

Countervailable Net Subsidy: 0.002% *ad valorem*

CIAP, which existed between 1981 and 1984, provided grants to promote business investments in communities affected by serious industrial dislocations.

2.4.3 Federal–Provincial Programs

The following programs were found to be limited to specific enterprises and industries or specific regions, and thus countervailable.

2.4.3.1 Agricultural and Rural Development Agreements (ARDA)

Countervailable Net Subsidy: 0.003% *ad valorem*

The ARDA was designed to promote economic development and alleviate social and economic disadvantages in certain rural regions through the provision of grants funded jointly by the federal and provincial governments. The focus of the programs was alternative land use, soil and water conservation, and economic development. The ARDAs signed with Manitoba, British Columbia, the Yukon and the Northwest Territories provided benefits to the softwood industry. The assistance was found to be specific because it was limited to rural areas.

2.4.3.2 General Development Agreements (GDAs)

Countervailable Net Subsidy: 0.002% *ad valorem*

GDAs were umbrella development agreements between the federal and provincial governments, designed to encourage regional development. Only the GDA subsidiary agreement on Manitoba Northern Development provided assistance to the softwood lumber industry.

2.4.3.3 Economic and Regional Development Agreements (ERDAs)

Countervailable Net Subsidy: 0.001% *ad valorem*

ERDAs were essentially continuations of the GDAs. The Saskatchewan Northern Development Subsidiary Agreement provided grants to the softwood lumber industry.

2.4.3.4 Sawmill Improvement Program (SIP)

Countervailable Net Subsidy: 0.002% *ad valorem*

SIP was conducted by Forintek, a private not-for-profit entity incorporated as Canada's "Wood Products Research Institute." Forintek derived its operating funds from membership fees from member companies, contracts, and contributions from the federal and provincial governments. Forintek members accounted for about 75% of Canada's lumber production. Under SIP, Forintek conducted confidential studies of the efficiency of mill operations. Commerce found the government's funding of Forintek's studies countervailable as this research was confidential and benefited specific enterprises.

2.4.4 Provincial Programs

The following programs were found to be limited to specific enterprises and industries or specific regions, and thus countervailable.

2.4.4.1 British Columbia

2.4.4.1.1 British Columbia Critical Industries Act

Countervailable Net Subsidy: 0.006% *ad valorem*

This program provided various forms of assistance to industries designated as "critical" by the provincial government. "Critical" could refer to either the economic conditions facing that industry or the importance of the industry to the economy. As the designation of "critical" was left to the government's discretion and the government had not provided any objective criteria for such a designation, the program was found to be specific.

2.4.4.1.2 British Columbia Low-Interest Loan Assistance

Countervailable Net Subsidy: less than 0.001% *ad valorem*

Loans received by softwood lumber producers in 1978 and 1979 were found to be countervailable because their availability was limited to specific regions within British Columbia. Commerce determined that the terms of the loans were inconsistent with commercial considerations.

2.4.4.2 Quebec

2.4.4.2.1 Quebec Tax Abatement Program

Countervailable Net Subsidy: 0.001% *ad valorem*

This program, which was terminated in 1981, permitted manufacturing enterprises located in any part of the province outside of Montreal to deduct from taxes payable 25% of the value of allowable capital investments.

2.4.4.2.2 Aide à la promotion des exportations (APEX)

Countervailable Net Subsidy: less than 0.001% *ad valorem*

In 1985, this program was split into two. APEX-Prospection provided grants to companies to facilitate the initial phases of exporting outside Quebec. APEX-Marketing was designed to enable firms that had identified a promising export market to analyze the market and develop a marketing plan. Because assistance was provided to promote exports of subject goods to the United States, Commerce found the program to be a countervailable export subsidy.

2.4.4.2.3 Forest Salvage, Management and Development Corporation of Quebec (REXFOR)

Countervailable Net Subsidy: 0.173% *ad valorem*

REXFOR was a provincial Crown corporation funded by the Ministère des Finances du Québec; it owned sawmills and pulp and paper mills producing the softwood products under investigation. REXFOR received funding from the Quebec and federal governments, and in turn funded the Quebec forestry industry through loans and equity transfusions. REXFOR's funding included a significant equity transfusion to Bois de l'Est du Québec (BEQ, an affiliate of REXFOR) for the purchase and reorganization of six sawmills. Commerce found this program countervailable because the benefits were limited to a specific enterprise on terms inconsistent with commercial considerations.

2.4.4.2.4 Quebec Industrial Development Corporation (SDI)—Export Expansion Program

Countervailable Net Subsidy: 0.012% *ad valorem*

The SDI was a Crown corporation acting as an investment corporation and development program administrator on behalf of the Government of Quebec. Commerce concluded that the SDI's financing assistance and development assistance programs were neither regionally specific nor inconsistent with commercial

considerations. However, the export expansion program, which offered interest cost reimbursements contingent on export performance, was found to be a countervailable export subsidy.

2.4.4.2.5 Quebec Lumber Industry Consolidation and Expansion (LICEP) Program

Countervailable Net Subsidy: 0.012% *ad valorem*

Under this program, the Government of Quebec provided 60% to 95% of the costs of engineering and management consulting related to wood processing facilities. The Government of Quebec also paid for 50% of the salary of personnel with expertise in production management or engineering, and 25% of the costs of feasibility studies for computer systems and the cost of purchasing and installing computer systems. The program was found to be specific to a particular industry.

2.5 Programs Determined Not to Confer Subsidies

2.5.1 Joint Federal–Provincial Programs

2.5.1.1 Forestry Development Agreements for Improvement of Crown Land

Under GDAs, ERDAs and ARDAs, agreements had been signed between the federal and provincial governments to develop forest land held by the Crown and by private owners. Commerce determined that the benefits of the silviculture, reforestation, forest management and administrative support elements of this program accrued to the Crown as owner of the lands, and not to the producers of the goods under investigation; accordingly it found these benefits not countervailable. Furthermore, as the resulting research was available to the public, and the benefits were available to all private landowners, Commerce found the program to be non-countervailable.

2.5.1.2 Newfoundland Rural Development Agreement

This program was designed to promote the small industrial sector in rural Newfoundland. As this GDA subsidiary agreement was not limited to a specific industry or locale within Newfoundland, it was found non-countervailable.

2.5.1.3 Rail Transportation Facilities for Lumber Industry

Commerce found that there were no instances in which Canadian railroads provided preferential benefits to, or facilities for, the softwood lumber industry. The rail services provided were not found to be limited to a specific industry or region.

2.5.1.4 Newfoundland Rural Development Subsidiary Agreement

This program was designed to promote manufacturing operations in a wide range of Newfoundland industries. As this ERDA subsidiary agreement was not limited to a specific industry or locale within Newfoundland, it was found non-countervailable.

2.5.1.5 Forintek Research and Development

Forintek was a private, non-profit entity dedicated to assisting the Canadian forest product industry. While some of Forintek's research activities were funded by the federal government, the results were made publicly available, and benefits therefore were not specific to an industry.

2.5.2 Provincial Programs

2.5.2.1 Quebec Industrial Development Financing and Development Assistance Program

Commerce concluded that the grant, loan, loan guarantee and equity protection programs administered by this overall program were neither regionally specific nor limited to a specific enterprise or region.

2.5.2.2 British Columbia Forest Stand Management Program

This program assisted individuals on welfare in acquiring forestry management skills. The program did not relieve timber licensees of any obligations or responsibilities, nor did it provide benefits to producers of the subject merchandise.

2.5.2.3 British Columbia Small Business Venture Capital Program

This program provided incentives for investment in equity capital of small businesses in British Columbia. The eligibility requirements for the program did not limit its benefits to a specific industry or enterprise.

2.5.2.4 Alberta Research Projects for the Forest Industry

Commerce found that the results of research funded by the Alberta government were publicly available and therefore not countervailable.

2.6 Programs Determined Not to be Used

2.6.1 Federal Programs

- Special Areas Act
- Forest Industry Renewable Energy Program

2.6.2 Joint Federal–Provincial Programs

- Prince Edward Island Comprehensive Development Plan

2.6.3 Provincial Programs

- British Columbia Preferential Rail Rates
- British Columbia Market Development Assistance
- Quebec Industrial Development Corporation Program to Promote the Export of Products and Services
- Quebec Laws Concerning Forest Credit
- Quebec Reimbursement of Real Estate Taxes
- British Columbia Income Tax Holidays
- British Columbia Development Corporation Industrial Parks
- Alberta Timber Salvage Program

2.7 Programs for which Commerce Needed Additional Information

- Fort Nelson Extension in British Columbia

2.8 Programs Preliminarily Determined Not to Exist

- Quebec Office of Planning and Development Exports Assistance Program

3 Softwood Lumber III

3.1 Summary

On October 31, 1991, Commerce initiated a third countervailing duty investigation after Canada notified the United States that it was terminating the Softwood Memorandum of Understanding. In December 1991, U.S. petitioners added Canadian log export restrictions as an alleged countervailable subsidy. On March 5, 1992, Commerce issued its preliminary subsidy determination, in which it found stumpage in Alberta, British Columbia, Ontario and Quebec to confer a subsidy of 6.25%, and log export restrictions in British Columbia to confer a subsidy of 8.23%. A preliminary subsidy rate of 14.48% was applied to lumber from all provinces except the Atlantic Provinces. Commerce abandoned the cost-revenue comparison methodology used in *Softwood II* and instead found that stumpage

prices were below market prices, providing a subsidy that was passed to the lumber producers. It also found that stumpage programs were, in fact, limited to a group of industries.

On May 28, 1992, Commerce published its final determination, reducing the rate for stumpage to 2.91% and the rate for export restrictions to 3.60%. A final subsidy rate of 6.51% was then applied to lumber from all provinces except the Atlantic Provinces. On July 15, 1992, the ITC released an affirmative final injury determination. The ITC found injury primarily on the basis that Canadian lumber imports consistently accounted for a very large share of apparent U.S. consumption. Subsidized Canadian lumber, and spruce-pine-fir in particular, was found to have caused price depression in the U.S. market. On July 29, 1992, a panel was convened under Chapter 19 of the Canada–U.S. Free Trade Agreement to review Commerce's final determination. On May 6, 1993, the panel issued remand instructions to Commerce. On September 17, 1993, Commerce issued its determination on remand, in which it affirmed its previous determinations and increased the rate from 6.51% to 11.54%.

On May 17, 1993, the panel issued its decision on remand. It concluded that Commerce had failed to provide a rational basis for its finding that stumpage was specific, and remanded the issue back to Commerce for a determination that stumpage was not provided to a specific enterprise or industry. The panel further concluded that Commerce had not empirically shown that the stumpage programs produced market distortions (i.e. it had not performed an effects test).

With respect to log export restrictions, the panel found that Commerce had failed to determine precisely the beneficiaries of the export restrictions, and therefore rejected Commerce's specificity finding. With a panel remand to make determinations that both stumpage and log export restrictions were not specific and therefore not countervailable, Commerce terminated the order.[162]

3.2 Case History

On September 3, 1991, the Government of Canada announced its intention to terminate the Canada–U.S. Memorandum of Understanding on Softwood, effective October 4, 1991. On October 4, 1991, the U.S. Trade Representative initiated a "Section 301"[163] investigation of Canadian softwood lumber exports. The USTR determined to withhold or extend liquidation of entries of imports of softwood lumber until the completion of a countervailing duty investigation by Commerce.

162 On January 6, 1994, Commerce issued its second remand determination that stumpage and log export restrictions were not countervailable. The panel accepted the remand on February 23, 1994. On April 6, 1994, the U.S. Trade Representative requested the establishment of an Extraordinary Challenge Committee. On August 3, 1994, the committee affirmed the panel's order. On August 16, 1994, Commerce revoked the countervailing duty order.

163 § 302(b)(1)(A) of the Trade Act of 1974, as amended.

To that end, Canadian softwood lumber was made subject to duties of up to 15% *ad valorem*, depending on the province of origin. The imposition of such duties was made contingent upon an affirmative final subsidy and injury determination in the countervailing duty investigation, and applied to entries filed on or after October 4, 1991.

Also, on October 4, 1991, Commerce self-initiated a countervailing duty investigation. Commerce stated that it undertook this action because Canada had unilaterally breached the terms of the MOU, and affirmed that it possessed information regarding the extent of Canadian subsidies and the likelihood of injury. Companies located in the Maritime Provinces had been exempt from payment of the export charge since 1988, and were thus exempted from this investigation.

On December 20, 1991, the ITC released an affirmative preliminary determination, finding a reasonable indication that the domestic industry was threatened with material injury by reason of allegedly subsidized imports from Canada.

On March 12, 1992, Commerce issued its preliminary subsidy determination. Alberta, British Columbia, Ontario and Quebec were found to maintain stumpage programs conferring countervailable subsidies.

Commerce calculated a country-wide rate for stumpage programs of 6.25%, multiplying the rates for the four provinces by their relative share of total Canadian softwood lumber exports to the United States during the period of investigation.

In addition, British Columbia was found to maintain log export restrictions that conferred a countervailable subsidy. Commerce calculated a country-wide rate for log export restrictions of 8.23%, multiplying the rate for British Columbia by that province's relative share of total Canadian softwood lumber exports to the United States during the period of investigation. Taken together, a preliminary subsidy rate of 14.48% was applied to lumber from all provinces except the Atlantic Provinces. Six companies that used only U.S.-origin logs in their production were also excluded from the investigation.

On May 28, 1992, Commerce published its final determination. Weight-averaging each province's rate (Alberta, 1.25%; British Columbia, 3.30%; Ontario, 5.95%; Quebec, 0.01%) by the province's share of exports to the United States, it calculated a country-wide rate of 2.91% for stumpage programs. British Columbia's log export regulations were found to provide a countervailable subsidy of 4.65%, weight-averaged for a country-wide rate of 3.60%. Taken together, a final subsidy rate of 6.51% was applied to lumber from all provinces except the Atlantic Provinces.

On July 15, 1992, the ITC released an affirmative final injury determination, thereby confirming a countervailing duty order. Canadian lumber imports consistently accounted for a large share of apparent U.S. consumption during the period of investigation, and increased when measured by value (although they decreased when measured by market share and quantity). The ITC found that prices for

spruce-pine-fir were a bellwether in the market and that Canadian-origin imports of these species served to limit potential price increases in the U.S. market. Log costs for Canadian producers did not increase as steeply as log costs in the United States, a fact that the ITC attributed in part to Canadian subsidies. The ITC concluded that U.S. producers' inability to raise prices commensurate with rising costs clearly demonstrated significant price suppression and was attributable, at least in part, to sales of imported subsidized Canadian lumber.

3.3 Canada–U.S. Free Trade Agreement Chapter 19 Panel (Commerce)

On May 25, 1992, the Government of Canada, the governments of Alberta, British Columbia, Manitoba, Ontario, Saskatchewan, Quebec, the Northwest Territories and the Yukon, and the Canadian Forest Industries Council and affiliated companies requested an FTA Binational Panel Review of Commerce's final determination.

On July 29, 1992, a panel was convened under Chapter 19 of the Free Trade Agreement to review Commerce's final determination. On May 6, 1993, the panel unanimously affirmed in part and remanded in part the final determination:

1) In the case of the stumpage programs, Commerce had found them to be specific on the grounds that the program had a limited number of users. The panel concluded that Commerce was required to consider all four of the specificity elements in its Proposed Regulations, as well as any other relevant record of evidence in making its specificity finding.

2) Commerce had found that the federal government's pricing policies for timber-cutting rights were preferential when measured against benchmark prices charged in alternative markets. Accordingly, the policies were found to convey a subsidy to softwood lumber exporters. Commerce was instructed to consider whether or not the stumpage program did in fact distort the market so as to give a competitive advantage to Canadian exporters (i.e. it was instructed to perform an effects test).

3) The panel found Commerce's conclusion that British Columbia's log export restrictions were de jure specific to be contrary to U.S. law, and it remanded the matter to Commerce for reconsideration because it felt that Commerce should have undertaken a *de facto* specificity analysis. A panel majority found that Commerce was entitled to treat the restrictions as subsidies. However, Commerce was directed to reconsider and recalculate a number of the economic and statistical methodologies used to determine whether the log export restrictions conferred a benefit upon B.C. softwood

> producers, entitling the United States to treat lumber imports from that province as countervailable. Two of the panellists found log export restrictions not to be countervailable and therefore dissented from the majority on log export restrictions.

On September 17, 1993, Commerce issued its determination on remand, in which it affirmed its previous determinations and increased the subsidy rate from 6.51% to 11.54%. As requested, Commerce analyzed the four factors identified in its 1989 Proposed Regulations relating to specificity. It re-affirmed its prior determination that the stumpage programs were countervailable for the reason that the recipients of these benefits were "too few" in number. Commerce agreed with the panel that the log export restrictions were not *de jure* specific, but after reconsideration it found that they were *de facto* specific for substantially the same reasons given with respect to the stumpage program. Commerce adhered to its original position that it was not required to perform an analysis of "market distortion." However, in accordance with the panel's instructions, Commerce reviewed the record of evidence and concluded that the provincial programs had the effect of distorting the market.

On December 17, 1993, the panel issued its decision on remand. By a majority of 3 to 2, the panel concluded that Commerce had failed to provide a rational basis for its finding that stumpage was specific, and it remanded the issue back to Commerce with instructions to provide a determination that stumpage was not provided to a specific enterprise or industry.

On the question of whether the stumpage programs distorted or otherwise had an effect on markets, the majority took the position that a subsidy cannot be countervailed unless a competitive advantage is conferred upon the object of the subsidy, or unless market distortion flows from the subsidy. The panel concluded that Commerce had not empirically shown that the stumpage programs produced market distortions. With respect to log export restrictions, the panel accepted Commerce's remand determination that the restrictions had an effect on the price of logs. However, the panel found that Commerce had failed to determine precisely the beneficiaries of the export restrictions; and since the panel believed that they were not necessarily the same as those benefiting from stumpage programs, it rejected Commerce's specificity finding. Two panel members dissented and concluded that under U.S. principles of judicial review of agency action, the panel gave too little deference to Commerce's choice of methodologies in determining specificity. With a panel remand to make determinations that both stumpage and log export restrictions were not specific and therefore not countervailable, Commerce was effectively instructed to revoke the order.

3.4 Canada–U.S. Free Trade Agreement: Extraordinary Challenge

On April 6, 1994, the USTR filed a Request for an Extraordinary Challenge Committee to review the findings made by the Binational Panel that reviewed Commerce's final determination and its determination on remand. The request for the extraordinary challenge stated that two members of the panel materially violated the FTA Rules of Conduct by failing to disclose information that revealed at least the appearance of partiality or bias and, in the case of one of the panellists, that indicated a serious conflict of interest. Moreover, the panel manifestly exceeded its powers, authority and jurisdiction by ignoring the Chapter 19 standard of review, including substantive law and the facts, in overturning Commerce's finding that the subsidies at issue were provided to a specific industry or group of industries and inventing a legal requirement that Commerce examine whether subsidies distorted the market (i.e. that it perform an effects test). The request stated that these actions materially affected the panel's decision and threatened the integrity of the Binational Panel Review process.

On August 3, 1994, by a majority of 2 to 1, the Extraordinary Challenge Committee upheld the earlier findings of the Binational Panel. The majority found that the panel followed an appropriate standard of review and properly interpreted U.S. law[164] when it ruled that Commerce, in this unique situation, was required to assess whether or not there was any competitive advantage or market distortion created by the Canadian stumpage systems or the B.C. log export restrictions before determining whether or not a countervailable subsidy existed.

The majority found that the panel had articulated the proper standard of review and had conscientiously applied the appropriate law with respect to its reversal of Commerce's specificity findings, based on the agency's failure to consider all of the enumerated factors.

The minority held that since the *Softwood III* decision, the U.S. Federal Circuit's decision in *Daewoo Electrics v. International Union of Electric* 6 F. 3d 1511 (Fed. Cir. 1993) required greater deference to Commerce's specificity methodology and its decision that market distortion is not a required element. The panel majority seems to have agreed with the Canadian position that the decision in *Daewoo* was not relevant and did not add to what had been laid down in earlier judicial decisions. Moreover, Justice Hart found that when Canada and the United States replaced domestic judicial review with panel review, they must have realized that such panels would exhibit less deference to administering agencies than would domestic courts.

164 Article 1904 (3) of the FTA states that panels must apply the standard of review and "general legal principle" that a U.S. court would apply in its review of a U.S. agency's determination.

With respect to the allegation of bias and gross misconduct lodged against two of the Canadian panel members, the majority found that the standard of gross misconduct, bias, serious conflict of interest or material violation of the rules of conduct had not been met. While Judge Morgan found that the two panellists had been remiss in not disclosing certain advice given and services rendered to various interested parties on unrelated issues, there had been no material violation of the rules of conduct. Justice Hart found that there was no intentional refusal to reveal any matter that would justify their removal, and that any omission had been inadvertent. The majority also noted that the concerns about the two panellists were not raised until after the second remand determination. In dissent, Judge Wilkey found that it was inappropriate for the Extraordinary Challenge Committee to speculate on the significance of the undisclosed conflicts of interest, and that new panellists should accordingly be chosen.

Judge Wilkey also asserted that the Extraordinary Challenge Committee was to operate in a manner equivalent to the U.S. Federal Circuit in terms of its review of panel decisions—namely, to determine whether the panel had manifestly exceeded its powers, authority or jurisdiction so as to threaten the integrity of the Binational Panel process. Furthermore, Judge Wilkey found that the panel had not shown sufficient deference to the expertise of the U.S. agency, and had substituted its theories and beliefs for those of the agency. Finally, he questioned the entire rationale of having independent "experts" reviewing agency decisions and the feasibility of educating Canadians about U.S. law.

In light of the Extraordinary Challenge Committee's affirmation of the Binational Panel's order, the countervailing duty order on certain softwood lumber products from Canada was revoked on August 16, 1994.

3.5 Canada–U.S. Free Trade Agreement Chapter 19 Panel (ITC)

On July 24, 1992, the Government of Canada, the governments of Alberta, British Columbia, Manitoba, Ontario and Quebec, the Canadian Forest Industries Council and affiliated companies, and the Quebec Lumber Manufacturers' Association and its individual member companies requested a panel review of the ITC's final injury determination.

On July 27, 1993, the panel found that the ITC's determination was not supported by substantial evidence on the record, and it directed the ITC to make a determination about causation of material injury. The panel found that substantial evidence supported the ITC's finding that the subject goods from Canada and the United States were highly substitutable and that the volume of Canadian imports during the period of investigation was "significant." However, in the absence of increases in quantities or shares, or other indicia, the mere presence of a significant volume of unfairly traded imports is insufficient to support an affirmative injury determination.

The panel instructed the ITC that if price suppression was the basis of a new affirmative determination, the ITC should have indicated the actual price-suppressing effect of the subject goods. The ITC should have also addressed the "to a significant degree" requirement of 19 U.S.C. sec. 1677 (7) (C) (ii). The panel further found that should the ITC on remand decide to rely on a cross-sectoral comparison, it must explain the statutory and other bases permitting such a comparison. An appropriate methodology must also be established, defined and explained. Finally, the ITC was instructed to provide an adequate explanation of the basis for its findings that imports of softwood lumber from Quebec were not entitled to a separate injury determination.

The ITC released its determination on remand on October 25, 1993, again finding material injury by reason of Canadian softwood lumber imports. The ITC found that U.S. price increases had been less than they otherwise would have been and that this price suppression was caused in a significant part by Canadian imports.

It supported this conclusion with: (1) price trend evidence showing that Canadian prices rose more slowly and fell more rapidly than U.S. prices; (2) evidence that prices of Canadian spruce-pine-fur lumber had a dominant impact on prices in the U.S. market; and (3) evidence that U.S. prices were lowest in the Northeast (where Canadian import penetration was highest) and highest in the Southeast (where Canadian import penetration was lowest).

On January 28, 1994, the panel issued its review of the ITC's first remand determination. The panel upheld the ITC's determination not to accord Quebec a separate injury determination as the ITC did not have the statutory authority to vary the scope of Commerce's determination, which in the instant case was a "country-wide" subsidy finding.

The panel found that the ITC's price trend data and analysis did not constitute substantial evidence in support of its conclusion that the significant price suppression was caused by imports from Canada. The ITC did not provide sufficient information as to how its conclusions were reached. Furthermore, the panel was concerned about the use of Producer Price Indices, as opposed to actual prices, to establish price trends and determine that subsidized Canadian lumber increased in price more slowly and decreased in price more rapidly than U.S. lumber. If the ITC on remand relied on price trend information to support an affirmative determination, it was instructed to provide a full analysis and explanation of the underlying data and methodology.

On remand, the ITC again found that Canadian imports had a price-suppressive effect on domestically produced softwood lumber because the price of subsidized Canadian lumber had a dominant impact on lumber prices in the U.S. market. The panel found that there was not sufficient evidence to support the ITC's finding that the Canadian prices served as a reference point for the pricing of U.S.

lumber. Furthermore, even if there was substantial evidence on the record, it would not be sufficient to establish causation. The panel found that the evidence used by the ITC in it regional analysis was insufficient because it was based on data previously rejected and now used without adequate explanation. Moreover, the analysis contained a relatively low level of statistical certainty.

In its second remand determination released on March 14, 1994, the ITC concluded that the panel had rejected any reliance on price trends and so it did not discuss the issue further.

The ITC plurality (two of the three Commissioners who had found injury) re-affirmed their earlier conclusion: that the U.S. industry was experiencing material injury; that lumber is a competitive, commodity market; that subsidized Canadian imports accounted for over one quarter of the market, and that they were therefore significant and causally linked to the material injury suffered by the U.S. industry; and that although their price effects on U.S. prices were uncertain, no other causes fully explained the injury. The Commissioners' view of the finding was that imports were significant and that this fact was tantamount to a finding of injury causation.

