Foreign Affairs and International Trade Canada
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U.S. TRADE REMEDY LAW

The Canadian Experience 2000-2007

Canada

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FOREWORD

In June 2002, the Department of Foreign Affairs and International Trade issued the *Second Edition* of a study entitled *U.S. Trade Remedy Law: The Canadian Experience.* It reviewed Canada's experience with U.S. anti-dumping, countervailing duty and safeguard investigations for the years 1985 to 2000, updating and expanding on the information regarding Canada's experience with U.S. trade remedy laws as provided in a 1993 study entitled *U.S. Trade Remedy Law: A Ten Year Experience.*

The following study is the successor to those two publications, bringing the Canadian experience with U.S. trade remedy investigations fully up to date. It includes detailed information, provided by the Washington law firm of Miller & Chevalier, on changes in the U.S. trade remedy regime since 2000. It also includes summary narratives on the most recent anti-dumping and countervailing duty investigations, as well as a safeguard investigation involving imports of various products from Canada, including, of course, softwood lumber. In view of the constraints of time and resources, as well as the complexity of the investigations and subsequent litigation with respect to softwood lumber in particular, this study may not be entirely comprehensive. However, like its two predecessors, it is hoped that it will be a useful reference document.

My thanks to Chad Anderson and Lindsay Partridge of the University of Ottawa for their contributions to this project.

Mike Robertson
Trade Remedies Division
Foreign Affairs and International Trade Canada
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U.S. Trade Remedy Regime – Recent Developments

U.S. Anti-dumping Regime

Overview of Key Developments 2000–Present

The U.S. anti-dumping (AD) regime has evolved in several important aspects since 2000. This evolution is due to legislated reforms, policy reviews and changes, court decisions, dispute settlement decisions under the World Trade Organization (WTO), and case-specific determinations with more general implications. Changes have been noted with respect to the following areas:

- **Organizational:** The U.S. Customs Service, responsible for enforcement of U.S. AD measures at the border, was moved from the Treasury Department into the newly created Department of Homeland Security after the September 11, 2001 terrorist attacks, and was renamed the Bureau of Customs and Border Protection (CBP). There have also been some changes to the internal organization of the U.S. Department of Commerce's Import Administration.

- **Investigations:** Recent AD proceedings have focused more frequently on imports from China, more frequently in the area of consumer products, and less frequently on steel products, which was the previous norm.

- **Dumping analysis:** There have been several revisions to the special methodology used for dumping analysis for non-market economy (NME) products, and some allowance for graduations, most notably with respect to Russia, from NME to market economy status. The post-2000 period has also seen some changes to general dumping analysis, such as a partial abandonment of the practice of "zeroing"[1] negative dumping margins, as well as some consideration of "targeted dumping" analysis.

- **Injury analysis:** U.S. International Trade Commission (ITC) opinions and staff reports have begun to pay more explicit attention to "non-attribution"[2] factors and have begun giving effect to a court decision requiring analysis of whether domestic producers, or third-country suppliers not under investigation, would likely benefit from the imposition of an AD measure. The ITC has also displayed a greater tendency toward issuing negative decisions in contested five-year "sunset" reviews, where petitioners actively seek to maintain import relief.

- **Enforcement and security:** Concerns about the under-collection of AD duties have prompted experimentation with new security requirements, including "continuous" bonding and "enhanced" deposits, as well as the suspension of bonding privileges for new shippers.

- **Use of collected duties:** The Continued Dumping and Subsidy Offset Act (Byrd Amendment) was repealed and changes relating to its use for pre-repeal entries were implemented pursuant to Court decisions.

- **Exclusivity:** The 1916 Anti-dumping Act was repealed during this period, leaving the provisions of Title VII of the Tariff Act of 1930 as the exclusive remedy for injurious dumping into the U.S. market.

Issues

1. Initiation

Since 2000, the U.S. Department of Commerce (DOC) has continued to develop and apply its approach for ensuring that a petition is sufficiently supported by the relevant domestic industry, as required by Section 732 of the Tariff Act. Pertinent issues include (a) standards for discretionary exclusion, from the industry support calculation, of the views of domestic producers who are, or who are related to, importers of the subject merchandise; and (b) labour union support for petitions.

(a) Discretionary exclusion. In deciding whether to count the views of domestic producers expressing opposition to a petition, DOC has continued to apply its approach, based on Section 732(c)(4)(B) of the Tariff Act, of seeking to determine, on a case-by-case basis, the

1 "Zeroing" is the practice of not providing offsets for non-dumped sales.
2 The requirement not to blame imports for harm arising from other factors.

motivation of firms opposing the petition and whether that opposition principally reflects the interest of the firm as a domestic producer.

(b) Labour union support. Since 2000, labour unions have more frequently joined as co-petitioners, and/or expressed formal support for petitions. Normally labour union and company support for a petition is assumed to be additive, and DOC regularly mentions labour union support when finding that adequate domestic industry support exists in a given case. It is possible, however, that a company and a labour union could express opposite views about the desirability of an investigation being initiated. According to the Statement of Administrative Action to the Uruguay Round Agreements Act (URAA) of 1994, if the management of a firm expresses a position in direct opposition to the views of the workers in that firm, DOC will treat that firm's position as representing neither support for nor opposition to the petition. While there do not appear to be any post-2000 cases where company and unions expressed contrary views, the growing frequency of union-backed petitions, and of the establishment of more globally influenced firms opposing trade remedy petitions, the potential for conflict has increased substantially since 2000.

2. Evidence

DOC and the ITC had made only modest changes with respect to evidentiary requirements in trade remedy proceedings. These relate to questionnaires and associated deadlines, treatment of partial responses, sampling, facts available, verifications, public evidence files, and the treatment of business proprietary information.

(a) Questionnaires. DOC has issued new standard questionnaires for AD investigations and reviews. In addition, market economy questionnaires were updated in 2003 and 2006. NME questionnaires were updated in 2007.

(b) Certifications and false statements. Legislation requires that persons submitting factual information to DOC in trade remedy proceedings certify the accuracy and completeness of such information. While DOC regulations address the wording of certifications, there is no provision for investigating, or imposing sanctions against, persons who certify and submit false statements. In January 2004, DOC announced that it was considering developing regulations to apply and sought public comment, but to date it has not finalized any new regulations.

(c) APO procedures. In January 2008, DOC issued new rules regarding its procedures for access to information under administrative protective order (APO). Significant modifications include the following:

- Interested party status: DOC amended 19 CFR 351.105(b) to define who is an "interested party" and to require applicants for APO access to specify the type of interested party status claimed.

- Importer documentation: "To ensure that only those who are authorized to receive {APO} access" obtain such access, DOC amended 19 CFR 351.305(d) to require documentary evidence confirming a party's status as an importer. This requirement can be met by submitting Customs Form 7501 (Entry Summary) showing that an import occurred during the applicable period of investigation or review.

- Application template: DOC also implemented changes to the APO application template, Form ITA-367, which is available at http://ia.ita.doc.gov/apo/new/367-208-apo-app.pdf.

3. Product Coverage

Since 2000, significant changes have been made in the identification and administration of product coverage as it applies to AD duty measures.

(a) Emergency relief supplies. In October 2006, prompted by concerns that trade remedy measures might impede access to emergency relief supplies needed to respond to humanitarian disasters such as the one resulting from Hurricane Katrina, DOC promulgated rules for emergency relief supplies free of AD and countervailing duties (CVD).[3]

(b) Imported merchandise not "sold" in the United States. In 2005, the U.S. Court of Appeals for the Federal Circuit held that uranium enriched outside the United States pursuant to separative work unit (SWU) contracts is not "sold" when it enters the United States and therefore cannot be included within the coverage of AD measures.[4] The case—U.S. utilities contracting for uranium that they already own to be processed overseas and then returned to the United States—is not a common one in industries where trade remedy investigations typically arise. However, such cases may arise in other industries. The U.S. government and the U.S. petitioner, USEC, have sought Supreme Court review of the decision pertaining to Eurodif, a European company, through certiorari petitions filed in February 2008, citing national security concerns as well as broad damage to the integrity of the AD/CVD regime. The Supreme Court has not yet decided whether to accept the case for review. The case is also thought likely to prompt changes to—or perhaps the repeal of—DOC's existing regulation on AD analysis in the context of "tolling" arrangements.[5]

4. Determination of Dumping

(a) Normal value. One significant change has occurred with respect to the data and analysis used by DOC to establish normal value. It involves the "ordinary course of trade" limitation on inclusion of comparison market sales to affiliates. Section 773(a)(1) of the Tariff Act restricts comparison market sales used in establishing normal value to those sales made in the "ordinary course of trade." DOC's long-standing practice under this provision, at least until 2002, was to treat an exporter's or producer's comparison market sales to an

3 71 Fed. Reg. 63,230 (October 30, 2006).

4 Eurodif, SA v. United States, 411 F.3d 1355 (Fed. Cir. 2005).

5 19 CFR 351.401(h).

affiliated customer as being within the ordinary course of trade, if said prices were, on average, at least 99.5 percent of the prices charged by that exporter or producer to unaffiliated comparison market customers. Sales to affiliates at prices less than 99.5 percent of prices to non-affiliates were disregarded. In contrast, requests by an exporter or producer to exclude from normal value calculations individual high-priced sales to affiliates were judged according to a different standard: DOC generally required a showing that the prices were "aberrationally" high. A decision adopted by the WTO Dispute Settlement Body (DSB) in 2002 found this approach to be inconsistent with Article 2.1 of the Agreement on Anti-Dumping. Following an August 15, 2002 request for public comment, DOC changed its methodology. Under the new approach, sales to an affiliate are considered to be "in the ordinary course of trade" and included in the normal value calculation where their prices are, on average, between 98 percent and 102 percent of prices charged by the exporter or producer to unaffiliated customers.[6]

(b) Export price. Significant developments since 2000 with respect to export price and constructed export price (CEP) include the following:

i) Treatment of safeguard duties. Section 772(c)(2)(A) of the Tariff Act requires DOC to deduct from export price and CEP any "United States import duties" included in the price. In 2003, a long-standing disagreement between DOC, whose practice had limited this provision to normal Customs duties, and petitioners, who believed that it should apply equally to remedial duties like safeguard and CVD, took on added importance as AD proceedings began to focus on entries on which steel safeguard duties had been imposed beginning in March 2002. In September 2003 DOC requested public comment on the appropriate treatment of Section 201 duties and CVD in AD calculations. With regard to safeguard duties, DOC concluded that a deduction from export price was neither statutorily required nor appropriate.[7]

ii) Duty drawback. Section 772(c)(1)(B) of the Tariff Act provides for the price used to establish export price and CEP to be increased by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." In October 2006, DOC announced intended modifications to the test, by which it allowed an adjustment for duty drawback. DOC stated that it would:

- begin allocating the total amount of duty drawback received across all exports that may have incorporated the duty-paid input in question, regardless of destination; and

- permit a full adjustment for duty drawback received only where the foreign producer/claimant can trace the imported duty-paid inputs through subsequent

6 67 Fed. Reg. 69, 186 (November 2002).

7 Stainless Steel Wire Rod from the Republic of Korea, 69 Fed. Reg. 19,153, 19,157-59 (April. 12, 2004).

production processes and into particular finished goods exported to the United States. DOC invited public comment on this new approach in October 2006.

(c) Calculation of dumping margin. There have been significant developments regarding the calculation and establishment of dumping margins related to "zeroing," "targeted dumping" and the "all others" rate.

i) Zeroing. The U.S. practice of by assigning a value of zero to individual non-dumped comparison sales has been challenged in a series of WTO dispute settlement cases and found to be inconsistent with the Anti-dumping Agreement. Although all forms of zeroing have been found WTO-inconsistent, in all of the contexts in which they are applied, the United States has so far formally renounced zeroing only in the context of average-to-average comparisons in original investigations. In March 2006, DOC requested public comments on the calculation of weighted average dumping margins in original AD investigations. In December 2006, DOC published a notice pursuant to Section 123 of theURAA formally adopting the proposed change in practice and stating that it "will no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons."[8]

ii) Targeted dumping methodology. One result of the partial abandonment of zeroing has been increased attention to use of the "targeted dumping" or "average-to-transaction" methodology, which involves comparing a weighted average normal value to the export prices. Section 777A(d)(1)(B) of the Tariff Act allows this approach to be used if there is a pattern of export prices or CEPs that differs significantly among purchasers, regions or periods of time, and the differences cannot be taken into account using one of the more traditional comparison methods. In November 2007, DOC requested public comment on a "determining whether targeted dumping is occurring in AD investigations," and on "standards and tests that may be appropriate in a targeted dumping analysis." Noting that it had "very limited" experience in using this comparison methodology and very little by way of pertinent regulations, DOC requested comments and suggestions on what guidelines, thresholds and tests it should use in determining whether targeted dumping is occurring. In a final determination on Coated Free Sheet (CFS) Paper from the Republic of Korea,[9] DOC found that certain customers and regions were being targeted and applied the "targeted dumping" comparison method. In particular, this determination suggests how targeted dumping analysis may be used in conjunction with other comparison methods. The investigation itself concluded with a negative final injury determination.

iii) All others rate. The "all others" rate applicable to exporters not receiving individual dumping margin calculations is generally derived, under Section 735(c)(5)(A) of the Tariff Act, by trade weight-averaging individually calculated rates, excluding

8 71 Fed. Reg. 77722, December 27, 2006.
9 72 Fed. Reg. 60630 (October 25, 2007).

those that are *de minimis* and those based wholly on facts available. DOC's long-standing practice of including in this calculation company-specific rates based partly on facts available was held to violate the WTO Agreement on Anti-dumping (hot-rolled steel from Japan). This aspect of the decision is regarded as requiring, for full U.S. implementation, an amendment to the Tariff Act. The U.S. Administration has for several years been consulting with Congress on obtaining such an amendment. In the meantime, DOC has sought to avoid repeated WTO violations, while remaining in compliance with U.S. law, by finding creative ways to avoid including in "all others" calculations company-specific rates that are based on facts available. Section 735(c)(5)(B) does permit DOC to use any "reasonable" method where all of the company-specific margins established are disqualified. One tactic used by DOC under these circumstances has been to assign, as the all-others rate, the simple average of the margins in the petition.

iv) NME methodology. DOC's special methodology applicable to NME products has been the subject of considerable ferment during the post-2000 period. Noteworthy developments have occurred in this category with respect to the following issues, which are discussed in summary form below (see Appendix A), given that the NME method does not apply to Canadian products:

- assessment instructions
- expected wages
- market-economy inputs
- market-oriented enterprises
- NME designations
- separate and combination rates
- surrogate country selections

5. Determination of Injury

Litigation on injury issues at the ITC is generally regarded as having become more challenging since 2000 for petitioners seeking to obtain or maintain import relief. This trend likely reflects several concurrent influences, including personnel changes, evolution of the analytical methods and economic models used at the Commissioner and staff levels, increasingly exacting judicial review of ITC determinations, WTO criticism and the natural desire to avoid additional adverse WTO decisions, scholarly and practitioner commentary urging greater analytical rigour, shifts in workload (when there are fewer cases, as has been the case for much of the post-2000 period, there is more time to analyse), and changes in the trade policy environment.

(a) Non-attribution. Commissioner opinions and staff reports have begun to pay more careful attention to "non-attribution"—the requirement not to blame subject imports for injury arising from other factors. The WTO Appellate Body in hot-rolled steel from Japan articulated a requirement that injury analyses demonstrate compliance with this requirement by "separating and distinguishing" the injurious effects of subject imports from the injurious effects of other factors. The ITC initially resisted any effort to deepen its analysis in this respect, contending that it was incompatible with governing U.S. law, but decisions issued in the post-2000 period show an increasingly focused effort to adhere to the non-attribution principle. In this regard, Stainless Steel Angle from Japan, Korea and Spain, Inv. Nos. 731-TA-888-890 (final) (May 2001); Certain Color Television Receivers from China, Inv. No. 731-TA-1034 (final) (May 2004) at 7-17 and Sichuan Changhong Electric Co., Ltd. v. United States, Slip Op. 06-168 (CIT 2006) at 17-25; and Certain Orange Juice from Brazil, Inv. No. 731-TA-1089 (final) (March 2006) at 27-28 are offered as examples.

As part of the Softwood Lumber IV litigation, an initial ITC threat of injury determination—held upon WTO review to have insufficiently documented adherence to the non-attribution requirement—was revised in a Section 129 proceeding (without changing the bottom-line threat of injury finding) in a way that proved satisfactory to an Art. 21.5 Panel, although that Panel's analysis was later sharply criticized and reversed by the Appellate Body.

(b) Requirement that domestic producers be positioned to benefit. Another trend in ITC decision making is the struggle to give effect to a court decision requiring analysis of whether domestic producers, or third-country suppliers not under investigation, would likely benefit from imposition of an AD measure. In Bratsk Aluminum Smelter v. United States, Slip Op. No. 05-1213 (Fed. Cir. 2006), the United States Court of Appeals for the Federal Circuit (CAFC) addressed the requirement in U.S. law that AD measures be based on a finding of material injury occurring "by reason of" subject imports. The court held that in cases involving commodity products, "when ... fairly traded, price competitive, non-subject imports are in the market, the Commission must explain why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers." While the ITC's initial reaction was to resist the Bratsk requirement, there are signs of tentative efforts to meet it while finding workable limits on its scope. In any event, subsequent court decisions have made clear that the CAFC and the U.S. Court of International Trade (CIT) treat the Bratsk requirement seriously, and will oblige the ITC to follow it where it applies.

(c) Negative determinations. The ITC has been a consistently demanding forum for claimants for import relief during the post-2000 period. In the sunset review context, it has displayed a greater tendency to issue negative decisions in contested cases where petitioners actively seek to maintain relief. The 2006 determinations involving carbon flat steel products, which found that removing numerous orders posed no likelihood of continuation or recurrence of injury, are a good example.

6. Reviews and Assessment

(a) Administrative reviews with cost investigations. In 2005, DOC issued a policy bulletin addressing decisions about "automatically" opening investigations into sales below cost within administrative reviews. DOC's Policy Bulletin 05.2 excludes significant and extended sales below cost in a respondent's home market from normal value calculations. The effect is typically to increase normal value and, by extension, dumping margins. Section 773(b) of the Tariff Act directs DOC to check for such below-cost home market sales whenever there are "reasonable grounds" to do so, and provides that reasonable grounds "automatically" exist when below-cost sales have been disregarded in a recently completed segment. An ambiguity had been identified regarding when, in a newly initiated administrative review, DOC should make a decision on automatically opening a cost investigation based on prior findings of sales below cost. Under the policy laid out, in the first administrative review of a respondent, DOC will base its decision to automatically initiate a below-cost sales investigation on whether below-cost sales were disregarded for that respondent in the original investigation. For subsequent reviews, decisions will be based on whether below-cost sales were disregarded in the respondent's most recently completed review.

(b) Liquidation of intermediaries' entries. In April 2003, DOC announced a clarification of its policy regarding liquidation of entries made by "intermediaries" such as resellers and trading companies. As explained by DOC, where an intermediary does not have its own rate, automatic liquidation of its entries at the cash deposit rate can only occur if no administrative review has been requested, either of the intermediary itself or of any producer of merchandise exported by the intermediary to the United States. If, in the course of an administrative review, DOC finds that the producer of goods under review knew, or should have known, that the merchandise it sold to the intermediary was destined for the United States, entries of that merchandise will be liquidated at the assessment rate calculated for the producer. If, on the other hand, DOC finds that the producer did not know that the merchandise it sold to the intermediary was destined for the United States, then entries of merchandise exported by the intermediary will not be liquidated at the producer's assessment rate, nor at the cash deposit rate. Assuming there is no company-specific review of the intermediary itself for that review period, entries of merchandise by the intermediary during the review period will be liquidated at the all-others rate.

(c) New shipper reviews. Section 751(a)(2)(B) of the Tariff Act provides for expedited reviews of "new shippers," i.e. companies that did not export during the original period of investigation. The practice regarding these reviews has evolved since 2000 with the mechanism's increasingly frequent use.

- At the procedural level, DOC has updated and publicized the initiation checklist it uses in determining whether to open such reviews.

- Policy Bulletin 03.2, issued in 2003, addressed the situation where the exporter and the producer of merchandise involved in a review are different entities. DOC limited the benefits of this review mechanism to merchandise produced and exported by the particular producer/exporter combination found to qualify for a review.

- A second bulletin issued that same year clarified that entries of subject merchandise made while a review is in progress, and secured by a bond in lieu of a cash deposit, are fully subject to the interest provisions of Section 778(a) of the Tariff Act if for some teason the review has been rescinded (Policy Bulletin 03.3).

- Finally, DOC and Customs have implemented the statutory directive, set out in Section 1632 of the Pension Protection Act of 2006, to deny bonding privileges to new shippers for a three-year trial period.

