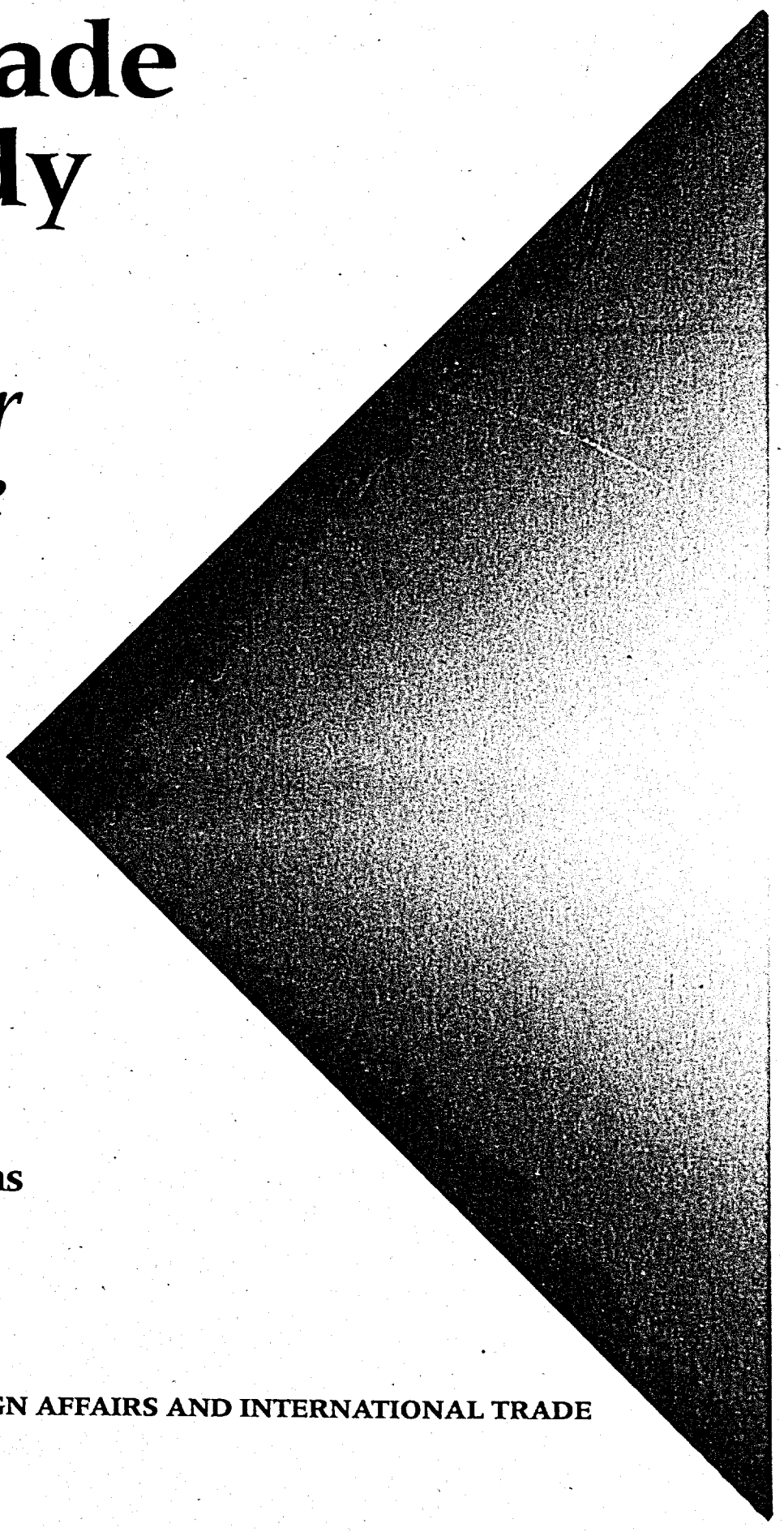
U.S. Trade Remedy Law

A Ten Year Experience



U.S. Trade Relations Division (UET)

March 1993

DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE

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External Affairs and International Trade Canada | Affaires extérieures et Commerce extérieur Canada

Canada

OTTAWA, Ontario
K1A 0G2

January 4, 1994

Dear Colleagues,

I am pleased to recommend to you the attached study on U.S. Trade Remedy Law.

The study was a collaborative effort by several officers who have served in the U.S. Trade Relations Division. The study reviews the Canadian experience with U.S. trade remedy law over the past decade. Although the primary focus of the study is U.S. countervailing duty and antidumping actions against Canada, the study also covers other major provisions of U.S. trade remedy law.

Those involved in the preparation of the study saw a value in collecting and presenting this information under one cover. The information contained in the document makes the study useful as a base document in helping one to understand better the intricacies of U.S. trade remedy law. In addition, the case-by-case analyses will be a useful source of information on how actions under the trade remedy law have affected on Canadian interests. Although we have only a limited number of copies of the study, additional copies can be obtained by contacting the Information Resource Centre (tel: 1-800-267-8376 or for the Ottawa area 944-4000). Copies are available in English and French.

Sincerely,

Tom MacDonald.

Tom A. MacDonald
Director General
United States Trade and
Economic Policy Bureau

External Affairs and International Trade Canada | Affaires extérieures et Commerce extérieur Canada

Canada

OTTAWA, Ontario
K1A 0G2

Le 4 janvier 1994

Chers collègues,

Je suis heureux de vous recommander l'étude ci-jointe sur la législation américaine en matière de recours commerciaux.

Cette étude, qui est le fruit d'une collaboration entre plusieurs agents précédemment affectés à la Direction des relations commerciales avec les États-Unis, résume l'expérience canadienne des dix dernières années en ce qui concerne la législation américaine sur les recours commerciaux. Même si l'accent y est surtout mis sur les mesures compensatrices et antidumping prises à l'encontre du Canada, elle couvre aussi d'autres aspects importants de la législation américaine sur les recours commerciaux.

Les personnes qui ont participé à la préparation de l'étude ont vu l'utilité de recueillir et de regrouper cette information dans un même document. La documentation de base qu'elle contient permettra au lecteur de mieux comprendre les complexités de la législation américaine sur les recours commerciaux. De plus, les analyses de cas particuliers donneront des renseignements utiles sur la façon dont les mesures prises en vertu de cette législation ont affecté les intérêts canadiens. Nous n'avons qu'un nombre limité d'exemplaires, mais on peut encore en obtenir en communiquant avec InfoEx (tél.: 1-800-267-8376, ou 944-4000 pour la région d'Ottawa). L'étude est disponible en français et en anglais.

Veuillez agréer, chers collègues, l'expression de mes sentiments les meilleurs.

Le directeur général
Direction générale de la politique
commerciale et économique – États-Unis

Tom MacDonald.

Tom A. MacDonald

U.S. TRADE REMEDY LAW

~ A TEN YEAR EXPERIENCE ~

U.S. Trade Relations Division (UET)
External Affairs and
International Trade Canada

February, 1993

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FOREWORD

This Study, which is a collaborative effort by many members of the U.S. Trade Relations Division over the years, reviews and highlights the Canadian experience with U.S. trade remedy law over the past decade.

While the study's primary focus is on U.S. countervailing duty and antidumping laws and attendant actions against Canada, it also covers other major provisions of U.S. trade remedy law.

It is hoped that having this information under one cover will make the study useful as a base document in helping to understand better the intricacies of U.S. trade remedy law and that the case-by-case analyses will be a useful source of information on how actions under the law have impacted on Canadian interests.

March 31, 1993

C.L. Bland
Director,
U.S. Trade Relations Division
United States Trade
and Economic Policy Bureau,
Department of External Affairs
and International Trade Canada

1.0 INTRODUCTION[1]

The following study identifies, categorizes and analyzes U.S. trade remedy law actions against Canada over the last ten years. This document is composed of four parts. The first part examines the application of U.S. countervailing duty law on Canadian exports. The focus is on domestic subsidies and how the International Trade Administration (ITA) of the Department of Commerce (DOC) has applied the law in relation to Canadian government programmes. The second part examines the application of U.S. antidumping law and is followed by an analysis of recent antidumping cases against Canadian products. The third part provides a description and analysis of recent Canadian cases under other U.S. trade remedy law provisions such as: Section 301; Super 301, Special 301; Section 337; Section 232; Section 332; and Section 201. Table 1 provides the reader with a description of U.S. statutory provisions related to import relief. The fourth part of the study provides an overview of the Canada-U.S. Free Trade Agreement (FTA) as it relates to U.S. trade remedy law, particularly antidumping and countervailing duty actions. It concentrates mainly on the dispute settlement provisions of Chapter 19 and a review of the work of various binational panels established under that Chapter.

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[1] Please note that since U.S. trade laws are frequently amended and that a number of cases are ongoing, the information contained in this document can be considered current as of December 1992.

TABLE 1. DESCRIPTION OF U.S. STATUTORY PROVISIONS RELATED TO IMPORT RELIEF.

Section	Statute	Common Name	Basis for Action	Administrative Authority	Remedy
201	Trade Act of 1974 as amended.	Escape Clause	Increased imports which are a substantial cause of serious injury (product-specific from all sources).	ITC (recommendation); President (final action); U.S. Congress (disapproval of Presidential action if different than ITC recommendation).	Tariff increases, tariff-rate quotas, quantitative import restrictions, orderly marketing agreements, expedited adjustment assistance.
303, 703, and 705	Tariff Act of 1930 as amended.	Countervail	Import sales benefiting from foreign subsidies resulting in injury or threat of material injury (both product- and country-specific).	DOC (subsidy determination); ITC (injury determination where required by international obligations).	Countervailing duties equal to margin of subsidization.
733 and 735	Tariff Act of 1930 as amended.	Dumping	Import sales at less than fair value resulting in injury or threat of material injury (both product- and company-specific).	Commerce (dumping determination); ITC (injury determination).	Antidumping duties equal to margin of dumping.
337	Tariff Act of 1930 as amended.	Unfair Import Practices	Unfair methods of competition injuring a U.S. industry or restraining or monopolizing U.S. trade and commerce - usually a patent infringement (product-specific).	ITC (order); President (veto authority).	Exclusion from entry into U.S., or a cease-and-desist order.
22	Agricultural Adjustment Act of 1933, as amended.		Imports of an article are materially interfering or likely to interfere with a programme of the U.S. Department of Agriculture.	U.S. Department of Agriculture (recommendation); ITC (recommendation); President (final action).	Import fees of up to 50 per cent ad valorem or quantitative restriction reducing allowable imports of the article to a level not less than 50 per cent of the quantity imported during a representative period.

Section	Statute	Common Name	Basis for Action	Administering Authority	Remedy
332	Tariff Act of 1930 as amended.	General fact-finding investigations	Investigate U.S. foreign trade and its effect on industries and labour or to provide assistance to the U.S. Congress and the President or USTR upon request.	President, House Ways and Means Committee, Senate Finance Committee, either branch of the U.S. Congress or the Commission.	Public report issued. Cannot authorize any restrictions on imports.
301	Trade Act as amended.		Violation of U.S. rights under a trade agreement or any foreign act, policy or practice which is unjustifiable, unreasonable, or discriminatory and burdens or restricts U.S. commerce.	USTR (action); Subject to the specific direction, if any, of the President regarding any such action.	"All appropriate and feasible action" including retaliation in the form of suspension or withdrawal of trade agreement benefits, imposition of tariffs, fees or other import restrictions.
232	Trade Expansion Act of 1962		Imports which threaten the national security (product-specific from all sources).	Commerce (recommendation); President (final action).	Such action as the President deems necessary to safeguard the national security.
2	Trade Act of 1974 as amended.	Trade Adjustment	Increases in imports that have contributed importantly both to (a) the total or partial separation of a significant number or proportion of workers from their firm and to (b) a decrease in production or sales of the firm.	U.S. Department of Labour (investigation, determination, and provision of benefits).	Assistance in the form of trade adjustment allowances, training, and other employment services, and job search allowances.

2.0 COUNTERVAILING DUTY (CVD) LAW

The Tariff Act of 1930, as amended, provides for the imposition of duties whenever a subsidy is bestowed by a foreign country upon the manufacture or production for export of any article which is subsequently imported into the United States. There are currently two separate provisions of the Tariff Act which govern the imposition of countervailing duties. Subtitle A of title VII of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 and amended by the Trade and Tariff Act of 1984 and the Omnibus Trade and Competitiveness Act of 1988,[2] applies to imports from countries which are signatories to the General Agreement on Tariffs and Trade (GATT) Agreement Relating to Subsidies and Countervailing Measures,[3] commonly referred to as the Subsidies Code, or which have assumed obligations substantially equivalent to those of the Code. For imports from these countries, an injury test is required prior to imposition of countervailing duties. Imports from countries which have not signed the Subsidies Code or assumed substantially equivalent obligations are subject to the provision of Section 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979,[4] and are generally not afforded an injury test in countervailing duty cases. Other than the requirement of an injury test, however, the provisions of the countervailing duty law under the two separate sections are generally the same.

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[2] Just as its name implies, the Omnibus Trade and Competitiveness Act of 1988 is many faceted, focusing on assisting businesses to be more competitive in world markets as well as correcting perceived injustices in trade practices. The Trade Act was designed to deal with trade deficits, protectionism, and the overall fairness of the United States trading partners. Congressional concern centered around the issue that the United States, the world's largest economy, was open to Japan, Western Europe, and the newly industrializing countries of Asia but was closed out in parts of their markets. These countries have accumulated vast trade surpluses while the United States has accumulated vast trade deficits. Some see the trade bill as a protectionist measure, but the U.S. government sees it as a means of providing stronger tools to open foreign markets and to help U.S. exporters be more competitive. The bill covers three areas considered critical in improving the U.S. trade position: improving access to foreign markets, assisting U.S. exporters to be more competitive, and providing relief to U.S. businesses affected by unfair trade activities.

[3] Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures), MTN/NTM/W/236, reprinted in House Doc. No. 98-153, pt. 1 at 257.

[4] 19 U.S.C. 1303.

2.1 U.S. Definitions of Subsidies[5&6]

In considering the vulnerability of Canadian exports to the United States' CVD process, the definitions of subsidy with which we must deal are necessarily those established by the United States itself. The relevant legislative provision in this regard is Section 771 (19 U.S.C. § 1667) of the U.S. Tariff Act of 1930, as amended by Section 1312 of the 1988 Omnibus Trade and Competitiveness Act. The ITA of the DOC makes the determination of subsidy.

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

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

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

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

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

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

(iv) The assumption of any costs or expenses of manufacture, production or distribution.

(C) Special Rule - In applying subparagraph (A), the administering authority, in each investigation, shall determine whether the bounty, grant or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries. Nominal general availability, under the terms of the law, regulation, programme or rule establishing a bounty, grant or subsidy, of the benefits thereunder is not a basis for determining that the bounty, grant or subsidy is not, or has not been, in fact provided to a specific enterprise or industry, or group thereof."

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[5] The amount of the per unit subsidy is determined by dividing the subsidy by the number of units produced (in the case of domestic subsidies) or exported (in the case of export subsidies).

For example, in the case of Lumber III, Commerce followed the same general formula in each province. The numerator in each province consisted of the calculated benefit per cubic metre (i.e. the difference between administered rates and the benchmark), multiplied by the softwood sawlog harvest. The denominator consisted of the value of softwood lumber shipments plus the value of lumber co-products, e.g. chips and sawdust.

[6] This information was acquired from the Library of Parliament, Research Branch Backgrounder Paper BP-215E Subsidies and United States Trade Law: The Application to Canada. October 1989. p.8-12.

U.S. Countervailing duty law is designed to attack imports where domestic subsidies have been provided to specific companies or industries. From this it can be inferred that countervailing duties will be imposed where a benefit accrues to a specific industry but not where it is generally available to all industries in the economy. This is known as the principle of "general availability". This principle has been brought into U.S. countervailing duty law through the concept of specificity, which requires that a subsidy must be provided to a "specific" industry or enterprise in order for it to be countervailable.

Over the past few years there has been considerable controversy surrounding the ITA's interpretation of the specificity test. In several cases, the ITA interpreted the law to mean that a subsidy is countervailable only if it is available to a particular industry or group of industries. In a 1983 decision in relation to Canadian softwood lumber products, the ITA held that Canadian stumpage programmes were available within Canada on similar terms regardless of the industry or enterprise of the recipient[7] and that any limitations on the kinds of industries using these programmes resulted from the inherent characteristics of the natural resource not government action. Thus, in the opinion of the ITA, these programmes were generally available.

The ITA's interpretation of the specificity test was scrutinized by the U.S. Court of International Trade (CIT) in the 1985 decision, Cabot Corporation vs. United States[8]. The Court held that "the generally available benefits rule as developed and applied by the ITA is not an acceptable legal standard for determining the countervailability of benefits. According to the CIT, the appropriate standard requires the ITA to focus on the de facto effect of the benefits provided under a particular programme rather than their nominal general availability. Thus, the ITA must determine whether a benefit or competitive advantage has been actually conferred on a specific industry or group of enterprises or industries.

The Cabot interpretation of the specificity test was applied by the ITA in the second Canadian Softwood Lumber case in 1986[9]. Contrary to its 1983 decision, the ITA found that Canadian stumpage programmes were being provided to a specific group of industries notwithstanding that they were nominally generally available and were actually used by more than one industry. In the 1991 softwood lumber investigation (Lumber III), the ITA turned this proposition on its head by concluding that a programme is per se specific if there are limitations imposed on use by the characteristics of the product such that it can only be used by an enterprise or industry or group of enterprises or industries. In effect this reduces the specificity test to a determination of whether an enterprise or industry or group of enterprises or industries are the only users of the product.

Since the second Softwood Lumber decision, the tenets of the Cabot interpretation of specificity were codified in U.S. law by the Omnibus Trade and Competitiveness Act of 1988. Now the ITA is required to determine whether a domestic subsidy is in fact given to specific industry even though under the relevant law or regulation it is nominally available to industries in general[10]. Thus, in U.S. law, the de facto application of a subsidy has become the critical factor.

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

[8] 620 F. Supp. 722 (CIT 1985).

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

[10] 19 U.S.C.A. section 1677(5)(B).

In applying the de facto specificity test to determine whether a programme is limited to a specific enterprise or industry or group of enterprises or industries the ITA usually considers four factors.

1. the extent to which a government acts to limit the availability of a programme;

2. the number of users that actually use the programme;

3. whether any users receive benefits of the programme in a dominant or disproportionate manner; and

4. whether the government exercises discretion in awarding benefits under the programme.

2.2 Procedures For Countervailing Duty Investigations

2.2.1 Initiation of Investigation

Countervailing duty investigations may be self-initiated by the DOC or may be initiated as a result of a petition filed by an interested party. Petitions may be filed by any of the following, on behalf of the affected industry: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified or recognized union or group of workers which is representative of the affected industry; (3) a trade or business association with a majority of members producing a like product; (4) a coalition of firms, unions, or trade associations that have individual standing; (5) a coalition of trade association representative of processors, or processor and growers, in cases involving processed agricultural products. The DOC is required to provide technical assistance to small businesses to enable them to prepare and file petitions under the CVD law. Petitions are to be filed simultaneously with both the DOC and the U.S. International trade Commission (ITC). Within 20 days after the filing of a petition, the DOC must decide whether or not the petition is legally sufficient to commence an investigation. If so, an investigation is initiated with respect to imports of a particular product from a particular country.

2.2.2 Preliminary ITC Injury Determination

Within 45 days of the date of filing of the petition, or of self-initiation, the ITC must determine whether there is a "reasonable indication" of material injury, based on the best information available to it at the time. The petitioner bears the burden of proof with respect to this issue. If the ITC preliminary determination is negative, the investigation is terminated. If it is positive, the investigation continues.

2.2.3 Preliminary DOC Subsidy Determination

Within 85 days after the petition is filed or the investigation is self-initiated, the DOC must determine whether there is a "reasonable basis to believe or suspect that a subsidy is being provided." In cases involving upstream subsidies, the time period may be extended to 250 days. This preliminary determination is based on best information available to it at the time. If affirmative, the preliminary determination must include an estimated amount of the net subsidy.

An expedited preliminary determination may be made based on information received during the first 50 days if such information is sufficient and the parties provide a written waiver of verification and an agreement to have an expedited preliminary determination. On the other hand, the preliminary determination may be post-poned until 150 days after filing of petition or self-initiation, at the petitioner's request or in cases which DOC determines are extraordinarily complicated.

The effect of an affirmative preliminary determination is two-fold: (1) the DOC must order the suspension of liquidation of all entries of foreign merchandise subject to the determination from the date of publication of the preliminary determination. The DOC must also order the posting of a cash deposit, bond, or other appropriate security for each subsequent entry of the merchandise equal to the estimated amount of the net subsidy; (2) the ITC must begin its final injury investigation, and the DOC must make all relevant information available to the ITC. If the preliminary determination is negative, no suspension of liquidation occurs, and the DOC investigation simply continues.

In cases involving "countries under the Agreement," if the petitioner alleges critical circumstances, the DOC must determine, on the basis of best information available at the time, whether (1) the alleged subsidy is inconsistent with the GATT Subsidies Code; and (2) there have been massive imports of the merchandise over a relatively short period. This "critical circumstances" determination can be made prior to the preliminary determination of subsidies. If the DOC determines critical circumstances exist, then any suspension of liquidation ordered shall retroactively apply to unliquidated entries of merchandise entered up to 90 days prior to the date suspension of liquidation was ordered.

2.2.4 Final DOC Subsidy Determination

Within 75 days after the date of its preliminary determination, the DOC must issue a final subsidy determination, unless the case involves upstream subsidies, in which case special extended time limits apply. If there are simultaneous investigations under the antidumping and countervailing duty laws involving imports of the same merchandise, the final CVD determination may be postponed until the date of the final determination in the antidumping investigation at the request of a petitioner.

If the final subsidy determination is negative, the investigation is terminated, including any suspension of liquidation which may be in effect, and all estimated countervailing duties are refunded and all appropriate bonds or other security are released. If the final determination is affirmative, the DOC orders the suspension of liquidation and posting of a cash deposit, bond, or other security (if such actions have not already been taken as a result of the preliminary determination), and awaits notice of the ITC final injury determination.

Final subsidy determinations are subject to binding binational panel review under Chapter 19 of the FTA.

2.2.5 Final ITC Injury Determination

Within 129 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, whichever is longer, the ITC must make a final determination of material injury. If the DOC preliminary determination was negative, and the DOC final determination was affirmative, the ITC has until 75 days after the final affirmative determination to

make its injury determination.

A negative final determination by the ITC terminates the countervailing duty action. If the determination is affirmative, a countervailing duty order will be issued by the DOC.

The ITC is composed of six commissioners, appointed by the President, no more than three of whom can be from the same major political party in the United States. Determinations are made on the basis of a majority vote. If the Commission splits evenly in a vote on material injury or threat of injury, the Commission will be deemed to have made an affirmative determination. Cash duties would be imposed at the rate identified in the DOC final subsidy determination, following publication of a permanent countervailing duty order.

In the event that the Commission votes affirmative on injury, cash deposits would start to be collected with the publication of the permanent countervailing duty order. However, bonds posted since the DOC preliminary determination would remain outstanding until the completion of the first administrative review. The administrative review would confirm the actual subsidy rate. Customs would only collect actual duties for the period since the DOC preliminary and final subsidy determination, based on the confirmed rate.

In the event of a threat of injury determination, cash deposits would start to be collected with the publication of the permanent countervailing duty order and all bonds posted since the DOC preliminary subsidy determination would be cancelled and cash deposits for the period would be refunded by Customs.

Should the Commission vote no injury, the countervailing duty investigation would be terminated, all bonds would be cancelled and all cash deposits would be refunded.

Final injury determinations are subject to binding binational panel review under Chapter 19 of the FTA.

A properly documented countervailing duty petition can be disposed of within 205 days. It Should be noted, however, that U.S. law provides for extensions of certain time periods for complex cases and for cases involving upstream subsidy questions.

2.2.6 Termination or Suspension of CVD Investigations

Either the DOC or ITC may terminate a CVD investigation upon withdrawal of the petition by petitioner, or by the DOC if the investigation was self-initiated. The DOC may not, however, terminate an investigation on the basis of a quantitative restriction agreement limiting U.S. imports of the merchandise subject to investigation unless the DOC is satisfied that termination on the basis of such agreement is in the public interest.

The DOC may suspend a CVD investigation on the basis of one of three types of agreements entered into with the foreign government or with exporters who account for substantially all of the imports under investigation. The three types of agreements are:

(1) an agreement to eliminate the subsidy completely or to offset completely the amount of the net subsidy within 6 months after suspension of the investigation;

(2) an agreement to cease exports of the subsidized merchandise to the United States within 6 months of suspension of the investigation; and

(3) an agreement to eliminate completely the injurious effect of subsidized exports to the United States (which, unlike under the antidumping law, may be based on quantitative restrictions).

The DOC may not, however, accept any such agreement unless it is satisfied that suspension of the investigation is in the public interest, and effective monitoring of the agreement is practicable.

Prior to actual suspension of an investigation, the DOC must provide notice of its intent to suspend and an opportunity for comment by interested parties. When the DOC decides to suspend the investigation, it must publish notice of the suspension, and issue an affirmative preliminary determination (unless previously issued). The ITC also suspends its investigation. Any suspension of liquidation ordered as a result of the affirmative preliminary determination, however, is to be terminated and all deposits of estimated countervailing duties or bonds posted are to be refunded or released.

If, within 20 days after notice of suspension is published, the DOC receives a request for continuation of the investigation from a domestic interested party or from the foreign government, then both the DOC and ITC must continue their investigations.

The DOC has responsibility for overseeing compliance with any suspension agreement. Intentional violations of suspension agreements are subject to civil penalties.

2.2.7 Assessment of CVD Duties

Under title VII and in Section 303 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979[11] investigations requiring an injury test, both the DOC and ITC must issue affirmative final determinations in order for a CVD order to be issued. In Section 303 investigations not requiring an injury determination, the CVD order is issued on the basis of an affirmative final DOC determination alone. Within 7 days of notice of an affirmative final ITC determination, the DOC must issue a countervailing duty order which (1) directs the Customs Service to assess countervailing duties equal to the amount of the net subsidy; (2) describes the merchandise to which the CVD applies; and (3) requires the deposit of estimated CVD's pending liquidation of entries, at the same time as estimated normal customs duties are deposited. Customs must assess countervailing duties within 6 months after the DOC receives satisfactory information on which to base the assessment, but no later than 12 months after the end of the annual accounting period within which the merchandise is imported or sold in the United States. The DOC must publish notice of its determination of net subsidy which shall be the basis for assessment of CVD's and for deposit of estimated CVD's on future entries.

2.2.8 Differences Between Estimated and Final CVD's

If the cash deposit, bond, or other security for estimated countervailing duties pursuant to an affirmative preliminary determination is greater than the amount of CVD assessed

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[11] 19 U.S.C. 1303.

pursuant to a CVD order, then the difference between the deposit and the amount of final CVD will be refunded for entries prior to notice of the final injury determination. If the cash deposit is lower than the final CVD under the CVD order, then the difference is disregarded. No interest accrues in either case.

If estimated countervailing duties deposited for entries pending liquidation are greater than the amount of final CVD's determined under a CVD order, then the difference will be refunded, together with interest on the amount of overpayment. If estimated CVD's are less than the amount of final CVD's then the difference will be collected together with interest.

2.2.9 Administrative Review

The DOC is required, upon request, to conduct an annual review of outstanding CVD orders and suspension agreements on the anniversary month of the original order. For all entries of merchandise subject to the review, the DOC must review and determine the amount of any net subsidy. Such determination will provide the basis for assessment of CVD's on all entries subject to the review, and for deposits of estimated duties on entries subsequent to the period of review. The results of its annual review must be published together with a notice of any CVD to be assessed, estimated duty to be deposited, or investigation to be resumed.

A review of a final determination or of a suspension agreement shall be conducted by the DOC or ITC whenever it receives information or a request showing changed circumstances sufficient to warrant such review. Without good cause shown, however, no final determination or suspension agreement can be reviewed within 24 months of its notice of publication.

2.2.10 Anti-Circumvention Authority

In 1988, specific authority was added to U.S. law from the Omnibus Trade and Competitiveness Act to authorize the DOC to take action to prevent or address attempts to circumvent an outstanding countervailing duty order. The authority addresses four particular types of circumvention:

(1) assembly of merchandise in the United States,

(2) assembly of merchandise in a third country,

(3) minor alterations or merchandise, and

(4) later-developed merchandise.

Under certain circumstances and after considering certain specified factors, DOC may extend the scope of the countervailing duty order to include parts and components (in cases involving U.S. assembly), third country merchandise (in cases involving third country assembly), altered merchandise, or later-developed merchandise.

2.2.11 Judicial Review

An interested party who is dissatisfied with a final determination under the countervailing duty law may file an action with the CIT for judicial review. To obtain judicial review

of the administrative action, a summons and complaint must be filed concurrently within 30 days of publication of the final determination. The standard of review used by the Court is whether the determination is supported by "substantial evidence on the record, or otherwise not in accordance with law."

Judicial review of interlocutory decisions, previously permitted, was eliminated by Section 623 of the Trade and Tariff Act of 1984. Decisions of the CIT are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

As a result of provisions in the FTA and its implementing legislation, final determinations in countervailing duty proceedings as well as administrative reviews of countervailing duty orders involving products of Canada can be reviewed by a binational panel instead of by the CIT, if either of the parties involved so requests. The binational panel will apply only U.S. law and U.S. standards of judicial review to decide whether U.S. law was applied correctly. The results of panel review and extraordinary challenges are binding on the administering authorities for the period under review.

3.0 METHODOLOGIES UTILIZED IN U.S. COUNTERVAILING DETERMINATIONS

3.1 Overview:

There exist essentially two approaches to the measurement of subsidies, the benefit-to-recipient and cost-to-government approaches. Both approaches attempt to measure the assistance provided to commercial entities by the state. In practice, the results are more often than not the same. The U.S. tends to rely more heavily on the former approach, though will substitute the other methodology when more practical. The benefit-to-recipient approach measures the financial benefit accrued to firms which directly affects their pricing, production and investment decisions. The benefit is equated with the nominal amount of financial assistance provided to a firm. The cost-to-government approach measures the benefits in terms of costs absorbed by the treasury in providing financial assistance.

Under the GATT Subsidies Code, countervailing duties are permitted to be imposed in order to remove the injury to the domestic producer caused by the importation of subsidized products. The Code clearly recognizes that the relationship between the amount of the subsidy, and its effects, varies from case to case. While the Code authorizes the imposition of duties up to the amount of subsidization found, it suggests that the duties only be imposed to the extent necessary to remove the injury. The Code thus recognizes that, in certain cases, the imposition of duties equalling to less than the full amount of the subsidy may be sufficient to offset injury.

Conversely, the benefits or effects of a subsidy, may extend beyond the amount of subsidization. In this regard, the U.S. has argued in international discussions the desirability of offsetting the full amount of the effects or benefits of subsidies. This is particularly true in the context of research and development subsidies. Indeed, the U.S., in its own countervailing decisions, regardless of whether the programme under investigation is an R & D measure, has adopted a practice of imposing a duty designed to fully offset the net subsidy rather than merely the injury. (Note: Canadian policy also ensures that CVD duties fully offset the foreign subsidization instead of just the domestic injury, although there does exist -- unlike in the U.S. -- a public interest provision that provides for duty reductions).

Before investigating the various mechanisms used by Commerce to come up with a net subsidy figure it should be underlined that regardless of whether or not a countervailable subsidy is found, no countervailing duties can be applied to Canadian products, unless the ITC also determines that injury is caused or threatened.

3.2 Specific Methodologies

The criteria applied to the following examples are, with the exception of upstream subsidies, those suggested in Section 771(5) of the U.S. Tariff Act of 1930. The determination of subsidy depends, in the first instance, on whether the assistance in question is targeted to a specific industry. If it is not so targeted, but is generally available, no subsidy will be found. If it is targeted, the case is examined to determine whether the assistance is covered by any of the specific categories of subsidies listed in the statute. In this regard, a distinction is made between programmes undertaken by the government in its proprietary capacity, and those undertaken in its sovereign capacity. In the former case, the government is essentially exercising the same functions as may be provided by a private commercial entity. These functions may include extending loans, providing insurance or taking out equity in particular companies. The criteria used in cases such as these is that outlined in Section 771(5)(b)(i), that is to say, whether the action taken was consistent with commercial considerations.

3.2.1 Export Subsidies:

Export subsidies are more easily defined than are domestic subsidies and no particularly complicated methodology is required. Loans provided under the federal Programme for Export Market Development (PEMD), which provides interest-free loans for the purpose of developing new markets, were found to be a countervailable export subsidy in both the Atlantic Groundfish and the second Softwood Lumber cases. In these cases DOC simply determined the amount of the assistance provided and divided it by the value of the subject commodity shipped to the U.S.. It should be noted that the amount of assistance provided is, in the PEMD cases, determined by comparing the PEMD loan rates against a benchmark rate designed to approximate the commercial rate applicable during the period under review (normally the Bank of Canada corporate discount rate), and calculating the extent of the preferential treatment accorded. One can see that the benefit-to-recipient approach was used since it is the degree to which the programme aided the exports that was countervailed, not the cost to the Treasury.

3.2.2 Insurance Policies:

The question as to whether government insurance programmes can be considered to be countervailable is not yet fully answerable. Canadian respondents in the latest Fresh, Chilled and Frozen Pork case claimed that the Red Meat Tripartite Programme was in actual fact more an insurance programme than a grant programme. DOC dismissed this argument and found the programme to be a countervailable grant programme.

3.2.3 Grants:

(a) Since grants represent subsidies by definition under U.S. trade law, the only criteria used in deciding whether or not they should be countervailed is that of targeting. In this regard targeting may be a matter of intent, as when the legislation concerned specifically singles out certain industries as the only one(s) qualifying for benefits. This de jure specificity has been commonly cited, by DOC, as the cause of countervailability. Examples, in the context of U.S. countervailing cases, are numerous.

Minor and very limited programmes such as the Ontario Greenhouse Energy Efficiency Programme (GEEP) in the Certain Fresh Cut Flowers from Canada case, which affected exports valued at only $40,000, have been countervailed due to the specific intent of the programme. GEEP disburses grants to greenhouses to alleviate the costs of converting to more efficient energy methods. Interestingly enough, under the negligible imports provision of the 1988 Omnibus Trade Bill (OTB) such a case may be avoided in the future. At any rate, in this instance Commerce once again applied a benefit-to-recipient approach by dividing the value of the benefits accruing to the subject company, by its sales.

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

(b) Grants can also be found countervailable due to the practical, de facto, effect of the programme. If some industries, as a result of the eligibility requirements or government discretion, manage to gain more benefits or incur fewer costs, such a situation is liable to countervail. Perhaps the most striking example of Canadian programmes that have been designed to meet the standard of general availability - and legitimate domestic policy priorities -- and have been found countervailable, are the extensive development agreements between the federal and provincial governments. These agreements for the most part are intended to promote regional development. Such federal-provincial joint programmes as General Development Agreements (GDAs), Agricultural and Regional Development Agreements (ARDAs) and Economic and Regional Development Agreements (ERDAs) have all been found countervailable not because they favour specific enterprises or industries -- as Section 771 of the U.S. Tariff Act mandates -- but rather because their benefits are geographically targeted.

3.2.3.1 Capital Grants:

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

3.2.4 Equity Infusions:

In the fall of 1982, DOC conducted a number of countervailing investigations against steel products from the European Community. These cases provided significant insight into Commerce methodology. This is especially true with respect to government equity. According to these cases Commerce considers that government equity ownership per se, or any secondary benefit to a company reflecting the market's reaction to such ownership, does not necessarily confer a subsidy. Such a subsidy is conferred only when government equity ownership is on terms inconsistent with commercial considerations (e.g., government funded equity infusions despite continuing heavy losses and without reasonable prospects for recovery).

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

- rate of return on total assets and net equity;
- profit margin on sales;
- operating loss to financial expense;
- the 'current' and 'quick' ratios;
- debt to equity; and
- debt to total assets.

The particular equity infusions under question here were in the form of the provincial government's conversion of Sysco's debt to equity. Normally, DOC stated, they calculate the benefit conferred by the government equity infusions inconsistent with commercial considerations by determining the difference between the average national rate of return on equity, and the average rate of return on equity of the company in question. From there DOC would divide this net benefit over the sales value of the commodity to determine a benefit-to-recipient result. However, in this case, DOC concluded that the calculation of any rate of return for Sysco would be meaningless as the corporation had fully consumed the infusion. Therefore, DOC treated this equity infusion as a grant.

3.2.5 Forgiveness of Debt:

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

3.2.6 Loans:

As previously noted, the extension of loans by governments is essentially a proprietary function which might be carried out equally effectively by private entrepreneurs. The most common loan practice of governments which gives rise to countervailable subsidies is the use of preferential rates of interest. This can be manifested either through the government being the actual lender or when the government directs a private lender to offer such rates, or even where the government assists in the payment of commercial rates in a manner analogous to there being preferential rates for the borrower. In such cases, Commerce determines the amount of subsidy by comparing what expenses the company concerned would incur given they were dealing with a commercial loan, in principal and interest, versus what they actually paid as a result of government intervention. The examples of Commerce finding such Canadian transactions countervailable are many. In the 1985 Live Swine and Fresh, Chilled and Frozen Pork case four different provincial programmes were found countervailable due to their provision of favourable loan conditions. In the Atlantic Groundfish case seven programmes were identified as countervailable as a result of the provision of preferential loan terms. In all these cases, and indeed in the many other instances in other cases, DOC applied the same methodology. In most cases the competitive benchmark rate used was the "national average" or the Bank of Canada corporate discount rate.

There has been substantial criticism of the manner in which DOC attempts to allocate loan benefits over time. In "Michelin Tire Corp. vs. the United States" (1981) the CIT found fault in the "exaggerated" nature of the DOC determined benefit of the deferral of the principal. The Court saw this decision as "beyond reason" and rejected DOC's failure to limit the benefit to a single principal amount. The Court stated that "if benefits exist in years after the year of deferral, they cannot be more than the interest ramifications of an original benefit in the year of deferral. To revive the deferred amount year after year defies reality". In "Bethlehem Steel vs. the United States" (1983) the manner by which Commerce determined the present-value calculation of benefits allocated over time, was also criticized. These judicial decisions continue to refine the attempts by Commerce to implement, administratively, their interpretations of U.S. CVD law in the absence of clear legislative guidelines. However, these refinements have not, in the context of the allocation of benefits over time, concluded with the enunciation of an accepted methodology. Indeed, the methodology utilized by DOC in this regard is still quite arbitrary -- much like the issue of the recurrence or non-recurrence of grants. Questions such as: is the "risk-free" interest rate (i.e., the foreign equivalent of U.S. T-Bill rates) the appropriate discount rate?, and how should DOC derive an equivalent commercial loan in the absence of any accepted standard?, still are not resolved.

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

3.2.7 Loan Guarantees:

The criteria used in these cases is similar to those applied to loans. These involve a government guarantee of repayment to the private lender. Such a guarantee constitutes a subsidy to the extent that it assures more favourable loan terms versus an unguaranteed arrangement. The amount of the subsidy is calculated in the same manner as it would be for a preferential loan.

Once again the instances of loan guarantees being countervailed by DOC are numerous. In the Live Swine and Fresh, Chilled and Frozen Pork, and Atlantic Groundfish cases, loan guarantees were found to confer subsidies on four separate occasions.

Section 771(5)(b)(i) of the Tariff Act explicitly legislates Commerce action on both loan guarantees and preferential loans.

3.2.8 Research & Development Grants and Loans:

In the view of Commerce, grants and preferential loans awarded by a government to finance research that has a broad application and that yields results which are made publicly available do not confer subsidies. Moreover, programmes which provide funds to a specific industry to complete research that benefits a whole range of industries are not countervailable. Conversely, programmes established to finance research which affects only a particular industry or group of industries, and which yield results available only to particular producers in a particular country, or group of countries, are considered to confer a subsidy on the products which benefit from such research.

In "Agrexco, Agricultural Export Co. vs. the United States" (1985), the CIT found that the relevant measure of whether government sponsored research and development is in fact a subsidy turns on whether the benefit of such research is targeted to a specific industry.

An excellent example of this approach, as practiced by Commerce, is the treatment accorded the Canadian Record of Performance (ROP) Programme. This programme which is jointly administered by the federal and provincial governments is designed to assist swine producers in improving breeding stock and to encourage the production of uniform and high quality pork -- at lower costs. In the 1985 Live Swine and Fresh, Chilled and Frozen Pork case the ROP was determined to improve the profit margins of a specific industry; Canadian hog growers largely at the expense of the federal and provincial governments. As such it was found countervailable. In the first administrative review of this decision, however, DOC found that as Agriculture Canada publishes ROP's results and the methodology used in obtaining these results, the benefits of the programme are publicly available, not just to the Canadian hog industry, and hence do not confer a unique or special benefit to that industry. Accordingly, Commerce reversed its earlier decision and removed the countervailing duty applied to this programme.

When R & D programmes are found countervailable, the methodology employed to calculate net subsidy is the same as it would be for regular loans and grants.

3.2.9 Tax Credit and Allowances:

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

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

3.2.10 Social Welfare Programmes and Worker Benefits:

As this is again a "sovereign role" of a government, for it to be found countervailable in accordance with Section 771(5)(B) of the Tariff Act, it must be found to offer preferential benefits to workers in a specific industry or region. Commerce practice has been that such preferentiality can be determined by looking at both programme eligibility and participation. Even when provided to workers in specific industries, such benefits are countervailable only to the extent that such benefits, as laid down in subsection 771(5)(B)(iv), relieve the firm of costs it would ordinarily incur. An example would be government assumption of a firm's normal obligation to partially fund worker pensions. Such labour-related subsidies are generally conferred in the form of grants and are accordingly treated as untied grants.

U.S. petitioners have, in a number of cases, attempted to persuade Commerce to find Canadian labour based social programmes countervailable. Fortunately Commerce has yet to determine any such programme countervailable. However despite the high political sensitivity of this matter DOC has investigated a number of such programmes. In the first Softwood Lumber case Commerce found that the federal Local Employee Assistance and Work Sharing Programmes and the British Columbia Employment Bridging Assistance Programme were not countervailable as the benefits were of an inconsequent magnitude; not provided in the review period; or were eligible beyond a specific region and industry. A more important instance of Commerce investigating a social programme as a possible countervailable practice was in the Atlantic Groundfish case. In this case Section 146 of the Unemployment Insurance Act was alleged to preferentially treat self-employed Atlantic fishermen. Although Commerce did conclude that Section 146 does authorize the Canada Employment and Immigration Commission to establish a scheme of unemployment insurance for self-employed fishermen, while fishermen that work under a contract of service are covered under the general provisions of the Act (as are the most Canadian contract workers), Commerce nevertheless concluded that the benefits of the unemployment insurance regime for self-employed fishermen does not result in preferential treatment. DOC, in the final determination wrote that "while terms of the unemployment insurance for self-employed fishermen and general contract workers are very similar, they are not identical". However, "comparing the terms of the unemployment insurance provided under the Fishermen's Regulations for self-employed fishermen to those provided under the Unemployment Insurance Act and Regulations, we determine that the unemployment insurance provided to self-employed fishermen is not provided on preferential terms and therefore is not countervailable."

3.2.11 Provision of a Good or Service by the Government:

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

However, since then, it appears that Commerce has reinterpreted this concept of preferentiality. In cases where the provision of goods or services is limited, DOC has used alternative benchmarks to evaluate preferentiality. The first such instance of the new interpretation was in an administrative review of a CVD order of Carbon Black from Mexico (i.e., the Cabot case). In that case, Commerce determined that given the limited number of users of carbon black, its standard test for evaluating preferentiality was not appropriate. Therefore, DOC considered alternative benchmarks and issued a so-called 'preferentiality appendix' describing these alternatives.

The usual and preferred test of preferentiality employed by the ITA is "whether the government (or government directed suppliers) provides a good or service to the producer(s) of a product at a price that is lower than the price the government charges to the same or other users of that product within the same political jurisdiction" (51 Fed. Reg. 13272). This test is effectively one of assessing whether the foreign government practices price discrimination for the good within the domestic economy. However, the choice of the appropriate benchmark to measure preferentiality has been a contentious issue, especially where two-tier pricing policies are involved in the investigation or when the good in question is limited to a few actual users.

As a result of an administrative review of Carbon Black from Mexico, the ITA proposed four alternative tests to measure preferentiality in those cases where the producers under investigation are the only users within the foreign jurisdiction. Since the ITA has introduced a fifth test, those tests, in order of preference, are the difference between the price charged by the government for the good and:

1. the price the government charges to the same or other users of the good within the same political jurisdiction;

2. the price, adjusted for quality differences, the government charges for a similar good, provided that the price and the good are non-selective;

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

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

5. the price paid for the identical good outside the political jurisdiction (proposed regulations, 54 Fed. Reg. at 23, 381-82; Preferentiality Appendix, 51 Fed Reg. at 13, 273).

The ranking of these alternative tests reflects the ITA's stated belief that comparisons of prices within the foreign jurisdiction are the most appropriate measures of preferentiality. The use of external prices, alternative 5, is considered the "least desirable and most deficient because regardless of which external price is chosen for its effect on the domestic market, this test does not measure preference within the economy" (51 Fed. Reg. 13272).

In Lumber II, DOC accepted petitioners argument that not only was government discretion widely used in the allocation of stumpage rights, but also that the original conclusion of de facto non-specificity was no longer assured. Commerce instead determined that stumpage (i.e., the sale of the rights to harvest timber) was provided de facto to a specific industry, and thus countervailable. The amount of the subsidy, and degree of preferentiality, was calculated using the third benchmark from the 'preferentiality appendix' (as outlined above). DOC chose alternative four as they determined that there was no "generally available" benchmark price for stumpage fees. The countervailable net subsidy was therefore calculated by subtracting all government revenue (i.e., stumpage) from the provision of this good, from government costs associated with forestry maintenance and management.

This methodology was essentially the use of a cost-to-government approach.

3.2.12 Price Supports:

While Canada is not free of price support programmes they have yet to be examined in a countervailing duty case. However, price support programmes could in fact be subject to U.S. countervailing determinations if they were found to be providing benefits to a specific region or industry, in a preferential manner. Such a reality is important to note given Canada's extensive supply management systems in the agricultural sector. Many of these systems, including such high-profile sectors as milk, are based on a price support concept.

3.2.13 Income Supports:

Government income support programmes have not escaped U.S. countervailing action despite Canadian arguments that income support does not affect price, production or investment decisions. Rather it merely guarantees a minimum income level. In the 1985 Live Swine and Fresh, Chilled and Frozen Pork case and again in the 1989 Fresh, Chilled and Frozen Pork decision, an income support programme has been investigated and determined to be conferring a countervailable subsidy by DOC.

In the first case, the federal Agricultural Stabilization Act (ASA) and a number of provincial swine producer stabilization programmes were investigated. Regardless of Canadian government claims that such stabilization programme were part of a "nationwide fabric of programmes covering farm products" and hence were generally available, DOC disagreed on the following counts. Firstly, Commerce determined that the Agricultural Stabilization Board had a degree of discretion in deciding upon the level of support payments. Secondly, DOC found that as the ASA specifically listed "named products" for support payments, as well as a number of "designated products", the coverage was not exhaustive, and hence not generally available. Additionally, the funding formula for the various commodities under the ASA was not uniform, and hence provided preferential treatment for certain commodities, including hogs.

In the 1989 Fresh, Chilled and Frozen Pork case, the nature of the agricultural income support programmes had changed significantly. For one thing, the previously provincially dispersed plans for swine grower support payments had been largely consolidated under the Tripartite Red Meat Stabilization Plan. This plan involved equal contributions into a fund by the federal and provincial governments, plus enrolled producers. This fund pays out support payments to producers in times of low hog prices and collects money in times of a healthy hog market. As such it is an income stabilization programme, not a production or export incentive.

Despite this programme redesign, DOC used the same reasons for finding it countervailable again in this second case. The second time, however, the emphasis was much more on the violation of de facto general availability, rather than the original focus on a de jure violation. Commerce determined that while agricultural support was generally available (i.e., de jure non-specificity) the terms of such support varied by commodity and that government discretion was involved in the distribution and level of support payments.

The methodology employed to calculate the subsidy in these cases was to derive the dressed-weight (i.e., pork producing percentage of a hog) equivalent of all hogs marketed that year, and to divide the value of the stabilization payments by that equivalent. This produced a subsidy per pound which would be countervailed in kind at the border.

Once again Commerce has found a "sovereign role" of the government countervailable due to the specificity of the programme and the amount of governmental discretion -- and hence preferentiality -- used in the programme's delivery.

3.2.14 Upstream Subsidies[12]

Section 613 of the Trade and Tariff Act of 1984 clarifies the scope of the countervailing duty law with respect to its application to upstream subsidies: An upstream subsidy is defined as any subsidy described in present law that:

(1) is paid or bestowed by a government with respect to an input used to manufacture or produce in that same country merchandise subject to a CVD proceeding;

(2) in the judgment of the DOC bestows a competitive benefit on that merchandise; and

(3) has a significant effect on the cost of manufacture or production of the merchandise.