On July 6, 1994, the panel released its review of the ITC's second remand determination. The panel stated that the ITC had misunderstood its findings on price trend analysis and the panel had in fact indicated that it would be open to such analysis if conducted appropriately.

The panel rejected as not in accordance with law the ITC assertion that the existence of significant Canadian imports could be presumed to be a cause of material injury to the U.S. industry. Such imports, it maintained, could be viewed only as support for a determination of such causation. The panel remanded the plurality's determination that no cause other than significant Canadian imports fully explained the losses suffered by the U.S. industry. The panel concluded that this finding was based in part upon the ITC's cross-sectoral comparison, a practice which in its first and second review had been remanded to the ITC to address several methodological and statutory concerns. The panel remanded the determination of the third Commissioner, who had offered a separate but concurring finding, so that several methodological concerns relating to the economic model employed could be addressed.

The Panel Review of the ITC decision effectively ended at this point. Further proceedings were stayed initially in light of a constitutional challenge to the panel process in U.S. courts, but were later terminated after the United States revoked the order on August 16, 1994.

3.6 Final Determination—Programs Investigated[165]

Based upon its analysis of the stumpage and log export programs, Commerce calculated a country-wide countervailing duty rate of 6.51% *ad valorem*. In view of the complexity of the investigation, the following detailed analysis is presented.

3.6.1 Programs Determined to Confer Subsidies

3.6.1.1 Provincial Stumpage Programs

To find the provincial stumpage programs countervailable, Commerce had to first determine whether the programs were limited to "a specific enterprise or industry, or group of enterprises or industries." Second, Commerce had to determine whether the provinces provided "goods or services at preferential rates."

3.6.1.1.1 The Specificity Test

In *Softwood I*, Commerce found that stumpage programs were limited to a specific industry because of the "inherent characteristics" of timber. In its preliminary decision in *Softwood II* and in this decision, Commerce reversed itself and found the stumpage programs to be specific, as they benefited only two industries: the solid wood products industry and the pulp and paper industry.[166] Commerce offered two reasons for this reversal: (1) its belief that the 1988 Omnibus Trade and Competitiveness Act was intended to overrule any prior Commerce cases in which programs were found non-specific based upon the "inherent characteristics" doctrine; and (2) its belief that, even if the 1988 Trade Act did not overrule the "inherent characteristics" doctrine, the act did not adopt the doctrine, leaving Commerce with the discretion to overturn its earlier finding.

Commerce rejected the respondents' argument that "purposeful government action" to limit a program must be shown for a program to be considered specific. The respondents argued that "purposeful government action" means that the program is restricted or limited by government action to a specific enterprise. Commerce found that use of the "purposeful government action" test would lead to the absurd result of finding all natural resource programs to be non-specific.

Commerce stated that it had considered all of the specificity factors contained in the 1989 Proposed Regulations, and found that one of them—the limited number of users—required a finding of specificity. While conceding that a wide variety of

165 The following is based in part on analysis provided by Steptoe and Johnson, legal counsel to the Canadian Forest Industries Council, May 29, 1992. Reproduced by permission of the Council.

166 Commerce noted that its Proposed Rulemaking of May 1989 identified four factors for determining specificity: (a) the extent to which a government acts to limit the availability of a program; (b) the number of users that actually use the program; (c) whether any user receives benefits of the program in a dominant or disproportionate manner; and (d) whether the government exercises discretion in awarding benefits under the program.

products were produced by covered companies, Commerce employed a broad meaning to the term “industry” so as to include a wide variety of downstream products made from the same base products, i.e. solid wood and pulp.

3.6.1.1.2 The Preferentiality Test

Having determined that the stumpage programs were specific, Commerce addressed the second key issue: whether they provided stumpage at preferential rates. Commerce found the stumpage programs in Alberta, British Columbia, Ontario and Quebec to be preferential and therefore countervailable. Commerce rejected the respondents’ argument that the programs could not be countervailed because they did not cause “market distortion,” i.e. did not cause higher output or lower lumber prices than what would be obtained in a purely competitive market (i.e. they did not meet the effects test).

Commerce also relied upon the legislative history of the “offset” provision concerning the treatment of regional subsidies in support of its finding that Congress did not intend Commerce to consider “market distortion.” Prior to the 1979 Trade Agreements Act, the Treasury Department had a practice of taking into account the effects of government subsidies on the competitive position of subsidy-receiving firms. In the 1979 act, Congress specifically eliminated this offset practice. Commerce indicated that this reflected Congress’ position that Commerce should not assess the economic effects of a subsidy on recipients in either defining or evaluating a government program.

In support of their position, the respondents relied in part upon several U.S. countervailing duty investigations in which Commerce had performed an effects test. Commerce stated, however, that the cited decisions were of no relevance in this case because they concerned imports from non-market economies. The cited cases did not indicate that Commerce would necessarily use a market distortion test in countervailing duty cases involving imports from a market economy country. An effects test was necessary in a non-market economy case because the concept of “subsidy” has no meaning outside the context of a market economy. In a market-economy case, the existence of a “market distortion” is normally presumed once the receipt of a countervailable subsidy has been established.

The respondents relied on an economic analysis performed by Dr. Nordhaus to advance their argument that the stumpage programs did not have a distortive effect. Commerce not only found the study to be irrelevant given its determination concerning the effects test, but disputed the methodology and conclusion reached by Dr. Nordhaus.

3.6.1.1.2.1 Preferentiality Hierarchy

Commerce had devised a hierarchical methodology for determining and measuring when goods and services are being provided at preferential rates. Commerce

stated that it had done so in the interest of maximizing administrative predictability, as the statute did not provide considerable guidance in this area.

Commerce's preferred test (test one of the Preferentiality Appendix)[167] to determine preferentiality is to examine whether the government has provided a good or service at a price that is lower than the prices the government charges to the same or other users of that product within the same political jurisdiction. Commerce used this benchmark for British Columbia, Alberta and Ontario, but it used its first alternative benchmark—private prices charged for the identical good—for Quebec-origin products.

Where comparisons based on price discrimination within the jurisdiction cannot be reliably made, one of three further hierarchically ranked alternatives are used.[168]

Commerce indicated that its ranking was not "immutable" but would be followed unless "presented with facts or arguments demonstrating that it is inappropriate, which was not the case here."

Commerce rejected the respondents' argument that each province's revenues exceeded its costs, meaning that the third alternative benchmark—the government's cost—should be used. Commerce did not use the cost benchmark because it could use higher-ranked benchmarks in each province. Moreover, Commerce indicated that the cost benchmark raised particular problems when applied to natural resources, and Ontario, Quebec and Alberta had expressed concerns over the use of the cost benchmark in their provinces.

Commerce refused to use a cross-border comparison between U.S. stumpage charges and Canadian charges because its long-standing practice has been to measure preferentiality within the foreign jurisdiction. Commerce also noted that it was convinced that too many factors affected the comparability of U.S. and Canadian stumpage charges.

3.6.1.1.3 British Columbia

Commerce determined that British Columbia provided stumpage at preferential prices as administratively set prices were lower than competitively bid prices under section 16 of the Small Business Forest Enterprise Program. Commerce

167 See *Carbon Black from Mexico* (51 FR 13269) (April 18, 1986).

168 The benchmarks are, in order of preference: (1) the prices charged by the government for the identical good to others in the same political jurisdiction; (2) the price charged by the government for a similar or related good, adjusted for quality differences; (3) the price charged by private sellers in the same political jurisdiction for an identical good; (4) the government's cost of providing the good; and (5) the price paid for the identical good outside the political jurisdiction. These benchmarks are known as the "Preferentiality Appendix" and first appeared in Commerce's preliminary determination of its Administrative Review of *Carbon Black from Mexico* in 1986.

utilized section 16 prices as the benchmark because they were determined solely by competitive market forces and were thus non-preferential.

Commerce accepted the respondents' argument that it should use all softwood log prices in calculating both the administratively set price and the competitive benchmark, since sawmills use both sawlogs and pulplogs in their milling operations.

Subsidy Calculation: Commerce found a final countervailing duty rate of 3.30%.[169] The rate in Commerce's preliminary determination was 6.88%.

3.6.1.1.4 Quebec

To determine whether Quebec's Timber Supply Forest Management Agreement (TSFMA) program, which accounted for over 95% of the stumpage harvested on provincial lands, provided preferential rates, Commerce used its second alternative benchmark—private sales of stumpage.

Commerce found that its preferred benchmark—the government's price for the identical good on a non-specific and non-preferential basis—was not available, and that its first alternative benchmark could not be used since the government did not sell "similar" goods. Based upon its comparison of adjusted TSFMA rates and weight-averaged private stumpage rates, Commerce found the TSFMA rates to be lower and thus preferential.

Subsidy Calculation: Commerce calculated a final countervailing duty rate of 0.01%. The rate in its preliminary determination was 3.78%.

3.6.1.1.5 Ontario

Commerce found that the Ontario government charged non-integrated mills (i.e. mills not related to pulp/paper mills) lower stumpage rates than those it charged integrated mills. It was determined that the rate charged to integrated mills was non-preferential and thus provided an appropriate benchmark. Since Ontario's rates were set only by reference to the end user rather than by the type of timber harvested, no pulplog/sawlog adjustments needed to be made. Commerce made no adjustments to the integrated and non-integrated rates since both types of users shared the same responsibilities.

Subsidy Calculation: Comparing the integrated and non-integrated rates, Commerce found a final countervailing duty rate of 5.95%. Commerce had calculated a 5.21% rate for Ontario in its preliminary determination.

169 To calculate the stumpage subsidies, Commerce followed the same general formula in each province. The numerator in each province consisted of the calculated benefit per cubic metre (i.e. the difference between administered rates and the benchmark), multiplied by the softwood sawlog harvest. The denominator consisted of the value of softwood lumber shipments plus the value of lumber co-products (e.g., chips and sawdust).

3.6.1.1.6 Alberta

Alberta provided timber under three types of tenures: Forest Management Agreements (FMAs); Timber Quota Certificates (TQs); and Commercial Timber Permits (CTPs). Commerce used the FMA pulplog rate as the benchmark to measure the preferentiality of the FMA sawlog rate, since the pulplog rate was found to fluctuate based on published pulp and paper prices. According to Commerce, this fact made the pulplog rates non-preferential and thus an appropriate basis for comparison. Commerce found the FMA sawlog rate to be countervailable since it was lower than the pulplog rate. Commerce determined that some TQs involved competitive bids, whereas others involved administered prices. Commerce used the competitive TQ bid prices as the benchmark for administered TQs and found a countervailable benefit. By comparing the prices of competitive-bid CTPs with the administrative prices for other CTPs, Commerce found a countervailable benefit.

Subsidy Calculation: Based upon its analysis of the three tenures, Commerce found a final countervailing duty rate of 1.25%. In its preliminary determination, Commerce calculated a 4.16% rate.

3.6.1.1.7 Manitoba, Saskatchewan, Yukon and Northwest Territories

Commerce also found the stumpage programs in these provinces and territories to be countervailable. However, Commerce decided that, since the calculated rates would have an insignificant impact on the country-wide countervailing duty rate, it would not separately construct a margin for these jurisdictions. These provinces and territories received the country-wide rate calculated under Commerce's analysis of Alberta, British Columbia, Ontario and Quebec.

Country-wide Rate for Stumpage: For each province, Commerce divided the countervailable benefit calculated above by the total value of that province's lumber and lumber co-product (e.g., chips and sawdust) shipments. Commerce then weight-averaged the resulting provincial rates according to each province's percentage share of softwood lumber exports to the United States. Commerce calculated a country-wide stumpage rate of 2.91%.

3.6.1.2 Provincial Log Export Restrictions

Commerce maintained its preliminary determination that B.C. log export restrictions provided countervailable benefits to lumber producers and that regulations in Alberta, Ontario and Quebec did not.

3.6.1.2.1 Market Distortion

As discussed above, Commerce found that the 1979 Trade Act did not require proof of market distortion (i.e. effects test) as a prerequisite to a finding of a subsidy. More specifically, Commerce determined that while the ITC was precluded by statute from measuring benefits on the basis of the net economic

effect on the subsidy recipient (i.e. an increase in output or a decrease in price), the ITC was not precluded from identifying and analyzing a subsidy in terms of market distortion (i.e. marginal cost and price changes). Commerce therefore used a supply-and-demand analysis for the purposes of the log export restriction issue, because this analysis was found to be the only method by which it could be determined whether B.C. softwood lumber manufacturers received countervailable benefits as a result of the log export restrictions.

Commerce noted that both the stumpage programs and the log export restriction had a net economic effect on the recipient as they decreased the cost of the major raw material input (logs) and thereby lowered the recipient's marginal cost. Commerce stressed that its analysis of the supply-and-demand forces at play in the B.C. log market demonstrated that marginal cost was affected by the export restriction.

3.6.1.2.2 Countervailability of Export Restrictions

Commerce recognized that prior to *Leather from Argentina* (a 1991 decision in which Commerce countervailed an export restriction on hides), its practice was not to countervail border measures. Commerce noted, however, that it was free to alter its long-standing practice so long as it provided a reasonable basis for doing so and demonstrated that the new practice was consistent with the statute. Commerce stated that prior to *Leather*, its decisions—in which border measures, such as the log export restrictions, were found *per se* to be non-countervailable—had been erroneous.

While conceding that Congress had not expressly addressed the issue of countervailability of export restrictions, Commerce stated that its review of the historical background, legislative history and statutory language indicated that Congress had intended the terms "subsidy" and "bounty or grant" to be read broadly. Therefore, according to Commerce, had Congress directly confronted this issue, it would have applied the countervailable law as a matter of law to border measures, such as export restrictions.

Commerce also stressed that the illustrative examples of domestic subsidies Congress had included in the Trade Act of 1979 did not constitute an exhaustive list and did not restrict the definition of subsidy. Commerce was free to expand the list in a manner "consistent with the underlying principles implicit in [those] enumerations."

According to Commerce, Congress had intended it to countervail programs having the indirect effect of lowering a foreign producer's manufacturing cost by limiting the demand for the resource. Commerce found that the B.C. log export restrictions did indirectly lower lumber manufacturers' marginal costs, while the export restrictions maintained by other provinces did not confer any countervailable benefits.

Relying on the statute's explicit provision that programs providing "indirect" benefits can be countervailed, Commerce rejected the respondents' argument that a program must involve some kind of a financial contribution to be countervailable.

3.6.1.2.3 Effect of Export Restrictions on Domestic Log Prices

Having established that export restrictions can be considered domestic subsidies under U.S. law, Commerce next considered whether there was a correlation between the B.C. export restrictions and the domestic price of B.C. logs. Commerce determined that the Margolick and Uhler study[170] established that the B.C. program had a "direct and discernible effect" on domestic log prices.

By reducing the demand for B.C. logs that otherwise would exist in the absence of the export restrictions, the B.C. measures had the effect of reducing the price of logs sold in the B.C. market. Commerce noted that, although the study did not establish a correlation with absolute certainty, it provided a "high probability" that B.C. export restrictions were primarily responsible for the price differential that existed between domestic and export log prices. Commerce found the log export restrictions to be de jure limited to a specific group of industries using B.C. logs, namely the solid wood products industry and the pulp and paper industry.

3.6.1.2.4 Measurement of the Benefit

Commerce determined that the B.C. log export restrictions depressed domestic log prices only on the coast and in the tidewater and border interior areas of British Columbia. Only cutting-right tenure-holders in these areas could respond to a lifting of the restrictions by increasing log exports. The tenure-holders located in the north-central interior of the province could not economically export and would not experience a price effect.

Commerce rejected the respondents' arguments that any differential between export and domestic log prices could be accounted for by quality and transportation differences. Commerce also found unpersuasive the respondents' assertion that British Columbia's log export restrictions were not distortive because they merely offset the distortive effects of Japanese and U.S. policies on the coast and in the tidewater interior of British Columbia. Commerce noted that it was concerned with the effects of a program within the foreign government's jurisdiction, not the effects of policies in other political jurisdictions.

While conceding that a significant volume of logs were exported from British Columbia, Commerce maintained its preliminary finding that the B.C. regulations effectively restricted exports, which would otherwise be more significant, resulting in an artificially high domestic supply of logs.

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170 Margolick and Uhler, "The Economic Impact of Removing Log Export Restrictions in British Columbia," April 1986 (Margolick).

3.6.1.2.5 Calculation of the Subsidy

Commerce compared current domestic log prices with what prices would be without the log restrictions. Commerce rejected the petitioner's request that it use a cross-border analysis because, as noted with respect to stumpage, Commerce's methodology focused on circumstances within the political jurisdiction under investigation.

Domestic Price: Commerce calculated prices for coastal log exports based on Vancouver log market prices. It used observed log prices for the tidewater interior and 1989 Statistics Canada information for the border interior. Commerce weight-averaged the data according to the percentage of the harvest from each area capable of exporting. Commerce made a species/grade adjustment to the domestic prices to account for differences between timber in the interior and coastal areas.

Export Price: Commerce derived export prices from Statistics Canada data. Commerce then adjusted the export prices downwards by a price equilibrium factor to reflect the decrease in export prices that would occur if the log export restrictions were lifted. Commerce also made adjustments to the export price for export-related costs (i.e. export sort costs).

Integrated Firms: Commerce found that the log export restrictions benefited integrated firms as well as firms that purchased logs. The restrictions served to subsidize lumber production of integrated firms because the firms were discouraged from selling or exporting logs as a result of the reduced prices and the restrictions.

3.6.1.2.6 Country-wide Rate

Commerce compared the domestic and adjusted export prices. It allocated the benefit to lumber and other products made in the lumber production process based upon the value of shipments. The resulting rate was weight-averaged based upon British Columbia's percentage share of exports to the United States. Commerce found a log export subsidy of 3.60%. In its preliminary determination, Commerce had calculated an 8.23% rate.

3.6.1.3 General Calculation Issues

3.6.1.3.1 Country-wide Rate

Commerce calculated a single country-wide rate instead of province-specific rates. Commerce noted that its long-standing practice was to calculate country-wide, and not province-specific, rates. Commerce did not calculate any company-specific rates.

3.6.1.3.2 Inclusion of Value of Remanufactured Products (Remans) in Shipment Values

Commerce determined that the first mill shipment values reported by Statistics Canada, which it used to calculate the subsidy amount, were acceptable even though they included some shipment value for remans made from that lumber. Commerce stated that, in calculating the value of shipments, the overall impact of including reman values was small and not to the clear advantage of either party.

3.6.1.3.3 Allocation of Subsidy Amount to Other Products Made through the Lumber Production Process

Commerce allocated the subsidy amount not only to softwood lumber but also to the other products (e.g., chips and sawdust) that resulted from the lumber production process. Allocation was based upon the value of shipments of those products.

3.6.1.3.4 Pulplog/Sawlog Adjustment

Commerce rejected the petitioners' argument that it should adjust for quality differences between sawlogs and pulplogs because the provinces did not use the terms "sawlog" and "pulplog" to distinguish between logs in terms of quality or size. Instead, the terms were used to distinguish the final use of what in reality were often similar logs.

3.6.1.3.5 Exclusion of Logs Sold by Tenure-Holders

Commerce did not exclude from its subsidy calculation logs sold by tenure-holders to unrelated parties because it could not separate out those sales.

3.6.1.4 Exclusion Requests for Specialty Products, Remanufactured Products and Companies

3.6.1.4.1 Specialty Products

Commerce did not exclude from the scope of the investigation products made from Western Red Cedar, Yellow Cypress, Eastern White Cedar, Eastern White and Red Pine, and clear and shop grades of lumber for two main reasons: (1) these species and grades of timber were sold under the same stumpage programs as any other coniferous species; and (2) they could be used to make the same or similar lumber products as those made from other coniferous species.

3.6.1.4.2 Remanufactured Products

Commerce decided not to exclude remanufactured products from the investigation. First, Commerce noted that the investigation covered softwood lumber products, including remans. Second, Commerce noted that it had no precise definition of remans or "reasonable, objective criteria" that it could follow to separate remans from other softwood products in excluding them from the investigation. Third, Commerce found the list of remanufactured products excluded from the MOU to be unpersuasive since the list resulted from a series of negotiations and did not legally define a class of merchandise that should be excluded. Fourth, Commerce determined that stumpage holders produced many reman products; consequently, at least some remanufacturers benefited directly from the stumpage programs. Commerce decided to collect duties based upon the first mill value of the lumber used to make the remans.

3.6.1.4.3 Company Exclusion Requests

Commerce decided that it was impracticable to review all the 334 company exclusion requests. Commerce did exclude 15 companies that used exclusively or primarily U.S.-origin logs.

Postscript

The Uruguay Round Agreements Act of 1995 made two significant clarifications of U.S. countervailing duty law regarding the issues under review by the panel on softwood lumber. With respect to the two issues—specificity and the so-called "effects test"—pre-URAA U.S. law, regulation and procedure were often vague, confusing and contradictory. Commerce applied different tests in different cases. The Statement of Administrative Action to the URAA, and the URAA itself, clarified that in determining *de facto* specificity, Commerce would stop its analysis if it found that a single factor justified a specificity finding.

Furthermore, the Tariff Act of 1930 was amended to explicitly state that Commerce did not have to perform an "effects test" in order to determine that a subsidy program is countervailable.

According to the SAA, this amendment was made to prevent future misinterpretations of U.S. countervailing duty law, such as those made by the softwood lumber Binational Panel. Much effort was expended by Canada in attempting to persuade the U.S. administration to either eliminate or ameliorate these amendments. It was thought, at least by certain parties, that elimination of the "effects test" in particular would have the result of overturning the softwood lumber panel. These attempts were unsuccessful.

4 Live Swine and Fresh, Chilled and Frozen Pork Products[171]

4.1 Case History

On November 2, 1984, Commerce and the ITC received a petition filed by the U.S. National Pork Producers Council (NPPC) alleging that subsidized imports of various pork products from Canada were injuring U.S. industry. After initiation of an investigation, on December 19, 1984, the ITC issued an affirmative preliminary determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly subsidized Canadian imports.

On April 3, 1985, Commerce issued an affirmative preliminary determination. The bonding/deposit rate was C$0.053/lb. for live swine and for fresh, chilled and frozen pork products. Suspension of liquidation of all Canadian subject goods was ordered. Because of the large number of individual producers and government programs at issue, this investigation was deemed "extraordinarily complicated" and the deadline for release of the preliminary determination was extended.

On June 17, 1985, Commerce issued an affirmative final determination. There were no specific companies named as Commerce had used a country rate.

Countervailing duty	
Live Swine	C$0.04386/lb.
Fresh, Chilled and Frozen Pork Products	C$0.05523/lb.

On September 7, 1985, the ITC released an affirmative final determination with respect to live swine, and a negative final determination with respect to fresh, chilled and frozen pork products. Based on differences in physical characteristics, uses and production facilities, the ITC found two like products: (1) live swine; and (2) fresh, chilled, and frozen pork products. The ITC also found two domestic industries, one producing live swine and the other fresh, chilled and frozen pork products. Although the primary purpose of raising slaughter hogs was to produce pig meat and pork products, hog growers and packing facilities were not sufficiently economically integrated to be considered a single industry.

U.S. imports of Canadian swine more than doubled from 1981 to 1982, increased by 53% in 1983, and almost tripled from 1983 to 1984. During the period from January to March 1985, imports increased by 97% compared with the correspon-

171 The original investigation is summarized here, even though it is outside the time period of this study, because of the continued participation by the Government of Canada in the many administrative reviews that were to follow.

ding period in 1984. This rapid increase in market share was found to have had a disruptive effect on the U.S. market, leading the ITC to conclude that the U.S. industry had been injured by Canadian imports of live swine.

The condition of the pork products industry during the period of investigation had deteriorated, as evidenced by the industry's declining financial situation and declining capacity utilization rate. The industry was unprofitable and was experiencing material injury. Although imports of pork products increased in volume, the import penetration ratios remained low (less than 3% of U.S. consumption). The pricing data revealed no discernible trends regarding the effect of the subject imports, and the price of U.S. pork generally rose as imports from Canada increased. These indicators led the ITC to conclude that the U.S. industry was not suffering material injury by reason of Canadian pork product imports. Canadian pork production, exportation and consumption levels had all decreased slightly, indicating that Canadian-origin imports did not pose a threat to the U.S. industry.

On August 15, 1985, the countervailing duty order was issued. A cash deposit of C$0.04386/lb. was required for all entries of live swine. The suspension of liquidation with respect to fresh, chilled and frozen pork products was terminated as a result of the negative ITC determination. For a further discussion of the original investigation, see *U.S. Trade Remedy Law* (March 1993).

4.2 Legal and Subsequent Issues

4.2.1 CIT Challenge

The Canadian Meat Council (CMC) took the original subsidy ruling to the U.S. Court of International Trade. The basis of its appeal was that the Commerce decision had assumed a pass-through of subsidies on live swine to pork producers, without actually conducting an upstream investigation to determine the extent or existence of such a pass-through. Commerce had refused to conduct an upstream subsidy investigation because, in its view, swine were not an input into pork production. In effect, Commerce was arguing that swine and pork were the same product. In May 1987, the Court ruled in favour of the CMC and remanded the case back to Commerce to perform a full upstream subsidy investigation. However, as the CIT upheld the ITC no-injury determination, which had been appealed by the U.S. National Pork Producers Council, the issue of the upstream subsidy investigation (and lack thereof) became moot.

