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Comparative Analysis of Specific Elements in United States and Canadian Unfair Trade Law†

The development of a bilateral trading arrangement that would create a North American free trade area dominated the Canadian and United States Governments' international trade agendas in the late 1980s.[1] This goal was second only to the successful conclusion of the Uruguay Round multilateral trade negotiations

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1. So high a priority was placed on the creation of the Free Trade Agreement (FTA) that during the annual meeting of the International Monetary Fund and World Bank, both James Baker III, U.S. Secretary of Treasury, and Michael Wilson, Canadian Minister of Finance, deferred the crucial task of reviving the delicate global financial system in order to negotiate the FTA. *See* ASSESSING THE CANADA-U.S. FREE TRADE AGREEMENT (Murray G. Smith & Frank Stone eds., 1987); REPORTS OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE FUTURE OF AMERICAN TRADE POLICY, THE FREE TRADE DEBATE (1989); Paul Wonnacott, *The United States and Canada: The Quest for Free Trade*, 16 INST. FOR INT'L ECON. (Mar. 1987); Shelley P. Battram, *Canada-United States Trade Negotiations: Continental Accord or a Continent Apart?*, 22 INT'L LAW. 345 (1988).

under the auspices of the General Agreement on Tariffs and Trade (GATT).[2] Both governments thought it in their mutual interests to negotiate a far-reaching, bilateral free trade arrangement that could also provide a model for the ongoing Uruguay Round negotiations.[3] Preferring something less than the political and economic integration that is the goal of the European Community, the United States and Canada successfully negotiated an agreement that created the largest free trade area in history.[4]

Unlike previous arrangements of this type, the two governments did not negotiate a common code to regulate unfair trade practices between themselves.[5] Rather, as the deadline for the expiration of fast-track negotiating authority[6] in the United States rapidly approached and threatened to prevent a successful conclusion to the negotiations, both governments agreed to a procedural interim arrangement. In lieu of an arrangement to discipline subsidies, which had eluded the negotiators, the two governments agreed to retain their unfair trade laws and to negotiate, over a five-year period, a common solution to the issue of government subsidies.[7] During the transition period, binational panels of nongovern-

2. Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187. An overview of the GATT and its effect on multilateral trade relations is found in MARTINUS NIJHOFF, TRADE POLICIES FOR A BETTER FUTURE, "THE LEUTWILER REPORT," THE GATT AND THE URUGUAY ROUND (1987) [hereinafter THE LEUTWILER REPORT]; RICHARD W.T. POMFRET, UNEQUAL TRADE (1988); JOHN H. JACKSON & WILLIAM J. DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS (1986) and the June 1991 Supplementary Memorandum to that text.

3. The Uruguay Round, initiated by the Contracting Parties to the GATT in 1986, is a comprehensive multilateral effort to negotiate improvements in the current GATT system. *See generally* Jeffrey J. Schott, *The Global Trade Negotiation: What Can Be Achieved,* 29 INST. FOR INT'L ECON. (Sept. 1990); THE LEUTWILER REPORT, *supra* note 2; UNITED STATES TRADE REPRESENTATIVE, 1991 TRADE POLICY AGENDA AND 1990 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM (1991) [hereinafter USTR REPORT].

4. For the definitions of customs unions and free trade areas, see GATT, *supra* note 2, art. XXIV(8)(a), (8)(b). For a text of the FTA, see *Canada-United States Free Trade Agreement,* Jan. 2, 1988, 27 I.L.M. 281 (1988) (codified at 19 U.S.C. § 2112 (1988)). *See also* HOUSE DOC. NO. 100-216 for texts of the FTA, the implementing legislation, and the Statement of Administrative Action. For a detailed survey of the FTA, see Stewart Baker & Shelley Battram, *The Canada-United States Free Trade Agreement,* 23 INT'L LAW. 37 (1989); MARJORIE BOWKER, ON GUARD FOR THEE (1988); RICHARD LIPSEY & ROBERT YORK, EVALUATING THE FREE TRADE DEAL (1988); DEP'T OF COMM., SUMMARY OF THE U.S.-CANADA FREE TRADE AGREEMENT (Feb. 1988).

5. Traditionally, free trade areas have developed harmonized tariffs and trade regulations among the members, while each member has retained its individual tariff and trade laws to be applied to third countries; *see, e.g.* Australia-New Zealand Free Trade Area Agreement, 5 I.L.M. 305 (1966), and European Free Trade Area Association (EFTA), 5 I.L.M. 784 (1966). The only restraint on Australia and New Zealand's relationships with third countries came under the auspices of rules of origin. *See* REPORTS OF THE TWENTIETH CENTURY FUND TASK FORCE ON THE FUTURE OF AMERICAN TRADE POLICY, *supra* note 1.