With regard to the second criterion, the DOC shall decide that a competitive benefit has been bestowed when the price for the input used in manufacture or production of the merchandise subject to investigation is lower than the price the manufacturer or producer would otherwise pay for the input from another seller in an arms-length transaction. Whenever the DOC has reasonable grounds to believe or suspect an upstream subsidy is being paid or bestowed, the DOC must investigate whether it is in fact and, if so, include the amount of any competitive benefit, not to exceed the amount of upstream subsidy, in the amount of any CVD imposed on the merchandise under investigation.

The provision on upstream subsidies added by the 1984 Act does not affect the basic definition of subsidy in any way. The potential for an upstream subsidy exists only when a subsidy is provided to the input producer. The provision is also limited to subsidies paid or bestowed by the country in which the final product is manufactured. In 1988, a separate, special rule was added to the law with respect to calculating subsidies on certain processed agricultural products.

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[12] These are domestic subsidies given by a foreign government to "input products" used in the manufacture or production of the goods under investigation, where these subsidies significantly lower the cost of production and thus bestow a competitive benefit on the goods.

3.3 Examples of U.S. Countervailing Duty Actions Against Canada

The United States uses countervailing duty measures more than any other nation, having launched some 308 cases from 1980-1987. Since 1980 there have been a considerable number of American countervailing duty investigations of Canadian exports (Table 2). These investigations have examined a vast array of government initiatives, including agricultural stabilization and regional development programmes, tax incentives and government equity infusions into commercial enterprises.

This portion of the paper summarizes the highlights of seven of the cases in which the ITA found that subsidization had occurred and in which the ITC determined that there had been material injury or threat thereof to U.S. producers.

3.3.1 The Live Swine and Pork Case

In 1985, the ITA found that certain benefits provided to Canadian producers and exporters of live swine by 22 federal and provincial programmes constituted subsidies; a countervailing duty was levied on these products.[13]

For the most part, the investigation focused on the various price stabilization programmes offered to hog producers. These programmes were found to be countervailable because they benefited a specific industry. The rationale applied by the ITA in finding that federal payments for a hog stabilization programme under the Agricultural Stabilization Act (ASA) were countervailable is representative of the reasoning applied to a number of comparable provincial programmes.

The federal ASA stabilization payments were held to be countervailable because: (i) they were made to selected agricultural products in specific amounts, e.g. hogs; (ii) the specific rates of support varied from commodity to commodity; and (iii) there was government discretion in the administration of the various stabilization schemes.[14]

Other provincial programmes such as interest payment assistance, loan guarantees, and grants to defray the cost of transporting hogs to processing facilities were determined to be countervailable because they benefited a specific industry.

The swine case reveals that the ITA defines subsidies in a number of ways. They could be government programmes available to the agricultural sector as a whole or those given on a regional basis or those available to one sector of the industry. Programmes available to more than one specific enterprise or group of enterprises were held to be countervailable if they "entailed differential treatment across commodity groups, and within a commodity group across individual

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[13] Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada, 50 Federal Register, 17 June 1985, 25097. It should be noted that the ITC found that only subsidized imports of live swine from Canada were causing material injury to the U.S. hog industry. As a result of this determination, a countervailing duty was levied on live swine but not on pork.

[14] Ibid., 25101.

producers, in terms of eligibility for a level of subsidy payments".[15] As noted above, payment under the federal ASA and provincial stabilization programmes were countervailable because there were variations in the level of support from commodity to commodity and/or discretion in determining eligibility for and the amount of support payments.

3.3.2 The Fresh Atlantic Groundfish Case

In this 1986 investigation, the ITA found that some 11 federal, 6 joint federal-provincial and 38 provincial programmes conferred subsidies on the producers or exporters of certain fresh Atlantic groundfish from Canada.[16] Federal grants to construct, modify or re-equip fishing vessels were countervailable because they were determined to be applicable to a specific industry. Other programmes were countervailable because they benefited companies located in a specific region within a province.

A potentially explosive political problem in this case was DOC's decision to examine the countervailability of the unemployment insurance benefit programme for self-employed fishermen. In the end Commerce determined the programme not to be countervailable because the ITA did not find that the insurance had been provided on preferential terms to a specific enterprise or industry. The ITA compared the terms of unemployment insurance provided for self-employed fishermen with those provided under the unemployment insurance programme generally, and found that there were no preferential terms extended to fishermen.[17]

Another important issue in this case was the DOC's treatment of the equity participation by the government's into two fish processing companies - National Sea Products Limited and Fishery Products International Limited. In its decision, the ITA noted that government provision of equity does not per se confer a countervailable benefit; this is the case only when these infusions occur on terms that are inconsistent with commercial considerations.[18] The ITA went on to find that at the time of the government investment, the financial condition of these companies had been such that a reasonable investor acting according to normal commercial considerations would not have invested in them. Accordingly, the government equity infusions constituted a countervailable benefit.

The ITA's treatment of government provided infrastructure programmes warrants discussion since there has been considerable concern about whether basic items such as public highways and public education are countervailable subsidies. In Atlantic Groundfish one of the federal programmes under scrutiny was the Small Craft Harbours programme, pursuant to which the Department of Fisheries operates and maintains over 2,000 small craft harbours. Berthage fees

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[15] Grace Skogstad, "The Application of Canadian and U.S. Trade Remedy laws: Irreconcilable Expectations?" Canadian Public Administration, Vol. 31, No. 4, Winter 1988, p. 539-565 at p. 549.

[16] Final Affirmative Countervailing Duty Determination: Certain Fresh Atlantic Groundfish from Canada, 51 Federal Register, 24 March 1986, 10041.

[17] Ibid., 10059.

[18] Ibid., 10047.

are charged to users, but at a reduced rate for commercial fishermen.

In examining this programme, the ITA set out the factors that it considers when determining whether an infrastructure programme provides a countervailable subsidy. These are whether the government limits who can move into the area where the infrastructure has been built; whether the infrastructure is used by more than a specific enterprise or industry or group...; and whether industries have equal access to or receive benefits from the infrastructure on the basis of neutral criteria.[19] Where limitations on use do not result from government activities, but rather from the inherent characteristics of the specific infrastructure item, the ITA is not likely to find a countervailable benefit.

To the extent that the federal government charged preferential rates to commercial fishermen for harbour facilities, the ITA found that the Small Craft Harbours Programme conferred a countervailable subsidy. Had no preferential rates been given, this infrastructure programme would not have been countervailable.

3.3.3 The Oil Country Tubular Goods Case

In April 1986, the ITA assessed a countervailing duty against certain "Oil Country Tubular Goods from Canada" - hollow steel products intended for use in drilling oil or gas.[20] In this case, certain types of investment tax credits and federal-provincial regional development programmes were found to confer subsidies. In examining the various categories of investment tax credits, the ITA noted that because two of these programmes were directed at encouraging investment in certain regions of Canada, they were therefore countervailable. Similarly, federal development incentives to manufacturers for establishing or modernizing facilities in economically disadvantaged areas of the country were considered to be subsidies.[21]

3.3.4 The New Steel Rails Case

In July 1989, the ITA issued a final affirmative countervailing duty determination in respect of the importation of new steel rails from Canada.[22] This determination examined subsidies to two Canadian producers - Algoma Steel Corporation and Sydney Steel Corporation (Sysco). Only subsidies provided to Sysco were found to be countervailable, those to Algoma being below the de minimis level.

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[19] Ibid., 10065.

[20] Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada, 51 Federal Register, 22 April 1986, 15037.

[21] Ibid., 15039.

[22] Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rail from Canada, 54 Federal Register, 3 August 1989, 31991.

Among the programmes examined by the ITA were regional development incentive programmes, certain investment tax credits, economic and regional development agreements and certain grants, debenture guarantees and equity infusions into Sysco.

In examining the debenture guarantees, loan guarantees and equity infusions by government into Sysco, the ITA looked at whether the company was "creditworthy" and "equityworthy". The ITA considers a company not to be equityworthy if it is "unable to generate a reasonable rate of return within a reasonable period of time."[23] Furthermore, a company is not creditworthy if it will not have sufficient resources or revenues to meet its costs and fixed financial obligations in the absence of government intervention.[24] After analysing Sysco's financial position from 1973 to 1988, the ITA found the company to be neither creditworthy nor equityworthy. As a result, the various loan and debenture guarantees and equity infusions into Sysco were deemed to be countervailable.

The ITA also examined at the economic and regional development cost-sharing agreements signed by the federal government and the Nova Scotia government. The ITA noted that two such agreements had implications for Sysco. The first provided for the modernization of the Sysco plant. The second dealt with funding for economic planning studies throughout Nova Scotia.

The ITA countervailed the assistance provided under the development agreement, in particular the grants to a specific enterprise. Only funds provided by the federal government were held to be countervailable under the second agreement, however, because they were limited to companies in a particular region of Canada (i.e., Nova Scotia). Provincial contributions under this agreement were not countervailable because the assistance was not limited to a specific enterprise or industry or group within the province.[25] However, the combined subsidies resulted in a countervailing duty rate, following appeals, of roughly 95 per cent.

Certain investment tax credit programmes were also found to be countervailable. As it has in other cases, the ITA determined that additional credits available to industry to locate in certain disadvantaged regions of Canada constituted subsidies.

3.3.5 The Fresh, Chilled and Frozen Pork Case

In July 1989, the ITA issued a final affirmative countervailing duty determination against fresh, chilled and frozen pork products from Canada.[26] In this case, the ITA applied one of the amendments enacted under the Omnibus Trade and Competitiveness Act of 1988.

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[23] Ibid., 31992.

[24] Ibid.

[25] Ibid., 31996.

[26] Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada, 54 Federal Register, 24 July 1989, 30774.

Under this new provision, which was enacted in direct response to a successful appeal by the Canadian Meat Council of the 1985 ITA decision in the Swine case, subsidies to the producers of raw agricultural products will be deemed to be provided to the processed agricultural products derived therefrom where the demand for the raw product is "substantially dependent" on the demand for the processed product and the "processing operation adds only limited value to the raw commodity."[27] By relying on this provision, the ITA was able to find that subsidies to live swine were also provided to Canadian pork producers. Canada challenged the decision before the GATT. On August 3, 1990, the GATT Panel ruled that the U.S. countervailing duty on pork was not in accordance with its GATT obligations (Article VI:3), since the DOC unjustifiably concluded that subsidies provided to live swine producers were automatically passed through to producers of pork products. The GATT panel also requested that the United States either reimburse the countervailing duties corresponding to the amount of the subsidies granted to producers of swine or make a subsidy determination which meets the requirements of Article VI:3 and reimburse the duties to the extent that they exceed an amount equal to the subsidy so determined to have been granted to the production of pork[28].

After blocking adoption of the GATT Panel report for almost a year, the U.S. permitted the GATT to adopt it in July 1991 after Canada had turned back the U.S. Extraordinary Challenge of the FTA binational injury panel decision on pork products. As a result, the approximately 20 million dollars in duties that had been collected were returned to Canadian producers (please see the FTA Chapter for details).

As in the 1985 Swine case, the ITA found the price stabilization scheme for hogs established under the federal Agricultural Stabilization Act to be countervailable. The most important factor in the 1989 decision was the extent and the manner in which the government exercised its discretion in making the programme available. The ITA noted that: there were no "explicit or standard criteria" for evaluating requests to include a commodity in the programme; the level of price stabilization and the terms varied at the discretion of the government from commodity to commodity; and support levels varied for the same product as well as from product to product.[29]

3.3.6 Softwood Lumber III

On December 30, 1986, Canada and the United States signed a Softwood Lumber Memorandum of Understanding (MOU) under which Canada agreed to impose an export charge of 15 per cent on certain softwood lumber entering the United States. The export charge could be eliminated or reduced as a result of provincial replacement measures, including increased stumpage and other forestry cost to industry.

On September 3, 1991, the Canadian Government informed the Government of the United States of its intention to terminate the MOU, effective October 4, 1991. Termination of the MOU was specifically provided for under paragraph nine of the MOU. This decision was based

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[27] 19 U.S.C.A. section 1677-2.

[28] General Agreement on Tariffs and Trade. Basic Instruments and Selected Documents. No.38, July, 1992. p.47.

[29] Ibid., 30777.

upon the judgement that the MOU had served its purpose, that provinces had initiated new forest management policies and that the MOU was no longer required.

On October 31, 1991, the United States (i) self-initiated a new CVD investigation, and (ii) imposed an interim bonding requirement on imports of lumber from Canada.

The DOC alleged that companies in Québec, Ontario, Manitoba, Saskatchewan, Alberta, British Columbia, and the Territories benefited from subsidies in the form of the low stumpage rates. The investigation focused on provincial stumpage pricing mechanisms. As well, the Commerce Department expanded the investigation to include log export measures.

An affirmative preliminary determination of injury was made by the U.S. International Trade Commission on December 12, 1991. On March 5, 1992, the U.S. Department of Commerce made an affirmative preliminary determination that stumpage programmes in British Columbia, Alberta, Ontario, and Québec, and log export restrictions in British Columbia, provided countervailable subsidies to softwood lumber exported to the United States at a national rate of 14.48 per cent ad valorem (stumpage at 6.25% + log exports controls at 8.23%).

In its final subsidy determination on May 15, 1992, the DOC confirmed its preliminary determination that Canada's provincial stumpage mechanisms, and log export restrictions in British Columbia, provided countervailable subsidies to softwood lumber exported to the United States. The overall country-wide subsidy rate was 6.51 per cent ad valorem (stumpage at 2.91% + log export controls at 3.60%). The Department also excluded 15 companies from the investigation.

On May 29, 1992 the Federal Government, the Canadian industry and the affected Canadian provinces appealed the final determination of subsidy to a binding binational review panel.

On June 25, the ITC voted, four to two, in favour of material injury. On July 24, 1992, the final determination of injury was appealed by the Canadian stakeholders to a binding binational review panel.

Canada also referred the self-initiation of the CVD investigation to the GATT on the basis that the United States did not have sufficient evidence of subsidy, or injury and a causal link thereof when it initiated the investigation. Canada argued that neither log export controls nor provincial stumpage mechanisms confer countervailable subsidies. Finally, Canada contended that the U.S. violated its international obligations when it imposed the interim bonding requirement on October 4, 1991, under Section 301 of the 1974 Trade Act.

3.3.7 Magnesium

On September 5, 1991, DOC received a petition from Magnesium Corporation of America, on behalf of the U.S. industry producing pure and alloy magnesium. The petitioner alleged that manufacturers, producers, or exporters of magnesium in Canada receive subsidies.

On December 2, 1991, DOC preliminarily determined that Canadian magnesium exports were benefiting from subsidies at a rate of 32.85 per cent. The high subsidy rate for Norsk Hydro was attributed to those programmes determined to provide benefits, specifically the electricity contract between Norsk Hydro and Hydro-Québec (24.81 per cent) as well as assistance provided by the Province of Québec under its SDI programme (6.28 per cent).

More generally, the preliminary finding that Hydro Québec electricity contracts with a select group of large consumers provide countervailable benefits under U.S. law raised the spectre of other key resource based industries such as aluminium facing similar countervail action. The magnesium case had already threatened a key Québec incentive to lure investment to the province and additional cases would seriously exacerbate an already sensitive issue for that province.

On June 8, 1992, an agreement which would provide the basis for the suspension of the countervailing duty investigation against magnesium from Canada was drafted. As part of the suspension agreement package, Canada had agreed to drop its GATT challenge of the standing of the U.S. petitioner to request the investigation. However, the draft suspension agreement failed to gain the necessary support of all affected parties.

On July 8, 1992, the DOC made a final subsidy determination in which it assigned a rate of 21.73 per cent to Norsk Hydro of Québec. In its final subsidy determination, Commerce made it clear that risk and profit sharing electricity contracts, which was the major element of the subsidy determination against Norsk, were not countervailable in and of themselves although the Norsk contract as maintained during the review period of the investigation had been so determined. Commerce indicated, however, that it would conduct an expedited "change of circumstances" review based on the amended electricity contract that was signed between Norsk and Hydro-Québec.

On August 10, 1992, the ITC made an affirmative final injury determination with respect to the investigation against imports of magnesium from Canada, thereby confirming the application of countervailing duties against magnesium exports to the U.S. by Norsk Hydro of Québec.

On November 9, 1992, the DOC, in the final decision of its "changed circumstances" review of the countervailing duty on U.S. imports of magnesium from Norsk Hydro confirmed the preliminary results of its review issued October 13, 1992. At that time, Commerce determined that the amended electricity contract between Norsk Hydro and Hydro-Québec provided no countervailable subsidy. As a result of this final decision, the countervailing duty against Norsk was reduced from 21.61 per cent to 7.61 per cent.

Canada had also referred the CVD investigation to the GATT; however because Commerce completed an expedited review, Canada dropped its GATT case. The Government of Québec has appealed the final subsidy and injury determinations to a binding binational review panel.

TABLE 2

SUMMARY OF U.S. TRADE ACTIONS AGAINST CANADA

Countervailing Duty Investigations

Year Initiated	Case	Preliminary Determination		Final Determination		Annual Trade
		ITC	ITA	ITA	ITC	
1971 [1]	Michelin Tires Ltd.; x-radial tires	Affirmative	Affirmative	Affirmative	Affirmative	N/A
1976 [2]	Canasphere Industries; glass beads	Affirmative	Affirmative	Affirmative	Affirmative	N/A
1976 [3†]	Certain fish	Affirmative	Affirmative	Affirmative	Affirmative	N/A
1978 [4]	Honeywell Limited; optic liquid level sensors	Affirmative	Affirmative	Affirmative	Negative	N/A
1979	Frozen potatoes	Negative				N/A
1980	Unprepared fish	Negative				N/A
1981	Hard smoked herring filets	Negative				N/A
1981	Bombardier Inc.; transit vehicles	Affirmative	Affirmative	Terminated (petitioner withdrew)	Terminated	N/A

Year Initiated	Case	Preliminary Determination		Final Determination		Annual Trade
		ITC	ITA	ITA	ITC	
1982 †	Softwood lumber, shakes and shingles and fence	Affirmative	Negative	Negative	-	$2.5 billion
1984 [5]*	Live swine and pork	Affirmative (swine only)	Affirmative	Affirmative (swine only)	Affirmative	$200.0 million
1985	Red Raspberries	Affirmative	Affirmative	Suspension	Terminated (government agreement)	$10.0 million
1985	Oil country tubular goods	Affirmative	Affirmative	Affirmative	Affirmative	$100.0 million
1985	Fresh atlantic groundfish	Affirmative	Affirmative	Affirmative (only whole fish, no fillets)	Affirmative	$55.0 million
1986 [6]†	Softwood lumber	Affirmative	Affirmative	Terminated	Terminated (petitioner withdrew)	$3.5 billion
1986	Cut flowers (carnations)	Affirmative	Affirmative	Partial Affirmative	Affirmative	$0.1 million
1988 *	New steel rails	Affirmative	Affirmative	Affirmative	Affirmative	$10.0 million
1989 [7]*†	Fresh, chilled and frozen pork	Affirmative	Affirmative	Affirmative	Affirmative	$300.0 million
1989	Limousines	Affirmative	Negative	Negative	-	N/A
1989	Plastic tubing corrugators	Negative	-	-	-	N/A
1991 *†	Softwood lumber	Affirmative	Affirmative	Affirmative	Affirmative	$3.0 billion
1991 *†	Magnesium	Affirmative	Affirmative	Affirmative	Affirmative	$70.0 million

Year Initiated	Case	Preliminary Determination		Final Determination		Annual Trade
		ITC	ITA	ITC	ITA	
1992 [8]	Portable Seismographs	Affirmative	Affirmative	Terminated	Terminated (petitioner withdrew)	$2.0 million

Note: N/A: Not Available
*: FTA Challenge
†: GATT Challenge

ADDITIONAL NOTES TO TABLE 2.

1. The case was reopened for an injury investigation as a result of the GATT agreement in the Tokyo Round; investigation was terminated when the U.S. petitioner withdrew the petition.

2. Duty revoked in 1981 as the subsidy no longer exceeded the de minimis threshold.

3. There were five investigations on groundfish and shellfish. The investigations on duty-free (shellfish) products were dismissed on "no injury" grounds. The countervail duty on groundfish was waived as a result of an agreement between Canada and the U.S.. An injury determination resulting from the GATT agreement found "no injury" in 1980, thus terminating the outstanding countervailing orders.

4. Following the GATT agreement on injury determination the ITC found "no injury" and the duty order was terminated in 1982.

5. The ITC determined that these imports "materially injure or threaten to injure" the U.S. industry. The Alberta Pork Producer's Marketing Board appealed the decision to the CIT in 1985. The Court affirmed the ITC's determination.

6. 30 December 1986, the Canadian Government agreed to impose a 15% duty on softwood lumber exported to the United States in return for the U.S. lumber Coalition dropping its CVD case. The Canadian softwood lumber export tax took effect January 8, 1987. The CVD investigation terminated January 7, 1987.

7. In 1991, the binational panel under the FTA effectively overturned the Commission's affirmative determination in Fresh, Chilled, or Frozen Pork from Canada.

8. DOC assessed a de minimis rate of 0.02% against Instantel Inc., and a rate of 32.4% against Nomis Computer Systems. Because Nomis Computer Systems was out of business, the petitioner (Geosonics of Warrendale, PA) withdrew the complaint. Thus the investigation was terminated.

4.0 ANTIDUMPING (AD) LAW[30]

Dumping generally refers to a form of international price discrimination, whereby goods are sold in one export market (such as the United States) at prices lower than the prices at which comparable goods are sold in the home market of the exporter, or in its other export markets. Such pricing practices often are made possible when market barriers in the exporter's home market protect its higher home market price.

Three different provisions of U.S. law address different types of dumping practices. The Antidumping Act of 1916 provides for criminal and civil penalties for the sale of imported articles at a price substantially less then the actual market value or wholesale price, with the intent of destroying or injuring an industry in the United States. Title VII of the Tariff Act of 1930, as amended, provides for the assessment and collection of antidumping duties by the U.S. Government after an administrative determination that foreign merchandise is being sold in the U.S. market at less than fair value and that such imports are materially injuring the U.S. industry. Finally, Section 1317 of the Omnibus Trade and Competitiveness Act of 1988 establishes procedures for the U.S. Trade Representative to request a foreign government to take action against third-country dumping that is injuring a U.S. industry.

4.1 Basic Provisions of Title VII Antidumping Remedy

Section 731 of the Tariff Act of 1930, as amended, provides that an antidumping duty shall be imposed, in addition to any other duty, if two conditions are met. First, the DOC must determine that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." Second, the ITC must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise." If the DOC determines that Less Than Fair Value (LTFV) sales exist and the ITC determines that material injury exists, an antidumping duty order is issued imposing antidumping duties equal to the amount by which foreign market value exceeds the United States price for the merchandise (the dumping margin).

4.2 Basis of Comparison: Foreign Market Value

The determination of whether LTFV sales exist, and what is the margin of dumping, is based on a comparison of foreign market value with the United States price of each import sale made during the time period under investigation. Leases which are equivalent to sales may be treated as import sales. Foreign market value is determined by one of three methods, in order of preference: home market sales, third-country sales, or constructed value. If such or similar merchandise is sold in the market of the exporting country for home consumption, then foreign market value is to be based on such sales. If home market sales do not exist, or are so few as to form an inadequate basis for comparison, then the price at which such or similar merchandise is sold for exportation to countries other than the United States becomes the basis for foreign market value. If neither home market sales nor third-country sales form an adequate basis for comparison, then foreign market value is the constructed value of the imported merchandise. Constructed value

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[30] This section draws upon the Committee on Ways and Means U.S. House of Representatives Report: Overview and Compilation of U.S. Trade Statutes, March 25, 1991.

is determined by a formula set forth in the statute, which is the sum of costs of production, plus at least 10 per cent for general expenses, and at least 8 per cent for profit.

Foreign market value based on home market or third-country sales is a single price, in U.S. dollars, which represents the weighted average of prices in the home market of third-country market during the period under investigation. Sales made at less than cost of production are disregarded in the determination of foreign market value. Adjustments are made for differences in merchandise, quantities sold, and circumstances of sale to provide for comparability of foreign market value with United States price. Averaging or sampling techniques may be used in the determination of foreign market value whenever a significant volume of sales is involved or a significant number of price adjustments is required.

4.3 United States Price

The margin of dumping, and the amount of antidumping duty to be imposed, is determined by comparing the foreign market value with the United States price of each entry in to the United States of foreign merchandise subject to the investigation. United States price is equal to the purchase price or the exporter's sales price of the merchandise, whichever is appropriate. "Purchasing price" is the price at which merchandise is purchased or agreed to be purchased prior to date of importation to the United States. It may be used if transactions between related parties indicate the merchandise has been sold prior to importation to a U.S. buyer unrelated to the producer. "Exporter's sales price" is the price at which merchandise is sold or agreed to be sold in the United States before or after importation, by or for the account of the exporter.

4.4 Material Injury

Prior to issuance of an antidumping duty order, the ITC must determine that the domestic industry is being materially injured, or threatened with material injury or the establishment of a domestic industry is materially retarded, by reason of imports at less than fair value. The standard of injury under the antidumping law, material injury, is the same standard as that under the countervailing duty law. Section 771(7) of the Tariff Act of 1930 defines "material injury" as harm which is not inconsequential, immaterial, or unimportant.

The ITC determination of injury basically involves a two-prong inquiry: first, with respect to the fact of material injury, and second, with respect to the causation of such material injury. The ITC is required to analyze the volume of imports, the effect of imports on U.S. prices of like merchandise, and the effects that imports have on U.S. producers of like products, taking into account many factors, including lost sales, market share, profits, productivity, return on investment, and utilization of production capacity. Also relevant are the effects on employment, inventories, wages, the ability to raise capital, and negative effects on the development and production activities of the U.S. industry. The ITC is required to cumulatively assess the volume and effect of like products from two or more countries subject to investigation if the imports compete with each other and with like products of the domestic industry in the U.S. market. However, if imports from a country under investigation are negligible and have no discernable adverse impact on the U.S. industry, then the ITC may decide not to cumulate those imports with imports from the other countries. Furthermore, the ITC has discretion not to cumulate imports when the imports subject to investigation are products of Israël.

4.5 Procedures for Title VII Antidumping Investigations

4.5.1 Initiation of Investigation

Antidumping investigations may be self-initiated by the DOC or may be initiated as a result of a petition filed by an interested party. Petitions may be filed by any of the following, on behalf of the affected industry: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified or recognized union or group of workers which is representative of the affected industry; (3) a trade or business association with a majority of members producing a like product; (4) a coalition of firms, unions, or trade associations that have individual standing; (5) a coalition or trade association representative of processors, or processor and growers, in cases involving processed agricultural products. The DOC is required to provide technical assistance to small businesses to enable them to prepare and file petitions under the antidumping law.

Petitions are to be filed simultaneously with both the DOC and ITC. Within 20 days after the filing of a petition, the DOC must decide whether or not the petition is legally sufficient to commence an investigation. If so, an investigation is initiated with respect to imports of a particular product from a particular country. Section 609 of the Trade and Tariff Act of 1984 establishes a procedure whereby the DOC may monitor imports from additional supplier countries for up to 1 year in order to determine whether persistent dumping exists with respect to that product, and self-initiation of additional dumping cases is warranted.

4.5.2 Preliminary ITC Injury Determination

Within 45 days of the date of filing of the petition, or of self-initiation, the ITC must determine whether there is a "reasonable indication" of material injury, based on the best information available to it at the time. The petitioner bears the burden of proof with respect to this issue. If the ITC preliminary determination is negative, the investigation is terminated. If it is positive, the investigation continues.

4.5.3 Preliminary DOC LTFV Determination

Within 160 days after the petition is filed or the investigation is self-initiated, the DOC must determine whether there is a "reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less than fair value." The preliminary determination is based on the best information available to the DOC at the time. If affirmative, the preliminary determination must include an estimated average amount by which the foreign market value exceeds the United States price.

The effect of an affirmative preliminary determination is two-fold: (1) The DOC must order the suspension of liquidation of all entries of foreign merchandise subject to the determination from the date of publication of the preliminary determination. The DOC must also order the posting of a cash deposit, bond, or other appropriate security for each subsequent entry of the merchandise equal to the estimated margin of dumping. (2) The ITC must begin its final injury investigation, and the DOC must make all information available to the ITC which is relevant to an injury determination. If the preliminary determination is negative, no suspension of liquidation occurs, and the DOC investigation simply continues.

An expedited preliminary determination within 90 days of initiation of the investigation may be made based on information received during the first 60 days if such information is sufficient and the parties provide a written waiver of verification of an agreement to have an expedited preliminary determination. A preliminary determination may also be expedited for cases involving short life cycle merchandise, if the foreign producer has been subject to prior affirmative dumping determinations on similar products. On the other hand, the preliminary determination may be postponed until 210 days after filing of petition or self-initiation, at the petitioner's request or in cases which the DOC determines are extraordinarily complicated.

If the petitioner alleges critical circumstances, the DOC must determine, on the basis of best information available at the time, whether (1) there is a history of dumping in the United States or elsewhere of this class or kind of merchandise, or the importer knew the merchandise was being sold at less than fair value; and (2) there have been massive imports of the merchandise over a relatively short period. This critical circumstances determination can be made prior to a preliminary determination of sales at less than fair value. If the DOC determines critical circumstances exist, then any suspension of liquidation ordered shall retroactively apply to unliquidated entries of merchandise entered up to 90 days prior to the date suspension of liquidation was ordered.

4.5.4 Final DOC LTFV Determination

Within 75 days after the date of its preliminary determination, the DOC must issue a final LTFV determination, unless a timely request for extension is granted, in which case the final determination must be made within 135 days. If the final determination is negative, the investigation is terminated, including any suspension of liquidation which may be in effect, and all estimated antidumping duties are refunded and all appropriate bonds or other security are released. If the final determination is affirmative, the DOC orders the suspension of liquidation and posting of a cash deposit, bond, or other security (if such actions have not already been taken as a result of the preliminary determination), and awaits notice of the ITC final injury determination.

4.5.5 Final ITC Injury Determination

Within 120 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, whichever is longer, the ITC must make a final determination of material injury. If the DOC preliminary determination was negative, and the DOC final determination was affirmative, the ITC has until 75 days after the final affirmative determination to make its injury determination.

4.5.6 Termination or Suspension of AD Investigations

Either the DOC or ITC may terminate an AD investigation upon withdrawal of the petition by petitioner, or by the DOC if the investigation was self-initiated. The DOC may not, however, terminate an investigation on the basis of a quantitative restriction agreement limiting U.S. imports of the merchandise subject to investigation unless the DOC is satisfied that termination on the basis of such agreement is in the public interest.

The DOC may suspend an AD investigation on the basis of one of three types of agreements entered into with exporters who account for substantially all of the imports under investigation. The three types of agreements are: (1) an agreement to cease exports of the

merchandise to the United States within 6 months of suspension of the investigation; (2) an agreement to revise prices to eliminate completely any sales at less than fair value; (3) an agreement to revise prices to eliminate completely the injurious effect of exports of such merchandise to the United States. The DOC may not, however, accept any such agreement unless it is satisfied that suspension of the investigation is in the public interest, and effective monitoring of the agreement is practicable. Unlike countervailing duty cases, antidumping investigations cannot generally be suspended on the basis of quantitative restriction agreements. The one exception is where the antidumping investigation involves imports from a nonmarket economy country.

Prior to actual suspension of an investigation, the DOC must provide notice of its intent to suspend and an opportunity for comment by interested parties. When the DOC decides to suspend the investigation, it must publish notice of the suspension, and issue an affirmative preliminary LTFV determination (unless previously issued). The ITC also suspends its investigation. Any suspension of liquidation ordered as a result of the affirmative preliminary LTFV determination, however, is to be terminated and all deposits of estimated antidumping duties or bonds posted are to be refunded or released.

If, within 20 days after notice of suspension is published the DOC receives a request for continuation of the investigation from a domestic interested party or from exporters accounting for a significant proportion of exports of the merchandise, then both the DOC and ITC must continue their investigations.

The DOC has responsibility for overseeing compliance with any suspension agreement. Intentional violations of suspension agreements are subject to civil penalties.

4.5.7 Assessment of Antidumping Duties

Both the DOC and ITC must issue affirmative final determinations in order for an AD duty order to be issued. Within 7 days of notice of an affirmative final ITC determination, the DOC must issue an AD duty order which (1) directs the Customs Service to assess antidumping duties equal to the amount by which foreign market value exceeds the United States price, i.e., the dumping margin; (2) describes the merchandise to which the AD duty applies; and (3) requires the deposit of estimated AD duties pending liquidation of entries, at the same time as estimated normal customs duties are deposited.

Customs must assess AD duties within 6 months after the DOC receives satisfactory information on which to base the assessment, but no later than 12 months after the end of the annual accounting period within which the merchandise is imported or sold in the United States. The DOC must publish notice of its determination of foreign market value and United States price which shall be the basis for assessment of AD duties and for deposit of estimated AD duties on future entries.

4.5.8 Security in Lieu of Deposits

As a result of the Zenith decision that was issued on July 29, 1991[31] the so-called provisional measures cap applied to entries of merchandise subject to an antidumping duty order that were secured by either cash deposits or bonds or other security. The Court ruled that the provisional measures cap applies only to entries secured by cash deposits. As a result, the ITA will no longer apply the cap to entries secured by bonds.

Section 733 (d)(2) of the Act provides that an importer of merchandise subject to an antidumping duty investigation must post bonds, cash deposits, or other security for entries of the subject merchandise after the ITA publishes and affirmative preliminary determination of sales at less than fair value. This provisional measure applies until the ITC's final injury determination. If an antidumping duty order is imposed, the actual amount of antidumping duties due on sales during this period is determined through an administrative review of the entries under section 751. Section 737 (a)(1) provides that, if the amount of a cash deposit collected as security for an estimated antidumping duty after publication of an affirmative preliminary determination under section 733 (d)(2) is different from the amount of the antidumping duty determined under a section 751 administrative review, then the difference shall be disregarded, to the extent that the cash deposit collected is lower than the duty determined to be due under the section 751 administrative review, for entries between publication of the ITA's preliminary determination and the ITC's final determination of injury under section 735.

This provisional measures cap provided by section 737(a), therefore, imposes a limit on the amount of antidumping duties an importer pays between the ITA's affirmative preliminary less-than-fair-value determination and the ITC's affirmative final injury determination during an antidumping investigation. The cap may be adjusted to reflect a change in the margin found in the ITA's final determination. The importer is not liable for more than the amount of estimated duties imposed during this period, even if the actual duties due under a section 751 review are greater than the amount of the provisional measures.

As a result of the decision in Zenith, the ITA has instructed the U.S. Customs Service to refund the difference between estimated duties and final duties for the relevant period where the estimated duties are higher than the final duties, and not to collect the difference between estimated duties and final duties for the relevant period where the estimated duties are lower than the final duties, but only for entries that were secured by cash deposits. This change applies only to antidumping duty investigations; there is no change to countervailing duty investigations.

4.5.9 Administrative Review

The DOC is required, upon request, to conduct an annual review of outstanding AD orders and suspension agreements. For all entries of merchandise subject to the review, the DOC must determine the foreign market value, United States price, and the amount of dumping margin. Such determination will provide the basis for assessment of AD duties on all entries subject to the review, and for deposits of estimated duties on entries subsequent to the period of review. The

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[31] On July 29, 1991, the Court of International Trade issued a decision in Zenith Electronics Corp. v. United States, 770 F. Supp. 648, that overturned the International Trade Administration's interpretation of Antidumping Duties: Provisional Measures Deposit Cap.

results of its annual review must be published together with a notice of any AD duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

A review of a final determination or of a suspension agreement shall be conducted by the DOC or ITC whenever it receives information or a request showing changed circumstances sufficient to warrant such review. Without good cause shown, however, no final determination or suspension agreement can be reviewed within 24 months of its notice. The party seeking revocation of an AD order has the burden of persuasion as to whether there are changed circumstances sufficient to warrant revocation.

4.5.10 Anti-Circumvention Authority

In 1988, specific authority was added to U.S. law from the Omnibus Trade and Competitiveness Act to authorize the DOC to take action to prevent or address attempts to circumvent an outstanding antidumping duty order. The authority addresses four particular types of circumvention:

(1) assembly of merchandise in the United States,

(2) assembly of merchandise in a third country,

(3) minor alterations or merchandise, and

(4) later-developed merchandise.

Under certain circumstances and after considering certain specified factors, DOC may extend the scope of the antidumping duty order to include parts and components (in cases involving U.S. assembly), third country merchandise (in cases involving third country assembly), altered merchandise, or later-developed merchandise.

4.5.11 Judicial Review

An interested party who is dissatisfied with a final determination under the antidumping law may file an action with the CIT for judicial review. To obtain judicial review of the administrative action, a summons and complaint must be filed concurrently within 30 days of publication of the final determination. The standard of review used by the Court is whether the determination is supported by "substantial evidence on the record" or "otherwise not in accordance with law."

Judicial review of interlocutory decisions, previously permitted, was eliminated by Section 623 of the Trade and Tariff Act of 1984. Decisions of the CIT are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

As a result of provisions in the FTA and its implementing legislation, final determinations in antidumping duty proceedings involving products of Canada can be reviewed by a binational panel instead of by the CIT, if either the U.S. or Canadian Government so requests. The binational panel will apply only U.S. law and U.S. standards of judicial review to decide whether U.S. law was applied correctly.

4.5.12 Third Country Dumping

Section 1318 of the Omnibus Trade and Competitiveness Act of 1988 was enacted in response to concern over the injurious effects of foreign dumping in third country markets.

Section 1318 establishes procedures for domestic industries to petition the U.S. Trade Representative to pursue U.S. rights under Article 12 of the GATT Antidumping Code. A domestic industry that produces a product like or directly competitive with merchandise produced by a foreign country may submit a petition to the U.S. Trade Representative if it has reason to believe that such merchandise is being dumped in a third country market and such dumping is injuring the U.S. industry.

If the U.S. Trade Representative determines there is a reasonable basis for the allegations in the petition, the U.S. Trade Representative shall submit to the appropriate authority of the foreign government an application requesting that antidumping action be taken on behalf of the United States. Article 12 of the GATT Antidumping Code requires that such an application "be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned" (paragraph 2, article 12). Accordingly, at the request of the U.S. Trade Representative, the appropriate officers of the Commerce Department and the ITC shall assist the U.S. Trade Representative in preparing any such application.

After submitting an application to the foreign government, the U.S. Trade Representative shall seek consultations with its representatives regarding the requested action. If the foreign government refuses to take any antidumping action, the U.S. Trade Representative shall consult with the domestic industry on whether action under any other U.S. law is appropriate.

4.6 Examples of U.S. Antidumping Actions Initiated Against Canada

There have been numerous antidumping cases against Canadian products. Some high profile cases in recent years are summarized below.

4.6.1 Elemental Sulphur

The antidumping order dates from December 17, 1973.[32] On January 27, 1982, DOC published the results of its first administrative review of the finding, determining to revoke the findings for two Canadian exporters.[33] Subsequently, the finding was revoked for three additional exporters. However, on November 7, 1985, the Court of Appeals for the Federal Circuit overturned the revocation, holding that DOC had abused its discretion by failing to obtain adequate information upon which to base its action.[34] Accordingly, DOC reinstated the antidumping finding with regard to the exporters on May 30, 1986.[35] However other reviews[36] have resulted in the revocation of the finding for approximately one fifth of the nearly 50 exporters. For the remaining exporters, margins range from de minimis to 28.90 per cent. On December 31, 1992, the U.S. industry petitioned the DOC to undertake another administrative review. The results of this review expected in the latter part of 1993 will establish new antidumping rates.

4.6.2 Salted Codfish

Imports of Canadian dried heavy salted codfish were also subject to antidumping action. On June 12, 1985, ITC reached a final, affirmative determination that the establishment of an industry in the United States is materially retarded by reason of imports from Canada.[37] DOC imposed duties ranging from 12.7 to 20.75 per cent, corresponding to dumping margins found upon comparing the U.S. price to foreign market value.[38]

The U.S. price was based on the purchase price of codfish. The foreign market value was a constructed value for the one exporter which made sales to third-country markets at prices below production costs. In constructing the value, DOC added statutory minimums for

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[32] 38 Fed. Reg. 34,655 (1973).

[33] 47 Fed. Reg. 3811 (1982).

[34] Freeport Minerals Co. (Freeport-McMoran, Inc.) v. U.S., 776 F. 2d 1029 (CAFC, 1985).

[35] 51 Fed. Reg. 19,580 (1986).

[36] 50 Fed. Reg. 37,889 (1985); 51 Fed. Reg. 43,954 (1986); 51 Fed. Reg. 45,153 (1986).

[37] Dried Salted Codfish, ITC Inv. TA-731-199, USITC Pub. No. 1711 (1985).

[38] 50 Fed. Reg. 20,819 (1985).

general expenses and prices - 10 and 8 per cent respectively. For the other companies, foreign market value was based on third-country sales. These two measures for gauging foreign market value were used because no viable market exists in Canada for dried codfish.

The ITC's final determination of injury by material retardation (a rare determination at the ITC) came on a vote of 4 to 1. At the time of the case, only one United States firm existed, and it was a newcomer. The ITC found that the imports from Canada were undercutting the American firm's price and therefore preventing it from gaining a foothold in the U.S. market. The Salted Codfish case was ended after the U.S. company went bankrupt and DOC agreed to terminate the antidumping order.

4.6.3 Potash

On March 5, 1987, DOC initiated an antidumping investigation of imports of Potassium Chloride (Potash) from Canada.[39] On March 27, 1987, ITC made an affirmative preliminary determination of injury to the United States industry.[40] DOC made its preliminary determination of sales at less than fair value on August 20, 1987.[41] LTFV (dumping) margins against Canadian potash producers ranged from 9.14 per cent ad valorem to 85.20 per cent ad valorem, with the major producers receiving extra duties of more than 50 per cent.

The petitioners, two United States corporations acting on behalf of their industry, relied largely on U.S. government statistics to arrive at a potential dumping margin of 42.86 per cent. This margin reflects the comparison of the United States price - based on U.S. Bureau of Census import statistics, less estimated Canadian inland freight - to the constructed value. The constructed value was based on production costs estimated by the U.S. Department of the Interior, Bureau of Mines, plus the statutory minimum profit of 8 per cent.

On January 8, 1988, the eight Canadian companies subject to the investigation negotiated a suspension agreement with the DOC. The negotiation of such agreements is provided for in U.S. law and did not represent a special accommodation for Canada. The companies were potentially liable for duties ranging from 9 per cent to 85 per cent but avoided their application by undertaking not to undercut U.S. domestic prices and by eliminating 85 per cent of their dumping margins on future sales to the U.S. In this regard both U.S. and Canadian producers benefited. The U.S. consumer paid the price in higher potash costs. A bizarre ending to a bizarre case!

On December 23, 1992 the DOC published in the Federal Register a notice of its intention to terminate the suspension agreement. Commerce invited interested parties to submit comments. On January 29, 1993, two original U.S, petitioners objected to the termination of the suspension agreement claiming that the agreement is of vital interest to the U.S. potash industry. As a result of these objections, Commerce decided to let the agreement remain in force for a further year pending review at that time.

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[39] 52 Fed. Reg. 6836 (1987).

[40] Potassium Chloride from Canada, ITC Inv. TA-751-374, USITC Pub. No. 1963 (1987).

[41] 52 Fed. Reg. 32,151 (1987).

4.6.4 New Steel Rails

Bethlehem Steel Corp. of the U.S. alleged that Canadian steel producers Algoma Steel Corp. Ltd. and Sydney Steel Corp. (Sysco) were dumping steel rails at below fair market value. As a result, on November 10, 1988, the ITC transmitted to the Secretary of Commerce its ruling that imports of Canadian steel rails were causing material injury to U.S. producers.

On March 7, the Commerce Department imposed a preliminary antidumping duty of 2.7% on steel rail imports from both companies. In a final ruling, on July 27, 1989, the DOC announced that steel rails from Sysco received subsidies equivalent to 113.56% of their value and imposed a countervailing duty to offset this advantage. Moreover, an additional antidumping duty of 38.79% was applied to Algoma to compensate for selling the steel rails below cost.

Sysco and Algoma requested binational panels under Chapter 19 of the FTA to review the U.S. Department of Commerce final determination of dumping by Algoma.

On August 30, 1990, the binational panel upheld the U.S. Department of Commerce final determination of dumping by Algoma Steel[42].

4.6.5 Nepheline Syenite

In response to a petition filed by the Feldspar Corporation, Asheville, North Carolina on July 12, 1991, the ITC instituted a preliminary antidumping investigation to determine whether or not a U.S. industry was injured or threatened with injury by dumped imports of Nepheline Syenite from Canada. Because nepheline syenite is not produced in the United states, the petition was filed on the basis of like products consisting of aplite, glass-grade feldspar, and feldspar sand.

On August 21, 1991, the ITC made a preliminary determination that there was a reasonable indication of injury or threat of injury caused by such imports. During this phase of the investigation, however, the ITC decided that feldspathic sand was not a like product and would not be included within the scope of the final investigation. On March 17, 1992, the DOC issued its final determination that imports of nepheline syenite from Canada were being sold at LTFV, with dumping margins of 9.36 per cent.

As a result of its final investigation, the ITC made a unanimous determination on April 16, 1992, that an industry in the United States was not injured or threatened with injury by reason of nepheline syenite imports from Canada. As a result, the ITC notified the DOC and Commerce directed the U.S. Customs Service to terminate its collection of cash deposits or bonds first imposed on the subject imports December 27, 1991, and to refund or release all such collections made in connection with the investigation.

4.6.6 Magnesium

On September 5, 1991, a petition was filed with the DOC and ITC by Magnesium Corp. of America (MagCorp), Salt Lake City, UT. The petition alleged that an industry in the United States is materially injured or threatened with material injury by reason of LTFV imports from Canada.

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[42] 55 Fed. Reg. 38,375 September 18, 1990.

Accordingly, effective September 5, 1991, the ITC instituted an antidumping investigation to determine whether there was a reasonable indication that an industry in the United States was materially injured, or was threatened with material injury, or the establishment of an industry in the United States was materially retarded, by reason of imports from Canada.

On October 16, 1991, the ITC, in a preliminary determination had ruled that pure and alloy magnesium was injuring or threatened to injure the U.S. industry. The case alleging dumping of magnesium focused on the Norsk Hydro plant, which received low priced power from Hydro-Québec; although it also affected exports of magnesium from other producers in Canada.

In a preliminary determination of February 13, 1992, the DOC ruled that Norsk Hydro's magnesium exports were subject to an antidumping duty of 32.74 per cent. Both preliminary determinations (DOC and ITC) determined de minimis rates of dumping for Timminco Ltd. of Ontario.

On July 7, 1992, the DOC made a final antidumping determination on imports of magnesium from Canada.

The preliminary rates of 32.74 per cent against Norsk was reduced slightly to 31.33 per cent in the final determination. However, alloy magnesium was dropped from the scope of the investigation on the bases that the petition did not provide Commerce with sufficient evidence of dumping. This was a significant benefit to Norsk Hydro.

The preliminary de minimis rates of dumping were confirmed for Timminco Ltd. of Ontario. This meant that Timminco was effectively eliminated from the investigation and no duties were to be applied to its exports of magnesium to the United States.

On August 11, 1992, the ITC voted unanimously in making an affirmative final determination of injury in the antidumping investigations against imports of magnesium from Canada.

As a result of this decision, the Government of Québec and Norsk Hydro filed requests for panel review of the final determination of dumping on magnesium from Canada by the DOC on July 8, 1992.

4.6.7 Steel Plate, Hot Rolled Sheet, Cold Rolled Sheet, and Galvanized Steel

On June 30, 1992, a group of U.S. steel producers filed petitions with the U.S. DOC and the ITC requesting antidumping and countervailing duty investigations of imports of four steel products from 21 countries, including Canada. The products identified in the petitions are cold rolled carbon steel flat products, certain hot-rolled carbon steel flat products, cut-to-length steel plate, and certain corrosive-resistant carbon steel flat products. The petitions involving imports from Canada requests antidumping investigations only. The petitions cover about $400 million of U.S. imports from Canada.

On July 20, 1992, the DOC initiated an antidumping and countervailing duty investigation of the above mentioned products. In initiating the investigation, DOC also determined the cases to be extraordinarily complicated.

On August 11, 1992, the ITC vote unanimously to make affirmative preliminary determinations of injury with respect to the antidumping investigations of four flat rolled steel products from Canada.

On January 27, 1993, the DOC announced its preliminary determination of dumping against imports of flat rolled steel products from 19 countries, including Canada.

In its preliminary determinations against imports from Canada, Commerce found rates which ranged from 0.03 to 68.70 per cent with an average of 68.70 per cent for plate; 1.05 to 10.80 per cent with an average of 3.99 for hot rolled sheet; 0.47 to 35.75 per cent with an average of 10.95 per cent for cold rolled sheet; and 1.62 to 7.19 per cent with an average of 5.96 per cent for galvanized. Final dumping determinations by Commerce are due June 21, 1993, with a final injury determination by the ITC due later.