(d) Security. Concerns about significant under-collection of AD duties, made more acute by the Byrd Amendment, spurred consideration of various proposals to enhance collection and bolster the security measures applied at the time merchandise subject to AD proceedings enters the United States. Under-collection has many causes, and many responsive measures have been considered during the post-2000 period, two of which have been implemented. One is the suspension of bonding privileges in the new shipper review, while the other is an "enhanced bonding" requirement implemented by U.S. Customs to make it easier to collect in situations of expected differentials between cash deposit rates and higher assessment rates later established for the same entries. Customs put enhanced bonding into effect through changes to its basic Customs Bond Directive (99-3510-004) made in July 2004 and August 2005. Enhanced bonding is viewed as facilitating full collection by providing some security against the possibility that importers will default on payment of increased duties. It has so far been made applicable only to "agriculture/aquaculture merchandise" and in fact only to shrimp. It has also been provisionally found to violate WTO rules[10] and has been partially sidelined by a court injunction pursuant to National Fisheries Institute v. U.S. Bureau of Customs and Border Protection, No. 05-00683 (CIT 2006).

(e) Sunset reviews. The practice regarding public notice of, and waiver of participation in, sunset reviews has evolved since 2000. On public notice, DOC decided in 2005 to begin using Federal Register notices, rather than direct communications to potentially interested parties, to announce upcoming sunset reviews.

As to waiver, Section 751(c)(4)(B) of the Tariff Act provides that where an interested party "waives" its participation in a sunset review, DOC "shall conclude that revocation of the order ... would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party." Under DOC's implementing regulation, 19 CFR 351.218(d)(2), paragraph (d)(2)(I) covers "affirmative waivers" by parties electing not to participate, while paragraph (d)(2)(iii) treats failure to file a complete substantive response to a notice of initiation as a "deemed waiver." The WTO found this approach to be inconsistent with the Anti-dumping Agreement.[11] To implement this decision, DOC published changes to its regulations to eliminate the possibility that order-wide likelihood determinations could be based on assumptions flowing from parties' waiver of participation.

10 United States—Measures Relating to Shrimp from Thailand, WT/DS343/R (February 29, 2008).

11 United States—Sunset Reviews of Anti-dumping Measures on Oil Country Tubular Goods from Argentina, WT/DS268/R, WT/DS268/AB/R (adopted December 17, 2004).

7. Other Procedural and Practical Issues

Noteworthy developments include changes to the organization of DOC's Import Administration (IA), sector-specific trade remedy initiatives undertaken by DOC, and a policy bulletin on expediting AD investigations.

(a) IA organization. Three changes within IA were implemented in 2004. In May of that year, DOC announced the creation of an "Unfair Trade Practices Task Force," charging it with "pursuing the elimination of foreign unfair trade practices that prejudice or adversely affect U.S. commercial interests." Describing this initiative as part of the broader "Manufacturing in America" strategy that Secretary of Commerce Donald Evans had launched the prior January, DOC invited "the public and representatives of the manufacturing sector to identify those unfair trade practices of greatest concern and impact," and to include "suggestions on the most effective ways in which the Task Force can assist in addressing the ... unfair trade practices identified." In September, IA established a "Petition Counselling and Analysis Unit". This unit describes itself as "a dedicated staff of professionals who are available to assist U.S. companies ... with respect to the U.S. unfair trade laws," including by "providing guidance to potential petitioners to assist them in determining what types of information will be required in order to pursue action against ... unfair trade practices" and in "ensuring their petition is in compliance with statutory initiation standards". In November 2004, DOC's Office of Textile and Apparel, whose decisions had long been overseen at the political level by the Assistant Secretary for Import Administration, was formally merged into the IA.

(b) Sector-specific trade remedy initiatives. The most important sectoral trade remedy initiative at DOC since 2000 is the "Steel Import Monitoring and Analysis" program, an import monitoring and licensing regime established in 2002. A second, more narrowly focused monitoring regime deals with apparel and textile imports from Vietnam. Other sector-specific import monitoring efforts have been activated since 2000 as part of the U.S. enforcement machinery for government-to-government agreements settling trade remedy cases on Softwood Lumber from Canada (2006 Softwood Lumber Agreement) and Cement from Mexico (2006 Cement Agreement).

(c) Expediting anti-dumping investigations. In 2000, DOC issued Policy Bulletin 00.1, which addresses conditions in which it would consider expediting an AD investigation and seeking to "complete it sooner than the initial deadlines provided in the Act." The bulletin then identified "criteria" that DOC would treat as relevant in processing future requests to expedite a case. These included:

- surging imports prior to petition filing (described as "the most critical factor");
- levels of import penetration;
- magnitude of alleged dumping margins and recent import price declines; and
- prior dumping of the same product or same general category of merchandise by exporters in the subject country.

The bulletin concluded with a statement of policy indicating that, "upon request and consideration of support provided by the petitioner," DOC "may expedite an anti-dumping investigation ... if it determines that "extraordinary circumstances exist that warrant expediting the schedule ... and {DOC's} resources permit such a schedule."

8. Appellate Review

The general framework for appellate review of agency-level U.S. trade remedy determinations has remained steady since 2000. For example, the allocation of competence over AD/CVD appeals has remained constant; jurisdiction generally rests with the CIT and CAFC, while the special binational panel review system established in Chapter 19 of the NAFTA continues to apply only to determinations involving goods from Canada and Mexico. (None of the new free trade agreements implemented since 2000 replicate this special AD/CVD appellate review system.) The statutory standards of review for factual determinations and legal interpretations in agency determinations that are challenged on appeal have not changed.

U.S. Countervailing Duty Regime

Overview of Key Developments 2000–Present

The U.S. countervailing duty regime has also evolved in important aspects since 2000. Many of the changes described above for anti-dumping apply equally in the countervailing duty context. Particularly important developments have occurred in the following areas:

- **Subsidy analysis:** DOC's practice has evolved with respect to indirect subsidies, benchmarks, most importantly cross-border benchmarks, multi-year benefit streams from amortizable subsidies, and the attribution of subsidies among affiliated firms.

- **Extension to China:** DOC, with initial acquiescence from the judiciary, has determined that it can apply CVD law to NME goods, at least those exported from China.

Issues

1. Initiation

The post-2000 developments described above, with respect to initiation and "standing" analysis in AD cases, apply equally with respect to CVD.

2. Evidence

The post-2000 developments described above with respect to evidence apply equally in the CVD context, except for the discussion of standard commerce questionnaires. Evolution of the template for countervail questionnaires reflected substantive developments such as the coverage of imports from China and the adoption of new methodologies on issues like pre-privatization subsidies.

3. Product Coverage

The post-2000 developments described above with respect to product coverage apply equally in the CVD context. However, the treatment of enriched uranium imports likely merits a separate discussion. The uranium-related litigation discussed above involved challenges to both AD and CVD measures. The countervail order on uranium imported from France was based on a finding by DOC that the Government of France had entered into a uranium-enrichment contract with Eurodif, thereby providing a "financial contribution," and under that contract had paid more than adequate remuneration, thereby conferring a "benefit." DOC concluded that the resulting subsidy should be offset through countervailing duties on enriched uranium imported from France. The Court of Appeal for the Federal Circuit[12] held that since the enrichment contract specified a purchase of services as opposed to goods by the Government of France, and since purchasing services is excluded from the definition of a "financial contribution,"[13] DOC's subsidy finding was erroneous. Unlike the Court's concurrent decision on AD law, this ruling was not appealed, and accordingly stands as a definitive interpretation of the relevant statute.

4. Determination of Subsidization

(a) Financial contribution. The standards used by DOC to determine whether particular programs and transactions meet the "financial contribution" requirement of Section 771(5)(D) of the Tariff Act have not changed meaningfully since 2000. Some cases have arisen in which applying these standards proved to be challenging, either factually or legally. These include, for example, DRAMs from Korea (2003), CFS Paper from Indonesia (2007) and some of the programs at issue in Softwood Lumber from Canada. However, DOC has sought to hold its analytical method steady, and the results in the cases above, two of which were tested by WTO dispute settlement, were roughly predictable.

The U.S.-Export Restraints WTO case, with its nuanced outcome, resulted in no evident change in DOC's application of the financial contribution requirement. In fact, DOC in CFS Paper from Indonesia (2007) found that Indonesia's log export ban satisfied the "entrusts or directs" standard for an indirect subsidy and otherwise met the requirements for

12 Eurodif, SA v. United States, 411 F.3d 1355 (Fed. Cir. 2005).

13 Section 771(5)(D) of the Tariff Act.

countervailability. The Eurodif court decision, as discussed above, interpreted Section 771(5)(D) of the Tariff Act, but has only affected DOC's behaviour in the specific case to which it applied; the proposition that purchasing services is not a financial contribution was already well-ensconced in DOC policy and practice. In general, DOC has continued to take a fairly aggressive approach to "indirect subsidy" cases. On the other hand, it has declined, in a recent series of countervails involving Chinese products, to investigate claimed "currency subsidies" arising from allegedly misvalued foreign exchange transactions between Chinese exporters and their government. DOC has ruled that the subsidy claims made in several petitions on this point did not merit investigation. Indications are that DOC believes that there are no sufficient allegations of a financial contribution in such cases.

(b) Benefit. DOC's application of the "benefit" element of the subsidy definition has evolved since 2000 in three specific contexts:

- the treatment of amortized subsidy benefits, when a change in ownership occurs during the amortization period;
- the use of cross-border benchmarks; and
- the analysis of benefit "pass through."

i) Change in ownership/privatization. DOC's practice for many years has been to allocate amortizable subsidies over a period of years based on facts existing at the time of bestowal, and to decline to tamper with established benefit streams in reaction to subsequent events occurring during the amortization period. This approach is now subject to a significant exception applicable where the post-bestowal event is a fair-market-value sale of the subsidy-receiving company's stock or assets.

This change resulted from a series of court decisions as well as the decision adopted by the DSB in United States–Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/R (December 9, 2002). The new methodology as announced by DOC in reaction to the WTO decision in 2003 applies only where the change in ownership is a privatization. In that context, it affects all pre-sale subsidies that would otherwise yield an allocated benefit in the time period being examined. While not expressed in absolute terms, the view that privatization extinguishes previously bestowed subsidies is now a very strongly held default rule. As explained by DOC:

> "...if it is demonstrated that the privatization was at arm's length for fair market value, any pre-sale subsidies will be presumed to be extinguished in their entirety and, therefore, non-countervailable. A party can ... obviate this presumption of extinguishment by demonstrating that, at the time of the privatization, the broader market conditions necessary for the transaction price to reflect fairly and accurately the subsidy benefit were not present, or were severely distorted .... Where a party demonstrates that these broader market conditions were severely distorted by government action and that the transaction price was meaningfully

different from what it would otherwise have been absent the distortive government action, the ... unamortized amount of any pre-sale subsidy benefit will continue to be countervailable. Where a party does not make such a demonstration with regard to an arm's-length sale for fair market value, we will find all pre-sale subsidies to be extinguished by the sale and, therefore, to be non-countervailable."

Pursuant to court decisions, this same general approach has been applied in the context of private changes in ownership, and to both asset sales and stock sales.

ii) Cross-border benchmarks. The use of cross-border benchmarks has developed significantly since 2000, mainly with respect to subsidy findings involving Chinese products. Of greatest significance is the fact that cross-border benchmarks have begun to be used outside the narrow context—to test the "adequacy of remuneration" paid for government-provided goods and services—where their use first arose. For example, in CFS Paper from China (2007) and other China countervail investigations, DOC has used external benchmarks to identify and measure the benefit associated with government loans (relying on a "basket" of lending rates from other countries economically similar to China). Cross-border benchmarks have also been used in China countervail investigations to test the adequacy of remuneration paid for new types of government-provided goods and services, most notably the provision of government land.

Program and transaction analysis that have used cross-border benchmarks account for most of the subsidies found to exist in the countervail investigations involving China. In this period, DOC also used the concept of using external prices as the basis for a benchmark to test the adequacy of remuneration in the context of CVD investigations involving softwood lumber from Canada and CFS paper from Indonesia. In both cases, the alleged subsidy at issue was the provision by government of standing timber. While the three-tiered analytical method normally used by DOC to seek benchmarks in the "adequate remuneration" context has held steady, the range of programs and transactions to which DOC has applied the third-tier external benchmark has increased significantly in the post-2000 period.

iii) Pass-through analysis. In December 2004, DOC took action to implement the DSB adopted decision in United States–the Final Countervailing Duty Determination with Respect to Softwood Lumber from Canada (WT/DS257/AB/R as adopted February 17, 2004). The decision had found that the failure by DOC "to conduct a pass-through analysis with respect to arm's-length sales of logs by tenure harvesters/sawmills to unrelated sawmills" was inconsistent with the WTO Agreement on Subsidies and Countervailing Measures. While DOC action, under Section 129 of the URAA, was case-specific, it may have broader effects on benefit analysis in the future. In analysing whether there were any arm's-length transactions involving Crown timber in which the identified stumpage subsidy did not "pass through" to the purchasing sawmills, DOC found that some of the relevant transactions were not at arm's length and required no pass-through analysis. For transactions found to be at arm's length, DOC examined whether benefits passed through to purchasing sawmills, and removed from its aggregate subsidy calculation those benefits found not to have been passed through.

(c) Allocation.

i) Allocation over time. DOC's general practice in this area has remained stable. The test for deciding which subsidies to amortize and which to expense has not changed, and neither have its long-standing approaches to selecting an amortization period (i.e. based on the average useful life of production assets), selecting a discount rate to account for the time value of money, and focusing generally on facts relating to the original bestowal of an amortizable subsidy rather than on facts emerging during the amortization period. However, the above-described change in practice related to changes in ownership (privatization) may have opened the door to a subtle increase in consideration by DOC of post-bestowal events.

As a matter of principle, there is nothing unique about a change in ownership; if such an event can justify revisiting an established benefit stream, then perhaps other events can do so as well. DOC has maintained an adherence to strict *ex ante* subsidy analysis and has been therefore unwilling to trace the "use" of subsidies or the "competitive effects" of subsidies during their amortization period. There is some evidence, however, that certain types of findings may be made with some level of awareness of what transpired after a given subsidy was bestowed (e.g. creditworthiness). It remains to be seen, however, whether this slight evolution will continue and will be acknowledged in some official fashion.

ii) Allocation across products. The general approach here has also remained steady. DOC continues to treat subsidies as presumptively fungible and allocable to all of the recipient's output, but capable, at least in exceptional circumstances, of being "tied" to a particular portion of the recipient's output if it is shown, at the time of bestowal, to be likely to benefit only that portion of the total output. This analysis governs what benefits are included in the numerator of DOC's subsidy calculation, and also what is included in the calculation's sales denominator. Evolution in this area has involved the attribution of subsidies between and among "affiliated" and "cross-owned" companies. DOC's test, which has focused on whether there is effective common control over the decision making of separately established firms, has not changed explicitly, although it has been applied to a growing number of increasingly complex fact patterns. The "Subsidies Valuation Information" section of DOC's subsidy determinations, preceding the program-by-program analysis of countervailability, now commonly features a lengthy discussion of cross-ownership relationships among various corporate entities.

(d) Upstream subsidies. DOC has continued to make some progress in clarifying what has long been a murky area of its CVD practice. This relates to when alleged subsidization of production inputs will be treated like other subsidies in an investigation. Countervail respondents frequently seek to steer the analysis in such instances toward the "upstream" category, where the standards for countervailability are thought to be more exacting.

DOC has generally resisted such pressure, a tendency highlighted in the recent CFS Paper from Indonesia (2007), where DOC stated:

> "There is no indication that the statutory provision for upstream subsidies was intended to be the only provision that addresses subsidies bestowed on input products. The Department squarely addressed this issue in Lined Paper at Comment 2, and in several other determinations .... Section 351.525(b)(6)(iv) of the Department's regulations provides that, if there is cross ownership between an input supplier and the producer of a downstream product and the input product is primarily dedicated to production of downstream product, the subsidy to the input supplier is attributed to sales of both the input and the downstream product. The Department also possesses authority to conduct upstream subsidy investigations pursuant to section 771A of the Act, which the Department has implemented through 19 CFR 351.523. Upstream subsidy investigations examine purchases of inputs from affiliates that are "used in the production of the subject merchandise." See 19 CFR 351.523. Further, the legislative history makes it clear that the intent of Congress in enacting the Trade and Tariff Act of 1984 was to broaden the Department's ability to examine upstream subsides when companies are not cross-owned, not to restrict the Department's abilities to countervail subsidies received by cross-owned companies. See Report of the House Committee on Ways and Means, H.R. Rep. No. 98-725 (1984) at 7, 33 -34."

In the same determination, DOC held that countervailable upstream subsidization can occur more than one stage above the product under investigation, i.e. it can reach back to timber subsidies, rather than just to pulp subsidies, at least in a case involving paper products.

5. Determination of Injury

The developments described above for anti-dumping with respect to injury analysis and determinations apply equally in the countervail context.

6. Reviews and Assessment

Most of the post-2000 developments described above, with respect to reviews and assessment, are specific to anti-dumping. Portions of the developments reported under the headings of "security" and "sunset reviews" apply equally in the countervail context. There have been two additional CVD-specific developments in this category.

(a) Changed circumstances reviews. In January 2007, DOC requested public comment on its handling of changed circumstances reviews in countervail cases to determine the appropriate cash deposit rate in light of a change in a company's name, structure, or ownership. DOC specifically asked for views on the appropriateness of continuing to use the "successor in interest" analysis applied to address similar types of changes in the AD context. This "successor in interest" analysis focuses on continuity of various factors, including management, production facilities, supplier relationships, and customer base, in seeking to determine whether the renamed or restructured "successor" company remains essentially the same as the predecessor company.

DOC noted that "to the extent that this anti-dumping analysis is concerned with the pricing behaviour of the successor company, it might not be entirely relevant in the countervail context where price discrimination is not the analytical focus. Other factors or considerations (e.g. factors that focus on whether subsidies to the predecessor are attributable to the successor, or on increased participation in or eligibility for new subsidy programs as a result of the changed circumstance) might be more relevant." DOC also noted the "broader question of whether a successorship/business entity analysis generally is too narrowly focused when reviewing the changed circumstances of a subsidized company. An examination that focuses largely or solely on changes in the legal or managerial structure or the productive capacity of a company may overlook other important considerations .... For instance, whether the change (e.g. name change or merger) was accompanied or preceded by new subsidies, or had an impact on any existing subsidies to the companies involved, also might be a relevant consideration." Finally, DOC sought comment on a related procedural issue: whether, "if the subsidy levels have been affected by the changed circumstances," it should calculate a new cash deposit rate in the changed circumstances review or self-initiate an administrative review.

(b) Changed circumstances reviews (lumber). In June 2003, DOC published and requested public comment on "Proposed Policies Regarding the Conduct of Changed Circumstance Reviews of the Countervailing Duty Order on Softwood Lumber from Canada." Although technically linked to the countervail proceeding that was under way at the time, it was broadly framed and appeared intended to have general effect.

DOC stated that the proposal's "purpose ... is, consistent with the intent of U.S. law, to provide an incentive for Canadian provinces to move to market-based systems of timber sales that ensure that the provinces receive adequate remuneration for sales of standing timber. The proposed policies are intended to serve as the basis for a long-term, durable solution to the ongoing dispute between the United States and Canada over trade in softwood lumber and encourage the development of an integrated market for forest products consistent with the goals of the North American Free Trade Agreement (NAFTA) and sustainable forestry." DOC also referred to the "goal that firms in Canada are free from government restraints that inhibit their ability to respond to changing conditions in the markets in which they operate and pay market prices for their timber," and stated that "the overriding objective is to create economic conditions under which lumber producers and timber markets throughout North America would face the same competitive pressures. DOC expects that reforms introduced by the Canadian provinces, consistent with the discussion below, will result in a North American market in which lumber producers and timber markets in Canada and the United States operate under similar competitive conditions and that timber valuations would equilibrate, subject to the normal qualifications based on geography, species, and other factors that normally apply in the case of timber markets in either country."

The notice set out substantive criteria for analysing provincial reforms and described procedures for handling changed circumstances review requests. It also contained a "General Statement of Policy" stating that "upon submission of an application by a provincial government that satisfies the criteria for initiation, Commerce will conduct a changed circumstances review ... to determine whether reforms to the province's system of timber sales meet the standards set out in this policy bulletin for a market-based timber sales system that charges adequate remuneration. ... If those standards are met, Commerce will determine that the provincial system does not provide a countervailable subsidy ...."

7. Other Procedural and Practical Issues

In general, the post-2000 developments described above for anti-dumping, with respect to other procedural and practical issues, apply equally in the countervail context. An additional countervail-specific change involves the applicability of the countervail law to Chinese-origin products. From the mid-1980s when the issue first formally arose until 2006, DOC had maintained that meaningful subsidy analysis could not be conducted in the distorted context of an NME. DOC's view that it could not, and was not legally obligated to, entertain countervail complaints involving NME products was upheld by reviewing courts. In 2006, however, DOC accepted for investigation a countervail petition involving CFS paper from China, and informed the public that it was now generally prepared to apply the law to Chinese products, even though China had not yet met the standards for graduation from NME status under U.S. AD law. DOC sought public comment on this policy change in December 2006 and issued its first final affirmative CVD determination involving Chinese products in October 2007. In that determination, it stated that the assessed differences between China's current economy and the Soviet-style economies that had been at the root of the prevailing policy regarding the application of CVD law to NME countries led to DOC's reconsideration.