6. Fast-track negotiating authority has its genesis in sections 2(a) and 3(c) of the Trade Agreements Act of 1979, 19 U.S.C. § 2503(a), (b) (1988). Under these provisions, the President must consult with Congress during the negotiation of a trade agreement and present the final agreement to Congress for a vote on the agreement as a whole, without amendments, within sixty or ninety days, if certain other conditions are met. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 377 (1991).

7. The FTA is implemented into U.S. law at 19 U.S.C. § 2112 (1988). Article 1907 of the U.S.-Canada FTA establishes a bilateral working group whose primary goal is to develop more

ment experts will determine whether the unfair trade laws of each country are being administered in accordance with the applicable country's laws.[8]

For both governments, the Uruguay Round has been the principal forum for the debate about discipline on unfair trade practices since the conclusion of the United States-Canada Free Trade Agreement (FTA).[9] Unless significant progress is made in these talks in the near future, it will be increasingly important to shift from the multilateral to the bilateral negotiation of improved "rules of the game" as the December 31, 1993, deadline imposed by the FTA approaches.

The following five-step analysis of the existing features of each country's framework for trade regulation seeks to demonstrate the broad common ground shared by both nations in the administration of their current unfair trade regimes. First, the article examines the international obligations that are the basis of the FTA partners' trade laws. Second, it presents an analysis of the substantive refinements that each country has made to the concepts of subsidies, material injury, and public interest. Third, it focuses on the procedures and practices of each country that implement the substantive laws and regulations. Fourth, it studies the use of negotiated settlements in each country as a tool for enforcement rather than as a means to evade unfair trade laws, as is the case in most of the world. Finally, it analyzes the different standards of judicial review in trade cases in each FTA country.

I. Sources of Domestic Trade Law

Canadian and American trade laws flow from the treaty obligations undertaken by both Canada and the United States as contracting parties to the GATT and as signatories to the Tokyo Codes on subsidies[10] and antidumping.[11] As such, both countries have enacted domestic legislation designed to adhere to these instruments. These codes and their implementing legislation were established to dis-

effective rules and disciplines over the use of government subsidies and to develop a substitute system of rules to address the issue of unfair pricing (dumping). Article 1906 sets a five-year deadline for the implementation of the rules, with an automatic extension for two more years. Failure to agree to implement a new regime after seven years will allow either government to terminate the FTA on six months' notice.

8. Chapters 18 and 19 of the FTA provide several mechanisms for the further elaboration of the agreement, as well as for the resolution of disputes. In particular, the article 1907 working group (*see supra* note 7) will monitor problems under chapter 19 and recommend improvement, and develop a new system to discipline subsidies and dumping. During the transition period to the new system, article 1902(1) permits each country to retain the right to continue to apply its own domestic trade law, which is to include all relevant statutes, legislative history, regulations, administrative practice, and judicial precedent. In addition, article 1904 creates a unique binational system for the review by five-member panels of nongovernment experts from each nation of antidumping and countervailing duty determinations made in each country affecting the other country's goods. This review is made in lieu of a review by the relevant courts in each country.

9. *See* USTR REPORT, *supra* note 3, on the continuing implementation of the FTA.

10. *See* Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the GATT (GATT Subsidies Code), Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619.

11. *See* Agreement on the Implementation of Article VI of the GATT (GATT Antidumping Code), Apr. 12, 1979, 31 U.S.T. 4914, T.I.A.S. No. 9650.

cipline the use of unfair trade laws as protectionist, nontariff trade barriers by national governments.

The GATT codes form the basis of American and Canadian unfair trade laws. Canada incorporated these measures in the Special Imports Measures Act[12] (SIMA); the United States implemented them in the Trade Agreements Act of 1979[13] (1979 Trade Act). At a cursory level both systems are similar, employing language analogous to that found in the Tokyo Codes. The codes, however, are sufficiently vague to permit differences in the good faith interpretation and implementation of their requirements.

Indeed, both systems call for a determination of an unfair trade practice that causes or threatens to cause material injury to a domestic industry or group of industries before a duty becomes assessable.[14] Consistent therewith, both countries provide a mandatory two-track, quasi-judicial, administrative proceeding to determine whether a domestic industry has been injured by an unfair trade practice.[15]

In the United States, the Import Administration of the International Trade Administration (ITA) in the Department of Commerce determines the extent or margin of a subsidy or sale at less than fair value.[16] The U.S. International Trade Commission (ITC) makes material injury determinations. Under the Canadian system, the determination of subsidy or sales at less than fair value is made by the Assessment Programs Division of the Department of National Revenue, Customs and Excise (C&E). The Canadian International Trade Tribunal (CITT) conducts the material injury investigation.[17]

II. Substantive Law

While there is a broad consensus that certain international trade practices are unfair and therefore should be controlled or regulated to some extent, there has been considerable controversy in the GATT during the current Uruguay Round of

12. R.S.C. ch. S-15 (1985). Administrative procedures governed by the Special Import Measures Regulations.

13. Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of titles 5, 13, 19, and 26 U.S.C.). Administrative procedures are governed by 19 C.F.R. § 200ff.