The Alberta Pork Producers' Marketing Board also challenged Commerce's original decision with respect to the countervailability of the Agricultural Stabilization Act (ASA) Hog Stabilization Program.[172] The CIT affirmed Commerce's determination, finding that: (1) hogs received benefits as a "named" commodity; and

172 *Alberta Pork Producers' Marketing Board v. United States*, 669 F.Supp. 445 (Court of International Trade 1987).

(2) the ASA discriminated between commodities by providing pre-authorized, regular payments to producers of named commodities while offering unpredictable benefits to others who might apply for designation.

4.2.2 Canada-U.S. Free Trade Agreement Fourth Administrative Review

On July 8, 1991, the Canadian Pork Council (CPC), the Government of Canada and the Government of Quebec filed requests for a Binational Panel Review under Article 1904 of the FTA. Panel Review concerned the final results of the fourth administrative review covering the period from April 1, 1988, through March 31, 1989. On May 19, 1992, the panel affirmed in part and remanded in part the determinations made by Commerce during the fourth administrative review. The complainants challenged Commerce's determinations with respect to seven of the nine programs found to confer countervailable subsidies. Complainant Pry me Pork Ltd. also challenged Commerce's refusal either to exclude weanlings from the scope of the order or to establish a separate rate (or sub-class) for weanlings. Furthermore, Pryme asserted that it should have been assigned a separate company rate.

The panel remanded the determinations on the National Tripartite Stabilization Program for hogs, the Quebec Farm Income Stabilization Insurance Program (FISI), the Saskatchewan Hog Assured Returns Program (SHARP), the Alberta Crow Benefit Offset Program (ACBOP), the Feed Freight Assistance Program (FFA) and the establishment of a sub-class for weanlings for further examination and/or explanation by Commerce. Commerce's determinations regarding the B.C. Feed Program and the British Columbia Farm Income Insurance Program (FIIP), and inclusion of weanlings within the scope of the order, were upheld. Last, the panel denied Pryme's request for a separate company rate and exclusion of sows and boars from the scope of the order.

On July 20, 1992, Commerce issued its remand determination with respect to the panel report issued in May 1992. On August 10, 1992, CPC, Pryme Pork Ltd., and the governments of Quebec and Canada filed challenges of ITC's remand determination. Canada and other complainants also filed a motion for oral argument on the remand determination. This motion was granted by the panel on August 28, 1992.

On October 30, 1992, the panel majority remanded Commerce's remand determination with specific instructions. In its remand determination, Commerce once again concluded that Canada's National Tripartite Stabilization Program for hogs and Quebec's Farm Income Stabilization Insurance Program were limited *de facto* to a specific group of agricultural commodities and were therefore countervailable. The panel found that this determination was not in accordance with law because the test used to determine *de facto* specificity was inappropriate and purely mathematical. Commerce also determined that it was unable to comply with the panel's remand order with respect to weanlings, or to

determine a separate rate for this specific category of hogs based on the evidence in the administrative record. The panel remanded again, with specific instructions, on these two issues

With respect to the Saskatchewan Hog Assured Returns Program, the Alberta Crow Benefit Offset Program and the Feed Freight Assistance Program, Commerce recalculated the benefits to live swine under these programs, in accordance with the panel's instructions.

On November 9, 1992, the Binational Panel affirmed in part and remanded in part Commerce's determination made on remand concerning the final results of the fourth administrative review of the order.

The panel denied Commerce's request to reopen the record to include additional reports on the number of agricultural commodities in Canada. The panel rejected Commerce's finding of specificity with respect to two government agricultural support programs, instead directing Commerce to find that the programs were not specific. Furthermore, Commerce was directed to calculate a separate rate for weanlings. Commerce did so on November 19, 1992, and on December 21, 1992, the panel affirmed the determination on remand.

4.2.3 Extraordinary Challenge

On February 9, 1993, the Office of the U.S. Trade Representative filed a request for an Extraordinary Challenge Committee to review both decisions made by the Binational Panel with respect to the fourth administrative review and the redetermination pursuant to the remand by Commerce, based on the allegation that the panel did not apply the appropriate standard of review.

On April 8, 1993, the Extraordinary Challenge Committee issued its decision, declining to amend or overturn the decision of the *Swine IV* panel. The Committee stated that, based upon the record before it, it could not conclude that the panel "did not conscientiously apply the appropriate standard of review."

4.2.4 Fifth Administrative Review

On July 8, 1991, the Canadian Pork Council filed a request for a Binational Panel Review, as did the Government of Canada and the Government of Quebec. Panel review was requested of the final results of the fifth administrative review covering the period from April 1, 1989, through March 31, 1990.

On August 26, 1992, the panel affirmed Commerce's determination regarding the Government of Canada's Feed Freight Assistance Program. The panel also affirmed Commerce's determination that sows, boars and weanlings were within the scope of the order. The panel remanded to Commerce its determinations regarding:

- the National Tripartite Stabilization Program for hogs;
- the Quebec Farm Income Stabilization Insurance Program;
- the British Columbia Farm Income Insurance Program; and
- the Alberta Crow Benefit Offset Program.

The panel also remanded to Commerce for further explanation its determination that it could not establish a separate rate for weanlings or a separate company-specific rate for Pryme Pork Ltd. The panel affirmed Commerce's decision not to conduct a scope inquiry regarding weanlings in the fifth administrative review.

On October 30, 1992, Commerce filed the final results of its redetermination pursuant to remand. Commerce redetermined that the Tripartite, FISI and FIIP programs conferred countervailable subsidies upon specific industries or groups of industries. Commerce also redetermined that Pryme's request for the establishment of a separate sub-class for weanlings was untimely and that, in any event, the record did not contain sufficient information for it to determine any such separate rate. With respect to ACBOP, Commerce recalculated the benefit conferred under the program. The redetermination was challenged by the complainants.

On June 11, 1993, the panel affirmed Commerce's redetermination that the Tripartite programs were countervailable during the review period. The panel concluded that substantial evidence in the record supported Commerce's redeterminations that: (1) hog producers were the dominant users of Tripartite programs; (2) no more than 20% of eligible commodities actually participated in the program; and (3) no other factor or record of evidence raised a significant question with regard to Commerce's determination of countervailability.

The panel affirmed Commerce's redetermination that FIIP was de jure countervailable during the review period. Insofar as FIIP was concerned, there was no challenge to the redetermination. The panel affirmed Commerce's redetermination regarding ACBOP. The panel reviewed Commerce's recalculations and concluded that the reasoning of Commerce as to how and why it proceeded to make certain adjustments was adequately articulated, was based upon substantial record of evidence, and was otherwise in accordance with law. The panel also affirmed Commerce's redetermination that, while there was some evidence on the record concerning weanlings, it was insufficient to create a sub-class.

The panel remanded Commerce's redetermination regarding FISI, with instructions for it to remove FISI benefits from its duty calculation. The panel concluded that Commerce's redetermination that FISI provided a subsidy to a specific enterprise or industry, or group of enterprises or industries, was based primarily upon a "mathematical formula," which failed to show that Commerce exercised judgment and had balanced the various factors in analyzing the facts of this particular case. On June 25, 1993, Commerce complied with the panel's instructions

concerning FISI. On July 16, 1993, the panel issued an order affirming all aspects of Commerce's determination on remand. On September 7, 1993, Commerce released the redetermined subsidy rates. They were:

Sows and boars: C$0.0045/lb.

Other live swine: C$0.0927/lb.

4.2.5 Sixth Administrative Review

On March 30, 1994, P. Quintaine & Son Ltd. of Brandon, Manitoba, filed a request for a Binational Panel Review of the final countervailing duty determination made by Commerce with respect to the sixth administrative review covering the period from April 1, 1990, through March 31, 1991. A request for Panel Review was also filed by Pryme Pork Ltd. and Earle Baxter Trucking.

On May 30, 1995, the panel affirmed in part and remanded in part the Commerce determination. The petitioners challenged Commerce's denial of separate treatment for sows and boars, and for a category of weanlings covered by the order. In all prior review periods for which separate rates had been calculated, Commerce had found that these categories of swine received zero or *de minimis* subsidies under the Canadian programs being countervailed.

The panel affirmed Commerce's finding that sows and boars as well as weanlings were within the scope of the order. The panel remanded with directions to Commerce to: (1) reinstate the sows and boars sub-class and determine a separate countervailing duty rate for it; and (2) consider Pryme's application for a sub-class for weanlings employing the same criteria used in creating the sows and boars sub-class, and calculate a separate rate for that sub-class.

The panel found that Commerce had failed to provide a factual basis or legal argument to warrant the abolition of the separate sub-class. The panel expressed no view on Commerce's treatment of Pryme's request for an individual review and a company-specific rate.

On August 14, 1995, Commerce submitted to the panel its remanded determination. Commerce: (1) reinstated sows and boars as a sub-class; (2) calculated a *de minimis* CVD rate for sows and boars; (3) ordered U.S. Customs to liquidate sows and boars entries without regard to duties, and collect zero cash deposits; (4) determined an unspecified *de minimis* rate for Pryme Pork by a consent motion; and (5) ordered Customs to assess zero duties against Pryme Pork and to collect zero cash deposits on Pryme Pork's entries. The amended subsidy rates were as follows:

Sows and boars: C$0.0036/kg (*de minimis*)

Other live swine: C$0.0296/kg

4.2.6 Changed Circumstances Review

On August 29, 1996, Commerce released the final results of a changed circumstance administrative review. The ITC revoked the order with respect to slaughter sows, boars and weanlings (effective April 1, 1991) because of affirmative statements of no interest by petitioners.

4.2.7 Administrative Reviews of Countervailing Duty Order

The 13 administrative reviews carried out annually since 1985 examined the changes in the level of support to Canadian swine producers. The results were as follows.

First Administrative Review

Review Period: **April 3, 1985–March 31, 1986**

Preliminary Determination (June 14, 1988)

Net Subsidy: Slaughter sows and boars: .... *de minimis*

All other live swine: .... C$0.022/lb.

Final Determination (January 9, 1989)

Net Subsidy: Slaughter sows and boars: .... *de minimis*

All other live swine: .... C$0.022/lb.

Second and Third Administrative Reviews

Review Periods: **April 1, 1986–March 31, 1987**
April 1, 1987–March 31, 1988

Preliminary Determination (May 21, 1990)

Period: April 1, 1986–March 31, 1987

Net Subsidy: Slaughter sows and boars: .... *de minimis*

All other live swine: .... C$0.061/lb.

Period: April 1, 1987–March 31, 1988

Net Subsidy: Slaughter sows and boars: .... *de minimis*

All other live swine: .... C$0.071/lb.

Final Determination (March 12, 1991)

Period: April 1, 1986–March 31, 1987

Net Subsidy: Slaughter sows and boars: . . . . C$0.0001/lb.

All other live swine: . . . . C$0.0039/lb.

Period: April 1, 1987–March 31, 1988

Net Subsidy: Slaughter sows and boars: . . . . C$0.0030/lb.

All other live swine: . . . . C$0.0032/lb.

Fourth Administrative Review

Review Period:	**April 1, 1988–March 31, 1989**

Preliminary Determination (February 12, 1991)

Net Subsidy: Sows and boars: . . . . C$0.0051/lb.

All other live swine: . . . . C$0.0548/lb.

Final Determination (June 21, 1991)

Net Subsidy: Sows and boars: . . . . C$0.0047/lb.

All other live swine: . . . . C$0.0449/lb.

In accordance with the FTA Binational Panel remand, Commerce recalculated its final results:

Final Determination (amended) (April 30, 1993)

Net Subsidy: Sows and boars: . . . . C$0.0040/lb.

Weanlings: . . . . C$0.0005/lb.

Live swine: . . . . C$0.0051/lb.

Fifth Administrative Review

Review Period:	**April 1, 1989–March 31, 1990**

Preliminary Determination (June 26, 1991)

Net Subsidy: Sows and boars: . . . . C$0.0051/lb.

All other live swine: . . . . C$0.0937/lb.

Final Determination (September 7, 1993)

Net Subsidy: Sows and boars: . . . . C$0.0045/lb.

All other live swine: . . . . C$0.0927/lb.

Sixth Administrative Review

Review Period:	**April 1, 1990–March 31, 1991**

Preliminary Determination (October 20, 1993)

Net Subsidy: Live swine: . . . . C$0.0289/lb.

Final Determination (March 16, 1994)

Net Subsidy: Live swine: . . . . C$0.0295/lb.

In accordance with the NAFTA Panel Review decision, Commerce amended its determination.

Net Subsidy:

Sows and boars:	. . . . . . C$0.0036/kg (*de minimis*)
All other live swine:	. . . . . . C$0.0296/kg
All swine produced by Pryme Pork:	. . . CVD duties and cash deposit zero

Seventh, Eighth and Ninth Administrative Reviews

Review Periods:	**April 1, 1991–March 31, 1992** **April 1, 1992–March 31, 1993** **April 1, 1993–March 31, 1994**

Preliminary Determination (May 29, 1996)

Net Subsidies:

April 1, 1991–March 31, 1992	. . . . . . C$0.0594/kg
April 1, 1992–March 31, 1993	. . . . . . C$0.0609/kg
April 1, 1993–March 31, 1994	. . . . . . C$0.0099/kg

Amended Final Determination (November 14, 1996)

Net Subsidies:

April 1, 1991–March 31, 1992	. . . . . . C$0.0597/kg
April 1, 1992–March 31, 1993	. . . . . . C$0.0611/kg
April 1, 1993–March 31, 1994	. . . . . . C$0.0100/kg

Tenth Administrative Review

Review Period:	**April 1, 1994–March 31, 1995**

Preliminary Determination (October 7, 1996)

Net Subsidy: Live swine: ...... C$0.0271/kg

Final Determination (April 14, 1997)

Net Subsidy: Live swine: ...... C$0.0098/kg

Eleventh Administrative Review

Review Period:	**April 1, 1995–March 31, 1996**

Preliminary Determination (September 9, 1997)

Net Subsidy: Live swine: ...... C$0.0271/kg

Final Determination (January 14, 1998)

Net Subsidy: Live swine: ...... C$0.0071/kg (duties)

Cash deposit: ...... C$0.0055/kg (*de minimis*)

U.S. Customs waived cash deposits on shipments of all live swine from Canada. The cash deposit rate was different from the assessment rate because of program-wide changes in calculating the cash deposit rate.

Twelfth Administrative Review

Review Period:	**April 1, 1996–March 31, 1997**

Preliminary Determination (April 30, 1998)

Net Subsidy: Live swine: ...... C$0.0041/kg (*de minimis*)

Final Determination (September 4, 1998)

Net Subsidy: Live swine: ...... C$0.0041/kg (*de minimis*)

4.2.8 Sunset Review

On November 4, 1999, Commerce released its negative final determination of the likelihood of continuation or recurrence of a countervailable subsidy in connection with the subject five-year review. Accordingly, on November 8, the five-year review of the countervailing duty order concerning live swine from Canada was terminated by the ITC.

4.3 Program Summary (Original investigation and administrative reviews)

4.3.1 Federal Programs

4.3.1.1 Feed Freight Assistance Program (FFA)

This program was intended to ensure: (1) the availability of feed grain to meet the needs of livestock feeders; (2) the availability of adequate storage space in Eastern Canada to meet the needs of livestock feeders; (3) reasonable stability in the price of feed grain in Eastern Canada to meet the needs of livestock feeders; and (4) equalization of feed grain prices to livestock feeders in Eastern Canada, British Columbia and the territories. Although the program was clearly designed to benefit livestock feeders, FFA payments were also made to grain mills that transformed the feed grain into livestock feed whenever these mills were the first purchasers of the grain.

Commerce found this program *de jure* specific and thus countervailable because benefits were available only to a specific group of enterprises or industries (livestock feeders and feed mills). Subsequently, an FTA Binational Panel (USA-91-1904-04) affirmed the Commerce determination.

The program was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993 and 1993–1994.

4.3.1.2 Agricultural Stabilization Act (ASA) Hog Stabilization Programs

The ASA was enacted to provide for the stabilization of prices of certain agricultural products through the use of price support systems. The program offered different support mechanisms for certain products (including live swine). Commerce found that the program offered additional, specific benefits for certain products and industries, and thus that the support payments delivered to hog farmers were countervailable.

Prior to the first administrative review, the ASA was amended. Changes included an expanded list of commodities and the adoption of identical methodologies for the calculation of support for commodities. However, Commerce continued to find the ASA program countervailable, determining that only a limited number of commodities benefited from the program.

4.3.2 Federal–Provincial Programs

4.3.2.1 Record of Performance Program

This program tested purebred swine to increase the efficiency of hog production. During the original investigation, Commerce found that as the program was limited to a specific group of industries, it was countervailable. In the first administrative review, Commerce decided that as the results of the program were available to other countries and industries, it was "generally available" and therefore not countervailable.

4.3.2.2 National Tripartite Stabilization Program

This program provided for cost-sharing schemes involving producers, the federal government and the provinces. The general terms were as follows: all participating hog producers received the same level of support per market-hog unit; the cost of the scheme was shared equally between the federal government, the provincial government and the producers; producer participation in the scheme was voluntary; the provinces were not to offer separate stabilization or assistance plans for hogs (with the exception of Quebec's FISI program); and the scheme was to operate at a level that limited losses but did not stimulate overproduction. Stabilization payments were made when the market price fell below the calculated support price. The difference between the support price and the market price was the amount of the stabilization payment.

Commerce determined that the program was *de facto* specific because benefits were being provided to a specific enterprise or industry, or group thereof. It was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993 and 1994–1995.

4.3.2.3 National Transition Scheme for Hogs

After termination of the National Tripartite Stabilization Program for hogs in July 1994, hog producers became eligible for the National Transition Scheme for Hogs, which provided for one-time payments to producers of hogs marketed from April 3, 1994, through December 31, 1994. The Transition Scheme provided payments to hog producers of C$1.50 per hog from the federal government and a matching C$1.50 from the provincial government. In the tenth administrative review, Commerce found this program to be *de jure* specific, and thus countervailable, because the agreement expressly limited its availability to a specific industry (swine producers). Commerce determined that the amounts provided by both the federal and provincial governments to the hog producers during that review period constituted a non-recurring grant.

4.3.2.4 Canada–Quebec Agri-Food Agreement—Technological Innovation Program

Funding for this agreement was shared equally by the federal and provincial governments. Through the agreement, grants were made to private businesses and academic organizations to fund projects in the areas of research, technological innovation and support for strategic alliances as they related to the agri-food industry. Since assistance under the Technological Innovation Program was provided by the federal government to industries located within a designated geographic region of Canada (i.e. Quebec), Commerce determined that the federal contributions were countervailable.

4.3.3 Provincial Income Stabilization Programs

Commerce determined all the following hog price stabilization programs to be limited to a specific group of enterprises or industries, and thus countervailable.

4.3.3.1 British Columbia Farm Income Insurance Program

This program was intended to assure income to farmers when commodity market prices went below the basic costs of production. It was funded equally by producers and the provincial government. Premiums were paid in all quarters regardless of market returns. In the administrative reviews for the periods of 1992–1993 and 1993–1994, Commerce found the program to be countervailable because it was limited to a specific group of enterprises or industries. It was found countervailable in administrative reviews for the periods of 1992–1993 and 1993–1994.

4.3.3.2 British Columbia Swine Producers' Farm Income Plan

Created in 1979, this program assured hog producers in British Columbia a specified level of return over certain basic production costs. The program was funded in roughly equal proportion by the provincial government and participating hog producers. In 1984, the provincial share of the support payment to hog producers averaged C$10.73 per hog.

4.3.3.3 Manitoba Hog Income Stabilization Plan (HISP)

Created in 1983 and ending in 1986, the HISP provided price support payments to hog producers in Manitoba. It was funded by both the Government of Manitoba and hog producers in the province. Participation in the program was voluntary. Provincial government contributions accounted for approximately 30% of the stabilization payment. In fiscal year 1984, the provincial share of the support payment to hog producers averaged C$5.26 per hog.

4.3.3.4 New Brunswick Hog Price Stabilization Program

This program was created to provide income stabilization to hog producers during periods of both high and low market prices. Created in 1974, the program was terminated on March 31, 1989, with the fund showing a sizeable deficit based on the loans made by the provincial government to cover pay-outs to producers. In view of the termination date, the program was found to be terminated and to have provided no residual benefits during subsequent review periods.

4.3.3.5 Newfoundland Hog Price Support Program

This program began in April 1985. Under the program, producers were paid an amount ($0.85/lb. in the period from April 3, 1985 to March 31, 1986) for all hogs indexing 80 or above (excluding sows and boars) that were purchased by the Newfoundland Farm Products Corporation (a provincial Crown corporation). Producers did not contribute to the program, and hogs were the only agricultural commodity in Newfoundland receiving stabilization payments.

The program was deemed limited to a specific industry and therefore countervailable. Despite the fact that Newfoundland did not directly export to the United States, it was held that since Newfoundland swine were sent to Ontario and then exported to the United States, Newfoundland's swine were indeed being exported to the United States (1985–1986 review period). In the 1986–1987 period the program was found not to be countervailable since Newfoundland was not found to be exporting any swine to the United States. In the review period from April 1, 1991, to March 31, 1994, and for all subsequent administrative reviews, the program was found not to be used.

4.3.3.6 Nova Scotia Pork Price Stabilization Program (NSPPSP)

The purpose of the program was to provide price stability for hogs by compensating farmers for fluctuations in prices, and to ensure that producers consistently recovered direct operating costs. The NSPPSP was funded jointly by producer premiums (which became equity in the fund) and provincial government contributions, and was available on a voluntary basis to all producers who sold hogs through the Nova Scotia Pork Price Stabilization Board. In the period from April 1, 1983, to March 31, 1984, the program was in a deficit position. Producers were not required to fund their share of the deficiency payment through a premium but received a loan from the province. However, the deficiency payment, which could include loans, was C$16.74 per hog. For the period from April 3, 1985, to March 31, 1986, the program was found to be countervailable because the stabilization payments were limited to a particular industry, namely swine producers. In that period, when producer equity was exhausted, the deficiency payment was made by the provincial government in the form of an interest-free loan. The loan portion was eliminated and replaced with a purely grant-based system on September 20, 1985. The program was terminated on September 30, 1987.

4.3.3.7 Prince Edward Island Price Stabilization Program

This program was established by the PEI Hog Commodity Marketing Board in 1973. The program provided income stability to hog producers by compensating them for price fluctuations caused by traditional hog-price cycles. It was made up of equal contributions from both the provincial government and producers. Contributions were made when the average weekly price for hogs increased, while payments were made not when the market price fell below the contribution level but rather when the market price fell below a predetermined "stabilization price." The payment equalled one half of the difference between the depressed market price and the stabilization price. In fiscal year 1984, the provincial share of the support payment to hog producers averaged C$9.33 per hog. Half the amount of the payments came from the provincial government, with the other half drawn from the producers' equity. If the producers' equity was exhausted, the government assumed the producers' portion in the form of an interest-free loan. During fiscal year 1985 the producers did not contribute to the fund.

While the Natural Products Marketing Act established marketing boards for a number of agricultural products, hogs were the only commodity to receive stabilization payments. The program was found to be countervailable in the original investigation. For the review period from April 1, 1995, to March 31, 1996, the program was found to be terminated.

4.3.3.8 Quebec Farm Income Stabilization Insurance Program (FISI)

Administered by the Régie des assurances agricoles du Québec, a provincial Crown corporation, the program was intended to guarantee a net annual income to participating producers. The program was voluntary, although some conditions applied. For example, Quebec producers had to agree to stay with the program for at least five years and to produce at least 100 hogs and own 15 sows during the first year, with a participating ceiling of 5,000 hogs or 400 sows. The provincial government annually assessed participants for contributions to the income stabilization fund. The contributions made up one third of the fund; the government covered the balance. In fiscal year 1984, the provincial share of the support payment to hog producers averaged C$15.08 per hog.

The Government of Quebec argued that since the program covered 11 commodities and 71% of total farm production, it should not be deemed to be targeted to specific industries. Commerce was not persuaded and deemed the program to be nonetheless limited to a specific group of industries or enterprises, and therefore countervailable. Even if the program were not found to be *de jure* specific, Commerce held that it would still be considered *de facto* specific. In the 1991–1992 administrative review, Quebec argued that FISI was integrally linked to the crop insurance program and the supply management system. Again, Commerce was not persuaded by the integral linkage argument and it once more found the program countervailable. In the 1994–1995 review period, FISI was found not to

be used. However in the 1995–1996 review period, the program was determined to confer a subsidy of C$0.0008 per kilogram.

4.3.3.9 Saskatchewan Hog Assured Returns Program (SHARP)

SHARP provided income stabilization payments to hog producers when market prices fell below a designated "floor price," which was calculated quarterly. The program was funded by levies from participating producers on the sale of hogs covered by the program; they ranged from 1.5% to 4.5% of market returns, and were matched by the provincial government. When the balance in the SHARP account was insufficient to cover payments to producers, the provincial government provided financing on commercial terms. The principal and interest on these loans was to be repaid from producer and provincial government contributions. SHARP was terminated on March 31, 1991. Commerce found the SHARP program to be *de jure* specific and thus countervailable because the legislation expressly made the program available only to a single industry (hog producers).

SHARP was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993, 1993–1994 and 1994–1995.

4.3.4 Other Provincial Programs

4.3.4.1 Alberta Crow Benefit Offset Program

This program was designed to compensate producers and users of feed grain for market distortions in feed grain prices. Assistance was provided for feed grain produced in Alberta, feed grain produced outside Alberta but sold in Alberta, and feed grain produced in Alberta to be fed to livestock on the same farm where it was produced. The program was terminated on March 31, 1994, and there were no residual benefits. Commerce found the program to be *de jure* specific and thus countervailable because the legislation expressly made it available only to a specific group of enterprises or industries (producers and users of feed grain). It was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993, 1993–1994 and 1994–1995.