DOC's decision to begin applying the law to Chinese products has not been fully tested on appeal. The first case ended with a negative injury finding, and an earlier court action seeking to enjoin DOC from conducting the investigation failed. Other cases on Chinese products have followed, however, and court challenges are likely. DOC has not yet addressed whether the analysis that led it to apply the CVD law to Chinese products also extends to products imported from other NMEs such as Vietnam. The practical significance of DOC's decision to entertain such cases on China is that:

- it has accounted for the lion's share of countervail complaints filed since mid-2006; and
- it has led DOC to develop substantially its practice in certain areas, especially cross-border benchmarks, as discussed above.

8. Appellate Review

The post-2000 developments described above, with respect to appellate review, apply equally in the countervail context.

U.S. Global Safeguard Regime

Overview of Key Developments 2000–Present

As it is in most countries, the use of global safeguard cases under Section 201 of the Trade Act of 1974 in the United States is much less frequent than AD and CVD law. Each investigation is sufficiently distinctive from another as to make the identification of trends and regime-wide changes somewhat of a speculative exercise. This is particularly true of the one U.S. safeguard case from the post-2000 period, involving steel products. With that caveat, noteworthy developments are identified in the following areas:

- **Exclusion of FTA imports:** The U.S. regime continued to struggle with the requirement of "parallelism" between what imports are included in serious injury analysis and what imports are actually subjected to resulting safeguard measures.

- **After-the-fact product exclusions:** Procedures, which might reappear in future safeguard cases, were developed for considering and announcing the removal of specific items from the coverage of the safeguard relief initially proclaimed by the President.

- **Actions accompanying termination of import relief:** An apparent pattern, in which the U.S. government takes other measures to help the affected domestic industry ease the impact of terminating import relief, continued during this period.

There have been several ITC reports since 2000 under Section 204 of the Trade Act of 1974,[14] reviewing developments in sectors where safeguard measures had earlier been imposed (lamb meat, wheat gluten, circular welded line pipe, and steel wire rod). Nothing in these reports suggests changes to the U.S. global safeguard regime.

Issues

1. Initiation

Unlike most safeguard cases, which begin with industry petitions, the 2001 steel investigation was initiated pursuant to a request from the Executive Branch. This option has long existed in U.S. law, having recently been used in 1985. The use of this provision had no regime-wide implications. It did, however, strongly suggest that the President would order relief if the ITC made an affirmative serious injury finding, and it may have influenced the atmosphere in which the initial agency-level proceedings took place. It was widely assumed in 2001 that Congress would request a steel safeguard investigation if the Executive Branch did not.

2. Product Coverage

Exclusion of FTA imports. The steel case saw a continuation of the U.S. safeguard regime's effort to deal with the WTO-imposed requirement of "parallelism"—basically a requirement that all imports included in a serious injury analysis be covered by the ensuing safeguard remedy. The United States has been ruled to be inconsistent with this requirement by excluding Canadian and Mexican products from global safeguard measures, as permitted by NAFTA, where such imports do not account for a substantial share of total imports and do not "contribute importantly" to the serious injury found by the ITC.

In steel, the U.S. government tried to address this issue more directly than it had done in past cases. Section 311(a) of the NAFTA Implementation Act requires the ITC, when issuing an affirmative serious injury determination on imports from all sources, to make findings relevant to possible exclusion of NAFTA imports. But the ITC is not required to take the further step of analyzing whether non-NAFTA imports, by themselves, are a substantial cause of serious injury. In steel, the June 2001 Administration letter requesting the investigation noted that if the ITC made affirmative determinations, it might be asked to issue additional findings on whether non-NAFTA imports, by themselves, were a substantial cause of serious injury. The ITC did, in fact, make affirmative serious injury determinations for several of the investigated steel product categories. It also made findings required by Section 311(a), not all of which would exclude imports from Canada and Mexico (i.e. imports from Canada and Mexico in some categories were found to be a substantial share of total imports and to contribute importantly to serious injury). Following the ITC's

14 Monitoring, Modification and Termination of Action.

December 2001 remedy decision, the United States Trade Representative (USTR) did request an ITC analysis of whether non-NAFTA imports, by themselves, were a substantial cause of serious injury for those steel products where the ITC had found that NAFTA imports were not substantial and were not "contributing importantly" to serious injury. The ITC obliged and found that non-NAFTA imports were by themselves a substantial cause of serious injury in these product sectors.

This additional analysis did not prevent an adverse decision on the "parallelism" issue when the steel safeguard measure was challenged at the WTO. On the other hand, at the level of U.S. practice, the predisposition toward excluding NAFTA products from safeguard measures was revealed to be fairly strong in steel. The President, in his March 2002 Proclamation, excluded Canadian and Mexican products from the safeguard measures, despite the likelihood of a WTO challenge. Further, even though the ITC findings would have supported the inclusion of several categories of NAFTA imports, the President expressly overruled the ITC in those cases.

Like product groupings. In steel, the ITC did not follow the like product categories established in prior AD/CVD cases. For example, it treated flat-rolled carbon steel products (including hot-rolled, cold-rolled, and corrosion-resistant) as a single product, even though it had consistently treated them as distinct products in the AD/CVD context. This did not represent a change in the safeguard or the AD/CVD regime, however. There is no clear legal requirement to group products similarly in the different contexts, and indeed the grouping used for flat-rolled carbon steel products largely matched what the ITC had used in prior steel safeguard proceedings in the mid-1980s.

After-the-fact product exclusions. The steel case featured extensive procedures, which may or may not be part of future safeguard proceedings, for considering and announcing the removal of specific items from the coverage of the safeguard relief initially proclaimed by the President. The sheer breadth of the steel case, and the manner in which products were grouped, meant that relief across broad categories would inevitably encompass some specific items that were not domestically available and should not attract remedial tariffs. The President's proclamation excluded numerous specific products, but it also allowed for additional after-the-fact exclusions; importers, foreign producers and industrial users continued to bring forward large numbers of product-specific exclusion requests. A substantial vetting operation had to be established under the auspices of the USTR and DOC, and there were several rounds of announced decisions on individual requests (June 2002, July 2002, August 2002 and July 2003). Procedures for the submission of exclusion requests, and for interested party comment on those requests, were semi-formalized in November 2002. The U.S. government could use similar procedures if analogous circumstances should arise in a future safeguard case.

3. Determination of Serious Injury

The ITC continued to grapple with the requirement, embodied in WTO provisions but not in U.S. law, to identify "unforeseen circumstances" as a predicate for an affirmative "serious injury" findings. The steel case did not represent much of a shift in this regard, except that the ITC, having been previously rebuked on this point by the WTO), made a greater effort to address unforeseen circumstances in its initial serious injury analysis. An adverse WTO decision on this point and numerous others nonetheless followed. Because the President elected to revoke the safeguard measures in March 2003 rather than ask the ITC to issue a new determination addressing the WTO critiques, there is no way to know where further ITC efforts on this point might have led.

4. Remedy Recommendations and Presidential Determination

ITC and subsequent Executive Branch decision making, with respect to the appropriateness and design of remedies in the steel case, did not reflect any significant shift from pre-2000 practice. The remedy recommendations issued by the ITC in December 2001 revealed differences of view among the various commissioners, which is typical, and included the normal/expected remedy elements. The Executive Branch review was intensely political, which is also typical, and involved lobbying by affected private interests and significant inter-agency discussion. The President's decision to alter (mainly by simplifying) the remedy recommendations of the ITC had ample precedent. And the new design he selected and subsequently imposed was within the mainstream of past safeguard practices.

By way of a summary, the safeguard measures covered 10 steel products. The safeguard measures, principally in the form of tariffs and a tariff-rate quotas, were imposed for a period of three years and one day; they applied to imports of subject steel products from all countries except Canada, Israel, Jordan and Mexico, which had entered into free trade agreements with the United States, and most developing countries that were WTO members.

5. Other Procedural and Practical Issues

A mid-term review of the steel safeguard measure occurred in the traditional fashion, with ITC analysis from March-September 2003 followed by an Executive Branch review. As noted above, the President in December 2003 elected to terminate the import relief at its supposed mid-point. In doing so, he opined that it had succeeded and met its objectives ahead of schedule. None of this was unusual. At this point there was an outstanding WTO decision finding the safeguard measure to be WTO-inconsistent and suggesting that the United States might already owe compensation to affected WTO members. Various trading partners were threatening to retaliate immediately rather than giving the United States a reasonable period of time to comply with the WTO findings. The President did not attribute his decision to terminate the relief either to the WTO decision nor to these retaliation threats.

Of greater note, even though it arguably continued a pattern within the U.S. safeguard regime rather than initiating one, was the decision to include measures designed to assist the affected domestic industry with the removal of import relief. In steel, the actions included assumption by the Pension Benefit Guarantee Corporation of pension liabilities that had negatively affected the competitiveness of numerous domestic steel companies.

In addition, the Administration announced an open-ended commitment to import licensing for steel.

6. Appellate Review

Appellate review remains generally unavailable with respect to discretionary Presidential action and most aspects of the ITC's participation in global safeguard cases. The steel proceeding did, however, give rise to an appeal, in which the complaint was held to be justifiable, but only on some narrow procedural questions relating to the manner in which the ITC votes on particular steel products were counted.

U.S. Anti-dumping Duty Investigations Regarding Imports From Canada – Case Histories

Iron Construction Castings from Canada

Background

On May 13, 1985 the ITC and DOC received a petition filed by the Municipal Castings Fair Trade Council, a U.S. trade association representing 15 producers of iron construction castings. The petition alleged that dumped imports of iron construction castings from Brazil, Canada, India and the People's Republic of China were injuring the U.S. industry. The investigation was initiated on June 7, 1985.

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 iron construction castings from all four countries, including Canada. On October 28, 1985, DOC issued a preliminary affirmative determination of dumping against the four countries. On January 16, 1986, DOC issued its final affirmative determination of dumping. This was followed by the February 16, 1986 issuance of the affirmative final injury determination of the ITC. The ITC found that U.S. industry was materially injured and threatened with material injury by reason of dumped imports of light and heavy iron construction castings. On March 5, 1986, DOC published its AD duty order. AD duty margins on imports from Canada were assessed as follows:

Producer/Exporter	Dumping Margins
Mueller Canada	9.8%
LaPerle Foundry Inc.	3.9%
Bibby-Ste-Croix Foundries	8.6%
All others	7.0%

On September 25, 1986, DOC amended the margin for LaPerle to 4.4 percent due to clerical errors made in the final determination. As a result, the "all others" rate was amended to 7.5 percent.

Administrative Reviews/Changed Circumstances Reviews

DOC conducted administrative reviews for the periods of 1985-1987, 1987-1988, 1991-1992, 1992-1993, 1997-1998, 1999-2000, 2000-2001, and various rate changes were made. The most recent rate was for 2000-2001 and was assessed to a comparatively new exporter, Canada Pipe Company Ltd. On June 8, 1994, Canadian producers formally requested that DOC review its AD duty order in light of changed circumstances. The Canadian petitioners maintained that a large share of the market was closed to foreign producers because of the extension of the "Buy America" provisions. Since U.S. producers were shielded from import competition through Buy America, the Canadian petitioners argued that the AD duty orders directed against Canada and possibly other countries should be revoked. On August 25, 1994, the respondents' request was denied because DOC concluded that there was a lack of evidence of changed circumstances having a significant impact on the market.

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

Sunset Reviews

On November 2, 1998, a five-year sunset review of the order was initiated. On June 7, 1999, DOC made a final determination that revocation of the AD duty order would likely 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 DOC and the fact that respondent parties had waived their right to participate in the review. DOC determined that the margins calculated in its original investigation (4.40 percent to 9.80 percent) were probative of the behaviour of Canadian producers and exporters of certain iron construction castings absent the order. On October 20, 1999, the ITC made an affirmative determination that revocation of the order would likely 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.

A second sunset review was initiated on October 1, 2004. On May 2, 2005, after an affirmative DOC finding, the ITC determined that the revocation of AD duty order on heavy iron castings from Canada would likely lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. Therefore, the AD duty order on heavy iron castings from Canada would be continued for a second time.

Brass Sheet and Strip from Canada

Background

On March 10, 1986, the ITC and DOC 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,[15] 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 injury determination, finding that there was a reasonable indication that an industry in the United States was materially injured by reason of allegedly dumped and subsidized imports of brass sheet and strip.

On August 22, 1986, DOC issued a preliminary affirmative determination, followed by a December 9, 1986 final affirmative determination of dumping. On December 31, 1986, the ITC made an affirmative final determination of injury regarding the latter, 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. In a second determination, on February 26, 1987, the ITC made affirmative determinations regarding imports from the other four countries of France, Italy, Sweden and West Germany. The AD duty order regarding Canada was issued on January 12, 1987, with the following margins being assessed:

Producer/Exporter	Dumping Margins
Arrowhead	2.51%
Noranda	11.54%
All others	8.10%

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 percent, a *de minimis* rate. Because Ratcliffs, the successor company to Arrowhead, had sold mer-

15 Brazil, Canada, France, Italy, People's Republic of China, South Korea, West Germany.

chandise covered by the order at not less than foreign market value for a period of three consecutive years and there was nothing to suggest that the company was likely to sell at dumped prices in the future, the AD duty order was therefore revoked with respect to Ratcliffs Noranda. Wolverine Tube, Noranda's successor company, continued participating in 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* (0.42 percent). As a result, DOC made a preliminary determination to revoke the order as it applied to Wolverine, based on three consecutive years of no dumping. However, in its final determination for the 1996 review, which was released on June 17, 1998, DOC determined that a dumping margin of 0.67 percent existed for Wolverine for 1996, and therefore determined not to revoke the AD duty order as it applied to Wolverine. However, DOC did acknowledge 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, DOC would not amend its request revocation determination and the order remained in place.

Anti-Circumvention Inquiry

On June 18, 1993, DOC determined that a Canadian brass producer and a U.S. brass importer were circumventing the AD 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. DOC 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.

NAFTA Chapter 19 Panel Review

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

Sunset Reviews

On June 7, 1999, DOC made a final determination that revocation of the AD duty order would likely lead to the continuation or recurrence of dumping. This determination was based on a finding of dumping margins above *de minimis* in each of the four administrative reviews conducted by DOC, the existence of continuing deposit rates above *de minimis* for all respondents, and the fact that respondent parties waived their right to participate in the review. On October 29, 1999, the ITC made an affirmative determination that revocation of the order would likely 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. The ITC found that while 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, they, along with imports from Brazil and China, had fallen over the life of the order, likely 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 were revoked.

On March 20, 2006, after its second sunset review, the ITC determined that revocation of the AD duty order on brass sheet strip from Canada would not likely lead to the continuation or recurrence of material injury to an industry in the U.S. in the near future. The order was revoked retroactively, effective March 1, 2005.

Certain Flat-rolled Carbon Steel Products from Canada

Background

On June 30, 1992, the ITC and DOC received a petition filed on behalf of a number of U.S. steel producers.[16] The petition alleged that the dumping and subsidization of imports of four specific flat-rolled steel products[17] from 20 countries,[18] 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, DOC made an affirmative preliminary dumping determination, which it subsequently amended on March 18, 1993. Five Canadian companies,[19] representing at least 60 percent of the subject merchandise exported from Canada during the period of investigation,[20] were individually investigated and assessed individual

16 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.

17 Carbon steel plate, hot-rolled carbon steel, cold-rolled carbon steel, and corrosion-resistant carbon steel (together known as carbon steel flat products).

18 Argentina, Australia, Austria, Belgium, Brazil, Canada Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan and the United Kingdom.

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

20 August 1991 to July 1992.

preliminary AD duty margins. On June 21, 1993, after several postponements, DOC made its final affirmative dumping determinations. In its final determination regarding Canada, DOC collapsed Stelco with its related party, Continuous Colour Coat (CCC), and collapsed Dofasco with a related party, Sorevco. Further, because of the inadequacy of questionnaire responses, best information available (BIA) 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, some of Sidbec-Dosco's hot-rolled, cold-rolled and corrosion-resistant steel sales, and some of IPSCO's hot-rolled steel sales. Following allegations by petitioners, cost-of-production investigations were conducted with respect to all of the companies.

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 negative findings with respect to imports of hot-rolled and cold-rolled steel from Canada. Average AD margins of 61.95 percent and 22.29 percent were imposed on imports of plate and corrosion-resistant steel respectively. Stelco (plate and corrosion-resistant), Dofasco (corrosion-resistant) and IPSCO (plate) were assessed specific margins.

Administrative Reviews

Since the AD duty orders went into effect in August 1993, DOC conducted nine administrative reviews, covering periods ranging from 1994-1995 to 2004-2005. In total, nine specific companies were assigned AD duty rates, with at least three seeing their rates revised on at least three occasions for both plate and corrosion resistant steel. The order on plate was revoked effective January, 2000.

Changed Circumstances Reviews

On November 3, 1995, Sidbec-Dosco and Canberra Industries requested that DOC conduct a changed circumstances 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 DOC that they did not object to the changed circumstances review. Accordingly, on February 28, 1996, DOC revoked the order in part. Pursuant to a subsequent request by a U.S. producer, DOC also revoked the order with respect to Canadian imports of other types and sizes of certain steel plate (Free of cobalt-60 and other radioactive nuclides) on March 29, 1999.

Scope and Anti-Circumvention Inquiries

On March 14, 1997, DOC 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 percent by weight) fell within the scope of the order on certain cut-to-length carbon steel plate from Canada. On January 16, 1998, DOC 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 percent boron), and because the petition equated the term "carbon steel" with the HTS term "non-alloy steel," grader blade and draft key steel containing at least 0.0008 percent boron by weight fell outside the scope of the order.

This decision lead to a January 30, 1998 request by Kentucky Steel that DOC 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 percent by weight), and falling within the physical dimensions outlined in the scope of the order—were circumventing the AD duty order on certain cut-to-length carbon steel plate from Canada. According to Kentucky Steel, the inclusion of 0.0016 percent boron by weight in high-carbon grader blade and draft key steel constituted a minor alteration. On May 20, 1998, DOC initiated a formal anti-circumvention inquiry. On January 24, 2001, DOC made a final determination that certain blade and draft key steel was circumventing the AD duty order and was therefore included within the scope of the order.

Sunset Review I

On September 1, 1999, DOC and the ITC initiated sunset reviews of the countervailing and AD duty orders on plate and corrosion-resistant steel from a number of countries, including Canada, as part of a grouped review of the 1993 orders on four flat-rolled steel products.

On July 27, 2000, DOC determined that revocation of the AD duty order on imports of plate and corrosion-resistant steel from Canada would likely lead to a continuation or recurrence of dumping. DOC determined that while respondents' AD duty margins had fallen significantly since the imposition of margins in the original investigation, it still reported the AD duty margins of the original investigations to the ITC, due mainly to the fact that imports had decreased dramatically immediately after the issuance of the order in 1993 and stayed at lower levels in subsequent years. DOC concluded, therefore, that the original margins reflected the behaviour of the respondents absent the discipline of the order. Furthermore, on corrosion-resistant steel, DOC 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 DOC policy to adjust margins in sunset reviews to reflect duty absorption findings, DOC reported the original rates as those likely to prevail if the order were revoked.

The ITC found that the domestic industry was in a weakened state. It concluded that the price and volume declines that this industry would likely experience would have a significant adverse impact on its production, shipment, sales and revenue levels. This would affect the industry's profitability, ability to raise capital and ability to maintain the necessary level of capital investments, and would likely result in commensurate employment declines. On this basis, the ITC concluded that the revocation of the AD and CVD orders concerning corrosion-resistant steel, including the order relating to Canada,[21] would likely have a significant adverse impact on the domestic industry within a reasonably foreseeable time. On December 1, 2000, the orders were therefore continued.

However, on the same date the ITC determined that while revocation of the AD and CVD orders on carbon steel plate from a number of countries[22] was likely to cause injury to an industry in the United States within a reasonably foreseeable time, it did not find that revocation of the order on imports from Canada would cause injury. That order as it pertained to Canada was revoked retroactively, as of January 1, 2000.

Sunset Review II

On December 14, 2006, the ITC announced that it had determined that revocation of the AD duty order on imports of corrosion-resistant steel from Australia, Canada, France and Japan, as well as the CVD order on imports of the same product from France, would not likely lead to a continuation or recurrence of injury to domestic industry. Accordingly, the orders were revoked as of December 15, 2005.

The ITC found that there had been substantial changes in the U.S. market and industry since the orders went into place in 1993, particularly since 2000, when the orders had been continued for another five years. The industry experienced several bankruptcies, shed significant pension obligations, and underwent consolidation and rationalization, a process that was facilitated in part by the imposition of a global safeguard between March 2002 and December 2003. In addition, domestic producers renegotiated labour contracts, reduced fixed costs, and increased productivity. Further, the ITC found that apparent domestic consumption had grown, was robust in 2006 and expected to maintain its growth in the foreseeable future. Demand for the product was growing globally, particularly in China, other industrialized countries in Asia, Latin America and Eastern Europe.

The ITC declined to cumulate imports from Canada with imports with the other countries subject to orders, finding that auto producers and auto part suppliers, including corrosion-resistant producers, treat Canada and the U.S. as "a unified market for production and sourcing decisions,"[23] concluding that the Canadian industry was unique relative to other steel producers.

