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## *U.S. Trade Law and Policy Series #12: The Specificity Dialogue Continues*

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## ***U.S. Trade Law and Policy Series #12: The Specificity Dialogue Continues***

Current U.S. countervailing duty law provides that for a subsidy to be potentially actionable, it must be provided only to a specific industry or group of industries. This requirement has been at the heart of several Commerce Department negative determinations that spawned considerable litigation in the Court of International Trade and legislative proposals to amend the law.

Recently the court issued two more opinions on this subject, clarifying its direction. And the 100th Congress further considered proposals to change the law itself. This article reviews these developments and their implications for U.S. countervailing duty law and practice.

### **I. Background**

Section 771(5) of the Tariff Act of 1930, as amended (Act),<sup>1</sup> defines the term subsidy for purposes of the countervailing duty (CVD) law. It distinguishes between export<sup>2</sup> and domestic subsidies, each of which it defines in part through use of an illustrative list of such subsidies.<sup>3</sup> To be

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1. 19 U.S.C. § 1677(5) (1982).

2. *Id.* Export subsidies are defined as "[a]ny export subsidy described in Annex A to the Agreement [on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade] (relating to illustrative list of export subsidies)."

3. For export subsidies, the illustrative list is the Annex to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (Subsidies Code), 31 U.S.T. 513, T.I.A.S. No. 9619 (including, e.g., the provision by governments of direct subsidies to a firm or industry contingent upon export perfor-

potentially actionable,<sup>4</sup> domestic subsidies must be "provided or required by government action to a specific enterprise or industry, or group of enterprises or industries."<sup>5</sup>

Based in part on this requirement, the Department of Commerce<sup>6</sup> decided in several cases in 1983 that foreign government practices concerning natural resources were not countervailable.

In *Anhydrous and Aqua Ammonia from Mexico (Ammonia)*,<sup>7</sup> *Carbon Black from Mexico (Carbon Black)*,<sup>8</sup> *Portland Hydraulic Cement and Cement Clinker from Mexico (Cement)*,<sup>9</sup> and *Certain Softwood Products from Canada (Lumber)*,<sup>10</sup> various U.S. petitioners complained about Mexican or Canadian government practices that resulted in prices in those countries for natural resources (natural gas, petroleum feedstock, heavy fuel oil, and standing timber, respectively) lower than prices prevailing in the United States. The prices for those inputs, which accounted for a high proportion of the end products' value, were alleged to reflect subsidies.

In each case, however, Commerce found that the practice concerned was not limited to a specific industry or group of industries. On this basis (inter alia), Commerce determined that these particular practices did not confer countervailable subsidies.<sup>11</sup>

## II. Litigation

The specificity issue in these and other cases resulted in a number of suits in the Court of International Trade. Initially the views on the court seemed to range widely. In *Carlisle Tire & Rubber Co. v. United States*<sup>12</sup> the court in 1983 approved Commerce's interpretation of "bounty or

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mance). For domestic subsidies, the illustrative list is included in the Act itself at § 771(5)(B)(i)-(iv), 19 U.S.C. § 1677(5)(B)(i)-(iv) (1982) (including, e.g., the provision of capital on terms inconsistent with commercial considerations).

4. Even if a countervailable subsidy exists, in most cases offsetting countervailing duties are not imposed unless imports of such subsidized merchandise cause or threaten material injury to a U.S. industry, or materially retard the establishment of such an industry. See §§ 303, 703(a), 705(b) and 706(a) of the Act, 19 U.S.C. §§ 1303, 1671b(a), 1671d(b) & 1671e(a) (1982 & Supp. III 1985).

5. Section 771(5)(B), 19 U.S.C. § 1677(5)(B) (1982).

6. The Department of Commerce is the "administering authority" that determines whether bounties, grants, or subsidies have been bestowed on imports. Reorg. Plan No. 3 of 1979, § 2(a), 44 Fed. Reg. 69,273, 69,274 (1979), reprinted in 5 U.S.C. app. at 1170, 1171 (1982); Exec. Order No. 12,188, 3 C.F.R. §§ 131, 135 (1981).

7. 48 Fed. Reg. 28,522 (Dep't Comm. 1983) (final determination).

8. 48 Fed. Reg. 29,564 (Dep't Comm. 1983) (final determination).

9. 48 Fed. Reg. 43,063 (Dep't Comm. 1983) (final determination).

10. 48 Fed. Reg. 24,159 (Dep't Comm. 1983) (final determination).

11. *Ammonia*, 48 Fed. Reg. 28,524; *Carbon Black*, 48 Fed. Reg. at 29,567; *Cement*, 48 Fed. Reg. at 43,066; *Lumber*, 48 Fed. Reg. at 24,167.