Canadian steel producers filed antidumping petitions with Revenue Canada on three products imported from the United States and elsewhere in the summer and fall, 1993. On January 29, 1993, Revenue Canada made preliminary determinations of dumping against imports of hot rolled sheet from six countries, including the United States. On imports from the United States, Revenue Canada found margins ranging from 4.5 to 124.2 per cent. The weighted average margin of dumping found was 12.0 per cent. Final dumping determinations are due within 90 days while injury determinations by the Canadian International Trade Tribunal are due within 120 days.

On January 6, 1993, Revenue canada had made preliminary dumping determinations against imports of plate from nine countries, including the United states. Final dumping determinations are due within 90 days while injury determinations by the Canadian International Trade Tribunal are due within 120 days.

Preliminary determinations of dumping by Revenue Canada are also due March 31, 1993, in antidumping duty investigations against imports of cold rolled steel from five countries. Imports from the United States are also included in these investigations.

In addition, Canadian flat rolled steel producers are still reviewing a possible complaint on carbon steel galvanized sheet.

TABLE 3

SUMMARY OF TRADE ACTIONS AGAINST CANADA

Antidumping Investigations

Year Initiated	Case	Preliminary Determination		Final Determination		Annual Trade
		ITC	ITA	ITA	ITC	
March 1980	Syrups	Affirmative	Affirmative	Affirmative	Affirmative	$15.0 million
April 1980	Clams	Negative	-	-	-	N/A
Sept. 1980	Asphalt Shingles	Negative	-	-	-	N/A
June 1982	French Fries Potatoes	Negative	-	-	-	N/A
Sept. 1982	Sheet Piling	Affirmative	Affirmative	Affirmative	Affirmative (case suspended by agreement)	N/A
Dec. 1983	Potatoes	Affirmative	Affirmative	Affirmative	Negative	N/A
Oct. 1984	Choline Chloride	Affirmative	Affirmative	Affirmative	Affirmative	$40.0 million
June 1985*	Red Raspberries	Affirmative	Affirmative	Affirmative	Affirmative	$10.0 million
June 1985	Salted Codfish	Affirmative	Affirmative	Affirmative	Affimative	N/A
July 1985	Egg Filler Flats	Affirmative	Affirmative	Affirmative	Negative	N/A

Year Initiated	Case	Preliminary Determination		Final Determination		Annual Trade
		ITC	ITA	ITA	ITC	
Jan. 1986	Rock Salt	Affirmative	Affirmative	Affirmative	Negative	N/A
Feb. 1986	Rectangular Pipe	Affirmative	Affirmative	Affirmative	Negative	N/A
Feb. 1986	Iron Castings	Affirmative	Affirmative	Affirmative	Affirmative	$7.0 million
June 1986*	Oil Country Tubular Goods	Affirmative	Affirmative	Affirmative	Affirmative	$100.0 million
Jan. 1987	Brass Sheet	Affirmative	Affirmative	Affirmative	Affirmative	$10.0 million
March 1987	Line Pipe	Affirmative	Negative	Negative		N/A
Dec. 1987	Picture Tubes	Affirmative	Affirmative	Affirmative	Affirmative	$10.0 million
Jan. 1988	Potash	Affirmative	Affirmative	Affirmative	Terminated (Suspension Agreement)	$400.0 million
Feb. 1988	Fabricated Structurals	Negative	-	-	-	N/A
Jan. 1989	Thermostats	Affirmative	Affirmative	Affirmative	Negative	N/A
Aug. 1989	Steel Rails	Affirmative	Affirmative	Affirmative	Affirmative	$10.0 million
Aug. 1989*	Cephalexin Capsules	Affirmative	Affirmative	Affirmative	Negative	N/A
Sept. 1991*†	Magnesium	Affirmative	Affirmative	Affirmative	Affirmative	$70.0 million
Nov. 1991x	Brass Plate	N/A	Affirmative	-	-	$5.0 million

Year Initiated	Case	Preliminary Determination		Final Determination		Annual Trade
		ITC	ITA	ITA	ITC	
April 1992	Nepheline Syenite	Affirmative	Affirmative	Affirmative	Negative	$15.0 million
April 1992	Potassium Hydroxide and Electrical Cable	Negative	Negative	-	-	N/A
July 1992	Steel	Affirmative	Affirmative	-	-	$400.0 million

Note: N/A - Not Available
* - FTA Challenge
† - GATT Challenge
x - Anti-Circumvention Case

5.0 SECTIONS 301-310 OF THE TRADE ACT OF 1974, AS AMENDED[43]

Chapter 1 of title III (Sections 301-310) of the Trade Act of 1974, as amended[44] provides the authority and procedures for the President to enforce U.S. rights under international trade agreements and to respond to certain unfair foreign practices. The predecessor statute, Section 252 of the Trade Expansion Act of 1962[45] was repealed and Section 301 established in its place under the Trade Act of 1974. Section 301 was amended under title IX of the Trade Agreements Act of 1979[46] in two principal respects: (1) to include specifically enforcement of U.S. rights and responses to actions by foreign countries inconsistent with or otherwise denying U.S. benefits under trade agreements; and (2) to place specific time limits on the procedures for investigating and taking action on petitions. Some further amendments were enacted under Sections 304 and 307(b) of the Trade and Tariff Act of 1984[47] to clarify certain authorities and practices covered by Section 301, and to authorize certain actions with respect to foreign export performance requirements.

The current statute reflects major modifications made by Sections 1301-1303 of the Omnibus Trade and Competitiveness Act of 1988[48] to Section 301 authority, as well as enactment of additional authorities commonly known as "Super 301" to deal with priority practices and priority countries and "Special 301" to deal with priority intellectual property right protection. The principal amendments in 1988 to strengthen the basic Section 301 authority were: (1) to require the U.S. Trade Representative (USTR) to make unfair trade practice determinations in all cases, and to transfer authority to determine and implement Section 301 action from the President to the USTR, subject to the specific direction, if any, of the President; (2) to make Section 301 mandatory in cases of trade agreement violations or other "unjustifiable" practices, except in certain circumstances; (3) to include additional types of practices as specifically actionable under Section 301; (4) to tighten and specify time limits on all investigations and actions; and (5) to require monitoring and enforcement of foreign settlement agreements and to provide for modification and termination of Section 301 actions.

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[43] This section draws upon the Committee on Ways and Means U.S. House of Representatives Report: Overview and Compilation of U.S. Trade Statutes, March 25, 1991.

[44] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2411.

[45] Public Law 87-794, sec. 252, approved October 11, 1962.

[46] Public Law 96-39, title IX, approved July 26, 1979.

[47] Public Law 98-573, approved October 30, 1984.

[48] Public Law 100-418, approved August 23, 1988.

5.1 International Consultation and Dispute Settlement

Article XII and XIII of the GATT as elaborated upon by the texts concerning a framework for the conduct of world trade concluded in the Tokyo Round of multilateral trade negotiations (MTN)[49], provide the general consultation and dispute settlement procedures applicable to GATT rights and obligations. In addition, the GATT agreements concluded in the MTN on specific non-tariff barriers each contain procedures for consulting and seeking to resolve disputes among signatories concerning practices by each signatory.

While the mechanisms and the time limits vary, the common principles include (1) provisions for bilateral and multilateral consultations seeking to reach a mutually satisfactory solution without resort to dispute settlement; (2) the right of any signatory to a panel, composed of three to five impartial experts from countries not parties to the dispute acting in their individual capacities, which reviews the dispute and makes findings of fact and law; and (3) submission of panel findings to the Committee on Signatories to the particular MTN agreement or to the GATT Council, which reviews and may adopt the panel report and may authorize retaliatory action.

5.2 Enforcement Authority and Procedures ("Section 301")

Sections 301-309 of the Trade Act of 1974, as amended, commonly referred to as Section 301, provide the domestic counterpart to the GATT consultation and dispute settlement procedures and U.S. domestic authority to impose import restrictions as retaliatory action, if necessary to enforce U.S. rights against unjustifiable, unreasonable, or discriminatory foreign trade practices which burden or restrict U.S. commerce. The broad inclusive nature of Section 301 authority applies to practices and policies of countries whether or not they are covered by, or are members of, GATT or other trade agreements. The USTR administers the statutory procedures through an inter-agency committee.

5.3 Basis and Form of Authority

Under Section 301, if the U.S. Trade Representative determines that a foreign act, policy or practice violates or is inconsistent with a trade agreement or is unjustifiable[50] and burdens or restricts U.S. commerce, then action by the USTR to enforce the trade agreement rights or to obtain the elimination of the act, policy, or practice is mandatory, subject to the specific direction, if any, of the President.

The USTR is not permitted to act, however, if (1) the GATT Contracting Parties have determined, a GATT panel has reported, or a dispute settlement ruling under a trade agreement finds that U.S. trade agreement rights have not been denied or violated; (2) the USTR finds that the foreign country is taking satisfactory measures to grant U.S. trade agreements rights, the foreign country has agreed to eliminate or phase out the practice or to an imminent solution to the burden or restriction of U.S. commerce, or has agreed to provide satisfactory compensatory

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[49] MTN/FR/W/20/Rev. 2, reprinted in House Doc. No. 96-453, pt 4 at 619.

[50] The term "unjustifiable" refers to acts, policies, or practices which violate or are inconsistent with U.S. international legal rights, such as denial of national or most-favoured-nation treatment, right of establishment, or protection of intellectual property rights.

trade benefits; or (3) the U.S. finds in extraordinary cases that action would have an adverse impact on the U.S. economy substantially out of proportion to the benefits of action, or action would cause serious harm to the U.S. national security. Any action taken must affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on U.S. commerce.

If the USTR determines that the act, policy, or practice is unreasonable[51] or discriminatory[52] and burdens or restricts U.S. commerce[53] and action by the United States is appropriate, then the USTR has discretionary authority as under prior law to take all appropriate and feasible action, subject to the specific direction, if any, of the President, to obtain the elimination of the act, policy, or practice.

In determining whether an act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account to the extent appropriate. Unreasonable measures include, but are not limited to, acts, policies, or practices which (1) deny fair and equitable (a) opportunities for the establishment of an enterprise, (b) provision of adequate and effective intellectual property right protection, or (c) market opportunities, including foreign government toleration of systematic anti-competitive activities by or among private firms that have the effect of restricting on a basis inconsistent with commercial considerations access of U.S. goods to purchasing by such firms; (2) constitute export targeting; or (3) constitute a persistent pattern of conduct denying internationally-recognized worker rights, unless the USTR determines the foreign country has taken or is taking actions that demonstrate a significant and tangible overall advancement in providing those rights and standards throughout the country or such acts, policies, or practices are not inconsistent with the level of economic development of the country.

As to the form of action, the USTR is authorized to (1) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country involved; (2) impose duties or other import restrictions on the goods of, and notwithstanding any other provision of law, fees or restrictions on the services of, the foreign country for such time as the USTR deems appropriate (i.e. increased tariffs, countervailing duties); or (3) enter into binding agreements that commit the foreign country to (a) eliminate or phase out the act, policy, or practice (b) eliminate any burden or restriction on U.S. commerce resulting from the act, policy, or practice, or (c) provide the United States with compensatory trade benefits that are satisfactory to the USTR. The USTR must also take all other appropriate and feasible action within the power of the President that the President may direct the USTR to take.

With respect to services, the USTR may also restrict the terms and conditions or deny the issuance of any access authorization (e.g., license, permit, order) to the U.S. market issued under Federal law, notwithstanding any other law governing the authorization. Such action can apply only prospectively to authorizations granted or applications pending on or after the date a

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[51] The term "unreasonable" refers to acts, policies, or practices which are not necessarily in violation of or inconsistent with U.S. international legal rights, but are otherwise unfair and inequitable.

[52] The term "discriminatory" includes, where appropriate, any act, policy, or practice which denies national or most-favoured-nation treatment to U.S. goods, services, or investment.

[53] The term "commerce" includes, but is not limited to, services (including transfers of information) associated with international trade, whether or not such services are related to specific goods, and foreign direct investment by U.S. persons with implications for trade in goods or services.

Section 301 petition is filed or the USTR initiates an investigation. Before imposing fees or other restrictions on services subject to Federal or State regulation, the USTR must consult as appropriate with the Federal or State agency concerned.

Action under Section 301 may be taken on a nondiscriminatory basis or solely against the products or services of the country involved and with respect to any goods or sector regardless of whether they were involved in the particular act, policy, or practice.

In taking action, the USTR must give preference to tariffs over other forms of import restrictions and consider substituting on an incremental basis an equivalent duty for any other form of import restriction imposed. Any action with respect to export targeting must reflect, to the extent possible, the full benefit level of the targeting over the period during which the action taken has an effect.

5.4 Petitions and Investigations

Any interested person may file a petition under Section 302 with the USTR requesting the President to take action under Section 301 and setting forth the allegations in support of the request. The USTR reviews the allegations and must determine within 45 days after receipt of the petition whether to initiate an investigation. The USTR may also self-initiate an investigation after consulting with appropriate private sector advisory committees. Public notice of determinations is required, and in the case of decisions to initiate, publication of a summary of the petition and an opportunity for the presentation of views, including a public hearing if requested on a timely basis by the petitioner or any interested person.

In determining whether to initiate an investigation of any act, policy, or practice specifically enumerated as actionable under Section 301, the USTR has the discretion to determine whether action under Section 301 would be effective in addressing that act, policy, or practice.

Section 303 requires the use of international procedures for resolving the issues to proceed in parallel with the domestic investigation. The USTR, on the same day as the determination to initiate an investigation, must request consultations with the foreign country concerned regarding the issues involved. The USTR may delay the request for up to 90 days in order to verify or improve the petition to ensure an adequate basis for consultation.

If the issues are covered by a trade agreement and are not resolved during the consultation period, if any, specified in the agreement, then the USTR must promptly request formal dispute settlement under the agreement before the earlier of the close of the consultation period specified in the agreement, if any, or 150 days after the consultation began. The USTR must seek information and advice from the petitioner, if any, and from appropriate private sector advisory committees in preparing presentations for consultations and dispute settlement proceedings.

5.5 USTR Unfairness and Action Determinations and Implementation

Section 304 sets forth specific time limits within which the USTR must make determinations of whether an act, policy, or practice meets the unfairness criteria of Section 301 and, if affirmative, what action, if any, should be taken. These determinations are based on the investigation under Section 302, and, if a trade agreement is involved, on the international

consultations and, if applicable, on the results of the dispute settlement proceedings under the agreement.

The USTR must make these determinations:

- within 18 months after the date the investigation is initiated or 30 days after the date the dispute settlement procedures are concluded, whichever is earlier, in cases involving a trade agreement, other than the agreement on subsidies and countervailing measures;

- within 12 months after the date the investigation is initiated in cases not involving trade agreements or involving the agreement on subsidies and countervailing measures; or

- within 6 months after the date the investigation is initiated in cases involving intellectual property rights priority countries, or within 9 months if the USTR determines such cases (1) involve complex or complicated issues that require additional time, (2) the foreign country is making substantial progress on legislative or administrative measures that will provide adequate and effective protection, or (3) the foreign country is undertaking enforcement measures to provide adequate and effective protection.

The applicable deadline is postponed by up to 90 days if consultations with the foreign country involved were so delayed.

Before making the determinations, the USTR must provide an opportunity for the presentation of views, including a public hearing if requested by an interested person and obtain advice from the appropriate private sector advisory committees. If expeditious action is required, the USTR must comply with these requirements after making the determinations. The USTR may also request the views of the ITC on the probable impact on the U.S. economy of taking the action. Any determinations must be published in the Federal Register.

Section 305 requires the USTR to implement any Section 301 actions within 30 days after the date of the determination to take action. The USTR may delay implementation by not more than 180 days if (1) the petition or, in the case of a self-initiated investigation, a majority of the domestic industry requests a delay; or (2) the USTR determines that substantial progress is being made, or that a delay is necessary or desirable, to protect U.S. rights or to find a satisfactory solution. In cases involving intellectual property rights of priority countries, action implementation may be delayed beyond the 30 days only if the extraordinary circumstances apply and by not more than 90 days.

If the USTR determines to take no action in a case involving an affirmative determination of export targeting, the USTR must take alternative action in the form of establishing an advisory panel to recommend measures to promote the competitiveness of the affected domestic industry. The panel must submit a report on its recommendations to the USTR and the Congress within 6 months. On the basis of this report and subject to the specific direction, if any, of the President, the USTR may take administrative actions authorized under any other law and propose legislation to implement any other actions that would restore or improve the international competitiveness of the domestic industry and must submit a report to the Congress within 30 days after the panel report is submitted on the actions taken and proposals made.

5.6 Monitoring of Foreign Compliance; Modification and Termination of Actions

The Omnibus Trade and Competitiveness Act of 1988 added a provision in Section 306 requiring the USTR to monitor agreements made and measures undertaken by foreign countries to enforce the rights of the United States under a trade agreement or to eliminate offending practices. If less than satisfactory implementation is found the USTR is directed to consult with the petitioner and representatives of the domestic industry involved in the original investigation and to provide interested persons with an opportunity to present their views before taking action. After this the USTR shall determine what future action he shall take under section 301.

Section 307 authorizes the USTR to modify or terminate a Section 301 action, subject to the specific direction, if any, of the President, if (1) any of the exceptions to mandatory Section 301 action in the case of trade agreement violations or unjustifiable acts, policies, or practices applies, (2) the burden or restriction on U.S. commerce of the unfair practice has increased or decreased, or (3) discretionary Section 301 action is no longer appropriate. Before modifying or terminating any Section 301 action, the USTR must consult with the petitioner, if any, and with representatives of the domestic industry concerned, and provide an opportunity for other interested persons to present views.

Any Section 301 action shall terminate automatically if it has been in effect for 4 years and neither the petitioner nor any representative of the domestic industry which benefits from the action has submitted to the USTR in the final 60 days a written request for continuation. The USTR must give the petitioner and representatives of the domestic industry at least 60 days advance notice by mail of termination. If a request for continuation is submitted, the USTR must conduct a review of the effectiveness of Section 301 or other actions in achieving the objectives and effects of actions on the U.S. economy, including consumers.

The USTR must submit a semi-annual report to the Congress describing petitions filed and determinations made, developments in and the status of investigations and proceedings, actions taken or the reasons for no action under Section 301, and the commercial effects of Section 301 actions taken. The USTR must also keep the petitioner regularly informed of all determinations and developments regarding Section 301 investigations.

5.7 Information Requests; Reporting Requirements

Under Section 308, USTR makes available information (other than confidential) upon receipt of a written request by any person concerning (1) the nature and extent of a specific trade policy or practice of a foreign country with respect to particular goods, services, investment, or intellectual property rights to the extent such information is available in the Federal Government; (2) U.S. rights under any trade agreement and the remedies which may be available under that agreement and U.S. laws; and (3) past and present domestic and international proceedings or actions with respect to the policy or practice. If the information is not available, within 30 days after receipt of the request, the USTR must request the information from the foreign government or decline to request the information and inform the person in writing of the reasons.

The USTR has taken 301 actions against Canada involving the following products (please see table four for details):

- Egg Quotas
- Border Broadcasting
- Front-End Loaders-Duty Remission scheme
- Salmon and Herring
- Softwood Lumber (1986) (action was initiated without receipt of a petition)
- Import Restrictions on Beer
- Softwood Lumber (1991) (action was initiated without receipt of a petition)

5.8 Super 301

Section 310 of the Trade Act of 1974, as amended by Section 1302 of the Omnibus Trade and Competitiveness Act of 1988, required the USTR, within 30 days after the National Trade Estimates (foreign trade barriers) report to the Congress in 1989 and 1990, to identify trade liberalization priorities[54]. This identification included (1) priority practices, including major barriers and trade distorting practices, the elimination of which are likely to have the most significant potential to increase U.S. exports, either directly or through the establishment of a beneficial precedent; (2) priority foreign countries; and (3) estimates of the total amount by which U.S. exports of goods and services to each foreign country identified would have increased during the preceding calendar year if the priority practices identified did not exist. The statute also lists specific factors that the USTR had to take into account in identifying priority practices and priority foreign countries. The USTR was required to submit a report to the House Committee on Ways and Means and the Senate Committee on Finance listing the priority countries, the priority practices with respect to each of the priority countries, and the trade amounts estimated with respect to each of the priority countries.

Within 21 days after submission of the report, the USTR was required to initiate Section 301 investigations with respect to all of the priority practices identified for each of the

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[54] In 1989, the USTR created a two-tier 'watch list" of countries at risk for designation under "special 301" instead of making actual designations. Initially named to the "priority watch list" were: China, India, Mexico, Saudi Arabia, South Korea, Taiwan, and Thailand. A deadline for improvement was set. Seventeen nations were placed on the "secondary watch list" that called on them to improve protection for intellectual property rights without a particular deadline. Nations making progress were moved from the priority to secondary list, but the USTR did not designate any countries under "special 301" after the deadline. In 1990 the USTR again declined to name any countries as priority foreign countries under "special 301" citing progress.

On April 29, 1992, USTR released the annual list of countries that fail to protect U.S. intellectual property such as patents, copyrights, and trademarks. Among the countries listed USTR cited Taiwan, India, and Thailand under special 301. Nine countries were named to the watch list: Egypt, Hungary, South Korea, the Philippines, Poland, Turkey, Australia, Brazil, and the EC. Another 22 countries (including Canada for the third consecutive year) were put on the secondary watch list. Successful negotiation of an agreement with Taiwan led the USTR to terminate the section 301 investigation and rescission of the identification of Taiwan as a priority foreign country under "Special 301" after finding that Taiwan's practices were unreasonable and burdened or restricted U.S. commerce.

priority foreign countries. The USTR could, but was not required to, initiate Section 301 investigations with respect to all other priority practices identified.

The normal Section 301 authorities, procedures, time limits, and other requirements generally apply to these investigations. In the consultations with the country under Section 303, the USTR must seek to negotiate an agreement which provides for the elimination of, or compensation for, the priority practices within three years after the initiation of the investigation, and the reduction of these practices over three years with the expectation that U.S. exports to the country will increase incrementally during each year as a result. Any investigation will be suspended if such an agreement is entered into with the country before the date on which any Section 301 action may be required to be implemented under Section 305. If the USTR determines that the country is not in compliance with such an agreement, the USTR must continue the investigation as though it had not been suspended.

On the date the National Trade Estimates report was due in 1990, and on that date in succeeding years, the USTR must submit a report which includes (1) revised total export estimates for each priority foreign country; (2) evidence that demonstrates, in the form of increased exports to each priority country during the previous year, substantial progress during each of the 3 years toward the goal of eliminating priority practices in the case of countries that have entered into an agreement, and the elimination of such practices by countries that have not entered into an agreement; and (3) to the extent this evidence cannot be provided, any actions that have been taken by the USTR under Section 301 with respect to the priority practices of each priority country. The USTR may exclude from the report in any year after 1993 any foreign country identified if the evidence submitted in the previous two reports demonstrated that all the priority practices identified with respect to that country have been eliminated.

5.9 Special 301

Section 182 of the Trade Act of 1974, as amended by Section 1303 of the Omnibus Trade and Competitiveness Act of 1988, requires the USTR to identify, within 30 days after submission of the annual National Trade Estimates (Foreign trade barriers) report to the Congress, those foreign countries that (1) deny adequate and effective protection of intellectual property rights or fair and equitable market access to U.S. persons that rely upon intellectual property protection, and (2) those countries under (1) determined by the USTR to be priority foreign countries. The USTR identifies as priorities only those countries that have the most onerous or egregious acts, policies, or practices that have the greatest adverse impact on the relevant U.S. products and that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective intellectual property right protection. The USTR at any time may revoke or make an identification of a priority country, but must include in the semiannual Section 301 report to the Congress a detailed explanation of the reasons for a revocation.

Section 302(b) requires the USTR to initiate a Section 301 investigation within 30 days after identification of a priority country with respect to any act, policy, or practice of that country that was the basis of the identification, unless the USTR determines initiation of an investigation would be detrimental to U.S. economic interests and reports the reasons in detail to the Congress. The procedural and other requirements of Section 301 authority generally apply to these cases except for tighter time limits to make determinations under Section 304 and to implement actions under Section 305.

On May 26, 1989, the U.S. Trade Representative announced that because of significant progress made in various negotiations, no priority countries had been identified under Special 301. Rather, 25 countries were singled out whose practices deserved special attention, of which 17 countries were placed on a "Watch List" and 8 countries were placed on a "Priority Watch List" to be reviewed again no later than November 1, 1989.

On November 1, 1989, the USTR announced that progress had been made in negotiations to obtain improved intellectual property right protection and enforcement with each of the 8 countries on the "Priority Watch List". Korea, Taiwan and Saudi Arabia were moved to the "Watch List" because of their significant progress. The other 5 countries (Brazil, India, Mexico, People's Republic of China, and Thailand) remained on the "Priority Watch List". No country was designated as a "priority foreign country" making it subject to investigation under the Special 301 provisions.

In January 1990, Mexico was removed from all Special 301 lists after outlining a programme for improved protection for patents, trademarks, and trade secrets, as well as improved enforcement of laws in those areas. Improvement in Mexico's protection of computer programmes and sound recordings also was anticipated by the USTR. On April 27, 1990, the USTR noted that because significant progress had been made in negotiations with countries previously identified under the Special 301 statute, no country would be designated as a "priority foreign country" in 1990. At that time, Portugal also was removed from all lists, due to improved protection of intellectual property rights in that country.

5.10 Foreign Direct Investment

Section 307(b) of the Trade and Tariff Act of 1984 requires the U.S. Trade Representative to seek the reduction and elimination of foreign export performance requirements through consultations and negotiations with the country concerned if the USTR determines, with inter-agency advice, that U.S. action is appropriate to respond to such requirements that adversely affect U.S. economic interests. In addition, the USTR may impose duties or other import restrictions on the products or services of the country involved, including exclusion from entry into the United States of products subject to these requirements. The USTR may provide compensation for such action subject to the provisions of Section 123 of the Trade Act of 1974 if necessary or appropriate to meet U.S. international obligations.

Section 307(b) authority does not apply to any foreign direct investment, or to any written commitment relating to a foreign direct investment that is binding, made directly or indirectly by any United States person prior to October 30, 1984 (date of enactment of the Act).

TABLE 4

SECTION 301 CASES INITIATED BY THE UNITED STATES AGAINST CANADA

Product Concerned	Complaint	Disposition of Present Status
Egg Quotas	United Egg Producers and American Farm Bureau Federation filed petitions on July 17 and 21, 1975, alleging that a Canadian quota on the importation of U.S. eggs constituted an unfair trade practice (40 FR 33749).	As a result of bilateral negotiations, Canada approximately doubled its quota for imports of U.S. eggs. USTR terminated the investigation on March 14, 1976 (41 FR 9430).
Border Broadcasting Policies	Certain U.S. television licensees filed a petition on Aug. 29, 1978, alleging that certain provisions of the Canadian Income Tax Act were unreasonable in denying tax deductions to any Canadian taxpayer for advertising time purchased from a U.S. broadcaster for advertising aimed at the Canadian market, when deductions were granted for the purchase of advertising time from a Canadian broadcaster (43 FR 39610).	USTR held public hearings in November 1978 and July 1980. The President determined on Aug. 1, 1980, that the most appropriate response was legislation to mirror in U.S. law the Canadian practice (45 FR 51173). That proposal was sent to Congress on Sept. 9, 1980, and again in November 1981. Legislation was enacted on Oct. 30, 1984. Trade and Tariff Act of 1984, Sec. 232, Pub. L. No. 98-573.
Canada Front-End Loaders-Duty Remission Programme	The J.I. Case Company filed a petition on July 27, 1982, alleging that Canada's regulations allowing remission of customs duties and sales tax on certain front-end	USTR initiated an investigation on Oct. 28, 1982, and held a public hearing on Dec. 14, 1982. The U.S. consulted with Canada under GATT Art. XXII on Dec. 21, 1982. No action was taken.

Product Concerned	Complaint	Disposition of Present Status
	loaders violate the GATT and Subsidies Code, are unreasonable and discriminatory and burden and restrict U.S. commerce. Petitioner amended and refiled a petition on Sept. 13, 1982 (47 FR 51029).	
Salmon and Herring	Icicle Seafoods and nine other seafood processors filed a petition on April 1, 1986, alleging that the Canadian prohibition on the export of unprocessed herring and salmon violates GATT Article XI and provides Canadian processors with an unfair cost advantage that burdens U.S. exports in third country markets.	USTR initiated an investigation on May 16, 1986 (51 FR 19648), and requested comments on certain economic issues relating to the investigation. The U.S. consulted with Canada under Art. XXIII:1 of the GATT Sept. 3 and Oct. 27, 1986, and presented arguments before a GATT dispute settlement panel on June 18 and July 10, 1987. The U.S. won the case, and the favorable panel report was adopted by the GATT Council in February 1988. Canada announced that it would terminate its export restrictions by Jan. 1, 1989, but would adopt some new landing requirements. On August 30, 1988, a Federal Register notice (53 FR 33207) requested comments on the unfairness determination required under the Omnibus Trade and Competitiveness Act of 1988. Canada failed to remove its export prohibition by January 1, 1989, and in early 1989 the U.S. and Canada continued to consult on Canada's plans to introduce new landing requirements. The USTR determined on March 28, 1989, that Canada's export prohibition denied U.S. rights under the GATT. At the same time the USTR sought public comment on possible trade action as a result of this determination and directed the

Product Concerned	Complaint	Disposition of Present Status
		Section 301 Committee to hold a public hearing on such action. The hearing was held April 26.
		On April 25, 1989, Canada announced the replacement of the export prohibitions with landing requirements that the U.S. considered inconsistent with Canada's obligations under both the GATT and the Canada-U.S. Free Trade Agreement (FTA).
		In an exchange of letters dated May 23 and 30, 1989, the U.S. and Canada agreed to submit the matter to expedited dispute settlement under the FTA. On October 13, 1989, the FTA Panel issued its report finding the landing requirements violated FTA Article 407.
		The parties began consultations on October 16, 1989, to reach agreement on an amendment to Canada's current landing requirement that would conform with the FTA or otherwise constitute a satisfactory resolution of the dispute.
		In mid-February 1990, the United States and Canada reached an agreement on an interim settlement of the dispute. Under that arrangement, U.S. buyers could purchase 20 percent of British Columbia (B.C.) roe herring and salmon directly from B.C. fishing grounds during the 1990 fishing season. The percentage would increase to 25 percent during 1991-93. Under the arrangement, roe herring shipped to the United States from Canada would have to be processed before re-export to third countries, to the same

Product Concerned	Complaint	Disposition of Present Status
		extent as Canada requires under its domestic law. Canada and the United States will review the operation of this arrangement in 1993. The investigation was terminated on June 1, 1990 (55 FR 23322).
Softwood Lumbert	On Dec. 30, 1986, the U.S. and Canada concluded an agreement under which the Department of Commerce terminated a countervailing duty investigation (based upon withdrawal of the petition) after Canada agreed to impose a tax of 15% ad valorem on exports of certain softwood lumber products to the U.S..	Pending Canada's imminent imposition and collection of that tax as agreed, on Dec. 30, 1986, the President proclaimed - under Section 301 authority - a temporary additional duty of 15% ad valorem on imports of Canadian softwood lumber products (52 FR 229). On the same date, as the necessary predicate for the exercise of Section 301 authority, he determined that Canadian practices regarding the federal and provincial governments' terms and conditions for the harvest of stumpage (standing timber) were unjustifiable or unreasonable and a burden or restriction on U.S. commerce (52 FR 231). Effective Jan. 8, Commerce suspended the import duty based on the Secretary's determination that Canada had begun to collect the export surcharge on exports to the U.S. of certain softwood lumber products (52 FR 1311). On May 26, 1987, the Government of Canada passed legislation providing for this tax.
Import Restrictions on Beer	G. Heileman Brewing Company, Inc. filed a petition on May 15, 1990, alleging that Canada's import restrictions on beer - including listing requirements, discriminatory mark-ups, and restrictions on distribution - were inconsistent with	On June 29, 1990, the USTR initiated an investigation and requested public comment on the allegations in the petition (55 FR 27731). Also on that date the U.S. requested consultations with Canada under Article XXIII:1 of the GATT. Consultations were held July 20, 1990.

Product Concerned	Complaint	Disposition of Present Status
	the GATT and the Canada-U.S. Free Trade Agreement.	On September 14, 1990, the Stroh Brewing Company filed a petition complaining about the distribution and pricing practices of the Province of Ontario with respect to imported beer. On October 17, 1990, the USTR decided to investigate the allegations contained in the Stroh petition in the context of this investigation. On December 12, 1990, the U.S. requested the GATT Contracting Parties in Geneva to establish a GATT Panel to examine the listing, pricing and distribution practices of provincial liquor boards with respect to beer. The Panel provided its findings to Canada and the U.S. on September 18, 1991. The Panel found several provincial measures related to the pricing, distribution and sale of beer to be inconsistent with the General Agreement. The Panel report was adopted by GATT Council February 18, 1992. The report contained the recommendation that Canada "report to the Contracting Parties on the measures taken in respect to access to points of sale and differential mark-ups before the end of March 1992 and in respect of the other matters before the end of July 1992". Canada confirmed to the Council its commitment to abide by the Panel's recommendations. On March 31, 1992, Canada advised the Contracting Parties of measures the provinces would be taking to ensure observance of the

Product Concerned	Complaint	Disposition of Present Status
		GATT. A timetable for the changes was also provided. The U.S. objected to the proposals, regarding them as too limited, and to the amount of time allowed for their introduction (up to three years). On April 25, 1992, Canada and the U.S. reached an Agreement-in-Principle in which Canadian provinces undertook to implement certain measures in exchange for the withdrawal by the U.S. of the threat of retaliatory action. Subsequent to the Agreement-in-Principle, the U.S. objected to changes to the pricing system in the province of Ontario. Accordingly, at the July 14 Council meeting, the U.S. requested authority of the GATT Council to retaliate against Canada for these allegedly discriminatory measures. The Council did not approve the request. At the same meeting, Canada offered to have the specific issues raised by the U.S. examined on an expedited basis by the GATT. The U.S. refused this offer. On July 24, the U.S. imposed a surtax of 50 percent ad valorem on imports of Canadian beer brewed in Ontario. In response, Canada imposed a matching duty on imports of Stroh and Heileman beer into Ontario. At the September 29 meeting of the GATT Council, Canada again sought U.S. agreement to submit the issues to an expedited review. The U.S. again refused.

Product Concerned	Complaint	Disposition of Present Status
		On November 24, 1992 Canada presented the U.S. with a proposal to seek binding arbitration of the outstanding issues in terms of their consistency with the GATT Panel decisions and the Canada-U.S. Agreement-in-Principle of April 25, 1992. In mid-December, the U.S. rejected the arbitration proposal. Alternate possibilities are now being explored for resolving the dispute.
Softwood Lumber†	On October 4, 1991, USTR self-initiated an investigation under Section 302(b)(1)(A) of the Trade Act with respect to certain acts, policies, and practices of the Government of Canada affecting exports to the United States of softwood lumber.	On October 4, 1991, USTR invited public comments on the matters being investigated (56 FR 50738). Because expeditious action was required, the USTR made these determinations prior to receiving public comment in accordance with Section 304(b)(1). The Administration announced the following action: (1) intention to self-initiate a countervailing duty investigation of softwood lumber imports from Canada (which was in fact initiated on October 31, 1991); and (2) until preliminary results of that investigation are available, USTR imposed interim bonding requirements under Section 301 of the 1974 Trade Act to prevent disruption of the U.S. lumber market as a consequence of the abrupt termination of the MOU undertaking.

† Denotes actions initiated without having received a petition

6.0 UNFAIR PRACTICES IN IMPORT TRADE [55]

6.1 Section 337 of the Tariff Act of 1930, as Amended - Patent Infringement

Section 337 of the Tariff Act of 1930[56] declares unlawful unfair methods of competition and unfair acts in the importation or sale of articles (other than articles relating to certain intellectual property rights, as described below), the threat or effect of which is to (1) destroy or substantially injure an industry in the United States; (2) prevent the establishment of such an industry; or (3) restrain or monopolize trade and commerce in the United States. Section 337 also declares unlawful the importation or sale of articles that (1) infringe a valid and enforceable U.S. patent or registered copyright; or are made, produced, processed, or mined under a process covered by a valid and enforceable U.S. patent; (2) infringe a valid and enforceable U.S. registered trademark; or (3) infringe a registered mask work of a semiconductor chip product. For this separate class of certain intellectual property rights, the importation or sale of infringing articles is unlawful only if an industry in the United States relating to the articles protected by the patent, copyright, trademark, or mask work exists or is in the process of being established. A U.S. industry is considered to exist if there is (1) significant investment in plant and equipment; (2) significant employment of labour or capital; or (3) substantial investment in the exploitation of the patent, copyright, trademark, or mask work, including engineering, research and development, or licensing.

The ITC is responsible for investigating alleged violations of Section 337. Upon finding a violation, the ITC may issue an exclusion order and/or a cease and desist order, subject to Presidential disapproval.

Section 337 is unique among the trade remedy laws in that it is the only one subject to the provisions of the Administrative Procedure Act (APA).[57] All ITC investigations and determinations under Section 337 must be conducted on the record after publication of notice and opportunity for hearing in conformity with the APA.[58]

The language of Section 337 closely parallels that of Section 5 of the Federal Trade Commission Act,[59] and therefore the scope of Section 337 has been compared to that of the antitrust and unfair competition statutes. The ITC has significant discretion in determining what practices are "unfair" under Section 337. In practice, however, the overwhelming majority of cases dealt with under Section 337 has been in the area of patent infringement. Among the few

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[55] This section draws upon the Bureau of International affairs publication: International Trade Reporter's U.S. Import Weekly.

[56] Public Law 71-361, Sec. 337, approved June 17, 1930, 19 U.S.C. 1337.

[57] Act of June 11, 1946, ch. 324, sections 1-12, 5 U.S.C. 551 et seq.

[58] 19 U.S.C. 1337(c).

[59] Public Law 63-203, approved September 26, 1914, 38 Stat. 717, 15 U.S.C. 45.

nonpatent cases has been cases involving group boycotts, price fixing, predatory pricing, false labelling, false advertising, and trademark infringement.

Whenever, in the course of a Section 337 investigation, the ITC has reason to believe that the matter before it involves dumping or subsidization of imports within the purview of the antidumping or countervailing duty laws, it must notify the administering authority of those laws for appropriate action.[60] If the alleged violation of Section 337 is based solely on such dumping or subsidization practices, the ITC must terminate (or not initiate) the Section 337 investigation. If it is based in part on such practices, and in part on other alleged practices, then the ITC may continue (or initiate) an investigation under Section 337. This provision is designed to avoid duplication and conflicts in the administration of the unfair trade practice laws.

6.2 Procedure

The ITC is required to investigate any alleged violation of Section 337 on complaint under oath or upon its own initiative. The ITC must conclude its investigation and make its determination at the earliest practicable time within one year, except in more complicated cases which must be concluded within 18 months. In the course of each investigation, the ITC is required to consult with and seek advice and information from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and other appropriate departments and agencies.

If a violation of Section 337 is found, the ITC must direct that the foreign articles be excluded from entry into the United States, unless it determines that such articles should not be excluded in consideration of the effect of exclusion on:

(a) the public health and welfare;
(b) competitive conditions in the U.S. economy;
(c) the production of like or directly competitive articles in the United States; and
(d) U.S. consumers.

In appropriate circumstances, the ITC may issue temporary exclusion orders during the course of an investigation if it determines that there is reason to believe that there is a violation of Section 337. In the event of a temporary exclusion order, entry is to be permitted only under bond. If petitioned by a complainant for issuance of a temporary exclusion order, the ITC must determine whether or not to issue such an order within 90 days after initiation of an investigation, with a possible extension of 60 days in more complicated cases.

In addition to or in lieu of issuing an exclusion order, the ITC may issue an appropriate cease and desist order to be served on the violating party or parties, unless it finds that such order should not be issued in consideration of the effect of such order on the same public interest factors listed above.

The ITC may at any time, upon such notice and in such manner as it deems proper, modify or revoke any cease and desist order, and issue an exclusion order in its place.

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[60] 19 U.S.C. 1337(b)(3).

Any person who violates a cease and desist order issued under this section shall be subject to a civil penalty of up to the greater of $100,000 per day or twice the domestic value of the articles entered or sold on such day in violation of the order.

In the event that a person has been served with notice of proceedings and fails to appear to answer the complaint in cases where the complainant seeks relief limited solely to that person, the ITC must presume the facts alleged by the complainant to be true. If requested by the complainant, the ITC must issue an exclusion order and/or a cease and desist order against the person in default, unless it finds that such order should not be issued for the same public interest reasons listed earlier. Similarly, if no person appears to contest the investigation and violation is established, the ITC may issue a general exclusion order.

The ITC may order seizure and forfeiture of goods subject to an exclusion order if an attempt has been made to import the goods and the owner or importer has been notified that a further attempt to import the goods would lead to seizure and forfeiture.

6.3 Presidential and Judicial Review

Following an ITC determination of a violation of Section 337, the President may, within 60 days after receiving notification, disapprove the ITC determination for "policy reasons." The statute does not specify what types of policy reasons may provide the basis for disapproval. Upon Presidential disapproval, actions taken by the ITC cease to have effect. If the President does not disapprove the ITC determination, or if he approves it, then the ITC determination becomes final. Any person adversely affected by a final ITC determination under Section 337 may appeal the determination to the U.S. Court of Appeals for the Federal Circuit.

6.4 Case Under the General Agreement on Tariffs and Trade

In response to a complaint by the European Economic Community about the application of Section 337, the GATT Council agreed on October 7, 1987 to establish a panel to review the U.S. law. On November 23, 1988, the panel found that section 337 is inconsistent with Article III:4 of the GATT, because it treats imported articles that violate U.S. patents less favourably than products of U.S. origin. The panel recommended that the GATT Contracting Parties request the United States to bring its procedures for patent infringement cases involving imports into conformity with the GATT.

The panel report was adopted at a GATT Council meeting on November 9, 1989. However, the President and U.S. trade officials indicated at that time that GATT adoption of the panel report would not result in change in current practice with respect to Presidential review of ITC recommendations for relief under section 337 or for disapproving such recommendations[61]. The Unites States is currently considering proposals to reform its patent enforcement system and noted that legislative changes to bring Section 337 into compliance with U.S. GATT obligations would be sought only as part of a comprehensive agreement on improved intellectual property protection in the Uruguay Round of multilateral trade negotiations taking place under GATT auspices.

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[61] The panel reported on section 337 as it existed before 1988 amendments. However, the 1988 amendments did not affect the basic inconsistency with the GATT found by the panel.

TABLE 5. SECTION 337 CASES INITIATED AGAINST CANADA

Year	Product	Outcome
August 1980	Spring Assembly	Exclusion Order
February 1980	Screw Jacks	Terminated
June 1981	Card Imprinters	Suspended
December 1981	Cube Puzzles	Exclusion Orders
June 1982	Point Screws	Terminated
May 1982	Decorative Items	Terminated
September 1982	Character Display Devices	Terminated
September 1983	Structural Systems	Terminated
September 1983	Batteries	Overturned by President
December 1983	Shelving	Terminated
December 1983	Drive Apparatus	Terminated
February 1984	Indomethacin	Terminated
April 1984	Wrapping Apparatus	Terminated
June 1984	Installation Apparatus	Exclusion Order
August 1984	Lighting Switches	Exclusion Order
November 1985	Firescreens	Terminated
June 1987	Smoke Detectors	Terminated
November 1987	Chime Modulars	Terminated
February 1988	Mobile Telephone	Terminated
June 1989	Minoxidil	Terminated
August 1990	Transmission Chains	Terminated
April 1991	Food Trays	Terminated
July 1991	Vacuum Cleaners	Terminated
July 1992	Bulk Bags	Initiated

7.0 SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 - NATIONAL SECURITY

Section 232 of the Trade Expansion Act of 1962 requires the Secretary of Commerce to determine whether a product is being imported "in such quantities or under such circumstances as to threaten to impair the national security" of the United States, and to submit the findings and recommendations to the President. The President must then decide whether to take action. The Omnibus Trade and Competitiveness Act made two important changes to Section 232 procedures. The deadline of the submission to the President of Commerce's findings and recommendations has been reduced from 12 to 9 months, and the President now has 90 days within which to determine whether to take action. Previously there was no deadline within which the President had to act in response to the Secretary of Commerce's recommendations.

TABLE 6. SECTION 232 CASES AGAINST CANADA

Year	Product	Outcome
December 1989	Bearings	No Import Restrictions
January 1989	Oil	No Import Restrictions
March 1989	Injection Machines	No Relief Recommended
February 1989	Uranium	No Relief Recommended
January 1992	Gears	No Relief Recommended

8.0 SECTION 332 OF THE U.S. TARIFF ACT OF 1930 - FACT FINDING INVESTIGATIONS

The Tariff Act of 1930 provides the ITC with broad authority to conduct studies and investigations relating to the impact of international trade on U.S. industries (Please see table 7). Such studies and investigations, most of which are completed in one year are conducted upon the request of the President, the House Committee on Ways and Means, the Senate Committee on Finance or on the ITC's own motion. In addition to studying competitive conditions in various sectors which could be affected by imports, the ITC often includes reference to existing U.S. trade laws available to domestic producers. There are no statutory deadlines or requirements as to the manner of the conduct of the investigations although hearings are usually held and deadlines requested by the initiator of the investigation. Reports are generally made public upon completion. These fact finding studies authorize no import restrictive action although they can often be used to collect basic data for future trade remedy law petitions by U.S. industry e.g. groundfish, softwood lumber, and swine and pork.

TABLE 7. SECTION 332 INVESTIGATIONS OF CANADIAN PRODUCTS

Cattle and Cattle Meat

Purpose of Investigation:	To study competitive conditions in U.S. markets between foreign and domestic cattle and cattle meat.
Investigation Initiated:	May 31, 1977
Hearing Held:	September 20, 1977
Report Published:	November 1977
Origin of Investigation:	ITC motion

GSP Treatment

Purpose of Investigation:	To provide advice on impact of providing GSP treatment to certain products.
Investigation Initiated:	March 27, 1979
Hearing Held:	June 26, 1979
Report Published:	September 10, 1979
Origin of Investigation:	U.S. Trade Representative

Casein

Purpose of Investigation:	To study the impact of casein on the domestic dairy industry.
Investigation Initiated:	June 21, 1979
Hearing Held:	October 4-5, 1979
Report Published:	December 1979
Origin of Investigation:	House Committee on Ways and Means

Softwood Lumber

Purpose of Investigation:	To gather information on softwood lumber imports from Canada.
Investigation Initiated:	December 16, 1981
Hearing Held:	February 17, 1982
Report Published:	April 1982
Origin of Investigation:	Senate Finance and House Ways and Means Committees

White Potatoes

Purpose of Investigation:	Competitive Status of Major Regions for White Potatoes.
Investigation Initiated:	April 1, 1982
Hearing Held:	June 30, 1982
Report Published:	August 1982
Origin of Investigation:	U.S. Trade Representative

Groundfish and Scallops

Purpose of Investigation:	To gather information on the competitive conditions in the northeastern U.S. groundfish and scallop industries.
Investigation Initiated:	December 21, 1983
Hearing Held:	September 5 and 7, 1984
Report Published:	December 1984
Origin of Investigation:	U.S. Trade Representative

Swine and Pork

Purpose of Investigation:	Assess the competitive position of Canadian live swine and pork in the U.S. market.
Investigation Initiated:	June 25, 1984
Hearing Held:	September 21, 1984
Report Published:	November 1984
Origin of Investigation:	Senate Finance Committee

Softwood Lumber

Purpose of Investigation:	Gather information on imports of softwood lumber into the U.S..
Investigation Initiated:	March 26, 1986
Hearing Held:	None
Report Published:	October 1985
Origin of Investigation:	U.S. Trade Representative

Certain Vegetables:

Purpose of Investigation:	Study the competitive conditions in certain U.S. markets of certain vegetables produced in Canada and the U.S..
Investigation Initiated:	December 12, 1985
Hearing Held:	None
Report Published:	March 1986
Origin of Investigation:	House Ways and Means Committee

Cattle and Beef

Purpose of Investigation:	Gather information on the competitive position of Canadian cattle and beef in the U.S. market.
Investigation Initiated:	December 15, 1986
Hearing Held:	April 16, 1987
Report Published:	July 1987
Origin of Investigation:	Senate Finance Committee

Durum Wheat

Purpose of Investigation:	To study the conditions of competition between the U.S. and Canadian Durum Industries.
Investigation Initiated:	December 4, 1989
Hearing Held:	None
Report Published:	June 1990
Origin of Investigation:	House Ways and Means and Senate Finance Committees

Apples

Purpose of Investigation:	Study certain conditions of competition between the U.S. and Canadian apple industries.
Investigation Initiated:	November 28, 1990
Hearing Held:	None
Report Published:	August 1991
Origin of Investigation:	Senate Finance Committee

Alfalfa Products

Purpose of Investigation:	Study conditions of competition between U.S. and Canadian alfalfa industries in third country markets.
Investigation Initiated:	May 1, 1991
Hearing Held:	None
Report Published:	December 1991
Origin of Investigation:	U.S. Trade Representative

Cattle and Beef

Purpose of Investigation:	Study competitive position of Canadian cattle and beef in the U.S. market.
Investigation Initiated:	July 13, 1992
Hearing Held:	September 9, 1992
Report Published:	Deadline January 1993
Origin of Investigation:	Senate Finance Committee and House Ways and Means Committee

Dry Peas and Lentils

Purpose of Investigation:	Study conditions of competition of U.S. and Canadian dry peas and lentils industries in third country markets.
Investigation Initiated:	September 14, 1992
Hearing Held:	December 8, 1992
Report Published:	Deadline April 20, 1993
Origin of Investigation:	House Ways and Means Committee

9.0 EMERGENCY SAFEGUARD ACTIONS[62]

9.1 Sections 201-204 of the Trade Act of 1974, as Amended - Escape Clause

The GATT contains an "escape clause" or an "emergency safeguard" provision (Article XIX[63]) which permits signatories to temporarily suspend, withdraw, or modify trade concessions to give domestic industries injured by import competition an opportunity to take measures necessary to become more competitive with foreign firms.