21 Australia, Canada, France (AD/CVD), Germany (AD/CVD), Japan, Korea (AD/CVD).

22 Belgium (AD/CVD), Brazil (AD/CVD), Finland, Germany (AD/CVD), Mexico (AD/CVD), Poland, Romania, Spain (AD/CVD), Sweden (AD/CVD), United Kingdom (AD/CVD).

23 ITC Investigation Ns. AA1921-197, page 8.

FTA/NAFTA Chapter 19 Panel Reviews

Identification:	USA-93-1904-03
Determination:	Dumping determination (corrosion-resistant)
Appellant:	Canadian producers
Result:	Duties amended

Identification:	USA-93-1904-04
Determination:	Dumping determination (plate)
Appellant:	Canadian producers
Result:	Duties amended

Identification:	USA-93-1904-05
Determination:	Injury determination (corrosion-resistant)
Appellant:	Canadian producers
Result:	Affirmed

Identification:	USA-97-1904-03
Determination:	Administrative review (corrosion-resistant)
Appellant:	Canadian producers
Result:	Affirmed

Identification:	USA-CDA-98-1904-01
Determination:	Administrative review (corrosion-resistant)
Appellant:	Canadian producers
Result:	Affirmed

Identification:	USA-CDA-99-1904-01
Determination:	Administrative review (corrosion-resistant)
Appellant:	Canadian producers
Result:	Terminated

Identification:	USA-CDA-2000-1904-01
Determination:	Administrative review (plate)
Appellant:	Canadian producers
Result:	Terminated

Identification:	USA-CDA-2000-1904-02
Determination:	Administrative review (corrosion-resistant)
Appellant:	Canadian producers
Result:	Terminated

Identification:	USA-CDA-2000-1904-08
Determination:	Sunset review (corrosion-resistant)
Appellant:	Canadian producers
Result:	Terminated

Identification:	USA-CDA-2001-1904-01
Determination:	Circumvention determination (plate)
Appellant:	Canadian producers
Result:	Terminated

Identification:	USA-CDA-2000-1904-11
Determination:	Sunset review (corrosion-resistant)
Appellant:	Canadian producers
Result:	Affirmed

Stainless Steel Plate from Canada

Background

On March 31, 1998, the ITC and DOC 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 dumped and subsidized imports of stainless steel plate from Belgium, Canada (dumping only), Italy, Korea, South Africa (dumping only) and Taiwan (dumping only). An investigation was initiated on April 20, 1998.

On June 4, 1998, the ITC issued a preliminary affirmative determination, finding a reasonable indication that an industry producing cold and hot-rolled stainless steel plate in the United States was materially injured by reason of imports of stainless steel plate in coils from Belgium, Canada, Italy, Korea, South Africa and Taiwan. On November 4, 1998, DOC issued a preliminary determination of dumping regarding imports from the named countries. On March 31, 1999, DOC issued its final determination of dumping, in which it assessed the following margins (based entirely on "facts available" since the Canadian producer/exporter declined 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 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. An AD duty order on imports from Canada was thereby confirmed.

Sunset Review

On June 7, 2005, the ITC issued its determination that revoking the AD duty order on stainless steel plate from Canada would not likely lead to the continuation or recurrence of material injury. Accordingly, the order on Canada was revoked.

Live Processed Blue Mussels from Canada

Background

On March 12, 2001, the ITC and DOC received a petition from Great Eastern Mussel Farms Inc. alleging that dumped imports of live processed blue mussels from Canada were causing material injury to the domestic industry in the United States. DOC initiated the investigation on April 6, 2001.

Investigation

On April 25, 2001, the ITC issued its preliminary injury determination. The ITC preliminarily determined that there was a reasonable indication that an industry in the U.S. was materially injured or threatened with material injury by reason of imports of live processed blue mussels from Canada.

On October 18, 2001, DOC released its preliminary AD determination on live processed blue mussels from Canada. It had issued questionnaires to four Canadian mussel exporters: Atlantic Aqua Farms Inc., Confederation Cove Mussel Co. Ltd., PEI Mussel King Inc., and Prince Edward Aqua Farms Inc., and set the following preliminary AD duty margins:

Manufacturer/Exporter	Anti-Dumping Margins
Atlantic Aqua Farms Inc.	0.00%
Confederation Cove Mussel Co. Inc.	4.70%
Prince Edward Aqua Farms Inc.	3.48%
PEI Mussel King Inc.	0.00%
All others	4.33%

Before any other determination was made, however DOC terminated the investigation on withdrawal of the petition by the petitioner. The investigation was terminated on January 30, 2002.

Greenhouse Tomatoes from Canada

Background

On March 28, 2001, Carolina Hydroponic Growers Inc., Eurofresh, HydroAge, Sunblest Management LLC, Sunblest Farms LLC, and Village Farms filed a petition with the ITC and DOC alleging that dumped imports of greenhouse tomatoes from Canada were materially injuring and threatening material injury to the U.S. industry. On April 17, 2001, DOC initiated an AD investigation. The scope of the investigation specifically excluded all field-grown tomatoes.

Investigation

On May 11, 2001, the ITC released its preliminary injury determination on greenhouse tomatoes from Canada. In its determination, the ITC found that the relevant domestic industry included only greenhouse tomatoes, although it did say that it intended to re-examine this issue in the final phase of the investigation. The ITC preliminarily determined that there was a reasonable indication that an industry in the U.S. was materially injured by reason of imports of greenhouse tomatoes from Canada.

On October 5, 2001, DOC made a preliminary determination that greenhouse tomatoes from Canada were being, or were likely to be, sold in the U.S. at less than fair value. Since it was not possible to examine all known producers and exporters of Canadian greenhouse tomatoes, DOC selected the five largest producers for purposes of the investigation: BC Hot House Foods, Inc., Red Zoo Marketing (a.k.a. Produce Distributors, Inc.), Veg Gro Sales Inc. (a.k.a. K&M Produce Distributors, Inc.), J-D Marketing Inc., and Mastronardi Produce Ltd. The investigation included cost of production data due to the prevalence of reselling. Preliminary AD duty margins were determined as follows:

Exporter/Grower	Preliminary Anti-Dumping Margins
BC Hot House Foods Inc.	33.95 % (amended)
Red Zoo Marketing	12.17%
Veg Gro Sales Inc.	02.45%
J-D Marketing Inc.	00.00%
Mastronardi Produce Ltd.	05.54%
All others	24.04 % (amended)

On February 26, 2002, DOC published its final determination of sales at less than fair value. After further investigation and the acceptance of revised U.S. sales lists from BC Hot House Foods Inc., Red Zoo Marketing, Veg Gro Sales Inc., Mastronardi Produce Ltd. and J-D Marketing Inc., DOC set final rates as follows:

Exporter/Grower	**Final Anti-Dumping Margins**
B.S. Hot House Foods Inc.	18.21%
Red Zoo Marketing	01.86 %
Veg Gro Sales Inc.	03.85%
J-D Marketing Inc.	01.53%
Mastronardi Produce Ltd.	14.89%
All others	16.22%

On April 2, 2002, DOC released an amended determination of sales at less than fair value for greenhouse tomatoes from Canada. Three of the respondents to the DOC questionnaires made allegations that ministerial errors were evident in the final determination. In order to correct the ministerial errors made in the final AD determination, DOC recalculated the weighted-average margin percentages as indicated below.

Exporter/Grower	**Final Margins**	**Amended Margin**
BC Hot House Foods Inc.	18.21%	18.04%
J-D Marketing Inc.	01.53%	00.83%
Mastronardi Produce Ltd.	14.89%	00.52%
Red Zoo Marketing	01.86%	01.85%
All others	16.22%	16.53%

In April 2002, the ITC released its final injury determination on greenhouse tomatoes from Canada. Its investigation showed that the domestic industry accounted for a majority of shipments during the period examined. The share of foreign producers' shipments into the U.S. had decreased from 1998 to 2001. At the time, the record also indicated that there was no substantial increase in Canadian imports, nor was there likely to be in the imminent future. There was also no indication of substantial increases in production capacity among Canadian producers.

The ITC found no evidence that tomatoes from Canada were likely to enter the U.S. at prices likely to have a significant depressing or suppressing effect on domestic prices. It found that imports from Canada were priced higher than the majority of field tomatoes, and, in comparison, oversold domestic greenhouse tomatoes in 1999-2001. Evidence on the record also showed no indication of the possibility of a price decline among subject imports. Furthermore, given the lack of likely volume price effects of imports and the present condition of the domestic industry, the ITC found that material injury by reason of subject imports of greenhouse tomatoes from Canada was not imminent. The ITC made a negative final injury determination, and the investigation was terminated.

On November 9, 2001, Revenue Canada initiated an AD duty investigation on imports of tomatoes from the United States. That investigation was terminated without the application of AD duties when the Canadian International Trade Tribunal (CITT) made a negative final injury determination on June 26, 2002, after the Canadian domestic industry decided not to pursue the case.[24]

Kosher Chicken from Canada

Background

On December 1, 2003, the ITC and DOC received a petition from Empire Kosher Poultry Inc. alleging that dumped imports of kosher chicken from Canada were injuring the U.S. industry. On December 22, 2003, DOC initiated an AD investigation. It was determined that the scope of investigation would include ready-to-cook chicken, whether fresh, chilled or frozen and whether whole or cut up in pieces, that has been certified as Kosher or Glatt Kosher. Kosher or Glatt Kosher chicken wings and offal were excluded from the scope of the investigation.

Investigation

On January 14, 2004, the ITC issued its preliminary injury determination. It found that several factors caused the under-performance of the domestic industry. During 2000, it was found that several economic indicators were already unfavourable, prior to the increase in imports from Canada. At the beginning of the examination period, the U.S. industry had considerable excess capacity. Therefore, the ITC found no evidence of an adverse impact on the domestic industry's growth or ability to raise capital. Empire Kosher Poultry Inc., at the time, had been purchased by new owners who reportedly intended to invest substantial new capital into the business. In light of the competition between subject imports and the domestic product and the predominance of the U.S. product in the market, the ITC found that subject imports had not been significantly undersold or suppressed, nor had domestic prices been depressed. It also found that there was no correlation between subject import trends and any declines in the condition of the industry, and no reasonable indication that subject imports were having a material adverse impact on the domestic industry. Therefore, ITC made a negative preliminary injury determination and the investigation was terminated.

24 On June 19, 2002, the domestic industry sent a letter to the CITT stating that it did not wish to advance its case at the scheduled hearing and requested that the CITT cancel the hearing and terminate the proceedings. The CITT agreed to cancel the hearing, but proceeded to conclude the inquiry on the basis of the written record.

Liquid Sulfur Dioxide from Canada

Background

On September 30, 2005, a petition was filed by Calabrian Corp. with the ITC and DOC alleging that the domestic industry was being injured by imports of dumped liquid sulfur dioxide from Canada. Because it was not clear to DOC whether the petition had the required level of industry support, initiation was postponed so that DOC could make that determination. The investigation was initiated on November 17, 2005.

Investigation

On December 1, 2005, the ITC issued a negative preliminary injury determination. It determined that there was no reasonable indication that an industry in the U.S. was materially injured or threatened with material injury, or that the establishment of an industry in the U.S. was materially retarded, by reason of imports of liquid sulfur dioxide from Canada. The ITC found that the domestic industry was not vulnerable due to several factors. In interim 2005, the domestic industry operated at a significant profit. Further, the total production of liquid sulfur dioxide from Canada declined from 2002 to 2004. Canadian production was lower in interim 2005 than in interim 2004. It was also projected to be lower in the full year 2005 than in 2004, and lower still in 2006. Therefore, the data in the investigation on Canadian production capacity, and exports to the U.S., indicated a very low probability of substantially increased imports of the subject merchandise into the U.S. It was also found that subject imports would likely not enter the U.S. market at prices that were likely to have a significant depressing or suppressing effect on domestic prices or that were likely to increase demand for further imports.

U.S. Countervailing Duty Investigations Regarding Imports From Canada – Case Histories

Steel Rails from Canada

Background

On September 26, 1988, the ITC and DOC received a petition filed by Bethlehem Steel Corp., alleging that dumped and subsidized imports of new steel rails were injuring U.S. industry. On October 21, 1988, investigations were initiated.

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 and subsidized imports of new steel rails from Canada. On March 13, 1989, DOC issued preliminary affirmative determinations, while on August 3, 1989, it made final affirmative determinations in which a countervailing duty of 95 percent was applied to exports by Sydney Steel Corporation (Sysco) and an AD duty of 38.79 percent was applied to Algoma Steel and all other exporters. On September 8, 1989, the ITC issued a final affirmative determination of threat of material injury. Because the ITC found that U.S. industry was threatened with material injury, all provisional AD and CVD collected subsequent to the determination of preliminary dumping were refunded.

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 AD order as it applies to a specific variety of new steel rail (100 pounds per yard [100 ARA-A]). The other review was terminated after a scope clarification was issued.

FTA Chapter 19 Panel Review (Dumping)

Both Algoma Steel Corp. and Sydney Steel Corp. filed a request for an FTA Panel Review of the final affirmative determination of dumping. On August 30, 1990, the Panel affirmed DOC's final dumping determination.

FTA Chapter 19 Panel Review (Subsidy)

Sydney Steel Corp. filed a request for a review of the DOC's final affirmative determination of subsidy. Further to Panel remand, DOC adjusted the CVD rate downward slightly.

FTA Panel Review (Injury)

A request for a review of the ITC final affirmative determination of injury was filed by Sydney Steel Corp. On August 13, 1990, the Panel affirmed the ITC's final affirmative threat of injury determination, including most particularly the cumulation of dumped and subsidized imports.

Sunset Reviews

On January 24, 2000, the ITC determined, on the basis of the record developed in the subject five-year reviews, that the revocation of the countervailing duty and AD duty orders on steel rails from Canada would likely lead to continuation or recurrence of material injury to an industry in the U.S. within foreseeable time.

On April 11, 2005, in the context of the second sunset review, DOC published notice that it was revoking the orders effective February 9, 2005 as no domestic interested party responded to the sunset review notice of initiation by the deadline.

Pure Magnesium and Alloy Magnesium from Canada

Background

On September 5, 1991, the Magnesium Corporation of America filed a petition with the ITC and DOC alleging the injurious dumping and subsidization of imports of magnesium from Canada, as well as injurious dumping from Norway. On September 25, 1991 AD and CVD investigations were initiated regarding imports from Canada. DOC did not initiate an investigation with respect to the dumping of magnesium from Norway, finding that there was insufficient evidence on which to proceed.

On October 30, 1991, the ITC made a preliminary injury determination, finding a reasonable indication that an industry in the U.S. was materially injured by reason of allegedly subsidized and dumped imports of Canadian magnesium. On December 6, 1991 and February 20, 1992, DOC made affirmative preliminary determinations of subsidy and dumping respectively. On July 13, 1992, it made final subsidy and dumping determinations regarding imports of pure and alloy magnesium from Norsk Hydro Canada (the other Canadian producer/exporter under investigation, Timminco Ltd., was excluded). The portion of the dumping investigation related to alloy magnesium was terminated due to insufficient evidence. On August 26, 1992, the ITC issued an final injury determination with respect to pure (dumping only) and alloy magnesium from Canada.

On September 10, 1992, DOC initiated a changed circumstances review following an amendment in the electricity contract between Norsk Hydro and Hydro-Québec. DOC found that as a result of the amended contract, a subsidy was no longer conferred on Norsk Hydro through its purchase of electricity from Hydro-Québec. As a result, the CVD rate on Norsk Hydro was revised from 21.61 percent to 7.61 percent. The AD duty applied to Norsk Hydro was 31.33 percent.

Administrative Reviews

Since the AD and CVD orders went into effect on imports of pure and alloy magnesium from Canada, DOC has conducted a number of administrative reviews. With respect to the CVD order, DOC conducted 13 administrative reviews, starting with the period December 6, 1991 to December 31, 1992 and concluding with the period January 1, 2005 to August 15, 2005, after which time the CVD order was revoked. Over the 13 reviews, DOC considered only two programs, both of which were maintained by the Province of Quebec. Based on the amortization rates, the subsidy rate for Exemption from Water Bills fell from 1.31 percent to zero by 1998. Article 7 Grants from Quebec Industrial Development Corporation declined from 8.55 percent to zero by 2005. Norsk Hydro was the main exporter over these years, although Magnola, a newcomer in magnesium production, was assessed a CVD rate in 2002 and 2003 due to its benefiting from Quebec's Emploi-QU Manpower Training Program.

Ten administrative reviews of the AD duty order on pure magnesium from Canada were conducted. During the first two administrative reviews, which covered the period 1992-1994, no U.S. sales were reported and therefore DOC determined that there was no basis on which to reassess AD duties and the AD duty rate. Margins for the next five administrative reviews (1994-1999) were found to be in the *de minimis* range. Over this period, Norsk Hydro requested, based on three consecutive periods of no dumping, that the order be revoked with respect to its exports. On March 16, 1999, in its final determination in the administrative review covering August 1, 1997 to July 31, 1998, DOC concluded that Norsk Hydro did not qualify for revocation, since it had not exported pure magnesium in commercial quantities in any of the three administrative review periods it had cited in its request. In fact, it had made only one sale in one of the years and two sales in each of the two other years. In short, DOC concluded that the low level of exports did not provide a basis for determining that the discipline of an AD duty order was no longer necessary to offset any dumping.

For each of the next three administrative reviews, DOC determined that either Norsk Hydro was not dumping or was dumping at a *de minimis* level. The last final determination in any administrative review regarding pure magnesium from Canada was issued August 5, 2004 when DOC released the results of its review of the period August 1, 2002 to July 31, 2003. On February 2, 2005, DOC rescinded its review for the period August 1, 2003 to July 31, 2004 after it had revoked the order on December 7, 2004, effective August 1, 2000, following a NAFTA Panel review of DOC's sunset review.

Sunset Reviews

On August 2, 1999, DOC and the ITC initiated a sunset review of the AD and CVD orders on pure and alloy magnesium from Canada. On July 5, 2000, DOC made a final determination that revocation of the countervailing and AD duty orders would likely lead to the continuation or recurrence of subsidization and dumping. With respect to dumping, DOC determined that while Norsk Hydro had eliminated dumping over a period of the first four administrative reviews, it also noted that imports of pure magnesium had declined by 97 percent in the first year of the order, and thereafter had never reached more than 10 percent of pre-order levels. Therefore, the existence of a zero dumping margin did not require DOC to find that this would be indicative of the company's behaviour without the order.

With respect to subsidies, DOC reported rates of 1.84 percent for Norsk Hydro, the rate found in the most recent administrative review, and the original 7.34 percent for all other exporters (except for the excluded Tomminco Ltd.). DOC found that since the Quebec Industrial Development Corporation (SDI) grant program continued and an allocated benefit stream would continue past the end of the sunset review period, it was appropriate to report the most recent rates.

Regarding injury, 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. On pure magnesium, the ITC found that revocation of the orders would likely 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 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 market entry of Canadian firm Magnola, which at full capacity would be the largest North American producer.

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 (which had plans 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 of these factors supported the view that imports would increase significantly without this 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.

On alloy magnesium, the ITC found that the flexibility of Canadian producers—which enabled 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 should the order be revoked.

Based on this analysis, the ITC made an affirmative determination and the order was continued. The order was subsequently revoked December 7, 2004, following a Chapter 19 Panel review.

FTA/NAFTA Chapter 19 Panel Reviews

Identification: USA-92-1904-03
Determination Under Review: Countervailing duties
Appellant: Norsk Hydro/Province of Quebec
Result: Determination affirmed

Identification: USA-92-1904-04
Determination Under Review: Anti-dumping duties
Appellant: Norsk Hydro
Result: Determination affirmed

Identification: USA-92-1904-05
Determination Under Review: Injury
Appellant: Norsk Hydro/Province of Quebec
Result: Determination affirmed

Identification: USA-97-1904-04
Determination Under Review: Countervailing duties (Administrative review)
Appellant: Norsk Hydro/Province of Quebec
Result: Terminated

Identification: USA-2000-1904-06
Determination Under Review: Anti-dumping duties (Sunset review)
Appellant: Province of Quebec
Result: Duties revoked (August 16, 2005)

Identification: USA-2000-1904-07
Determination Under Review: Countervailing duties (Sunset review)
Appellant: Province of Quebec
Result: Affirmed

Identification: USA-2000-1904-09
Determination Under Review: Injury (Sunset review)
Appellant: Norsk Hydro/Magnola/Province of Quebec
Result: Affirmed

Identification: USA-2003-1904-02
Determination Under Review: New Shipper review (DOC)
Appellant: Magnola/Province of Quebec
Result: Affirmed

Identification: USA-2004-1904-01
Determination Under Review: Countervailing duties (Administrative review)
Appellant: Norsk Hydro/Magnola/Province of Quebec
Result: Terminated

Softwood Lumber from Canada – Softwood IV

Section I: Investigations and Reviews

Background

Since the early 1980s, U.S. softwood lumber producers have sought trade remedy action regarding imports of softwood lumber from Canada. The principal U.S. allegation has been that the forest-management practices of certain Canadian provinces constitute countervailable subsidies, and that imports of allegedly subsidized lumber from Canada were causing or threatening to cause material injury to the U.S. industry. In addition to three CVD investigations, Canada and the United States concluded two separate agreements related to the softwood lumber trade in the 1982-1996 period.