4.3.4.2 Alberta Livestock and Beeyard Compensation Program

This program was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993 and 1993–1994. The program compensated Alberta livestock producers for losses of food-producing livestock (including cattle, sheep, hogs, goats, rabbits and poultry) to predators. The Alberta Department of Agriculture administered the program and provided assistance in the form of grants compensating farmers for up to 100% of the value of the livestock.

4.3.4.3 New Brunswick Swine Assistance Policy on Boars

This program was intended to encourage breeding stock producers to produce quality boars at reasonable prices for use in commercial swine herds. The program provided assistance in the form of grants to swine producers (to a maximum of C$110) for the purchase of boars. Commerce found the program to be countervailable because it was limited to a specific industry.

4.3.4.4 New Brunswick Swine Industry Financial Restructuring and Agricultural Development Act—Swine Assistance Program

Under this program, hog producers indebted to the Farm Adjustment Board because of earlier loans were granted an interest rebate on the portion of their total debt that exceeded the "standard debt load" as of March 31, 1984. Commerce found the program to be countervailable because loans were provided to a specific industry on terms inconsistent with commercial considerations.

4.3.4.5 New Brunswick Loan Guarantees and Grants under the Livestock Incentives Program

This program provided loan guarantees to livestock producers. Loans ranging from $1,000 to $90,000 were granted by commercial lending institutions and guaranteed by the Government of New Brunswick. The interest rate for the loans was set at the prime rate plus 1.0 percentage point. Commerce established as its benchmark the Bank of Canada prime rate plus 1.5 percentage points. This rate represented the average of the spread above prime charged by commercial banks on comparable loans. The amount that a recipient paid on such a loan was therefore less than what the recipient would have paid on a comparable commercial loan. Commerce found the program to be *de jure* specific and therefore countervailable because the legislation expressly made it available only to livestock producers.

4.3.4.6 New Brunswick Hog Marketing Program

With the closure of slaughterhouses in northern New Brunswick, it became more expensive for farmers in that area to move their hogs to market. This program was aimed at equalizing the cost of moving hogs to markets across the province. In 1984, the provincial government paid C$1.25 per hog marketed. Because these grants targeted specific groups, the program was found countervailable.

4.3.4.7 Nova Scotia Swine Herd Health Policy

This program reimbursed veterinarians for house calls to enrolled producers. Any hog producer could enroll, but each had to agree to follow specific health practices and to pay the veterinarian a stipulated fee for the services provided. Because the program was limited to a specific enterprise or industry, or group of enterprises or industries, Commerce found that it conferred countervailable benefits.

4.3.4.8 Nova Scotia Transportation Assistance

This program defrayed the cost of transporting hogs to pork processing plants. The funds were distributed based on the number of hogs marketed per year and the distance from the processing facility. The grant was limited to a specific enterprise or industry, or group of enterprises or industries, and was found to be countervailable in 1984.

4.3.4.9 Ontario Bear Damage to Livestock Compensation Program

This program provided compensation for the destruction of, or injury to, certain types of livestock by bears. Grants for damage to live swine could not exceed C$200 per head. In the tenth administrative review, Commerce determined that the program was *de jure* specific and thus countervailable because the legislation expressly made it available only to livestock producers. During earlier administrative reviews, Commerce determined that the program had not been used.

4.3.4.10 Ontario Livestock and Poultry Honeybee Compensation Program

This program provided assistance in the form of grants compensating producers for livestock and poultry injured or killed by wolves, coyotes or dogs. Commerce found the program to be *de jure* specific and thus countervailable because the legislation expressly made it available only to a specific group of enterprises or industries (livestock, poultry farmers and beekeepers). It was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993 and 1993–1994.

4.3.4.11 Ontario Export Sales Aid Program

This program was established in 1987 to assist producers and processors of agricultural and food products in developing export markets. The Ontario government provided reimbursements in the form of grants for up to 50% of the costs incurred in developing export marketing materials, with a maximum dollar amount. Commerce determined the program to be a countervailable subsidy because receipt of benefits was contingent upon actual or expected exportation. It was found countervailable in administrative reviews for the periods of 1991–1992 and 1993–1994.

4.3.4.12 Ontario Farm Tax Reduction Program

This program provided a rebate of up to 75% of municipal property taxes on eligible farmland. As eligibility varied by location, this was found to be a regional subsidy and thus countervailable. A rate of C$0.00003182/lb. dressed-weight was determined in 1984. However, in an administrative review in 1991–1992, Commerce verified that there was no restriction on the types of farm products that received these rebates, and no evidence that the Ontario government exercised discretion in the distribution of the rebates. Commerce therefore reconsidered its decision and determined that the program was not specific and not countervailable.

4.3.4.13 Ontario (Northern) Livestock Program

This program reimbursed Northern Ontario farmers for 20% of the purchase costs of boars (among other animals). It was determined that the program was terminated prior to April 1, 1991, and that no residual benefits were provided during the 1991–1992, 1992–1993 and 1993–1994 review periods.

4.3.4.14 Ontario Rabies Indemnification Program

This program enabled producers to apply for compensation through a federal inspector, who determined whether an animal was rabid and had to be destroyed. Farmers received a maximum of C$100 per hog under the program. Commerce found it to be countervailable on the basis that the legislation made the program available only to livestock producers. It was found countervailable for the review periods of 1991–1992, 1992–1993 and 1993–1994.

4.3.4.15 Prince Edward Island Hog Marketing and Transportation Subsidies

This program defrayed the cost of hog transportation and processing. Inasmuch as these benefits were regional subsidies within the province, it was found to be countervailable in 1984.

4.3.4.16 Quebec Meat Sector Rationalization Program

This program provided technical assistance and grants for the establishment, standardization, expansion or modernization of slaughterhouses, processing plants, or plants preparing food containing meat. Because the grants were limited to the meat sector and thus to specific groups, the program was found to be countervailable.

4.3.4.17 Quebec Special Credits for Hog Producers

This program provided low-interest loans or loan interest subsidies to agricultural producers during "critical" periods. A critical period was defined as a natural disaster that created an emergency, an unexpected, uncontrollable drop in prices, or the disappearance of production for reasons beyond the control of the producer. Because of the specificity of the program, it was found to be countervailable. The Government of Quebec reported that it had stopped giving interest subsidies to pork producers as of March 1983. However, delayed payments were made in 1984 and were therefore calculated for that period.

4.3.4.18 Saskatchewan Financial Assistance for Livestock and Irrigation

This program provided low-interest long-term loans, grants and loan guarantees to farmers for the acquisition of livestock, including swine. Loans to each participant were limited to C$350,000. This programme was found to confer countervailable subsidies.

4.3.4.19 Saskatchewan Livestock Investment Tax Credit

This program provided tax credits to owners of livestock marketed or slaughtered by December 31, 1989. Eligible claimants received credits of $3.00 per hog. Although the program was terminated on December 31, 1989, tax credits were carried forward through the end of fiscal year 1996. Commerce found the program to be *de jure* specific and thus countervailable because the legislation expressly made the program available only to livestock producers. It was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993 and 1993–1994.

4.3.4.20 Saskatchewan Livestock Facilities Tax Credit Program

This program, which was terminated on December 31, 1989, provided tax credits to livestock producers based on their investments in livestock production facilities. The tax credits could be used only to offset provincial taxes, and could be carried forward for up to seven years or until no later than fiscal year 1996. The program paid 15% of 95% of project costs, or 14.25% of total costs.

Commerce found the program to be *de jure* specific and thus countervailable because the legislation expressly made the program available only to livestock producers. It was found countervailable in administrative reviews for the periods of 1991–1992, 1992–1993 and 1993–1994.

4.3.4.21 Saskatchewan Interim Red Meat Production Equalization Program

This program provided grants to livestock producers who raised and fed their livestock in Saskatchewan. In order to qualify, producers had to have sold a minimum number of eligible livestock. Commerce found the program *de jure* specific and thus countervailable because the legislation expressly limited the program's availability to a specific group of enterprises or industries (livestock producers). Commerce also determined that the grants were recurring because recipients could expect to receive benefits on an ongoing basis. The last date on which producers could apply for or claim benefits was November 30, 1994, and the last date on which producers could receive benefits was March 31, 1995. The program was found countervailable in administrative reviews for the periods of 1992–1993, 1993–1994 and 1994–1995.

4.4 Programs Determined Not to Confer a Subsidy

4.4.1 Federal Programs

4.4.1.1 Financial Programs

Commerce found that as the following programs did not designate specific products for financing, they were not limited to a specific industry and were not countervailable:

- Farm Credit Act
- Farm Syndicates Credit Act
- Special Farm Assistance Programs

4.4.1.2 Federal Hog Carcass Grading System

As numerous agricultural products were similarly graded at government cost, this program was not limited to a specific industry and was found not to be countervailable.

4.4.2 Federal–Provincial Programs

4.4.2.1 Canada–B.C. Agri-Food Regional Development Subsidiary Agreement

The aim of this agreement was to promote agricultural development cooperation between the two governments. The federal and B.C. governments shared funding for projects in the areas of productivity enhancement, resource development and commodity development. The program was not found countervailable during the 1988–1989 review, and was not used during the 1989–1990 and 1990–1991 reviews. Again during the 1991–1992, 1992–1993 and 1993–1994 reviews, the program was found not to confer subsidies. It was terminated in 1995.

4.4.2.2 Canada–Manitoba Agri-Food Development Program

Under this 1984 agreement, the federal and Manitoba governments supported research for the development of agriculture. Both levels of government shared the funding in the following areas: (1) enhanced agricultural productivity; (2) enhanced soil and water resource management; (3) human resources management; and (4) analysis, evaluation and public relations. The program was found not countervailable during the administration review of 1988–1989, and not used during 1989–1990. Again during the 1991–1992, 1992–1993 and 1993–1994 reviews, it was found not countervailable. The program was terminated in 1995.

4.4.2.3 Canada–Quebec Agri-Food Agreement—Technological Innovation Program

Funding for this agreement was shared equally by the federal and provincial governments. Through the agreement, grants were made to private businesses and academic organizations to fund projects in the areas of research, technological innovation and support for strategic alliances as they related to the agri-food industry. The results of research carried out under the program were made publicly available and were published in an annual report upon completion. The federal and Quebec governments reported that all projects completed under the program were made publicly available. Because the research results were publicly

available, Commerce determined that the research program did not confer countervailable subsidies to live swine.

4.4.3 Provincial Programs

The following programs did not designate specific products or regions for the receipt of funding, nor did they establish differing terms for specified products. They therefore were not limited to any specific enterprise(s) or industry/industries and were not found countervailable.

Grant Programs in Quebec

- grants under the Act to Promote the Development of Agricultural Operations
- grants to Provincial Pork Packers under the Quebec Industrial Assistance Act

Financing Programs in Quebec

- low-interest financing under the Act to Promote Long-Term Farm Credit by Private Institutions
- low-interest financing under the Farm Credit Act
- low-interest guaranteed loans under an Act to Promote Farm Improvement
- interest-free loans under the Act to Promote the Establishment of Young Farmers
- low-interest mortgages under the Farm Loan Act
- certain short-term loans

Financing Programs in Ontario

- Ontario Farm Adjustment Assistance Program
- Ontario Beginning Farmer Assistance Program
- Ontario Young-Farmer Credit Program

New Brunswick Financing under the 1980 Farm Adjustment Act

Newfoundland Loans under the Farm Development Loan Act

Nova Scotia Farm Loan Board Program

Prince Edward Island Lending Authority Long- and Short-Term Loans

Alberta Agricultural Development Corporation Low-Interest Loans and Loan Guarantees

Financing Programs in British Columbia

- low-interest loans and loan guarantees by the B.C. Ministry of Agriculture and Food
- partial interest reimbursement

Manitoba Agricultural Credit Corporation Loans and Loan Guarantees

Saskatchewan Economic Development Corporation Financial Assistance

Saskatchewan Livestock Cash Advance Program

Ontario Farm Credit Tax Rebate Program

Prince Edward Island Pork Assistance Program

5 Magnesium from Canada and Norway

5.1 Case History

On September 5, 1991, Commerce and the ITC accepted a petition filed by Magnesium Corp. of America, of Salt Lake City, Utah, alleging that subsidized imports of magnesium from Canada were injuring U.S. industry. A concurrent anti-dumping petition was also filed. In October 1991, Commerce dismissed the countervailing duty petition and terminated the proceedings with respect to Norway. Commerce found that the information provided in the petition did not contain a sufficient basis to initiate an investigation with regard to Norwegian goods. On October 30, 1991, the ITC released an affirmative preliminary determination, finding a reasonable indication that an industry in the United States was materially injured by reason of allegedly subsidized and dumped Canadian imports.

On December 6, 1991, Commerce released an affirmative preliminary determination which established the following rates:

Manufacturer/Exporter	***Ad valorem* CVD rate**
Norsk Hydro Canada	8.95%
Timminco	0.04% (*de minimis* and exempt from liquidation)
All others	8.95%

On February 20, 1992, Commerce announced that on the request of the petitioner, the date of the final countervailing duty determination would be delayed to coincide with the date of the final anti-dumping determination with respect to the same product. On July 13, 1992, Commerce released an affirmative

final determination. The period of investigation was the calendar year 1990. Commerce calculated a single rate for both pure and alloy magnesium. Commerce determined that the subsidies provided to the respondents benefited the production of both pure and alloy magnesium, and could not be segregated. A single estimated net subsidy was therefore calculated for both classes of merchandise for Norsk Hydro Canada Inc. (NHCI).

Manufacturer/Exporter	*Ad valorem* CVD rate
Norsk Hydro Canada	21.61%
Timminco	0.09% (*de minimis* and excluded from investigation)
All others	21.61%

On August 26, 1992, the ITC released an affirmative final determination. The ITC determined that the volume and market penetration of the subject imports increased dramatically during the period of investigation. Coincident with this large increase, U.S. producers' production, domestic shipments and market share declined steadily in both quantity and value, while inventories increased. The financial performance of the domestic industry also steadily declined, with decreases in operating income margins, gross profit and net sales. Correspondingly, the prices for both U.S.- and Canadian-produced magnesium declined during the period of investigation, leading to a direct loss of profits.

5.2 Changed Circumstances

On September 10, 1992, Commerce initiated a changed circumstances review to determine the effect of an amendment in the electricity contract between NHCI and Hydro-Québec. On November 16, 1992, it was determined that as a result of the amended contract, no subsidy was conferred upon NHCI through its purchase of electricity from Hydro-Québec.

NHCI was being treated as any other similar user, and the price being charged to NHCI was consistent with Hydro-Québec's standard pricing mechanism. Accordingly, the CVD rate was reduced to 7.61%.

5.3 FTA/NAFTA Binational Panel Reviews

5.3.1 First Review

On September 25, 1992, NHCI and the Government of Quebec filed a request for a Chapter 19 (FTA) Binational Panel Review of the ITC's final affirmative injury determination. The Government of Canada subsequently filed a notice of appear-

ance in support of Quebec and NHCI. This Panel Review was consolidated with the Panel Review concerning the ITC determination of injury with respect to the concurrent anti-dumping investigation.

On August 27, 1993, the panel found that the ITC's determination that pure and alloy magnesium constituted one class of merchandise was not supported by the record. Evidence of the existence of similar distribution channels and shared core production processes was considered by the panel to be an insufficient basis on which to reasonably conclude that only one like product existed.

The panel also found the ITC's alternative conclusion—that even if two separate products existed, it would have reached an affirmative material injury determination with respect to each of these industries—was not supported by adequate analysis concerning the impact of imports on the domestic industry. The determination was remanded to the ITC for separate injury determinations for pure and alloy magnesium.

On January 27, 1994, the panel upheld the ITC's injury determination on remand. The ITC determined that the U.S. industry producing pure magnesium was materially injured by reason of subsidized (and dumped) Canadian imports of pure magnesium, and that the U.S. industry producing alloy magnesium was materially injured by reason of subsidized Canadian imports of alloy magnesium. The panel found that the ITC's determination that there was an absolute increase in Canadian imports relative to consumption and a steady decline in prices for both U.S.- and Canadian-produced alloy magnesium was adequately stated and supported by substantial evidence.

With respect to the impact of Canadian imports on domestic producers, the ITC based its determination of causality on: evidence of a high degree of substitutability between imported and domestic magnesium; the relatively inelastic demand for the product; and the significant increase in Canadian imports, coinciding with a decline in market share and revenues for U.S. producers. The complainants argued that non-price factors in the market were responsible for the growth in Canadian imports and the difficulties experienced by U.S. producers. The panel conceded that there was evidence to support this position but it determined that the ITC had acted within its discretion in finding that non-price factors did not negate the significance of price in buyers' purchasing decisions.

5.3.2 Second Review

On August 10, 1992, the Government of Quebec filed a Request for a Binational Panel Review (FTA) of Commerce's affirmative final determination. NHCI also filed a request for Panel Review in this matter.

On August 16, 1993, the Binational Panel remanded in part and affirmed in part Commerce's final determination. The panel affirmed Commerce's policy of assuming that the petitioner has standing, in the absence of any expressed opposi-

tion to the petition by a majority of the U.S. industry. Quebec had argued that Commerce's determination that the Quebec Industrial Development Corporation (SDI) program provided benefits to a "specific" enterprise or industry was improper. It was argued that the sole basis for the specificity determination was a finding of disproportionate use of the SDI program, and that Commerce had failed to consider and weigh the other three factors contained in its Proposed Regulations. The panel concluded that Commerce's reliance on the "disproportionality" factor to find specificity was within Commerce's discretion. The panel found that Commerce had considered the other factors, but found them unnecessary for its determination.

Quebec submitted that Commerce should have conducted its "disproportionality" analysis on an industry-by-industry rather than an enterprise-by-enterprise basis. The panel found that although Commerce has statutory discretion to conduct an analysis by enterprise rather than by industry, it nevertheless had a duty to justify its choice by giving a cogent explanation for the exercise of its discretion.

In its final determination, Commerce allocated the benefits of the SDI grant for the purchase of pollution control equipment over 14 years—the average life of assets in the magnesium industry, according to the 1977 Class Life Asset Depreciation Range System developed by the Internal Revenue Service (IRS). Quebec argued that Commerce should have used the depreciation period used by Norsk instead of the IRS table. The panel stated that Commerce must consider the IRS tables and the producer records, in a manner that satisfies the standard articulated in the *Ipsco* case of "an allocation period which will accurately reflect the commercial and competitive benefit received by the plaintiffs," and that Commerce must provide a satisfactory explanation in support of whatever decision it reached. The panel was also satisfied with Commerce's explanation concerning the use of IRS tables to determine the useful life of equipment bought with an SDI subsidy. This action was seen as a reasonable exercise of discretion in view of Commerce's stated review of available financial records.

SDI entered into a grant contract in which it agreed to reimburse NHCI for interest payments made on outstanding debt obligations. The SDI grant was calculated as a percentage of the cost of pollution control equipment. Quebec asserted that because the interest payments made on the outstanding debt obligations were directly tied to recurring interest payments, Commerce should have treated the assistance as a recurring grant. The panel affirmed Commerce's determination that the assistance was authorized and disbursed in one act—meaning that it should be deemed a non-recurring grant.

Quebec submitted that Commerce should only have countervailed the portion of the SDI grant that was above the line of proportionality because countervailing duty law was intended to simply offset the benefit conferred and not to penalize firms that received subsidies. The panel, however, affirmed Commerce's decision to countervail the entire grant in accordance with its past practice and its Proposed Regulations.

It was asserted that the subsidy related to NHCI's exemption from payment for water should be limited to the exemption from payment of actual water consumed, not the amount of water NHCI was forecast to consume. It was argued that Norsk Hydro received no benefit from not having to pay for the water it did not use. The panel affirmed Commerce's determination that actual use was irrelevant since all companies in the industrial park concerned were normally billed for their "hypothetical/forecasted" water use rather than actual use.

On December 14, 1993, the Binational Panel affirmed in all aspects the remanded determination made by Commerce. The panel found that Commerce's use of an enterprise- rather than an industry-based "disproportionality" analysis was reasonable as Commerce had the discretion to use either type of analysis. Furthermore, the enterprise data was provided by the respondents, rendering an industry analysis unnecessary once the enterprise analysis indicated specificity.

5.3.3 Third Review

On May 16, 1997, the Quebec government filed a request for Panel Review. On May 19, 1997, a second request was filed on behalf of Norsk Hydro. Both concerned the final results of the third (1994) countervailing duty administrative review respecting pure and alloy magnesium from Canada, released on April 17, 1997. Pursuant to a motion filed by the requesters, the Panel Review was terminated on June 20, 1997.

5.4 Other Key Issues

Commerce determined that the discounted electricity rate received by NHCI constituted a subsidy because there was no evidence to suggest that similar industrial users of electricity in Quebec received such rates. Commerce rejected the respondents' argument that no subsidy existed because Hydro-Québec possessed projected surplus power and entered into a commercially sound contract with NHCI on the issue of SDI funding. Commerce determined that the funding NHCI received under Article 7 of the SDI Act should not be examined in the context of SDI funding in general. Article 7 assistance and general SDI assistance were not integrally linked programs, as evidenced by differing administration methods, government policy and funding mechanisms.

5.5 Administrative Reviews

First Administrative Review

Review Period:	**December 6, 1991–December 31, 1992**

Preliminary Determination (March 19, 1996)

Final Determination (March 24, 1997)

Net Subsidy: NHCI and all other producers/exporters (except Timminco): . . . . 9.86% *ad valorem*

Programs Found Countervailable

Exemption from payment of water bills . . . . . . 1.31% *ad valorem*

Article 7 Grants from the Quebec Industrial Development Corporation (SDI) . . . . 8.55% *ad valorem*

Second Administrative Review

Review Period:	**January 1, 1993–December 31, 1993**

Preliminary Determination (March 24, 1997)

Net Subsidy: NHCI and all other producers/exporters (except Timminco): . . . . 7.13% *ad valorem*

Final Determination (September 16, 1997)

Net Subsidy: NHCI and all other producers/exporters (except Timminco): . . . . 7.34% *ad valorem*

Programs Found Countervailable

Exemption from payment of water bills . . . . . . 1.00% *ad valorem*

Article 7 Grants from the Quebec Industrial Development Corporation (SDI) . . . . 6.34% *ad valorem*

Third Administrative Review

Review Period: January 1, 1994–December 31, 1994

Preliminary Determination (October 7, 1996)

Net Subsidy: NHCI and all other producers/exporters .... 4.01% *ad valorem*

Final Determination (April 17, 1997)

Net Subsidy: NHCI and all other producers/exporters .... 4.48% *ad valorem*

Programs Found Countervailable

Exemption from payment of water bills ...... 0.65% *ad valorem*

Article 7 Grants from the Quebec Industrial Development Corporation (SDI) .... 3.83% *ad valorem*

Fourth Administrative Review

Review Period: January 1, 1995–December 31, 1995

Preliminary Determination (May 12, 1997)

Net Subsidy: NHCI and all other producers/exporters .... 3.18% *ad valorem*

Final Determination (September 17, 1997)

Net Subsidy: NHCI and all other producers/exporters .... 3.18% *ad valorem*

Programs Found Countervailable

Exemption from payment of water bills ...... 0.50% *ad valorem*

Article 7 Grants from the Quebec Industrial Development Corporation (SDI) .... 2.68% *ad valorem*

Fifth Administrative Review

Review Period:	**January 1, 1996–December 31, 1996**

Preliminary Determination (April 30, 1998)

Net Subsidy: NHCI and all other producers/exporters .... 2.78% *ad valorem*

Final Determination (August 24, 1998)

Net Subsidy: NHCI and all other producers/exporters .... 2.78% *ad valorem*

Programs Found Countervailable

Exemption from payment of water bills ...... 0.46% *ad valorem*

Article 7 Grants from the Quebec Industrial Development Corporation (SDI) .... 2.32% *ad valorem*

Sixth Administrative Review

Review Period:	**January 1, 1997–December 31, 1997**

Preliminary Determination (May 7, 1999)

Net Subsidy: NHCI and all other producers/exporters .... 2.02% *ad valorem*

Final Determination (September 8, 1999)

Net Subsidy: NHCI and all other producers/exporters .... 2.02% *ad valorem*

Programs Found Countervailable

Exemption from payment of water bills ...... 0.18% *ad valorem*

Article 7 Grants from the Quebec Industrial Development Corporation (SDI) .... 1.84% *ad valorem*

Seventh Administrative Review

Review Period:	**January 1, 1998–December 31, 1998**

Preliminary Determination (May 4, 2000)

Net Subsidy: NHCI and all other producers/exporters .... 1.38% *ad valorem*

Programs Found Countervailable

Article 7 Grants from the Quebec Industrial Development Corporation (SDI) .... 1.38% *ad valorem*

5.6 Sunset Review

On August 2, 1999, Commerce and the ITC initiated a sunset review of the anti-dumping and countervailing duty orders on pure and alloy magnesium from Canada. Both Commerce and the ITC determined that they would conduct a full review. On July 5, 2000, Commerce made a final determination that revocation of the countervailing and anti-dumping duty orders would be likely to lead to the continuation or recurrence of subsidization and dumping. With respect to the countervailing duty, Commerce reported rates of 1.84% for Norsk Hydro and 7.34%[173] for all other exporters. The rate of 1.84% was based on the results of the most recent administrative review for Norsk, and was based entirely on the benefit calculation for the only remaining subsidy—the SDI grant, with a so-called benefit stream to last until 2004. The rate of 7.34% was based on the "all others" rate as established on September 16, 1997, for the administrative review for the 1993 period. Commerce reasoned that since the SDI grant program continued to exist and an allocated benefit stream continued past the end of the sunset review period, it was appropriate to report the most recent rates for both Norsk Hydro and "all others."[174]

On July 26, 2000, by a vote of 5 to 1, the ITC made an affirmative determination that revocation of the orders would be likely to lead to a continuation or recurrence of injury to the U.S. industry by reason of dumped and subsidized imports. The order was therefore continued.