Chapter 1 of title II (Sections 201-203) of the Trade Act of 1974,[64] as amended by Section 1401 of the Omnibus Trade and Competitiveness Act of 1988,[65] sets forth the authority and procedures for the President to take action, including import relief, to facilitate efforts by a domestic industry which has been seriously injured by imports to make a positive adjustment to import competition.

9.1.1 Petitions and Investigations

An entity representative of an industry (including a trade association, firm, union or group of workers) may file a petition under Section 202 of the Trade Act of 1974 with the ITC. The petition must include a statement describing the specific purposes for which action is being sought, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition. Alternatively, the President, U.S. Trade Representative, or the House Committee on Ways and Means or Senate Committee on Finance may request an investigation.

Upon petition, request, or on its own motion, the ITC conducts an investigation "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Substantial cause is defined as "a cause which is important and not less than any other cause."

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[62] This section draws upon the Bureau of International affairs publication: International Trade Reporter's U.S. Import Weekly and the Committee on Ways and Means U.S. House of Representatives Report: Overview and Compilation of U.S. Trade Statutes, March 25, 1991.

[63] The language of GATT Article XIX is as follows: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement, including tariff concessions, any product imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product and to the extent and for such time as may be necessary to prevent such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

[64] 19 U.S.C. 2251-2253.

[65] Public Law 100-418, approved August 23, 1988. Amendments to Section 201-203 were also made by Sections 248 and 249 of the Trade and Tariff Act of 1984, Public Law 98-573, approved October 1984.

In making its determination the Commission must take into account all relevant economic factors, including certain factors specified in the statute,[66] and must consider the condition of the domestic industry over the course of the relevant business cycle. The Commission may determine to treat as the domestic industry: (1) only the portion or subdivision producing the like or directly competitive article of a producer of more than one article; and (2) only production concentrated in a major geographic area under certain circumstances. The Commission is required, to the extent information is available, in the case of a domestic producer which also imports, to treat as part of the domestic industry only the domestic production of such producer.

A public hearing is required during the course of the investigation. Whenever during the investigation the Commission has reason to believe increased imports are attributable in part to unfair trade practices, then it must promptly notify the agency administering the appropriate remedial law.

The ITC must make its injury determination within 120 days of receipt of the petition, unless it determines the case is extraordinarily complicated, in which case there may be an extension of 30 days. If the ITC makes an affirmative injury finding, then it must recommend the action that would address the injury and be the most effective in facilitating efforts by the domestic industry to make a positive adjustment; such recommended action must be either a tariff, tariff-rate quota, quantitative restriction, adjustment measures, or a combination thereof.

The ITC's remedy recommendation and report must be submitted to the President within 180 days of receipt of the petition. The report must also be made available to the public, and a summary of the report must be published in the Federal Register.

9.1.2 Adjustment Plans and Commitments

Under title II[67], as amended, petitioners are encouraged to submit, at any time prior to the ITC injury determination, a plan to promote positive adjustment to import competition. The law provides that a positive adjustment occurs when (1) the domestic industry is able to compete successfully with imports after actions taken under Section 204 terminate, or the domestic industry experiences an orderly transfer of resources to other productive pursuits; and (2) dislocated workers in the industry experience an orderly transition to productive pursuits.

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[66] These factors include: with respect to serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry (excluding foreign operations); with respect to threat of serious injury, a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry concerned; the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development, the extent to which the United States market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic producers. The presence or absence of any factor is not necessarily dispositive.

[67] Under Title II of the Trade Act of 1974, adjustment assistance can be provided to workers in the form of cash benefits for direct trade readjustment allowances and service benefits for job search, relocation, and training. Domestic firms and industries can receive technical and financial assistance in the form of trade adjustment grants.

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

Before submitting an adjustment plan, the petitioner and other members of the domestic industry that wish to participate may consult with the U.S. Trade Representative and other Federal Government officials for purposes of evaluating the adequacy of the proposals being considered for inclusion in the plan.

In addition, during the ITC investigation, the ITC is required to seek information (on a confidential basis to the extent appropriate) on actions being taken, or planned to be taken, or both, by firms and workers in the industry to make a positive adjustment to import competition. Any party may individually submit to the ITC commitments regarding actions such party intends to take to facilitate positive adjustment to import competition.

9.1.3 Provisional Relief

The amendments made by the 1988 Act authorize the President to provide emergency import relief for perishable agricultural products within 28 days after the filing of a petition if the ITC has monitored imports for at least 90 days and the ITC makes an affirmative preliminary injury determination. With respect to products other than perishable agricultural products, the President may provide provisional import relief within 127 days after a petition is filed if the ITC makes an affirmative injury determination and also determines that critical circumstances exist.

9.1.4 Presidential Action

The Act requires the President within 60 days of receiving a report from the ITC[68] containing an affirmative finding to take all appropriate and feasible action within his power which, in his determination, will facilitate efforts by the domestic industry to make a positive adjustment to import competition and will provide greater economic and social benefits than costs. Any import relief provided may not exceed the amount necessary to prevent or remedy the serious injury.

In determining what action is appropriate, the President is required to consider a number of factors, including the adjustment plan (if any), individual commitments, probable effectiveness of action to promote positive adjustment, other factors related to the national economic interest including the impact on U.S. industries and firms as a result of international obligations regarding compensation/retaliation.

The actions authorized to be taken by the President include an increase in or imposition of a duty, tariff-rate quotas, quantitative restrictions, adjustment measures, orderly marketing agreements, international negotiations, legislative proposals, and any other action within his power.

The Trade Policy Committee, chaired by the U.S. Trade Representative, is required to make a recommendation to the President as to what action the President should take. On the

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[68] If a supplemental report is requested by the President within 15 days of receiving the ITC report, the ITC must furnish such report within 30 days, and the President has 30 days from receipt of that supplemental report to take action.

day the President takes action under this title, he must submit to Congress a document describing the action and the reasons for taking the action. If the action taken by the President differs from the action recommended by the ITC, the President shall state in detail the reasons for the difference. If the President decides that there is no appropriate and feasible action to take with respect to a domestic industry, the President is required to transmit to Congress on the day of such decision a document that sets forth in detail the reasons for the decision.

Congress may adopt a joint resolution of disapproval within 90 legislative days under the expedited procedures of Section 152 of the Trade Act if the President takes action which is different from that recommended by the ITC or if the President declines to take any action. Under these procedures, resolutions are referred to the House Committee on Ways and Means and the Senate Committee on Finance, which are subject to a motion to discharge if the resolution has not been reported within 30 legislative days. No amendments to the motion or to the resolution are permitted. Within 30 days after enactment of such a resolution, the President must proclaim the relief recommended by the Commission.

Under the FTA action under this title may be taken for up to eight years. If the action taken is for less than eight years, then one extension for such time as will result in a total period of not more than eight years may be provided. As provided in Section 302(a) of the Canada-United States Free-Trade Agreement Implementation Act of 1988, the President exempts Canada from import relief measures if he determines that imports from Canada of the product under review are not substantial (normally 5 to 10 per cent or less of total imports) and are not contributing importantly to the injury or threat thereof. However, during the transition period, the United States could increase the duty of the article to the pre-FTA level for as much as three years if the Canadian product was the source of substantial injury to the U.S. industry. Such action could only be used once for any product.

Canada could still be caught up in American safeguard actions if Canadian products accounted for more than 10%-15% of total imports or if there was a surge in Canadian imports whenever safeguard action was taken against other countries. Notification and consultation would have to take place before any U.S. action in either case and compensation paid if action was taken.

However, before determining what action to take the President is directed by the statute to consider the following:

- the ITC recommendations and report;
- the extent to which workers and firms are benefitting from adjustment assistance and similar programmes and are engaged in worker retraining efforts;
- the efforts being made or planned by the domestic industry to make a positive adjustment to import competition;
- the probable effectiveness of action he might take to achieve positive adjustment;
- the economic and social costs and benefits of actions;
- the extent to which there is a diversion of foreign restraints;
- the potential for circumvention of action taken;
- the national security interests of the United States;

- the factors which the ITC is required to take into account under section 202(e)(5) in making its recommendation; and

- other factors relating to the economic interest of the United States including the economic and social costs which would be incurred by taxpayers, communities, and workers if relief were not provided, the effect of action on consumers and on competition in domestic markets, and the impact on domestic industry as a result of international obligations regarding compensation.

9.1.5 Monitoring, Modification, and Termination of Action

If Presidential action is taken, the ITC is required to monitor developments in the industry, including efforts by the domestic industry to adjust, and to report thereon every 2 years.

After two years have lapsed, the President may reduce, modify, or terminate action if either (1) the domestic industry requests it on the basis that it has made a positive adjustment, or (2) the President determines that changed circumstances warrant such reduction, modification, or termination. Upon request of the President, the ITC must advise the President as to the probable economic effects on the domestic industry of any proposed reduction, modification, or termination of action.

After any action taken under this title has terminated, the ITC must evaluate the effectiveness of the action in facilitating positive adjustment by the domestic industry to import competition, and submit a report thereon to the President and to the Congress within 180 days of the termination of the action.

9.1.6 Subsequent Investigations

Except if the Commission determines good cause, no investigation may be initiated with respect to the same subject matter as a previous investigation under this title, unless 1 year has elapsed since the ITC report to the President.

If import relief was provided, then no investigation may be initiated with respect to the same product for a period of time equivalent to the period of import relief granted.

9.2 Examples of U.S. Section 201 Actions Initiated Against Canada

9.2.1 Stainless Steel Products

On July 20, 1983, President Reagan announced the imposition of supplementary tariffs on imports of flat-rolled stainless steel products (sheet, strip and plate) and quantitative restrictions on stainless steel bar, wire rod and alloy tool steel for a four year period under Article XIX of the GATT. The President's announcement was further to an ITC report under Section 201 of the Trade Act, in which it recommended that additional tariffs be established for a three year period on sheet, strip and plate and quotas on bar, wire rod and alloy tool steel. In 1985, total value of exports from Canada amounted to about $10 million.

Reports regarding the U.S. domestic industry's dissatisfaction with the supplementary tariffs began to circulate the previous year. In this regard, the industry claimed that the tariffs were ineffective means of providing relief from imports and should be replaced by a quantitative restriction. After declining by 12 per cent in 1983, imports of stainless flat-rolled products grew by 57 per cent in 1984 with particularly healthy increases being recorded by the EEC countries, Japan, and relatively new suppliers like Brazil. This trend abated somewhat in 1985 although imports in the year remained, however, well above the levels in the years prior to the U.S. action in 1983. Imports from Canada declined in these years. In 1985, they were down 65 per cent from 1980.

As a result of the imposition of quotas on the bar products, Canada concluded an orderly marketing agreement with the United States to maintain its share of total imports. Canada retaliated against the U.S. on the additional tariff. Canada later terminated its retaliation when it received compensation in the form of liberalization of the Surface Transportation Assistance Act (Buy America) regarding cement.

On March 1, 1986, the U.S. exempted from the supplementary tariff those 18 suppliers which agreed to restrain their exports of flat-rolled stainless products as part of the coverage of their voluntary restraint arrangements on carbon steel. The U.S. action on specialty steel exports expired in 1987 but was extended in July 1987 for another two years.

9.2.2 Carbon Steel

In July 1984 the ITC presented its report to the President on investigation No.TA-201-51 under Section 201 of the Trade Act of 1974 and found that imports of five out of the nine major categories of steel products were injurious to U.S. producers and recommended that protection be provided via quotas and/or tariffs on the products in question.

President Reagan rejected this recommendation, stating that protectionism was not in the national interest, and, instead, announced on September 18, 1984, that the Administration would negotiate voluntary restraint agreements (VRA's), covering all steel products, with countries considered to be unfairly exporting carbon steel (through dumping and subsidization). Further to the announcement, agreements setting market penetration ceiling were negotiated with 20 steel suppliers. There would, however, continue to be open access to the U.S. market for those countries considered to be trading fairly in steel (i.e. Canada). The goal was to limit total steel imports to 20.5% of the American market with finished steel imports to take no more than 18.5 %. By 1989, total imports had declined to 17.9 % of the U.S. market as compared to the 25.5 % share held in 1984.

9.2.2.1 Canada's Undertakings in Steel

9.2.2.1.1 1984-1989

- Canadian authorities never undertook nor were they ever asked to maintain Canada's share of the U.S. steel market at a specific level.

- We appreciated, however, that the U.S. would want some assurance that Canadian steel producers would not exploit a situation in which U.S. imports from other suppliers were restrained. We therefore indicated our willingness to cooperate and consult when Canada's share of the U.S. market for specified steel products increased significantly.

- We envisaged that such consultations would provide an opportunity to examine the underlying market forces leading to an increased market share and to agree on appropriate remedial action if required. At the request of the U.S. Government, we consulted quarterly on developments in Canada/U.S. steel trade on ten occasions between December 1984 - October 6, 1988.

- This undertaking was developed and put into play with the concurrence of the primary steel producers, representatives of the steel service centres, steel fabricators and labour (United Steelworkers).

- Canadian primary producers did, however, indicate to U.S. authorities their willingness to exercise prudence in their shipments to the U.S. This was an important element in efforts to defuse pressures in the U.S. for a VRA with Canada.

- In June 1987, an export monitoring system was established for steel. This enabled the Government to ensure that Canada was not being used as a "backdoor" for foreign steel to be shipped through Canada to the U.S. In addition, more accurate statistics on exports to the U.S. could be collected.

- In this period, U.S. officials signalled that a Canadian market share of around three per cent is what the traffic would bear. This of course fluctuated depending on the circumstances in the U.S. market and the market share held by all imports.

9.2.2.1.2 1989-1992

- The nature of the extended U.S. programme doubtlessly strengthened the Administration's hand in resisting possible industry and Congressional pressures for a VRA with Canada. While it was recognized that such pressures would not disappear completely, such elements of the extended U.S. programme as its lack of a global target for imports, its progressive growth rates and its firm termination date have made it easier for the Administration to resist industry proposals for further restrictions.

- Accordingly, the Administration did not seek a commitment from Canada, as it did in 1984, not to exploit a situation in which other suppliers were restrained. While the option was always open to the U.S. to requests consultations on steel trade, as they had on ten occasions between 1984-1988, no such consultations were held.

9.2.3 Copper

The ITC in 1984 found unanimously that imports of copper was injuring the United States industry.[69] But, like President Carter in 1978, President Reagan rejected the ITC recommendations and provided no import relief.[70] Relief was denied because the President feared that import restrictions would seriously disadvantage the downstream industries. The Administration was also concerned that relief would adversely affect foreign copper-producing countries, many of which were heavily in debt and highly dependent on export revenues. In making this decision, the President rejected any effort to secure international production cutbacks as ineffective cartelization.

9.2.4 Shakes and Shingles

In September 1985, following receipt of a petition on behalf of domestic wood shingle and shake producers, the Commission instituted investigation No. TA-201-56, under section 201 of the Trade Act of 1974, to determine whether wood shingles and shakes were being imported into the United States in such increased quantities as to be substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article. In March 1986, the Commission made an affirmative injury determination. Three Commissioners recommended that a 35 per cent ad valorem tariff be placed on imports of western red cedar shingles and shakes for a period of five years.

The President in June 1986 imposed a 35 per cent ad valorem duty on these products. The rate was later staged downward: to 20 per cent in December 1988; 10 per cent in December 1989; and five per cent in December 1990.

The five per cent duty on Canadian shingles and shakes ended on June 7, 1991.

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[69] Unwrought Copper, ITC Inv. TA-201-52, USITC Pub. No. 1549 (1984).

[70] 49 Fed. Reg. 35,609 (1984).

TABLE 8. Section 201 CASES AGAINST CANADA

(Safeguard Investigations)

Year Initiated	Product	Outcome
September 1980	Mushrooms	Additional duties imposed. Annual Canadian exports of $1.0 million.
N/A	Motor Vehicles	Negative injury determination.
July 1983	Stainless Steel	Additional duties and quotas imposed. Annual Canadian exports of $15.0 million. Extended in July 1987 for two years.
July 1984	Footwear	Negative injury determination.
September 1984	Carbon Steel	Establishment of restraint agreements with over 20 steel suppliers. Canada not included but has been under U.S. pressure since then to maintain traditional levels.
September 1984	Copper	Despite injury finding, no relief provided.
August 1985	Footwear	Despite injury finding, no relief provided.
August 1985	Shakes and Shingles	Additional duties imposed. Annual Canadian exports of $200.0 million.
May 1986	Metal Casings	Negative injury determination.
May 1986	Apple Juice	Negative injury determination.
June 1986	Steel Fork Lift Arms	Negative injury determination.
September 1990	Cameras	Negative injury determination.

10.0 CANADA-UNITED STATES FREE TRADE AGREEMENT

The FTA is one of the most comprehensive bilateral trade agreements ever negotiated and creates one of the world's largest internal markets for goods and services. Canada and the United States agreed to ensure that state, provincial and local governments take necessary actions in areas under their jurisdiction to implement the agreement. Each party agreed to accord national treatment to the goods, services, and investments of the other party to the extent provided in the Agreement.

The central provision of the Agreement is the phased out elimination of tariffs on all goods traded between the two countries within ten years, by January 1, 1998, in three staging categories. Tariff elimination on particular products can be implemented faster than scheduled by mutual agreement. The Agreement contains rules of origin based primarily on changes in tariff classifications to determine that only products with sufficient content originating in either or both countries receive the benefits of preferential tariff treatment. Customs user fees and duty drawback programmes must be phased out by 1994 for bilateral trade; duty waivers linked to performance requirements, except certain waivers affecting automotive trade, and duty remission programmes for autos must be terminated by 1998.

The Agreement eliminates and prohibits import and export quotas or other restrictions, unless specifically permitted by the GATT, and liberalizes or harmonizes laws and regulations relating to technical standards. Other Agreement provisions liberalize barriers affecting agriculture, automotive products, wine and distilled spirits, energy, government procurement, services, investment, temporary entry for business persons, and financial services. Certain "cultural industries" are exempt from the Agreement. Temporary import relief actions may be taken on a bilateral or global basis under certain circumstances to safeguard domestic industries from import-related injury.

"Institutional Provisions" are included for the avoidance or settlement of disputes between the two parties concerning the interpretation or application of the Agreement (Chapter 18). A key element of the Agreement is the establishment of a mechanism for binding binational panel review of final antidumping, countervailing duty, and injury determinations (Chapter 19). The remainder of this section will focus on the Chapter 19 provisions of the Agreement.

10.1 Overview of Chapter Nineteen Dispute Mechanism[71]

Chapter 19 reserves the right of each Party to apply its antidumping and countervailing duty law to goods imported from the territory of the other Party. If, however, a Party amends its antidumping or countervailing duty law, such amendments shall apply to goods from the other Party only if such application is specified in the amending statute. Further, the "amending Party" must notify the other Party, in writing, of the amending statute.

There are two Articles in Chapter 19 relating to the establishment of panels for the resolution of disputes. The first, Article 1903, provides that a party may request that an amendment to the other Party's AD or CVD statute be referred to a panel for a declaratory opinion

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[71] This information was acquired from the Binational Secretariat (Canada); Canada-United States Free Trade Agreement Handbook.

on whether the amendment is consistent with the GATT and the FTA. As of October, 1992, the provisions of Article 1903 have not been utilized by either Party.

The second Chapter 19 provision on the establishment of panels to resolve disputes is Article 1904 relating to the review of AD and CVD final determinations.

Prior to the entry into force of the FTA, AD/CVD and final injury determinations of either Government could be appealed, in the case of a U.S. final determination, to the Court of International Trade, or, in the case of a Canadian final determination, to the Federal Court of Appeal or, for certain Revenue Canada decisions, to the Canadian International Trade Tribunal (CITT). Under the FTA, however, Article 1904 offers binational panel review as an alternative to judicial review or appeal to these bodies.

Article 1904 binational panel reviews are to determine whether the relevant investigating authority's final determination was in accordance with its national AD/CVD law. If a panel finds that the final determination was in accordance with the domestic law of the importing Party then it affirms the determination. Otherwise, the panel remands the case with instructions to the investigating authority for its further action.

To implement the provisions of this Article, the Parties have adopted common Rules of Procedures which came into force on January 1, 1989. These Article 1904 Panel Rules were amended December 23, 1989, and June 13, 1992.

The Chapter 19 Rules are designed to result in final panel decisions within 315 days of the date on which a request for a panel is made. Within the 315 day period very tight deadlines have been established relating to the selection of panel members, the filing of briefs and reply briefs and the setting of the date for Oral Argument.

As a safeguard against impropriety or gross panel error that materially affects the panel's decision and threatens the integrity of the process, Article 1904 also provides for an "extraordinary challenge procedure". In carefully defined circumstances, either government can appeal a panel's decision to a three-member committee of Canadian and U.S. judges or former judges. The committee will make a prompt decision to affirm, vacate, or remand the panel's decision. To date, only two panel reviews, Pork (Injury) and Live Swine (Fourth Administrative Review), have been appealed to an Extraordinary Challenge Committee.

10.2 The Binational Panel

For Chapter 19 panels, pursuant to Annex 1901.2, the Parties have developed a roster of individuals to serve as panellists all of whom must be citizens of Canada or the United States. A panel consists of five people of which, at least two of the panellists must be Canadian and two American. A fifth panellist may be either American or Canadian. The candidates are selected solely on the basis of objectivity, reliability, judgement, and general familiarity with international trade law. Moreover, a majority of the panellists on the dispute panels are required to be lawyers. However, a panel can have up to two experts in international business and economics also on the dispute panels. The chairperson is selected among the five panellists, however, the chairperson has to be drawn from one of the lawyers on the dispute panel.

Canada's two panel members are selected by the Minister for International Trade and the Minister of Finance. In the United States the two panel members are selected by USTR. In order to minimize the potential for bias in the selection of panellists under Chapter 19, either Party

shall have the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other Party.

10.3 Procedures Under Chapter Nineteen

Under the FTA's panel procedures, independent binational panels review final antidumping, countervailing duty determinations, and administrative reviews made by the relevant administrative agencies of Canada and the Unites States. This system of review applies to final determinations made after January 1, 1989.[72] As stated in Article 1904 paragraph 4 of the FTA

> "A request for panel review shall be made in writing to the other Party within 30 days following the date of publication of the final determination in question in the Federal Register or the Canada Gazette. In the case of final determinations that are not published in the Federal Register or the Canada Gazette, the importing Party shall immediately notify the other Party of such final determination where it involves a good from the other Party, and the other Party may request a panel within 30 days of receipt of such notice. Where the competent investigating authority of the importing Party has imposed provisional measures in an investigation, the other Party may provide notice of its intention to request a panel under this Article, and the Parties shall begin to establish a panel at that time. Failure to request a panel within the time specified in this paragraph shall preclude review by a panel".

10.4 Time Limits for Review of AD and CVD Actions

Under Chapter Nineteen, a dispute panel must operate under strict time limits. It has a maximum of 315 days to bring down an initial written declaratory opinion[73]. These consist of the time-frames specified in Article 1904.14. These are:

- thirty days to file the complaint;
- thirty days to designate or certify the administrative record and filing with panel;
- sixty days for the complainant to file its brief;
- sixty days for respondent to file brief;

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[72] See Article 1904, paragraph 4, FTA.

[73] See Article 1904, paragraph 14, FTA.

- fifteen days for the filing of reply briefs;
- fifteen to thirty days over which time the dispute panel convenes and hears arguments; and
- ninety days during which time the dispute panel will write up its decision.

This is much shorter than the two to four years that have been spent on cases when they have been appealed to the United States' Federal Courts.

10.5 Extraordinary Challenge Committees[74]

Under Chapter 1904 of the FTA, either country can request an Extraordinary Challenge Committee to review a binational panel ruling on any of the following grounds:

- a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct;
- the panel seriously departed from a fundamental rule of procedure; or
- the panel manifestly exceeded its powers, authority or jurisdiction.

It also must be determined that any one of those grounds has materially affected the panel's decision and threatens the integrity of the binational panel review process.

An Extraordinary Challenge Committee must be established within 15 days of a request for such a committee. The Committee comprises three members, who are selected from a ten person roster of judges or former judges of a federal court of the United States or a court of the superior jurisdiction in Canada. Each country selects one panel member, and the third is chosen by both or by lot from the roster.

All written arguments must be filed with the Committee within 21 days after the request for a Committee has been filed.

Annex 1904.13 of the FTA provides that the Committee must render its decision typically within 30 days of its establishment. The decision of the Committee is binding on both governments. The Committee can extend the time limits in the interests of fairness and justice, as was the case in the Pork Extraordinary Challenge that was launched in 1991 and the recent live swine challenge.

In rendering its decision, the Committee can affirm the decision of the binational panel, vacate the decision, or remand the decision back to the panel for further consideration, accompanied by instructions from the Committee.

When the Office of USTR notifies Canada of its intention to launch the challenge, USTR must include a statement as to why the challenge is being launched.

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[74] This information was acquired from the Government of Canada news release #13: Ministers Disappointed by U.S. Decision to Request Extraordinary Challenge On Live Swine, January 22, 1993.

10.6 Canada-U.S. Chapter Nineteen Disputes

There have been thirty-two (Table 9) Chapter 19 dispute panels formed since the implementation of the FTA on January 1, 1989 to review antidumping and countervailing duty cases. Twenty-four of these cases were initiated by Canada while only eight were initiated by the United States. Nineteen of the Canadian cases contested the ITA's decision on their role in assessing the dumping or subsidy margins. Only five cases were concerned with the ITC's material injury determinations. Nine of the dispute panels have examined cases undertaken against dumped imports, while seventeen of the reviews examined issues involved in CVD cases. Some of the high profile cases in recent years are summarized below.

10.7 Principal Chapter Nineteen Cases:

10.7.1 Live Swine

In 1984, the DOC investigated the following Canadian imports in response to a petition from the National Pork Producers Council (NPPC): (a) live swine, and (b) fresh, chilled and frozen pork. The ITC found injury only against U.S. swine industry. A countervailing duty was imposed in 1985 on live swine but not on fresh, chilled and frozen pork[75].

The administrative reviews carried out annually since 1985 have examined the changes in the level of support to Canadian swine producers. These levels vary annually in direct correlation to payments made under the National Tripartite Stabilization Programme (NTSP).

As the countervailing duty order on live swine predates the FTA, Canada can take only the findings from administrative reviews issued after January 1, 1989 to a Chapter 19 panel, and not the initial decision. The Canadian objective throughout all proceedings has been to reverse the DOC determination that the NTSP is countervailable.

10.7.1.1 Fourth Administrative Review

On June 21, 1991, the DOC issued its final determination in the fourth administrative review for the period April 1, 1988 - March 31, 1989. The countervailing duty rate was set at 4.49 cents per pound. On July 8, 1991, the Canadian Pork Council requested that an FTA Chapter 19 panel review this determination. The Government of Canada's participation in this process arose from the filing of a complaint as an interested party.

On May 19, 1992, the Panel instructed the DOC to review its ruling of countervailability of the NTSP, the Québec Farm Income Stabilization Insurance Programme (FISI), and the calculation of benefits provided under certain other provincial programmes. On July 20, 1992, Commerce issued its redetermination on remand and again ruled that the NTSP which represents 87.8% of the national rate, and FISI, which represents 9.0% of the national rate, are countervailable. Commerce also recalculated the benefits received by Canadian producers of live swine from the Saskatchewan Hog Assured Returned Programme (SHARP), the Alberta Crow Benefit Offset Programme (ACBOP), and the Feed Freight Assistance Programme (FFA). Commerce's recalculation of the countervailing duty rate was reduced marginally to 4.41 cents per pound from 4.49 cents per pound.

On October 30, 1992, the Panel found in the majority by a vote of 4-1 that NTSP and FISI during period of review did not confer countervailable benefits to Canadian producers of live swine. In addition, the Panel ruled that weanlings are a distinct class of live swine and thus, require a separate countervailing duty rate. The Panel upheld DOC's ruling for other programmes. The Panel ordered the DOC to recalculate its countervailing duty rate in accordance with its decision. In a dissenting opinion, however, the panel chairman argued that the majority decision distorted and misapplied U.S. law.

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[75] Pork exports, from Canada, to the United States average $400 million annually while live swine exports average over $100 million annually.

As a result of the ruling, the DOC was ordered to recalculate its countervailing duty on imports of live swine from Canada. Canadian producers were entitled to receive refunds of duties already paid. The total financial benefit to the Canadian industry is expected to amount to close to $8 million.

On November 19, 1992, DOC issued its response to the panel ruling - NTSP and FISI were removed from the calculations and a new subsidy rate was established: live swine - $0.0051¢, sows/boars - $0.004¢,and a new rate for weanlings of $0.0005¢. The DOC noted their agreement with the Chairman of the Panel's conclusion that the panel decision is wrong and insensitive to United States law. Commerce choose to conform with the panel's instructions by removing the Tripartite and FISI benefits from the calculation of the subsidy rate. Commerce did not specifically state that Tripartite and FISI were noncountervailable.

On January 21, 1993, the USTR filed a request for the formation of an Extraordinary Challenge Committee to review the October 30, 1992. The ECC is to review issues raised by the Binational Panel. The USTR contends that the Panel manifestly exceeded its powers and that this threatened the integrity of the panel review process.

10.7.1.2 Fifth Administrative Review

On October 7, 1991, the DOC issued its final determination in the fifth administrative review for the period April 1, 1989 to March 31, 1990. The CVD rate was set at a rate of 9.32 cents/pound. This is the current rate of deposit paid by Canadian exporters of live swine to the United States. On October 11, 1991, the Canadian Pork Council and the Government of Québec requested that an FTA Chapter 19 panel review this determination. Again, the Government of Canada's participation arose from the filing of a complaint as an interested party.

On August 26, 1992, the Panel ruled that parts of DOC's determinations on the countervailability of the NTSP and other programmes was not fully supported by evidence in the record and did not offer reasoned explanations. On December 24, 1992, the Panel was suspended. A U.S. nominated member was excused due to a potential conflict of interest. The Panel was to have rendered a final decision on January 28, 1993. Proceedings are underway to appoint a new panellist.

10.7.2 Pork[76]

In 1989, DOC reinvestigated Fresh, Chilled and Frozen Pork in response to a new petition from the NPP. As a result of this reinvestigation the DOC in 1989 imposed countervailing duties on Canadian exports of fresh, chilled and frozen pork to the United States. There were three panel proceedings stemming from this action. One was a GATT panel while two were binational panels under the FTA. One FTA panel concerned itself with the subsidy findings by the DOC. The other FTA panel addressed the finding of a threat of injury by the ITC.

To establish and maintain a countervailing duty order, GATT rules require a country to show not only that an imported product has been subsidized, but also that its industry has been injured or threatened with injury by reason of the subsidized imports.

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[76] This information was acquired from a memorandum that was prepared by the Agricultural and Fisheries Trade Division, External Affairs and International Trade Canada.

10.7.2.1 GATT Panel

On August 3, 1990, the GATT panel on Pork from Canada released its report. The panel supported Canada's position and held that the U.S. acted in a manner inconsistent with its GATT obligations by applying the "automatic passthrough" provisions in U.S. countervailing law to imports of pork from Canada. The U.S. law (section 771B of the Tariff Act of 1930) provides that under certain circumstances subsidies given to either the producer or the processor of raw agricultural products shall be deemed to be provided to the manufacture, production or exportation of the processed product. The panel concluded that the U.S. did not meet the requirements of GATT Article VI:3 (determination of subsidies and off-setting countervailing duties) when it deemed that all subsidies granted to swine producers were fully passed through to pork producers based solely on the application of section 771B. In the opinion of the panel, the U.S. failed to examine all the relevant facts. The panel found that, given the existence of separate industries for swine and pork production in Canada operating at arm's length, the subsides granted to swine producers could only be considered to be bestowed on the production of pork if they had led to a decrease in the price of swine paid by Canadian pork producers. It requested that the United States either reimburse the countervailing duties corresponding to the amount of the subsidies granted to producers of swine or to make a subsidy determination which meets the requirements of Article VI:3 and reimburse the duties to the extent that they exceed an amount equal to the subsidy so determined to have been granted to the production of pork[77]. The U.S. blocked adoption of the panel report for several months, but finally agreed to its adoption on July 11, 1991, once the FTA Extraordinary Challenge Committee had ruled (see below).

10.7.2.2 FTA Subsidy Panel

The FTA subsidy panel issued its report on September 28, 1990. The panel remanded the matter back to the DOC for reconsideration of certain issues.

On December 7, 1990, the U.S. DOC issued its remand decision pursuant to the instructions from the subsidy panel. In the decision, the DOC again found that two Canadian programmes (the NTSP, and Québec's FISI Programme) were countervailable, and also confirmed the arbitrary rate it had established for benefits under Alberta's Crow Benefit Offset Programme.

The Canadian parties objected to the results of this remand determination and requested that it be reviewed by the FTA subsidy panel to ensure that it conformed with that panel's original instructions. The panel then conducted this review and issued its report on March 8, 1991.

In its report of March 8, 1991, the subsidy panel accepted DOC's ruling with respect to the Tripartite Programme being countervailable because it provided benefits to a specific group of industries. However, the panel remanded the Québec and Alberta programmes back to the Department for re-examination.

On April 11, 1991, DOC reported to the subsidy panel that it would comply with the panel's findings. Thus, it concluded that there was insufficient evidence on the record to find that the Québec programme was countervailable, and also modified its original subsidy calculation for the Alberta programme. As a result of this DOC decision the countervailing duty rate on imports of pork from Canada was reduced from 8 cents per kilogram to 3 cents.

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[77] General Agreement on Tariffs and Trade. Basic Instruments and Selected Documents. No.38, July, 1992. p.47.

10.7.2.3 FTA Injury Panel

On August 24, 1990, the FTA injury panel issued its report. The Canadian pork industry had challenged the ITC "threat of injury" determination principally on the grounds that the finding was largely based on faulty statistical information regarding Canadian pork production.

The injury panel, in a unanimous decision, confirmed the Canadian argument that the threat of injury finding was not supported by the evidence on the record. The panel remanded the matter back to the ITC for reconsideration of a number of its original findings. The ITC issued its remand determination on October 23, 1990. That decision was reviewed by the FTA panel, which issued its report on January 22, 1991. The panel again held that there was not sufficient evidence to support the ITC's findings of threat of injury and instructed the ITC to review its findings accordingly.

On February 12, 1991, the ITC issued a second, revised injury finding pursuant to the instructions of the FTA panel. In this finding, the ITC complied with the panel's instructions and held that there was no threat of injury, while making clear its disagreement with the panel.

On March 29, 1991, USTR requested the establishment of an Extraordinary Challenge Committee to review the January 22 decision of the FTA injury panel. This request was based on the allegation that the panel had seriously departed from a fundamental rule of procedure or manifestly exceeded its jurisdiction, and that these actions threatened the integrity of the FTA panel review process.

10.7.2.4 Extraordinary Challenge Committee

As noted earlier, the Extraordinary Challenge Committee requested by the United States reviewed only the findings of the FTA injury panel. On June 14, 1991, the Committee dismissed the request for an extraordinary challenge for failure to meet the standards of an extraordinary challenge set forth in FTA Article 1904.13.

10.7.3 Raspberries

British Columbia red raspberry growers filed a request with the FTA's binational dispute settlement panel in response to a U.S. Department of Commerce ruling revising punitive antidumping duties against Canadian exporters of red raspberries.

In December 1989, the binational panel reached a decision on the imposition of antidumping duties on Canadian raspberries. The panel upheld the DOC ruling affecting one Canadian exporter but stated that the department's findings were "defective" in regard to imports by two other Canadian raspberry exporters.

After recalculating, the DOC found that the two B.C. raspberry growers were not dumping their product at below fair market price. More than $70,000 (U.S.) in antidumping duties collected since 1986 were returned to the raspberry growers.

10.7.4 New Steel Rails

On September 1, 1989, the Algoma Steel Corporation Limited "Algoma" filed a request for panel review to contest the final determination of sales less than fair value made by the DOC, in the investigation of New Steel Rails, Except Light Rails, from Canada[78]. In its complaint, Algoma contended that Commerce's rejection of Algoma's cost data and its use of best information available was unsupported by substantial evidence on the record and otherwise not in accordance with law. Algoma later amended its complaint to also contest Commerce's choice of cost data supplied by the U.S. petitioner, Bethlehem Steel Corp., as the best information available. On the basis of an examination of the administrative record, review of the applicable United States law, and consideration of the arguments of the parties, the Panel, in a 4-1 majority decision, affirmed Commerce's determination as supported by substantial evidence on the record and otherwise in accordance with law.

10.7.5 Horsepower Induction Motors

The U.S. filed requests for a binational panel review of a finding by the CITT that antidumping and countervailing duties should continue on imports into Canada of certain induction motors commonly used in fans, blowers, pumps, compressors, conveyors and machine tools. The domestic market for these motors is estimated at $95 million with three major Canadian producers accounting for about 40% of domestic sales.

With one panellist dissenting, the binational panel decision on September 11, 1991, affirmed the CITT determination of injury to Canadian producers.

10.7.6 Sheet Piling

A binational panel was to hear a Canadian appeal of an affirmative finding in a Department of Commerce antidumping duty administrative review affecting imports of sheet piling from the Canadian company, Casteel Inc. The DOC administrative review had determined that Casteel Inc. had violated the terms of an earlier antidumping suspension agreement covering an import period from September 1, 1985 through August 31, 1986.

The binational panel review was terminated on April 22, 1991 upon the motion of Casteel Inc. and with the consent of the other parties. The reason for the termination request was the decision by Casteel Inc. to discontinue production of sheet piling in Canada and to relocate in the U.S.

10.7.7 Oil Country Tubular Goods

A Canadian request for a binational panel review of a DOC finding that included within the scope of an antidumping order certain overlap coupling stock used in oil drilling, was terminated on August 9, 1991. Algoma Steel requested the termination after the DOC had excluded the coupling stock from the antidumping order.

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[78] 55 Fed. Reg. 31,984 on August 3, 1989.

10.7.8 Beer

On June 4, 1991, Revenue Canada made a preliminary ruling that three U.S. brewers were dumping beer in British Columbia at prices about 30% less than they charged U.S. wholesalers. This ruling was confirmed in the Department's final determination.

In October 1991, the CITT ruled that beer imports from the U.S. were injuring the B.C. beer industry. At a separate hearing in November, however, the CITT reported that, in its opinion, the scale of duties recommended by Revenue Canada would not be in the public interest.

With respect to Revenue Canada's final determination of dumping, U.S. beer producers filed a request for a panel review of the final determination of dumping. On August 6, 1992, the FTA panel unanimously affirmed the agency in part and remanded in part, with partial concurring opinion. Revenue Canada filed its remand determination on September 18, 1992, and on November 3, 1992, the panel review of the determination of dumping was terminated.

On October 16, 1991, U.S. beer producers requested a panel review of the October 12, 1991, determination of injury by the CITT against imports from the United States. The panel decision was handed down August 26, 1992, in the review of the determination of injury by the CITT against beer imports from the United States. The panel remanded the decision to the CITT. On November 9, 1992, the CITT filed its remand redetermination and on November 24, 1992, a motion to request panel review of the CITT remand redetermination was filed. Subsequently, the panel hearing for review of the redetermination by the CITT was held January 7, 1993. On February 8, 1993, the panel affirmed the determination by the CITT.

10.7.9 Softwood Lumber III

As a result of the affirmative final countervailing duty determination by the DOC, the Government of Canada, the Provinces, and industry filed a request for panel reviews of the final determinations of subsidy and injury on Certain Softwood Lumber Product from Canada. The two panel decisions (subsidy and injury) are expected in May and June 1993, respectively.

10.7.10 Magnesium

As a result of the affirmative final countervailing and antidumping and injury determinations issued by DOC and the ITC, the Government of Québec and Norsk Hydro filed requests for panel reviews of the final determinations of subsidy, dumping, and injury on Pure Magnesium and Alloy Magnesium from Canada. The four panel decisions (injury-subsidy; injury-dumping; subsidy; and dumping) are expected towards the latter part of 1993. The case involving dumping and subsidization of magnesium focused on the Norsk Hydro plant, which it was alleged received low-priced power from Hydro-Québec; however, the panel's determination will be particularly important since it could affect a number of other industrial users of cheap power from Hydro-Québec, including aluminium producers such as Alcan Aluminium.

10.7.11 Carpets from the United States

On April 21, 1992, the CITT made an affirmative injury determination further to the final antidumping determination made by Revenue Canada on March 18, 1992, against imports of carpets from the United States. The CITT determination confirmed the application of duties

determined by Revenue Canada at that time. Imports of carpets from the United States are valued at about $150 million annually.

The investigation was initiated by Revenue Canada on August 6, 1991, further to a petition filed by the Canadian Carpet Institute on behalf of the Canadian industry, which is comprised of ten producers, of which all but two are located in either Québec or Ontario. In 1990, the Canadian market for the carpeting covered by the investigation was about $60 million square meters valued at about $660 million. This compared with a market of 68 million square metres with a value of $767 million in 1988. In its final dumping determination, Revenue Canada found dumping margins which ranged from 1.9 to 51.3 per cent with an average margin of 12.02 per cent, the latter applying to 61 per cent of the imports covered by the investigation.

On May 22, 1992, General Felt Industries, a U.S. exporter. Requested panel review of the injury determination by the CITT with respect to dumping of carpets from the United States. A final determination by the panel is expected by April 7, 1993.

With respect to Revenue Canada's March 18, 1992, final determination of dumping against imports of carpets from the United States, complaints were filed to the panel review on May 29, 1992. A final determination by the panel is expected by May 19, 1993.

10.7.12 Gypsum Wallboard from the United States

On June 24, 1992, Revenue Canada initiated an antidumping investigation against imports of gypsum wallboard from the United States.

On September 22, 1992, Revenue Canada made a preliminary determination of dumping against imports of gypsum wallboard from the United States into British Columbia. Revenue Canada found dumping margins which ranged from 19 to 45 per cent with an average margin of 28 per cent.

On December 14, 1992, Revenue Canada made a final determination of dumping against imports of gypsum wallboard from the United States. Revenue Canada found dumping margins which ranged from 0.70 to 69.68 per cent with an average margin of 27.28 per cent.

On January 20, 1992 the CITT's determined that imports of gypsum from the United States into Canada was materially injuring the domestic production of like goods in Canada.

On January 7, 1993 the United States requested panel review of Revenue Canada's final determination of dumping. A final determination by the panel is expected by November, 18, 1993.

TABLE 9

CANADA-U.S. FTA CHAPTER NINETEEN DISPUTES; JANUARY 1989 TO DECEMBER 1993

Panels Formed	Ruling Challenged	Results	Outcome	Reporting Date
Cases Initiated by the U.S.**				
(1) Pol. Induction Motors (CDA-89-01)	Revenue Canada Dumping Finding	CITT found negative injury - Panel terminated	Terminated	January-90
(2) Int. Horse. Induction Motors (CDA-90-01)	CITT Injury	Panel affirmed decision of the CITT	Negative	October-91
(3) Beer 1 (CDA-91-01)	Revenue Canada Dumping Finding	Panel affirmed agency in part and remanded in part	Terminated	November-92
(4) Beer 2 (CDA-91-02)	CITT Injury	CITT found negative injury	Negative	November-92
(5) Machine Tufted Carpeting (CDA-92-01)	Revenue Canada Dumping Finding	- - -	Not Completed	May-93
(6) Machine Tufted Carpeting (CDA-92-02)	CITT Injury	- - -	Not Completed	April-93
(7) Gypsum Wallboard (CDA-93-01)	Revenue Canada Dumping Finding	- - -	Not Completed	November-93
(8) Gypsum Wallboard (CDA-93-02)	CITT Injury	- - -	Not Completed	

Panel Formed	Ruling Challenged	Results	Outcome	Reporting Date
Cases Initiated by Canada* **				
(1) Red Raspberries (USA-89-01)	ITA Dumping	Zero and de minimus margins found	Positive	June-90
(2) Paving Equipment 1 (USA-89-02)	ITA Scope†	Panel affirmed part of DOC's determination	Negative	February-90
(3) Paving Equipment 2 (USA-89-03)	ITA Dumping Review	Panel affirmed DOC's determination	Negative	April-90
(4) Paving Equipment 3 (USA-89-05)	ITA Admin. Amendment	Panel review terminated	Terminated	November-89
(5) Salted Codfish (USA-89-04)	ITA Dumping Review††	AD order revoked - Panel review terminated	Terminated	December-89
(6) Fresh, Chilled & Frozen Pork (USA-89-06)	ITA Subsidy†††	CVD rate reduced from 8.0 to 3.0 c/kg	Positive	July-91
(7) New Steel Rails (Sydney Steel) (USA-89-07)	ITA Subsidy	CVD rate reduced from 112.34% to 94.57% ad valorem	Positive	August-90
(8) New Steel Rails (Algoma Steel) (USA-89-08)	ITA Dumping	Panel affirmed DOC's determination	Negative	October-90
(9) New Steel Rails (USA-89-09/10)	ITC Injury	Panel affirmed ITC's determination	Negative	September-90
(10) Fresh, Chilled & Frozen Pork (USA-89-11)	ITC Injury	No injury present/Extraordinary Challenge Overturned	Positive†††††	February-91
(11) Paving Equipment 4 (USA-90-01)	ITA Admin. Review	DOC determination on remand	Not Completed	October-92
(12) Oil Country Tubular Goods (USA-90-02)	ITA Scope	Case filed late - terminated	Terminated	January-91
(13) Sheet Piling (USA-90-03)	ITA Admin. Review	Joint motion to terminate by participants	Terminated	April-91
(14) Oil Country Tubular Goods (USA-91-01)	ITA Scope Excl. Determination	Joint motion to terminate by participants	Terminated	August-91
(15) Iron Construction Castings (USA-91-02)	ITA Dumping Review	Joint motion to terminate by participants	Terminated	July-91
(16) Paving Equipment 5 (USA-91-05)	ITA Dumping Review	Joint motion to terminate by participants	Terminated	October-91
(17) Live Swine From Canada (USA-91-03)	ITA CVD Admin. Review††††††	DOC redetermination on remand	Not Completed	October-92
(18) Live Swine From Canada (USA-91-04)	ITA CVD Admin. Review	DOC determination on tripartite	Not Completed	October-92

Panel Formed	Ruling Challenged	Results	Outcome	Reporting Date
(19) Softwood Lumber Products (USA-92-01)	ITA Final CVD Determination	- - -	Not Completed	May-93
(20) Softwood Lumber Products (USA-92-02)	ITC Final Injury Determination	- - -	Not Completed	June-93
(21) Magnesium From Canada (USA-92-03)	ITA Final CVD Determination		Not Completed	June-93
(22) Magnesium From Canada (USA-92-04)	ITA Final AD Determination		Not Completed	June-93
(23) Magnesium From Canada (USA-92-05)	ITC Final Injury Determination		Not Completed	August-93
(24) Magnesium From Canada (USA-92-06)	ITC Final Injury Determination		Not Completed	August-93

Notes to Table 9:

*Positive if it favours the initiator(s), and Negative if it does not.
**This includes Canadian plaintiffs.
***This includes U.S. plaintiffs.
†The U.S. firm also disputed the admin. review on dumping.
††The U.S. Co. went bankrupt, panel was terminated.
†††GATT panel was also requested.
††††The ITC overturned its earlier decision and accepted the Panel's decision. An Extraordinary Challenge was launched by USTR after political pressure was brought by the industry. It was thrown out by the three judges (ECC-91-1904-01-USA).
†††††October 30, 1992, the panel ruled in favour of Canada and on November 19, 1992, DOC issued its response to panel ruling. USTR requested ECC to review issues raised by the panel on January 22, 1993.

Source:

United-States Free Trade Agreement Binational Secretariat, Canadian Section, "Status of Cases Report (Various Months)", Ottawa.

A

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I. FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION: RAILCARS FROM CANADA

BACKGROUND:

- On July 14, 1982, the DOC accepted petitions from the Budd Company, and the AFL-CIO, the United Automobile and Aerospace Workers, and the United Steelworkers of America, and initiated a countervailing duty investigation into railcars from Canada.