14. *See, e.g.*, GATT Subsidies Code, *supra* note 10, arts. 2, 6(2), and annex.

15. While such a bifurcated system is GATT consistent, it is by no means mandatory. In fact, Australia and the EEC employ equally GATT consistent one-step investigations. For an insightful commentary on the advantages of the respective approaches, see ANTIDUMPING LAW AND PRACTICE 427–28 (John H. Jackson & Edwin A. Vermulst eds., 1989).

16. For a comprehensive discussion of the administration of U.S. antidumping and countervailing duty laws, see Stephen J. Powell, Craig R. Giesse, & Craig L. Jackson, *Current Administration of U.S. Antidumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks*, 11 NW. J. INT'L L. & BUS. 177 (1990).

17. R.S.C. ch. S-15 (1985) §§ 31(1) & 42(1); 19 C.F.R. §§ 353, 355 (1988); 19 U.S.C. § 2251(b)(1) (1988).

negotiations, as well as in the previous multilateral trade negotiation rounds, over what constitutes an unfair trade practice.[18] The GATT, as interpreted through the GATT Subsidies Code and the GATT Antidumping Code, is far from a complete code of conduct.[19] Many countries have enjoyed a wide latitude to interpret the GATT to justify trade distorting measures. Canada and the United States are not exceptions. While both nations profess to adhere to GATT ideology and have employed much of its language in their domestic legislation, some peculiarities remain, which the following sections explore.

A. SUBSIDIES

1. *International Law*

Perhaps the biggest irritant in Canadian-American trade relations in the past decade has been the issue of subsidies. Indeed, Canada's perceived overuse of subsidies is likely one of the main reasons behind American insistence that Canada be included in American unfair trade law under the FTA.[20]

Subsidies were a difficult issue in the Tokyo Round negotiations. Subsidies still remain controversial instruments of commercial policy. Although the GATT Subsidies Code provides an illustrative list of export subsidies, the code fails to provide a precise definition of what constitutes a countervailable subsidy.[21] This problem continues today and is particularly acute in the area of agricultural trade, where a failure to negotiate satisfactory limitations on subsidies threatens to prevent the conclusion of the Uruguay Round multilateral trade negotiations.

The decision of whether subsidies are countervailable depends on the perception of the proper role of government in society. As a result, the decision prompting a countervailing duty response is a determination that a foreign producer is receiving an unfair competitive advantage through an improper government subsidy.[22]

A principal difficulty today lies in distinguishing between domestic subsidies that divert and distort otherwise natural trade patterns and domestic subsidies

18. *See* JACKSON & DAVEY, *supra* note 2, ch. 10.

19. *See* POMFRET, *supra* note 2; THE LEUTWILER REPORT, *supra* note 2.

20. An interesting example of the friction in Canada-U.S. trade relations caused by Canada's use of subsidies is found in RALPH H. FOLSOM, MICHAEL W. GORDON & JOHN A. SPANOGLE, JR., INTERNATIONAL BUSINESS TRANSACTIONS 499–506 (1986).

21. A countervailing duty is a special duty levied on imported merchandise that benefits from the payment or bestowal of a "bounty or grant." 19 U.S.C. § 1303(a)(1) (1988). The purpose of the duty is to nullify the benefits of the "bounty or grant" so the amount of the duty is always equal to that of the "bounty or grant." William Lay, *Redefining Actionable "Subsidies" Under U.S. Countervailing Duty Law*, 91 COLUM. L. REV. 1495 (1991).

22. To glean an appreciation of the influence of ideology in American subsidy determinations, see Daniel K. Tarullo, *Beyond Normalcy in the Regulation of International Trade*, 100 HARV. L. REV. 546 (1986). For an articulation of the case against countervailing duties, see Alan O. Sykes, *Countervailing Duty Law: an Economic Perspective*, 89 COLUM. L. REV. 199 (1989).

aimed at promoting important internal objectives of national policy.[23] While trade distorting subsidies are prohibited by the GATT, subsidies that achieve other legitimate national objectives are not.[24] Particularly problematic are those subsidies that are directed at national domestic policy objectives, but that incidentally affect international trade by creating an incentive to export or by making it more difficult for imports to compete domestically.