12. 564 F. Supp. 834 (Ct. Int'l Trade 1983).

grant" in section 303 of the Act<sup>13</sup> as implying some special advantage conferred on a particular industry or industry group.<sup>14</sup> Rejecting petitioner's argument that generally available benefits from government programs should be countervailable, Judge Maletz required that "at a minimum either a regional or industry preference [must] be present in order for a bounty or grant to exist."<sup>15</sup>

The next year, however, the same court, in *dictum*, rejected the proposition that "as a rule, generally available benefits are not subsidies."<sup>16</sup> Claiming to be in harmony with *Carlisle*, the court in *Bethlehem Steel Corp. v. United States*<sup>17</sup> stated: "[T]here is no reason why a particular benefit cannot be extended without limitation" and still be countervailable.<sup>18</sup>

In 1985, in *Cabot Corp. v. United States*,<sup>19</sup> the court, in reviewing Commerce's 1983 *Carbon Black* decision,<sup>20</sup> held that section 303 of the Act is unconcerned "with the nominal availability of a governmental program."<sup>21</sup> Instead, "[t]he question is what aid or advantage has actually been received."<sup>22</sup> The court distinguished between generally available benefits accruing to all citizens, and those actually accruing only to specific individuals or classes. The court stressed that even though some benefits may be generally available, their actual bestowal may nonetheless constitute grants to specified, identifiable entities.<sup>23</sup>

More recently, however, the court seems to have developed a more settled interpretation of the specificity test. In *PPG Industries, Inc. v. United States (PPG)*<sup>24</sup> the court clarified its holding in *Cabot*. In *PPG* the plaintiff had contended that any program that reduced the cost of producing or exporting must be countervailed irrespective of whether companies received similar benefits.<sup>25</sup> Defendant relied on the literal lan-

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13. 19 U.S.C. § 1303, which applies in CVD investigations of merchandise from countries other than "countr[ies] under the [Subsidies Code]." Section 701(b) of the Act, 19 U.S.C. § 1671(b) (1982).

14. 564 F. Supp. at 838.

15. *Id.* at 837.

16. *Bethlehem Steel Corp. v. United States*, 590 F. Supp. 1237, 1239 (Ct. Int'l Trade 1984).

17. *Id.*

18. *Id.* at 1242; *see also* *Agrexco, Agricultural Export Co. v. United States*, 604 F. Supp. 1238 (Ct. Int'l Trade 1985).

19. 620 F. Supp. 722 (Ct. Int'l Trade 1985).

20. *Supra* note 8.

21. 620 F. Supp. at 730.

22. *Id.*

23. The court held: "The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits." *Id.* at 732.

24. 662 F. Supp. 258 (Ct. Int'l Trade 1987).

25. *Id.* at 260.

guage of section 771(5) of the Act<sup>26</sup> in support of Commerce's application of the specificity or "generally available" test to the facts in that case.<sup>27</sup>

In *PPG* Judge Carman reviewed and clarified the *Cabot* ruling. On the one hand, he noted the absurdity of countervailing generally available public benefits such as education and national defense; on the other, he noted the absurdity of rendering a competitive benefit noncountervailable simply by making it "generally available."<sup>28</sup> Ultimately the message of *Cabot*, according to Judge Carman, was its focus on a de facto, case-by-case determination whether a competitive advantage had actually been conferred on a specific industry or group of industries, rather than on the nominal availability of such advantage. Judge Carman also noted that the decision in *Cabot* with respect to the carbon black industry was influenced by the fact that no other enterprise or industry had the technology or ability to make use of the carbon black feedstock or catcracker bottoms at issue.<sup>29</sup>

Applying the thus clarified *Cabot* principles in *PPG*, Judge Carman ruled that the application of certain eligibility requirements for participation in a program does not per se make the benefits bestowed under that program countervailable. While narrowly drawn eligibility requirements may de facto qualify the benefit as countervailable under the specificity test, the court found that the eligibility requirements under review in that case did not render the benefit one that is provided to a discrete class of beneficiaries and thus satisfied the specificity test.<sup>30</sup>

Less than a month later, the court issued another opinion further clarifying the specificity test. In *Can-Am Corp. v. United States*<sup>31</sup> the plaintiff, relying on *Cabot*, contended that the Mexican Government conferred a countervailable subsidy in providing fuel oil at prices below world market value only to industrial purchasers who used such fuel in Mexico, and not to exporters of such fuel oil (allegedly a specific industry or group of industries). The court, however, held that this interpretation of *Cabot* was in error. It referred to the *PPG* court holding that the specificity test requires Commerce to conduct a de facto, case-by-case analysis to determine whether or not a program provided a subsidy to a specific industry or group of industries. The court upheld Commerce's finding that all industrial users of heavy fuel oil can obtain this good at the same price;

26. Section 1677(5) defines the term "subsidy"; § 303 of the Act uses instead the terms "bounty or grant."

27. 662 F. Supp. at 260.