- On August 8, 1982, the ITC found that there was a reasonable indication that railcars from Canada threatened the U.S. industry with injury.

- On September 17, 1982, DOC declared this investigation "extraordinarily complicated", thereby delaying the deadline for issuing a preliminary determination of subsidy.

- On November 22, 1982, DOC issued a preliminary affirmative determination of subsidy.

- On February 4, 1983, DOC made a final affirmative countervailing duty determination of $110,565 per railcar.

- On February 9, 1983, Budd withdrew its petition, stating that through DOC's final affirmative countervailing duty decision its goal of establishing a favourable legal precedent had been met. (There was also the possibility that the ITC would have made a negative injury determination.) The AFL-CIO unions associated with the Budd Company immediately filed a new petition, but an agreement was reached between the MTA and the unions whereby the MTA would, up to 1985, follow federal Buy-American guidelines and place advertisements in U.S. papers supporting the AFL-CIO's trade positions. Budd's withdrawal and the MTA-union agreement terminated the case.

KEY ISSUE:

- The key element in this countervail case was the financing offered to the MTA by the Canadian Export Development Corporation (EDC) (a crown corporation). The EDC financing package was the result of not only negotiations between MTA, Bombardier and the EDC but also was affected by competing public financing bids behind the Francorail tender. In fact, the EDC final irrevocable financing offer was conditioned upon "satisfactory" evidence that the French financing bid was at least of equal terms.

- Therefore under the derogation provisions of the OECD Arrangement whereby financing packages were allowed to match those of the competitors, the EDC got caught in a virtual bidding war with the French export financing authority. The final affirmative countervailing duty determination, reinforced Canada's long standing support for greater international discipline in public financing.

I. PROGRAMMES DETERMINED TO CONFER A SUBSIDY:

1. Export Credit Financing of the Export Development Corporation

- The MTA awarded Bombardier the contract on the expressly stated condition that the EDC would make financing available at 9.7% per annum. This rate of concessional financing was well below commercial rates at the time, and was part of an overall financial package offered by the EDC that included a guarantee to finance the entire contract price up to total credit of $750 million (U.S.).

- The MTA would pay the EDC a loan commitment fee, and in addition to other administrative costs, 0.5% per annum on the unused portion of the $750 million.

- The DOC found that this package offered by the EDC conferred a subsidy in five distinct ways:

  i) the 9.7% rate contained an "intrinsic value" in and of itself as it was below the market value of equivalent MTA financing (i.e., MTA tax exempt securities) on June 10, 1982. DOC calculated the benefit derived form this arrangement at $65.229 million;

  ii) EDC's package also included an "Option Value" which allowed MTA to use, or not use, the 9.7% financing rate dependant upon future market financing rates. Using the Black-Scholes model (widely used in financial markets), DOC calculated the countervailable benefit of this added flexibility at $16.237 million;

  iii) as the commitment fee in this financing was higher than a commercial arrangement (0.5% vs 0.25%) DOC made a deduction from the countervail on the option price;

  iv) DOC also noted the interest charges Bombardier would have had to incur to obtain comparable financing. By examining a contemporaneous loan to Bombardier, DOC calculated a net benefit of $12.219 million; and

  v) the EDC sponsored financing arrangement denominated in U.S. dollars had value in that it assumed the exchange rate risk. However, DOC did not enumerate the value of this risk exposure assumption.

- Commerce calculated the total net subsidy of the EDC financing package at $110,160 per railcar.

2. Department of Regional Economic Expansion (DREE) Grants

- Since DOC has traditionally held that regional development grants are countervailable, and as Bombardier indicated that it's Mass Transit Division had received a number of DREE grants and Regional Development Incentive Act grants, Commerce determined that these grants were subsidies within the meaning of U.S. countervailing duty law.

3. Québec Industrial Development Corporation (SDI)

- Bombardier had received financial assistance for the purchase of certain equipment used in the manufacture of railcars. DOC determined that this financial assistance was countervailable, due to its specificity. DOC calculated the estimated subsidies conferred by the Québec and DREE grants together and came up with a computed figure of $405 per railcar.

Note: In the first Softwood Lumber Case, Commerce admitted that its finding of the SDI programme as countervailable in this case was incorrect as within Québec SDI assistance is not limited to a specific enterprise or industry, or group thereof.

II. PROGRAMMES DETERMINED NOT TO CONFER A SUBSIDY:

1. Guarantee Agreement Between the MTA and Bombardier

- Bombardier sold to the MTA a performance guarantee vis-à-vis both the specifications of the railcars and the terms of the contract. As DOC determined that this performance guarantee was not sold at a preferential rate it was not found countervailable.

II. FINAL NEGATIVE COUNTERVAILING DUTY DETERMINATION
CERTAIN SOFTWOOD PRODUCTS FROM CANADA
"SOFTWOOD LUMBER I"

BACKGROUND:

- In October 7, 1982, DOC received a petition from the United States Coalition for Fair Canadian Lumber Imports, alleging that Canadian manufacturers, producers and exporters of certain softwood products were receiving benefits countervailable under U.S. law.

- On November 22, 1982, the ITC found reasonable indications of material injury to U.S. industry due to the imports under question.

- The ITA issued preliminary negative countervail determination on March 11, 1983.

- On May 19, 1983 the ITA issued a final negative net subsidy determination. DOC had concluded that the total estimated net subsidy for each product was de minimis.

SCOPE OF INVESTIGATION:

- softwood lumber
- softwood shakes and shingles
- softwood fence

KEY ISSUES:

- The very high value of Canadian softwood lumber exports to the U.S. (i.e., approx. $3 billion) gave this case a high political profile.

- A key element in this investigation was the decision to investigate a Canadian natural resource management programme (i.e., stumpage programmes) as potentially countervailable.

- Commerce, in this case, determined that the stumpage programmes "were not provided to a specific enterprise or industry", or group thereof, "and did not entail the provision of goods at preferential rates.

- Furthermore, Commerce determined that any limitations on the use of stumpage programmes was "not due to the actions of Canadian governments" and that "the actual users of stumpage spanned a wide range of industries". As a result stumpage programmes were not found countervailable.

I. PROGRAMMES DETERMINED TO CONFER SUBSIDIES:

While these programmes were determined to be subsidies and are therefore countervailable under U.S. trade law, they were found to provide only benefits of a de minimis value (i.e., less than 0.5% of the value of the production).

(A) FEDERAL PROGRAMMES:

1. Certain Aspects of Investment Tax Credit (ITC)

- Aspects of this programme have region specific eligibility criteria, and therefore were determined to confer a subsidy.
- For "qualified property" (i.e, new plant and equipment used in processing) the basic ITC is 7%, with an additional 3% or 13% for qualified property in certain regions.
- For "certified property" (i.e., qualified property in regions characterized with high unemployment and low per capita income), the ITC rate reaches 50%.
- There is also a "scientific research" ITC with a base rate of 20% (35% for small Canadian companies, 30% for expenditure in certain regions), and a "qualified transportation equipment" ITC.
- A final "research and development" ITC of 10% (20% to small companies) was also found by the ITA.
- The ITA found that the non-basic rates of the "qualified property" ITCs were countervailable as they are claimed on assets in specific regions. Additionally, the ITA found the 30% "scientific research" ITC rate countervailable for the same reason.
- ITA found, through an analysis of the Standard Industrial Code's (SIC) description of the sawmill, planning mill and wood products industries, and their production volumes, that the production of the goods under investigation did receive a net subsidy under this programme in the amount of 0.018% ad valorem for softwood fence; and 0.030% ad valorem for softwood lumber and softwood shakes and shingles.

2. Programme for Export Market Development (PEMD)

- PEMD facilitates the development of export markets for Canadian products by sharing the costs of travel and promotional projects.
- ITA found this to be a countervailable export subsidy with an estimated net subsidy of 0.001% ad valorem for all the products under investigation.

3. Forest Industry Renewable Energy Programme

- Prior to April 1, 1981 the benefits of this programme were determined to be limited to a specific industry and thus countervailable. Taxable grants under this programme were made to "Forest Industry Firms" for the purchase of capital equipment to substitute biomass energy sources.

- ITA found this programme's subsidy to be 0.003% ad valorem.

4. Regional Development Incentives

- This programme provides development incentives (usually grants) to attract capital investments to regions of the where employment and economic opportunity are chronically low.

- The ITA found this programme countervailable due to its regional specificity.

- The ITA calculated this programme's net subsidy to be 0.180% ad valorem for softwood lumber, 0.070% ad valorem for softwood shakes and shingles, and 0.151% ad valorem for softwood fence.

5. Federal Employment Programme - Community Based Industrial Adjustment Programme (CIAP)

- This programme was designed to alleviate (usually through grants) large scale permanent industry dislocation.

- ITA determined that the list of depressed communities eligible for CIAP assistance is designated at the discretion of the federal government. The ITA thus found this to be countervailable regional subsidy.

- ITA found this programme's subsidy to the softwood lumber industry to be 0.001% ad valorem.

(B) FEDERAL-PROVINCIAL PROGRAMMES:

1. Agricultural and Rural Development Agreements (ARDA)

- Of the six programmes under ARDA only the Alternative Income and Employment Opportunities in the Rural Development Region was relevant to this investigation.

- As the eligibility criteria under this programme were limited to companies in specific rural areas, both the provincial and federal benefits provided by this programme were found to be countervailable.

- ITA found this programme's subsidy to be 0.005% ad valorem for all products under investigation.

2. General Development Agreements (GDAs)

- The GDAs are the comprehensive development agreements between the federal and provincial governments aimed a spurring regional development.

- The GDAs entailed the signing of numerous subsidiary agreements which were directed at specific sectors in specific regions.

- The ITA found the following GDA subsidiary agreements countervailable due to regional specificity:

(i) B.C.: Assistance to Small Enterprise Programme

- The ITA calculated this programme's net subsidy to be 0.002% ad valorem for softwood lumber, 0.044% ad valorem for softwood shakes and shingles, and 0.010% ad valorem for softwood fence.

(ii) N.B.: Northeast, Kent and Industrial Development Agreements

- The ITA calculated this programme's net subsidy to be 0.008% ad valorem for softwood shakes and shingles, 0.007% for softwood fence, and 0.001% for softwood lumber.

(iii) Ontario: Eastern Ontario Subsidiary Agreement

- The ITA calculated this programme's net subsidy to be 0.001% ad valorem for softwood lumber.

- Both the federal and provincial benefits provided under these three GDAs were countervailed as eligibility for funds was limited to an area within the province. Had the entire province been eligible only the federal contribution would have been liable to countervail.

(C) PROVINCIAL PROGRAMMES:

1. Alberta-Stumpage Payment Deferral

- In 1982, the Government of Alberta deferred the payment of stumpage dues for one year.

- The ITA concluded that as the availability of this benefit was entirely up to the discretion of the government, the programme was countervailable as it was limited to a specific industry or group thereof.

- The ITA also found that as recipients of the deferral incurred no interest charges, this programme was countervailable as it was inconsistent with commercial considerations.

- The ITA calculated the net subsidy of this programme, to all the products under investigation, to be 0.003% ad valorem.

2. British Columbia:

(i) Low Interest Loan Assistance

- The eligibility requirements for this programme limited its benefits to specific regions within B.C..

- The ITA determined that the terms of the loans were not consistent with commercial considerations.

- The ITA calculated a net subsidy of less than 0.001% ad valorem for all the products under investigation.

(ii) Stumpage Payment Deferral

- As logging in the Fort Nelson swamplands can only be done in the winter, the B.C. government allows a deferral of the stumpage payments until that period.

- As this programme is region specific, as well as being inconsistent with commercial considerations (i.e., no interest charges are assessed for this deferral) the ITA found a net subsidy of less than 0.0001%, for all products under investigation.

3. Ontario:

(i) Stumpage Prices for Non-Integrated Licensees

- Integrated licenses refer to stumpage users who also own or operate pulp mills.

- The stumpage fees for non-integrated licensees was found to be 90% of that for the integrated licensees.

- The ITA found that this lower price represented preferential treatment, and was thus countervailable.

- The ITA calculated the net subsidy to be 0.015% ad valorem for all products under investigation.

(ii) Stumpage Payment Deferral

- In 1982 the Government of Ontario deferred stumpage payments for one year.
- The ITA concluded that the benefits of this programme were limited to sawmill operators, and was thus countervailable.
- ITA found this programme's net subsidy to be 0.005% ad valorem for softwood lumber.

4. Québec:

(i) Stumpage Pricing on Timber Limits

- The ITA determined that there was a price difference between charges for stumpage rights on 'timber limits' and general pulpwood rights.
- The ITA found that the lower timber limits price conferred a preferential benefit and hence a countervailable subsidy.
- ITA found this subsidy to be 0.061% ad valorem for all products under investigation.

(ii) Aide à la Promotion des Exportations (APEX)

- Under APEX grants are awarded to companies for the promotion of Québec goods and services outside Canada.
- The ITA concluded that APEX was a countervailable export subsidy, and that the products under investigation had benefitted from this programme.
- ITA calculated this subsidy to be 0.001% ad valorem for softwood lumber and shakes and shingles, and 0.002% for softwood fence.

(iii) Société de Récupération d'Exploitation et de Développement Forestiers du Québec (REXFOR)

- REXFOR is a provincial crown corporation which is funded by the Québec Ministère des Finances.
- REXFOR administers provincial funds to meet its mandate of "encouraging the development of the forest industry in Québec". As these funds are directed toward a specific industry the ITA found them countervailable.
- The ITA calculated REXFOR's net subsidies to be:

(a) LOANS AND LOAN GUARANTEES - 0.001% ad valorem for all products under investigation;
(b) GRANTS - 0.001% ad valorem for all products under investigation;
(c) LOSS COVERAGE - 0.017% ad valorem for softwood lumber, 0.014% ad valorem for softwood shakes and shingles and softwood fence;
(d) EQUITY PURCHASES - 0.005% ad valorem for all products under investigation;
(e) TAX ABATEMENT PROGRAMME - and 0.005% ad valorem for all the products under investigation; and
(f) EXPORT EXPANSION PROGRAMME - 0.019% ad valorem for softwood lumber.

II. PROGRAMMES DETERMINED NOT TO CONFER SUBSIDIES:

(A) CANADIAN FEDERAL AND PROVINCIAL STUMPAGE PROGRAMMES:

- The ITA stated that as the stumpage programmes were not based upon export performance they could not be found to be export subsidies. ITA went on to point out that the fact that significant quantities of softwood were exported, was not sufficient to define stumpage programmes as export subsidies.

- The ITA concluded that stumpage programmes "are not provided to a specific enterprise or industry, or group of enterprises or industries".

- In fact, the ITA noted that several different Canadian industries utilize stumpage programmes. These included lumber, wood products, veneer, plywood, pulp and paper, furniture, turpentine processors, charcoal, wood alcohol and even food additives (i.e., vanillin and lignin).

- The ITA also noted the lack of government limitation in the general availability of the rights to stumpage.

- The ITA also found that it could not be determined that these stumpage programmes caused a less than "fair" stumpage price. On examination of the various stumpage fees the ITA concluded that the stumpage programmes "do not assume a cost of producing the goods under investigation".

- The ITA concluded that the stumpage programmes: were non-specific; not limited by government discretion; and did not provide goods or services at preferential rates.

(B) FEDERAL PROGRAMMES:

1. Deductible Inventory Allowance

- The Canadian Federal Income Tax Act authorizes a deduction equal to 3% of the opening value of inventories.
- The ITA did not find this programme countervailable as it is not limited to a specific industry(ies).

2. Capital Cost Allowances (CCA)

- The Federal Tax Act allows a CCA for assets used in pollution abatement, manufacturing or energy conservation.
- The ITA did not find this programme countervailable as it is not limited to a specific industry(ies).

3. The Export Development Corporation (EDC)

- The EDC, a crown corporation, offers financial services to Canadian exporters, including export credit insurance (which was the focus of the petitioners' allegations).
- As the programme for export credit insurance was found to be consistent with commercial considerations, and not an export subsidy, is was not determined to be countervailable.

4. Federal Employment Programmes

(i) Local Employment Assistance Programme (LEAP)

- LEAP aims to increase the self-sufficiency of chronically un- or underemployed persons (e.g., handicapped), through grants for job creation and worker training.
- ITA found that this programme was not limited to any specific industry(ies) or region(s), and that as it is ineligible to "for profit" enterprises, it is not countervailable.

(ii) Work Sharing Programme

- This programme is designed to avert temporary lay-offs during short-term economic downturns.
- ITA found that as this programme is not limited to any specific industry(ies) or region(s), it is not countervailable.

5. Regional Development Incentives Programme - Loan Guarantees

- Although RDIP was found countervailable in this investigation, the loan guarantee element of the programme was exempted from the net subsidy determination as it was determined to be consistent with commercial considerations, and as such not countervailable.

6. Enterprise Development Programme (EDP)

- The EDP was developed to promote productivity enhancement. The tools through which it pursued this goal included:

  (i) Loan Insurance
  (ii) EDP Contributions (i.e., grants)

- The ITA found that the loan insurance element of the EDP was fully consistent with commercial considerations, and that neither element was limited to a specific industry(ies) or region(s).

7. Transportation Programmes

(i) Rail Freight Rates

- The ITA examined the Canadian rail freight charges softwood lumber companies face.

- The ITA concluded that not only was no countervailable subsidy conferred through these charges, but also that the fees paid by lumber companies was markedly higher than that for other commodities.

(ii) Currency Exchange Rate Tariff

- This tariff allows the value of the rail haul taking place in the U.S. to be reflected in U.S. currency and the value of the Canadian haul to be reflected in Canadian currency.

- Since 1977, U.S. currency was at a premium in relation to Canadian currency. As a result, Canadian shippers were paying a surcharge on exports to the United States. Because Canadian shippers were paying a surcharge, DOC ruled that no benefits were being bestowed through the currency exchange rate tariff on exports of the products under investigation.

- The ITA notes that in this scenario Canadian exports did not benefit (in fact, they faced a surcharge), and therefore this programme was not countervailable.

(iii) Fuel Tax Refund and Exemption

- This programme ensures that all U.S. states and Canadian provinces collect taxes equal to the actual fuel consumed in each jurisdiction, but purchased outside that jurisdiction.

- The ITA found that this programme did not relieve shippers of any tax, nor did it provide any benefit to shipments of the product under investigation.

(C) JOINT FEDERAL-PROVINCIAL PROGRAMMES:

1. Forestry Subsidiary Agreements

(i) Long-Term Forest Management

- The ITA concluded that the benefits of the construction of forest access roads, as mandated under this programme, as well as the soil and forest inventory studies and the silviculture and nursery camps, did not solely benefit a specific industry. Therefore this programme was found not countervailable.

(ii) Saskatchewan: Opportunity Identification & Technological Assistance

- The ITA concluded that the results of the studies provided for by this programme were publicly available and thus not countervailable.

(iii) Forestry Job Programme - Employment Bridging Assistance Programme (EBAP)

- EBAP is designed to allow industries to retrain skilled workers during times of recession.

- The programme is not limited to a specific group or industry and was, therefore found not countervailable.

(iv) Canada/Nova Scotia and Canada/New Brunswick - Grants for Private Woodlot Owners

- These grants were designed to provide technical assistance in effective management of forest resources.

- As these grants are available to all private landowners, they were not countervailable.

(D) PROVINCIAL PROGRAMMES:

1. Alberta:

- These following two Alberta programmes were not found to be countervailable as they were not limited to a specific enterprise or industry, or group thereof.

(i) Timber Salvage Incentive Programme

- This programme was designed to provide incentives for the harvesting of timber damaged by forest fires or diseases.

(ii) Alberta Opportunity Company

- This provincial crown corporation provides assistance to a variety of processing and manufacturing sectors.

2. B.C.:

(i) Section 88 Roads

- Section 88 roads licences allow the construction of roads on crown land to be credited against stumpage fees owed.

- However, the ITA concluded that as the quality of these roads must be above that required by loggers -- and must be accessible to recreationalists etc... -- this programme does not benefit a specific industry.

3. Ontario:

- The following two Ontario programmes do not provide benefits limited to a specific enterprise or industry, or group thereof, and thus were found not countervailable.

(i) Employment Development Fund (EDF)

- This programme was designed to promote long-term employment by providing grants to job creating investment projects.

(ii) Non-Forestry Subsidiary Agreement Road

- The ITA concluded that as the quality of these roads must be above that required by loggers -- and must be accessible to recreationalists etc... -- this programme does not specifically benefit a specific industry.

4. Québec:

- The following five Québec programmes were found not to preferentially benefit a specific enterprise or industry, or group thereof.

(i) Caisse de Dépôt et Placement du Québec (CDPQ)

- The ITA confirmed that the CDPQ manages several pension funds and insurance programmes, and invests over a broad range of sectors.

(ii) FRI Industrial Incentives Fund for Small and Medium Sized Businesses

- This programme allowed small and medium sized businesses to deposit up to half their income tax owed to the province into an escrow fund, from which they could withdraw up to 25% of the cost of approved projects.

(iii) Programme Expérimental de Création d'Emplois Communautaires

- This programme makes cash payments to entrepreneurs to assist them in maintaining and creating jobs for the chronically unemployed.

(iv) PME Innovation

- This programme assists small and medium sized businesses in obtaining capital.

(v) Société de Développement Industriel (SDI) Programmes

- The ITA concluded that the development grant, and loan and loan guarantee programmes administered by SDI were neither region specific, nor inconsistent with commercial considerations.

III. PROGRAMMES DETERMINED NOT TO BE USED:

(A) Federal Programmes:

1. Enterprise Development Programmes - Loans

(B) Federal-Provincial Programmes:

1. Canada/Nova Scotia Forestry Subsidiary Agreement Grants

(C) Provincial Programmes:

1. Alberta: Inventory Financing
2. B.C.: Marketing Development Assistance
3. Québec: SDI Financial Assistance to Advanced Technology Firms

III. FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION LIVE SWINE AND FRESH, CHILLED AND FROZEN PORK PRODUCTS FROM CANADA

BACKGROUND:

- On November 2, 1984 DOC received a petition from the U.S. National Pork Producers Council (NPPC), alleging that producers or exporters in Canada of live swine and fresh, chilled and frozen pork directly or indirectly receive benefits which constitute subsidies under U.S. trade law.

- On December 19, 1984 the U.S. ITC determined that there was a reasonable indication that these imports materially injure a U.S. industry.

- On June 17, 1985, the ITA issued a final affirmative countervailing duty determination. The U.S. Customs Service was directed to require a cash deposit or bond of Can. $0.04390 / lb. for live swine and Can. $0.05523/ lb. for fresh, chilled and frozen pork products.

- On August 1, 1985, the ITC found that while Canadian exports of live swine materially injured, or threatened to injure, the U.S. swine industry, Canadian exports of the subject pork products did not cause, or threaten to cause, injury to the U.S. pork industry. The ITC had found that swine producers and pork producers were not part of the same industry. As a result the duty on pork was abrogated while the duty on live swine was upheld.

- The administrative reviews carried out annually since 1985 have examined the changes in the level of support to Canadian swine producers. These levels vary annually in direct correlation to payments made under the National Tripartite Stabilization Programme (NTSP).

- As the countervailing duty order on live swine predates the FTA, Canada can take only the findings from administrative reviews issued after January 1, 1989 to a Chapter 19 panel, and not the initial decision. The Canadian objective throughout all proceedings has been to reverse the DOC determination that the NTSP is countervailable.

KEY ISSUE:

- The Canadian Meat Council (CMC) took the subsidy ruling to the CIT. The basis of their appeal was that the DOC decision had assumed a passthrough of subsidies on live swine to pork producers without actually conducting an upstream investigation to determine the extent or existence of such a passthrough. DOC had refused to conduct an upstream subsidy investigation because, in its view, swine was not an input into pork production. In effect, DOC was arguing that swine and pork were the same product. In May, 1987, the CIT ruled in favour of the CMC and remanded the case back to DOC to perform a full upstream subsidy investigation. However, as the CIT upheld the ITC no injury determination, which had been appealed by the NPPC, the upstream subsidy investigation (and lack thereof) issue became moot.

I. PROGRAMMES DETERMINED TO CONFER A SUBSIDY:

(A) FEDERAL PROGRAMMES:

1. Hog Stabilization Programmes provided under the Agricultural Stabilization Act (ASA)

- The ASA was enacted to provide for the stabilization of prices of certain agricultural products and specifically listed "named products" (including swine) to be eligible for price support systems.

- As the ASA did not specifically prescribe the formula in determining a support price; as the support prices for various commodities varied; and as there were other aspects of government discretion within the stabilization schemes (e.g., producers must sell hogs with a minimum grade factor of 80), DOC found that this programme did benefit specific industries and thus the support payments under this programme delivered to hog farmers during the review period were found countervailable.

- DOC calculated the net subsidy by dividing the value of stabilization payments made in the fiscal year 1985 on hogs marketed in the review period, by the total live weight equivalent of all hogs marketed in fiscal 1984. To determine the net subsidy to pork, DOC used the same calculations but inserted the total dressed weight equivalent of pork, for the total hog live weight figure.

- The ITA of DOC calculated the bonding rate to be Can. $0.02251/lb. dressed weight and Can. $0.01789/lb live-weight.

(B) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

1. The Record of Performance Programme

- The Canadian Swine Record of Performance Programme tests purebred swine to increase the efficiency of hog production.

- ITA found that as this programme is limited to a specific group of industries it is countervailable.

- The ITA determined the subsidy rate to be Can. $0.00144/lb dressed weight and Can. $0.00144/lb live-weight.

- In the First Administrative Review of the Countervailing Duty Order, DOC decided that as the results of the programme were available to other countries and industries, it was in fact "generally available" and not countervailable.

(C) PROVINCIAL STABILIZATION PROGRAMMES:

The ITA determined that all the following hog price stabilization programmes to be limited to a specific group of enterprises or industries and thus countervailable.

1. British Columbia Swine Producers' Farm Income Plan

- The ITA calculated the subsidy rate at Can. $0.00060/lb for dressed-weight and Can. $0.00048/lb for live-weight.

2. Manitoba Hog Income Stabilization Plan

- The ITA calculated the subsidy rate at Can. $0.00131/lb. for dressed-weight and Can. $0.00104/lb. for live-weight.

3. New Brunswick Hog Price Stabilization Programme

- The ITA calculated the subsidy rate at Can. $0.00068/lb. for dressed-weight and Can. $0.00054/lb. for live-weight.

4. Newfoundland Hog Price Support Programme

- The ITA calculated the subsidy rate at Can. $0.00017/lb. for dressed-weight and Can. $0.00013/lb. for live-weight.

5. Nova Scotia Pork Price Stabilization Programme

- The ITA calculated the subsidy rate at Can. $0.00086/lb. for dressed-weight and Can. $0.00068/lb. for live-weight.

6. Prince Edward Island Price Stabilization Programme

- The ITA calculated the subsidy rate at Can. $0.00057/lb. for dressed-weight and Can. $0.00045/lb. for live-weight.

7. Québec Farm Income Stabilization Programme

- The ITA calculated the subsidy rate at Can. $0.02133/lb. for dressed-weight and Can. $0.01696/lb. for live-weight.

8. Saskatchewan Hog Assured Returns Programme

- The ITA calculated the subsidy rate at Can. $0.00153/lb. for dressed-weight and Can. $0.00122/lb. for live-weight.

(D) OTHER PROVINCIAL PROGRAMMES:

The ITA determined that the following programmes are either limited to a specific number of enterprises, or are regional subsidies within a province, or both, and thus are countervailable.

1. New Brunswick Swine Assistance Programme

- This programme provides interest subsidies on medium term loans to hog producers for start-up or liability costs.

- The ITA calculated the subsidy rate at Can. $0.00005/lb. for dressed-weight and Can. $0.00004/lb. for live-weight.

2. New Brunswick Loan Guarantees & Grants under the Livestock Incentives Programme

- This programme provides free loan guarantees to farmers purchasing feeder or breeder animals.

- The ITA calculated the subsidy rate at Can. $0.00004/lb. for dressed-weight and Can. $0.00003/lb. for live-weight.

3. New Brunswick Hog Marketing Programme

- This programme equalizes the cost of moving hogs to markets across New Brunswick.

- The ITA calculated the subsidy rate at Can. $0.00008/lb. for dressed-weight and Can. $0.00006/lb. for live-weight.

4. Nova Scotia Swine Herd Health Policy

- This programme reimburses veterinarians for house-calls to enrolled producers. Any hog producer may enroll.

- The ITA calculated the subsidy rate at Can. $0.00001/lb. for dressed-weight and Can. $0.00001/lb. for live-weight.

5. Nova Scotia Transportation Assistance

- This programme defrays the cost of transporting hogs to pork processing plants.
- The ITA calculated the subsidy rate at Can. $0.00006/lb. for dressed-weight and Can. $0.00005/lb. for live-weight.

6. Ontario Farm Tax Reduction Programme

- This programme provides a rebate of 60% of municipal property taxes on eligible farmland. As eligibility varied on location this was found to be a regional subsidy.
- The ITA calculated the subsidy rate at Can. $0.00339/lb. for dressed-weight and Can. $0.00270/lb. for live-weight.

7. Ontario (Northem) Livestock Programme

- This programme reimburses Northern Ontario farmers for 20% of the purchase costs of boars (among other animals).
- ITA calculated the subsidy rate at Can. $0.000001/lb. for dressed-weight and Can. $0.0000004/lb. for live-weight.

8. P.E.I. Hog Marketing and Transportation Subsidies

- This programme defrays the cost of hog transportation and processing.
- ITA calculated the subsidy rate at Can. $0.00007/lb. for dressed-weight and Can. $0.00006/lb. for live-weight.

9. Prince Edward Island Swine Development Programme

- This programme awards hog farmers a specified cash benefit for each boar or gilt that meets specific quality standards.
- ITA calculated the subsidy rate to be Can. $0.00002/lb. for dressed-weight and Can. $0.00002/lb. for live-weight.

10. P.E.I. Interest Payments on Assembly Yard Loans

- This programme assumes the interest payments on a loan to construct a provincial hog assembly yard.
- ITA calculated the subsidy rate at Can. $0.0000004/lb. for dressed-weight and Can. $0.0000003/lb. for live-weight.

11. Québec Meat Sector Rationalization Programme

- This programme provides technical assistance and grants for the establishment, standardization, expansion or modernization of slaughterhouses, processing plants or plants preparing food containing meat.

- ITA calculated the subsidy rate to be Can. $0.00005/lb. for dressed-weight and Can. $0.00004/lb. for live-weight.

12. Québec Special Credits for Hog Producers

- This programme provides low interest loans or loan interest subsidies to agricultural producers during "critical" periods.

- ITA calculated the subsidy rate to be Can. $0.00005/lb. for dressed-weight and Can. $0.00004/lb. for live-weight.

13. Saskatchewan Financial Assistance for Livestock & Irrigation

- This programme provides low interest long-term loans, grants and loan guarantees to farmers for the acquisition of livestock including swine.

- ITA calculated the subsidy rate to be Can. $0.00045/lb. for dressed-weight and Can. $0.00036/lb. for live-weight.

II. PROGRAMMES DETERMINED NOT TO CONFER A SUBSIDY:

(A) FEDERAL PROGRAMMES:

1. Financial Programmes

- The ITA found that as the following programmes do not designate specific products for financing, they are not limited to a specific industry, and are not countervailable.

  (a) Farm Credit Act
  (b) Farm Syndicates Credit Act
  (c) Special Farm Assistance Programmes

2. Federal Hog Carcass Grading System

- As numerous agricultural products are similarly graded at government cost, this programme is not limited to a specific industry, and was found not to be countervailable.

(B) PROVINCIAL PROGRAMMES:

The following programmes do not designate specific products or regions for the receipt of funding, nor do they establish differing terms for specified products, and therefore are not limited to a specific enterprise(s) or industry(ies) and are not countervailable.

1. Grant Programmes in Québec

(a) Grants under the Act to Promote the Development of Agricultural Operations
(b) Grants to Provincial Pork Packers under the Québec Industrial Assistance Act

2. Financing Programmes in Québec

(a) Low Interest Financing under an Act to Promote Long-Term Farm Credit by Private Institutions
(b) Low Interest Financing under the Farm Credit Act
(c) Low Interest Guaranteed Loans under an Act to Promote Farm Improvement
(d) Interest Free Loans under an Act to Promote the Establishment of Young Farmers
(e) Low Interest Mortgages under the Farm Loan Act
(f) Short Term Loans

3. Financing Programmes in Ontario

(a) Ontario Farm Adjustment Assistance Programme
(b) Ontario Beginning Farmer Assistance Programme
(c) Ontario Young-Farmer Credit Programme

4. New Brunswick financing under the 1980 Farm Adjustment Act

5. Newfoundland Loans under the Farm Development Loan Act

6. Nova Scotia Farm Loan Board Programmes

7. P.E.I. Lending Authority Long- and Short-Term Loans

8. Alberta Agricultural Development Corporation Low-Interest Loans and Loan Guarantees

9. Financing Programmes in British Columbia

   (a) Low-Interest Loans and Loan Guarantees by the British Columbia Ministry of Agriculture and Food
   (b) Partial Interest Reimbursement

10. Manitoba Agricultural Credit Corporation Loans & Loan Guarantees

11. Saskatchewan Economic Development Corporation Financial Assistance

III. PROGRAMMES DETERMINED NOT TO BE USED:

(A) Ontario Red Meat Plan
(B) Ontario Swine Sales Assistance Policy
(C) New Brunswick Swine Industry Restructuring
(D) Saskatchewan Livestock Investment Tax Credit

IV. PROGRAMMES DETERMINED TO BE TERMINATED:

(A) Alberta Pork Producers Market Insurance Programme
(B) Ontario Weaner Pig Stabilization Plan

V. PROGRAMME DETERMINED NOT TO EXIST:

(A) Proposed Tripartite Red Meat Stabilization Programme

VI. RESULTS OF LIVE SWINE ADMINISTRATIVE REVIEW:

- The ITA removed the Records of Performance programme off the list of countervailable programmes.
- The countervailable net subsidy rate was reduced from 4.4 cents per pound to 2.2 cents per pound.
- Breeder sows and boars were found to be in a different category with a "de minimis" countervailable subsidy rate.

IV. LIVE SWINE - CHRONOLOGY (KEY DATES AND RESULTS)

	(Effective Dates)	(Summary)
Original:		
•	November 2, 1984	NPPC files petition with DOC
•	November 23, 1984	DOC initiates countervail duty investigation
•	December 19, 1984	ITC determines reasonable indication of injury to U.S. industry
•	April 3, 1985	DOC preliminary determination Rate: Cdn. $0.053/lb. - live swine
•	June 17, 1985	DOC final determination Rate: Cdn. $0.0439/lb. - live swine
•	August 1, 1985	ITC notifies DOC of injury to U.S. industry
•	August 15, 1985	DOC countervail duty order Rate: Cdn. $0.4386/lb. - live swine (assessment as of April 3, 1985)
Administrative Reviews:		
First		April 1, 1985 - March 31, 1986
•	June 14, 1988	DOC preliminary determination Rate: Cdn. $0.022/lb. - other live swine de minimis - sows & boars
•	January 9, 1989	DOC final determination Rate: Cdn. $0.022/lb. - other live swine de minimis - sows & boars
Second and Third		April 1, 1986 - March 31, 1987 April 1, 1987 - March 31, 1988
•	May 21, 1990	DOC preliminary determination Second • Rate: de minimis (Cdn. $0.0061/lb.) - other live swine de minimis - sows & boars

		Third • Rate: de minimis (Cdn. $0.0071/lb.) - other live swine de minimis (Cdn. $0.0068/lb.) - sows & boars
•	March 12, 1991	DOC final determination
		Second • Rate: de minimis (Cdn. $0.0039/lb.) - other live swine de minimis (Cdn. $0.0001/lb.) - sows & boars
		Third • Rate: de minimis (Cdn. $0.0032/lb.) - other live swine de minimis (Cdn. $0.003/lb.) - sows & boars
Fourth		April 1, 1988 - March 31, 1989
•	February 12, 1991	DOC preliminary determination Rate: Cdn. $0.0548/lb. - other live swine Cdn. $0.0051/lb. - sows & boars
•	June 21, 1991	DOC final determination Rate: Cdn. $0.0449/lb. - other live swine Cdn. $0.00447/lb. - sows & boars
•	May 19, 1992	FTA Panel remand to DOC
•	October 30, 1992	Final FTA Panel determination (Original date -October 19, 1991)
•	November 19, 1992	DOC final results on redetermination
		Rate: Cdn. $0.005/lb. - other live swine Cdn. $0.004/lb. - sows & boars, weanlings Cdn. $0.005/lb.
•	January 21, 1993	Extraordinary Challenged Committee filed by USTR.

Fifth		April 1, 1989 - March 31, 1990
•	June 25, 1991	DOC preliminary determination Rate: Cdn. $0.0937/lb. - other live swine Cdn. $0.051/lb. - sows & boars
•	October 7, 1991	DOC final determination Rate: Cdn. $0.0932/lb. - other live swine Cdn. $0.0049/lb. - sows & boars
•	August 26, 1992	FTA Panel remand to DOC
•	January 24, 1993	Final FTA Panel determination
•	December 24, 1993	Panel suspended until new U.S. nominated panellist appointed.
Sixth		April 1, 1990 - March 31, 1991
•	Unknown	DOC preliminary determination Rate: Cdn. $0.xxxx/lb. - other live swine Cdn. $0.xxx/lb. - sows & boars
	To be determined	Rate: Cdn. $0.xxxx/lb. - other live swine Cdn. $0.xxxx/lb. - sows & boars
Seventh		April 1, 1991 - March 31, 1992
•	August 28, 1992	Request for administrative review filed

V. SUSPENSION OF COUNTERVAILING DUTY INVESTIGATION CERTAIN RED RASPBERRIES FROM CANADA[79]

BACKGROUND:

- On July 18, 1985, DOC received a petition from a coalition of northwest U.S. red raspberry producers, alleging that producers and exporters of certain red raspberries in Canada receive countervailable benefits under U.S. trade law.

- On September 3, 1985, the ITC found reasonable indication that red raspberry imports from Canada materially injure or threaten to materially injure a U.S. industry.

- The ITA preliminarily determined that there was a countervailable net subsidy of 0.99% ad valorem.

- On November 26, 1985, the ITA initiated a proposed suspension agreement, whereby the Governments of Canada and B.C. will offset or eliminate all the benefits under question.

- In 1991, Canada advised DOC of its intention to withdraw from the suspension agreement. DOC published its notice of intention to resume the investigation. However, before the investigation was resumed, the petitioners withdrew their petition on September 25, 1991. As a result the DOC published its notice terminating the countervailing duty investigation.

KEY ISSUE:

- The Suspension Agreement which eliminated benefits which were preliminarily determined to be countervailable, required annual re-certification. According to its terms the federal government was required to certify annually that those programmes identified as countervailable in the preliminary determination had not been used by the raspberry industry and that no substitute programmes had been introduced. This certification was effected through an exchange of letters between the Government of Canada and the Government of British Columbia to confirm the continued compliance with the agreement, and then an exchange of letters between the Government of Canada and the Government of the United States affirming the continued application of the agreement.

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[79] For the readers information, an antidumping investigation was also initiated against British Columbia red raspberry growers and the ITC affirmed the DOC determination that the U.S. industry was being injured. As a result, an antidumping order was imposed. British Columbia red raspberry growers filed a request with the FTA's binational dispute settlement panel in response to a DOC ruling revising punitive antidumping duties against Canadian exporters of red raspberries. In December 1989, the binational panel reached a decision on the imposition of antidumping duties on Canadian raspberries. The panel upheld the DOC ruling affecting one Canadian exporter but stated that the department's findings were "defective" in regard to imports by two other Canadian raspberry exporters. After recalculating, the DOC found that the two B.C. raspberry growers were not dumping their products at below fair market price. More than U.S.$70,000 in antidumping duties collected since 1986 were returned to the raspberry growers. This was Canada's first win before an FTA panel.

Antidumping duties are additional duties imposed by an importing country in circumstances where imports are priced at less than the "normal" price in the exporter's domestic market and cause or threaten to cause material injury to a domestic industry in the importing country.

I. PROGRAMME PRELIMINARILY DETERMINED TO CONFER SUBSIDY:

(A) British Columbia Farm Income Plan

- The British Columbia Raspberry Growers' Plan was preliminarily determined to be countervailable by nature of its specificity.
- The ITA calculated the countervailable net subsidy offered by this plan to be 0.99% ad valorem.
- Under the Suspension Agreement the benefits of this programme to growers, producers and exporters of Red Raspberries, have been offset or eliminated.

II. PROGRAMMES PRELIMINARILY DETERMINED NOT TO CONFER SUBSIDY:

- The ITA did not investigate these programmes as they were not included in the original allegations.
- The ITA will, however, examine these programmes in any administrative review of the Suspension Agreement.

(A) Industrial and Regional Development Programme

(B) Federal Financing Assistance

(C) Lower Mainland Horticultural Improvement Association

- The terms of the Suspension Agreement stipulated that if any of these programmes are found to be countervailable in any other ITA investigations, or if these programmes are found to benefit the growers, producers or exporters of Red Raspberries to the U.S., the Agreement will be terminated, and the DOC may resume its CVD investigation.

VI. FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION OIL COUNTRY TUBULAR GOODS FROM CANADA

BACKGROUND:

- On July 22, 1985, DOC received a petition from the Lone Star Steel Company and the CF&I Steel Corporation, alleging that Canadian producers of Oil Country Tubular Goods (OCTG) were receiving countervailable benefits.

- On August 22, 1986, the ITA estimated the net countervailable subsidy at 0.72% ad valorem. The ITC subsequently found injury due to subsidized imports.

- Of the eleven known Canadian exporters and producers of OCTG, nine were excluded from this determination because they were found to have received no countervailable benefits under the programmes under investigation (Algoma was found to have received only de minimis benefits). The remaining, and affected, Canadian companies were IPSCO and Seigfied Kreiser Pipe and Tube.

KEY ISSUE:

- Despite petitioners arguments to the contrary, DOC did not find that "critical circumstances" existed as a result of imports into the U.S. of Canadian OCTG. If Commerce had found that OCTG imports from Canada were benefitting from export subsidies and that there had been a sudden and massive influx of OCTG over a "relatively short period of time", the countervailing duty could have been imposed with a 90 day retroactive provision. As it turned out DOC found no export subsidies.

- Also at issue in this investigation was the question of Commerce's declining balance methodology for dispersing the benefits of grants over time. IPSCO disagreed with Commerce's use of the U.S. Internal Revenue Service's Class Life Asset Depreciation Range System to value the useful life of capital infusions.

- In 1991, the Court of International Trade found for IPSCO and ordered the countervailing duty discontinued.

I. PROGRAMMES DETERMINED TO CONFER A SUBSIDY:

(A) Certain Types of Investment Tax Credits (ITCs)

- For "qualified property" (i.e, new plant and equipment used in processing) the basic ITC is 7% with an additional 3% or 13% for qualified property in certain regions.
- For "certified property" (i.e., qualified property in regions characterized with high unemployment and low per capita income), the ITC rate is 50%.
- There is also a "scientific research" ITC with a base rate of 20% (35% for small Canadian companies, 30% for expenditure in certain regions), and a "qualified transportation equipment" ITC.
- A final "research and development" ITC of 10% (20% to small companies) was also found by the ITA.
- The ITA found that the non-basic rates of the "qualified property" ITCs, are countervailable as they are claimed on assets in specific regions. IPSCO and Algoma each claimed the additional 3% ITC.
- ITA found the net subsidy of those ITCs at 0.01% ad valorem for each company.

(B) Regional Development Incentive Programme (RDIP)

- The ITA found that this programme provided development incentives (usually grants) to make capital investments in regions designated as economically disadvantaged.
- The ITA determined the benefits under this programme to be limited to specific regions and thus countervailable.
- ITA calculated IPSCO's net countervailable subsidy at 0.71% ad valorem, and 0.04% ad valorem for Algoma.

(C) General Development Agreement & the Canada-Saskatchewan Subsidiary Agreement on Iron, Steel & Other Metal Industries

- GDAs were umbrella economic development agreements between federal and provincial governments. The subject subsidiary agreement was found to have provided IPSCO with direct financial assistance.
- The ITA incorporated the benefits provided by this programme into its analysis of the RDIP programme.

II. PROGRAMMES DETERMINED NOT TO CONFER SUBSIDIES:

- In the first softwood lumber case, the ITA had found that the following three programmes were not limited to a specific enterprise or industry, or group thereof, and thus were not countervailable. In this investigation DOC "had found no information changing our original conclusion".

(A) Grant Under the Enterprise Development Programme (EDP)

- ITA verified that this grant had yet to be made to IPSCO, and was thus not countervailable.

(B) Employment Development Fund (EDF)

- This programme was designed to promote long-term employment by providing grants to job creating investment projects.

- ITA found that as this programme was not dependent upon export performance, it was not an export subsidy.

(C) The Alberta Opportunity Loan to IPSCO

- This loan was found to be consistent with commercial considerations, and hence not countervailable.

III. PROGRAMMES DETERMINED NOT TO BE USED:

(A) Loans Under Subsidiary Agreements
(B) Defense Industry Productivity Programme
(C) Community-Based Industrial Action Programme of the Industry and Labour Adjustment Programme
(D) Programme for Export Market Development
(E) Promotional Projects Programme
(F) Industrial and Regional Development Programme
(G) Saskatchewan Economic Development Commission
(H) Ontario Development Corporation Export Support Loans, Other Loans and Loan Guarantees
(I) Enterprise Development Programme Loans
(J) Interest-Free and Below Commercial Rate Loans
(K) Government Grants for the Purchase of Fixed Assets

VII. FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION CERTAIN ATLANTIC GROUNDFISH FROM CANADA

BACKGROUND:

- On August 15, 1985, DOC received a petition from the North Atlantic Fisheries Task Force alleging countervailable subsidy violations against Canada.

- On September 19, 1985 the ITC determined that there was a reasonable indication that there was an industry in the U.S. threatened with material injury by reason of imports of Certain Fresh Atlantic Groundfish Fillets from Canada.

- On March 18, 1986 DOC issued a final subsidy determination of 5.82% ad valorem.

- On June 21, 1991, the DOC published a notice of revocation of the 1986 countervailing duty order against Atlantic Groundfish from Canada because the principal exporter purchased the petitioner. The effective date of the order was January 1, 1991.

KEY ISSUES:

- A most important element of this investigation was the allegation, by the petitioners, and the investigation by Commerce, of the countervailability of a section of the Canadian Unemployment Insurance Act.

- Section 146 of the Unemployment Insurance Act, authorizes the Canadian Employment and Immigration Commission to operate a scheme of unemployment insurance for self-employed fishermen.

- Although, Commerce did find that the scheme for self-employed fishermen was not "identical" to the unemployment insurance generally available to contract workers, the Department did not find that the scheme provided preferential treatment. As a result Section 146 was found not countervailable.

- Another important element of this investigation was DOC's investigation of government equity infusions into National Sea Products Limited and Fisheries Products International Limited. DOC found that such infusions had been made on terms inconsistent with commercial considerations and calculated an estimated net subsidy of 1.876% ad valorem.

- In arriving at its final determination of subsidy DOC investigated a total 85 different programmes. DOC found 55 programmes countervailable, 18 not countervailable, and another 12 to be not used.

- As well as programmes of the Federal Government being investigated, provincial programmes of the following provinces were subject to investigation: New Brunswick, Nova Scotia, P.E.I., Newfoundland and Québec.

- 11 federal programmes, 6 joint federal-provincial programmes and 38 provincial programmes were found countervailable.

I. PROGRAMMES DETERMINED TO CONFER A SUBSIDY:

(A) FEDERAL PROGRAMMES:

1. **Fishing Vessel Assistance Programme**

- This programme authorizes funding for up to 60% of the cost of constructing a vessel to a maximum of $750,000, and was in effect up to March 31, 1986. During the review period funding was limited to a 25% (not 60%) ceiling.

- ITA found this programme's was directed to a specific industry (i.e., Atlantic Groundfish fishing) and provided a net subsidy of 0.715% ad valorem.

2. **Department of Fisheries and Oceans (DFO) Promotions Branch**

- This programme provides funding for both domestic and export market promotional displays for the fishing industry.

- ITA found this programme to be limited to a specific industry and providing a net subsidy of 0.001% ad valorem.

3. **Construction of Ice-making & Fish Chilling Facilities**

- This programme was initiated in 1973 and terminated in 1980. It provided grants up to 50% of the cost of construction and equipping of commercial ice-making facilities used by the fishing industry.

- ITA found this programme to be limited to a specific industry and providing a net subsidy of 0.059% ad valorem.

4. **Certain Types of Investment Tax Credits (ITCs)**

- For "qualified property" (i.e, new plant and equipment used in processing) the basic ITC is 7% with an additional 3% or 13% for qualified property in certain regions.

- For "certified property" (i.e., qualified property in regions characterized with high unemployment and low per capita income), the ITC rate is 50%.

- There are also "scientific research" and "qualified transportation equipment" ITC rates above the basic 7%.

- The ITA found that the non-basic rates of the "qualified property" ITCs, and the portion above the basic 7% rate for the "certified property" ITC are countervailable as they are claimed on assets in specific regions.