In October 1982, the U.S. industry filed a petition for an investigation of Canadian softwood lumber imports under U.S. CVD law, alleging that certain forest-management practices in Canada were providing countervailable subsidies to Canadian producers and exporters. The allegations were made regarding stumpage programs in British Columbia, Alberta, Ontario and Quebec. After an investigation, DOC concluded that stumpage programs were not specific to the softwood lumber industry and therefore did not confer a countervailable subsidy to Canadian firms. As a result, countervailing duties were not applied.

In May 1986, DOC initiated a second CVD investigation on imports of softwood lumber from Canada. As in Softwood I, the main programs under investigation were the stumpage systems maintained by four provinces: Alberta, British Columbia, Ontario and Quebec. For this investigation, however, 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 DOC's interpretation of both its specificity and preferentiality tests since Softwood I. In its preliminary determination of October 22, 1986, DOC found that the governments exercised considerable discretion in allocating stumpage rights. A preliminary CVD rate of 15.0 percent was calculated. 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 percent charge on lumber exports. However, the charge could be reduced or eliminated for provinces initiating replacement measures (i.e. increasing stumpage). Producers in the Maritime provinces were exempt. On December 30, 1986, the petition was withdrawn and the investigation terminated effective January 5, 1987.

In September 1991, Canada announced its intention to terminate the Canada-U.S. MOU on Softwood Lumber, effective October 4, 1991. On October 4, 1991, the USTR initiated a "Section 301" investigation of Canadian softwood lumber exports. The USTR determined to withhold or extend suspension of liquidation of entries of Canadian softwood lumber until DOC had completed its CVD investigation. To that end, Canadian softwood lumber was made subject to duties of up to 15 percent, depending on the province of origin. The imposition of such duties was made contingent upon an affirmative final subsidy and injury determination in the CVD investigation, and was applied to entries filed on or after October 4, 1991.

On October 31,1991, DOC self-initiated a CVD investigation. DOC 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. In December 1991, Canadian log export restrictions were included in the investigation as an alleged countervailable subsidy. On May 28, 1992, DOC published its final determination. A final subsidy rate of 6.51 percent, composed of a 2.91 percent rate for stumpage and a 3.60 percent rate for log export restrictions, was applied to lumber from all provinces except the Maritime provinces, which had been exempted from the investigation. On July 15, 1992, the ITC made an affirmative final injury determination, thereby confirming the CVD order.

On May 25, 1992, the governments of Canada, Alberta, British Columbia, Manitoba, Ontario, Saskatchewan, Quebec, the Northwest Territories and the Yukon, and the Canadian Forest Industries Council and affiliated companies requested a Panel review under Chapter 19 of the Canada-United States Free Trade Agreement of DOC's final CVD determination. On May 6, 1993, the Panel unanimously affirmed in part and remanded in part the final subsidy determination. On September 17, 1993, DOC issued its determination on remand, in which it affirmed its previous determinations and increased the subsidy rate from 6.51 to 11.54 percent. On December 17, 1993, the Panel concluded, by a 3 to 2 majority, that DOC had failed to provide a basis for its finding that stumpage and/or log export restrictions were specific, and it remanded the issues back to DOC with instructions to provide a determination that neither stumpage nor log export restrictions were provided to a specific enterprise or industry. With an order to make determinations that neither stumpage nor log export restrictions were countervailable, DOC was effectively instructed to revoke the order.

On April 6, 1994, the USTR filed a request for an Extraordinary Challenge Committee (ECC) to review the findings made by the Panel that reviewed DOC's final determination and its determination on remand. On August 3, 1994, by a majority of 2 to 1, the ECC dismissed the challenge and upheld the earlier findings of the Panel. In light of the ECC's affirmation of the Panel order, the CVD order on certain softwood lumber products from Canada was revoked on August 16, 1994. A Panel review of the ITC decision had also been requested by Canadian respondents. That had been stayed and was eventually terminated after the order was revoked.

On May 29, 1996, Canada and the United States concluded the Softwood Lumber Agreement (SLA), a five-year agreement in which Canada agreed to impose fees on exports of softwood lumber from certain provinces above certain quantitative limits. The SLA expired on March 31, 2001.

Softwood Lumber IV Investigations

Further to the petition filed April 2, 2001 by the Coalition for Fair Lumber Imports, the United Brotherhood of Carpenters and Joiners, and the Paper, Allied-Industrial, Chemical and Energy Workers International,[25] and following consultations with the Government of Canada on April 18, 2001, DOC initiated a CVD investigation regarding imports of softwood lumber from Canada. The petition identified federal and provincial stumpage and log export restraints, as well as five federal and 22 provincial government programs as alleged subsidies. At the same time, DOC initiated an AD duty investigation following receipt of a separate petition filed by the same group.

In its initiation notice, DOC indicated that it would investigate whether provincial and federal forest-management regimes, including stumpage and log export controls, conferred countervailable subsidies on the softwood lumber industry. In addition, three federal programs (Western Economic Diversification Canada, the Federal Economic Development Initiative for Northern Ontario, and the Canadian Forest Service's Industry, Trade and Economics Program), along with 13 provincial programs, were identified for investigation.

On May 16, 2001, the ITC preliminarily determined that there was a reasonable indication that imports of subsidized and dumped softwood lumber from Canada posed a "threat of material injury" to the U.S. industry. This determination was based on several factors: the

25 The following four companies were added to the list of petitioners on April 20; Moose River Lumber, Shearer Lumber Products, Shuqualak Lumber and Tolleson Lumber.

export orientation of the Canadian industry, the recent increase in Canadian production capacity and capacity utilization, the restraining effect of the SLA and the likely substantial increase in imports from Canada, and the likelihood that such imports would exacerbate price pressures on domestic producers in the United States.

Countervailing Duty Investigation

On August 2, 2001, DOC amended its Notice of Initiation to exempt the provinces of Newfoundland and Labrador, Nova Scotia, Prince Edward Island and New Brunswick from the CVD investigation. This was followed by DOC's issuance of its preliminary subsidy determination on August 17, 2001. DOC found that Canadian softwood lumber exports to the United States were subsidized. A national subsidy rate of 19.31 percent was assessed, based almost entirely on the benefit calculated for the provincial stumpage programs of Quebec, British Columbia, Ontario, Alberta, Manitoba and Saskatchewan during the investigation period of April 1, 2000 to March 31, 2001. Countervailable benefits from several other federal and provincial programs[26] made up the remainder of the national rate.

Petitioners had also alleged that a restriction on the export of logs provided a countervailable benefit to softwood lumber producers. However, DOC did not address this allegation because it indicated that any conceivable benefit provided by a log export restriction would have already been included in the calculation of the stumpage benefit. Furthermore, a WTO Panel had found, in a decision released on June 29, 2001, that export restraints do not constitute a countervailable subsidy. DOC also made an affirmative critical circumstances determination, concluding that there had been a massive surge of softwood lumber imports from Canada in the April-June 2001 period compared to the immediately preceding three months (January-March 2001).

One of the issues that did emerge in the preliminary phase of the CVD investigation was the decision by DOC to instruct the U.S. Customs Service to apply the 19.31 percent subsidy rate, on the entered value (i.e. the full value of the lumber as it enters the United States) rather than a first mill basis (the value of the lumber as it leaves the primary sawmill). In previous softwood investigations, the subsidy rates were based on the first mill value and imposed on the same basis.

On April 2, 2002 and then amended on May 22, 2002, DOC issued its final subsidy determination. It found that Canadian softwood lumber exports to the United States were subsidized and calculated a national rate of 18.79 percent, down slightly from the 19.31 percent rate found in the preliminary investigation. Aside from provincial stumpage programs, grants and assistance by Western Economic Diversification, Industry Canada's FedNor, B.C. Forest Renewal, B.C. Job Protection Commission, and Quebec's Private Forest Development Program were also countervailed. One of the more contentious issues

26 Grants by Western Economic Diversification, Industry Canada's FedNor, Forest Renewal B.C., Quebec's Private Forest Development Program, and Quebec's Export Assistance.

was the search for the most appropriate benchmark for measuring the benefit provided by stumpage. DOC continued to determine that cross-border stumpage prices were the most appropriate comparison prices to measure whether the provincial governments provided a good or service to softwood lumber producers at less than adequate remuneration.

A number of other issues were considered in the final determination. DOC determined, with respect to the exclusion of lumber from the Maritime provinces, that lumber produced from timber harvested from Crown lands in any other province but exported from the Maritimes was not exempt from the order. Regarding company exclusions, DOC found it practicable to consider only 30 of the over 300 company-specific requests for exclusion. It also made a negative critical circumstances final determination, reversing an affirmative preliminary determination that there had been a massive surge of softwood lumber imports from Canada in the April-June 2001 period. In addition, DOC specifically addressed a large number of issues in the decision memorandum attached to its final determination. These ranged from the scope of the investigation to an analysis of each program investigated, included the ones not countervailed or found not to have been used.

Anti-Dumping Duty Investigation

On October 31, 2001, DOC issued a preliminary affirmative determination of dumping and directed Customs to suspend liquidation of all entries of certain softwood lumber products from Canada. The company-specific weighted average dumping margins were calculated as follows:

Producer/Exporter	Preliminary Margins
Abitibi	13.64%
Canfor	12.98%
Slocan	19.24%
Tembec	10.76%
West Fraser	5.94%
Weyerhaeuser	11.93%
All others	12.58%

On April 2, 2002, DOC issued a final affirmative determination that found that certain softwood lumber products from Canada were being sold, or were likely to be sold, in the United States at less than fair value. DOC instructed Customs to continue to suspend liquidation of all entries of softwood lumber from Canada that were entered or withdrawn from warehouse for consumption on or after the date of the publication of the preliminary determination in the Federal Register (November 6, 2001). The individual dumping rates were for the most part reduced, with the "all others" rate declining from 12.58 to 9.67 percent, then to 8.43 percent. DOC also confirmed the results of its preliminary critical circumstances review, finding that imports of softwood lumber to the United States had not been "massive" following the expiration of the SLA.

DOC amended its final determination[27] on the basis of allegations by the petitioners and the respondents that it had made ministerial errors in its final determination. The amended determination resulted in lower weighted average dumping margins for Abitibi, Tembec, West Fraser and Weyerhaeuser and the "all others" rate. Canfor's rate was unchanged and Slocan's increased slightly. The original and amended weighted average dumping margins are as follows:

Producer/Exporter	Original Margins	Amended Margins
Abitibi	14.60%	12.44%
Canfor	5.96%	5.96%
Tembec	12.04%	10.21%
West Fraser	2.26%	2.18%
Weyerhaeuser	15.83%	12.39%
All others	9.67%	8.43%

In addition, a large number of issues were specifically addressed by DOC in its decision memorandum, including: value- versus volume-based cost allocation methodology; constructed value calculations; value-based differences in merchandise (difmer) adjustments; whether SLA export taxes should be deducted from the U.S. export price; and the treatment of negative dumping margins (zeroing).

From the outset of this investigation, a central issue had been the determination of the appropriate method by which to allocate joint production costs for the various lumber products produced (value- or volume-based cost allocation methodology). All of the respondents submitted data sets that allocated production costs on a per-unit volume basis (i.e. per thousand board feet), which is consistent with their normal records. Four of the six respondents also submitted additional data sets that allocated production costs using a value-based methodology. The petitioners had argued throughout the investigation that the joint lumber production costs should be allocated using a volume-based methodology. For the preliminary determination, DOC calculated cost of production (COP) and constructed value (CV) based on the volume-based cost allocation data sets as submitted by each of the respondents.

DOC stated that the cost allocation issues raised in this case were among the most complex they had ever seen. After analyzing the comments they received, DOC reconsidered the appropriateness of its preliminary decision to allocate costs on the basis of volume. It decided that it was appropriate to allocate wood and sawmill costs to particular grades of lumber using a value-based measure, because a volume-based allocation did not recognize the fact that there are separately identifiable grades of wood within a given log and that the producer factors their presence into the cost it is willing to incur to produce those various grades. respondents. Finally, on the issue of zeroing, DOC disagreed with respondents and did not change its dumping methodology. Most particularly, it noted that its zeroing methodology

27 May 22, 2002.

had recently been upheld by U.S. courts, and that it was under no obligation to act further to a recent WTO Appellate Body decision (*EU Imports of Bed Linens from India*).

Injury Investigation

On May 22, 2002, the ITC released its final injury determination. It determined that by reason of subsidized and dumped imports of softwood lumber from Canada, the U.S. industry was threatened with material injury. The ITC stated that the decline in the U.S. industry's financial performance over the period of investigation made it vulnerable to injury. While the number of U.S. mills producing softwood decreased between 1999 and 2000, there was disagreement among the parties as to the extent to which the closures were attributable to mergers, permanent closures of older facilities, installation of new equipment, maintenance or competition with the subject imports.

The ITC finding that imports of Canadian softwood lumber were likely to increase was based on several factors: Canadian producers' excess capacity and projected increases in capacity; capacity utilization and production; the export orientation of the Canadian industry; the increase in imports over the period of investigation; the effects of the expiration of the SLA; import trends during periods when there were not any export restraints; and forecasts of strong and improving demand in the U.S. market. The ITC also found that requirements for lumber producers to harvest at or near their annual allowable cut or face penalties would also lead to increased production when demand is low and would create an incentive to export more softwood lumber to the U.S. market.

It was also determined that although Canadian imports of softwood lumber had maintained a significant share of the U.S. market during the period of investigation, there were no significant present price effects. However, the ITC did find that additional imports of softwood lumber in the U.S. market would increase excess supply and put downward pressure on prices. Therefore, the ITC stated that the imports of softwood lumber were likely to have a significant depressing or suppressing effect on domestic prices, were likely to increase demand for further imports, and that material injury to the domestic industry would occur. The ITC also found that there was at least a moderate degree of substitutability between the subject imports of softwood lumber from Canada and the domestic like product in the United States, and that the prices of one species affected the prices of other.

Administrative Reviews

First Administrative Review (Countervail)

On December 20, 2004, DOC published the final results of the first administrative review of the CVD on softwood lumber products from Canada.[28] In this review, DOC established

28 This was subsequently amended on February 24, 2005.

a country-wide CVD rate of 16.37 percent. The period of review was May 22, 2002 through March 31, 2003.

In determining the benefit of stumpage for British Columbia, DOC continued to use a cross-border benchmark as it had in the original investigation. With respect to Alberta, Saskatchewan, Manitoba, Ontario and Quebec, it used a Maritimes benchmark (private stumpage prices in Nova Scotia and New Brunswick).With respect to pass-through subsidies, DOC, as it had done in the original investigation, it determined that Alberta, British Columbia, Manitoba, Ontario and Saskatchewan each failed to substantiate its claims that logs entering sawmills during the period of investigation included logs purchased in arm's-length transactions. DOC, therefore, did not conduct any analysis to determine whether any of the benefits received by independent harvesters or sawmills passed through to purchasing sawmills. Non-stumpage programs countervailed were a number of federal programs[29] and provincial programs in British Columbia and Quebec.

The review itself raised myriad issues. A 150-page decision memorandum accompanied the results. More than 60 specific comments were specifically addressed by DOC. These included company-specific issues related to the difficulty of the review itself, specific programs, valuation issues, stumpage program issues, and private forests benchmark issues.

First Administrative Review (Dumping)

On December 20, 2004, DOC published the final results of the first administrative review[30] of the anti-dumping duty on softwood lumber products from Canada. In this review, DOC determined company-specific anti-dumping rates ranging from 0.91 percent to 9.10 percent. The period of review was May 22, 2002 through April 30, 2003.

As usual in administrative reviews, in calculating the dumping margins, DOC used a "weighted-average-to-transaction" methodology. This methodology differed from the methodologies it had used in both the original investigation (weighted-average-to-weighted-average) and its subsequent Section 129 dumping determination (transaction-to-transaction).[31] DOC continued to use its zeroing methodology. It stated that due to the number of mandatory respondents and requests by companies to be considered voluntary respondents, as well as the complex circumstances unique to this review, it was not able to review all companies under the AD order. Therefore, DOC determined, in an unusual decision, a "review-specific weighted average margin," based on the seven largest softwood lumber exporters/producers, for those companies that had requested but were not selected for individual review. The review-specific average rate for these companies can be found in the final results below. This is distinguished from the original "all others" rate, which is the weighted-average margin calculated in the original investigation and which continues to apply to all exporters and producers that did not request an administrative review.

29 Fednor, Western Economic Diversification, NRCan programs and payments to CLTA and ILRA.

30 The determination was amended January 24, 2005 on the basis of ministerial errors.

31 Section 129 of the URAA.

Producer/Exporter	Dumping Margins
Abitibi	3.12%
Buchanan	4.76%
Canfor*	1.83%
Tembec	9.10%
Tolko	3.72%
West Fraser	0.91%
Weyerhaeuser	7.99%
Review-specific average rate	3.78%
Original all-others rate	8.43%

*Slocan merged with Canfor between the preliminary results and the final results for the administrative review. DOC determined that post-merger Canfor would be assigned a cash deposit rate reflecting a weighted-average of Canfor's and Slocan's respective cash deposit rates prior to the merger.

Second Administrative Review (Countervail)

On December 12, 2005, DOC published the final results of the second administrative review of the CVD on softwood lumber products from Canada.[32] The period of review was April 1, 2003 through March 31, 2004.

DOC calculated a single country-wide CVD rate of 8.70 percent to be applied to all producers and exporters of softwood lumber from Canada. It used the same benchmarks as it did in the first administrative review: Maritimes stumpage prices for Alberta, Saskatchewan, Manitoba, Ontario and Quebec, and U.S. log prices for British Columbia. DOC rejected the use of private benchmarks in each of the provinces under review, claiming that they were unusable.

There was an extensive discussion in the determination and the attached Decision Memorandum regarding whether DOC was required to conduct a pass-through analysis before it could countervail alleged subsidies when the downstream sawmills purchase logs as inputs to lumber production. DOC agreed that it should conduct a pass-through analysis where Crown timber was purchased by sawmills from unrelated harvesters, but did not agree that it had failed to properly conduct a pass-through analysis as Canadian parties claimed, noting that for many of the claims, the parties had failed to provide the information necessary to demonstrate that the subsidies had not been passed through.

As in the first CVD administrative review, DOC addressed more than 60 specific comments by parties. The comments were basically divided into the following areas: pass through, treatment of company-specific exclusions, scope and specificity, use of U.S. prices as benchmarks, stumpage calculation, and adequacy of remuneration.

32 This was subsequently amended February 24, 2006.

33 The determination was amended January 24, 2006, and again on February 14, 2006 on the basis of Ministerial errors.

Second Administrative Review (Dumping)

On December 12, 2005, DOC published the final results of the second administrative review of the AD duties on softwood lumber products from Canada.[33] In this review, DOC determined company-specific anti-dumping rates ranging from 0.51 percent to 4.02 percent. The period of review was May 1, 2003 through April 30, 2004. DOC used its zeroing methodology in this administrative review.

As in the first review, DOC was not able to review all companies under the anti-dumping order, and thus chose the eight largest exporters/producers. Therefore, DOC continued to determine a "review-specific weighted average margin" for those companies that requested but were not selected for individual review.

Producer/Exporter	Dumping Margins
Abitibi	2.52%
Buchanan	2.76%
Canfor	1.35%
Tembec	4.02%
Tolko	3.09%
Weldwood	0.61%
West Fraser	0.51%
Weyerhaeuser	4.43%
Review-specific average rate	2.10%
Original all-others rate	8.43%

Rescission of Administration Reviews and Revocations of Orders

On September 12, 2006, USTR Schwab and Canadian Minister of International Trade Emerson signed the Softwood Lumber Agreement (SLA 2006). SLA 2006 entered into force on October 12, 2006, resulting in DOC revoking the CVD and AD duty orders on softwood lumber from Canada and rescinding all ongoing proceedings relevant to the order. SLA 2006 also led to the termination of a majority of the softwood lumber-related litigation.

Section II: Litigation

North American Free Trade Agreement: Chapter 19

In connection with the conduct by the United States of the AD and CVD investigations regarding softwood lumber from Canada as initiated on April 30, 2001, interested Canadian

34 USA-CDA-2002-1904-03.

parties requested a review of the three final determinations in the original investigations by Panels established under Chapter 19 of NAFTA. These reviews resulted in the issuance of a number of administrative actions, specifically remand decisions by Chapter 19 Panels; remand determinations by investigative agencies, DOC and the ITC; and two ECCs requested by the USTR.

Determination of Subsidy

The Government of Canada, as well as the Governments of Alberta, British Columbia, Manitoba, the Northwest Territories, Ontario, Quebec, Saskatchewan, the Yukon, and a number of private-sector companies and associations sought Panel review under NAFTA Chapter 19[34] of the April 2, 2002 final CVD determination by DOC. Over the life of this review, the Panel issued five remand decisions and DOC made five remand determinations before the review concluded with the Panel decision of March 17, 2006.