5.7 Programs Determined to Confer Subsidies

5.7.1 Federal Programs

5.7.1.1 Federal Funding for a Feasibility Study Under the Canada-Quebec Subsidiary Agreement on Industrial Development

Net subsidy: NHCI, 0.10% *ad valorem* (original investigation)

Under this agreement, the federal and Quebec governments established a program to provide financial assistance to companies in order to cover the cost of feasibility studies related to major industrial projects.

The program was implemented under the 1984 Canada–Quebec Economic and Regional Development Agreement. The agreement was signed on January 23, 1985, and was terminated on March 31, 1992. Commerce determined that the

173 The "all others" rate was originally found to be 4.48% but was amended by Commerce on July 13, 2000.

174 The "all others" rate for the 1993 review period also included an exemption from the payment of water bills for Norsk Hydro. The rate as calculated was 6.34% for SDI grants and 1.00% for the exemption from the payment of water bills.

federal funding was countervailable because it was limited to a particular region of Canada (i.e. Quebec). However, the provincial funding was not found to be countervailable because it was not specific to an enterprise or industry within the province. Commerce treated the reimbursable grant as an interest-free short-term loan rolled over from year to year.

5.7.2 Provincial Programs

5.7.2.1 Exemption From Payment of Water Bills

Pursuant to a December 15, 1988, agreement between NHCI and the Société du parc industriel et portuaire de Bécancour, NHCI was exempt from payment of its water bills except for the taxes associated with such bills. No other company received such an exemption. Commerce determined this program to be countervailable since benefits were limited to a specific enterprise. The net subsidy was 1.43% for Norsk Hydro (original investigation).

5.7.2.2 Article 7 Grants from the Quebec Industrial Development Corporation

The Quebec Industrial Development Corporation (SDI), a Crown corporation, acted as an investment corporation administering development programs on behalf of the Government of Quebec. The SDI provided assistance in the form of loans, loan guarantees, grants, assumption of costs on loans, and equity investments.

This assistance was offered for projects capable of having a major impact on Quebec's economy. In 1988, NHCI was awarded a grant under Article 7 of the SDI Act to cover a large percentage of the cost of certain environmental protection equipment. Commerce determined that NHCI received a disproportionately large share of assistance under Article 7, thus rendering Article 7 grants specific to an enterprise or industry. The net subsidy was 6.18% for Norsk Hydro (original investigation).

5.7.2.3 Preferential Electricity Rates

The Risk and Profit Sharing Program was administered by the provincially owned power company Hydro-Québec. Under this program, long-term contracts were signed between Hydro-Québec and industrial customers meeting certain criteria. A portion of the rate to be charged under the contracts was based either on the price of the customer's products or the customer's profitability. The price paid by a customer may therefore have varied from year to year as a result of fluctuations in the customer's prices or profits.

Contracts were negotiated with the expectation that over the term of a particular contract, Hydro-Québec would earn the full projected revenue that would have been generated under its general rates and programs.

During the period of investigation, NHCI's electricity rate did not vary as per the terms of the Risk and Profit Sharing Program. However, NHCI did receive a discount on its electricity rate beyond that received by other industrial customers in Quebec. Commerce found that this preferential electricity rate was limited to a specific enterprise and was therefore countervailable. However, as discussed above, a subsequent changed circumstances review determined that the revised electricity rates did not constitute a subsidy. The net subsidy was 6.18% (original investigation).

5.8 Programs Determined not to be Countervailable

5.8.1 Federal-Provincial Programs

5.8.1.1 Research Conducted by the Institute of Magnesium Technology (IMT)

The IMT was incorporated in 1989 as a private, non-profit company dedicated to the promotion of the magnesium industry. The creation of the IMT was a joint effort of the federal and Quebec governments and the magnesium industry. The IMT provided magnesium processors with the expertise and equipment necessary for development work, as well as for the improvement of products and processes. Initial funding was provided by the federal and Quebec governments under the Canada–Quebec Subsidiary Agreement on Scientific and Technological Development. However, the IMT aimed to be a self-sustaining body through membership fees and research contracts.

Commerce's practice with regard to the countervailability of research and development assistance is that when the results of the research are made available to the public, including competitors in the United States, the assistance does not confer a countervailable benefit. The IMT had 30 members throughout the world, including in the United States. Commerce concluded that IMT's research was not countervailable because membership in the Institute was open to all parties, and these parties could obtain research performed by the IMT on equal terms.

5.8.2 Provincial Programs

5.8.2.1 Manpower Training Program

This program was administered by the Quebec Ministry for Manpower and Income Security, and was offered to individuals for training and retraining. NHCI received payments for teaching materials and teacher services used in the training of employees and non-employees of the company. Commerce did not countervail this program since there were no *de jure* or *de facto* limitations pertaining to the eligible enterprises, and since the program was offered and provided to individuals employed or seeking employment and to companies providing such training within a large number and broad range of industrial sectors in Quebec.

5.9 Programs Determined Not to be Used

- St. Lawrence River Environmental Technology Development Program
- Program for Export Market Development
- Export Development Corporation
- Canada–Quebec Subsidiary Agreement on the Economic Development of the Regions of Quebec
- Opportunities to Stimulate Technology Programs
- Development Assistance Program
- Industrial Feasibility Study Assistance Program
- Export Promotion Assistance Program
- Creation of Scientific Jobs in Industries
- Business Investment Assistance Program
- Business Financing Program
- Research and Innovation Activities Program
- Export Assistance Program
- Energy Technologies Development Program
- Financial Assistance Program for Research, Formation and the Improvement of Recycling Industry
- Transportation Research and Development Assistance Program

6 Certain Laminated Hardwood Trailer Flooring (LHF) from Canada

6.1 Case History

On March 7, 1996, Commerce and the ITC accepted a petition filed by the Ad Hoc Committee on Laminated Hardwood Trailer Flooring Imports (Anderson-Tully, Havco Wood Products, Inc., Industrial Hardwood Products Inc., Lewisohn Sales Company Inc., and Cloud Corporation / Cloud Oak Corporation) alleging injury to U.S. industry by reason of allegedly subsidized imports of laminated hardwood flooring from Canada. The petition also alleged that critical circumstances existed with respect to imports of the subject merchandise. The scope of the investigation consisted of certain laminated hardwood flooring made of oak, maple or other hardwood lumber.

On May 9, 1996, the ITC released an affirmative preliminary determination, finding a reasonable indication that the domestic industry was threatened with material injury by reason of allegedly subsidized imports from Canada. Based on the combination of declining U.S. demand, the rise in available capacity in the United States and Canada, the rise in subject import volumes and market share, and the evidence of intensifying downward price pressure from subject imports, the ITC found that subject imports were likely to have a significant adverse impact on the condition of the domestic industry, and that these factors provided a reasonable indication of a real and imminent threat of material injury.

On June 7, 1996, Commerce extended the deadline for its preliminary determination in order to investigate the petitioner's allegations that the Canadian respondent, Nilus Leclerc Inc. and Industries Leclerc Inc. (Leclerc), received upstream subsidies through its purchase of lumber from suppliers who had harvested stumpage from Quebec's public forests. The allegation provided reasonable grounds for Commerce to believe that stumpage subsidies provided by the Government of Quebec were being passed through to Leclerc pursuant to the purchase of hardwood lumber from suppliers. However, Commerce found that Leclerc purchased lumber from both allegedly subsidized and unsubsidized suppliers, and that the price paid for the allegedly subsidized lumber was generally equal to or more expensive than that for the unsubsidized lumber. Accordingly, Commerce made a preliminary determination that Leclerc did not receive an upstream subsidy.

On November 20, 1996, Commerce released a preliminary negative countervailing duty determination. The total estimated preliminary net countervailable subsidy rate for Leclerc was 0.31%, which was *de minimus*. Erie Flooring & Wood Products (Erie) and Milner received zero subsidies during the period of investigation (calendar year 1995). The only subsidy received by Industrial Hardwood Products Ltd., located in Ontario, was for consulting services pursuant to the Industrial Research Assistance Program.

Commerce determined without further calculation that even if this assistance constituted a countervailable subsidy, the rate would be de minimis. Hence, Erie, Milner and Industrial Hardwood Products were excluded from the investigation.

Accordingly, the total estimated preliminary net countervailable subsidy rate for Leclerc, the one remaining firm, was 0.31%, a *de minimis* rate. Nilus Leclerc Inc. was part of a consolidated group, Groupe Bois Leclerc. Nilus Leclerc Inc. and Industries Leclerc Inc. were the only companies in the group directly engaged in the production of LHF. Because of the extent of common ownership, Commerce treated these two LHF producers as a single company.

On February 4, 1997, Commerce released a final negative determination and final negative critical circumstances determination. Based on the four countervailable programs described, the aggregate *ad valorem* rate set for Leclerc was 0.57%. This rate was *de minimis*. On February 26, 1997, the investigation was formally terminated by the ITC.

6.2 Key Issues

Petitioners claimed that Nilus Leclerc Inc. (Leclerc) became partners with the Government of Quebec, with the sole objective of taking over the U.S. laminated hardwood flooring market, and that all programs provided to Leclerc should be considered specific because they were provided under a plan that gave Leclerc special treatment. However, evidence of "special treatment" was never provided by the petitioners and so Commerce never considered this argument.

There was also a question of upstream subsidies. Commerce compared the prices paid by Leclerc to its "allegedly subsidized" suppliers with the prices paid to unsubsidized suppliers on a product-by-product and aggregate basis. Commerce found that the price of allegedly subsidized lumber was generally equal to or higher than the price of unsubsidized lumber. Leclerc therefore did not receive a competitive benefit, precluding a finding of an upstream subsidy.

6.3 Programs Determined to be Countervailable

6.3.1 Joint Federal-Provincial Programs

6.3.1.1 Canada-Quebec Subsidiary Agreement on Industrial Development (SID)

Under this agreement, the federal and Quebec governments established a program to improve the competitiveness of the Quebec economy by providing financial assistance to companies for major industrial projects.

The long-term interest-free loan received by Leclerc was found to constitute a countervailable subsidy. It was a direct transfer of funds providing a benefit in the amount of the difference between the benchmark interest rate and the zero interest rate paid by Leclerc. Funds paid out under this program were limited to companies in a particular region of Canada (i.e. Quebec), and hence were regionally specific. The net rate found was 0.29%.

6.3.2 Federal Programs

6.3.2.1 Industrial and Regional Development Program (IRDP)

IRDP was created to promote economic development in Canada, especially in regions where opportunities for productive employment were exceptionally inadequate. The program was terminated on June 30, 1988. Under IRDP, each of Canada's 260 census districts was classified into one of four tiers on the basis of the economic development of the region.

The grants received by Leclerc, which was located in a Tier III district, were determined to constitute a countervailable subsidy as they were a direct transfer of funds from the Government of Canada and conferred a benefit in the amount of the portion of the grant that was in excess of the most favourable, non-specific

level of benefits (i.e. Tier I). IRDP grants were also found regionally specific because the preferential levels of benefits were limited to companies in particular regions of Canada. These grants were treated as "non-recurring" subsidies. The net rate found was 0.04%.

6.3.3 Provincial Programs

6.3.3.1 Quebec Industrial Development Corporation (SDI)—Expansion and Modernization Program

Quebec firms could receive funding under this program for projects aimed at markets outside Quebec, or where the target Quebec market was inadequately served by businesses in Quebec and the supported production was expected to replace goods imported into Quebec.

Based on the eligibility criteria, Commerce determined that the program was not *de jure* specific but was rather *de facto* specific. In 1993 and 1994, a disproportionate share of assistance was provided to the wood industry in general and to Leclerc in particular. The loans were determined to be a direct transfer of funds providing a benefit in the amount of the difference between the benchmark interest rate and the interest rate paid by Leclerc. In order to account for the value of the subsidy, Commerce estimated a repayment schedule for the SDI loan and compared the amount Leclerc would repay under that schedule with the amount repayable under a comparable commercial loan.

Commerce determined that Leclerc was uncreditworthy in 1995. Although Leclerc received loans through the SDI program, Commerce determined that SDI assumed more risk than commercial banks would have, and that there were significant differences with respect to the extent to which commercial and SDI loans could be recovered in the event of default. Because of these differences, Commerce chose a benchmark interest rate that generally reflected the level of security exhibited by the government loans. Commerce determined that Leclerc had been creditworthy in 1993–1994 as the company had received comparable commercial loans.

With regard to the SDI loans received by Leclerc, Commerce performed a "disproportionality" test on the level of an industry as opposed to an enterprise. In the final determination, Commerce justified this deviation from its normal practice by explaining that it was provided the relevant information on an industry basis and that the statute conferred discretion to determine the appropriate level of aggregation. Commerce also asserted that it had no obligation to take into account the economic factors that might have resulted in disproportionate use of a program by a particular industry. The net rate was 0.24%.

6.3.3.2 Export Promotion Assistance Program (APEX)

Under the APEX program, Quebec shared certain costs incurred by a Quebec company in the penetration of new foreign markets. Such costs included missions to develop new markets, participation in foreign trade fairs, adaptation of products to new export markets, preparation of bids with the assistance of consultants, preparation of marketing studies and strategies to enter foreign markets, and the hiring of international marketing experts.

Because receipt of benefits under this program was contingent upon export performance, Commerce determined that it was an export subsidy. It was also determined that the grants received by Leclerc constituted a countervailable subsidy because they were direct transfers of funds, conferring a benefit to Leclerc in the amount of the face value of the grant. The grant was treated as a non-recurring subsidy and the benefit was allocated over the average useful life of Leclerc's non-renewable physical assets. The net rate was 0.00%.

6.4 Programs Determined Not to be Countervailable

6.4.1 Federal Programs

6.4.1.1 Export Development Corporation (EDC)

One of EDC's services was the provision of insurance intended to protect exporters against losses resulting from non-payment relating to commercial and political risks.

During the period of investigation, Leclerc purchased export credit insurance from EDC that covered sales of the subject merchandise. No claims were made or pay-outs received by Leclerc during this period.

Commerce's standard methodology for examining government export credit insurance programs was to determine whether the premium charged by the government entity was adequate to cover the long-term operating costs and losses of the program. According to EDC annual reports, the Corporation's insurance program reported profits from 1991 to 1995. Given that the premium rates charged by EDC had been more than adequate to cover the operating costs and losses of its export insurance program, Commerce determined that the program did not confer a benefit and therefore was not a subsidy.

6.4.2 Provincial Programs

6.4.2.1 Société québécoise de développement de la main-d'oeuvre— Program for the Development of Human Resources

Commerce concluded that this program was neither *de facto* nor *de jure* specific, and had not conferred a countervailable subsidy on Leclerc. The program was available to all commercial enterprises, workers' unions, other worker's groups

and non-profit organizations located in Quebec. Assistance under the program was distributed over a large number and wide variety of users representing virtually every industry in Quebec. Neither Leclerc nor the wood products industry was found to have received a disproportionate share of the benefits.

6.4.2.2 Hydro-Québec Electrotechnology Implementation Program

This program was administered by Hydro-Québec, a public utility wholly owned by the Government of Quebec. The program was designed to reduce dependence on fossil fuels by increasing the consumption of hydro-electric power and promoting research and development on more efficient uses of energy. The program was found not to be *de jure* specific. With regard to *de facto* specificity, from 1985 to 1992 assistance under the program was distributed over a large number and wide variety of users, representing a wide cross-section of the Quebec economy. Neither Leclerc nor the wood products industry received a disproportionate share of the program's benefits. Commerce therefore determined that the program was not specific and had not conferred countervailable subsidies on Leclerc.

6.4.2.3 Société québécoise de développement de la main-d'oeuvre—Decentralized Fund for Job Creation Program

This program was created by an agency of the Government of Quebec in 1994 for the purpose of increasing employment and reducing public expenditures for the unemployed.

By providing a one-time cash grant to qualifying enterprises, the program aimed to induce private enterprises to develop projects to hire the unemployed. The program was found not to be *de jure* specific. With regard to *de facto* specificity, from February 1994 to March 1996 assistance under the program was distributed to many sectors representing virtually every industry and commercial sector found in Quebec. Neither Leclerc nor the wood products industry received a disproportionate share of the program's benefits. Commerce therefore determined that the program was not specific and had not conferred countervailable subsidies on Leclerc.

6.4.2.4 Société de placement dans l'entreprise québécoise (SPEQ)

The SPEQ program provided a tax incentive for owners of business investment companies to make equity investments in eligible small to medium-sized Quebec companies. This program was not found to be *de jure* specific. With regard to *de facto* specificity, from 1988 to 1993 assistance under the program was distributed over a large number and wide variety of users, representing a wide cross-section of the Quebec economy. Neither Leclerc nor the wood products industry was a dominant or disproportionate user of the program. Commerce therefore determined that the program was not specific and had not conferred countervailable subsidies on Leclerc.

6.4.2.5 Quebec Industrial Development Corporation—Programme d'appui à la reprise (PREP)

PREP was a temporary program under which SDI provided guarantees on commercial bank loans. The program was active between 1992 and 1995, and was designed to assist small to medium-sized firms in Quebec experiencing liquidity problems as a result of the recession of the early 1990s.

The program was found not to be *de jure* specific. With regard to *de facto* specificity, the companies that obtained loan guarantees under PREP represented a large number of different industries. Neither Leclerc nor the wood products industry was a disproportionate user of the program. Commerce therefore determined that the program was not specific and had not conferred countervailable subsidies on Leclerc.

6.5 Programs Determined Not to be Used

- Capital Gains Exemptions
- Regional Investment Tax Credits
- Performance Security Services through Export Development Corporation
- Working Capital for Growth from the Business Development Bank of Canada
- St. Lawrence Environmental Technology Development Program
- Program for Export Market Development
- Canada–Quebec Subsidiary Agreement on the Economic Development of Quebec
- Quebec Stumpage Program
- Programs provided by the Quebec Industrial Development Corporation (SDI)
    - Article 7 Assistance
    - Export Assistance Program
    - Business Financing Program
    - Research and Innovation Activities Program
- Private Forest Development Program

7 Certain Steelwire Rod from Canada (and Germany, Trinidad and Tobago, and Venezuela)

7.1 Case History

On February 26, 1997, Commerce and the ITC accepted a petition filed by the following companies: Steel Corp.; Co-Steel Raritan; GS Industries, Inc.; Keystone Steel & Wire Co.; and North Star Steel Texas Inc. The petitioners alleged that subsidized imports of steel wire rod from Canada, Germany, Trinidad and Tobago, and Venezuela were injuring the U.S. industry.

On April 30, 1997, the ITC published an affirmative preliminary determination, finding a reasonable indication that the domestic industry was threatened with material injury by reason of allegedly subsidized imports from Canada, Germany, Trinidad and Tobago, and Venezuela.

On August 4, 1998, Commerce released an affirmative preliminary determination, in which it estimated the following preliminary countervailing duty rates:

Manufacturer/Exporter	CVD rate
Sidbec-Dosco (Ispat) Inc.	9.55%
Ivaco, Inc.	0.00%
Stelco, Inc.	0.00%
All Others	9.55%

On October 22, 1997, Commerce released an affirmative final determination, finding that countervailable subsidies were provided to Sidbec-Dosco (Ispat) Inc.

Manufacturer/Exporter	CVD rate
Sidbec-Dosco (Ispat) Inc.	8.95%
Ivaco, Inc.	0.00%
Stelco, Inc.	0.00%
All Others	8.95%

On November 21, 1997, Ispat Sidbec Inc. filed a request for a Chapter 19 Binational Panel Review with the NAFTA Secretariat. A second request was filed on November 21, 1997, on behalf of the Quebec government. A Panel Review was

requested of the final countervailing duty determination made by Commerce. Given the ITC's negative final determination, these requests were subsequently withdrawn.

On December 3, 1997, the ITC made a negative final determination and the investigation was terminated.

In the ITC determination, Canadian imports were cumulated with subsidized and dumped imports from Venezuela and Trinidad and Tobago, and dumped imports from Germany. In light of the lack of significant volume of subject imports and significant price effects, the consistently high level of investments by the domestic industry, and the improving trend in the industry's financial condition (which began well before the petition was filed), the ITC did not find that the subject imports had an adverse impact on the domestic industry. Although the domestic industry had lost over 3.0 percentage points of market share from 1994 to 1995, the subject imports' market share remained constant during that period. From 1995 to 1996, when subject imports made their greatest gains in volume, the domestic industry's market share remained virtually the same. The subject imports captured sales and market share at the expense of other imports, rather than the domestic like product. Moreover, the domestic industry was not able to satisfy all of the domestic demand for steel wire rod during this period.

With respect to price issues, in light of the absence of evidence supporting a correlation between subject import volumes or prices and declines in domestic steel wire rod prices, the ITC decided it could not conclude that subject import prices prevented, to a significant degree, domestic price increases that would otherwise have occurred.

With regard to threat of material injury, the interim 1997 data and the full year 1996 data led the ITC to conclude that a substantially increased volume of subject imports was not imminent and that no material injury would occur by reason of subject imports. Subject imports decreased throughout 1997 according to the interim data, and were at lower levels during that period than during either the first or second half of 1996. Foreign producers of the subject merchandise had generally been operating at or near full capacity throughout the period of investigation, with no plans for expansion. There was no basis for concluding that imports were likely to have a significant adverse effect on prices for the U.S. domestic like product in the imminent future.

7.2 Key Issues

The Government of Quebec owned 100% of Sidbec's stock, and Sidbec owned 100% of Sidbec-Dosco, Inc.'s stock, until privatization in 1994. On August 17, 1994, Sidbec-Dosco, Inc. was sold to Beheer-en Beleggingsmaatschappij Brohenco B.V. (Brohenco), which is wholly owned by Ispat-Mexicana, S.A. de C.V. (Ispat Mexicana). It became known as Sidbec-Dosco (Ispat) Inc. Sidbec, the holding company, continued to be 100% owned by the Government of Quebec.

It was Commerce's practice to allocate subsidies received by a parent over the sales of its entire group of companies in certain situations. Therefore, Commerce treated any untied subsidy received by the parent, Sidbec, during the period of investigation as benefiting all of the companies in the Sidbec group, including Sidbec-Dosco, Inc. and Sidbec-Normines.

Commerce determined that while grants provided in 1983 and 1984 were tied to Sidbec-Normines' iron ore production, these subsidies became attributable to the Sidbec group's remaining production once the iron ore operations were shut down. Furthermore, because Commerce considered Sidbec-Normines to be a part of the Sidbec group, the grants were considered to be provided directly to Sidbec. Accordingly, Commerce found that grants provided both before and after the closure of Sidbec-Normines' mining operations in 1984 benefited the Sidbec group's remaining production as of 1985 onward, including the production of the subject merchandise (steel wire rod).

Commerce allocated the subsidies at issue to the remaining production of the consolidated group given that the closed mining operations had been operated by a subsidiary (Sidbec-Normines) whose only production came from the closed plant. The parent of the consolidated group (Sidbec) was the group's shareholder in the subsidiary, and had financed and was obligated to pay the debts of the subsidiary. Thus Sidbec was being relieved of the costs it would have incurred in closing down the plant, so that its remaining production, including steel wire rod, undeniably benefited from the subsidies it received.

Commerce found that the 1983–1992 grants to cover Sidbec-Normines debt were non-recurring in nature. Commerce considers grants to be non-recurring when the benefits are exceptional, the recipient cannot expect to receive benefits on an ongoing basis, and/or the provision of funds by the government must be approved every year. Based upon the multi-layered process necessary to obtain budgetary authority, Commerce concluded that government approval was necessary prior to the receipt of each individual grant. Whereas non-recurring grants are allocated over the average useful life of assets in the industry, recurring grants are expensed in the year of receipt.

Commerce determined that Sidbec was uncreditworthy for the years from 1983 to 1992, based on certain liquidity and debt ratios. The Quebec Industrial Development Corporation (SDI) asserted that Commerce's finding was not supported by evidence on the record as the company had received long-term commercial financing. SDI asserted that the result of this error was that Commerce added a risk premium to the discount rate. Commerce stated that its credit analysis was consistent with the decision to analyze the subsidies as benefiting the consolidated group of the parent company, Sidbec. Furthermore, Commerce did not consider Sidbec's long-term capital lease as comparable to long-term commercial financing. The lease in question was a capital lease, secured by a first-rank specific charge, which is not unlike a typical mortgage.

On this basis, Commerce distinguished the capital lease from a typical long-term commercial loan, which was not secured in this way.

SDI asserted that any possible countervailable subsidies were extinguished by the privatization of Sidbec-Dosco. The Government of Canada expressed concerns with Commerce's privatization methodology as it was advised that the sale of Sidbec-Dosco was an arm's-length transaction and fully reflected the market value of the company's assets. According to Commerce's practice, the sale of a "business" or "productive unit" does not alter the effect of previously bestowed subsidies. A calculation is performed to measure the portion of the subsidies passed through, taking into account the sale price and previously bestowed subsidies. This approach was consistent with the Federal Circuit's decision in *Saarstahl AG v. United States*, 78 F.3d 1539 (Fed. Cir. 1996).