- ITA found the net subsidy of those ITCs at 0.162% ad valorem.

5. Programme for Export Market Development (PEMD)

- ITA determined that PEMD provides assistance for project bidding, market identification, export consortia, sustained export market development, foreign trade fair participation and bringing in foreign buyers, and as such constituted an export subsidy liable to countervail.

- ITA valued this programme's net subsidy at 0.001% ad valorem.

6. Regional Development Incentive Programme (RDIP)

- Through its mandate to promote stable employment in areas of Canada suffering from chronic low employment RDIP provided funds to the fishing industry through 1985.

- ITA found the net regional subsidy at 0.447% ad valorem.

7. Industrial and Regional Development Programme (IRDP)

- This programme classified each of Canada's 260 census districts into one of four tiers. Tier I represented the most economically advanced regions while Tier IV represented the most economically disadvantaged areas.

- Upon examining this programme DOC concluded that while the benefits (i.e., grants and loans to stimulate investment) in the Tier I areas were not countervailable due to general availability, the benefits above and beyond the Tier I rate evident in the other three Tier areas, were countervailable due to regional specificity.

- ITA found this programme's net subsidy at 0.001% ad valorem.

8. Fisheries Improvement Loan Programme (FILP)

- This programme guarantees loans made to commercial fishermen for fisheries improvement projects.

- ITA found this programme to be limited to a specific industry, and inconsistent with commercial considerations, and calculated a net subsidy at 0.043% ad valorem.

9. DFO Grants to Fishermen and Fish Processors from Special Recovery Capital Projects Programme (SRCPP) Funds

- DFO used SRCPP funds to construct and operate marine centres, bait storage depots, fish unloading systems and ice-making facilities. Additionally, DFO made grants to individual fish processors and commercial fishermen.

- ITA found this programme to be limited to a specific industry and calculated a net subsidy of 0.079% ad valorem.

10. Preferential User Fees Under the Small Craft Harbour Programme

- Under this programme harbour berthage fees for commercial fishing vessels are $0.07 per meter, per day, while for other commercial vessels the fee is $0.49.

- ITA found this programme's benefits to be limited to a specific industry, and calculated a net subsidy of 0.046%.

11. Govemment Equity Infusions Into National Sea Products Limited and Fisheries Products Intemational Limited

- ITA determined that the equity transfusions were not consistent with commercial considerations.

- ITA found this programme's net subsidy at 1.876% ad valorem.

(B) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

1. Agricultural and Rural Development Agreements (ARDA)

- The ITA determined that even though this programme terminated in 1975, funding benefits ran through 1985.

- The ITA determined that the benefits under this programme were available only to specific companies in specific regions and are thus countervailable.

- ITA found this programme's net subsidy at 0.005% ad valorem.

2. P.E.I. Comprehensive Development Plan

- The ITA did not find the provincial allocation of this programme as countervailable, but as the federal share was directed to a specific region it was found countervailable.

- ITA found this programme's net subsidy at 0.039% ad valorem.

3. General Development Agreements (GDA)

- GDAs are umbrella development arrangements between the federal and provincial government departments, designed to promote investment. In the New Brunswick, Nova Scotia and Newfoundland cases the ITA determined the grants to the fishing industry under these GDAs to be countervailable as their benefits were directed to specific regions and industries (i.e., the fishing industry) within those provinces.

- ITA found this programme's net subsidy at 0.181% ad valorem.

4. Transitional Programmes

- These programmes provided funds to the fishing industry between the termination of the GDAs in 1984 and the launch of the ERDAs in 1985. As the grants were limited to companies in certain regions the ITA found them to be countervailable.

- ITA found this programme's net subsidy at 0.060% ad valorem.

5. Economic and Regional Development Agreements (ERDAs)

- ERDAs are the successors to the GDAs.

- As in the GDAs, the ITA found the benefits of this programme to be limited to specific industries, and specific regions, and determined a net subsidy of 0.007% ad valorem.

6. Interest-Free Loans to National Sea Products

- The ITA found this programme to be limited to a specific enterprise and thus countervailable.

- ITA found this programme's net subsidy at 0.018% ad valorem.

(C) PROVINCIAL PROGRAMMES:

The ITA found that as the following provincially delivered programmes deliver benefits almost exclusively to commercial fishing operations, they are countervailable.

The numbers in parenthesis following the provincial fisheries support programmes on the next four pages, are the ad valorem net subsidy rates, for each respective programme, as calculated by the ITA.

1. **NEW BRUNSWICK:**

(i) Loans from the Fisheries Development Board: (0.259%)

(ii) Fish Unloading Systems and Icemaking Programme: (0.004%)

(iii) Insurance Premium Repayment Programme: (0.018%)

(iv) Interest Rate Rebates: (0.018%)

(v) Technical Services (i.e. the Fishing Vessel & Gear Programme): (0.015%)

2. **NEWFOUNDLAND:**

(i) Grants for Purchasing and Constructing Boats: (0.150%)

(ii) Grants for Rebuilding & Repair of Fishing & Coastal Vessels: (0.003%)

(iii) Grants to Cover Operating Expenses: (0.096%)

(iv) Loans from the Fisheries Loan Board: (0.245%)

(v) Loan Guarantees from the FLB: (0.013%)

(vi) Operation of Fisheries Facilities and Services: (0.001%)

(vii) Construction and Repair of Fisheries Facilities: (0.009%)

(viii) Enhancement of Fishing Operations: (0.001%)

(ix) Marketing Assistance: (0.001%)

3. **NOVA SCOTIA:**

(i) Fishing Vessel Construction Programme: (0.014%)

(ii) Loans from the Fisheries Loan Board: (0.375%)

(iii) Industrial Development Division of Department of Fisheries: (0.181%)

(iv) Market Development Assistance: (0.008%)

- The ITA also identified this as an export subsidy.

4. **PRINCE EDWARD ISLAND:**

(i) Fishing Vessel Subsidy Programme: (0.015%)

(ii) Near and Offshore Vessel Assistance Programme: (0.004%)

(iii) Engine Conversion Programme: (0.006%)

(iv) Commercial Fishermen's Investment Incentive Programme: (0.003%)

(v) Construction of Icemaking and Fish Chilling Facilities: (0.003%)

(vi) Fish Box Pool Programme: (0.002%)

(vii) Technical Upgrading Programme: (0.001%)

(viii) Fresh Fish Marketing Programme: (0.090)

- ITA also found that this programme was an export subsidy.

(ix) Fishing Industry Technology Programme: (0.012%)

(x) Technology Improvements Programme: (0.002%)

(xi) Onboard Fish Handling Systems Programme: (0.001%)

5. **QUÉBEC:**

(i) Vessel Construction Assistance Programme: (0.028%)

(ii) Gear Subsidy Programme: (0.041%)

(iii) Insurance Premium Subsidy Programme: (0.043%)

(iv) Large Vessel Construction Programme: (0.144%)

(v) Loans from the Ministry of Agriculture, Fisheries and Food: (0.045%)

(vi) Grants for Engine Purchases: (0.021%)

(vii) Grants for Fish Transport and Seafood Processing Tanks: (0.029%)

(viii) Grants to Processing Enterprises for Capital Equipment: (0.109%)

(ix) Ice-making and Fish Chilling Assistance: (0.077%)

III. PROGRAMMES DETERMINED NOT TO CONFER A SUBSIDY:

(A) FEDERAL PROGRAMMES:

1. **Atlantic Fisheries Management Programme**

- As this programme provides no financial assistance to the groundfish industry, and as the research results of this programme are not targeted to aid a particular industry, this programme is not countervailable.

2. **DFO Marketing Intelligence and Industry Services Branch.**

- This facility provides no financial assistance to the groundfish industry and its market reports are publicly available. Therefore this service is not countervailable.

3. **Enterprise Development Programme (EDP)**

- EDP financial assistance is not limited to the groundfish industry, nor any specific industry, therefore it is not countervailable.

4. **Section 146 of the Unemployment Insurance Act.**

- The ITA studied whether the unique unemployment insurance scheme to self-employed fishermen, as authorized under Section 146, bestows a benefit on the production of groundfish.

- While the petitioners alleged that Section 146 represents a specific statutory exemption from the general provisions of Canada's Unemployment Insurance Act, and that the unique features of this scheme provide disproportionate benefits to self-employed fishermen, the ITA did not find the programme countervailable.

- The ITA admitted that Section 146 was not "identical" to the "general unemployment system", however, they concluded that provision of benefits to unemployed workers under Section 146 was not preferential to the benefits provided under the general system. Moreover, the ITA noted that self-employed fishermen must pay the same premium rates to fund the unemployment insurance, as do participants in the general programme.

5. **Import Duty Remission Under the Machinery Programme.**

- As the types of machinery eligible under this programme are used by a wide range of industries, the benefits are not limited to a specific industry, and therefore the programme is not countervailable.

6. Fishing Vessel Insurance Plan.

- The ITA found that the rates offered under this plan were not inconsistent with commercial considerations, nor were they preferential to the industry. As such they are not countervailable.

7. Federal Assistance for Bait Services Programme.

- The ITA found that the rates offered under this plan were not inconsistent with commercial considerations, nor were they preferential to the industry. As such they are not countervailable.

(B) PROVINCIAL PROGRAMMES:

1. NEW BRUNSWICK: (i) Marketing and Promotion Activities
(ii) Training Services

- Because these two programmes were found to be generally available to all industries in the province, they were not found to be countervailable.

2. NEWFOUNDLAND:

(i) Newfoundland-Labrador Development Corp.
(ii) Rural Development Loan Programme
(iii) Loan Deficiency Guarantee Programme
(iv) Market Development Information Service
(v) Construction of Fisheries Access Roads
(vi) Market and Product Development Programme
(vii) Rural Development Assistance Programme
(viii) Small Business Programme

- The ITA concluded that all of the above programmes were generally available within Newfoundland, and that as they did not preferentially treat a specific industry they were not countervailable.

IV. PROGRAMMES DETERMINED NOT TO BE USED

(A) FEDERAL PROGRAMMES:

1. Community based Industrial Adjustment Programme

(B) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

1. Fisheries Development Programme for Coastal Labrador

(C) PROVINCIAL PROGRAMMES:

1. New Brunswick Fuel Subsidy for Fishermen
2. New Brunswick Winterization of Fish Plants Programme
3. Newfoundland Secondary Processing Interest Subsidy Programme
4. Newfoundland Ocean Industries Development Programme
5. Newfoundland Ocean Industry Capital Assistance Programme
6. Newfoundland Oceans Research and Development Corporation
7. Québec Tax Abatement Programme
8. Québec Aide a la Promotion des Exportations
9. Québec Technological Assistance Service for Business Programme
10. Québec Société de Développement Industriel Expansion Programme

V. PROGRAMMES DETERMINED NOT TO EXIST

1. New Brunswick Fish Chilling Assistance Programme
2. Newfoundland Bait Services Programme
3. Newfoundland Production Machinery and Processing Technology
4. P.E.I Fish Chilling Assistance Programme
5. P.E.I. Fishermen's Holding Unit Programme
6. Québec Joint Federal-Provincial Development Programme.

VIII. PRELIMINARY AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA "SOFTWOOD LUMBER II"

BACKGROUND:

- On May 19, 1986 DOC received a petition from the Coalition for Fair Lumber Imports on behalf of the U.S. industry of said merchandise, alleging that manufacturers, producers and exporters in Canada of the subject merchandise receive countervailable subsidies under section 701 of the amended Tariff Act of 1930.

- On June 5, 1986, DOC initiated a countervailing duty investigation despite strong opposition from the Canadian Government.

- On June 26, 1986, the ITC determined that there was a reasonable indication that a U.S. industry was materially injured by imports of Canadian softwood lumber.

- The ITA excluded 20 Canadian firms from its preliminary finding.

- The ITA estimated a countervailable net subsidy of 15.00% ad valorem.

NOTE: On December 30, 1986, to resolve a bitter and highly-politicized trade dispute, Canada and the United States signed the Softwood Lumber Memorandum of Understanding (MOU) under which Canada imposed a temporary export tax of 15 per cent on certain softwood lumber entering the U.S. market from Canada. The agreement retained the export charge revenues in Canada rather than sending them to the United States in the form of countervailing duties.

KEY ISSUES:

- The significant value of Canadian softwood lumber exports to the U.S. (i.e., approx. $3 billion) and the fact that the first lumber countervailing duty case was decided in Canada's favour gave the investigation an even higher profile than the 1983 case.

- The key element in this investigation was the decision to investigate a Canadian natural resource management programme (i.e., provincial stumpage programmes) as potentially countervailable for the second time in three years.

- Unlike in the previous softwood lumber case Commerce preliminarily found Canadian stumpage programmes countervailable. The key to making this determination was:

  (a) while the stumpage programmes were nominally generally available, due to government discretion in the programme design and delivery, the actual or de facto benefits were limited to specific industry; and

  (b) the nature of the stumpage programmes was not based on commercial considerations (i.e., stumpage fees did not follow a cost recovery methodology, and therefore the governments, in administering the stumpage programmes, were assuming a portion of the cost of production of softwood products).

- The MOU which terminated this investigation instituted a 15% export charge on the products under investigation. In response, the petitioners withdrew their petition.

- The MOU allowed for the reduction, or elimination, of the export charge through increased provincial stumpage and other forestry charges to industry.

I. PROGRAMMES PRELIMINARILY DETERMINED TO CONFER A SUBSIDY

(A) STUMPAGE PROGRAMMES OF THE ALBERTA, BRITISH COLUMBIA, ONTARIO AND QUÉBEC PROVINCIAL GOVERNMENTS:

- As these programmes were found not countervailable in the first softwood lumber case in 1983, Commerce based its decision to reinvestigate them by noting "petitioners' presentation of new evidence" and "an evolution in the Department's interpretation of countervailing duty law, both in terms of the specificity test and the measure of preferentiality".

- The ITA presented in its discussion of these programmes an explanation of the factors it considers when applying the specificity test. These are:

  (1) the extent to which a foreign government acts to limit the availability of a programme (this is the "nominal general availability", or de jure non-specificity);

  (2) the number of enterprises and industries which actually use the programme (this may include an analysis of disproportionate or dominant users); and

  (3) the extent to which the government exercises discretion in making the programme available.

- The ITA concluded that in the context of the stumpage programmes under investigation, "while the implementing legislation allows any potential user to apply,..., they also permit the administering ministries a degree of discretion".

- The ITA further determined that "there is significant evidence indicating that the discretionary allocation of stumpage rights results in targeting", and that contrary to the findings in the first softwood case there are not many industries utilizing these programmes. Therefore the programmes were skewed towards specific industries.

- In attempting to determine whether stumpage rights were provided at preferential rates, the ITA concluded that there was no generally available reference price to use as a benchmark.

- The ITA's alternative tests to determine whether a government has provided a good or service at preferential rates are:

  (1) prices charges by the government for a similar good or service;

  (2) prices charges within the jurisdiction by other sellers of an identical good or service;

(3) the government's cost of producing that good or service;

(4) external prices.

- By using alternative (3), and determining that the governments involved did not recover the costs of providing standing timber to stumpage rights holders, the ITA found that these programmes did provide goods at preferential rates.

- The ITA used the difference between provincial government expenditures in providing stumpage rights and the revenues gained by stumpage holders as the measure of the net subsidy.

- The ITA calculated the countervailable net subsidy for these stumpage programmes at 14.542% ad valorem in its preliminary subsidy determination.

(B) FEDERAL PROGRAMMES:

1. Certain Types of Investment Tax Credits

- For "qualified property" (i.e, new plant and equipment used in processing) the basic ITC is 7% with an additional 3% or 13% for qualified property in certain regions.

- For "certified property" (i.e., qualified property in regions characterized with high unemployment and low per capita income), the ITC rate is 50%.

- There is also a "scientific research" ITC with a base rate of 20% (35% for small Canadian companies, 30% for expenditure in certain regions), and a "qualified transportation equipment" ITC.

- A final "research and development" ITC of 10% (20% to small companies) was also found by the ITA.

- The ITA found that the non-basic rates of the "qualified property" ITCs are countervailable as they are claimed on assets in specific regions. Additionally, the ITA found the 30% "scientific research" ITC rate was found countervailable for the same reason.

- ITA calculated a net subsidy rate of 0.047% ad valorem.

2. Programme for Export Market Development (PEMD)

- The ITA found PEMD interest free loans for export promotion travel to be an export subsidy and thus countervailable.

- ITA found this programme's net subsidy at 0.001% ad valorem.

3. Regional Development Incentive Programme (RDIP)

- Through its mandate to promote stable employment in areas of Canada suffering from chronic low employment RDIP provided funds to the softwood lumber industry through 1985.

- The ITA found that this programme's benefits were limited to companies in specific regions and are countervailable.

- The ITA therefore determined the net subsidy rate to be 0.048% ad valorem.

4. Industrial and Regional Development Programme (IRDP)

- This programme classified each of Canada's 260 census districts into one of four tiers. Tier I represented the most economically advanced regions while Tier IV represented the most economically disadvantaged areas.

- Upon examining this programme DOC concluded that while the benefits (i.e., grants and loans to stimulate investment) in the Tier I areas were not countervailable due to general availability, the benefits above and beyond the Tier I rate evident in the other three Tier areas, were countervailable due to regional specificity.

- ITA found this programme's net subsidy at 0.145% ad valorem.

5. Community Based Industrial Adjustment Programme (CIAP)

- CIAP was designed to promote business investment in communities affected by serious industrial dislocations.

- ITA found this programme to be a countervailable due to its regional specificity, and calculated a net subsidy rate of 0.002% ad valorem.

(C) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

The following programmes were found to be limited to specific enterprises and industries, in specific regions, and judged to be countervailable by the ITA.

1. Agricultural and Rural Development Agreements (ARDA)

- ARDA was designed to promote economic development and alleviate social and economic disadvantages in certain rural regions (i.e., usually through grants). The ARDAs signed with Manitoba, B.C., the Yukon and the Northwest Territories, provided benefits to the softwood industry.

- ITA found this programme to be a countervailable due to its regional specificity, and calculated a net subsidy rate of 0.003% ad valorem.

2. General Development Agreements (GDAs)

- The GDAs are the comprehensive development agreements between the federal and provincial governments aimed a spurring regional development. Only the GDA subsidiary agreement on Manitoba Northern Development provided assistance to the softwood lumber industry.

- ITA found this programme to be a countervailable due to its regional specificity, and calculated a net subsidy rate of 0.002% ad valorem.

3. Economic and Regional Development Agreements

- ERDAs are essentially continuations of the GDAs. The Saskatchewan Northern Development Subsidiary Agreement did provide benefits to producers of the products under investigation.

- ITA found this programme to be a countervailable due to its regional specificity, and calculated a net subsidy rate of 0.001% ad valorem.

4. Sawmill Improvement Programme (SIP)

- SIP is conducted by Forintek, a private, non-profit entity incorporated as Canada's "Wood Products Research Institute".

- Forintek receives its operating funds from membership fees from member companies, contracts and contributions of Federal and Provincial governments. Forintek members account for about 75% of Canada's lumber production.

- Under SIP Forintek conducts confidential studies on the efficiency of mill operations.

- ITA found the government's funding of Forintek's studies countervailable as this research benefits specific enterprises.

- The ITA found the net subsidy at 0.002% ad valorem.

(D) PROVINCIAL PROGRAMMES:

The following programmes were found to be limited to specific enterprises and industries, in specific regions, and judged to be countervailable by the ITA.

1. British Columbia Critical Industries Act

- This programme aids industries designated as "critical" by the provincial government. "Critical" can refer either to the economic conditions facing that industry or the importance of that industry to the economy.

- As this programme leaves the designation of "critical to the government's discretion the ITA found this programme to be countervailable due to specificity. The programme's net subsidy was calculated to be 0.006% ad valorem.

2. British Columbia Low-Interest Loan Assistance

- The scope of this programme was found to be limited to specific regions. Additionally, the terms of the programme were determined to be inconsistent with commercial considerations.

- ITA found this programme's subsidy to be 0.001% ad valorem.

3. Québec Tax Abatement Programme

- This programme was found to provide tax incentives for business investments in specific regions of Québec.

- ITA found this programme's subsidy to be 0.001% ad valorem.

4. Québec Export Promotion Assistance (APEX)

- Under APEX grants are awarded to companies for the promotion of Québec goods and services outside Canada.

- The ITA concluded that APEX is countervailable export subsidy, and that the products under investigation have benefitted from this programme.

- ITA calculated this subsidy to be 0.001% ad valorem.

5. Québec Assistance to and by The Forest Salvage, Management and Development Corporation of Québec (REXFOR)

- REXFOR receives funding from the Québec and Federal governments and funds the Québec forestry industry through loans and equity transfusions.

- REXFOR's funding to the industry has included a significant equity transfusion to BEQ (an affiliate of REXFOR) for the purchase and reorganization of six sawmills.

- ITA found this to be countervailable as these benefits were limited to a specific enterprise.

- ITA found this programme's subsidy to be 0.173% ad valorem.

6. Québec Industrial Development Corporation (SDI) Export Expansion Programme

- The ITA concluded that while the financing assistance and development assistance programmes of the SDI were neither region specific, nor inconsistent with commercial considerations, the export expansion programme was a countervailable export subsidy.

- The export expansion programme offered interest cost reimbursements contingent on export performance.

- ITA calculated this programme's net subsidy to be 0.012% ad valorem.

7. Québec Lumber Industry Consolidation and Expansion Programme

- This programme provides 60% to 95% of the cost for engineering and management consulting to wood processing facilities.

- ITA found this programme to be countervailable due to its specificity, and calculated its net subsidy to be 0.007% ad valorem.

II. PROGRAMMES PRELIMINARILY DETERMINED NOT TO CONFER A SUBSIDY

(A) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

1. Forestry Development Agreement for Improvement of Crown Land

- The federal and provincial governments have signed forest development agreements under GDAs, ERDAs and ARDAs.

- As the ITA determined that since the benefits of the silviculture, reforestation, forest management and administrative support elements of this programme accrue to the owners of the forest lands -- and not the producers of the goods under investigation -- these benefits are not countervailable.

- Furthermore, as the research resulting from this programme is available to the public, and as the benefits of this programme are available to all private landowners, the ITA found that this programme is not countervailable.

2. Newfoundland Rural Development Agreement

- This programme was designed to promote the small industrial sector in rural Newfoundland.

- As this GDA subsidiary agreement is not limited to a specific industry or locale within Newfoundland, it was found not countervailable.

3. Rail Transportation Facilities for Lumber Industry

- The ITA found that there were no instances of Canadian railroads providing preferential benefits to, or facilities for, the softwood lumber industry.

- This programme is not limited to a specific industry or region and is therefore not countervailable.

4. Newfoundland Rural Development Subsidiary Agreement

- This programme was designed to promote manufacturing operations in a wide range of Newfoundland industries.

- As this ERDA subsidiary agreement is not limited to a specific industry or locale within Newfoundland, it was found not countervailable.

5. Forintek Research and Development

- While Forintek's projects were undertaken with government funds the results were made publicly available and therefore benefit more than a specific industry.

(B) PROVINCIAL PROGRAMMES:

1. Québec Industrial Development Financing and Development Assistance Programme

- The ITA concluded that the grant, loan, loan guarantee and equity protection programmes administered by SDI were neither region specific, nor limited to a specific enterprise or industry, or groups thereof.

2. British Columbia Forest Stand Management Programme

- This programme assists individuals on welfare in acquiring skills in forestry management.

- The benefits of this programme do not benefit any specific enterprise or industry, or group thereof.

3. British Columbia Small Business Venture Capital Programme

- This programme encourages the investment in the equity capital of small businesses in B.C..

- As this programme is not limited to any specific enterprise or industry, or group thereof, the ITA found it not countervailable.

4. Alberta Research Projects for Forest Industry.

- As the results of such projects are publicly available, this programme was found not countervailable.

III. PROGRAMMES PRELIMINARILY DETERMINED NOT TO BE USED:

(A) FEDERAL PROGRAMMES:

1. Special Areas Act
2. Forest Industry Renewable Energy Programme

(B) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

1. Prince Edward Island Comprehensive Development Plan

(C) PROVINCIAL PROGRAMMES:

1. British Columbia Preferential Rail Rates
2. British Columbia Market Development Assistance
3. Québec Industrial Development Corporation Programme to Promote the Export of Products and Services
4. Québec Laws Concerning Forest Credit
5. Québec Reimbursement of Real Estate Taxes
6. British Columbia Income Tax Holidays
7. British Columbia Development Corporation Industrial Parks
8. Alberta Timber Salvage Programme

IV. PROGRAMMES WHICH ITA NEEDS ADDITIONAL INFORMATION:

1. Fort Nelson Extension in British Columbia

V. PROGRAMMES PRELIMINARILY DETERMINED NOT TO EXIST:

1. Québec Office of Planning and Development Exports Assistance Programme.

IX. FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION: CERTAIN FRESH CUT FLOWERS FROM CANADA (STANDARD CARNATIONS FROM CANADA)

BACKGROUND:

- On May 21, 1986, a petition for a countervailing duty investigation against Certain Fresh Cut Flowers from Canada was filed with the U.S. Department of Commerce (DOC).

- On January 20, 1987, the ITA issued notice of an affirmative final determination of subsidy. The U.S. Customs Service was directed to require a cash deposit or bond of 1.47% ad valorem for each entry of fresh cut miniature (spray) carnations from Canada. (Note: Unsworth Greenhouses Ltd. was excluded from this determination).

- On February 22, 1993, the DOC advised the Government of Canada of its intent to revoke the countervailing duty order. In accordance with section 355.25 (d) (4) of the DOC regulations (19CFR 355.25 (d) (4), if no interested party has requested an administrative review of an order or suspended investigation for four consecutive anniversary months, the DOC will publish in the Federal Register a notice of intent to revoke the order or the suspended investigation. As a result, if no interested party submits written objections to the DOC's intent to revoke the order, or submits a request for an administrative review, by March 31, 1993, the DOC will revoke the order.

KEY ISSUE:

- An issue in this investigation was the trivial amount of Canadian exports of the products under investigation (some $40,000). Canada was caught up in an investigation aimed at other suppliers in Central and South America. However, Canada could not be excluded from this investigation because of the mandatory cumulation provision of U.S. law. The negligible imports provision of the Omnibus Trade and Competitiveness Act of 1988 may, depending upon its application, permit Canada to escape similar actions in the future.

I. PROGRAMME DETERMINED TO CONFER A SUBSIDY:

1. Ontario Greenhouse Energy Efficiency Programme (GEEP)

- Pursuant to Section 5 of the Ontario Ministry of Agriculture and Food Act, GEEP was created to assist greenhouse growers with the capital costs of certain energy saving equipment and materials. Since this programme is limited to Ontario greenhouses which have a minimum gross income of $12,000, and are producers food or ornamentals, it was determined that this programme is limited to a specific enterprise or industry or group of enterprises or industries.

- Using the Bank of Canada's discount rate as a long term Canadian bond rate, and by dividing the value of the benefits provided by GEEP to the individual company by the sales of the individual company (i.e., Renkema), the U.S. DOC calculated an estimated subsidy of 1.47%. The other Canadian producer involved, Unsworth, was excluded from the determination because the value of the grant received under GEEP was less than 0.5% (i.e., de minimis).

II. PROGRAMMES DETERMINED NOT TO CONFER A SUBSIDY:

(A) Canada's Farm Improvement Loan Programme

- This loan guarantee programme was found to be available to the entire agricultural sector and hence was determined to be not limited to a specific industry and therefore not countervailable.

(B) Ontario Farm Tax Reduction Programme

- This programme was found to be open to all farmers and hence was determined to be not limited to a specific industry and thus not countervailable.

(C) Canadian Investment Tax Credits Programme

- The basic 7% tax credit for qualified property claimed by the subject firms, was found to be not limited to a specific enterprise or industry, and thus not countervailable.

III. PROGRAMMES DETERMINED NOT TO BE USED:

(A) Federal Programmes:

1. Programme for Export Market Development
2. Promotional Projects Programme

(B) Joint Federal - Provincial Programmes:

1. Agricultural and Rural Development Agreements
2. Economic and Regional Development Agreements
3. General Development Programmes
4. Crop Insurance

(C) Provincial Programmes:

1. Ontario Development Corporation
2. Provincial Crop Insurance
3. Alberta Beginning Farmer Assistance Programme
4. B.C. Greenhouse Farm Income Insurance

5. B.C. Agricultural Land Development Assistance.

IX. FINAL NEGATIVE COUNTERVAILING DUTY DETERMINATION THERMOSTATICALLY CONTROLLED APPLIANCE PLUGS AND INTERNAL PROBE THERMOSTATS FROM CANADA

BACKGROUND:

- On July 22, 1988, DOC issued a Preliminary Affirmative Countervailing Duty Determination for Thermostatically Controlled Appliance Plugs and Internal Probe Thermostats from Canada, Malaysia and Taiwan.
- On July 22, 1988 and August 10, 1988 the Government of Canada and ATCO Controls of Canada (the only Canadian company covered by this investigation), submitted supplementary responses.
- In light of these supplementary responses, and ITA's investigation of them, it was determined that ATCO had not applied for, nor received, any benefits from the programmes under investigation.
- On December 13, 1988, ITA issued a Final Negative Countervailing Duty Determination in this case. The investigation was terminated.

KEY ISSUE:

- The low threshold for initiating an investigation was a key feature of this investigation. Despite the minor amounts of Canadian exports, and despite the lack of solid evidence with which to suspect subsidization, DOC launched a full investigation.
- As Canada was one of three countries named in the investigation, along with Taiwan and Malaysia, Canada was could not avoid an affirmative preliminary injury determination despite the low Canadian market penetration. (i.e., the combined imports from the other two countries made a negative determination more unlikely).

I. PROGRAMMES DETERMINED NOT TO BE USED:

(A) Federal Programmes:

1. Certain Types of Investment Tax Credits
2. Community-Based Industrial Adjustment Programme
3. Programmes of Export Market Development and Promotional Projects
4. Regional Development Incentives Programme
5. Industrial and Regional Development Incentives Programme
6. Export Credit Financing

(B) Joint Federal-Provincial Programmes:

1. Agricultural and Rural Development Agreements
2. General Development Agreements
3. Economic and Regional Development Agreements

(C) Provincial Programmes:

1. Ontario Development Corporation

XI. FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION NEW STEEL RAIL, EXCEPT LIGHT RAIL, FROM CANADA

BACKGROUND:

- On September 26, 1988, DOC received a petition from Bethlehem Steel Corporation, alleging that manufacturers, producers or exporters of steel rails in Canada, were provided with benefits countervailable under U.S. trade law. Only two Canadian companies were subsequently found to produce the product under investigation (i.e., Algoma Steel of Sault Ste.-Marie, Ontario and Sydney Steel Corporation (SYSCO), Sidney, Nova Scotia).

- On February 24, 1989, DOC issued a preliminary affirmative countervailing duty determination. A net subsidy rate of 103.55% ad valorem was found against steel rails from Sysco. Algoma was found to have only received de minimis subsidies.

- On March 13, 1989, this CVD investigation was aligned with a contemporaneous U.S. antidumping investigation into Steel Rail Imports from Canada.

- On July 26, 1989, Commerce issued a final determination of subsidy of 113.56% ad valorem for Steel Rails from Sysco. The final determination excluded steel rails from Algoma as the subsidies conferred to this company received were confirmed to be de minimis (i.e., 0.24%). However, Algoma was found to be dumping steel rails into the United States and was assessed an antidumping penalty of 38.79%. Various elements of provincial participation in SYSCO constituted the major portion of the countervailable benefits.

- SYSCO and Algoma requested binational panels under Chapter 19 of the FTA to review the DOC final determination of subsidy in the SYSCO case and of dumping by Algoma. The two companies also requested binational panel reviews of the ITC's finding that Canadian steel rail imports were injuring the U.S. industry.

- In June 1990, the panel found that the DOC countervailing duty determination against SYSCO was in accordance with U.S. trade law. On August 13, 1990, the panel found that the injury determinations by the ITC against SYSCO and Algoma were also in accordance with U.S, trade practice. On August 30, 1990, the binational panel upheld the DOC final determination of dumping by Algoma Steel.

I. PROGRAMMES FOUND TO CONFER SUBSIDY:

(A) FEDERAL PROGRAMMES:

1. Debenture Guarantees provided to Sysco.

   - This loan guarantee programme was determined to be limited to a specific enterprise (i.e., Sysco.).

- The ITA determined that Sysco was an "uncreditworthy" firm and thus was commercially unable to obtain private loans without a premium interest rate. The guarantees were therefore found to be inconsistent with commercial considerations.

- As a result, the DOC determined that this programme provided a countervailable subsidy of 1.13% ad valorem for Sysco.

2. Forgiven Wharf Loan to Sysco.

- The ITA determined that by forgiving this loan, originally provided to fund the construction a loading wharf, the federal government had provided a countervailable benefit to a specific enterprise.

- The ITA determined a net subsidy rate of 2.36% ad valorem to Sysco, from this programme.

3. Regional Development Incentive Programme (RDIP)

- This grant and loan guarantee programme designed to promote employment in less economically developed regions, was found to be countervailable because benefits are limited to companies within a specific region.

- The ITA examined four particular grants to Sysco, and two grants to Algoma. They determined a net subsidy rate of 1.10% ad valorem for Sysco and 0.03% ad valorem for Algoma.

4. Certain Investment Tax Credits (ITCs)

- Using the precedence of the "Groundfish from Canada" case, the ITA determined that tax credit rates in excess of the Canadian basic rate of 7% are countervailable.

- The ITA found that as Sysco. was a provincially owned corporation it was not liable for federal tax, and was hence not eligible for ITCs.

- Algoma, however, was determined to received the "qualified property" ITC as it was located in a specific region (i.e., Northern Ontario). The extra 3% provided by this "qualified property" ITC was found countervailable due to its regional specificity.

- The ITA calculated a net subsidy rate of 0.02% ad valorem for Algoma.

(B) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

1. General Development Agreements (GDAs)

- GDAs are umbrella development agreements that provide the legal framework for provincial and federal departmental co-operation.
- The ITA found three subsidiary agreements under the GDA between the Federal and Nova Scotia governments to be countervailable.
- The ITA determined that certain funds under the three GDA subsidiary agreements were targeted specifically for Sysco. Therefore both the contributions of the federal and Nova Scotia governments were countervailable due to their specificity.
- The ITA estimated a net subsidy of 25.48% ad valorem to Sysco under this programme.

2. Economic and Regional Development Agreements (ERDA)

- The ITA determined that ERDAs are essentially the descendants of the GDA programmes.
- The ITA determined that two subsidiary agreements under the ERDA between the Government of Canada and the Government of Nova Scotia affected Sysco.
- While one of the subsidiary agreements provided funds directly for the modernization of Sysco's production facility, the other provided for market feasibility studies throughout the province of Nova Scotia.
- As the first agreement's assistance was directed specifically Sysco., both the contributions of the federal and Nova Scotia governments were found countervailable.
- In the second agreement though, only the federal contribution was found countervailable as these funds were limited to a region of Canada (i.e., Nova Scotia). The provincial funds were not countervailed as they were not limited to a specific industry or region of Nova Scotia.
- ITA calculated the net subsidy of this programme to Sysco at 6.70% ad valorem.
- The ITA found that no assistance under the Ontario ERDA has gone to Algoma.

3. Iron Ore Freight Subsidy to Algoma

- Under the Canada-Ontario Subsidiary Agreement on Tourism Development, the Ontario and Federal Governments provided grants to the Algoma Canyon Railway (ACR) so that it could charge Algoma Steel lower freight costs. By lowering freight rates Algoma Steel was persuaded to withdraw its plans to abandon its contract with ACR. This arrangement allowed the ACR to remain in operation and to continue its sightseeing tourist service.

- DOC determined that as these grants provided an indirect benefit to a specific enterprise (i.e., Algoma Steel) they are countervailable.

- The net subsidy rate was found to be 0.19% ad valorem.

(C) PROVINCIAL PROGRAMMES:

NOVA SCOTIA:

1. **Grants to Sysco. for the Payment of Principal and Interest on Debentures**

- DOC determined these grants (which had been provided since 1982) to be non-recurring grants to a specific enterprise, and hence countervailable.

- The net subsidy to Sysco was found to be 22.73% ad valorem

2. **Operating Grants to Sysco.**

- The ITA found that the operating grants provided to Sysco. by the Government of Nova Scotia, were countervailable due to their specificity. They were also found to be non-recurring.

- The ITA calculated the net subsidy to Sysco under this programme at 19.34% ad valorem.

3. **Long-Term Loan Guarantees Provided to Sysco.**

- The ITA found that this programme was countervailable for the following reasons: the Government of Nova Scotia loan guarantees were inconsistent with commercial considerations; Sysco was "uncreditworthy"; and these benefits were limited to a specific enterprise.

- The ITA calculated the net subsidy to Sysco under this programme at 12.83% ad valorem.

4. **Equity Infusions**

- As the ITA found Sysco. "unequityworhty", Nova Scotia's equity infusions to Sysco. -- which provided cash for Sysco. to redeem loans; continue capital construction; and convert debt to equity -- were found to be countervailable (i.e., the ITA found this programme inconsistent with commercial considerations).

- The ITA calculated the net subsidy to Sysco under this programme at 21.89% ad valorem.

II. PROGRAMMES DETERMINED NOT TO CONFER SUBSIDIES:

(A) FEDERAL PROGRAMMES:

1. **Research Grant Received by Sysco.**

   - Under the Industrial Energy Research and Development Programme the Government of Canada provided Algoma with a grant to study sulphur reduction.

   - As the results of this study were made available to the general public this programme was found to be not countervailable.

(B) PROVINCIAL PROGRAMMES:

1. **Short-term Loan Guarantees**

   - The ITA found that the interest rates on the Government of Nova Scotia guaranteed loans were not on terms more favourable than the interest rate on 90-day commercial paper in Canada (i.e., the benchmark rate). Therefore this programme was found to not confer a subsidy and was not countervailable.

III. PROGRAMMES DETERMINED NOT TO BE USED:

(A) FEDERAL PROGRAMMES:

1. Industrial and Regional Development Programme (IRDP)
2. Loans under the Enterprise Development Programmes (EDP)
3. Programme for Export Market Development (PEMD)
4. Promotional Projects Programme (PPP)
5. Federal Expansion and Development/Northern Ontario (FEDNOR)
6. Community-Based Industrial Adjustment Programme (CIAP) Grants
7. Export Credit Financing
8. Defense Industry Productivity Programme

(B) JOINT FEDERAL - PROVINCIAL PROGRAMMES:

1. Mineral Development Agreement (MDA) Benefits to Algoma

(C) PROVINCIAL PROGRAMMES:

1. Ontario Development Corporation Export Support Loans, Other Loans and Loan Guarantees
2. Provision of Electricity by Ontario Hydro to Algoma
3. Income Tax Exemption for Sysco

XII. FINAL AFFIRMATIVE COUNTERVAILING DUTY DETERMINATION: FRESH, CHILLED AND FROZEN PORK FROM CANADA

BACKGROUND:

- In the 1985 Live Swine countervailing investigation, the Department of Commerce found that not only were imports of live swine countervailable but also imports of fresh, chilled and frozen pork.

- The DOC made this decision for both live swine and fresh, chilled and frozen pork, as they viewed these two commodities as being part of one integrated industry. By doing so they deemed that any subsidies to swine growers were automatically enjoyed by pork producers.

- The Canadian Meat Council took this decision to the CIT and won a reversal of the assumption that pork and swine were one single industry. CIT ruled that subsidies to swine cannot be assumed to be fully passed through to pork. DOC was instructed to complete a full upstream subsidy investigation to determine the extent to which the subsidy to the live swine industry benefitted the pork industry.

- However, as the ITC had found that the U.S. pork industry was not injured, or threatened with injury, by imports of fresh, chilled and frozen pork from Canada, this CIT decision became moot. The ITC determination had exempted pork products from the countervailing duty imposed under the 1985 investigation. (Live swine imports were found to cause injury and were countervailed.)

- Congress, sympathetic to the U.S. industry, was persuaded to amend U.S. law to, in effect, codify the methodology ruled against by the CIT and thus overturn the Canadian industry's successful court challenge.

- On January 5, 1989, the National Pork Producers Council (NPPC), utilizing the newly amended law, filed a petition with the U.S. Department of Commerce (DOC) requesting a countervailing duty (CVD) investigation of fresh, chilled and frozen pork from Canada. This petition alleged that pork production in Canada benefited from 75 federal and provincial programmes.

- On January 27, 1989, the U.S. Department of Commerce (DOC) initiated a CVD investigation into fresh, chilled and frozen pork products from Canada. In launching this investigation Commerce declined to investigate 36 programmes, including those designed to assist grain growers. 39 programmes remained covered by the investigation.

- DOC, despite representations made by the Canadian Government for national coverage, confined the investigation to 5 provinces (Québec, Ontario, Manitoba, Saskatchewan and Alberta). These 5 provinces accounted for well over 90% of pork production and exports. This reduction in scope further reduced the number of programmes under investigation to 16.

- On February 15, 1989, the U.S. International Trade Commission (ITC) made an affirmative preliminary injury determination (by a 3 to 2 vote).

- On March 10, 1989, DOC declared this case "extraordinarily complicated", thus extending the deadline for the preliminary determination to May 1, from the original March 31 date. DOC referred to the large number of programmes under investigation and the complicating aspects of the new so called "automatic passthrough" section 1313 provision of the Omnibus Trade Bill (OTB).

- On May 2, 1989, DOC issued the following preliminary affirmative CVD determination:

  $0.035/lb. Cdn., or $0.077/kg Cdn..

- Following verification in late May and early June; a Public Hearing into the case in late June; the submission of an Aide-Mémoire and Diplomatic Note by the Canadian Embassy contesting the PD; and numerous representations by legal counsel for both respondents and petitioners, DOC issued on July 18, 1989 the following final determination:

  $0.036/lb. Cdn., or $0.079/kg Cdn..

- In December 1989, it was agreed by Canada and the U.S. that a GATT panel would examine a Canadian complaint about the admissibility under GATT of the U.S. countervailing duties on pork. On Augusts 3, 1990, the GATT panel ruled that the U.S. countervailing duty on pork was not in accordance with its GATT obligations since the DOC unjustifiably concluded that subsidies provided to live swine producers were automatically passed through to producers of pork products. It requested that the United States either reimburse the countervailing duties corresponding to the amount of the subsidies granted to producers of swine or to make a subsidy determination which met the requirements of Article VI:3 and reimburse the duties to the extent that they exceed an amount equal to the subsidy so determined to have been granted to the production of pork[80].

- After blocking adoption of the GATT panel report for almost a year, the U.S. allowed adoption in July 1991 after Canada had won the Extraordinary Challenge of the FTA binational panel decision on pork products.

KEY ISSUES:

- In 1988 the U.S. Congress passed the Omnibus Trade Bill (OTB). Section 1313 of that bill was inserted specifically to reverse the 1985 ruling of the CIT which stated that DOC must perform a full upstream subsidy investigation to determine to what extent, if any, subsidies to live swine benefit pork producers.

- Section 1313 explicitly states that in the case of primary agricultural products subsidies to the primary products (e.g., live swine) are deemed to be automatically passed through to producers of the processed agricultural products (e.g., pork).

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[80] General Agreement on Tariffs and Trade. Basic Instruments and Selected Documents. No.38, July, 1992. p.47.

- The NPPC's petition specifically requested that Commerce apply Section 1313 in this investigation.

- The Canadian Government has expressed its view that Section 1313 may be in contravention of the U.S.'s obligations under the GATT that demand contracting parties determine the benefits of a subsidy, direct or indirect, not merely deem that they exist.

- Another important aspect of this case was the determination by Commerce that the National Tripartite Red Meat Stabilization Plan was countervailable.

- The Government of Canada argued that agricultural income stabilization is generally available in Canada.

I. PROGRAMMES DETERMINED TO CONFER A SUBSIDY:

(A) FEDERAL PROGRAMMES:

1. Agricultural Stabilization Act (ASA)/National Tripartite Red Meat Stabilization Programme.

- At the time, in determining specificity DOC considered the following 3 factors:

  (1) the extent to which a government acts through programme design (i.e., through its legislative source or implementing regulations) to limit the availability of the programme;

  (2) the number of enterprises or industries actually using the programme, which may include the examination of disproportionate or dominant users; and

  (3) the extent to which the government exercises discretion in making the programme available.

- In the 1985 Live Swine case, the ASA was found countervailable due to its violation of factor (1). The Tripartite Programme under consideration in this case was found to not violate factor (1).

- However, as there are only 9 Tripartite programmes out of an "innumerable" number of agricultural commodities; as Asparagus producers were refused a Tripartite Plan; and as Cherry and Corn Agreements have yet to be drawn up because of administrative difficulties, DOC found Tripartite did violate factor (2). Therefore Tripartite was found countervailable due to its provision of benefits being limited to a specific industry, or group of industries. This determination was rendered regardless of the eligibility of all products under other manifestations of the ASA.

- Tripartite was also found countervailable due to its violation of factor (3). The lack of any explicit or standard criteria for evaluating tripartite agreement requests; the variation in the level of price stabilization (i.e., 85% for beef vs. 95% for hogs); and the unequal terms of the plan even among Canadian swine producers (i.e., Québec alone has been allowed to maintain a complementary provincial programme), were cited as factor (3) violations.

- DOC calculated the net countervailable subsidy to be $0.012468/lb. Cdn., or $0.027486/kg. Cdn.

2. Feed Freight Assistance (FFA)

- Under this programme benefits are provided for transporting and storing feed.
- As this programme is limited to feed grain users in BC and Eastern Canada, DOC determined that this programme was limited to a specific enterprise(s) and/or industry(ies), and thus countervailable.
- DOC calculated the net countervailable subsidy to be $0.000016/lb. Cdn., or $0.000034/kg. Cdn..

3. Western Diversification Programme

- This programme was designed to promote the economic diversification of western Canada.
- As this programme is limited to Western Canada, it was found countervailable due to its regional specificity.
- DOC found that a non-repayable contribution had been disbursed under this programme to a hog/pork related project during the fiscal year 1988-89.
- DOC calculated the net subsidy of this grant to be $0.000048/lb. Cdn., or $0.000105/kg. Cdn..

4. Western Transportation Industrial Development Programme

- This programme was designed to promote industrial investment and economic development in Western Canada.
- As this programme is limited to Western Canada, it was found countervailable due to its regional specificity.
- This programme expired in June 1988 and was incorporated into the Western Diversification Programme.
- DOC has calculated the net countervailable subsidy to be $0.000025/lb. Cdn., or $0.000054/kg. Cdn.

(B) JOINT FEDERAL/PROVINCIAL PROGRAMMES:

1. Canada/Québec Subsidiary Agreement on Agri-Food Development

- This Agreement was signed pursuant to an Economic and Regional Development Agreement (ERDA) between the federal and Québec provincial government.
- There were a number of programmes under this Subsidiary Agreement, including a Technological Innovations and New Initiatives - Agricultural Production programme.
- As the benefits of this programme are limited to Québec, DOC determined that the federal government's portion of this programme's funding was countervailable due to its specificity.
- DOC calculated the net countervailable subsidy to be $0.000009/lb. Cdn., or $0.000019/kg. Cdn..

(C) PROVINCIAL PROGRAMMES:

1. Alberta Crow Benefit Offset Programme

- Under this programme assistance is provided to feed grain producers in Alberta; feed grain produced outside of Alberta but sold in Alberta; and feed grain produced in Alberta to be fed to livestock on the same farm.
- As this programme is limited to feed grain users DOC determined that this programme was limited to a specific enterprise(s) and/or industry(ies) and thus countervailable.
- DOC calculated the net countervailable subsidy to be $0.001464/lb. Cdn., or $0.003228/kg. Cdn..

2. Alberta Department of Economic Development and Trade Act

- This programme is designed to aid in the promotion of economic development in Alberta.
- DOC concluded that as they were unable to carry out an adequate review of this programme at verification, they would have to rely on the best information available. Such information led them to find this programme to be countervailable due to specificity.
- DOC found that the loan and loan guarantee aspects of this programme were also inconsistent with commercial consideration and thus countervailable (they also noted that 75% of all loans under this programme went to Gainers).
- DOC calculated the net countervailable subsidy to be $0.000008/lb. Cdn., or $0.000018/kg. Cdn..

3. Alberta Grant to Fletcher's Fine Foods

- This grant was discovered during verification, and found countervailable due to targeting to a specific firm.

- DOC calculated the net countervailable subsidy to be $0.000030/lb. Cdn., or $0.000066/kg. Cdn..

4. Ontario Farm Tax Rebate Programme

- This replaced the Ontario Farm Tax Reduction Programme, which partially offset the tax costs of operating a farm in Ontario.

- As this programme is limited to a specific enterprise(s) and/or industry(ies) in specific regions (i.e., the tax rebate conditions vary across the province) DOC found it to be countervailable.

- DOC calculated the net countervailable subsidy to be $0.000009/lb. Cdn., or $0.000020/kg. Cdn..

5. Ontario (Northern) Livestock Improvement and Transportation Assistance Programme

- This programme is designed to assist livestock producers in Northern Ontario through herd improvement.