Remand Decision and Determination I

On August 13, 2003, the Panel issued its first remand decision. It addressed a number of issues, the following of which it remanded to DOC for reconsideration: DOC's use of a cross-border price benchmark to determine adequate remuneration in determining countervailable benefit; rejection by DOC of a request to exclude reprocessed Maritime lumber and used railroad ties (old wood) from the scope of the order; DOC's failure to conduct a pass, through analysis regarding downstream manufacturers; and the inclusion of residual products (e.g. poles, posts) in the calculation of the denominator of the *ad valorem* subsidy rate.

On January 12, 2004, DOC issued its remand determination. DOC established a new benefit methodology that continued to find that provincial stumpage programs conferred a benefit on Canadian softwood producers. DOC continued to reject private timber prices in Canada as a benchmark, claiming that they were distorted by the overall benefit conferred by timber prices on government land. But DOC had been instructed by the Panel to reject world market prices (i.e. U.S. prices) as a benchmark. Accordingly, it used a third benchmark, a "consistent with market principles" standard—a method that required a number of cost and pricing factors to determine the appropriate benchmark. To determine the benefit itself, DOC established benchmarks by using domestic log prices and imported log prices for all species by province. These were then compared to provincial stumpage charged.

DOC also determined that unsubsidized Maritimes-origin lumber that is reprocessed in another province prior to export to the United States was excluded from the order. Further, any shipment of railroad ties determined to be hardwood would be excluded from the order. DOC also determined that residual products should not be included in the calculation of the denominator of the subsidy rate. As a result of the determination, the CVD rate was recalculated at 13.23 percent, down from the original 18.79 percent.

Remand Decision and Determination II

On June 7, 2004, the Panel issued its second remand decision, in which it responded positively to a number of DOC's specific remand requests as well as issued a number of remand orders to DOC—most relating to the benchmark prices for logs.

On July 30, 2004, DOC issued its determination further to the second Panel remand of June 7, 2004. With respect to British Columbia, DOC responded to each of the six separate issues that the Panel had remanded. These affected the calculation of stumpage benefit and therefore the subsidy rate. For Alberta, DOC determined an amount of $1.73 per log for profit and recalculated its benchmark log price. For Manitoba, Saskatchewan, Ontario and Quebec, DOC responded to three issues each, all of which affected the calculation of the subsidy rates for each of these provinces. Finally, acknowledging that it had made certain legal errors, DOC recalculated the rate for six companies, which were then excluded. The CVD rate was accordingly revised to 7.82 percent, down from 13.23 percent.

Panel Decision and Determination III

On December 1, 2004, the Panel issued its third remand decision, directing DOC to make 13 specific changes—mainly in the areas of amounts for profit and benchmarks for subsidy benefits. On January 24, 2004, DOC issued its third remand determination. While reiterating its disagreement with the Panel's conclusion that there was not enough evidence to support its original benefit calculation, DOC recalculated the subsidy rate following reconsideration of the issues as remanded. The revised CVD rate was 1.88 percent, down from the previous 7.82 percent (and the original 18.79 percent).

Panel Remand and Determination IV

On May 23, 2005, the Panel issued its fourth remand decision, acknowledging that DOC had appropriately responded to seven of the 13 issues that it had been directed to reinstate, include, adjust or reconsider (in its third remand decision). The remaining five issues were remanded.[35] On July 7, 2005, DOC issued its fourth remand determination. The revised CVD rate was 1.21 percent, down from the previous 1.88 percent (and the original 18.79 percent).

Remand Decision and Determination V

On October 5, 2005, the Panel issued its fifth remand. It made two specific remand directions: determine the amount of profit earned by log sellers in Quebec to be $4.34 and adjust the profit figures for Ontario, Manitoba and Saskatchewan based on the profit

35 The main issues involved the reopening of the record for the purpose of recalculating the benefit for Quebec using this information; recalculating profit earned by Quebec log sellers; excluding Ontario companies for which an input was unsubsidized; and including in the Ontario calculations profit earned by private log sellers.

figure for Quebec. On November 22, 2005, DOC issued its fifth remand determination.[36] DOC applied a profit figure of $4.34 for log sellers in Quebec, as well as in its Ontario, Manitoba and Saskatchewan calculations. However, as stated in the original remand determination as well as the three subsequent remand determinations, DOC continued to disagree with the Panel's conclusion that there was not substantial evidence to support the original DOC benefit calculation. The revised CVD rate was 0.80 percent, which is *de minimis*. The original rate was 18.79 percent. On March 17, 2006, the Panel upheld DOC's remand determination of November 22, 2005.

On April 27, 2006, the United States requested an ECC, which was ultimately suspended during the SLA negotiations, following the April 27, 2006 agreement in principle, and then terminated following the entry into force of SLA 2006.

Determination of Dumping

Abitibi, Canfor, Slocan, Tembec, West Fraser and Weyerhaeuser all requested review by a NAFTA Chapter 19 Panel[37] of the April 2, 2002 final AD duty determination by DOC with respect to imports of softwood lumber from Canada. Over the life of this review, the Panel issued three remand decisions and DOC made three remand determinations before the review was rendered moot by the October 12, 2006 conclusion of the SLA.

Remand Decision and Determination I

On July 17, 2003, the Panel issued its first remand decision, remanding 13 specific issues to DOC. These included joint production costs using value-based methodology; dimensional differences in softwood products; certain administrative costs; internal costs of wood chips; and class or kind issues. On October 15, 2003, DOC issued its first remand determination, recalculating the AD duty margins for all of the respondent companies and the "all others" rate. The rate changes were minimal.

Remand Decision and Determination II

On March 5, 2004, the Panel issued its second remand determination. It directed DOC on three specific issues: recalculate Tembec's expenses; calculate the byproduct offset to West Fraser's production costs using the company's recorded revenues from chip sales to affiliates; and treat Slocan's futures trading profits as an adjustment to indirect selling expenses. On April 21, 2004, DOC issued its second remand determination. As a result, it recalculated the AD duty margins for three respondent companies and the "all others" rate. Because the margin for West Fraser fell to *de minimis*, it was to be excluded from the AD duty

36 The Panel also issued a November 16, 2005 order in response to four separate motions by DOC on October 28, 2005.

37 USA-CDA-2002-1904-03.

order. However, DOC indicated that this revision would only apply prospectively and that West Fraser would not be refunded any of the cash deposits paid on previous import entries.

Remand Decision and Determination III

On June 9, 2005, the Panel issued its third remand decision with explicit instructions to DOC to revoke the order with respect to exports by West Fraser and recalculate the margins for all other respondents without regard to "zeroing."[38] On July 11, 2005, DOC issued its third remand determination in which it recalculated the AD duty margins for all companies and the "all others" rate. DOC used a transaction-to-transaction methodology in comparing export price to normal values, rather than an average-to-average comparison, which had been used in the original investigation. This was consistent with DOC's action in its Section 129 determination in response to the Appellate Body report. It also did not revoke the order for West Fraser.

On January 5, 2007, the Panel issued its final remand decision, in which it concluded that this matter had been rendered moot by the October 12, 2006 conclusion of SLA 2006.

Determination of Injury

The Government of Canada, as well as all provincial and territorial governments with the exception of Nunavut, along with a number of private-sector companies and associations, sought Panel review under Chapter 19 of NAFTA[39] of the May 22, 2002 final affirmative injury determination by the ITC. Over the life of this review, the Panel issued three remand decisions and the ITC made three remand determinations.

Remand Decision and Determination I

On September 5, 2003, the Panel issued its first remand decision in which it directed the ITC on seven specific issues, mainly with respect to its threat of injury analysis. On December 15, 2003, the ITC issued its first remand determination. As in its original determination, the ITC determined that the U.S. domestic softwood lumber industry is threatened with material injury by reason of imports of softwood lumber from Canada. Further to the Panel remand instructions, the ITC reconsidered all of the information and data that it had considered in making its original determination. The ITC based this remand finding on the same six capacity and volume threat factors that it had relied on in its original determination. It also continued to conclude that imports were likely to have a significant depressing effect on

38 While the Panel previously found the application of "zeroing" by DOC to be permissible, the adoption of the DSB of the WTO of an Appellate Body report which found the application of "zeroing" in the softwood lumber investigation to be inconsistent with U.S. obligation under the Anti-Dumping Agreement intervened. The decision was based on the Charming Betsy doctrine, a U.S. common-law principle requiring the rejection of an otherwise permissible interpretation of a statute if that interpretation conflicts with an international treaty obligation of the United States.

39 USA-CDA-2002-1904-07.

domestic prices. In another key decision, the ITC concluded that it had properly exercised its discretion in accordance with established criteria to cross-cumulate the dumped and subsidized imports.

Remand Decision and Determination II

On April 19, 2004, the Panel issued its second remand decision. It concluded that the ITC remand determination that subject import prices are likely to have a significant price-depressing or -suppressing effect on domestic prices in the imminent future, was not supported by substantial evidence. The Panel analysed the same six factors that the ITC had used in its original determination.[40] It found flaws in the ITC analysis in the majority of these factors. The Panel directed the ITC to issue a new threat of injury determination. On June 10, 2004, the ITC issued its second remand determination, in which it continued to find that the U.S. industry is threatened with material injury by reason of imports of softwood lumber from Canada. In its second remand determination, the ITC took issue with several aspects of the Panel decision and claimed that the Panel violated U.S. law and the basic tenets of fairness by preventing the ITC from reopening the record in its remand proceeding. The ITC also claimed that the Panel overstepped its authority by failing to apply the correct standard of review and by substituting its own judgment for that of the ITC.

Remand Decision and Determination III

On August 31, 2004, the Panel issued its third remand decision. It remanded the case back to the ITC with explicit instructions to make a determination consistent with the decision of the Panel. The Panel began by stating that in its second remand determination, the ITC had refused to follow Panel instructions from its first remand decision. The Panel stated that the ITC had made it clear that it is unwilling to accept the Panel's review authority under Chapter 19, and that by doing so, was undermining the Chapter 19 Panel review process. The Panel remanded the determination back to the ITC with explicit instructions for the ITC to not undertake another analysis of the substantive issues and to issue a remand determination that is consistent with the decision of the Panel. On September 10, 2004, the ITC issued its third remand determination. Further to the NAFTA Panel's explicit instructions, the ITC issued a determination consistent with the Panel finding that the U.S. softwood lumber industry is not threatened with material injury by reason of subject imports from Canada. The ITC remand determination, however, did raise many concerns regarding the Panel's review authority under Chapter 19 of NAFTA. The main theme of the ITC statement was that the Panel had left no doubt that it has substituted its own judgment for that of the ITC, and has decided that there could only be one outcome to these investigations—negative threat of material injury determinations.

40 (i) the Canadian producers' excess capacity and projected increases in capacity; (ii) capacity utilization and production; (iii) the export orientation of Canadian producers to the U.S. market; (iv) the increase in imports over the period of investigation; (v) the effects of expiration of the SLA; import trends during periods when there were no import restraints; and (vi) forecasts for strong but relatively stable demand in the U.S. market.

Extraordinary Challenge Committee

On August 10, 2005, the NAFTA ECC issued its order.[41] The ECC was convened pursuant to a request filed on November 24, 2004 by the USTR. The request asked that an ECC review the decisions and final order of the Panel regarding injury in the softwood lumber dispute. The United States based its challenge, and asked the ECC to vacate the Panel's decisions and its order of October 12, 2004, on the following grounds:

- The Panel's refusal to permit the ITC to reopen the record when the case was remanded to it for the second time;
- The Panel's failure to provide adequate time for the ITC to respond to the issues raised in the Panel's first remand decision;
- The Panel's failure to apply the substantial evidence standard when reviewing the ITC's determinations that the importation of softwood lumber presented a threat of material injury to domestic producers;
- The Panel's direction to the ITC in its second remand decision to enter a negative threat determination; and
- The Panel's first and second remand decisions, as well as the order of the Panel dated October 12, 2004, were vitiated by the participation of a Panel member who had created an appearance of impropriety and a reasonable apprehension of bias by representing a client in another proceeding involving an issue that was also raised in the softwood lumber dispute, and by responding intemperately to the complaint of bias.

With regard to these allegations, the ECC made the following conclusions:

- The Panel did not manifestly exceed its powers, authority or jurisdiction in refusing to permit the ITC to reopen the record in preparing its responses, in setting the time limits within which the ITC had to respond to first Panel remand decision, or in ordering the ITC to enter a negative threat determination;
- Except on the issue of export orientation, the Panel did not exceed its powers, authority or jurisdiction by failing to apply the appropriate standard of review;
- On the issue of export orientation, the Panel's failure to apply the appropriate standard of review was not material; and
- The conduct of the Panel member did not create a reasonable apprehension of bias.

In light of these conclusions, except with regard to the Panel's finding of no substantial evidence on the finding on issue of export orientation, the ECC decided that it is not necessary for it to determine whether, if the Panel had committed any of the errors alleged, they would have been material to the Panel's decision or threatened the integrity of the binational Panel review process. Accordingly, the ECC challenge was denied and the challenged decision of the Panel stood affirmed.

41 ECC-2004-1904-01USA.

Conclusion

On November 24, 2004, the ITC, further to a WTO Panel decision of April 26, 2004, issued a new injury determination under Section 129 of the URAA. The ITC reopened the record of its original investigation to gather additional information from public sources and from questionnaires sent to Canadian and U.S. producers. It held a public hearing and gave parties opportunities to submit comments. Based on this information, the ITC reached the same conclusion that it had in its original investigation, i.e. that the domestic industry was threatened with material injury. The United States took the position that the new ITC determination rendered moot the ITC remand determination of September 10, 2004 in which it had found that the domestic industry was not threatened with injury from imports from Canada.

World Trade Organization (WTO)

In connection with the conduct by the United States of the countervailing and AD duty investigations regarding softwood lumber from Canada as initiated on April 30, 2001, Canada brought a number of challenges before the WTO DSB. These challenges, which required distinct actions by WTO Panels, the Appellate Body and the U.S. government as respondent, involved specific aspects of the investigations themselves, the legislation underpinning the investigations, and U.S. compliance with the WTO findings made further to the Canadian challenges. However, all of these cases would be terminated as part of SLA 2006.[42]

Export Restraints as Subsidies

On July 24, 2000, Canada requested the establishment of a WTO Panel to consider the treatment of export restraints as subsidies under U.S. CVD law. The Panel Report, which was adopted on August 23, 2001, found that export restraints cannot result in a "financial contribution" under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and therefore cannot lead to a finding of countervailable subsidy. The Panel also found that U.S. CVD law does not mandate the treatment of export restraints as a subsidy, and therefore does not violate the WTO.

Section 129 of the Uruguay Round Agreements Act

On July 12, 2001, Canada requested the establishment of a WTO Panel to consider Section 129(c)1 of the URAA. It was Canada's position that Section 129, which provides for administrative action following a WTO finding against a U.S. AD or CVD action, is inconsistent with the WTO because it allegedly precludes the U.S. from applying adverse WTO rulings

42 The notification of the Mutually Agreed Solution filed with the WTO DSB can be found as Annex 2A of the SLA 2006.

retrospectively. The Panel Report, which was adopted on August 30, 2002, rejected Canada's claim, finding that Section 129(c)1 does not apply to import entries made prior to implementation of adverse WTO rulings under Section 129 and therefore does not require WTO inconsistent action.

Preliminary Determinations of Countervailing Duties and Critical Circumstances

On October 25, 2001, Canada requested the establishment of a WTO Panel to consider various aspects of the August 27, 2001 preliminary determinations of CVD and critical circumstances regarding imports of softwood lumber from Canada. Also challenged were certain aspects of U.S. CVD legislation on expedited and administrative reviews. The final Panel Report, which was adopted on November 1, 2002, made a number of findings:

- The U.S. finding that the provision of stumpage constitutes a financial contribution is not inconsistent with the SCM Agreement.
- The use of U.S. rather than Canadian stumpage prices to determine benefit was inconsistent with SCM. Therefore, the finding of subsidy was WTO inconsistent.
- The U.S. acted inconsistently with the WTO by presuming subsidy "pass through" to producers of downstream lumber products.
- The U.S. acted inconsistently with the WTO by applying measures retroactively.
- U.S. law and regulations on expedited and administrative reviews did not require the U.S. to act inconsistently with the WTO.

Final Countervailing Duty Determination (DS257)

On August 19, 2002, Canada requested the establishment of a WTO Panel to consider aspects of the April 2, 2002 final CVD determination regarding imports of softwood lumber from Canada. The Panel Report, which was circulated on August 29, 2003, was appealed. The Appellate Body Report was adopted on February 17, 2004.

The Appellate Body upheld the Panel's finding that the U.S. had not acted inconsistently with the SCM Agreement by finding that the provision of stumpage constitutes a financial contribution. It reversed the Panel finding on the choice of benchmark, and found instead that "an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as provider of the same or similar goods." The Appellate Body noted, however, that "an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigation authority to choose a benchmark other than private prices in the country of provision." The Appellate Body further clarified that benchmarks must "relate or refer to, or be connected with, the prevailing market conditions in the country of provision." While the Appellate Body upheld the Panel finding that DOC had acted inconsistently with the WTO in not conducting a pass, through analysis with respect to sales of logs to unrelated sawmills, it reversed the Panel finding that DOC had acted inconsistently with the WTO in not conducting a pass, through analysis with respect to sales of logs to unrelated remanufacturers.

In response, on December 6, 2004, DOC issued its final Section 129 determination to implement the Appellate Body findings. It removed from the aggregate subsidy calculation those sales for which any benefit that was found to have not been "passed through" to sawmills, and accordingly reduced the country rate from 18.79 to 18.62 percent.

Section 129 Determination: Final Countervailing Duty (DS257)

On December 30, 2004, Canada requested the establishment of a WTO Panel to consider aspects of the Section 129 CVD determination of December 6, 2004 by DOC, which had been issued to comply with a previous Panel report, as well as the December 20, 2004 results of the first administrative review by DOC of the CVD on imports of softwood lumber from Canada. The Panel Report, which was circulated on August 1, 2005, was appealed. The Appellate Body Report, which was adopted on December 20, 2005, upheld the Panel's finding that the U.S. had acted inconsistently with the WTO by including in its subsidy numerator transactions for which it had not demonstrated that the benefit of subsidized log inputs had been passed through to the final product.

Final Dumping Duty Determination (DS264)

On December 30, 2002, Canada requested the establishment of a WTO Panel to consider aspects of the May 22, 2002 final determination of dumping regarding imports of softwood lumber from Canada. The Panel Report, which was circulated on April 13, 2004, was appealed. The Appellate Body Report was adopted on August 31, 2004.

The Appellate Body upheld the Panel's finding that the U.S. had acted inconsistently with the WTO by using the practice of zeroing in calculating weighted-average-to-weighted-average dumping margins. The Appellate Body also upheld the finding that the U.S. had not acted inconsistently in its calculation of byproduct revenue from the sale of wood chips in the calculation of Tembec's cost of production. The Appellate Body did, however, reverse the Panel's finding that the U.S. had not acted inconsistently in calculating financial expenses for Abitibi.

Section 129 Determination: Final Dumping Duty (DS264)

On May 19, 2005, Canada requested the establishment of a WTO Panel to consider the Section 129 determination by DOC in response to the August 31, 2004 finding by the Appellate Body that the U.S. had acted inconsistently with the WTO by using the practice of zeroing in calculating the dumping margin in the original investigation. The Panel Report, which was circulated on April 3, 2006, was appealed. The Appellate Body Report was adopted on September 1, 2006.

In its Section 129 determination, which was issued on May 2, 2005, DOC based the revised AD duty margins on a transaction-to-transaction comparison between normal values and export prices, as opposed to the weighed-average-to-weighed-average comparison used in the original investigation. In the new transaction-to-transaction comparison, DOC continued to use zeroing. In its August 15, 2006 report, the Appellate Body reversed the Panel finding and found that DOC's use of zeroing in the transaction-to-transaction methodology was inconsistent with the WTO and that DOC had not brought the measure into conformity with the Anti-Dumping Agreement.

Final Injury Determination (DS277)

On April 3, 2003, Canada requested the establishment of a WTO Panel to consider the May 22, 2002 determination by the ITC that dumped and subsidized imports of softwood lumber from Canada were threatening injury to the U.S. industry. The Panel Report was adopted on April 26, 2004. It found that the ITC's threat of injury determination was not consistent with either the SCM Agreement or the Anti-Dumping Agreement, mainly because the Panel found that the ITC's finding that there was likely to be an imminent increase in imports from Canada was "not one which could have been reached by an objective and unbiased investigating authority."

Section 129 Determination: Injury (DS277)

On November 24, 2004, the ITC issued a new injury determination under Section 129. It reopened the record of its original investigation to gather additional information from public sources and from questionnaires sent to Canadian and U.S. producers. It held a public hearing, and gave parties opportunities to submit comments. Based on this information, the ITC reached the same conclusion that it had in its original investigation, i.e. that the domestic industry was threatened with material injury. The new ITC determination rendered moot the ITC remand determination of September 10, 2004 which, in response to an August 31, 2004 NAFTA Panel remand, had found that the domestic industry was not threatened with injury from imports from Canada.