7.3 Programs Determined to be Countervailable

7.3.1 Provincial Programs

7.3.1.1 1988 Debt-to-Equity Conversion

Sidbec-Dosco received a debt-to-equity conversion from the Government of Quebec in 1988. The Quebec Industrial Development Corporation reported that a portion of Sidbec's debt was converted into Sidbec capital stock in 1988. The debt consisted of four loans provided to Sidbec during the period from 1982 to 1985, plus accrued interest. Every two years, Quebec extended the maturity date for these loans for another two years. Quebec converted four of Sidbec's debt instruments into Sidbec equity in 1988 in order to improve Sidbec-Dosco, Inc.'s economic profile. Sidbec was authorized to acquire an equivalent amount in shares of Sidbec-Dosco, Inc.

Commerce concluded that benefits to Sidbec occurred at the point when the debt instruments (i.e. loans) were converted to capital stock, given that Sidbec was not equityworthy in 1988. The conversion of debt to capital stock was considered to constitute an equity infusion inconsistent with the usual investment practice of private investors. Commerce determined the 1988 debt-to-equity conversion to be specific, because it was provided to only one enterprise, Sidbec, and was not part of a broader program. The net rate found was 0.92%.

7.3.1.2 1983–1992 Grants

Sidbec received grants from the Quebec government as compensation for expenses it incurred to finance Sidbec-Normines and its discontinued operations. Some of these grants were provided by Quebec to Sidbec with regard to the payment of interest and principal on six different loans made in the period from 1984 to 1992.

The Government of Quebec was the guarantor of these loans. Commerce determined that the grants constituted countervailable subsidies and were non-recurring in nature. They were specific because they were provided to only one enterprise, Sidbec, and were not part of a broader program. The net rate found was 8.03%.

7.4 Programs Determined Not to be Countervailable

7.4.1 Federal Programs

7.4.1.1 Canadian Steel Trade Employment Congress (CSTEC) Skill Training Program

The federal Department of Human Resources Development (HRDC) and provincial governments provided financial support to private sector-led human resource projects through the Sectoral Partnerships Initiative. With regard to worker adjustment assistance, funds flowing from HRDC went not to the companies but rather to unemployed workers in the form of assistance for retraining costs or income support. The funds were therefore not countervailable because the companies were not relieved of any obligations. Furthermore, the funds received by SDI, Stelco and Ivaco from CSTEC for training purposes did not provide countervailable benefits during the period of investigation because they were not specific to the Canadian steel industry.

7.4.2 Provincial Programs

7.4.2.1 1987 Grant to Sidbec-Dosco, Inc.

Commerce found no evidence that Quebec provided a grant to Sidbec-Dosco, Inc. in 1987, as alleged by the petitioners.

7.4.2.2 1987 Debt-to-Equity Conversion

Commerce found no evidence at verification that Quebec had provided an infusion of equity, either through a debt-to-equity conversion or otherwise, to Sidbec-Dosco, Inc. in 1987.

7.4.2.3 Contributed Surplus

The petitioners alleged that C$51.7 million in contributed surplus constituted a countervailable subsidy. Commerce determined that Sidbec had received this contributed surplus prior to the Average Useful Life (AUL) period. These funds therefore did not provide countervailable benefits during the period of investigation.

7.4.2.4 Payments Against Accumulated Grants Receivable

Commerce determined that all Quebec payments made to Sidbec between 1983 and 1993 were accounted for by the 1983–1992 grants that went to the discon-

tinued mining operations, discussed above, and that no additional countervailable benefits were provided.

7.4.2.5 1982 Assistance to Sidbec-Dosco, Inc.

Commerce determined that the Quebec government did not provide any governmental assistance to either Sidbec or Sidbec-Dosco, Inc. in 1982.

7.4.2.6 1980 and 1981 Grants

Commerce determined that Quebec did not provide any grants to Sidbec in 1980 or 1981.

7.5 Programs Determined Not to be Used

7.5.1 Industrial Development of Quebec

This program was administered by the Quebec Industrial Development Corporation, a Quebec agency that funded a wide range of industrial development projects in many sectors. Ivaco received grants in 1984 and 1985 that had been authorized prior to the program's rescission in 1982. Commerce determined that the benefits Ivaco received for each year constituted a *de minimis* portion (i.e. less than 0.5%) of total sales value, and therefore should be expensed in each year that they were received. Therefore, because the grants provided under this program were expensed in the year of receipt, Commerce determined that no countervailable benefits were bestowed on Ivaco during the period of investigation.

8 Live Cattle from Canada

8.1 Case History

Countervailing duty and anti-dumping investigations were initiated by Commerce and the ITC on November 19, 1998, and on December 30, 1998, respectively. The investigations were in response to a petition filed by the Ranchers-Cattlemen Action Legal Foundation (R-Calf), supporting trade associations and individual cattle producers. The products under investigation were live cattle and calves for slaughter, as well as feeder cattle and calves. Excluded from the investigations were dairy and breeding cattle. The period under investigation was the fiscal year of April 1, 1997, through March 31, 1998.

Two petitions were filed for this investigation. R-Calf had previously filed a petition but withdrew it on November 10, 1998. The petition was subsequently refiled on November 12, 1998, and R-Calf asked Commerce to incorporate all submissions contained in the previous petition. Both the federal and Quebec governments contested the refiling, but there was no statutory bar to refiling a petition.

On January 20, 1999, the ITC released a preliminary affirmative determination of injury, finding a reasonable indication that the domestic industry was threatened with material injury by reason of allegedly subsidized imports from Canada. On May 11, 1999, Commerce released a postponed negative countervailing duty determination, in which estimated net subsidy rates were found to be *de minimis*. The total estimated preliminary net countervailable subsidy rate for all producers/exporters of live cattle was 0.38%.

On October 22, 1999, Commerce released a final negative countervailing duty determination of 0.77% *ad valorem*. Again, the estimated net subsidy rate for the investigated product was found to be *de minimis*. The ITC released its final determination on November 24, 1999, stating that the industry in the United States was not materially injured or threatened with material injury by reason of imports of live cattle from Canada sold in the United States. The investigation was therefore terminated.

8.2 Key Issues

8.2.1 Standing

Commerce considered whether the industry alleging injury had standing—that is, whether a minimum percentage of the domestic industry supported the countervailing duty petition.

To meet this requirement, the domestic producers or workers supporting the petition were required to account for: (1) at least 25% of the total production of the domestic like product; and (2) more than 50% of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

In evaluating industry support, Commerce must consider what constitutes a domestic like product in order to define the industry producing domestic like products. The Tariff Act of 1930[175] defines domestic like product as "a product that is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation." In this case, the petition defined domestic like product as live cattle, feeder steers and heifers, slaughter steers and heifers, and cull cows and bulls, which are all fed for the purpose of beef production.[176] Since no party commented on the petition's definition of domestic like product, and since there was nothing in the record to indicate that the definition was inaccurate, Commerce accepted the petition's definition of domestic like product.

175 § 771 (10).

176 As domestic like products, Commerce considered neither purebred cattle used for breeding (unless and until cattle are culled), nor dairy cows used to produce milk for human consumption.

Commerce's initial review of production data indicated that the petitioner did not account for 50% of the production of total domestic like product. Pursuant to the Tariff Act of 1930,[177] Commerce found it necessary to poll or otherwise determine support for the petition. The deadline for initiation was extended to December 22, 1998. In Commerce's view, the large number of cattle producers and the lack of a comprehensive listing thereof made it unfeasible to conduct a traditional sampling of producers. Instead Commerce contacted over 150 cattle and related associations, requesting that the associations report the views of their members. Commerce also included the views of individual producers who had contacted Commerce directly. Commerce concluded that domestic producers or workers supporting the petition did meet the threshold level indicated above, and that there was therefore sufficient industry support for the petition.

Canada held consultations with Commerce on three occasions between October 15 and November 20, 1998.[178] Regarding the issue of whether the domestic industry supporting the petition had standing, during these consultations Canada raised concerns, contesting the methodology and results of the Commerce polling.

The petitioners suggested that Commerce should use several pricing statistics for determining export price benchmarks, such as Canadian export statistics, U.S. Portland and Pacific Northwest (PNW) prices, Producer Direct Sales (PDS) prices and U.S. import statistics. Commerce had in fact made several price comparisons using prices from several sources (including Portland prices) and making appropriate adjustments for freight when necessary. Commerce determined that the Canadian Wheat Board (CWB) export sale transactions to the United States were reliable prices. Commerce was also called on to explain the specificity analysis regarding the Farm Improvement and Marketing Cooperative Loans Act (FIMCLA). Commerce agreed with Canada that the disproportionality analysis should focus on the level of benefits provided rather than on the number of subsidies given to different industries. However, Commerce confirmed the preliminary analysis that the FIMCLA program was *de facto* specific. Commerce also attempted to ensure that the prices charged for public pasture services and those charged by private providers were comparable when services were nearly identical. Finally, regarding the Alberta Crown Lands Basic Grazing Program, Commerce disagreed with the contention that the compensation system for lessees of public and private land should be stricken from the record. Other issues related to CWB control, and market distortions, cross-border comparisons and various provincial programs.

177 § 702 (c) (4) (D).

178 Round of consultations held in April 1999.

8.3 Programs Determined to Confer Subsidies

While the following programs were determined to be subsidies and were therefore countervailable under U.S. trade law, the total estimated net subsidy for each product under investigation was found to be *de minimis*.

8.3.1 Federal Programs

8.3.1.1 Farm Improvement and Marketing Cooperative Loans Act (FIMCLA)

Product	Total Estimated Net Subsidy
Live cattle	0.04% *ad valorem*

The Government of Canada provided guarantees on loans extended by private commercial banks and other lending institutions to farmers across Canada. The purpose of this program was to increase the availability of loans for the improvement and development of farms, and for the marketing, processing and distribution of farm products by cooperative associations. Any individual engaged in farming in Canada and any farmer-owned cooperative was eligible to receive loan guarantees covering 95% of the debt outstanding for projects related to farm improvement or increased farm production.

The maximum amount of money that an individual could borrow under this program was $250,000. For marketing cooperatives, the maximum amount was $3 million. Beef and hog farmers received approximately 18% to 27% of all guarantees between 1994 and 1998, while poultry, fruit-and-vegetable and dairy producers received less than 10% of the guarantees. The specificity analysis examined disproportionality by reference to actual users of the program. The share of the subsidy received by producers of the subject merchandise was compared to the shares received by other agricultural producers. The disproportionality analysis focused on the level of benefits provided rather than on the number of subsidies given to different industries. Commerce concluded that the beef and hog industries received a disproportionate amount of assistance under the FIMCLA program during the period of investigation. FIMCLA was therefore found *de facto* specific to the beef and hog sectors.

8.3.2 Provincial Programs

8.3.2.1 Alberta Feeder Associations Guarantee Program

Established in 1938 to encourage banks to lend to cattle producers, this program was administered by the Alberta Department of Agriculture, Food and Rural Development. Under the program, up to 15% of the principal amount of commercial loans taken out by feeder associations for the acquisition of cattle was guaranteed. Eligibility for the guarantees was limited to feeder associations located in

Alberta. Sixty-two associations received guarantees on loans that were outstanding during the period of investigation. Because eligibility was limited to feeder associations, Commerce determined that the program was specific. It was determined that the loan guarantees were countervailable subsidies to the extent that they lowered the cost of borrowing. Commerce calculated Alberta's benchmark rate by averaging the verified range of lending rates that the associations could obtain in the market absent the government guarantee. On this basis, the program was found to be countervailable at a rate of 0.01%.

8.3.2.2 Manitoba Cattle Feeder Associations Loan Guarantee Program

The Manitoba Cattle Feeder Associations Loan Guarantee Program was established in 1991 to assist in the diversification of Manitoba farm operations. The program was administered by the Manitoba Agricultural Credit Corporation (MACC). Through MACC, the provincial government guaranteed 25% of the principal amount of loans for the acquisition of livestock by feeder associations. Eligibility for the guarantees was limited to feeder associations located in Manitoba. Associations had to be incorporated under the Cooperatives Act of Manitoba, and had to have a minimum of 15 members, an elected board of directors and a registered brand for use on association cattle.

Because eligibility was limited to feeder associations, Commerce determined that the program was specific. On this basis, it was found that the total subsidy from the program was less than 0.01%.

8.3.2.3 Ontario Feeder Cattle Loan Guarantee Program

The Ontario Feeder Cattle Loan Guarantee Program was established in 1990 to help secure financing for cattle producers. The program was administered by the Ontario Ministry of Agriculture, Food and Rural Affairs. The Ministry provided a start-up grant of $10,000 to new feeder associations, and government guarantees covering 25% of the amount borrowed by associations for the purchase and sale of cattle. Eligibility for the guarantees was limited to feeder associations composed of at least 20 individuals who owned or rented land in Ontario and were not members of other feeder associations. Eighteen associations received guarantees on loans that were outstanding during the period of investigation. The program was found to be countervailable on the grounds that it was limited to feeder associations and that it lowered the cost of borrowing. The total subsidy from the program was found to be 0.01%.

8.3.2.4 Saskatchewan Feeder Associations Loan Guarantee Program

The Saskatchewan Feeder Associations Loan Guarantee Program was established in 1984 to facilitate the establishment of cattle feeder associations in order to promote cattle feeding in Saskatchewan. The program was administered by the Livestock and Veterinary Operations Branch of the Saskatchewan Agriculture and

Food Department. This agency provided a government guarantee covering 25% of the principal amount on loans to feeder associations for the purchase of feeder heifers and steers. Eligibility for the guarantees was limited to feeder associations with at least 20 members over the age of 18 who were not active in other feeder associations. One hundred and sixteen associations received guarantees on loans that were outstanding during the period of investigation. Because eligibility was limited to feeder associations, the program was found to be specific. The total subsidy from the program was found to be 0.01%.

8.3.2.5 Prairie Farm Rehabilitation Community Pasture Program (PFRA)

The Prairie Farm Rehabilitation Administration was created in the 1930s to rehabilitate drought and soil-drifting areas in the provinces of Manitoba, Saskatchewan and Alberta. The PFRA established the Community Pasture Program to facilitate improved land use through rehabilitation, conservation and management. The goal of the Community Pasture Program was to utilize the resource primarily for the summer grazing of cattle to encourage long-term production of high-quality cattle.

In pursuit of its objectives, the PFRA operated 87 separate pastures covering approximately 2.2 million acres. At these pastures, the PFRA offered grazing privileges and optional breeding services for fees established by it. The fees were based upon recovery of the costs associated with the grazing and breeding services. Because use of Community Pastures was limited to Canadian farmers involved in grazing livestock, Commerce determined that the program was specific. As a result, the provision of public pasture services was a countervailable subsidy at 0.02%.

8.3.2.6 Saskatchewan Crown Lands Program

Agricultural crown land managed by Saskatchewan Agriculture and Food (SAF) was made available to all Saskatchewan agricultural producers for lease. Activities carried out on the land included grazing, cultivation, community pastures and additional multiple-use activities. Leases ranged from 1- to 33-year terms. Beginning in 1997, SAF set rental rates using a formula that took account of the average price of cattle marketed in the previous years. Lessees were responsible for paying taxes, developing and maintaining water facilities and fences, and providing for public access to the land. Because the cattle industry was a predominant user of the Saskatchewan Crown Lands Program, it was found to be specific and thus, to provide a countervailable subsidy at the rate 0.02%.

8.3.2.7 Manitoba Crown Lands Program

Agricultural crown land was managed by Manitoba Agriculture Crown Lands (MACL), whose primary objective was to administer the disposition of crown lands and to improve the lands' productivity. Crown agricultural land was made

available to farmers through cultivation and grazing leases. Leases for grazing dispositions ranged from 1- to 50-year terms. Leaseholders were required to pay an amount in lieu of municipal taxes, as well as to construct and maintain fences and watering facilities. The public had access to crown lands at all times without prior permission of the lessee for the period of such activities as wildlife hunting, forestry, winter sports, hiking and berry picking. During the period of investigation, MACL administered 1.6 million acres of grazing leases. Although Commerce agreed with the Government of Manitoba that most of the crown land was located in fringe areas, it was determined that the lease rate for public grazing land should be compared solely to the rate for private fringe area leases. Commerce determined that it was necessary to adjust the lease rate for private land downward to account for differences between the leases on private and public land. This adjustment was undertaken to reflect costs associated with the paying of taxes, and the construction of fences and water dugouts.

Because livestock (including cattle) industries were predominant users of the Manitoba Crown Lands Program, Commerce determined that the program was specific and thus that the provision of public grazing rights was a countervailable subsidy. On this basis, the countervailable subsidy was set at 0.01%.

8.3.2.8 Alberta Crown Lands Basic Grazing Program

Grazing rights were first issued on public lands in the early 1930s. Over 10.5 million acres of land were managed by the Alberta government, including a grazing component of approximately 2 million acres. Leases ranged from 1- to 20-year terms. Annual rent was equal to a percentage of the forage value of the leased land. When determining the forage value, consideration was given to the grazing capacity of the land, the average gain in weight of cattle on grass, and the average price per pound of cattle sold in the principal livestock markets in Alberta during the preceding year. Beyond paying the lease fee, lessees were also required to construct and maintain capital improvements necessary for livestock in order to comply with all multiple-use and conservation restrictions imposed by the government on the land. Lastly, lessees had to pay school and municipal taxes charged on the land being leased.

Commerce found that public lessees appeared to receive more compensation from oil and gas companies for use and access to the land than they would if leasing the same land from a private provider. Accordingly, public land was more valuable to a lessee than private land. The government was not found to be adequately remunerated for the provision of the land.

To measure the benefits received under the Alberta Crown Lands Basic Grazing Program, Commerce combined the difference calculated by comparing the grazing fees paid for public and private land with the difference in compensation received. The resulting amount became a recurring benefit, which was then divided by the province's total sales during the period of investigation. On this basis, Commerce determined the countervailable subsidy to be 0.65%.

8.3.3 Other Programs

8.3.3.1 Northern Ontario Heritage Fund Corporation Agriculture Assistance

The Northern Ontario Heritage Fund Corporation (NOHFC), a Crown corporation, was established in 1988. Its purpose was to promote and stimulate economic development in Northern Ontario. Assistance for eligible projects was available through forgivable performance loans, incentive term loans and loan guarantees. With respect to agricultural projects, all assistance provided by NOHFC was in the form of forgivable performance loans. The types of agricultural projects funded included capital projects, marketing projects, and research and development projects. The loans made available for the projects were interest-free and normally forgiven after two to three years. The extent of debt forgiveness was dependent on whether the project met its target of increasing the value of farm production by an amount equal to the NOHFC contribution.

Because benefits under this program were available only in Northern Ontario, it was determined that the program was regionally specific. To calculate the total benefit to cattle producers under the program, Commerce summed the benefit calculated for the forgiven debt and the interest-free loans. On this basis, Commerce determined the total subsidy from the program to be less than 0.01%.

8.3.3.2 Ontario Livestock, Poultry and Honeybee Protection Act

This program, administered by the Ontario Ministry of Agriculture, Food and Rural Affairs, provided compensation to livestock producers whose animals were injured or killed by wolves or coyotes. Producers applied for, and received, compensation through the local municipal government. The Ministry reimbursed the municipality. Beef cattle producers were believed to derive most of the benefits from the program. Because the program was limited by law to livestock producers, poultry farmers and beekeepers, Commerce determined that it was specific. The program was found to be countervailable at a rate of 0.01%.

8.3.3.3 Ontario Rabies Indemnification Program

This program was administered by the Farm Assistance Branch of the Ontario Ministry of Agriculture, Food and Rural Affairs. It was designed to encourage farmers to report cases of rabies in livestock by compensating livestock producers for damage caused by rabies. Of the grants, 60% were funded by Ontario and 40% by the federal government. The program was found to be specific because the legislation establishing it expressly limited the grants to livestock producers. Commerce determined the countervailable subsidy to be less than 0.01%.

8.3.3.4 Saskatchewan Livestock and Horticultural Facilities Incentives Program

The purpose of this program was to promote the diversification of Saskatchewan's rural economy by encouraging investment in livestock and horticultural facilities. The program allowed for an annual rebate of education and health taxes paid on building materials and stationary equipment used in livestock operations, as well as greenhouses, and vegetable and raw fruit storage facilities. In examining the legislation and regulations governing both the program and the Education and Health Tax, Commerce determined that even if the two programs were found to be integrally linked under the regulations governing this case, the program would still be specific and thus countervailable. This determination was based in part on the fact that legislation administering these programs made them available only to certain industries. On this basis, Commerce determined the countervailable subsidy to be less than 0.01%.

8.4 Programs Determined Not to be Countervailable

8.4.1 Federal Programs

8.4.1.1 Canadian Wheat Board (CWB)

The Canadian Wheat Board had the exclusive authority to market Canadian feed and malting barley in domestic and export markets. It was alleged that the CWB pooling system sent distorted market signals to Canadian farmers and that the system of marketing feed barley in Canada imposed excessive costs on farmers, resulting in a decrease in barley exports. Consequently, more feed barley was available on the domestic market, thus artificially lowering prices paid by Canadian cattle producers.

Commerce preliminarily found that Canadian domestic prices were comparable to U.S. prices. In the final determination, it found that although the CWB had extensive control over the feed barley export market and its operations in that market could, and did, have a major impact on the domestic feed barley market, CWB operations did not provide a benefit to producers of live cattle. Commerce had to address many concerns relating to the actions of the Canadian Wheat Board and its effects on the price of barley. There were allegations by the petitioners that the CWB, through policies such as export restraints, caused the price of barley to decrease and consequently provided a benefit to cattle farmers. Commerce determined that although some actions of the CWB did create market distortions, the CWB did not provide a benefit to the producers of live cattle, thus not satisfying the specificity criteria.

A second issue was the reliance on certain methods for the analysis of barley prices. First, Commerce explained that cross-border comparison was a valid method of determining whether Canadian barley and wheat prices were artificially low. Also, after adjusting for freight in the comparisons, there were no

consistent price differentials. Export price benchmarks, actual versus bid or offer prices, using Lethbridge as domestic pricing points—all these were valid instruments in determining whether in fact Canadian barley prices were artificially low.

Based on price comparisons, Commerce determined that CWB operations did not provide a benefit to producers of live cattle and thus did not provide an indirect countervailable subsidy.

8.4.2 Provincial Programs Providing Goods or Services

8.4.2.1 Saskatchewan Pasture Program

The Saskatchewan Pasture Program had been in place since 1922. It was designed to provide supplemental grazing to Saskatchewan livestock producers, and to maintain grazing and other fragile lands in permanent cover in order to promote soil stability. Saskatchewan Agriculture and Food offered grazing, breeding and health services for fees that it established. Fees were based upon recovery of the costs associated with the grazing and breeding services of each pasture. Commerce found no subsidy.

8.4.2.2 Alberta Grazing Reserve Program

Alberta developed community pastures (reserves) on which multiple ranchers' herds could graze. Grazing reserves also provided multiple-use opportunities to other users. As of April 1, 1999, Alberta ceased to perform management activities on 32 of its 37 grazing reserves as a result of a privatization initiative. Under the initiative, livestock management responsibilities were shifted to grazing associations and new fees were negotiated.

However, during the period of investigation, the Alberta government operated 20 reserves. Commerce determined that the government was adequately remunerated for its provision of land to the privatized reserves. As for the petitioners' request to calculate five separate full-service public pasture rates, it was rejected on the basis that rates for public pastures were all lower than the private pasturing rate provided by Alberta. Thus no countervailable subsidy existed.

8.4.2.3 Canada–Alberta Beef Industry Development Fund (CABIDF)

Established by the federal and Alberta governments in April 1997, CABIDF supported research, development and related activities connected to the beef industry in Alberta. To receive funding through this program, applicants had to submit a series of research proposals, which were evaluated on the basis of the project's relationship to the Fund's research priorities, its scientific merits, and the direct or indirect usefulness of the results to the beef industry. Final proposals were evaluated for technical merit by a scientific committee consisting of industry experts and scientists, and were then approved or rejected based on the evalua-

tions by CABIDF's governing committee. After verification, Commerce determined that programs funded by CABIDF were related to scientific research activities for the beef industry and the agriculture industry in general. All of the approved projects were grants, not revenue forgone, and none were paid directly to producers or processors. Based on this analysis, Commerce found that CABIDF was eligible for "green box" treatment under section 771(5B)(F) of the Tariff Act of 1930 and thus was not countervailable.

8.4.2.4 Saskatchewan Beef Development Fund (SBDF)

SBDF supported the development and diversification of Saskatchewan's beef industry through the funding of various projects related to production research, technology transfer, and development and promotion of new products. Priority was given to public research institutions conducting research, development and promotion activities that were to be generally available to the industry. All of the approved projects consisted of grants, not revenue forgone, and none were paid directly to producers or processors. Based on this analysis, Commerce found that SBDF was eligible for green box treatment under section 771(5B)(F) of the Tariff Act of 1930 and thus was not countervailable.

8.4.2.5 Net Income Stabilization Account (NISA)

NISA was designed to stabilize an individual farm's overall financial performance through a voluntary savings plan. Participants enrolled all eligible commodities grown on the farm. Farmers then deposited a portion of the proceeds from their sales of eligible NISA commodities (up to 3% of net eligible sales) into individual savings accounts, received matching government deposits, and made additional, non-matchable deposits up to 20% of net sales. The matching deposits came from both the federal and provincial governments.

NISA provided stabilization assistance on a "whole farm" basis. A farmer's eligibility to receive assistance depended on total farm profits, not on the profits earned on individual commodities. A producer could withdraw funds from a NISA account under a stabilization or minimum income trigger. The stabilization trigger permitted withdrawal when the gross profit margin from the entire farming operation fell below a historical average, based on the previous five years. If poor market performance of some products was offset by increased revenues from others, no withdrawal was triggered.