- As DOC determined that this programme is limited to livestock producers in Northern Ontario, the benefits provided are limited to a specific enterprise(s) and/or industry(ies), and thus countervailable.

- DOC calculated the net countervailable subsidy to be less than $0.000001 per either pound or kilograms.

6. Ontario Pork Industry Improvement Plan (OPIIP)

- There are a number of sub-programmes under OPIIP. As most of these sub-programmes provide assistance only to swine growers, DOC determined that this programme (with the exception of the sub-programmes dealing with Research and Education Grants) was countervailable due to its specificity.

- DOC calculated the net countervailable subsidy to be $0.001054/pound Cdn., or $0.002324/kgs. Cdn..

7. Ontario Marketing Assistance Programme for Pork (MAPP)

- DOC determined that this programme is designed to improve domestic market prospects for pork sales, and to enhance global competitiveness.

- As this programme provided assistance to pork processors only, DOC determined that MAPP was countervailable due to its specificity.

- DOC calculated the net countervailable subsidy to be $0.000278/pound Cdn., or $0.000613/kgs Cdn..

8. Québec Farm Income Stabilization Insurance Programme

- This programme guarantees a net annual income to participating agricultural product growers.

- Funding for this programme is two-thirds provided for by the provincial government and one-third by the enrolled producer.

- Stabilization payments received from another source (i.e., Tripartite Plans) are deducted from payments under this programme.

- As some agricultural commodities are not included in this programme (e.g., eggs, dairy products and poultry), DOC determined that this programme was countervailable due to its specificity.

- DOC calculated the net countervailable subsidy to be $0.019582/pound Cdn., or $0.043170/kgs Cdn..

9. Québec Productivity Improvement and Consolidation of Livestock Production Programmes (QPICLP)

- This programme was designed to assist small livestock growers. Of the eight sub-programmes under QPICLP, swine growers are eligible for only one programme: the Farm Building Improvements Programme.

- As this programme is limited to livestock producers, DOC determined it to be countervailable by nature of its specificity.

- DOC calculated the net countervailable subsidy to be $0.000005/pound Cdn., or $0.000010/kgs Cdn..

10. Québec Regional Development Assistance Programme (Livestock Transportation Sub-programme)

- Under this programme Québec is divided into 12 regions. Livestock producers in 5 of these regions are eligible for government financial assistance in the transportation of livestock to slaughterhouses.

- As this programme is limited to livestock farmers in specific regions of Québec, DOC determined that the benefits provided were limited to a specific enterprise(s) and/or industry(ies), and therefore countervailable.

- DOC calculated the net countervailable subsidy to be $0.000011/pound Cdn., or $0.000025/kgs Cdn..

11. Saskatchewan Hog Assured Return Programme (SHARP)

- SHARP provided stabilization payments to Saskatchewan hog producers when prices fell below a "floor price".
- DOC determined that benefits under this programme are limited, in practice, to hogs and beef. Therefore this programme was countervailable by nature of its specificity.
- This programme terminated on March 31, 1991.
- DOC calculated the net countervailable subsidy to be $0.000639/pound Cdn., or $001408/kgs Cdn..

12. Saskatchewan Livestock Investment Tax Credits

- As the benefits of this programme (i.e., tax credits per head of livestock) are limited to slaughter livestock producers, DOC determined that this programme was countervailable.
- DOC calculated the net countervailable subsidy to be $0.000327/pound Cdn., or $0.000721/kgs Cdn..

13. Saskatchewan Livestock Facilities Tax Credits

- As this programme was limited to investment in livestock production facilities (i.e., it paid for 14.25% of total costs), DOC determined that this programme was countervailable by nature of its specificity.
- DOC calculated the net countervailable subsidy to be $0.000161/pound Cdn., or $0.000355/kgs Cdn..

II. PROGRAMMES DETERMINED NOT TO BE COUNTERVAILABLE:

(A) FEDERAL PROGRAMMES:

1. Special Canada Grains Programme (SCG)

- SCG provides grants to grain, oilseed, special crop and honey producers who have experienced dramatic drops in income due to international agriculture policies.
- Because this programme is based upon seeded acreage of eligible crops, DOC determined that it did not provide a countervailable benefit to the production or export of pork.

- To determine a subsidy to hog production an upstream subsidy investigation would have to be conducted, and as petitioners did not make sufficient allegations in that regard such an investigation was not undertaken.

(B) JOINT FEDERAL/PROVINCIAL PROGRAMMES:

1. Research Projects under the Canada/Québec Subsidiary Agreement on Agri-Food Development

- As the results of this research are made public, it confers no countervailable benefit to Canadian hog producers.

2. Research under the Canada/Saskatchewan Agricultural Development Subsidiary Agreement

- As the results of this research are made public, it confers no countervailable benefit to Canadian hog producers.

(C) PROVINCIAL PROGRAMMES:

1. Alberta Processed Food Market Expansion Programme

- This programme was designed to increase consumer awareness of all agricultural products in the Alberta market.

- As the programme does not involve the U.S. market is was not found countervailable.

2. Alberta Food Processors' Promotion Assistance Programme

- This programme replaced the Alberta Processed Food Market Expansion Programme, and was designed to increase consumer awareness of all agricultural products in the Alberta market.

- As the programme does not involve the U.S. market is was not found countervailable.

3. MAPP Consumer Survey

- The Ontario ministry of Agriculture and Food commissioned this study of U.S. attitudes towards pork, the results of which are available both inside and outside Canada.

4. Research Grants under OPIIP

- As the results of this programme are generally available, both inside and outside Canada, DOC determined that this programme was not countervailable.

5. **Education Grants to the Ontario Pork Producers' Marketing Board under the OPIIP**

   - This programme helps to defray the costs of agricultural education in Ontario. As such the grants were not found countervailable.

6. **Grants to the Pork Producers' Marketing Boards**

   - DOC discovered during verification that some provincial governments funded the promotional campaigns of various provincial marketing boards.

   - As these campaigns dealt with markets other than the U.S. they were not found countervailable.

III. PROGRAMMES DETERMINED NOT TO BE USED:

(A) FEDERAL PROGRAMMES:

1. Export Expansion Fund

(B) JOINT FEDERAL/PROVINCIAL PROGRAMMES:

1. Canada/Alberta Subsidiary Agreement on Agricultural Processing and Marketing (APMA)
2. Canada/Alberta Livestock Drought Assistance Programme

(C) PROVINCIAL PROGRAMMES:

1. Alberta Livestock Assistance Programme
2. Alberta Red Meat Stabilization Programme
3. Alberta Grants to Pork Producers
4. Manitoba development Corporation
5. Manitoba Hog Income Stabilization Programme
6. Ontario Export Sales Aid
7. Ontario Small Food Processors Assistance Programme
8. Québec Meat Sector Rationalization Programme

XIII. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION: LIMOUSINES FROM CANADA

BACKGROUND:

- On July 24, 1989, the DOC received a petition from Southampton Coachworks Ltd., alleging that Canadian limousine imports into the U.S., were benefitting from countervailable subsidies.

- On August 9, 1989, Canadian authorities presented a diplomatic note to United States authorities arguing that a countervailing duty investigation should not be initiated on the grounds that the petition failed to provide evidence to support allegations that extended wheelbase limousines from Canada were subsidized, nor did it attempt to link subsidy and injury as required by Article 2:1 of the GATT Subsidies Code.

- On August 15, 1989, DOC announced it would initiate an investigation into these imports (54 Fed. Reg. 34805).

- On October 25, 1989, the DOC preliminary determined that "no benefits which constitute subsidies within the meaning of countervailing duty law are being provided to manufacturers, producers, or exporters in Canada of limousines" (54 Fed. Reg. 43444).

- On March 19, 1990, the DOC confirmed its preliminary determination with regard to countervailing duties (55 Fed. Reg. 11035). The countervailing duty investigation was thus terminated.

KEY ISSUE:

- The low threshold upon which Commerce will initiate a countervailing duty investigation, was clearly illustrated by this case.

I. PROGRAMMES COMMERCE ANNOUNCED IN ITS NOTICE OF INITIATION IT WOULD BE INVESTIGATING:

1. Investment Tax Credits (ITCs)
2. Regional Development Incentive Programme (RDIP)
3. Industrial and Regional Development Programme (IRDP)
4. Loans under the Enterprise Development Programme
5. Promotional Projects Programme (PPP)
6. Programme for Export Market Development (PEMD)

XIV. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION: PORTABLE SEISMOGRAPHS FROM CANADA

BACKGROUND:

- On February 18, 1992, the DOC received a petition from GeoSonic Inc., alleging that Canadian portable seismograph imports into the U.S. were benefiting from countervailable subsidies.
- On March 9, 1992, DOC announced it would initiate an investigation into these imports.
- DOC initiated investigations of nine programmes of which:
  - o eight were federal;
  - o one was a provincial (Ontario);
  - o four federal programmes were found to confer a countervailable subsidy.
- On March 30, 1992 the United States ITC made an affirmative preliminary injury determination.
- On May 11, 1992, DOC preliminarily determined that Nomis Computer Systems Corp. benefited from a net subsidy of 32.40% ad valorem. Instantel Inc., the principal Canadian exporter, was excluded from the preliminary determination because the estimated net subsidy for this company was 0.02% ad valorem, or de minimis.
- The case was terminated by withdrawal of petition by the petitioner.

I. PROGRAMMES DETERMINED TO CONFER A SUBSIDY:

A. FEDERAL PROGRAMMES:

1. Programme For Export Market Development (PEMD)

- The PEMD was restructured in 1987 to include the Promotional Projects Programme (PPP). The new programme was either industry-initiated (former PEMD) or government-initiated (former PPP). The industry initiated programme was to provide interest-free loans to industries requesting assistance in export market development. The government initiated component was responsible for sponsoring and organizing trade fairs and missions.
- An estimated net subsidy of 0.020% and 0.058% ad valorem respectively for Instantel and Nomis was determined by Commerce.

2. Industrial and Regional Development Programme (IRDP)

- The IRDP was established in 1983, replacing the Regional Development Incentive Programme (RDIP). The programme was designed to promote industrial development in all regions of Canada through financial support in the form of grants, loans and loan guarantees.

- Instantel reported that it did not receive benefits under this programme during the period of investigation (POI). Because Nomis did not respond to the questionnaire DOC assigned Nomis an estimated net subsidy rate of 0.001% ad valorem, the highest subsidy rate from a previous Canadian investigation.

3. Economic and Regional Development Agreements (ERDA)

- ERDA's were extensions of GDA's signed with every province in the early 1980's. Assistance was aimed at projects designed to upgrade infrastructure such as transportation and convention centres, and to enhance productivity, particularly for small businesses.

- Instantel reported that it did not receive benefits under this programme during the POI. DOC calculated an estimated net subsidy rate of 6.70% ad valorem for Nomis, the highest subsidy rate from a previous Canadian investigation.

4. General Development Agreements (GDA's)

- GDA's provided the legal basis for various departments of the federal and provincial governments to cooperate in the establishment of economic development programmes. The GDA's were umbrella agreements.

- Instantel reported that it did not receive benefits under this programme during the POI. Because Nomis did not respond to the questionnaire, DOC assigned Nomis an estimated net subsidy rate of 25.48% ad valorem, the highest subsidy rate from a previous Canadian investigation.

- The GDA's were umbrella agreements under which stated general economic development goals. Ten year GDA's were signed with most provinces in 1974. All of the GDA agreements expired in 1984.

- Subsidiary agreements were signed pursuant to the GDA's, generally between particular federal and provincial government departments, to address economic development and infrastructure needs. These agreements established various individual types of economic development programmes, delineated administrative procedures and set out the relative funding commitments of federal and provincial governments. Subsidiary agreements were typically directed at establishing traditional government economic assistance programmes, providing economic development assistance for certain regions within the province and providing financial assistance to specific regions, industries or enterprises.

5. Investment Tax Credits (ITC's)

- There are several categories of ITC's in Canada. The only category of ITC used and found countervailable in a previous Canadian investigation was for investment in qualified property such as new plant and equipment used for manufacturing or processing. The basic ITC for investment in qualified property was 7%. An additional 3% or 13% was available for qualified property used in certain regions.

- Instantel only benefitted from the general 7% rate which was not countervailable. Because Nomis did not respond to the questionnaire, DOC assigned Nomis an estimated net subsidy rate of 0.162% ad valorem, the highest subsidy rate from a previous Canadian investigation.

II. PROGRAMMES PRELIMINARILY DETERMINED NOT TO CONFER A SUBSIDY:

A. FEDERAL PROGRAMMES:

1. Investment Tax Credits for Research and Development

- Eligible expenditures under this category included the cost of capital equipment used for scientific research and expenses attributable to scientific research. A basic 20% tax credit was available for qualifying scientific research expenditures to all companies in Canada. For small controlled private corporations (CCPC), the rate was 35%. For other corporations, the rate was 30%, if the expenditure was made in certain regions.

- DOC determined that the 20% and 35% scientific research tax credits, whether sold or used by the company performing the research, did not confer domestic subsidies because they are not limited to a specific enterprise or industry, or group of enterprises or industries or to companies in specific regions.

B. PROVINCIAL PROGRAMMES:

1. Ontario Current Cost Adjustment (OCCA)

- The Government of Ontario introduced the OCCA in the 1988 Ontario Budget. The OCCA provided an additional deduction from income otherwise subject to tax in Ontario for the cost (net of federal investment tax credits) of new manufacturing and processing machinery and equipment acquired for use in Ontario. The deduction was 10% for acquisitions in 1989, 15% in 1990 and 30% in 1991 and subsequent years. New manufacturing and processing machinery and equipment qualified for deductions if it met criterias established by the Government of Ontario.

- Since the programme was available to all industries in Ontario, DOC determined that this programme was not countervailable.

III. PROGRAMMES PRELIMINARILY DETERMINED NOT TO BE USED:

A. FEDERAL PROGRAMMES:

1. Export Credit Financing

- The Export Development Council (EDC) was created to facilitate and develop Canada's export trade within the framework of the Canadian Export Development Act. The EDC pursues its purpose by providing insurance guarantees and financing. EDC provides export financing to foreign buyers of Canadian goods and services. The funds were disbursed directly by EDC to Canadian exporters on behalf of the foreign buyer as a cash sale.

- Instantel reported that it did not receive benefits under this programme during the POI. The only subsidy rate calculated under this programme in previous Canadian investigation was unique to the product involved in that investigation. Therefore, DOC was unable to use this rate as best information available (BIA) for Nomis.

2. Canada Centre for Mineral and Energy Technology (CANMET)

- CANMET was the main research and technology development arm of Energy, Mines and Resources Canada.

- CANMET sponsored predominantly commercial and cost-shared research and development and technology transfer to find safer, cleaner and more efficient methods to develop and use Canada's mineral and energy resources.

3. Programme for Industry/Laboratory Projects (PILP)

- PILP was established in 1978 to explore the use of government laboratory technology. The programme was changed later to incorporate additionally the use of technology from other public sources, including university laboratories. This was accomplished through shared-cost government research and development contracts with companies based in Canada. The PILP programme ceased to exist for funding of new proposals in 1986.

4. Industrial Research Assistance Programme (IRAP)

- IRAP was established in 1962 to assist firms with R&D projects that represented an increase in R&D performed and were no longer range and technically more difficult than the firms would otherwise have carried out. The programme was carried out through shared-cost government R&D contracts with companies based in Canada.

- Benefits received by Instantel was attributable to a product not covered by the investigation and because this programme had never been investigated, DOC did not have a rate to assign to Nomis.

B. PROVINCIAL PROGRAMMES:

1. Ontario Centre for Resource Machinery Technology (OCRMT)

- The OCRMT was created under the Technology Centres Act, 1982 and ended operation in March 1991. It was designed to promote and to enhance the application of resource machinery technology in order to improve the productivity and competitiveness of Ontario industry and commerce. The OCRMT provided venture capital and R&D funds to support projects which clearly contributed to resource machinery manufacturing in Ontario.

2. Ontario Development Corporation (ODC) Export Support Loans

- This programme was established to assist in the development and diversification of industries in Ontario. Assistance was provided in the form of loans, loan guarantees and grants.

XV. SELF-INITIATION OF A COUNTERVAILING DUTY INVESTIGATION: CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA "LUMBER III"

BACKGROUND:

- On December 30, 1986, Canada and the United States signed a Softwood Lumber Memorandum of Understanding (MOU) under which Canada imposed an export charge of up to 15% on certain softwood lumber products entering the U.S. market from Canada.

- On September 3, 1991, the Canadian Government informed the Government of the United States of its intention to terminate the MOU effective October 4, 1991.

- The United States responded by self-initiating a new countervailing duty investigation (CVD) on October 31, 1991, and by imposing an interim bonding requirement on imports of lumber from Canada (under Section 301 of the 1974 Trade Act).

- Canada challenged the self-initiation of the investigation and the imposition of the interim bonding requirement before the GATT.

- Companies in New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador had been exempt from payment of the export charge since 1988 and were exempted from the current interim bonding requirement and countervailing duty investigation.

- the DOC initially limited the investigation to provincial stumpage programmes, then expanded the investigation to include log export measures.

- A preliminary affirmative determination of injury was made on December 12, 1991 and a preliminary affirmative determination of subsidy of 14.48% was made on March 5, 1992.

- On May 15, 1992, DOC confirmed its March 5, 1992 decision that Canada's provincial stumpage mechanisms, and log export restrictions in British Columbia, provided subsidies to softwood lumber exported to the United States in the amount of 6.51%.

- On June 25, 1992, the ITC voted, four to two, in favour of material injury.

- Both the DOC and ITC final determinations were appealed by Canada, the provinces, and the Canadian industry to a binding binational review panel under Chapter 19 of the FTA.

KEY ISSUE:

- The significant value of Canadian softwood lumber exports to the U.S. (i.e. approximately $3 billion) and the fact that this was the third softwood lumber countervailing duty case in ten years placed this investigation on the top of the Canada-

U.S. trade agenda. A key element of the case included specificity and preferentiality of provincial stumpage practices and log export regulations.

- Nature of the subsidy: In its final determination[81], Commerce found two domestic subsidies -- stumpage programmes[82] and log export restrictions -- which together accounted for a country-wide subsidy margin of 6.51 per cent. Individual provincial stumpage and log export rates determined by DOC were as follows:

  - **National Rate:** 6.51%

    Stumpage:

British Columbia:	3.30%
Alberta:	1.25%
Ontario:	5.95%
Québec:	0.01%

  - **Overall Rate:** 2.91%

    Log Exports:

British Columbia:	4.64%
Alberta:	0.00%
Ontario:	0.00%
Québec:	0.00%

  - **Overall Rate:** 3.60%

- Commerce found that stumpage was being provided at preferential rates in the four provinces which accounted for virtually all Canadian production and exports of softwood lumber -- British Columbia, Alberta, Ontario, and Québec.

- Commerce also found that log export restrictions in British Columbia constituted an indirect domestic subsidy -- an indirect rather than direct subsidy in light of the fact that British Columbia did not maintain direct control over the log prices through the imposition of its export restrictions. Commerce determined that the export restrictions artificially depressed Canadian log prices in British Columbia; absent these restrictions, the volume of log exports would have increased which, in turn, would have increased the prices of Canadian logs -- the major input of lumber -- in Canada.

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[81] 57 Fed Reg. 22,570 (May 28, 1992)

[82] Stumpage programmes are government programmes through which individuals and companies acquire the rights to cut and remove standing timber from provincial forest lands.

SUMMARY OF COMMERCE'S FINAL DETERMINATION IN CERTAIN SOFTWOOD LUMBER PRODUCTS FROM CANADA[83 & 84]

Based upon its analysis of the stumpage and log export programmes, Commerce calculated a country-wide countervailing duty ("CVD") rate of 6.51% ad valorem.[85]

I. PROVINCIAL STUMPAGE PROGRAMMES:

In order to find the provincial stumpage programmes countervailable, Commerce first had to find that the programmes are limited to "a specific enterprise or industry, or group of enterprises or industries."[86] Commerce also had to determine that the provinces are providing "goods or services at preferential rates."[87] Commerce found the stumpage programmes in the four provinces to be specific and preferential.

A. THE SPECIFICITY TEST:

1. The "Inherent Characteristics" Doctrine: Commerce maintained that the fact that the inherent characteristics of timber, and not an action on the part of the provincial governments, limit the range of stumpage users, does not make the stumpage programmes non-specific.[88] Commerce disclaimed its contrary reasoning in the 1983 specificity finding for two reasons: (1) its belief that the 1988 Trade Act was intended to overrule any prior Commerce cases in which programmes were found non-specific based upon the "inherent characteristics" doctrine, and (2) its belief that, even if the

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[83] The following was prepared by Steptoe and Johnson legal counsel to the Canadian Forest Industries Council (CFIC), May 29, 1992.

[84] Reproduced with permission from CFIC.

[85] Commerce also found the stumpage programmes in Manitoba, Saskatchewan, and the Territories to be countervailable. However, Commerce decided that, since any rate calculated for these provinces and territories would have an insignificant impact on the country-wide countervailing duty rate, it would not separately construct a margin for these provinces. These provinces and territories received the country-wide rate calculated under Commerce's analysis of Alberta, British Columbia, Ontario, and Québec.

The CVD rate came into effect only once the International Trade Commission ("ITC") concluded that the U.S. producers of softwood lumber were being injured by and/or faced the threat of injury by Canadian softwood lumber imports (July 6, 1992). When the ITC reached an affirmative determination of injury, Commerce issued a countervailing duty order establishing the 6.51% rate as the cash deposit rate for entries of softwood lumber from Canada.

[86] 19 U.S.C. § 1677 (5)(A)(ii).

[87] Id. § 1677 (5)(A)(ii)(II).

[88] This so-called "inherent characteristics" doctrine was first used by Commerce in its 1983 Lumber I determination.

1988 Trade Act did not overrule the "inherent characteristics" doctrine, the Act certainly did not adopt the doctrine, leaving Commerce free to reject that doctrine in the present case.

2. Requirement of "Purposeful Government Action": Commerce also rejected the notion that "purposeful government action" to limit a programme must be shown for a programme to be specific. Commerce stated that the statute, court decisions and its prior determinations do not require that "purposefulness" be shown. According to Commerce, the "purposeful government action" requirement had to be rejected because it would lead to the absurd result of making almost every natural resource input programme non-specific and therefore non-countervailable.

3. Actual Number of Users:[89] After rejecting the "inherent characteristics" and "purposeful government action" tests, Commerce found the stumpage programmes to be specific because, in its view, they benefit only two industries, the solid wood products industry[90] and the pulp and paper industry.

   a. Primary Timber Processing/Interdependence and Integration: Commerce indicated that its preliminary decision had placed "excessive emphasis" on the common aspects of all timber products -- the similarity of all milling operations and the input. It also recognized that integration and interdependence of stumpage holders does not provide a basis for finding specificity. Commerce stated, however, that a small number of industries is a group of industries under the statute regardless of whether they share common features.[91]

   b. Like Product: Commerce rejected the statutory definition of "industry" -- the "domestic producers as a whole of a like product" -- as a basis for identifying the industries that benefit from stumpage. Commerce stated that this definition applies to the International Trade Commission's consideration of injury and to

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[89] Commerce noted that its Proposed Rulemaking identifies four factors for determining specificity: (a) the extent to which a government acts to limit the availability of a programme; (b) the number of users that actually use the programme; (c) whether any user receives benefits of the program in a dominant or disproportionate manner; and (d) whether the government exercises discretion in awarding benefits under the programme. Commerce stated that it need not consider all four factors in this case since one of the factors -- the actual number of users of the program -- is dispositive.

[90] This category apparently includes dimension lumber, logs, shakes and shingles, plywood and other such solid wood products.

[91] Commerce did indicate, however, that the producers of solid wood products are a single industry because they all use timber as an input to produce solid wood products. Similarly, pulp and paper producers constitute a single industry because they use timber as an input to make pulp through either mechanical or chemical processes. Commerce also relied upon a British Columbia Ministry of Forests policy paper regarding the Small Business Forest Enterprise Program which describes the primary manufacturers of timber as those that produce (1) logs, (2) timbers, (3) dimension lumber, (4) boards, (5) shakes and shingles, and (6) pulp and paper. Commerce viewed this report as support for its position that primary timber producers fall into the solid wood products and pulp and paper industries.

questions concerning the U.S. industry's standing to petition for an investigation, but not to Commerce's evaluation of whether a programme is specific.

c. Product Surveys: Commerce disregarded the product surveys in finding the stumpage programmes specific. First, Commerce noted that the number of products produced by the users of a programme has not been dispositive in its prior determinations. Second, the surveys included downstream products derived from two basic products, solid wood products and pulp. The stumpage programmes therefore encourage, in the first instance, the production of solid wood and pulp products. Finally, Commerce noted that, through verification, it had identified survey responses which included products that were not actually made by the respondents. Commerce concluded that the surveys are unreliable.

d. Standard Industrial Classification ("SIC") Codes: Commerce rejected the U.S. and Canada SIC codes as a basis for determining industries. Commerce noted that the SICs are not dispositive and have not been followed in prior determinations.

e. Lumber I: Commerce rejected its Lumber I determination of specificity as "inconsistent on its face." It also noted that it has not changed its view of the number of users of stumpage very much over time. In Lumber I, Commerce broke the users down into the lumber and wood products industries, pulp and paper industries, and furniture manufacturing industries. Lumber II found that furniture manufacturers hold negligible rights. The other two sets of users -- lumber and wood products and pulp/paper products -- correspond with the two industries Commerce identified in its current final determination.

f. Comparison with Agriculture Sector: Commerce rejected Respondents' argument that the stumpage programmes should be found non-specific because, in several provinces, the forestry sector is larger than the agriculture sector, a sector which Commerce has consistently found to be non-specific. Commerce noted that the "number and diversity of products produced in the forest industries are simply not comparable to those produced in agriculture." Moreover forestry arguably falls within the agricultural sector and, as a subset of agriculture, is specific.

B. THE PREFERENTIALITY TEST:

Having determined that the stumpage programmes are specific, Commerce addressed their second key issue under the U.S. CVD law, i.e. whether the stumpage programmes provide a good at preferential rates. Commerce found the stumpage programmes in all four provinces to be preferential and, therefore, countervailable.

1. The requirement of "Market Distortion": Before explaining its basis for finding the programmes preferential, Commerce first addressed Respondents' argument that the programmes cannot be countervailed because they do not cause "market distortion," i.e., cause higher output or lower lumber prices than that which would obtain in a purely competitive market.

a. Legal Issues: Commerce decided that, as a matter of law, it need not consider whether the programmes create "market distortion" for two main reasons: (1) the nonmarket economy ("NME") cases cited by Respondents are not relevant; and (2) the offset provision in the CVD law establishes that "market distortions" should not be evaluated by Commerce.

o The NME Cases: Commerce found that Respondents improperly relied upon the Carbon Steel Wire Rod from Poland, which involved a nonmarket economy country. According to Commerce, the decision in Wire Rod and the Federal Circuit's decision upon appeal in Georgetown turned on the fact that subsidies have no meaning outside of a market economy. In addition, Commerce noted that (1) its citation to Wire Rod and Georgetown in its proposed regulations, and (2) its comment in its proposed regulations regarding distortion (the definition of a subsidy as "a distortion of the market process for allocating an economy's resources" underlies Commerce's entire CVD methodology) merely meant that "its countervailing duty methodology was based upon the use of market benchmarks to determine the existence and value of a subsidy." For these reasons, Commerce rejected the notion that "market distortion" must exist for a programme to be countervailable.

o The Offset Provision: Commerce relied upon the offset provision of the 1979 Trade Act as support for its view that Congress did not intend Commerce to consider "market distortion." Prior to the 1979 Act, the Treasury Department[92] determined the net subsidy provided by regional development programmes by offsetting the recipient's costs associated with locating in an underdeveloped region against the benefit provided by the government. In the 1979 Act, Congress eliminated this offset practice. Commerce indicated that this reflects Congress' position that Commerce should not assess the economic effects of a subsidy on recipients in either defining or evaluating a government programme.

b. Dr. Nordhaus' Analysis: Commerce also disputed Dr. Nordhaus' economic analysis stating that even if Dr. Nordhaus' analysis was relevant, he had not proven that the Canadian programmes are not distortive.

o First, Commerce stated that it could not accept the validity of Dr. Nordhaus' analysis at face value because other economists espoused conflicting views in this case and because Respondents had not offered any independent support for Dr. Nordhaus' views.

o Second, Commerce took issue with what Commerce stated was Dr. Nordhaus' contention "that stumpage charges under the provincial stumpage programmes will necessarily be higher than (sic) those in a competitive market." Commerce indicated that prices set in a competitive market "will almost always be higher than an administered stumpage charge."

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[92] The Treasury Department conducted countervailing duty investigations until the responsibilities were shifted to the Department of Commerce in 1979.

- Third, Commerce did not agree with what it characterized as Dr. Nordhaus' contention that harvests "under the provincial stumpage programmes will always be lower than the harvest under a competitive market." Commerce noted that forests can be managed by the government or private parties to obtain a high or low level of sustained harvest.

- Fourth, Commerce stated that Dr. Nordhaus' analysis did not take into account the fact that, at lower stumpage prices, more timber can profitably be harvested than when stumpage prices are higher. Therefore, lower stumpage prices will increase the supply of logs for making lumber.

- Fifth, Commerce criticized Dr. Nordhaus' rent analysis because it is, in their view, a static analysis, i.e., it considers only one period of time. Dismissing Dr. Nordhaus' contention that his model also worked over multiple time periods, Commerce stated that only a dynamic analysis that covers changes over time would provide an accurate picture.

- Finally, Commerce found Dr. Litan's study comparing rates of return within the wood industries with those in other industries to be unpersuasive. Commerce indicated that evidence of low rates of return did not show the absence of a subsidy, noting that it had previously found massive grants given to failing companies to be countervailable. Commerce also indicated that the comparison was flawed since it included some financial companies in the wood industries in its comparison.

2. Benchmarks for Determining Preferentiality: Commerce recognized that, in order to satisfy the requirement that it engage in reasoned decision-making, it must supply reasons and a basis for selecting a particular benchmark for measuring preferentiality in this case.

- The Preferred Benchmark: Commerce noted that the statute does not indicate what benchmark should be used to determine whether a programme is preferential. Commerce through its past practice and its proposed regulations, has identified a hierarchy of benchmarks.[93] Commerce noted that its most common measure of preferentiality is whether the government discriminates between beneficiaries through its prices, which Commerce stated is the "clearest manifestation of whether preference exists" and which needs little justification in each case for its appropriateness. Commerce used this benchmark for B.C., Alberta and Ontario.

- The Alternative Benchmarks: Commerce also noted that, for cases in which it cannot use its preferred benchmark, it has developed a hierarchy of alternative benchmarks. Commerce indicated that it would follow the ranking of benchmarks unless "presented with facts or arguments demonstrating that it is inappropriate, which was not the case here." Commerce used its first alternative benchmark, private prices charged for the identical good, in Quebec.

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[93] The benchmarks are, in order of preferences: (1) the prices charged by the government for the identical good to others in the same political jurisdiction; (2) the price charged by the government for a similar or related good, adjusted for quality differences; (3) the price charged by private sellers in the same political jurisdiction for an identical good; (4) the government's cost of providing the good; and (5) the price paid for the identical good outside of the political jurisdiction.

o The Cost Benchmark: Commerce rejected Respondents argument that it should use its third alternative benchmark, the government's cost. Respondents argued that each province's revenues exceed its costs.[94] Commerce did not use a cost benchmark because it could use higher ranked benchmarks in each province.[95]Moreover, Commerce indicated that the cost benchmark raises particular problems when applied to natural resources and that Ontario, Quebec and Alberta had expressed concerns over the use of a cost benchmark in their provinces. Finally, Commerce raised a number of methodological problems with how the provinces had applied TSPIRS in evaluating their systems.

o The Cross-Borders Benchmark: Commerce refused to use a cross-border comparison between U.S. stumpage charges and Canadian charges because it has been Commerce's long-standing practice to measure preferentiality within the foreign jurisdiction. Commerce also noted that it was convinced that too many factors affected the comparability of U.S. and Canadian stumpage charges.

3. British Columbia: Commerce determined that B.C. provides stumpage at preferential prices since, after all necessary adjustments (described below), administratively set prices are lower than competitively-bid prices under Section 16 of the Small Business Forest Enterprise Program ("SBFEP). Commerce utilized Section 16 prices as the benchmark because they are determined solely by competitive market forces and are thus non-preferential.

a. Commerce rejected Respondents' four main criticisms concerning use of Section 16 prices as the benchmark:

o Comparability of Rights and Obligations: Respondents argued that Commerce could not compare major tenures, which are long-term, and Section 16 tenures, which are similar to spot sales. Commerce stressed that Section 16 sales are not spot sales since they have durations as long as three years. Commerce also noted that prices for major tenures fluctuate each quarter and in that sense are not long-term prices. In addition, Commerce noted that short-term and long-term prices are sometimes higher and sometimes lower than each other, so the difference in terms between the majors and the SBFEP does not necessarily work to the favour of either side. Finally, Quebec has requested that short-term private sales be compared with long-term administered sales without identifying any problem with such a comparison.

o Representativeness of SBFEP Prices: Respondents claimed that SBFEP prices are inflated (i.e., that SBFEP participants can bid more) since they supply the marginal need for logs of major tenureholders seeking to avoid plant closures etc. Commerce stated that, except for statements during verification by the

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[94] Respondents placed reliance on TSPIRs, which was designed by the U.S. Forest Service to determine whether the USFS is selling national forest timber below cost.

[95] Commerce noted that it only used a cost benchmark in 1986 because the date on the record in that case made application of the preferred benchmarks impossible.

MOF and industry, it had no evidence that supported this point. Commerce indicated that, even if this point were correct, it would not undermine the validity of the SBFEP sales as a proper measure of market rates.

- o Competitiveness of Major Tenures: Commerce rejected Respondents' argument that major tenures can also involve competitive bids since bonus offers or offers to undertake additional obligations can be included in application packages. Commerce stated that the MOF was unaware of the existence of any bonus offers and that the assumption of additional obligations was rare.

- o Nonpreferential Price Benchmarks: Respondents challenged Commerce's view that only auction prices are nonpreferential since administered prices (e.g., Section 16 prices) are commonly used in competitive markets. Commerce stated that, while auction prices are not the only type of nonpreferential prices, they are the only nonpreferential prices in B.C.

b. Calculation of Stumpage Prices:

- o Commerce only used Section 16 prices, and not Section 16.1 or 18, because only Section 16 prices are set by purely competitive bids.

- o Commerce accepted Respondents' argument that it should use all softwood log prices in calculating the subsidy since sawmills use both sawlogs and pulplogs in their milling operations.

c. Adjustments:

- o Commerce rejected Respondents' argument that, instead of adjusting the prices of the major tenures upwards for differences in costs between major tenures and the SBFEP, Commerce should adjust the SBFEP price downwards for MOF costs assumed on behalf of SBFEP operators. Commerce determined that it should continue to adjust major tenures prices upward because this methodology provides the best measure of the benefits conferred on the major licensees.

- o Commerce refused to amortize road building and road maintenance costs as requested by the Coalition.[96]

- o Commerce continued to use silviculture expenses, rather than liabilities, for its adjustment because it could not accurately estimate liabilities.

- o Commerce accepted all miscellaneous expenses, except scaling fees, reported by the MOF as an adjustment to the administered price. Commerce was convinced that SBFEP operators do not bear these expenses. Commerce also accepted the G&A expenses as reported by the MOF as an adjustment to the major tenureholders' prices.

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[96] Commerce did make a 15 percent adjustment to the road building costs reported by B.C. for major licensees to account for the overlap with road costs for SBFEP operators. In its preliminary decision, Commerce used a 25% figure.

- o Commerce rejected the Coalition's claim for a tenure security adjustment to take into account the positive benefits of a long-term arrangement for major licensees.

- o Commerce denied a number of miscellaneous adjustments (e.g., an adjustment for SBFEP's lower tax rate) requested by Respondents.

d. Subsidy Calculation:[97] Based upon its comparison of prices for the major tenures with the SBFEP benchmark, Commerce found a countervailing duty rate of 3.30 percent.[98] The rate in Commerce's preliminary determination was 6.88 percent.

4. Quebec: To determine whether Quebec's Timber Supply Forest Management Agreement ("TSFMA") program provides preferential rates, Commerce used its second alternative benchmark (i.e., private sales of stumpage). Commerce found that its preferred benchmark -- the government's price for the identical good on a non-specific and non-preferential basis -- was not available and that its first alternative benchmark could not be used since the government does not sell "similar" goods.[99] Based upon its comparison of adjusted TSFMA rates and weight-averaged private stumpage rates, Commerce found the TSFMA rates to be lower and thus preferential.

a. The Private Price Benchmark: Commerce adopted Quebec's survey of private stumpage prices as the basis for calculating the benchmark.[100]

b. The TSFMA Rate: Commerce used the per cubic meter stumpage charge assessed by Quebec for its TSFMAs.

c. Adjustments to TSFMA Rate: Commerce made the following adjustment to the TSFMA rate for obligations born by TSFMA holders that are not born by those harvesting private stumpage:

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[97] To calculate the stumpage subsidies, Commerce followed the same general formula in each province. The numerator in each province consisted of the calculated benefit per cubic meter (i.e., the difference between administered rates and the benchmark), multiplied by the softwood sawlog harvest. The denominator consisted of the value of softwood lumber shipments plus the value of lumber co-products, e.g., chips and sawdust.

[98] Commerce did not publish the provincial rates in its written determination; it did, however, release them to us by telephone.

[99] Commerce rejected Respondents argument that it should compare Quebec's stumpage prices for sawmills with Quebec's stumpage prices for pulpmills. Commerce stated that Quebec's prices for pulpmills are limited to a specific industry or group of industries and therefore do not provide an appropriate benchmark. In addition, Commerce had reason to believe the pulpmill prices to be preferential since they are lower than private stumpage prices.

[100] Commerce rejected the Coalition's argument that a study of private stumpage prices in Quebec prepared for New Brunswick should have been used. Commerce also did not agree with the Coalition that the "cost adjustments" Quebec uses to make private and public timber comparable should be rejected. Commerce noted that the information relied upon by the Coalition "is either outdated and irrelevant or anecdotal."

- o Harvesting Costs: Commerce recognized that harvesting costs in Northern Quebec, which contains a high proportion of public lands, are higher than those for private lands located in southern Quebec. Commerce allowed an adjustment for differences in harvesting costs only for public lands located in those northern zones that do not contain any private lands.

- o Road Construction and Maintenance: Commerce made no adjustment for the costs of building primary road since it did not have evidence that these costs are different from TSFMA holders and harvesters of private stumpage. Commerce did, however, make an adjustment for differences in the costs associated with secondary and tertiary roads since it had verifiable data showing the differential.

- o Silviculture: Commerce adjusted the TSFMA rate for silviculture costs that are not credited towards stumpage fees. Commerce made cost adjustments for the transportation of seedlings, silviculture, road maintenance,[101] control and planning, fire protection, and insect and disease protection.[102]

- d. Reimbursements to Private Sellers for Silviculture Treatments: Commerce found that private sellers did not receive reimbursements of silviculture expenses during the period under investigation.

- e. Subsidy Calculation: Commerce calculated a countervailing duty rate of 0.01 percent. The rate in its preliminary determination was 3.78 percent.

5. Ontario: Commerce found that timber is provided to nonintegrated mills (i.e., mills that are not related to pulp/paper mills) at lower rates than the rates for integrated mills.[103] Commerce stressed that, since Ontario's rates are set only by reference to the end user, rather than by the type of timber harvested, no pulplog/sawlog adjustments needed to be made.

   a. Adjustments: Commerce made no adjustments to the integrated and nonintegrated rates since both types of users share the same responsibilities.

   b. Subsidy Calculation: Comparing the integrated and nonintegrated rates, Commerce found a countervailing duty rate of 5.95. Commerce calculated a 5.21 percent rate for Ontario in its preliminary determination.

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[101] Commerce deducted the cost of road maintenance associated with silviculture treatments from the road maintenance costs figure above to avoid double counting.

[102] Commerce rejected adjustments for the cost of environmental compliance, control of utilization (scaling costs), and the construction of forest camps.

[103] Commerce determined that the rate charged integrated mills is nonpreferential and provides an appropriate comparison because it compares favourably with private prices in Ontario.

6. Alberta: Alberta provides timber under three types of tenures: Forest Management Agreements (FMAs); Timber Quota Certificates (TQs) and Commercial Timber Permits (CTPs). Commerce found certain FMAs, Tqs and CTPs to be countervailable as described below.

   a. FMAs: Commerce used the FMA pulplog rate as the benchmark to measure the preferentiality of the FMA sawlog rate. Commerce noted that the price paid by pulplog FMA holders is originally negotiated and subsequently fluctuates based upon published pulp and paper prices. According to Commerce, these features make the pulplog rates nonpreferential and thus an appropriate basis for comparison. Commerce did not make any adjustments to the pulplog and sawlog rates since the only difference in the logs is how they are processed. Commerce found the FMA sawlog rate to be countervailable since it is lower than the pulplog rate.

   b. TQs: Commerce determined that some TQs involve competitive bids whereas others involve administered prices. Commerce used the competitive TQ bid prices as the benchmark for administered Tqs and found a countervailable benefit.

   c. CTPs: Commerce compared the prices for competitive bid CTPs with the administered prices for other CTPs. Commerce found a countervailable benefit.

   d. Subsidy Calculation: Based upon its analysis of the three tenures, Commerce found a countervailing duty rate of 1.25 percent. In its preliminary determination, Commerce calculated a 4.16 percent rate.

7. Country-wide Rate for Stumpage: For each province, Commerce divided the countervailable benefit calculated above by the total value of that province's lumber and lumber co-product (e.g., chips, sawdust) shipments. Commerce then weight-averaged the resulting provincial rates according to each province's percentage share of softwood lumber exports to the U.S. Commerce calculated a country-wide stumpage rate of 2.91 percent.

II. PROVINCIAL LOG EXPORT RESTRICTIONS:

Commerce maintained its preliminary determination that the B.C. log export restrictions provide countervailable benefits and that regulations in the other three provinces do not.

A. Market Distortion:

o Commerce held that the 1979 Trade Act allows, but does not require Commerce to identify countervailable subsidies on the basis of market distortion, i.e., an effect on output or price.[104] However, Commerce also indicated that the 1979 Trade Act "forbade" the department from measuring the subsidy based on the net economic effect of the government programme.

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[104] Commerce uses the phrase "net economic effect" to refer to such distortion.

- Commerce noted that both the stumpage programmes and the log export restriction have a net economic effect on the recipient (i.e., cause "market distortion"); they decrease the cost of the major raw material input (logs) and thereby lower the recipient's marginal cost. Commerce stressed that its analysis of the supply-and-demand forces at play in the B.C. log market show that marginal cost is affected by the export restrictions.

- Commerce underscored that, while it used a "market distortion" analysis to determine whether the log export restrictions are countervailable, it did not use that analysis to measure the benefit, which is based upon a comparison of domestic log prices and the prices that would obtain if the log export restriction were lifted.

B. Countervailability of Export Restrictions:

- Commerce recognized, that prior to Leather from Argentina, a 1991 decision in which Commerce countervailed an export restriction on hides, its practice was not to countervail border measures. Commerce noted, however, that it is free to alter its long-standing practice so long as it provides a reasonable basis for doing so and demonstrates that the new practice is consistent with the CVD statute. Commerce stated that its decisions prior to Leather were wrongly decided and that it now believes border measures, like the log export restrictions, should be countervailable.

- Commerce noted that, while Commerce has not expressly addressed the countervailability of border measures, it has indicated that the terms "subsidy" and "bounty or grant" should be read broadly. Moreover, at the time Congress enacted the 1979 Trade Act, it was aware that the courts (1) had concluded that indirect measures could provide countervailable subsidies and (2) in at least one case, had struck down a Treasury determination that refused to countervail an export-tax scheme that had the effect of decreasing the price of an input.

- Commerce also stressed that the illustrative examples of domestic subsidies Congress included in the 1979 Trade Act[105] do not restrict the definition of subsidy. Commerce is free to expand the list "consistent with the underlying principles implicit in (those) enumerations." According to Commerce, the enumerated examples establish that Congress intended Commerce to countervail programmes that have the indirect effect of lowering a foreign producers' manufacturing cost. Commerce found that the B.C. log export restrictions do lower the marginal cost of lumber manufacturers.

- Commerce rejected Respondents' argument that a programme must involve some kind of a financial contribution to be countervailable, relying on the statute's explicit provision that programmes providing "indirect" benefits can be countervailed.

C. Effect of Export Restrictions on Domestic Log Prices:

Having established that export restrictions can be countervailed under U.S. law, Commerce next considered whether the B.C. programme actually lowers the price of logs in the domestic market.

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[105] The 1979 Trade Act identifies four types of domestic subsidies, including goods or services provided at preferential rates. Export restrictions are not mentioned.

- Margolick and Uhler: Commerce determined that the Margolick and Uhler Study established that the B.C. programme has a "direct and discernable effect" on domestic log prices. Commerce noted that, although the study does not establish a correlation with absolute certainty, it provides a "high probability" that B.C. export restrictions are primarily responsible for the price differential that exists between domestic and export log prices.

D. The Specificity Test: Commerce found the log export restrictions to be limited to a specific group of industries, namely the solid wood products industry and the pulp and paper industry.

E. GATT: Commerce indicated that its decision to countervail B.C.'s export restrictions was consistent with GATT since the GATT Subsidies Code provides that fiscal incentives may be countervailed. The B.C. export restrictions rely in part upon a complex fiscal tax system. Moreover, the GATT Subsidies Code recognizes that programmes that have indirect effects may be countervailed. Commerce rejected Respondents' argument that border measures are not countervailable under GATT since they are covered by a specific article, Article XI, that provides mechanisms for addressing such measures. Commerce underscored that Article XI does not carve out an exception to the provision on countervailing duties.

F. Measurement of the Benefit:

- Areas Included in Analysis: Commerce determined that the B.C. log export restrictions only effect the B.C. coast and the tidewater and border interior areas of B.C. Only tenureholders in these areas could respond to a lifting of the restrictions by increasing log exports. The tenureholders located in the north/central interior of B.C. cannot economically export and would not experience a price effect.

- Export/Domestic Price Differential: Commerce rejected Respondents' arguments that any differential between export and domestic log prices can be accounted for by quality and transportation differences. Commerce also found unpersuasive Dr. Kalt's analysis that the export restrictions do not impact domestic prices. Commerce's main response was that the fee in lieu of manufacturing, which Dr. Kalt analyzed, covered only a small part of exports. Under these circumstances, changes in the fee would not be expected to affect domestic prices.

- Causal Link: Commerce also found unpersuasive Dr. Finan's study indicating that there is no causal link between exports and domestic prices. Finan's study is flawed because it covered only minuscule changes in the volume of exports and totally disregards the effect on exports of the fee in lieu of manufacturing.

- Coast and Tidewater Interior: Commerce rejected Dr. Kalt's conclusion that the B.C. regulations merely offset the distortive effects of Japanese and U.S. policies. Commerce noted that it is concerned with the effects of a programme within the foreign government's jurisdiction, not the effects of policies in other political jurisdictions. Therefore, it was required to take foreign practices as a given.

- Restrictiveness of the Log Export Regulations: Commerce maintained the finding in its preliminary determination that the B.C. regulations effectively restrict exports, despite

the fact, as pointed out by respondents, that significant amounts of logs are exported from B.C.

G. Calculation of the Subsidy: Commerce compared current domestic log prices with what prices would be without the log restrictions. Commerce rejected the Coalition's request that it use a cross-border analysis because, as noted with respect to stumpage, Commerce's methodology focuses on circumstances within the political jurisdiction under investigation.

- Domestic Price: Commerce calculated prices for coastal log exports based on Vancouver log market prices. It used observed log prices for the tidewater interior and 1989 Statistics Canada information for the border interior. Commerce weight-averaged the data according to the percentage of the harvest from each area able to export. Commerce made a species/grade adjustment to the domestic prices for differences between timber in the interior and coastal areas.

- Export Price: Commerce derived export prices from Statistics Canada data. Commerce then adjusted the export prices downwards by a price equilibrium factor to reflect the decrease in export prices that would occur if the log export restrictions were lifted. Despite Respondents criticisms of the Margolick Study, Commerce used the adjustment factor from this study as the basis for making the downward adjustment. Commerce also made adjustments to the export price for export related costs (i.e., export sort costs). Commerce did not, however, make an adjustment for falldown sort costs.

- Integrated Firms: Commerce found that the log export restrictions benefit integrated firms as well as firms that purchase logs. The restrictions subsidize lumber production of integrated firms because the firms are discouraged from selling or exporting logs due to the reduced prices and the restrictions.

H. Country-Wide Rate: Commerce compared the domestic and adjusted export prices. It allocated the benefit to lumber and other products made in the lumber production process based upon the value of shipments. The resulting rate was weight-averaged based upon B.C.'s percentage share of exports to the U.S. As a result of this calculation, Commerce found a log export subsidy of 3.60 percent. In its preliminary determination, Commerce calculated an 8.23 percent rate.