On February 14, 2005, Canada requested the establishment of a WTO Panel to consider the Section 129 injury determination issued by the ITC on November 24, 2004. The Panel Report, which was circulated on November 15, 2005, was appealed. The Appellate Body Report was adopted on May 9, 2006. Canada's major claim was that the new Section 129 injury determination, which was intended to comply with the original WTO Panel on the injury determination, was inconsistent with the WTO. While the Appellate Body reversed the Panel finding that the Section 129 determination was not inconsistent with the WTO, it could not complete the analysis that would enable it to determine whether the Section 129 determination itself was inconsistent with the WTO.

U.S. Domestic Court

In addition to litigation under both Chapter 19 of NAFTA and the World Trade Agreement, various parties challenged aspects of the softwood lumber investigations and administrative reviews in U.S. domestic court, the CIT. As mandated by SLA 2006, these court actions were terminated.

Section 129: Threat of Injury

On January 19, 2005, Tembec, later joined by the governments of Canada, Alberta, British Columbia, Ontario, Quebec, and other private Canadian parties, filed a complaint before the CIT. The complaint centred on the propriety under U.S. law of the second final threat determination issued by the ITC on November 24, 2004 in response to an adverse WTO Panel decision adopted on April 26, 2004.

The Canadian parties claimed that the USTR's implementation of the second threat determination constituted a breach of Section 129 of the URAA. Specifically, it was argued that Section 129(a) did not authorize the USTR to substitute injury findings in purported compliance with a WTO panel finding. Rather, the Canadian parties argued that Section 129(a) effectively gives the USTR a vehicle to revoke AD and CVD orders if doing so was a necessary element of complying with a WTO order. The U.S. parties argued that the Court had no jurisdiction to hear that matter, and in the alternative argued that the ability to substitute a threat finding was an implied prerogative under Section 129(a).

On July 21, 2006 the CIT issued its decision on the merits of the case, in which it found that the implementation of the November 24, 2004 threat determination was in breach of Section 129(a). On jurisdiction, the Court found that the URAA creates certain procedural protections under U.S. law that may be judicially reviewed. On the merits of the dispute, the Court sided with the Canadian parties. Section 129(a) of the URAA does not contemplate implementing a new positive finding of injury that does not include partial revocation. The Court noted that compliance with an adverse WTO finding is not mandatory under U.S. law. However, where the U.S. chooses to comply, it must do so in accordance with Section 129.

The CIT requested an additional briefing on the remedy to grant. At issue with respect to remedy was what portion of the AD and CVD should be refunded. The U.S. argued that relief should be prospective, or alternatively should be limited to the period following the negative threat finding on remand from the NAFTA panel. The Canadian parties argued that the illegality of the second final threat determination, and the negative finding on the first threat determination, justified a refund of all duties paid on softwood lumber. On October 13, 2006, the CIT ruled that, given the ITC's negative injury determination entered September 10, 2004, and the unlawful character of the November 24, 2004 finding of threat, all the duties collected on softwood lumber should be refunded. Several similar cases were filed by individual companies subsequent to the initiation of the Tembec case, but these were dismissed as moot in the wake of the implementation of SLA 2006.

The United States sought to vacate the CIT decision in the Tembec case on the grounds that the case was moot on October 13 because the duty orders on softwood lumber had already been revoked. The Canadian parties took the position that the CIT had authority to issue the decision and that the judgment was valid when issued on October 13 because an injunction preventing the liquidation of approximately US$1 billion in duty deposits was still in place and was only lifted on October 31. On February 28, 2007, the CIT issued an order in the Tembec case that denied the U.S. motion to vacate. While refusing to vacate its decision, the CIT's February 28 order did vacate the resulting "judgment" requiring DOC to revoke the softwood lumber duty orders and refund all duty deposits. The CIT concluded that the October 13 judgment should be vacated because the SLA resolved all the issues being litigated and therefore there was no action that DOC could take to comply with the judgment.

First Administrative Review: Anti-dumping Duty Order

In early 2005, Canadian softwood producers sought judicial review before the CIT of the final results of DOC's first administrative review of anti-dumping duties on softwood lumber, as issued December 20, 2004, and modified on January 24, 2005. Although a number of companies filed individual petitions for review, the CIT eventually consolidated the review into a single case.[43] The Canadian producers argued that DOC's methodology in conducting the administrative review contravened U.S. law. Many of the issues raised on judicial review mirrored the complaints alleged by Canadian producers during the administrative review itself.

As part of the application, the Canadian producers sought and obtained an injunction against liquidation of cash deposits. This was necessary to prevent CBP from proceeding with liquidation. Under U.S. law, CBP is free to liquidate entries following completion of an administrative review even if the parties seek judicial review before the CIT.

The entry into force of SLA 2006 resulted in the end of the challenge to the administrative review. The CIT never heard formal arguments on the claims made by Canadian industry. On October 18, 2006, the CIT dismissed the case as moot in light of the Agreement.

Constitutional Challenge

Late in *Lumber IV*, the Coalition for Fair Lumber Imports (CLFI) brought a challenge before the D.C. Court of Appeals alleging that NAFTA Chapter 19 violated the U.S. Constitution. A similar challenge was made by CFLI during *Lumber III*, but that challenge was never adjudicated. The basis for the challenge (in both *Lumber III and IV*) was that the U.S. legislation implementing Chapter 19 deprived U.S. citizens of the right to have their cases heard in a U.S. Court as provided in Article III of the U.S. Constitution. The CFLI used the injury case before NAFTA, including the results of the ECC, as the basis for its constitutional challenge.

As a result of SLA 2006, on December 12, 2006, the D.C. Court of Appeal dismissed the claim as moot.

43 West Fraser Mills v. United States, CIT No. 05-00079.

Review of CVD & AD Margins in Lumber IV

History of Countervailing Duty Margins in *Lumber IV*

	INVESTIGATION								FIRST REVIEW		SECOND REVIEW		THIRD REVIEW
Province	*Preliminary Determination (Aug. 2001)*	*Final Determination (May 2002)*	*NAFTA – 1st Remand Determination (Jan. 2004)*	*NAFTA – 2nd Remand Determination (July 2004)*	*NAFTA – 3rd Remand Determination (Jan. 2005)*	*NAFTA – 4th Remand Determination (July 2005)*	*NAFTA – 5th Remand Determination (Nov. 2005)*	*WTO – s129 final determination (Dec. 2004)*	*Preliminary Results (June 2004)*	*Final Results (Dec. 2004)*	*Preliminary Results (June 2005)*	*Final Results (Dec. 2005)*	*Preliminary Results (June 2006)*
Alberta	64.74%	32.80%	36.91%	6.46%	4.34%	4.34%	4.34%	32.10%	10.99%	7.43%	5.47%	6.83%	5.41%
British Columbia	14.59%	15.72%	7.97%	9.65%	0.14%	0.14%	0.14%	15.73%	8.91%	22.69%	10.05%	9.82%	13.53%
Manitoba	13.81%	16.46%	51.39%	1.99%	1.77%	0.61%	0.0%	16.46%	8.19%	8.83%	9.12%	10.56%	8.41%
Ontario	20.61%	15.65%	6.53%	1.59%	0.37%	0.27%	0.21%	13.93%	9.88%	9.31%	5.84%	6.95%	7.46%
Quebec	15.44%	24.14%	13.52%	6.56%	6.63%	3.55%	1.73%	24.14%	7.63%	5.01%	3.97%	5.35%	5.51%
Saskatchewan	39.21%	25.13%	75.39%	6.04%	5.67%	3.75%	2.58%	25.13%	14.06%	14.34%	10.50%	11.98%	14.13%
Country-wide Rate	19.31%	18.79%	13.23%	7.82%	1.88%	1.21%	0.80%	18.62%	9.24%	16.37%	8.18%	8.70%	11.23%
Benchmark	U.S. Timber	U.S. Timber	Composite domestic and import log price	Composite domestic and import log price	Composite domestic and import log price	Composite domestic and import log price	Composite domestic and import log price	U.S. Timber	Maritime private stumpage	Maritime/BC cross-border log	Maritime/BC cross-border log	Maritime/BC cross-border log	Maritime/BC cross-border log

Note: Above margins account for stumpage and non-stumpage programs.

History of Anti-dumping Duty Margins in *Lumber IV*

	INVESTIGATION							FIRST REVIEW		SECOND REVIEW		THIRD REVIEW
Producer	*Preliminary Determination (Nov. 2001)*	*Final Determination (May 2002)*	*NAFTA – 1st Remand Determination (Oct.2003)*	*NAFTA – 2nd Remand Determination (April 2004)*	*NAFTA – 3rd Remand Determination (July 2005)*	*WTO – s129 final preliminary Determination (Jan. 2005)*	*WTO – s129 final Determination (April 2005)*	*Preliminary Results (June 2004)*	*Final Results (Dec. 2004)*	*Preliminary Results (June 2005)*	*Final Results (Dec. 2005)*	*Preliminary Results (June 2006)*
Abitibi	13.64%	12.44%	11.85%	11.85%*	8.88%	13.02%	13.22%	2.97%	3.12%	2.53%	2.52%	N/A
Blanchette	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	1.25%
Buchanan	N/A	N/A	N/A	N/A	N/A	N/A	N/A	4.80%	4.76%	2.49%	2.76%	N/A
Canfor	12.98%	5.96%	5.74%	5.74%*	8.29%	9.16%	9.27%	2.06%	1.83%	1.42%	1.35%	N/A
Interfor	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	6.46%
Rene Bernard	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	8.62%
Slocan	19.24%	7.71%	8.77%	8.56%	13.32%	12.75%	12.91%	1.64%	N/A	N/A	N/A	N/A
Tembec	10.76%	10.21%	6.66%	6.28%	9.08%	12.73%	12.96%	10.21%	9.10%	3.16%	4.02%	1.85%
Tolko	N/A	N/A	N/A	N/A	N/A	N/A	N/A	3.68%	3.72%	3.22%	3.09%	0.90%
Weldwood	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	5.62%	0.61%	N/A
West Fraser	5.94%	2.18%	2.22%	1.79%	3.19%	3.98%	3.92%	1.08%	0.91%	0.51%	0.51%	1.47%
Western Forest Prod.	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	7.33%
Weyerhaeuser	11.93%	12.39%	12.36%	12.36%*	17.59%	16.10%	16.35%	8.38%	7.99%	4.74%	4.43%	2.38%
All others	12.58%	8.43%	8.07%	8.85%	10.52%	11.38%	11.54%	3.98%	3.78%	2.44%	2.10%	3.47%

* Did not participate; margin remained the same as last proceeding.

TOTAL COMBINED AR2 RATE = 10.8%

Carbon and Certain Alloy Steel Wire Rod from Canada

Background

On August 31, 2001, a petition was filed with the ITC and DOC on behalf of Co-Steel Raritan Inc., Amboy, GS Industries Inc., Keystone Consolidated Industries and North Star Steel Texas Inc. The petitioners alleged that the domestic industry was materially injured, or threatened with material injury, by subsidized and dumped imports of carbon and certain alloy steel wire rod from Canada, Brazil, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago and Ukraine. On October 1, DOC initiated CVD and AD investigations on imports from the above-noted countries, selecting July 1, 2000 to June 30, 2001 as the period of investigation.

This was the fourth petition for the imposition of trade remedy measures regarding U.S. imports of wire rod from a number of countries, including Canada, over the past decade. In 1993, an AD duty investigation was initiated with respect to imports of steel wire rod from Brazil, Japan, Trinidad and Tobago and Canada. After making final dumping determinations with respect to imports from Canada, the petition was withdrawn and the investigation terminated on Canada. The ITC did, however, make final injury determinations with respect to imports from Brazil and Japan. In 1997, AD duty investigations were initiated with respect to imports of steel wire rod from Germany, Trinidad and Tobago, Venezuela and Canada. This investigation resulted in a negative final injury determination regarding all countries. Finally, in 1999, the ITC initiated a safeguatd investigation on steel wire rod. On February 11, 2000, a three-year tariff rate quota was imposed on most imports. Imports from Canada were excluded from the measure.

Investigation

On October 29, 2001, the ITC made its preliminary injury determination on steel wire rod from Canada, finding that there was a reasonable indication that an industry in the United States was being materially injured by reason of imports of carbon and certain alloy steel wire rod from Canada. On February 8, 2002, DOC issued its preliminary subsidy determination, which indicated that countervailable subsidies were being provided to producers or exporters of steel wire rod from Canada. The Government of Canada, the Government of Quebec and the three producers/exporters with the largest volume of exports (Ispat Sidbec Inc., Ivaco Inc., and Stelco) were provided with questionnaires. DOC investigated several Quebec programs, finding that Quebec's debt-to-equity conversion program provided a countervailable benefit to Sidbec-Dosco when it converted $81.6 million of debt into equity. DOC preliminarily determined that the net countervailable subsidy to be 0.78 percent *ad valorem* for that program. Quebec grants to Sidbec-Dosco between 1986 and 1992 were also analysed. Quebec had reimbursed Sidbec for all payments of principal and interest on loans it received to finance a joint venture with Normines JV. DOC preliminarily determined these grants to be countervailable subsidies at a rate of 5.59 percent *ad valorem*. The most significant issue in the countervailing phase of the investigation was the issue of pre-privatization subsidies.[44]

Regarding the Government of Canada, a tax credit program for mining incentives to Stelco was investigated. DOC determined that under Canada's federal corporate income tax, companies were permitted to take a resource allowance. It was determined that Stelco, within federal tax law, took resource allowances in lieu of deductions for Crown royalties, provincial mining taxes and other charges related to oil and gas or mining production. Stelco was able to prove, however, that the resource allowance was a standard deduction, and thus, DOC preliminarily determined that the resource allowances did not confer countervailable subsidies. DOC also investigated Canadian government support for both the Bessemer project and Stelco's energy projects, as well as a resource allowance in Newfoundland. DOC did not find any of these countervailable.

Accordingly, DOC calculated preliminary countervailable subsidy rates as outlined below:

Producer/Exporter	**Preliminary Subsidy Rates**
Ispat Sidbec Inc.	6.37%
Ivaco Inc.	0
Stelco Inc.	0
All others	6.37%

On August 30, 2002, DOC issued its final CVD duty determination on steel wire rod from Canada, in which it recalculated the individual subsidy rates for each manufacturer. The "all others" rate was set at Ispat Sidbec's rate because the rates for the two other investigated companies were either zero or *de minimis*. Therefore, it was determined that the total estimated net subsidy rate for each company was:

Producer/Exporter	**Final Subsidy Rates**
Ispat Sidbec Inc.	6.61%
Ivaco Inc.	0
Stelco Inc.	0
All others	6.61%

As in the preliminary phase of the investigation, DOC analysed a number of subsidy issues in arriving at its determination. By far the most significant was its treatment of pre-privatization subsidies received by Ispat Sidbec. In 2000, the U.S. Court of Appeals for the Federal Circuit[45] had rejected DOC's change-in-ownership methodology. The Court held that DOC could not presume that subsidies granted to the former owner of a corporation's assets automatically "pass through" to the new owner. The Court ruled that DOC had to examine the particular facts and circumstances of sale and determine whether the new owner directly or indirectly received both a financial contribution and a benefit from a

44 See final determination.

government. Pursuant to that finding, DOC developed a change-in-ownership methodology. The first step in the new methodology is to determine whether the entity to which the subsidies were provided is distinct from the entity producing the goods being exported. In making this determination, a number of factors are analyzed, including the continuity of operations, continuity of production, continuity of assets and liabilities, and retention of personnel.

In the case of Ispat Sidbec, DOC found that the new owner (Ispat Sidbec) was essentially the same entity as the previous entity (Sidbec) and that the subsidies provided to Sidbec prior to the privatization of Sidbec-Dosco continued to benefit Ispat Sidbec during the period of investigation. Valuation of the subsidy benefit was also determined based on the cross-ownership of assets by Ispat Sidbec and Sidbec-Feruni (Ispat) Inc. Other issues included equity worthiness and creditworthiness, the countervailability of debt-to-equity conversion, grants, the average usual life of Sidbec assets and certain new subsidy programs.

On April 10, 2002, DOC issued its preliminary determination of sales at less than fair value on steel wire rod from Canada. It was preliminarily determined that steel wire rod from Canada was being sold, or was likely to be sold, in the U.S. at less than fair value. DOC identified three mandatory Canadian respondents: Ispat Sidbec, Ivaco and Stelco. Preliminary AD duty rates were established as follows:

Producer/Exporter	Preliminary Dumping Margins
Ispat Sidbec Inc.	4.21%
Ivaco Inc.	7.36%
Stelco Inc.	1.32%
All others	6.13%

On August 30, 2002 and then in a slightly amended version on October 29, 2002, DOC made its final determination of sales at less than fair value for carbon and certain alloy steel wire rod from Canada. It determined that steel wire rod from Canada was being sold, or was likely to be sold, in the U.S. at less than fair value. After analysing comments received concerning the preliminary determinations, DOC made adjustments and corrected ministerial errors identified in Ivaco's preliminary margin calculations. Accordingly, DOC included indirect selling expenses in the calculation of constructed export price profit. It also used Ivaco's reported credit expenses for its U.S. dollar sales in the home market.

Based on the additional findings and comments received after DOC issued the preliminary anti-dumping determination, changes were made to the dumping margins in the final determination proceedings. The following weighted-average dumping margins were used:

45 Delverde Srl v United States.

Producer/Exporter	Final Dumping Margins
Ispat Sidbec Inc.	2.54%
Ivaco Inc.	13.35%
Stelco Inc.	1.18%
All others	9.91%

On October 15, 2002, the ITC made an affirmative final injury determination on carbon and certain alloy steel wire rod from Canada, Brazil, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Turkey and Ukraine.

The ITC found that there was significant price underselling of the imported merchandise as compared with the price of domestic like products of the United States, and that the effect of imports of such merchandise depressed prices to a significant degree and/or prevented price increases, which otherwise would have occurred, to a significant degree. Moreover, while the ITC found that from 1999 to 2001 the volume of subject imports increased as the market grew, the domestic industry lost market share during this time.

Changed Circumstance Reviews

Countervail

On November 3, 2003, DOC issued the preliminary results of its CVD changed circumstances review after a request from Gerdau Ameristeel U.S. Inc., Keystone Consolidated Industries Inc., and North Star Steel Texas Inc. These companies specifically requested that the CVD order on steel wire rod from Canada be revoked, and that DOC fully refund any countervailing duties deposited pursuant to the order upon revocation. The petitioners stated that they were producers of carbon and certain alloy steel wire rod, but did not identify the percentage of production of the domestic like product they represented. At the time, DOC also could not state that other domestic producers of wire rod had no interest in maintaining the CVD order. Therefore, DOC was unable to come to a preliminary determination, and opened the issue for interested parties to comment on the proposed revocation.

On January 23, 2004, DOC published its final determination in its changed circumstances review. It determined that there was a reasonable basis to believe that changed circumstances existed and that they were sufficient to warrant a revocation of the CVD order. Accordingly, DOC revoked the CVD order on carbon and certain alloy steel wire rod from Canada.

Dumping I

On February 25, 2004, DOC released the preliminary results of its AD duty changed circumstances review. This review was initiated in order to clarify the exclusion of Stelco from the AD duty order. Several months after the final dumping determination, DOC received requests for clarification regarding this exclusion. It was determined that these requests came as a result of unclear language in the order itself and in the instructions that DOC had given to CBP. The order could be read to indicated that all products produced by Stelco, whether exported by Stelco or not, were excluded from the order. On May 7, 2004, DOC issued its final results of the AD changed circumstances review, which determined that merchandise produced and exported by the Stelco Group was excluded from the AD duty order.

Dumping II

On March 9, 2005, DOC initiated a second changed circumstances review of the AD duty order of steel wire rod from Canada. This review was initiated in response to a request from Mittal Canada Inc., a Canadian exporter of steel wire rod to the U.S., which requested the review to determine whether it was the successor-in-interest to Ispat Sidbec and whether it should be accorded the same treatment previously accorded to Ispat with regard to the AD order on steel wire rod from Canada.

On May 3, 2005, DOC published its preliminary results of the changed circumstances review. After reviewing such factors as changes in management, production facilities, supplier relationships and customer base, DOC determined that Mittal was functionally the same company as the former Ispat. On July 8, 2005, DOC made a final determination that Mittal Canada Inc. was the successor-in-interest to Ispat Sidbec Inc., and therefore should be accorded the same treatment previously accorded to Ispat.

Dumping III

In January 2006, DOC self-initiated a third changed circumstances review of the AD duty order of steel wire rod from Canada, in response to a notification by Ivaco and its division Sivaco that they had been purchased. On December 14, 2006, DOC published its preliminary results of the changed circumstances review, which determined that Ivaco Rolling Mills 2004 is the successor-in-interest to Ivaco Rolling Mills L.P.; and Sivaco Ontario, a division of Sivaco Wire Group 2004 is the successor-in-interest to Ivaco Inc. In its March 30, 2007, DOC confirmed that finding in its final determination.