28. *Id.* at 264.

29. *Id.* at 265-66 n.5.

30. *Id.* at 266-67.

31. 664 F. Supp. 1444 (Ct. Int'l Trade 1987).

and expressly held that Commerce had applied a test consistent with that articulated in *PPG*. In *Can-Am* the court further ruled that "Commerce is granted discretion to determine whether a given group is a specific recipient of a benefit."<sup>32</sup> In the instant case the court held that Commerce acted within its discretion in determining that all industrial users of fuel oil were not a specific group of industries within Mexico.<sup>33</sup>

### III. Recent Legislative Developments

While judicial interpretation of the specificity test has thus recently settled the issue, the test remains the target of proposed legislative amendments. On April 30, 1987, the House passed an omnibus trade bill, H.R. 3,<sup>34</sup> including a new definition of "subsidy."<sup>35</sup> This amended definition includes a "special rule" for the application of the specificity test. Under this rule, Commerce would be required to determine whether the subsidy concerned was "actually paid to or bestowed on a specific . . . industry, or group of . . . industries."<sup>36</sup> Moreover, the special rule expressly provides that: "A nominal general availability . . . is not cause for determining that [a subsidy] . . . cannot be, or has not been, [so] paid or bestowed."<sup>37</sup> In a lengthy explanation of the new "subsidy" definition and the reasons for change, the House report accompanying this bill<sup>38</sup> stresses the "competitive advantage" language from *Cabot*.<sup>39</sup> Some believe such language may provide a basis for a substantially broader interpretation of the specificity test than has to date been the case.

Less than three months later, the Senate passed H.R. 3 as amended, the amendment being a complete substitute, S. 1420.<sup>40</sup> This bill likewise includes a new definition of subsidy and special rule.<sup>41</sup> The Senate special

32. *Id.* at 1449.

33. *Id.*

34. 133 CONG. REC. H2981 (daily ed. Apr. 30, 1987).

35. H.R. 3, 100th Cong., 1st Sess. § 153 (1987), 133 CONG. REC. H2982 (daily ed. Apr. 30, 1987).

36. *Id.* (emphasis added).

37. *Id.*

38. H.R. REP. NO. 40, 100th Cong., 1st Sess. 123-27 (1987).

39. In *Cabot*, the court ruled:

The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits. . . . The definition of 'bounty or grant' under section 1303 as intended by Congress remains as it is embodied in the case law and later affirmed by Congress in section 1677(5). This definition requires focusing only on whether a benefit or 'competitive advantage' has been actually conferred on a 'specific enterprise or industry, or group of enterprises or industries.'

620 F. Supp. at 732 (Ct. Int'l Trade 1985).

40. 133 CONG. REC. 10,372 (daily ed. July 21, 1987).

41. H.R. 3, 100th Cong., 1st Sess. § 153 (1987), amended by S. 1420, 100th Cong., 1st Sess. § 333 (1987).

rule calls for a determination whether “in law or in fact” a subsidy is provided to a specific industry or group of industries. It, too, adds that “nominal general availability . . . is not a basis for determining that a bounty, grant or subsidy is not, or has not been, in fact provided to a specific . . . industry or group thereof.”<sup>42</sup> The Senate report indicates only that under this new rule, the Commerce Department “must determine whether a bounty [,] grant or subsidy in fact is provided to a specific industry rather than finding nominal availability of the subsidy to all industries as a basis for determining that the subsidy is not provided to a specific industry.”<sup>43</sup>

#### IV. Conclusion

The continuing controversy involving the specificity test reflects its importance in countervailing duty law and practice. Parties continue to struggle—first at Commerce and then in the courts—for what they consider a reasonable interpretation and application of the current test.

In addition, efforts continue to have the Congress intervene in this struggle. The Senate bill provisions would simply underscore the newly emerged judicial consensus for an exclusive *de facto* application. In light of accompanying report language, however, House bill provisions could be construed as perhaps more actively changing the underlying test and thus its application by Commerce and interpretation by the courts. Depending upon developments, the clarification and stability on this issue, achieved only recently, could be undermined by the enactment of an amendment spawning yet another series of contentious agency determinations and judicial suits.

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42. *Id.*

43. S. REP. NO. 71, 100th Cong., 1st Sess. 19 (1987).