III. GENERAL CALCULATION ISSUES:

A. Company-Specific Rates: Commerce did not calculate any company-specific rates.

B. Inclusion of Value of Reman Products in Shipment Values: Commerce determined that the first mill shipment values reported by Statistics Canada, which it used to calculate the subsidy amount, were acceptable even though they included some shipment values for remans made from that lumber.[106] Commerce stated that, in calculating the value of shipments, the overall impact of including reman values was small and not to the clear advantage of either party.

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[106] Since Commerce used the first mill values reported by StatsCan to calculate the subsidy amount, Commerce indicated that it would instruct Customs to collect duties on a first mill value basis.

C. Allocation of Subsidy Amount to Other Products Made through the Lumber Production Process: Commerce allocated the subsidy amount not only to softwood lumber but also to the other products (e.g., chips and sawdust) that result from the lumber production process. Allocation was based upon the value of shipments of those products.

D. Pulplog/Sawlog Adjustment: Commerce rejected the Coalition's argument that Commerce should adjust for quality differences between sawlogs and pulplogs because the provinces do not use the terms "sawlog" and "pulplog" to distinguish between logs in terms of quality or size. Instead, the terms are used to distinguish the final use of what in reality are often similar logs.

E. Exclusion of Logs Sold by Tenureholders: Commerce did not exclude from its subsidy calculation logs sold by tenureholders to unrelated parties because it could not separate out those sales.

F. Country-Wide Rate: Commerce calculated a single, country-wide rate instead of province-specific rates. Commerce noted that its long-standing practice has been to calculate country-wide, and not province-specific, rates.

IV. EXCLUSION REQUESTS FOR SPECIALTY PRODUCTS, REMANUFACTURED PRODUCTS AND COMPANIES:

A. Specialty Products: For two main reasons, Commerce did not exclude from the scope of the investigation products made from Western Red Cedar, Yellow Cypress, Eastern White Cedar, Eastern White and Red Pine, and clear and shop grades of lumber: (1) these species and grades of timber are sold under the same stumpage programmes as any other coniferous species; and (2) they can be used to make the same or similar lumber products as those made from other coniferous species.

B. Remanufactured Products: Commerce also decided not to exclude remanufactured products ("remans") from the investigation.

- First, Commerce noted that the investigation covers softwood lumber products, including remans. Second, Commerce noted that it had no precise definition of remans or "reasonable, objective criteria" that it could follow to separate remans from other softwood products in excluding them from the investigation. Third, Commerce found the list of remanufactured products excluded from the Memorandum of Understanding ("MOU") to be unpersuasive since that list resulted from a series of negotiations and did not legally define a class of merchandise which should be excluded from the scope of the investigation. Fourth, Commerce determined that stumpage holders produce many reman products; consequently, at least some remanufacturers benefit directly from the stumpage programmes.

- Commerce decided to collect duties based upon the first mill value of the lumber used to make the remans.

C. Company Exclusion Requests: Commerce decided that it was impracticable to review the 334 company exclusion requests. Commerce did exclude fifteen of the twenty-four companies it actually considered for exclusion.

XVI. INITIATION OF A COUNTERVAILING DUTY INVESTIGATION: PURE MAGNESIUM AND ALLOY MAGNESIUM FROM CANADA

BACKGROUND:

- On September 5, 1991, DOC received a petition from Magnesium Corporation of America, on behalf of the U.S. industry producing pure and alloy magnesium. The petitioner alleged that manufacturers, producers, or exporters of magnesium in Canada receive subsidies.

- On September 25, 1991, DOC initiated antidumping and countervailing duty investigations of Canadian magnesium imports.

- On December 2, 1991, DOC preliminarily determined that Canadian magnesium exports were benefiting from subsidies at a rate of 32.85 percent.

- On February 11, 1992, the petitioner requested that the final determination of the countervailing duty investigation be extended to coincide with the date of the final determinations in the antidumping duty investigation.

- On July 8, 1992, DOC made final subsidy and antidumping determinations in which it found rates of 21.61 and 31.33 respectively for Norsk Hydro of Quebec. De minimis rates were determined for Timminco Ltd. of Ontario. This meant that Timminco was eliminated from the investigation and no duties applied to it.

- In its final subsidy determination, Commerce made it clear that risk and profit sharing electricity contracts, which was the major element of the subsidy determination against Norsk, were not countervailable in and of themselves although the Norsk contract as maintained during the review period of the investigation has been so determined. Commerce indicated, however, that it would conduct an expedited "change of circumstances" review based on the amended electricity contract that had been signed between Norsk and Hydro-Québec.

- DOC found the Risk and Profit Sharing Programme (RPSP) to be specific because there were only 14 companies with RPSP contracts while there were over 300 industrial users of electricity in Québec. Furthermore, DOC found the rates paid by Norsk Hydro to be preferential when compared to the weighted-average rate paid by other industrial customers.

- DOC calculated an estimated net subsidy of 14.00 per cent ad valorem for Norsk Hydro. Timminco did not receive any benefits from this programme.

- DOC also found that Norsk benefitted from SDI grants and exemption of water payment bills. This increased the subsidy rate to 21.61 per cent.

- On August 10, 1992, the ITC made an affirmative final injury determination with respect to the investigation against imports of magnesium from Canada, thereby confirming the application of countervailing duties against magnesium exports to the U.S. by Norsk Hydro of Québec.

- On November 9, 1992, the DOC, in the final decision of its "changed circumstances" review of the countervailing duty on U.S. imports of magnesium from Norsk Hydro confirmed the preliminary results of its review issued October 13, 1992. At that time, Commerce determined that the amended electricity contract between Norsk Hydro and Hydro-Québec, which was the key element in the countervailing duty finding against Norsk, provided no countervailable subsidy. As a result of this final decision, the countervailing duty against Norsk was reduced from 21.61 per cent to 7.61 per cent.

- Canada challenged the standing of the Magnesium Corporation of America to petition for countervailing duties before the GATT, however, Canada dropped its GATT case because of the favourable results of DOC's expedited review.

- As a result of the affirmative final countervailing and antidumping determinations issued by DOC and the ITC, the Government of Québec and Norsk Hydro filed requests for panel reviews of the final determinations of subsidy and dumping on Magnesium from Canada. The four panel decisions (injury-subsidy; injury-dumping; subsidy; and dumping) are expected towards the latter part of 1993.

KEY ISSUE:

- The key issue of this investigation was whether or not the risk and profit sharing electricity contracts between Norsk and Hydro-Québec constituted a subsidy.

I. PROGRAMMES COMMERCE ANNOUNCED IN ITS NOTICE OF INITIATION IT WOULD BE INVESTIGATING:

1. Québec Resource Regions

2. St-Lawrence River Environmental Technology Development

3. Programme For Export Market Development (PEMD)

4. Export Development Programme (EDP)

5. Joint Federal-Provincial Programme

6. Provincial Programmes

   A. Hydro-Québec "Programme of Risk and Profit Sharing"
   B. Major Opportunities to Stimulate Technology (MOST) Programmes
   C. Development Assistance Programme (AQVIR)
   D. Industrial Feasibility Study Assistance Programme
   E. Export Promotion Assistance Programme
   F. Manpower Training Programmes
   G. Creation of Scientific Jobs in Industries
   H. Business Investment Assistance Programme
   I. Business Financing Programme
   J. Research and Innovation Activities Programme

K. Export Assistance Programme
L. Other Research and Innovation Programmes

II. PROGRAMMES COMMERCE ANNOUNCED IN ITS NOTICE OF INITIATION THAT IT WOULD NOT BE INVESTIGATING:

1. Duty Remissions
2. Technology Inflow Programme
3. Manpower Retraining and Development
4. Manpower Training Programmes
5. Manpower Adaptation
6. Technology Outreach
7. Advanced Manufacturing Technology Application
8. Microelectronics and Systems Development
9. Strategic Technologies
10. Automotive Components Initiative

III. PROGRAMMES DETERMINED TO CONFER A SUBSIDY:

1. Federal Funding for a Feasibility Study Under the Canada-Québec Subsidiary Agreement on Industrial Development

- Under this Subsidiary Agreement, the Governments of Canada and Québec established a programme to provide financial assistance to companies to cover the cost of feasibility studies related to major industrial projects. It was implemented under the 1984 Canada-Québec Economic and Regional Development Agreement (ERDA). Assistance is aimed at projects designed to upgrade infrastructure, such as transportation and convention centres, and to enhance productivity, particularly for small businesses. This Subsidiary Agreement was signed on January 23, 1985, and terminated on March 31, 1992. The last date for authorizing a project under this Agreement was March 31, 1990.

- The DOC considered the reimbursable grant as an interest-free short-term loan rolled over from year to year and calculated an estimated net subsidy of 0.10 percent ad valorem for Norsk Hydro Canada Inc. (NHCI).

2. Exemption From Payment of Water Bills

- Under an agreement signed between NHCI and La Société du Parc Industriel du Centre du Québec, NHCI is exempt from paying its water bills. Since no other company

received such exemption, DOC determined this programme to be countervailable since benefits were limited to a specific enterprise or industry, or a group of enterprises or industries.

- On this basis, DOC calculated an estimated subsidy of 1.43 percent ad valorem for NHCI.

3. Article 7 Grants From the Québec Industrial Development Corporation

- The Industrial Development Corporation (Société de Développement Industriel du Québec) (SDI) is a Crown corporation which acts as an investment corporation and administers development programmes on behalf of the Government of Québec. Established in 1971 under the Québec Industrial Development Act, the programme has been amended several times. Funding for SDI is obtained through the Québec National Assembly, through the sale of notes, bonds and other securities, and by an endowment established by the Government of Québec at the time of SDI's formation.

- The SDI provides assistance under Article 7 in the form of loans, loan guarantees, grants, assumptions of costs on loans, and equity investments. This assistance is offered to major projects capable of having a major impact upon Québec's economy.

- NHCI received a grant under this programme. The amount of the grant was calculated as a percentage of the cost of environmental protection equipment purchased by NHCI. As a result, DOC calculated an estimated net subsidy of 6.18 percent ad valorem for NHCI.

4. Preferential Electric Rates

- The Risk and Profit Sharing Programme is administered by the provincially-owned power company, Hydro-Québec. Under this programme, long-term contracts are signed between Hydro-Québec and its industrial customers for the provision of electricity. A portion of the rate to be charged under these contracts is based either on the price of the customer's products or the customer's profitability. Therefore, the price paid by each of these customers for electricity varies from year-to-year because of fluctuations in the customer's prices or profits. Contracts are negotiated with the expectation that over the term of the contract, Hydro-Québec will earn the full projected revenue that would have been generated under its general rates and programmes.

IV. PROGRAMMES DETERMINED NOT TO BE COUNTERVAILABLE:

1. Research Conducted by the Institute of Magnesium Technology (IMT)

- The IMT was incorporated in 1989, as a private, non-profit company. The creation of the IMT was a joint effort by the Governments of Canada and Québec and the magnesium industry. The IMT provides magnesium processors with the expertise and equipment necessary for development work, as well as for the improvement of products and processes. IMT also offers development of prototypes and pre-production trials. Initial funding was provided by the Governments of Canada and Québec under the Canada-Québec Subsidiary Agreement on Scientific and Technological Development. Both governments provided funds for the construction of a research

laboratory and the purchase of equipment, and to help the IMT launch its research programme.

- The Department's practice in the past regarding the countervailability of research and development assistance has been that when the results of research are made available to the public, including competitors in the United States, the assistance does not confer a countervailable benefit. As a result, the DOC determined that the research conducted by the Institute of Magnesium Technology was not countervailable, because membership was open to all parties, and these parties were able to obtain research performed by the Institute on equal terms.

2. Manpower Training Programme

- This programme is administered by the Québec Ministry for Manpower and Income Security. The Province of Québec offers this programme to individuals for manpower training and retraining.

- Since the programme is offered and provided to individuals employed or seeking employment, and to companies providing such training, within a large number and broad range of industrial sectors in Québec DOC did not countervail this programme.

V. PROGRAMMES DETERMINED NOT TO BE USED:

1. St. Lawrence River Environmental Technology Development Programme (ETDP)
2. Program for Export Market Development (PEMD)
3. The Export Development Corporation (EDC)
4. Canada-Québec Subsidiary Agreement on the Economic Development of the Regions of Québec
5. Opportunities to Stimulate Technology Programmes
6. Development Assistance Programme
7. Industrial Feasibility Study Assistance Programme
8. Export Promotion Assistance Programme
9. Creation of Scientific Jobs in Industries
10. Business Investment Assistance Programme
11. Business Financing Programme
12. Research and Innovation Activities Programme
13. Export Assistance Programme

14. Energy Technologies Development Programme

15. Financial Assistance Programme for Research, Formation and for the Improvement of the Recycling Industry

16. Transportation Research and Development Assistance Programme

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I. FEDERAL PROGRAMMES DETERMINED TO CONFER COUNTERVAILABLE SUBSIDIES:

(i) THE FOLLOWING FEDERAL PROGRAMMES WERE DETERMINED TO BE COUNTERVAILABLE BY THE ITA AS THEY WERE FOUND LIMITED TO A SPECIFIC ENTERPRISE OR INDUSTRY, OR GROUP OF ENTERPRISES OR INDUSTRIES.

1. **Hog Stabilization Programmes provided under the Agricultural Stabilization Act**

- The ITA investigated this programme in the Live Swine case, and found it conferred a net subsidy of $0.02251/lb. Cdn. dressed weight and $0.01789/lb. Cdn for live-weight.

2. **Federal Vessel Assistance Programme**

- The ITA investigated this programme in the Atlantic Groundfish case, and found it conferred a net subsidy of be 0.715% ad valorem.

3. **Department of Fisheries and Oceans (DFO) Promotions Branch**

- The ITA investigated this programme in the Atlantic Groundfish case, and found it conferred a the net subsidy of 0.001% ad valorem.

4. **Construction of Icemaking & Fish Chilling Facilities**

- The ITA investigated this programme in the Atlantic Groundfish case, and found it conferred a net subsidy of 0.059% ad valorem.

5. **Regional Development Incentive Programme (RDIP)**

- The ITA investigated this programme in the Atlantic Groundfish case, and found it conferred a net subsidy of 0.447% ad valorem.

- The ITA investigated this programme in the Tubular Goods case, and found it conferred a net subsidy of 0.71% ad valorem, for benefits provided to IPSCO.

- The ITA investigated this programme in the Lumber (I) and found it conferred a net subsidy of 0.001% ad valorem.

6. **Fisheries Improvement Loan Programme**

- The ITA investigated this programme in the Atlantic Groundfish case, and found it conferred a net subsidy of 0.043% ad valorem.

7. DFO Grants to Fishermen and Fish Processors from Special Recovery Capital Projects Programme Funds

- The ITA investigated this programme in the Atlantic Groundfish case, and found the net subsidy to be 0.079% ad valorem.

8. Preferential User Fees under Small Craft Harbour Programme

- The ITA investigated this programme in the Atlantic Groundfish case, and found the net subsidy to be 0.046% ad valorem.

9. Forest Industry Renewable Energy Programme

- In the Lumber (I) case, the ITA found this programme's net subsidy to be 0.003% ad valorem.

10. National Tripartite Red Meat Stabilization Plan under the Agricultural Stabilization Act

- The ITA investigated this programme in the Pork case, and found the net subsidy rate to be $0.012468/lb. Cdn. or $0.027486/kg. Cdn.

11. Feed Freight Assistance

- The ITA investigated this programme in the Pork case, and found the net subsidy rate to be $0.000016/lb. Cdn. or $0.000034/kg. Cdn.

12. Debenture Guarantees to Sysco.

- The ITA investigated this programme in the Steel Rails case, and found the net subsidy rate to be 1.13% ad valorem.

13. Forgiven Wharf Loan to Sysco.

- The ITA investigated this programme in the Steel Rails case, and found the net subsidy rate to be 2.36% ad valorem.

(ii) THE FOLLOWING FEDERAL PROGRAMMES WERE DETERMINED TO BE COUNTERVAILABLE BY THE ITA AS THEY WERE FOUND TO BENEFIT ONLY SPECIFIC REGIONS, AND WERE THUS COUNTERVAILABLE REGIONAL SUBSIDIES.

1. Industrial and Regional Development Programme (IDRP)

- The ITA investigated this programme in the Atlantic Groundfish case, and found it conferred a net subsidy of 0.001% ad valorem.

- The ITA also investigated this programme in the Lumber (II) case, and found it conferred a net subsidy of 0.145% ad valorem.

- The ITA also investigated this programme in the Seismographs case, and found it conferred a net subsidy of 0.001% ad valorem.

2. Community Based Industrial Adjustment Programme

- The ITA investigated this programme in the Lumber (I) case and found a 0.001% ad valorem subsidy.

- The ITA investigated this programme in the Lumber (II) case, and found a net subsidy of 0.002% ad valorem.

3. Regional Development Incentives Programme (RDIP)

- The ITA investigated this programme in the Atlantic Groundfish case, and found a net regional subsidy of 0.447% ad valorem.

- The ITA investigated this programme in the Lumber (I) case, and found a net regional subsidy in the following amounts: 0.180% for softwood lumber, 0.070% for softwood shakes, and 0.151% for softwood fence.

- The ITA investigated this programme in the Lumber (II) case, and found a net regional subsidy in the following amount 0.048%.

- The ITA investigated this programme in the Steel Rail case, and found a net regional subsidy in the following amount 1.10% ad valorem for Sysco. and 0.03% ad valorem for Algoma.

4. Fisheries Improvement Loan Board (FILP)

- The ITA investigated this programme in the Atlantic Groundfish case, and found a net subsidy of 0.043% ad valorem.

5. Certain Types of Investment Tax Credits

- The ITA investigated this programme in the Atlantic Groundfish case, and found the net subsidy to be 0.162% ad valorem.

- The ITA also investigated this programme in the Tubular Goods case, and found another net subsidy of 0.01% ad valorem for benefits provided to IPSCO Inc..

- The ITA investigated this programme in the Lumber (I) case, and found a net subsidy of 0.018% ad valorem.

- The ITA investigated this programme in the Lumber (II) case, and found a countervailable subsidy of 0.047% ad valorem.

- The ITA investigated this programme in the Steel Rail case, and found a net subsidy of 0.02% ad valorem.

- The ITA investigated this programmeIn the Seismographs case, and the ITA found it conferred a net subsidy of 0.162% ad valorem.

6. Western Diversification Programme

- The ITA investigated this programme in the Pork case, and found the net subsidy rate to be $0.000048/lb. Cdn. or $0.000105/kg. Cdn.

7. Western Transportation Industrial Development Programme

- The ITA investigated this programme in the Pork case, and found the net subsidy rate to be $0.000025/lb. Cdn. or $0.000054/kg. Cdn.

(iii) THE FOLLOWING FEDERAL PROGRAMME WAS DETERMINED TO CONFER A COUNTERVAILABLE SUBSIDY AS THEY WERE FOUND TO BE EXPORT SUBSIDIES.

1. Programme for Export Market Development (PEMD)

- The ITA investigated this programme in the Atlantic Groundfish case, and found a net subsidy of 0.001% ad valorem.

- The ITA investigated this programme in the Lumber (I) case, and found a net subsidy of 0.001% ad valorem.

- The ITA investigated this programme in the Lumber (II) from Canada" case, and found a net subsidy of 0.001% ad valorem.

- The ITA investigated this programme in the Seismographs case, and found a net subsidy of 0.020% and 0.058% ad valorem.

(iv) THE FOLLOWING FEDERAL PROGRAMMES WERE DETERMINED TO CONFER COUNTERVAILABLE SUBSIDIES AS THEY OPERATED IN A MANNER INCONSISTENT WITH COMMERCIAL CONSIDERATIONS.

1. The Export Development Corporation (EDC)

- The ITA investigated this programme in the Railcars case, and found that the financing package offered by the EDC to the New York City Metropolitan Transportation Authority (MTA) purchase of 825 railcars from Bombardier Inc. of Montréal, was inconsistent with commercial consideration on five separate counts:

i) the intrinsic value of the interest rate charged under the EDC package;
ii) the option-value which allowed the MTA the discretion to use, or to not use, the fixed rate of the EDC package, dependent upon future market financing rates;
iii) the commitment fee charged by the EDC in awarding its financing offer was above that of commercial charges;
iv) the EDC package freed the MTA of the interest charges cost of obtaining comparable financing; and
v) the EDC package was denominated in U.S. dollars thereby freeing the contracting parties of exchange-rate exposure.

- The ITA calculated the net subsidy conferred by this package to be $110,160 per railcar.

2. Government Equity Infusions into National Sea Products Limited and Fisheries Products International Limited

- The ITA investigated this programme in the Atlantic Groundfish case, and found a countervailable net subsidy of 1.876% ad valorem.

II. JOINT FEDERAL - PROVINCIAL PROGRAMMES DETERMINED TO CONFER SUBSIDIES:

(i) THE FOLLOWING JOINT FEDERAL - PROVINCIAL PROGRAMMES WERE DETERMINED TO BE COUNTERVAILABLE BY THE ITA AS THEY WERE FOUND LIMITED TO A SPECIFIC ENTERPRISE OR INDUSTRY, OR GROUP OF ENTERPRISES OR INDUSTRIES.

1. The Record of Performance Programme

- The ITA investigated this programme in the Live Swine case, and found a countervailable subsidy of $0.00144/lb. dressed weight and $0.00144/lb. live-weight.
- Note: in the first Administrative Review the ITA conducted on this case, the ITA removed this programme from the list of countervailable subsidies.

2. Agricultural and Rural Development Agreements (ARDA)

- The ITA investigated this programme in the Atlantic Groundfish case, and found a countervailable subsidy of 0.005%.
- The ITA investigated this programme in the Lumber (II) case, and found subsidy countervailable of 0.003%.
- The ITA investigated this programme in the Lumber (I) case, and found a countervailable subsidy of 0.005%.
- Note: this programme expired in 1975.

3. Transitional Programmes

- The ITA investigated this programme in the Atlantic Groundfish case, and found a countervailable subsidy of 0.060%.

4. Interest Free Loans to National Sea Products Ltd.

- The ITA investigated this programme in the Atlantic Groundfish case, and found a countervailable subsidy of 0.018%.

5. Economic and Regional Development Agreements

- The ITA investigated this programme in the Atlantic Groundfish case, and found a countervailable subsidy of 0.007%.
- The ITA investigated this programme in the Lumber (I) case, and found a countervailable subsidy of 0.001%.

- This programme was also found to confer a subsidy of 0.001%, in the Lumber (II) case.

- The ITA investigated this programme in the Magnesium case, and found a countervailable subsidy of 0.10% ad valorem.

6. Sawmill Improvement Programme

- The ITA investigated this programme in the Lumber (I) case, and found a countervailable subsidy of 0.002%.

7. Iron Ore Freight Subsidy to Algoma.

- The ITA investigated this programme in the Steel Rails case, and found the net subsidy rate to be 0.19% ad valorem.

(ii) THE FOLLOWING JOINT FEDERAL - PROVINCIAL PROGRAMMES WERE DETERMINED TO BE COUNTERVAILABLE BY THE ITA AS THEY WERE FOUND TO BENEFIT ONLY SPECIFIC REGIONS, AND WERE THUS COUNTERVAILABLE REGIONAL SUBSIDIES.

1. P.E.I. Comprehensive Development Plan

- The ITA investigated this programme in the Atlantic Groundfish case, and found a subsidy of 0.039%.

2. General Development Agreements

- The ITA investigated this programme in the Atlantic Groundfish case, and found that this programme's umbrella development arrangements with Newfoundland, Nova Scotia and New Brunswick, conferred a subsidy of 0.181%.

- The ITA investigated this programme in the Lumber (I) case, and found that this programme conferred, through:

  (a) B.C. - Assistance to Small Enterprise Programme
  net subsidies of 0.044% for softwood shakes and shingles; 0.002% for softwood lumber; and 0.010% for softwood fence,

  (b) New Brunswick - NED and SIFAP
  net subsidies of 0.008% for softwood shakes and shingles; 0.007% for softwood fence; and 0.001% for softwood lumber; and

  (c) Eastern Ontario Subsidiary Agreement
  net subsidy of 0.001% for softwood lumber.

- The ITA investigated this programme in the Lumber (II) case, and found a subsidy of 0.001%.

- The ITA investigated this programme in the Steel Rail case, and found that this programme's umbrella development arrangement with Nova Scotia conferred a subsidy of 25.48% to Sysco.

- The ITA investigated this programme in the Seismographs case, and found a subsidy of 25.48%.

3. Canada-Saskatchewan Subsidiary Agreement on Iron, Steel and Other Related Metal Industries

- The ITA investigated this programme in the Tubular Goods case, and found a subsidy of 0.039%.

4. Agricultural and Rural Development Agreements (ARDA)

- The ITA investigated this programme in the Atlantic Groundfish case, and found a regional subsidy of 0.005%.

- The ITA investigated this programme in the Lumber (I) case, and found a regional subsidy of 0.005%.

- The ITA investigated this programme in the Lumber (II) case, and found that a regional subsidy of 0.003%.

5. Economic and Regional Development Agreements (ERDAs)

- The ITA investigated this programme in the Atlantic Groundfish case, and found a regional subsidy of 0.007%.

- The ITA investigated this programme in the Lumber (I) case, and found a regional subsidy of 0.001%.

- The ITA investigated this programme in the Steel Rails case, and found a regional subsidy of 6.70% to Sysco.

- The ITA investigated this programme in the Seismographs case, and found a subsidy of 6.70%.

6. Transitional Programmes

- The ITA investigated this programme in the Atlantic Groundfish case, and found a regional subsidy of 0.060%.

7. Canada/Québec Subsidiary Agreement on Agri-Food Development

- The ITA investigated this programme in the Pork case, and found the federal portion to confer a countervailable net subsidy rate of $0.000009/lb. Cdn. or $0.000019/kg. Cdn.

III. PROVINCIAL PROGRAMMES DETERMINED TO CONFER SUBSIDIES:

(i) THE FOLLOWING PROVINCIAL PROGRAMMES WERE DETERMINED TO BE COUNTERVAILABLE BY ITA AS THEY WERE FOUND LIMITED TO A SPECIFIC ENTERPRISE OR INDUSTRY, OR GROUP OF ENTERPRISES OR INDUSTRIES.
(Note: the amount in parentheses indicates the net subsidy calculation of the ITA.)

1. Ontario Greenhouse Energy Efficiency Programme (1.47%)

   - Relevant investigation: "Final Affirmative Countervail Determination: Certain Fresh Cut Flowers from Canada".

2. Provincial Stabilization Programmes

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

     (a) B.C. Swine Producers' Farm Income Plan (Cdn. $0.0006/lb dressed weight & $0.00048/lb live weight)

     (b) Manitoba Hog Income Stabilization Plan (Cdn. $0.00131/lb dressed weight & $0.00104/lb live weight)

     (c) New Brunswick Hog Price Stabilization Programme (Cdn. $0.00068/lb dressed weight & $0.00054/lb live weight)

     (d) Newfoundland Hog Price Support Programme (Cdn. $0.00017/lb dressed weight & $0.00013/lb live weight)

     (e) Nova Scotia Pork Price Stabilization Programme (Cdn. $0.00086/lb dressed weight & $0.00068/lb live weight)

     (f) P.E.I. Price Stabilization Programme (Cdn. $0.00057/lb dressed weight & $0.00045/lb live weight)

     (g) Québec Farm Income Stabilization Programme (Cdn. $0.02133/lb dressed weight & $0.01696/lb live weight)

     (h) Saskatchewan Hog Assured Returns Programme (Cdn. $0.00153/lb dressed weight & $0.00122/lb live weight)

3. New Brunswick Swine Assistance Programme (Cdn. $0.00005/lb dressed weight & $0.00004/lb live weight)

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

4. **New Brunswick Loan Guarantees & Grants under the Livestock Incentives Programme** (Cdn. $0.00004/lb dressed weight & $0.00003/lb live weight)

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

5. **New Brunswick Hog Marketing Programme** (Cdn. $0.00008/lb dressed weight & $0.00006/lb live weight)

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

6. **Nova Scotia Swine Herd Health Policy** (Cdn. $0.00001/lb dressed weight & $0.00001/lb live weight)

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

7. **Nova Scotia Transportation Assistance** (Cdn. $0.00006/lb dressed weight & $0.00005/lb live weight)

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

8. **Ontario Farm Tax Reduction Programme** (Cdn. $0.00339/lb dressed weight & $0.00270/lb live weight)

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

9. **Ontario (Northern) Livestock Programme** (Cdn. $0.000001/lb dressed weight & $0.0000004/lb live weight)

   - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

10. **P.E.I. Hog Marketing & Transportation Subsidies** (Cdn. $0.00007/lb dressed weight & $0.00006/lb live weight)

    - Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

11. **P.E.I. Swine Development Programme** (Cdn. $0.00002/lb dressed weight & $0.00002/lb live weight)

- Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

12. P.E.I. Interest Payments on Assembly Yard Loans (Cdn. $0.0000004/lb dressed weight & $0.0000003/lb live weight)

- Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

13. Québec Meat Sector Rationalization Programme (Cdn. $0.00005/lb dressed weight & $0.00004/lb live weight)

- Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

14. Québec Special Credits for Hog Producers (Cdn. $0.00005/lb dressed weight & $0.00004/lb live weight)

- Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

15. Saskatchewan Financial Assistance for Livestock & Irrigation (Cdn. $0.00045/lb dressed weight & $0.00036/lb live weight)

- Relevant investigation: "Final Affirmative Countervail Determination: Live Swine and Fresh, Chilled and Frozen Pork Products from Canada".

The ITA identified the following 37 programmes (nos. 16-53) in "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada", as subsidies because their benefits were directed almost exclusively to one industry (i.e., fishing).

New Brunswick:

16. Loans from the Fisheries Development Board (0.259%)

17 Fish Unloading Systems and Icemaking Programme (0.004%)

18. Insurance Premium Repayment Programme (0.018%)

19. Interest Rate Rebates (0.018%)

20. Technical Services (i.e. the Fishing Vessel & Gear Programme) (0.015%)

Newfoundland:

21. Grants for Purchasing and Constructing Boats (0.150%)

22. Grants for Rebuilding & Repair of Fishing & Coastal Vessels (0.003%)

23. Grants to Cover Operating Expenses (0.096%)

24. Loans from the Fisheries Loan Board (0.245%)

25. Loan Guarantees from the FLB (0.013%)

26. Operation of Fisheries Facilities and Services (0.001%)

27. Construction and Repair of Fisheries Facilities (0.009%)

28. Enhancement of Fishing Operations (0.001%)

29. Marketing Assistance (0.001%)

Nova Scotia:

30. Fishing Vessel Construction Programme (0.014%)

31. Loans from the Fisheries Loan Board (0.375%)

32. Industrial Development Division of Department of Fisheries (0.181%)

33. Market Development Assistance (0.008%)

Prince Edward Island:

34. Fishing Vessel Subsidy Programme (0.015%)

35. Near and Offshore Vessel Assistance Programme (0.004%)

36. Engine Conversion Programme (0.006%)

37. Commercial Fishermen's Investment Incentive Programme (0.003%)

38. Construction of Icemaking and Fish Chilling Facilities (0.003%)

39. Fish Box Pool Programme (0.002%)

40. Technical Upgrading Programme (0.001%)

41. Fresh Fish Marketing Programme (0.090%)

42. Fishing Industry Technology Programme (0.012%)

43. Technology Improvements Programme (0.002%)

44. Onboard Fish Handling Systems Programme (0.001%)

Québec:

45. Vessel Construction Assistance Programme (0.028%)

46. Gear Subsidy Programme (0.041%)

47. Insurance Premium Subsidy Programme (0.043%)

48. Large Vessel Construction Programme (0.144%)

49. Loans from the Ministry of Agriculture, Fisheries and Food (0.045%)

50. Grants for Engine Purchases (0.021%)

51. Grants for Fish Transport and Seafood Processing Tanks (0.029%)

52. Grants to Processing Enterprises for Capital Equipment (0.109%)

53. Ice-making and Fish Chilling Assistance (0.077%)

54. British Columbia Farm Income Plan (0.99%)

- Relevant investigation: "Suspension of Countervailing Duty Investigation: Certain Red Raspberries from Canada".

55. British Columbia Critical Industries Act (0.006%)

- Relevant investigation: "Final Affirmative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber II).

56. British Columbia Low Interest Loan Assistance (0.001%)

- Relevant investigation: "Final Negative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

57. Québec Tax Abatement Programme (0.005%)

- Relevant investigation: "Final Negative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

58. Québec Assistance to, and by, the Forest Salvage Management and Development Corporation of Québec (0.173%)

- Relevant investigation: "Final Affirmative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber II).

59. Québec Lumber Industry Consolidation and Expansion Programme (0.007%)

- Relevant investigation: "Final Affirmative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber II).

60. Alberta Stumpage Payment Deferral (0.003%)

- Relevant ITA investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

61. British Columbia Low Interest Loan Assistance (0.001%)

- Relevant investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

62. **British Columbia Stumpage Payment Deferral (0.001%)**

- Relevant investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

63. **Ontario Stumpage Prices for Non-Integrated Licensees (0.015%)**

- Relevant investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

64. **Ontario Stumpage Payment Deferral (0.005%)**

- Relevant investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

65. **Québec Stumpage Pricing on Timber Limits (0.061%)**

- Relevant investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

66. **Québec Aide à la Promotion des Exportations (0.002%)**

- Relevant investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

67. **Québec Société de Récupération d'Exploitation et de Développement Forestiers du Québec**

(0.001% ad valorem for Loans and Guarantees, 0.001% ad valorem for Grants, 0.017% ad valorem for softwood lumber, 0.014% ad valorem for softwood shakes and shingles and softwood fence in Equity Purchases, 0.005% ad valorem for the FRI Tax Abatement Programme, and 0.019% ad valorem for softwood lumber in the SDI Export Expansion Programme)

- Relevant investigation: "Final Negative Countervail Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

68. **Québec Industrial Development Corporation (SDI)**

- The relevant case: In the 1983 Railcars case the ITA found that grants by this provincial government agency were countervailable as they were targeted to a specific enterprise.

- The ITA calculated the net subsidy of this benefit to be $331,125 ($405 per 825 railcars).

- The DOC admitted in Lumber I that it had made a mistake in finding this programme countervailable.

- The relevant case: In the Magnesium case the ITA calculated a net subsidy rate of 6.18% ad valorem.

69. Alberta Crow Benefit Offset Programme ($0.001464/lb. or $0.003228/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are limited to Alberta feed grain users it is countervailable.

70. Alberta Department of Economic Development and Trade Act ($0.000008/lb. or $0.000018/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are provided subject to the discretion of the Alberta government it is countervailable.

71. Alberta Grant to Fletcher's Fine Foods ($0.000030/lb. or $0.000066/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are limited to a specific enterprise and are countervailable.

72. Ontario Pork Industry Improvement Plan (OPIIP) ($0.001054/lb. or $0.002324/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are limited to Ontario pork producers it is countervailable.

73. Ontario Marketing Assistance Programme for Pork ($0.000278/lb. or $0.000613/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are limited to Ontario pork producers it is countervailable.

74. Québec Farm Income Stabilization Insurance Programme ($0.019582/lb. or $0.043170/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are limited to Québec hog farmers it is countervailable.

75. Québec Productivity Improvement and Consolidation of Livestock Production Programmes (QPICLP) ($0.000005/lb. or $0.000010/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are limited to Québec livestock producers it is countervailable.

76. Saskatchewan Hog Assured Returns Programme (SHARP) ($0.000639/lb. or $0.001408/kg.)

- The relevant case: In the 1989 Pork case, the ITA found that as the benefits of this programme are limited to Saskatchewan hog farmers it is countervailable.

77. Saskatchewan Livestock Investment Tax Credits ($0.000327/lb. or $0.000721/kg.)

- The relevant case: In the Pork case, the ITA found that the benefits of this programme are limited to Saskatchewan livestock producers and are countervailable.

78. Saskatchewan Livestock Facilities Tax Credits ($0.000161/lb. or $0.000355/kg.)

- The relevant case: In the Pork case, the ITA found that the benefits of this programme are limited to Saskatchewan livestock producers and are countervailable.

79. Nova Scotia Grants for the Payment of Interest and Principal on Sysco. Debentures (22.73% ad valorem)

- The relevant case: The ITA investigated this programme in the Steel Rails case.

80. Nova Scotia Operating Grants to Sysco. (19.34% ad valorem)

- The relevant case: The ITA investigated this programme in the Steel Rails case.

81. Nova Scotia Long-Term Loan Guarantees to Sysco. (12.83% ad valorem)

- The relevant case: The ITA investigated this programme in the Steel Rails case.

82. Nova Scotia Equity Infusions (21.89% ad valorem)

- The relevant case: The ITA investigated this programme in the Steel Rails case.

83. La Société du Parc Industriel du Centre du Québec (1.43% ad valorem)

- The relevant case: In the Magnesium case, the ITA calculated a net subsidy of 1.43% ad valorem.

84. Québec Risk and Profit Sharing Programme (RPSP)

- The relevant case: In the Magnesium case, the ITA found the RPSP to be specific, hence countervailable.

85. Provincial Stumpage Pricing on Timber Limits and Provincial Log Export Programmes

- Relevant ITA investigation: "Final Negative Countervail Duty Determination: Certain Softwood Lumber Products from Canada " (Lumber III).

National Rate:	**6.51%**
Stumpage:	
British Columbia:	3.30%
Alberta:	1.25%
Ontario:	5.95%
Québec:	0.01%
Overall Rate:	**2.91%**
Log Exports:	
British Columbia:	4.64%
Alberta:	0.00%
Ontario:	0.00%
Québec:	0.00%
Overall Rate:	**3.60%**

(ii) THESE PROVINCIAL PROGRAMMES WERE FOUND TO BE COUNTERVAILABLE BY THE ITA DUE TO LIMITED APPLICATION TO SPECIFIC REGIONS

1. **Ontario Farm Tax Reduction Programme**

   - The relevant case: In the Live Swine case this programme was found to confer a regional net subsidy of Can. $0.00339/lb. for dressed-weight and $0.00270/lb. for live-weight.

2. **Ontario (Northern) Livestock Programme**

   - The relevant case: In the Live Swine case this programme was found to confer a regional net subsidy of Can. $0.000001/lb. for dressed-weight and $0.0000004/lb. for live-weight.

3. **British Columbia Low-Interest Loan Assistance**

   - The relevant case: In the Lumber case this programme was found to confer a regional net subsidy of 0.001% ad valorem (Lumber I).

4. **Québec Tax Abatement Programme**

   - The relevant case: In the Lumber case this programme was found to confer a regional net subsidy of 0.005% ad valorem (Lumber I).

5. Ontario Farm Tax Rebate Programme

- The relevant case: In the Pork case this programme was found to confer a regional net subsidy of Can. $0.000009/lb. or $0.000020/kg..

6. Ontario (Northern) Livestock Improvement and Transportation Assistance Programme

- The relevant case: In the Pork case this programme was found to confer a regional net subsidy of less than Can. $0.000001 in either pounds or kilograms.

7. Québec Regional Development Assistance Programme (Livestock Transportation Sub-Programme)

- The relevant case: In the Pork case this programme was found to confer a regional net subsidy of Can. $0.000011/lb. or $0.000025/kg.

(iii) THE FOLLOWING PROVINCIAL PROGRAMMES WERE DETERMINED TO CONFER A COUNTERVAILABLE SUBSIDY AS THEY WERE FOUND TO BE EXPORT SUBSIDIES.

1. Nova Scotia Market Development Assistance (0.008%)

- The relevant investigation: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

- Note: this programme was also identified as a subsidy, previously under part (i) - as a programme limited to a specific industry.

2. P.E.I. Fresh Fish Marketing Programme (0.090%)

- The relevant investigation: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

- Note: this programme was also identified as a subsidy, previously under part (i) - as a programme limited to a specific industry.

3. Québec Export Promotion Assistance (0.001%)

- The relevant investigation: "Final Negative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

4. Québec Industrial Development Corporation (0.019%)

- The relevant investigation: "Final Negative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber I).

(iv) THE FOLLOWING PROVINCIAL PROGRAMMES WERE FOUND TO BE COUNTERVAILABLE AS THEY WERE "INCONSISTENT WITH COMMERCIAL CONSIDERATIONS".

1. **British Columbia Low-Interest Loan Assistance**

   - The Relevant case: In the Lumber case this programme was found to confer a net subsidy of 0.001% ad valorem (Lumber I).

2. **Nova Scotia Long-Term Loan Guarantees Provided to Sysco.**

   - The relevant case: In the Steel Rails case this programme was found to confer a subsidy of 14.11% ad valorem.

3. **Nova Scotia Equity Infusions to Sysco.**

   - The relevant case: In the Steel Rails case this programme was found to confer a subsidy of 26.23% ad valorem.

4. **Alberta Department of Economic Development and Trade Act**

   - The relevant case: In the Pork case this programme was found to confer a net subsidy of Can. $0.000008/lb. or $0.000018/kg.

5. **Québec Risk and Profit Sharing Programme (RPSP)**

   - The relevant case: In the Magnesium case the ITA found the RPSP to be specific, hence countervailable.

6. **Québec Industrial Development Corporation (SDI)**

   - The relevant case: In the "Pure Magnesium and Alloy Magnesium from Canada", the ITA calculated a net subsidy rate of 6.18% ad valorem.

IV. FEDERAL PROGRAMMES DETERMINED NOT TO CONFER COUNTERVAILABLE SUBSIDIES:

1. Federal Stumpage Programmes

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).
- Note: The ITA reversed this non-countervailable decision in the second softwood lumber case.

2. Deductible Inventory Allowance

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

3. Capital Cost Allowance

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

4. The Export Development Corporation (EDC)

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).
- Note: An EDC financing package was found countervailable in the "Railcars from Canada" case.

5. Local Employment Assistance Programme

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

6. Work Sharing Programme

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

7. Regional Development Incentives Programme - Loan Guarantees

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).
- Note: Other elements of this programme have been countervailed a number of times.

8. Enterprise Development Programme (EDP)

- Relevant case: "Final Negative Countervailing Duty Determination: Softwood Lumber Products from Canada" (Lumber I).
- Relevant case: "Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada".
- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

9. Transportation Programmes

- Relevant case: "Final Negative Countervailing Duty Determination: Softwood Lumber Products from Canada".

10. Farm Credits Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

11. Farm Syndicates Credit Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

12. Special Farm Assistance Programmes

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

13. Hog Carcass Grading System

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

14. Employment Development Fund

- Relevant case: "Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada".

15. Atlantic Fisheries Management Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

16. DFO Marketing Intelligence and Industry Services Branch

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

17. Section 146 of the Unemployment Insurance Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

18. Import Duty Remission under the Machinery Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

19. Federal Assistance to Bait Services Plan

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

20. Farm Improvement Loan Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from Canada".

21. Investment Tax Credits

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from Canada".
- Note: Only the basic 7% rate was found not countervailable. Rates above 7% have been found countervailable a number of times.
- Relevant case: "Final Affirmative Countervailing Duty investigation: Portable Seismographs from Canada".

22. Research Grants Received by Sysco.

- Relevant case: "Final Affirmative Countervailing Duty Determination: Steel Rails from Canada".

23. Special Canada Grains Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

V. JOINT FEDERAL - PROVINCIAL PROGRAMMES DETERMINED NOT TO HAVE CONFERRED COUNTERVAILABLE SUBSIDIES:

1. Forestry Subsidiary Agreements:

(a) Long-Term Forest Management

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

(b) Canada-Saskatchewan Opportunity Identification & Technological Assistance

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

(c) Forestry Job Programme - Employment Bridging Assistance Programme

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

(d) Canada-Nova Scotia Grants to Private Woodlot Owners

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada".

(e) Canada-New Brunswick Grants to Private Woodlot Owners

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

2. Forestry Development Agreement for the Improvement of Crown Land (signed between the federal government and all provincial governments)

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

3. Newfoundland Rural Development Agreement

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber II).

4. **Rail Transportation Facilities for the Lumber Industry**

   - Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber II).

5. **Newfoundland Rural Development Subsidiary Agreement**

   - Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber II).

6. **Forintek Research and Development**

   - Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber II).

7. **Research Projects under the Canada-Québec Subsidiary Agreement on Agri-Food Development**

   - Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

8. **Research under the Canada-Saskatchewan Agricultural Development Subsidiary Agreement**

   - Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

9. **Research conducted by the Institute of Magnesium Technology under the Canada-Québec Subsidiary Agreement on Scientific and Technological Development.**

   - Relevant case:"Pure Magnesium and Alloy Magnesium from Canada".

VI. PROVINCIAL PROGRAMMES DETERMINED NOT TO CONFER COUNTERVAILABLE SUBSIDIES:

1. Provincial Stumpage Programmes

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).
- Note: The ITA reversed its decision that these programmes were non-countervailable in the second softwood lumber case.

2. Alberta Timber Salvage Programme

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

3. Alberta Opportunity Company

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

4. British Columbia Section 88 Roads Programme

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

5. Ontario Employment Development Fund

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).
- Relevant case: "Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada" .

6. Ontario Non-Forestry Subsidiary Agreement Road

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

7. Caisse de Dépôt et Placement du Québec

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

8. Québec FRI Industrial Incentives Fund for Small and Medium Sized Businesses

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

9. Québec Programme Expérimental de Création d'Emplois Communitaires

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada".

10. Québec PME Innovation

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

11. Québec Société de Développement Industriel (SDI) Programmes

- Relevant case: "Final Negative Countervailing Duty Determination: Certain Softwood Lumber Products from Canada" (Lumber I).

12. Grants under the Québec Act to Promote the Development of Agricultural Operations

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

13. Grants to Provincial Pork Packers Under the Québec Industrial Assistance Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

14. Low Interest Financing under the Québec Act to Promote Long-Term Farm Credit by Private Institutions

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

15. Low Interest Financing under the Québec Farm Credit Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

16. Low Interest Guaranteed Loans under the Québec Act to Promote Farm Improvement

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

17. Interest Free Loans under the Québec Act to Promote the Establishment of Young Farmers

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

18. Low Interest Mortgages under the Québec Farm Loan Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

19. Québec Short-Term Loans

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

20. Ontario Farm Adjustment Assistance Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

21. Ontario Beginning Farmer Assistance Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

22. Ontario Young Farmer Credit Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

23. New Brunswick Financing under the 1980 Farm Adjustment Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

24. Newfoundland Loans under the Farm Development Loan Act

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

25. **Nova Scotia Farm Loan Board Programme**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

26. **P.E.I.. Lending Authority Short- and Long-Term Loans**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

27. **Alberta Agricultural Development Corporation Low Interest Loans and Loan Guarantees**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

28. **Low Interest Loans and loan Guarantees by the British Columbia Ministry of Agriculture and Food**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

29. **British Columbia Partial Interest Reimbursements**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

30. **Manitoba Agricultural Credit Corporation Loans and Loan Guarantees**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

31. **Saskatchewan Economic Development Corporation Financial Assistance**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Live Swine and Fresh, Chilled and Frozen Pork from Canada".

32. **Alberta Opportunity Loan to Ipsco.**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Oil Country Tubular Goods from Canada".

33. **New Brunswick Marketing and Promotion Activities**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

34. New Brunswick Training Services

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

35. Newfoundland-Labrador Development Corporation

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".
- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

36. Newfoundland Rural Development Loan Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

37. Newfoundland Loan Deficiency Guarantee Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

38. Newfoundland Market Development Information Services

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".
- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

39. Newfoundland Construction of Fisheries Access Roads

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

40. Newfoundland Market and Product Development Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

41. Newfoundland Rural Development Assistance Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

42. Newfoundland Small Business Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Atlantic Groundfish from Canada".

43. Québec Industrial Development Financing and Development Assistance Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Products from Canada" (Lumber II).

44. British Columbia Forest Stand Management Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Products from Canada" (Lumber II).

45. British Columbia Small Business Venture Capital Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Products from Canada" (Lumber II).

46. Alberta Research Projects for the Forest Industry

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Softwood Products from Canada" (Lumber II).

47. Ontario Farm Tax Reduction Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Certain Fresh Cut Flowers from Canada".

48. Nova Scotia Short-Term Loan Guarantees to Sysco.

- Relevant case: "Final Affirmative Countervailing Duty Determination: New Steel Rail, Except Light Rails, from Canada".

49. Alberta Processed Food Market Expansion Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

50. Alberta Food Processors' Promotion Assistance Programme

- Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

51. **Ontario MAPP Consumer Survey**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

52. **Research Grants under the Ontario Pork Industry Improvement Plan (OPIIP)**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

53. **Education Grants to the Ontario Pork Producers; Marketing Board under OPIIP**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

54. **Provincial Grants to the Pork Producers' Marketing Board**

- Relevant case: "Final Affirmative Countervailing Duty Determination: Fresh, Chilled and Frozen Pork from Canada".

55. **Ontario Current Cost Adjustment (OCCA)**

- Relevant case:"Final Affirmative Countervailing Duty Investigation: Portable Seismographs from Canada".

56. **Manpower Training Programme: Québec Ministry for Manpower and Income Security**

- Relevant case: "Final Affirmative Countervailing Duty Investigation: Pure Magnesium and Alloy Magnesium from Canada".


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