Commerce found NISA not to be *de facto* specific with respect to cattle producers. There was no evidence that cattle producers were dominant users or received disproportionate benefits from the NISA program. Commerce also found that NISA was not limited to a particular region. It was therefore found not to be countervailable.

8.4.2.6 Alberta Public Grazing Lands Improvement Program

Established in 1970 and terminated in 1995, this program provided a partial credit toward the payment of rent on public grazing land if the lessee undertook certain pre-approved range improvement projects. The leaseholder was required to pay for all the costs incurred for these improvements, and was reimbursed for 25% to 50% of the costs through credits on the rental fees otherwise due annually. All improvements belonged to the government and, once the improvements were completed, lessees were required to maintain them at their own expense. On the basis of its analysis, Commerce determined that the program did not provide a financial contribution and therefore was not countervailable.

8.4.2.7 Saskatchewan Crown Land Improvement Policy

This policy was designed to provide rental adjustments when crown land leaseholders made capital improvements to the land, such as clearing, bush removal, or breaking and re-seeding. In return, Saskatchewan Agriculture and Food agreed not to increase or even reduce the rental rate for a certain period of time, depending on the length of the improvement project. All improvements belonged to the Crown. In order for a financial contribution to exist under this program, the government had to forgo rental fees. In this case, the reduction in the rental fees corresponded to a reduction in the land's carrying capacity while improvements were undertaken. The increased value as a result of the improvements was captured with the subsequent setting of rental fees. Commerce determined, therefore, that the program did not provide a financial contribution and was not countervailable.

8.4.2.8 Saskatchewan Breeder Associations Loan Guarantee Program

This program was established in 1991 to facilitate the establishment of cattle breeder associations in an effort to promote cattle breeding in Saskatchewan. It provided a guarantee on 25% of the principal amount of loans to breeder associations for the purchase of certain breeding cattle. Eligibility was limited to breeder associations composed of at least 20 individuals who were residents of Saskatchewan. One hundred and seven associations received guarantees on loans that were outstanding during the period of investigation.

Breeding livestock was not covered by the investigation. Commerce therefore determined that the program did not provide a countervailable subsidy to the subject merchandise.

8.5 Programs Determined Not to be Used

Commerce determined that the producers of the subject merchandise under investigation did not apply for or receive benefits under the following programs during the period of investigation.

- *Feed Freight Assistance Adjustment Fund*
  Only Ontario participated in the Feed Freight Assistance Adjustment Fund program. Commerce verified that Ontario producers did not receive benefits under the program.
- *Canadian Adaptation and Rural Development (CARDS) Program in Saskatchewan*
- *Western Diversification Program*

8.6 Programs Determined to be Terminated

- *Ontario Export Sales Aid Program*

8.7 Other Programs Reviewed

Commerce did not consider it necessary to determine whether benefits conferred under the following programs were countervailable because any benefit to the subject merchandise was so small that there would be no impact on the overall subsidy rate.

- *Ontario Bear Damage to Livestock Compensation Program*
- *Ontario Livestock Programs for Purebred Dairy Cattle, Beef, and Sheep Sales Assistance Policy / Swine Assistance Policy*
- *Ontario Artificial Insemination of Livestock Act*

VI United States Safeguard Investigations regarding Imports from Canada: Case Histories, 1982–1999

1 Certain Specialty Steel (Stainless Steel and Alloy Tool Steel)

On December 9, 1982, the ITC initiated a safeguard investigation under section 202 of the Trade Act of 1974, to determine whether specialty steel products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing a like or directly competitive product.

In May 1983, the ITC determined that numerous categories of stainless steel and certain alloy tool steel products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to industries producing like or directly competitive products. For purposes of comparison, domestic producers were divided into four separate industries: stainless steel sheet and strip; stainless steel plate; stainless steel bar and wire rod; and alloy tool steel.

In either actual or relative terms, the ITC found increases in all categories of imports, and dramatic increases for two particular products. During the period from 1978 to 1982, there were increasing imports as the market share of domestic production in each of the four stainless steel and alloy tool steel product groups fell. This finding satisfied the increasing imports requirement of section 201.

Next, the ITC went on to determine whether there was injury to U.S. producers. The ITC looked at various factors relevant to each of the four industry groups.

In the case of stainless steel sheet and strip, during the period of review (1978–1982) overall production had decreased significantly, from 694,000 to 507,000 short tons. Capacity had increased slightly during the period, but capacity utilization had fallen from 72.8% in 1978 to 46.2% in 1982. Shipments, employment and worker hours showed decreases. Financial indicators showed that many producers earned lower profits and that some were operating at losses by the end of the period under review.

For stainless steel plate, production showed increases in the first part of the period under review but sharp declines by the end of the period. This performance was mirrored by changes in capacity utilization, shipments, exports and employment. Profits increased from 1978 to 1979, but were replaced with losses by 1982. Similar trends were found for the remaining two products (stainless steel bar and wire rod, and alloy tool steel).

The President granted relief to the domestic industry through a combination of *ad valorem* tariffs and quantitative restrictions. An *ad valorem* tariff was imposed on stainless steel sheet and strip, and on stainless steel plate; quantitative restrictions were placed on stainless steel bar and wire rod, and on alloy tool steel.

Upon expiration of the first set of tariffs and quotas in 1987, the President extended the relief for a period of just over two years, until January 1989. In addition to the extension of relief, in June and July 1987 certain U.S. semi-finished specialty steel products were reclassified, with the result that some additional Canadian exports fell within the scope of the U.S. import quota.

1.1 Canadian Government Activity

When the President granted the relief, Canada in turn exercised its GATT Article XIX rights to increase tariffs on specialty steel imports from the United States. These tariffs were later withdrawn after the U.S. Congress eliminated certain "Buy American" restrictions on cement. When imposing the quantitative restriction, the U.S. administration offered to negotiate an orderly marketing agreement with Canada; a four-year agreement was concluded in October 1983. Part of the orderly marketing arrangement included a waiver by Canada of its right to compensation. Upon extension of relief, in 1987 Canada sought renegotiation of the orderly marketing agreement for another 18 months.

2 Carbon and Certain Alloy Steel Products

On January 24, 1984, pursuant to a petition filed on behalf of Bethlehem Steel Corp. and the United Steelworkers of America, the ITC initiated a safeguard investigation under section 202 of the Trade Act of 1974, to determine whether various carbon and alloy steel products were being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing a like or directly competitive product.

On July 24, 1984, the ITC determined that imports of five of the nine categories of carbon and alloy steel products named in the petition[179] were being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to industries producing like or directly competitive products.

179 Plates, sheets and strip, wire and wire products, structural shapes, ingots, blooms and billets, but not wire rods, railway-type products, bars, pipes, tubes or blanks.

In each of the nine categories, the ITC found an increase in imports in either actual or relative terms. This finding satisfied the increasing imports requirement of section 201. Next, the ITC went on to determine whether there was injury to U.S. producers. Various factors relevant to industry performance were negative. During the period of review (1979–1984), the industry had experienced massive negative changes in market conditions. Overall production of carbon steel had decreased significantly from 1979 to 1982. Although later in the period of review there had been some recovery in production, it was still very low in 1984. Capacity utilization had declined drastically. Employment and worker hours showed decreases. Lastly, financial indicators were at record lows for most major producers, and bond ratings for a number of companies had fallen. All these factors were taken as clear indication of serious injury to the industry.

The ITC determined that intra-industry competition was the main cause of injury for the production of rods, bars, pipes and tubes, and that a decline in demand was a more important cause for injury for railway-type products. However, for the remaining products under investigation, no cause was found to be more important for injury than the increase in imports.

With respect to remedy, the ITC made recommendations to the President that included tariff rate quotas (TRQs), quotas or tariff rate increases on the various products. These recommendations included a five-year schedule of implementation. In September 1984, President Reagan rejected the ITC recommendation that protection be provided by quotas and/or tariffs. He announced that the U.S. administration would negotiate voluntary restraint agreements (VRAs) with countries considered to be trading unfairly through dumping and subsidization. Accordingly, agreements setting market penetration ceilings were negotiated with 28 steel-supplying countries. There would, however, continue to be open access to the U.S. market for countries considered to be trading fairly in steel and having markets open to U.S. steel suppliers.

The President's Steel Program targeted a reduction in imported steel products to about 20.5% of apparent U.S. consumption. This became the benchmark against which the effectiveness of the program was measured by Congress and the U.S. industry. In 1984, imports accounted for 26.6% of the U.S. steel market; by 1989 they had declined to 17.9%.

2.1 Canadian Government Activity

Carbon and alloy steel products were imported into the United States from a number of countries. Canada was the 15th-largest producer of steel in the world and ranked as second in total imports to the United States, at 2.4 million tons in 1984. During the period under review, Canada's steel production had declined steadily before rising again in 1983.

Throughout this investigation, the federal government and the Canadian steel industry presented their view that, as a fair trader, Canada should not face restric-

tions on its exports to the U.S. market. The Government of Canada had also engaged in discussions with the U.S. administration to attempt to influence the President's decision. At the time of the announcement, there were indications that Canada's share of the U.S. market, as established by U.S. steel producers, should be about 2.4% to 2.6%. Canada's actual share in 1984 was 3.2%. Canada and Sweden were the only traditional major steel suppliers to the United States not subject to a voluntary restraint agreement. Canada was by far the largest unrestrained supplier.

Canada appreciated, however, that the United States would want some assurance that Canadian steel producers would not exploit a situation in which U.S. imports from other suppliers were restrained. Consequently, Canada indicated its willingness to cooperate and consult when Canada's share of the U.S. market for specified steel products increased significantly. It was envisaged that such consultations would provide an opportunity to examine the underlying market forces leading to an increase in market share. At the request of the U.S. government, there were consultations on developments in the Canada–U.S. steel trade on 10 occasions between December 1984 and October 1988. Consultations were not pursued after the VRAs were extended in 1988.

Canadian primary producers did, however, indicate to U.S. authorities their willingness to exercise prudence in their shipments to the United States. This was an important element in efforts to defuse pressures in the United States for a VRA with Canada. In June 1987, a Canadian export monitoring system was established for steel. This, combined with the import monitoring system established the previous year, enabled the federal government to ensure that Canada was not being used as a "back door" for shipments of steel from third countries to the United States. In addition, it made possible the collection of more accurate statistics on exports to the United States. This too was an important element in efforts to respond to U.S. pressures with regard to rising Canadian exports.

In 1988, the VRAs were extended to March 1992. The levels negotiated with the most restrained countries were increased, and in a number of cases bilateral agreements were concluded on subsidy disciplines. These agreements formed the basis for U.S. attempts to negotiate a Multilateral Steel Agreement (MSA) that would limit government participation, especially the provision of subsidies in steel-producing countries. Discussions eventually ended after the failure of attempts to incorporate the MSA into the Uruguay Round negotiations.

3 Wood Shingles and Shakes

On September 25, 1985, following receipt of a petition filed on behalf of U.S. wood shingle and shake producers, the ITC initiated a safeguard investigation under section 202 of the Trade Act of 1974, to determine whether wood shingles and shakes were being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing a like or directly competitive product.

On March 25, 1986, the ITC determined that wood shingles and shakes were being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to industries producing like or directly competitive products. Four members of the ITC found an increase in imports in either actual or relative terms, with higher import volumes during the period under review leading to a decline in the market share supplied by U.S. producers. This finding satisfied the increasing imports requirement of section 201.

The ITC went on to determine whether there was injury to U.S. producers. The ITC looked at industry data for the period from 1978 to 1985, concentrating on the years 1983 to 1985. Within this period the market had improved and the industry experienced an upturn in the business cycle. However, the performance indicators of the domestic industry declined during the period under review. Production and employment fell significantly in the later parts of the period. Production capacity and the number of producing firms had also decreased significantly, and the decline was continuing. All these factors were taken as a clear indication of serious injury to the industry.

Next, the ITC had to determine whether the increased imports were both an important cause of serious injury and no less important then any other cause. It explored various other causes, including cyclical downturns, declining supply, increasing supply costs and other competitive products. It found that, although the demand for shakes and shingles was increasing, the performance of the domestic industry was worsening. Imports were able to undersell the domestic product by a significant amount.

As remedy, the ITC members made recommendations to the President that included tariff rate increases, adjustment assistance, and assistance to relocate and train displaced workers. The recommendations included a five-year schedule of implementation. On May 22, 1986, the President imposed a 35% *ad valorem* duty on imported shakes and shingles, effective June 6, 1986. The rate was later reduced to 20% in December 1988, 10% in December 1989, and 5% in December 1990. The action expired on June 7, 1991.

3.1 Canadian Government Activity

Wood shakes and shingles were imported into the United States from a number of countries. However, Canada was by far the largest exporter to the U.S. market in terms of both value and quantity. In response to the initial imposition of the tariff, the Canadian government prohibited exports of the raw materials used to produce cedar shakes and shingles (i.e. cedar logs, blocks, bolts, blanks and short boards). The export prohibitions remained in place for the duration of the U.S. import relief.

4 Steel Fork Arms

Following a petition filed on January 17, 1986, the ITC initiated an investigation under section 202 of the Trade Act of 1974 to determine whether steel fork arms were being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry. The petition was filed with the ITC on behalf of the Ad Hoc Committee of Steel Fork Arm Producers, composed of the only two U.S. producers of steel fork arms (used on forklift trucks and similar lifting equipment). On July 17, 1986, the ITC determined that steel fork arms were not being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic steel fork industry.

The ITC found that although the domestic industry had suffered economic difficulties, it was not seriously injured or threatened with serious injury. Although the recession of 1982–1983 had a significant negative impact on the domestic industry, the industry had regained its pre-recession position and, in most instances, had equalled or surpassed its 1981 performance. Domestic fork arm production, shipments and inventories showed improvement at the end of the period of investigation. Industry capacity had increased even though two domestic producers had ceased operations for reasons relating to the demand for forklifts rather than import competition. Employment had declined but worker productivity had almost doubled, and the industry appeared to have operated at a profit during the most recent two years. Because the ITC found that the domestic industry was not seriously injured or threatened with serious injury, the issues of causation and remedy were not addressed.

5 Certain Cameras

On March 29, 1990, Keystone Camera Company filed a petition under section 202 of the Trade Act of 1974, seeking relief from imports of “certain cameras.” On July 27, 1990, the ITC unanimously determined that “certain cameras” were not being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing articles like or directly competitive with the imported articles.

Although more than 25 parties appeared in the ITC investigation, none of the parties (other than the petitioner) publicly expressed support for the petition in briefs or hearing testimony. Furthermore, Kodak—the only domestic manufacturer of the subject goods other than the petitioner—opposed the petition and asserted that increased imports of “certain cameras” had not seriously injured or threatened serious injury to its domestic production facilities.

The ITC did find that the subject imports had increased and that Keystone was seriously injured or threatened with injury. However, the ITC did not find that the increased imports were a substantial cause of serious injury to the domestic

industry. Instead, "poor management" was determined to be the primary cause of the injury to Keystone. Imports from Canada were minimal and would probably have been exempted under the Canada–U.S. Free Trade Agreement.

6 Corn Brooms

Following receipt of a petition filed on March 4, 1996, on behalf of the U.S. Corn Broom Task Force and its individual members, the ITC initiated an investigation, under section 202 of the Trade Act of 1974, into imports of corn brooms. The majority of the Commissioners determined that corn brooms were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry producing an article like or directly competitive with the imported article. The final ITC vote on provisional relief, however, was 3 to 3; in the absence of a majority, the ITC made a negative determination on that aspect of the petition.

Factors indicating serious injury included a significant idling of productive facilities in the domestic industry, and significant unemployment and underemployment. Total domestic shipments declined by 15.9% over the five-year period for which the ITC collected data. Inventories and productivity remained relatively unchanged. Most responding firms also reported other indications of financial difficulty, such as rejection of loan applications or difficulty in obtaining a loan, lowering of credit ratings, cancellation or rejection of expansion projects, and reduction in the size of capital investments.

Also contributing to the industry's deteriorating financial condition was the inability of a significant number of firms to operate at a reasonable level of profit and recoup increased costs, along with falling prices in high-volume product lines,.

Pursuant to section 311 (a) of the North American Free Trade Agreement (NAFTA) Implementation Act, imports of corn brooms produced in Mexico were found to account for a substantial share of total imports of such brooms and to contribute significantly to the serious injury caused by imports. Imports from Mexico increased by over 50% in 1994, the first year of the NAFTA. Imports nearly doubled again in 1995 and in that year they accounted for 71% of the total volume of imports to the United States. However, imports of corn brooms from Canada were found to have been small or nil, and there were no reported imports in either 1992 or 1995. Accordingly, the ITC did not find that subject imports from Canada accounted for a substantial share of total imports or contributed significantly to the serious injury found.

Two groupings of Commissioners recommended differing remedies: (1) an increase in tariffs to 12% in the first year, declining to 3% in the fourth year; or (2) an increase in tariffs to 40% in the first year, declining to 12% by the fourth year.

On August 30, 1996, President Clinton determined not to implement the ITC's recommendations and instead directed the U.S. Trade Representative to negotiate and conclude, within 90 days, agreements pursuant to the terms of section 203 of the Trade Act of 1974. However, negotiations did not result in satisfactory agreements.

On November 28, 1996, the President proclaimed a temporary increase in duties over three years for two of the four tariff sub-headings subject to the injury determination. Additional tariffs were imposed on brooms covered by two broom sub-headings: under the tariff rate quota, tariffs were maintained at pre-safeguard levels up to a specified import level; imports above TRQ levels were subject to additional duties. TRQs were allocated individually to each substantial supplier, with a residual allocation for all other suppliers. Included in the safeguard was Mexico; excluded were Canada and developing countries holding less than a 3% market share.

On February 10, 1997, the Government of Mexico asked for the establishment of a Dispute Settlement Panel under NAFTA Chapter 20 to examine whether the ITC's determination was consistent with the NAFTA. Mexico contended that the ITC had improperly excluded the U.S. plastic broom industry from its definition of the U.S. domestic industry.

On January 30, 1998, the NAFTA panel concluded that the safeguard measure constituted a violation of U.S. obligations under the NAFTA because it was based on an ITC determination that failed to provide "reasoned conclusions on all pertinent issues of law and fact." The panel recommended that the United States bring its conduct into compliance with the NAFTA at the earliest possible time. Effective November 28, 1996, Mexico increased import duties on several U.S. products in retaliation for the U.S. safeguard measure on corn brooms, as permitted by NAFTA Article 802.6.

On December 3, 1998, President Clinton terminated the safeguard action against corn brooms after receiving reports from the U.S. Trade Representative and the ITC on developments in the corn broom industry and its progress in making a positive adjustment toward import competition. In this case, the President decided to terminate the safeguard action on the grounds that the industry had not undertaken adequate efforts to make a positive adjustment to import competition.

6.1 Canadian Government Activity

The Government of Canada filed a submission at the ITC hearing on May 30, 1996, to ensure that the ITC was aware of the minimal share of the U.S. import market held by Canadian corn brooms.

7 Tomatoes and Bell Peppers

Following receipt of a petition filed on March 11, 1996, on behalf of the Florida Fruit & Vegetable Association, the Florida Bell Pepper Growers Exchange, the Florida Commissioner of Agriculture, the Ad Hoc Group of Florida Tomato Growers and Packers, and individual Florida bell pepper growers, the ITC initiated an investigation, under section 202 of the Trade Act of 1974, into imports of fresh tomatoes and bell peppers.

On August 16, 1996, the ITC determined that even though imports of fresh tomatoes and bell peppers had increased, they were not being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing an article like or directly competitive with the imported article.

The ITC found that although a significant number of tomato and bell pepper growers and producers faced economic difficulties, acreage planted and harvested was steady; production was steady or rising; industry employment had risen; prices, while varying with the weather and supply/demand, showed no discernible trend; and there was no evidence that Mexico (the chief supplier of imported tomatoes) was about to expand tomato acreage, production or exports to the U.S. market.

7.1 Canadian Government Activity

The Government of Canada filed a submission at the ITC hearing held on May 30, 1996, to ensure that the ITC was aware of the minimal share of the U.S. import market held by Canadian exports of tomatoes and bell peppers.

8 Wheat Gluten

Following receipt of a petition filed on September 19, 1997, on behalf of the Wheat Gluten Industry Council, the ITC initiated an investigation under section 202 of the Trade Act of 1974 into imports of wheat gluten. On March 25, 1998, the ITC unanimously determined that wheat gluten was being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing an article like or directly competitive with the imported article. Pursuant to the NAFTA Implementation Act, the ITC made a negative finding with respect to imports of wheat gluten from Canada and Mexico.

The ITC determined that virtually all the factors relevant to industry performance were negative. Industry capacity utilization had declined significantly, production and shipments had declined, and inventories had more than doubled. The industry had gone from being profitable to operating at a loss by the end of the period under review. At the same time, unit costs were rising, hourly wages were relatively flat, worker productivity had declined because of the reduction in

capacity utilization, and unit labour costs had almost doubled. While there were minor improvements in several factors during the most recent year, these improvements were found to be isolated. The ITC found a direct correlation between the dramatic increase in wheat gluten imports and the significant decline in domestic wheat gluten industry performance in 1996 and 1997. Accordingly, the ITC found that the domestic wheat gluten industry was seriously injured and that increased imports were both an important cause of serious injury and a cause that was greater than any other cause.

With respect to remedy, the ITC unanimously recommended that the President impose a four-year quantitative restriction on imports of the subject merchandise, in the amount of 126 million pounds in the first year, to be increased by 6% in each subsequent year that the action would be in effect. Within the overall quantitative restriction, the ITC recommended that the President allocate separate quantitative restrictions for the European Union, Australia and "all other" non-excluded countries, taking into account the disproportionate growth and impact of imports of wheat gluten from the European Union.

Having made negative findings with respect to imports of wheat gluten from Canada and Mexico under section 311 (a) of the NAFTA Implementation Act, the ITC recommended that such imports be excluded from the quantitative restriction.

8.1 Canadian Government Activity

On December 11, 1997, the Government of Canada submitted a brief to the ITC presenting Canada's position: that, based on NAFTA and U.S. law, imports of wheat gluten from Canada should be excluded in the event that the ITC recommended import relief.

On May 30, 1998, the President proclaimed a three-year quantitative limitation on imports of the subject goods at an amount equal to 126.812 million pounds in the first year; this represented total average imports in the crop years from June 30, 1993, through June 30, 1995. The amount was to increase by 6% annually for the duration of the relief period. The quotas were allocated based on average import shares in the 1993–1995 period. Import shares of countries excluded from the quota were assigned on a prorated basis to countries subject to the quota. The President also proclaimed that pursuant to section 312 (b) of the NAFTA Implementation Act, the quantitative limitation would not apply to imports of wheat gluten from Canada or Mexico.

The President further directed the U.S. Trade Representative, with the assistance of the Secretary of Agriculture, to seek to initiate international negotiations in order to address the underlying cause of the increase in imports of the article, or otherwise to alleviate the injury found to exist.

On March 17, 1999, the European Communities requested consultation with the United States over this matter but the two parties never reached a satisfactory resolution.

Since the quota was put into place, it was discovered that wheat gluten imports from the European Communities had entered the United States in excess of the allotted quota. The Trade Act of 1974 allows the President to make an additional order under section 203 to eliminate any circumvention of any previous action taken under this section.[180] This additional action took the form of a reduction in the European Communities' 1999–2000 wheat gluten quota in the amount of the excess over the 1998 quota entering the United States.

On June 30, 1999, the European Communities requested a WTO panel to consider the safeguard measures imposed by the United States on imports of wheat gluten. It alleged that the U.S. action was in breach of several WTO obligations, including the Most Favoured Nation principle, the Agreement on Safeguards and the Agreement on Agriculture.

On December 22, 2000, the WTO Appellate Body released its findings. The Appellate Body upheld the panel's finding that the United States had acted inconsistently with its obligations under the Agreement on Safeguards, by excluding imports from Canada and Mexico from the application of the safeguard measure after conducting an investigation including imports from all sources, including Canada and Mexico, to determine whether increased imports were causing or threatening to cause serious injury. For reasons of judicial economy, the Appellate Body declined to rule on whether the exclusion per se was inconsistent with U.S. obligations.

9 Lamb Meat

Following receipt of a petition filed on October 7, 1998, on behalf of nine sheep industry associations, the ITC initiated a safeguard investigation, under section 202 of the Trade Act of 1974, on imports of lamb meat.

On April 7, 1999, the ITC unanimously determined that fresh, chilled or frozen lamb meat was being imported into the United States in such increased quantities as to be a substantial cause or threat of serious injury to the domestic industry producing an article like or directly competitive with the imported article. Pursuant to the NAFTA Implementation Act, the ITC made a negative finding with respect to imports of lamb meat from Canada and Mexico.

The ITC determined that although the U.S. lamb industry was not currently experiencing serious injury, factors relevant to future industry performance were negative. During the period of review (1993–1998), the industry had experienced massive changes in market conditions. Demand for lamb meat was consistently low, subsidies for wool had recently been terminated, and major lamb exporters (e.g., Australia and New Zealand) were increasing their exports. The ITC found that imports had been increasing in both actual and relative terms. Actual imports

180 § 204(b)(2).

had increased by 50% during the period under review. Demand had been declining since the 1940s but had stabilized to some degree during the period under review. However, economic indicators from 1996 onward showed a decline in domestic market share, production, number of lamb-growing establishments and prices. There were some mixed indicators as well. Capacity had declined early in the period but then rose near its end, and productivity remained relatively constant for feeders and growers. Lamb sales had both increased and decreased throughout the period, and industry-wide profits were very low. The ITC found that the industry's financial performance had deteriorated mainly because of falling prices.