Administrative Reviews

From 2005 through to 2007, three administrative reviews were conducted, covering the periods April 10, 2002 to September 30, 2003, October 1, 2003 to September 30, 2004, and October 1, 2004 to September 30, 2005. As a result, the AD duty margins for Ivaco were amended from 13.35 percent established in the original investigation to 2.06 percent established by the final determination in the third administrative review (May 10, 2007). The margins for Ispat/Mittal rose from 2.54 percent to 6.13 percent in the same time period.

Litigation

NAFTA Chapter 19: Determination of Injury

On November 27, 2002, Ivaco Inc. filed a request for NAFTA Chapter 19 Panel review of the ITC's final determination on steel wire rod from Canada. Ivaco alleged that the ITC had not collected all available data for the most recent quarter; had rejected second-quarter data provided by Ivaco; had incorrectly cumulated imports from Canada with those from Brazil, Indonesia, Mexico, Moldova, Ukraine and Trinidad and Tobago; had erroneously found that the volume of imports and price underselling were significant; had wrongfully determined that cumulated subject imports had significant price, suppressing effects; and had found that the subject imports had a significant adverse impact on the domestic economy.

On April 12, 2004, the Panel remanded the ITC's final determination and instructed the ITC to address all of Ivaco's arguments intended to rebut the presumption that the change in subject import volumes was related to the pending investigation. The Panel outlined three areas for action:

- The ITC was to provide reasons as to why it did not collect second quarter 2002 data as requested by the complainant.
- The ITC was to review all the evidence on the record and provide a reasoned decision that addresses all the arguments and issues raised by Ivaco.
- The ITC was to explain and justify its decision to reject the information Ivaco filed for the fourth quarter.

In October 2004, the ITC released its final remand decision in response to the Panel remand, determining that an industry in the U.S. was materially injured by reason of dumping imports of steel wire rod from Canada found to be sold in the U.S. at less than fair value. The ITC indicated that the arguments made by Ivaco failed to refute its findings and were not clearly related to the investigation issue. The data provided did not rebut the presumption that subject import volumes were lower in interim 2002 than in interim 2001 due to the pendency of investigations. The ITC found that the significant changes in subject import price effects were related to the pendency of the investigations, and therefore found the changes to be related to the same issue. Furthermore, the ITC asserted that the data submitted by Ivaco were unusable.

On April 18, 2005, the Panel issued its second remand decision on steel wire rod from Canada. The Panel found, in the case of the ITC rejection of Ivaco's request that the period of investigation be extended to cover the second quarter of 2002, that the ITC and Ivaco had different interpretations regarding the significance of data relating to the importation of steel wire rod during the relevant periods. The Panel found that Ivaco's argument that the ITC acted inconsistently in similar cases was not supported by sufficient evidence. Concerning the ITC decision to reject allegations of increased profitability of two of the petitioners during the second quarter of 2002, the Panel affirmed the ITC findings and accepted that the ITC had provided a reasonable justification for not granting Ivaco's request to have the period of investigation extended to include the second quarter of 2002. It was found that the ITC went to considerable effort to review the evidence on the record, analysing it in the context of the business cycle and conditions of competition of the wire rod industry, and found that subject imports were having a significant adverse impact on the U.S. industry. Based on the sufficient evidence produced by the ITC, the Panel affirmed the ITC remand determination.

Durum and Hard Red Spring Wheat from Canada

Background

On September 13, 2002, the ITC and DOC received a petition from the North Dakota Wheat Commission, the Durum Growers Trade Action Committee, and the U.S. Durum Growers Association alleging that the U.S. industry was materially injured and threatened with material injury by reason of dumped and subsidized imports of durum and hard red spring wheat from Canada. On October 29, 2002, AD and CVD investigations were initiated. August 1, 2001 to July 31, 2002, which coincides with the fiscal year of the Canadian Wheat Board (CWB), the sole responding exporter, was chosen as the period of investigation.

Investigation

In December 2002, the ITC released its preliminary injury determination, finding that there was reasonable indication that U.S. industry was materially injured by reason of imports of allegedly dumped and subsidized durum and hard red spring wheat from Canada. Specifically, the ITC found that imports of allegedly subsidized wheat from Canada had had negative price effects on the U.S. industry. The ITC also found that significant price underselling by imported wheat had occurred, and that such underselling had depressed local prices and prevented price increases that would have otherwise occurred.

On March 10, 2003, DOC made a preliminary CVD determination in which it found that the Government of Canada's guarantee of CWB borrowing was a countervailable subsidy. It determined the existence of a countervailable benefit by comparing the amounts that the CWB paid on its borrowings with what it would have paid without the guarantee. DOC then divided the total benefit received by the CWB on all its borrowings by the CWB's total sales in the period of investigation. The preliminary countervailable duty rate was set at 3.95 percent.

On May 8, 2003, DOC made a preliminary dumping determination in which it determined that durum wheat and hard red spring wheat from Canada were being sold in the United States below normal value during the period of investigation. In its determination, it found that the CWB, a government entity, was a monopoly buyer/seller of wheat in the Canadian domestic market. Concerns were raised that a particular market situation might be found to exist, and that normal dumping methodology would not be employed. However, DOC did not find that there was government control of prices. Preliminary AD rates of 8.15 and 6.12 percent were found for durum and hard red spring wheat respectively.

On August 28, 2003, DOC made its final countervailing and anti-dumping duty determinations. It determined a subsidy rate of 5.29 percent for both types of wheat and AD duty rates of 8.26 and 8.86 percent for durum and hard red spring wheat respectively.

In October 2003, the ITC determined that the U.S. industry was not injured or threatened with injury by reason of imports of durum wheat from Canada. It did find, however, that imports of hard red spring wheat from Canada were injuring U.S. industry. As a result of these determinations, anti-dumping and countervailing duties were imposed on imports of hard red spring wheat from Canada.

Litigation

1. North American Free Trade Agreement: Chapter 19

Determination of Injury

On November 24, 2003, the CWB filed a request for NAFTA Chapter 19 Panel review. On December 23, 2003, the CWB and the North American Millers' Association Ad Hoc CVD/AD Committee (NAMA) filed complaints alleging that the final ITC injury determination on hard red spring wheat was not supported by substantial evidence. The complainants alleged that the ITC made an error in finding that the volume of subject imports was significant. It was also alleged that the finding of significant price underselling and significant price suppression was not supported by substantial evidence. The ITC finding that prices declined between the 2000-2001 and 2001-2002 crop was questioned. It was also alleged that the ITC failed to consider factors other than the subject imports as the cause of injury to domestic producers, including different levels of trade at which the domestic product and the subject imports compete within the U.S.

On June 7, 2005, the Panel remanded the ITC injury determination for further action with respect to nine specific issues. These included the relevance of volume and price data, the relationship of underselling to adverse trends in domestic industry performance, the impact of imports on the domestic industry and the impact of prices on futures. On October 5, 2005, the ITC released its determination on remand on the question of injury by imports of hard red spring wheat from Canada. The ITC found that certain prices used in the original price comparisons were for sales between related parties. These related party data were removed from those used in the underselling analysis because they were not necessarily indicative of prices in arm's-length transactions. The ITC then concluded that such underselling was not significant. Based on this new determination on remand, the ITC found that the U.S. wheat industry in the U.S. was neither materially injured nor threatened with material injury by reason of imports of hard red spring wheat from Canada.

On December 12, 2005, the NAFTA Panel affirmed the ITC views on remand and its remand determination. On February 16, 2006, DOC revoked the AD and CVD orders on hard red spring wheat from Canada.

Determination of Subsidy

On March 10, 2005, the Panel had remanded the final CVD determination back to DOC. The Panel found that DOC had made an error in evaluating the three elements of the Comprehensive Financial Risk Coverage Program, the borrowing guarantee, the lending guarantee and the initial payment guarantee, as a single financial contribution. Regarding a determination involving government-owned and -leased railcars, the Panel upheld the determination that general infrastructure must be available to everyone. The Government of Saskatchewan had claimed that its rail cars were part of the general infrastructure created for the welfare of the region. DOC determined that the rail service benefit was clearly not available to everyone in Saskatchewan.

On December 12, 2005, DOC released its determination on remand. In taking a desegregated approach to the Comprehensive Financial Risk Coverage Program, DOC recalculated the subsidy rate from for hard red spring wheat from Canada down from 5.29 percent to 2.54 percent. This rate also included a 0.35 percent rate for the provision of government-owned and leased railcars to the CWB.

2. U.S. Court of International Trade

As mentioned above, DOC revoked the AD and CVD orders on hard red spring wheat from Canada on February 16, 2006. However, on February 21, 2007, the CWB and the Government of Canada filed suit in the CIT to fully refund the duties following the revocation orders. In its revocation, DOC had taken a prospective approach to the refunds, indicating that duty deposits collected on imports prior to 2006 were not eligible for refund.

Canada took the position that the issue of whether successful challenges to original U.S. dumping, subsidy or injury findings under NAFTA Chapter 19 result in full duty refunds is of fundamental systemic importance to Canada, and that failure to resolve this issue could threaten the viability of Chapter 19. The issue was at the heart of the Tembec case in softwood lumber, but that case was terminated upon implementation of the SLA. The Government of Canada and the CWB therefore decided to launch a new case to deal with the refund issue.

The action is still pending.

Live Swine from Canada

Background

On March 5, 2004, a petition was filed with the ITC and DOC by the National Pork Producers Council, the Illinois Pork Producers Association, the Indian Pork Advocacy Coalition, the Iowa Pork Producers Association, the Minnesota Pork Producers Association, the Missouri Pork Association, the Nebraska Pork Producers' Association, the North Carolina Pork Council, the Ohio Pork Producers' Council and 119 individual pork producers, alleging that an industry in the United States is materially injured or threatened with material injury by reason of dumped and subsidized imports of live swine from Canada. It is noted that a CVD order had been in place on U.S. imports of live swine from Canada from September 7, 1985 to November 4, 1999.

On April 7, DOC initiated countervailing and anti-dumping duty investigations, choosing calendar year 2003 as the period of study.

Investigation

In its preliminary injury determination, the ITC determined that there was reasonable indication that an industry in the United States was materially injured by reason of dumped and subsidized imports from Canada. It was found that U.S. production increased by 0.7 percent in 2003, with domestic shipments increasing by 0.9 percent. However, while U.S. producers experienced an increase in sales, the value of their sales declined, precipitating financial difficulties. In that context, imports of live swine from Canada, which increased in 2003, were also found to have depressed or suppressed domestic prices and therefore further weakened the financial performance of the domestic industry.

On August 23, 2004, DOC made a negative preliminary determination in which the CVD rate was *de minimis*. The Farm Credit Financing: Flexi-Hog Loan Program, established to offer hog producers long-term loans with flexible payment terms, was found to be countervailable at a preliminary CVD rate of 0.14 percent for respondent Hart Feeds and 0.03 percent for respondent BSG. In addition, the Manitoba Agricultural Credit Corporation Financing: Diversification Loan Guarantee Program and Enhanced Diversification Loan Guarantee Program were also found to be countervailable at rates of 0.11 percent *ad valorem* for Hart, 0.03 percent *ad valorem* for Hytek Inc. and 0.01 percent *ad valorem* for Premium Pork.

The Saskatchewan Short-Term Hog Loan Program and the Saskatchewan Livestock and Horticultural Facilities Incentives Program were also found to be countervailable. Both programs were also assessed at *de minimis* rates.

On October 20, 2004, DOC released its preliminary dumping determination. For the purpose of the investigation, it looked at several individual producers: Hytek Inc., Ontario

Pork Producers' Marketing Board and Premium Pork Canada Inc. The producers were found to be dumping in U.S. markets and were assigned dumping margins as follows:

Exporter/Manufacturer	Preliminary Dumping Margins
Ontario Pork Producers' Marketing Board	13.25%
Hytek Incorporated	0.38%
Premium Pork Canada Incorporated	15.04%
All others	14.06%

On March 11, 2005, DOC released its final CVD determination on live swine from Canada. DOC concluded that countervailable subsidies were not being provided to producers of exports of live swine from Canada because, as in the preliminary determination, the total subsidy rate was *de minimis.*

On March 11, 2005, DOC issued its final determination of sales at less than fair value for Canadian live swine. After interested parties were given the opportunity to comment on preliminary determinations, Commerce continued to find that live swine from Canada was sold below normal value in the U.S. during the period of investigation. The final margins were as follows:

Exporter/Manufacturer	Anti-dumping Margins
Ontario Pork Producers' Marketing Board	12.68%
Hytek Incorporated	00.53%
Premium Pork Canada Incorporated	18.87%
Excel Swine Services Incorporated	04.64%
All others	10.63%

On April 13, 2005, the ITC released its final injury determination on live swine from Canada, in which it determined that an industry in the U.S. was not materially injured or threatened with material injury, and that the establishment of an industry in the U.S. was not materially retarded, by reason of dumped imports from Canada of live swine. The investigation was thereby terminated.

U.S. Global Safeguard Investigations Regarding Imports From Canada

Certain Steel Products

Investigation

On June 22 2001, following the announcement by President Bush of a three-part steel initiative,[46] the USTR requested that the ITC conduct a safeguard investigation to determine whether the domestic steel industry had been seriously injured by an increase in imports. Unlike AD or CVD investigations, safeguard or Section 201 investigations focus on all imports, whether fairly or unfairly traded. The purpose of such investigations is to determine whether the domestic industry has been seriously injured by an increase in imports. If the ITC makes an affirmative determination, it then recommends a remedy, usually in the form of an import action, to the President, who has complete discretion over whether to take action and the type of action to take.

Under NAFTA, imports from Canada and Mexico can be exempted from actions if imports from either country are found not to be contributing importantly to injury to the domestic industry. In this case, however, in its October 22, 2002 injury determination, the ITC made an affirmative injury finding that included imports of six specific products from

46 The June 5, 2001 announced initiative consisted of: i) launching negotiations to establish disciplines on government subsidies and other market distortions in the global steel sector; ii) working to reduce excess capacity in the global steel sector; and iii) requesting initiation of a Section 201 investigation on steel.

Canada.[47] Imports of these products into the United States accounted for 44 percent of the total volume of Canadian steel exports to the United States at that time. In addition, under NAFTA, if imports from Canada were to be included in any import remedy action, any such action could not have the effect of reducing imports from Canada below recent import levels. The United States would also have to provide compensation in the event that Canada had equivalent trade effects. If the two sides cannot agree on compensation, Canada would be free to retaliate against the United States.

On December 7, 2001, the ITC, which was divided on the issues of both injury and remedy, made remedy recommendations that ranged from additional tariffs to import quotas, with respect to imports from all sources of the 16 steel products on which the ITC had made affirmative findings of injury. The ITC submitted its formal report to the President on December 19, 2001. Because the Administration subsequently asked the ITC for more information, the President, who had until February 17, 2002 to respond to the recommendations, postponed the decision to March 5, 2002.

President's Decision

On March 5, 2002, President Bush imposed a safeguard action, in the form of additional tariffs, on imports of the 10 steel products found by the ITC to be seriously injuring the U.S. industry. The additional duties, which ranged from 30 percent to 8 percent, went into effect on March 20, 2002 for a period of three years. The President's decision also included a number of adjustment measures to help U.S. industry consolidate, merge and shed inefficient production capacity. No action was taken on any of six steel products from Canada.

On June 3, 2002, a WTO Dispute Settlement Panel was established to examine the consistency of the U.S. safeguard measures with the WTO. The Panel was requested by the European Communities, with Japan, Brazil, Korea, China, Norway, Switzerland, and New Zealand joining as co-complainants. The Panel concluded that the U.S. measures were inconsistent with both the WTO Agreement on Safeguards and GATT Article XIX, finding that the United States had failed to provide an adequate explanation of its conclusion that imports had increased and that a causal link existed between the increased imports and serious injury to the domestic industry. The Panel ruled that the decision to exempt imports from Canada from the measure was also WTO inconsistent. The United States appealed, and on November 19, 2003, the WTO Appellate Body issued a ruling largely upholding the initial Panel conclusions.

In September 2003, the ITC issued its mid-term review of the safeguard measure. It found that the U.S. industry had undergone major restructuring and consolidation, that overall productivity had risen sharply, that prices had stabilized, that workers' pensions had been saved, that profitability had returned to the industry, that imports were no longer depressing

47 Hot-rolled bars; cold-rolled bars; welded tubes; flanges, fittings and joints; stainless bars and light shapes; and stainless flanges and fittings.

U.S. prices, and that U.S. steel exports were at historic levels. Consequently, the ITC found that the economic circumstances that gave rise to the imposition of the safeguard measure in the first place had changed. On December 4, 2003, the President terminated the measures. It was also announced that the steel licensing system that had been established to monitor the safeguard measures would be continued.

Government Action

The Government of Canada worked closely with the industry to ensure that steel imports from Canada were not included in any U.S. safeguard measures. In addition to a number of formal submissions to both the ITC and the U.S. Administration (USTR and DOC), the Government, in collaboration with the industry and various Canadian provinces, pursued vigorous representations and advocacy work in support of the Canadian position. Canada consistently argued that Canada/U.S. steel trade was unique, was mutually beneficial, and operated in an integrated market that should not be disrupted by the introduction of any import measures.

Appendix A
Assessment instructions

In June 2005, DOC requested public comment on the timing for issuing assessment instructions, in the context of NME administrative reviews, for entries to which no review request had been filed. The options discussed included:

- issuing assessment instructions after the initiation of an administrative review, once it becomes clear which entries subject to the NME-wide rate are not covered by a specific request for review; and
- issuing assessment instructions at the conclusion of an administrative review, both for reviewed entries and for those subject to the NME-wide rate to which no specific request for review has been filed.

Expected wages. DOC's NME methodology requires surrogate data for wages as for other cost items. Because of the significant variation in wage rates of market economy countries typically used as surrogates, DOC's regulation governing the valuation of NME labour inputs (19 CFR 351.408C)(3)), does not source wage data from a single surrogate country, but rather provides for the use of a regression-based wage rate—essentially an average of the wage rates in market economy countries considered economically comparable to the NME. Until 2000, DOC's periodic wage rate updates used per-capita gross domestic product (GDP) data, but beginning with the 2000 update, DOC shifted to per-capita gross national product (GNP) and now uses per-capita gross national income (GNI). In October 2006, DOC announced changes to the manner in which such rates are calculated.

Market-economy inputs. During 2005–2006, DOC adopted changes to its practice for valuing manufacturing inputs sourced by NME producers partly in their home market and partly from market-economy countries. Following various proposals and requests for public comment issued in May 2005, August 2005 and March 2006, DOC, in an October 2006 announcement, provided guidance on the circumstances under which it will accept market-economy purchase prices to value an entire input.

Market-oriented enterprises. DOC has floated the idea of recognizing a category of "market-oriented enterprises" to supplement the "market-oriented industry" category currently available in its NME practice. DOC sought public comment in May 2007 and October 2007.

NME designations. In 2003, DOC set out its approach for considering the potential NME status of countries to which no NME designation had previously been issued. Noting that U.S. law accords market-economy treatment except where a country has been formally designated as an NME, and that certain countries (e.g. Bulgaria) had never been involved in a U.S. AD investigation and thus never had their status as a potential NME considered, DOC stated that future AD investigations would proceed under market-economy procedures unless an interested party is able to rebut the presumption of market-economy status. To do this, the interested party must submit an allegation that the country is a NME, along with documentation responding to the six factors listed in 771(18)(B) of the Tariff Act.

Separate and combination rates. The issue of separate and combination rates in NME AD proceedings has received significant attention. It was the subject of requests for public comment in May 2004 and September 2004, of announcements of changes in practice in December 2004 and April 2005, of a Policy Bulletin in 2005, and of a further request for public comment in March 2007. DOC has also updated and published an "application template" for NME parties seeking separate rates.

Surrogate country selections. DOC's approach to considering and selecting countries from which to draw surrogate data has received significant attention as well. On this subject, DOC published a Policy Bulletin in 2004 as well as proposed refinements to its practice and requests for public comment in March 2007 and July 2007. To do this, the interested party must submit an allegation that the country is an NME, along with documentation responding to the six factors listed in 771(18)(B) of the Tariff Act.

Appendix B
Acronyms & Initialisms

AD	Anti-dumping
APO	Administrative protective order
BIA	Best information available
CAFC	U.S. Court of Appeals for the Federal Circuit
CBP	Customs and Border Protection
CEP	Constructed export price
CFR	Code of Federal Regulations
CFS	Coated free sheet (paper)
CIT	U.S. Court of International Trade
CLFI	Coalition for Fair Lumber Imports
COP	Cost of production
CV	Constructed value

CVD	Countervailing duties
CWB	Canadian Wheat Board
DOC	U.S. Department of Commerce
DSB	Dispute Settlement Body
ECC	Extraordinary Challenge Committee
GDP	Gross domestic product
GNI	Gross national income
GNP	Gross national product
HTS	Harmonized tariff schedule
IA	Import administration (DOC)
ITC	U.S. International Trade Commission
NAFTA	North American Free Trade Agreement
NME	Non-market economy
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SDI	Quebec Industrial Development Corporation
SLA	Softwood Lumber Agreement
SWU	Separative work unit
URAA	Uruguay Round Agreements Act
USTR	United States Trade Representative
WTO	World Trade Organization