Lamb meat was imported into the United States from a number of countries. However, the primary sources were Australia and New Zealand, which accounted for 98.3% of total imports in both value and quantity. Canada was a minimal supplier of lamb meat imports during the most recent three-year period, accounting for an average of 0.3% of the subject imports. Consequently, the ITC found that imports from Canada did not account for a substantial share of total imports nor contribute significantly to the threat of serious injury caused by imports, as described in section 311 of the NAFTA Implementation Act. The ITC recommended that Canada be excluded from any relief action.

With respect to remedy, the ITC unanimously recommended that the President impose a four-year tariff rate quota system on imports of lamb meat. However, the President declared an imposition of a three-year tariff rate quota covering exports of lamb meat from July 22, 1999, through July 22, 2002. Individual country quotas were established for imports from Australia, New Zealand and an "other countries" category. Within the quotas the rates of duty established for imports were 9% ad valorum in the first year, 6% in the second year and 3% in the third year. However, once the established quotas were filled, the rates increased to 40% *ad valorem* in the first year, 32% in the second year and 24% in the third year. The President excluded imports from Canada from the safeguard measure.

10 Certain Steel Wire Rod (Wire Rod)

Following receipt of a petition filed on January 12, 1999, on behalf of nine steel producers and two labour groups, the ITC initiated a safeguard investigation, under section 202 of the Trade Act of 1974, to determine whether certain steel wire rod was being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing a like or directly competitive product.

On July 13, 1999, Commissioners divided equally on the question of whether certain steel wire rod was being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof. The Trade Act of 1974 stipulates that in such a case the ITC must report both

determinations to the President,[181] who may consider either of them.[182] In safeguard actions, the President has complete discretion for choosing which course of action to consider.

Pursuant to the NAFTA Implementation Act, the ITC had to make a finding with respect to wire rod imports from Canada. Because the ITC was equally divided on whether there was serious injury, only three Commissioners made recommendations. Two of them made a negative finding with respect to imports of wire from Canada and Mexico. The other made a negative finding for Mexico only and recommended that wire rod imports from Canada be included.

The ITC determined that the U.S. wire rod industry was experiencing serious injury or threat thereof. After finding a significant increase in imports, both in actual and relative terms, the ITC went on to determine whether there was injury to U.S. producers. Various factors relevant to industry performance were negative. During the period of review (1994–1999), the industry had experienced massive changes in market conditions. Production of wire rod had climbed during the first part of the period and then declined. Capacity utilization had also declined and there was evidence of significant idling of productive capacity during the period. There was also evidence that a large number of domestic producers had been unable to operate profitably in 1998. The ITC made a positive injury finding because of the recent declines in production, capacity utilization, profits, employment and capital expenditures.

Next, the ITC had to determine whether the increased imports were both an important cause of serious injury and no less important than any other cause. It explored various other causes, including market prices of steel, raw material costs and start-up costs for increasing domestic capacity. However, none were found to be more important for injury than the increase in imports and the increase in domestic market share of imports.

With respect to remedy, the ITC issued two recommendations to the President. Both called for imposition of a four-year tariff rate quota system on imports of wire rod. The difference was that one recommendation did not include Canada in the relief action, while the other did.

On February 11, 2000, President Clinton accepted the ITC recommendation and announced import relief action, in the form of tariff rate quotas, for a three-year period. The tariff rate quotas, to be liberalized in successive years, were to remain in place for three years. Furthermore, President Clinton accepted the ITC recommendation that Canadian imports should be exempted from the tariffs. Imports would face an additional tariff of 10% during the first year after exceeding 1.58 million tons. In the second and third years of the action, the annual quantity of imports exempt from the tariff would increase by 2% and the level of additional tariff would decline by 2.5 percentage points per year.

181 § 300 (d) (3).

182 § 330 (d) (1).

10.1 Canadian Government Activity

Wire rod was imported into the United States from a number of countries. Canada was a significant supplier of wire rod imports during the period under review. During the last three years of the period under review, Canada accounted for 21.9% of total imports. However, imports from Canada had fallen relative to total imports into the United States during those three years. Two ITC Commissioners therefore found that imports from Canada were not contributing significantly to serious injury or threat thereof caused by imports, and they recommended that Canada should be excluded from any relief action. The other Commissioner decided that Canada's wire rod imports did contribute significantly to serious injury or threat thereof, and that Canada should be included in any relief action. The Government of Canada had submitted both pre-hearing and post-hearing briefs to the ITC, arguing that imports from Canada did not contribute significantly to any injury suffered by the U.S. industry.

On August 22, 2001, the ITC made an affirmative determination in a precedent-setting investigation of whether previously excluded imports of steel wire rod from Canada were undermining the effectiveness of the safeguard action imposed on imports under section 201 of the Trade Act of 1974, as announced by President Clinton. In late November, President Bush declined to extend relief to Canada.

11 Circular Welded Carbon Quality Line Pipe (Line Pipe)

Following receipt of a petition filed on June 30, 1999, on behalf of seven industries and one labour representative, the ITC initiated a safeguard investigation, under section 202 of the Trade Act of 1974, to determine whether circular welded carbon quality line pipe was being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing a like or directly competitive product.

In December 1999, the ITC determined that circular welded carbon quality line pipe was being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry producing an article like or directly competitive with the imported article. However, pursuant to section 311(a) of the NAFTA Implementation Act, the ITC made a negative finding with respect to imports of line pipe from Canada and Mexico.

With line pipe imports increasing since 1995 and reaching their highest annual level in 1998, the ITC concluded that there were increased imports. It also found serious injury to the domestic industry. The factors supporting this finding were the declines in capacity utilization, domestic production, domestic sales and

domestic market share. During the period of review (1994–1999), the industry had experienced some significant changes. Consumption by both volume and value increased in the 1994–1998 period before declining in 1998 and 1999.

The ITC recommended that the President impose a tariff rate quota for a four-year period on imports of line pipe, with the quota amount set at 151,124 tons in the first year, to be increased by 10% in each subsequent year. Over-quota imports were to be subject to a duty of 30% *ad valorem* in addition to current tariffs. Aside from excluding imports from Canada and Mexico, the ITC recommended that the tariff rate quota not apply to imports of line pipe from Israel, or to any imports of line pipe that entered duty-free from beneficiary countries under the Caribbean Basin Economic Recovery Act or the Andean Trade Preference Act.

On February 11, 2000, President Clinton accepted the ITC recommendation and announced import relief action, in the form of tariff rate quotas, on U.S. imports of line pipe. The additional tariffs, to be gradually reduced in successive years, would remain in place for three years.

11.1 Canadian Government Activity

In its brief to the ITC, Canada argued that its share of imports did not account for "a substantial share of total imports" as it was not among the top five suppliers and did not "contribute importantly to the injury of the domestic market." It based its arguments on the fact that its imports to the United States had declined and that Canadian prices had increased. With respect to NAFTA country findings, the ITC found that neither Canada nor Mexico contributed significantly to the serious injury or threat thereof to the domestic industry.

In a subsequent development, Korea requested the establishment of a WTO panel to challenge the measure. Korea objected to the ITC's inclusion of Mexican and Canadian imports in determining the cause of injury, while not including them in the import relief.

In the WTO Report dated October 29, 2001, the Dispute Panel rejected Korea's claims that "the United States violated Article 2 and 4 by exempting Mexico and Canada from the measure" and that "the United States violated Article I, XIII:1, and XIX by exempting Mexico and Canada from the measure."

VII Free Trade Agreement and North American Free Trade Agreement Chapter 19 Dispute Settlement, 1989–2000

In negotiating the Canada–U.S. Free Trade Agreement, one of Canada's major objectives was the establishment of a system for the binational review of "unfair" trade cases. The intention was to establish a less costly, more expeditious means for parties to appeal the results of unfair trade investigations. Originally Canada had sought the elimination of the use of anti-dumping (AD) and countervailing duty (CVD) laws within North America. However, the United States could not agree. Chapter 19 of the FTA was the compromise.

The FTA was superseded by the NAFTA on January 1, 1994.[183] Chapter 19 of the NAFTA is largely derived from the provisions contained in Chapter 19 of the FTA. It provides for a system of binational panel review as an alternative to domestic judicial review for final decisions regarding anti-dumping and countervailing duty matters. The main elements of the chapter are its binding nature, the standard of review to be used, and the procedure for establishing a panel.

NAFTA Chapter 19 extends (on a trilateral basis) the FTA review procedures for CVD and AD determinations, and makes these provisions permanent. Under the FTA, Chapter 19 was understood to be a temporary provision.

Under NAFTA sections 1901(3) and 1902, each country retains its current domestic CVD and AD laws, and the right to apply them to goods of the other parties to the agreement.[184] Any future amendments[185] to these laws must be in conformity with the WTO Anti-Dumping and Subsidies agreements. Binational reviews simply decide whether CVD and AD laws were applied in conformity with the domestic laws of the country concerned.[186]

183 North American Free Trade Agreement, § 2203.

184 Ibid., §§ 1901 (3), 1902.

185 Ibid., § 1902 (d).

186 Ibid., § 1904 (2).

To begin the process, one of the parties must request a Panel Review. The request must be made within 30 days of publication of a final determination.[187] Only final determinations are subject to review.[188] A NAFTA party must seek a review if it is requested by a domestic private party that would have standing to bring a case in a domestic court. Once the decision is made to have a Chapter 19 Panel Review, the determination cannot then be subject to domestic judicial review in either country concerned.

NAFTA provisions require the establishment of a roster of panellists who serve when one country wishes to review a CVD or an AD decision of any other country to the agreement. From this roster (while a panellist need not be chosen from the roster, a panelling normally should be), five panellists are normally chosen by involved Parties to review a CVD or AD decision. Their decision is final and binding on the parties, subject to an extraordinary challenge. A panel may uphold a final determination or remand it for changes that the panel feels are necessary. In other words, the panel has no jurisdiction to overturn decisions; it can only refer the matter back to the investigating authority.[189]

An Extraordinary Challenge proceeding is heard before a panel of three retired judges from the countries involved in the dispute. This procedure was designed to allow further appellate review for cases of gross misconduct, bias or serious conflict of interest on the part of the panel. A review can be requested only by a government. In a case of violation, the decision will either be remanded to the original panel or vacated. If the decision is vacated, a new panel will be chosen.

187 Ibid., § 1904 (4).

188 Ibid., § 1905.

189 Ibid., § 1901.2

FTA/NAFTA Chapter 19 Disputes

Canadian Decisions

Acronyms

CCRA Canada Customs and Revenue Agency

CITT Canadian International Trade Tribunal

Reference	Product and Decision Challenged	Results
CDA-89-1904-01	POLYPHASE INDUCTION MOTOR FROM THE UNITED STATES (Revenue Canada—Dumping)	Terminated
CDA-90-1904-01	CERTAIN INDUCTION MOTORS FROM THE UNITED STATES (CITT—Review—Injury)	Affirmed
CDA-91-1904-01	CERTAIN BEER FROM THE UNITED STATES (Revenue Canada—Dumping)	Duties amended
CDA-91-1904-02	CERTAIN BEER FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-92-1904-01	CERTAIN CARPETING FROM THE UNITED STATES (Revenue Canada—Dumping)	Duties amended
CDA-92-1904-02	CERTAIN CARPETING FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-93-1904-01	GYPSUM BOARD FROM THE UNITED STATES (Revenue Canada—Dumping)	Duties amended
CDA-93-1904-02	GYPSUM BOARD FROM THE UNITED STATES (CITT—Injury)	Terminated
CDA-93-1904-03	TOMATO PASTE FROM THE UNITED STATES (Revenue Canada—Dumping)	Terminated
CDA-93-1904-04	STEEL PLATE FROM THE UNITED STATES (Revenue Canada—Dumping)	No decision (consolidated with CDA-93-1904-06)
CDA-93-1904-05	HOT-ROLLED STEEL FROM THE UNITED STATES (Revenue Canada—Dumping)	No decision (consolidated with CDA-93-1904-07)
CDA-93-1904-06	STEEL PLATE FROM THE UNITED STATES (CITT—Negative Injury)	Affirmed
CDA-93-1904-07	HOT-ROLLED STEEL FROM THE UNITED STATES (CITT—Negative Injury)	Affirmed
CDA-93-1904-08	COLD-ROLLED STEEL FROM THE UNITED STATES (Revenue Canada—Dumping)	Duties Amended

CDA-93-1904-09	COLD-ROLLED STEEL FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-93-1904-10	PIPE FITTINGS FROM THE UNITED STATES (Revenue Canada—Dumping)	Terminated
CDA-93-1904-11	PIPE FITTINGS FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-93-1904-12	PIPE INSULATION FROM THE UNITED STATES (Revenue Canada—Dumping)	Terminated
CDA-93-1904-13	PIPE INSULATION FROM THE UNITED STATES (CITT—Injury)	Dismissed
CDA-94-1904-01	APPLES FROM THE UNITED STATES (CITT—Injury)	Terminated
CDA-94-1904-02	BALER TWINE FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-94-1904-03	CORROSION-RESISTANT STEEL FROM THE UNITED STATES (Revenue Canada—Dumping)	Duties amended
CDA-94-1904-04	CORROSION-RESISTANT STEEL FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-95-1904-01	CERTAIN MALT BEVERAGES FROM THE UNITED STATES (CITT—Rescission)	Affirmed
CDA-95-1904-02	APPLES FROM THE UNITED STATES (Revenue Canada—Dumping)	Terminated
CDA-95-1904-03	CERTAIN CARPETING FROM THE UNITED STATES (Revenue Canada—Redetermination)	Terminated
CDA-95-1904-04	REFINED SUGAR FROM THE UNITED STATES (Revenue Canada—Dumping)	Duties amended
CDA-96-1904-01	CULTURE MEDIA FROM THE UNITED STATES (Revenue Canada—Dumping)	Terminated
CDA-97-1904-01	CONCRETE PANELS FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-97-1904-02	STEEL PLATE FROM MEXICO (CITT-Injury)	Affirmed
CDA-98-1904-01	BABY FOOD FROM THE UNITED STATES (CITT—Injury)	Affirmed
CDA-98-1904-02	COLD-ROLLED STEEL FROM THE UNITED STATES (CITT—Rescission)	Affirmed
CDA-98-1904-03	PIPE FITTINGS FROM THE UNITED STATES (CITT—Rescission)	Affirmed
CDA-99-1904-01	STEEL PLATE FROM MEXICO (CITT—Corrigendum to Injury Finding)	To be determined

CDA-20-1904-01	CONTRAST MEDIA FROM THE UNITED STATES (CCRA—Dumping)	Suspended
CDA-20-1904-02	CONTRAST MEDIA FROM THE UNITED STATES (CITT—Injury)	Suspended
CDA-20-1904-03	APPLIANCES FROM THE UNITED STATES (CCRA—Dumping)	Suspended
CDA-20-1904-04	APPLIANCES FROM THE UNITED STATES (CITT—Injury)	Active

FTA/NAFTA Chapter 19 Disputes

U.S. Decisions

Reference	Product and Decision Challenged	Results
USA-89-1904-01	RED RASPBERRIES FROM CANADA (Commerce—Admin. Review—Dumping)	Duties amended
USA-89-1904-02	REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA (Commerce—Admin. Review—Dumping)	Affirmed
USA-89-1904-03	REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA (Commerce—Admin. Review—Dumping)	Affirmed
USA-89-1904-04	DRIED, HEAVY SALTED CODFISH FROM CANADA (Commerce—Admin. Review—Dumping)	Terminated
USA-89-1904-05 (Consolidated with USA-89-1904-03)	REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA (Commerce—Admin. Review—Dumping)	Terminated (consolidated with 1904-03)
USA-89-1904-06	FRESH, CHILLED AND FROZEN PORK FROM CANADA (Commerce—Countervail)	Duties amended
USA-89-1904-07	NEW STEEL RAIL, EXCEPT LIGHT RAIL, FROM CANADA (Commerce—Countervail)	Duties amended
USA-89-1904-08	NEW STEEL RAIL, EXCEPT LIGHT RAIL, FROM CANADA (Commerce—Dumping)	Affirmed
USA-89-1904-09/-10	NEW STEEL RAILS FROM CANADA (ITC—Injury)	Affirmed
USA-89-1904-11	FRESH, CHILLED OR FROZEN PORK FROM CANADA (ITC—Injury)	Affirmed

USA-90-1904-01	REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA (Commerce—Admin. Review—Dumping)	Duties amended
USA-90-1904-02	OIL COUNTRY TUBULAR GOODS FROM CANADA (Commerce—Scope Determination)	Terminated
USA-90-1904-03	SHEET PILING FROM CANADA (Commerce—Dumping)	Terminated
USA-91-1904-01	OIL COUNTRY TUBULAR GOODS FROM CANADA (Commerce—Scope Determination)	Terminated
USA-91-1904-02	IRON CONSTRUCTION CASTINGS FROM CANADA (Commerce—Admin. Review—Dumping)	Terminated
USA-91-1904-03	LIVE SWINE FROM CANADA (Commerce—Admin. Review—Countervail)	Duties amended
USA-91-1904-04	LIVE SWINE FROM CANADA (Commerce—Admin. Review—Countervail)	Duties amended
USA-91-1904-05	REPLACEMENT PARTS FOR SELF-PROPELLED BITUMINOUS PAVING EQUIPMENT FROM CANADA (Commerce—Admin. Review—Dumping)	Terminated
USA-92-1904-01	CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA (Commerce—Countervail)	Decision overturned
USA-92-1904-02	CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA (ITC—Injury)	Dismissed
USA-92-1904-03	PURE AND ALLOY MAGNESIUM FROM CANADA (Commerce—Countervail)	Duties amended
USA-92-1904-04	PURE AND ALLOY MAGNESIUM FROM CANADA (Commerce—Dumping)	Affirmed
USA-92-1904-05/-06	MAGNESIUM FROM CANADA (ITC—Injury)	Affirmed
USA-93-1904-01	CERTAIN COLD-ROLLED CARBON STEEL FLAT PRODUCTS FROM CANADA (Commerce—Dumping)	Terminated
USA-93-1904-02	CERTAIN HOT ROLLED CARBON STEEL FLAT PRODUCTS FROM CANADA (Commerce—Dumping)	Duties amended
USA-93-1904-03	CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM CANADA (Commerce—Dumping)	Duties amended
USA-93-1904-04	CERTAIN CUT-TO-LENGTH CARBON STEEL PLATE FROM CANADA (Commerce—Dumping)	Duties amended
USA-93-1904-05	CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM CANADA (ITC—Injury)	Affirmed

USA-94-1904-01	LIVE SWINE FROM CANADA (Commerce—Admin. Review—Countervail)	Duties amended
USA-94-1904-02	LEATHER APPAREL FROM MEXICO (Commerce—Admin. Review—Countervail)	Duties Amended
USA-93-1904-02	CERTAIN HOT ROLLED CARBON STEEL FLAT PRODUCTS FROM CANADA (Commerce—Dumping)	Duties amended
USA-93-1904-03	CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM CANADA (Commerce—Dumping)	Duties amended
USA-93-1904-04	CERTAIN CUT-TO-LENGTH CARBON STEEL PLATE FROM CANADA (Commerce—Dumping)	Duties amended
USA-93-1904-05	CERTAIN CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM CANADA (ITC—Injury)	Affirmed
USA-94-1904-01	LIVE SWINE FROM CANADA (Commerce—Admin. Review—Countervail)	Duties amended
USA-94-1904-02	LEATHER APPAREL FROM MEXICO (Commerce—Admin. Review—Countervail)	Duties amended
USA-95-1904-01	COOKWARE FROM MEXICO (Commerce—Admin. Review—Dumping)	Duties amended
USA-95-1904-02	CEMENT FROM MEXICO (Commerce—Admin. Review—Dumping)	Affirmed
USA-95-1904-03	COLOUR PICTURE TUBES FROM CANADA (Commerce—Decision Not to Revoke)	Affirmed
USA-95-1904-04	OIL COUNTRY TUBULAR GOODS FROM MEXICO (Commerce—Dumping)	Duties amended
USA-95-1904-05	FLOWERS FROM MEXICO (Commerce—Admin. Review—Dumping)	Affirmed
USA-96-1904-01	COOKWARE FROM MEXICO (Commerce—Admin. Review—Dumping)	Terminated
USA-97-1904-02	CEMENT FROM MEXICO (Commerce—Admin. Review—Dumping)	Affirmed
USA-97-1904-03	CORROSION-RESISTANT STEEL FROM CANADA (Commerce—Admin. Review—Dumping)	Duties amended
USA-97-1904-04	MAGNESIUM FROM CANADA (Commerce—Admin. Review—Countervail)	Terminated
USA-97-1904-05	COOKWARE FROM MEXICO (Commerce—Admin. Review—Dumping)	Terminated

USA-97-1904-06	PIPE AND TUBE FROM MEXICO (Commerce—Admin. Review—Dumping)	Terminated
USA-97-1904-07	COOKWARE FROM MEXICO (Commerce—Admin. Review—Dumping)	Duties amended
USA-97-1904-08	WIRE ROD FROM CANADA (Commerce—Countervail)	Terminated
USA-98-1904-01	BRASS SHEET AND STRIP FROM CANADA (Commerce—Admin. Review—Dumping)	Duties Amended
USA-99-1904-01	CORROSION-RESISTANT STEEL FROM CANADA (Commerce—Admin. Review—Dumping)	Terminated
USA-99-1904-02	STEEL PLATE FROM CANADA (Commerce—Admin. Review—Dumping)	Terminated
USA-99-1904-04	STAINLESS WIRE FROM CANADA (Commerce—Dumping)	Terminated
USA-99-1904-06	CATTLE FROM CANADA (Commerce—Countervail)	Terminated
USA-99-1904-07	CATTLE FROM CANADA (ITC—Injury)	Terminated
USA-20-1904-02	CORROSION-RESISTANT STEEL FROM CANADA (Commerce—Admin. Review—Dumping)	Terminated
USA-98-1904-01	CORROSION-RESISTANT STEEL FROM CANADA (Commerce—Admin. Review—Dumping)	Active (Feb. 2001)
USA-98-1904-02	CEMENT FROM MEXICO AND FROM CANADA (Commerce—Admin. Review—Dumping)	Active
USA-98-1904-04	COOKWARE FROM MEXICO (Commerce—Admin. Review—Dumping)	Active
USA-98-1904-05	PIPE FROM MEXICO (Commerce—Scope Ruling)	Active
USA-99-1904-03	CEMENT FROM MEXICO (Commerce—Admin. Review—Dumping)	Active
USA-99-1904-05	COOKWARE FROM MEXICO (Commerce—Admin. Review—Dumping)	Active
USA-20-1904-01	STEEL PLATE FROM MEXICO (Commerce—Admin. Review—Dumping)	Active
USA-20-1904-03	CEMENT FROM MEXICO (Commerce—Admin. Review—Dumping)	Active (Feb. 2001)
USA-20-1904-04	COOKWARE FROM MEXICO (Commerce—Admin. Review—Dumping)	Active (April 2001)
USA-20-1904-05	CEMENT FROM MEXICO (Commerce—Admin. Review—Dumping)	Active (May 2001)

USA-20-1904-06	MAGNESIUM FROM CANADA (Commerce—Sunset Review—Dumping)	Active (June 2001)
USA-20-1904-07	MAGNESIUM FROM CANADA (Commerce—Sunset Review—Countervail)	Active (June 2001)
USA-20-1904-09	MAGNESIUM FROM CANADA (ITC—Sunset Review—Injury)	Active (July 2001)
USA-20-1904-10	CEMENT FROM MEXICO (ITC—Sunset Review—Injury)	Active (Oct. 2001)
USA-20-1904-11	STEEL (CORROSION-RESISTANT) FROM CANADA (ITC—Sunset Review—Injury)	Active (Nov. 2001)

NAFTA Chapter 19 Disputes

Mexican Decisions

Acronym

SECOFI Ministry of Trade and Industrial Development

Reference	Product and Decision Challenged	Results
MEX-94-1904-01	FLAT COATED STEEL FROM THE UNITED STATES (SECOFI—Dumping)	Duties amended
MEX-94-1904-02	STEEL PLATE FROM THE UNITED STATES (SECOFI—Dumping)	Duties amended
MEX-94-1904-03	CRYSTAL FROM THE UNITED STATES (SECOFI—Dumping)	Affirmed
MEX-95-1904-01	PIPE FROM THE UNITED STATES (SECOFI—Dumping)	Terminated
MEX-96-1904-01	COLD-ROLLED STEEL FROM CANADA (SECOFI—Dumping)	Terminated
MEX-96-1904-02	STEEL PLATE FROM CANADA (SECOFI—Dumping)	Duties amended
MEX-96-1904-03	HOT-ROLLED STEEL FROM CANADA (SECOFI—Dumping)	Duties amended
MEX-97-1904-01	PEROXIDE FROM THE UNITED STATES (SECOFI—Countervail)	Terminated
MEX-99-1904-01	HOT-ROLLED STEEL FROM THE UNITED STATES (SECOFI—Dumping)	Terminated

MEX-99-1904-02	ROLLED STEEL PLATE FROM THE UNITED STATES (SECOFI—Dumping)	Terminated
MEX-98-1904-01	HIGH FRUCTOSE CORN SYRUP FROM THE UNITED STATES (SECOFI—Dumping)	Active (Feb. 2001)
MEX-20-1904-01	UREA FROM THE UNITED STATES (SECOFI—Dumping)	Active (Mar. 2001)
MEX-20-1904-02	BOVINE CARCASSES FROM THE UNITED STATES (SECOFI—Dumping)	Active (Apr. 2001)