As noted, while the GATT permits the use of subsidies for domestic purposes, the GATT does not address the resulting tension when such subsidies incidentally increase exports. Similarly, neither the Canadian nor the American unfair trade laws actually address this tension. Because of this discrepancy, both governments find themselves in the awkward position of aggressively challenging the domestic subsidy program of the other government while simultaneously subsidizing their own domestic interests.[25]

2. *United States Law*

American unfair trade law recognizes that while all export subsidies are countervailable, all domestic subsidies need not be. Countervailable domestic subsidies are those available to specific industries rather than those that are generally available. This distinction is embodied in the specificity standard, which is defined, by reference, in a case-by-case analysis. This flexibility in analysis is, however, prone to controversial distinctions between de jure and de facto availability and has resulted in a wide latitude of discretion exercisable by the administering agency as interpreted by the relevant courts.

In the United States, the definition of subsidies for the purpose of countervailing duty law is the result of a long history of judicial interpretation and statutory amendments. A distinction is drawn between export and domestic subsidies. Export subsidies are defined by reference to the illustrative list in the GATT Subsidies Code.[26] The basic difference between export and domestic subsidies is well established and has been articulated by Powell, Giesse, and Jackson:[27]

> The Tariff Act classifies subsidies into two categories: export subsidies and domestic subsidies.[28] Export subsidies are government programs that grant benefits to domestic

23. *See* GATT Subsidies Code, *supra* note 10, which recognizes the validity of domestic subsidies aimed at national policy while acknowledging that some domestic subsidies may cause harmful effects on trade.

24. *See id.* at preamble; *see also* GATT, *supra* note 2, arts. VI, XVI, & XXIII.

25. *See Final Countervailing Duty Determination in the Matter of Fresh, Chilled & Frozen Pork* (Dep't of Comm. 1990) (remand determination), Secretariat File No. USA-89-1904-06, Document No. 247.

26. 19 U.S.C. § 1677(5)(A)(i) & (ii) (1990).

27. *See* Powell, Giesse, & Jackson, *supra* note 16, at 236. (The footnotes in the following quotation are drawn from the original.)

28. 19 U.S.C. §§ 1303, 1677(5).

manufacturers based upon export activity or export performance.[29] These subsidies are analogous to "specific subsidies" in that they usually enable specific corporate individuals to gain a competitive advantage over, among other entities, U.S. manufacturers in the U.S. market. . . . Export subsidies *per se* are countervailable pursuant to the Tariff Act and the GATT Subsidies Code.[30]

Domestic subsidies, on the other hand, are foreign government programs that provide goods or services either to specific members or groups in a society or to all members in a society.[31] In contrast to export subsidies, domestic subsidies are not contingent upon export activity or export performance.[32] Only those domestic subsidies that grant a preference to "a *specific* enterprise or industry, or group of enterprises or industries,"[33] within the meaning of section 771(5) of the Tariff Act, are countervailable.[34] A so-called "preference" is a foreign government program that provides specific recipients with goods, services, or financing at prices or on terms more favorable than those available to other recipients in the exporting country.[35] Examples of countervailable domestic subsidies include equity infusions and loan guaranties on noncommercial terms.[36]

The application of a standard of specificity has evolved in the United States through a series of domestic laws and court cases. Initially, the Department of Commerce employed a "general availability test" to determine whether a particular domestic subsidy program promoted the production of specific products and were therefore countervailable under the Tariff Act.[37] The Court of International Trade (CIT) initially endorsed this standard,[38] but then rejected it[39] in favor of the so-called "de facto specificity test."[40] A recent amendment to U.S. law codifies this test:

> In applying subparagraph A [as regards subsidies] the administering authority . . . shall determine whether the subsidy . . . in law or fact is provided to a specific enterprise, or industry or group of enterprises or industries. Nominal general availability . . . is not a basis for determining that the subsidy is not . . . in fact provided to a specific enterprise or industry, or group thereof . . . .[41]

This statutory amendment appears to be the codification of the section of the *Cabot I*[42] decision that rejected nominal general availability as the test for whether a subsidy is countervailable. *Cabot I* held that:

29. 19 U.S.C. § 1677(5)(A)(i).
30. *Id.*
31. 19 U.S.C. § 1677(5)(A)(ii).
32. *Id.*
33. *Id.* (emphasis in original).
34. *Id.*
35. *Id.*
36. *Id.*; Michael S. Knoll, *An Economic Approach to the Determination of Injury Under United States Antidumping and Countervailing Duty Law*, 22 N.Y.U. J. INT'L L. & POL. 37 (1989).
37. Powell, Giesse, & Jackson, *supra* note 16.
38. United States Steel Corp. v. United States, 566 F. Supp. 1529 (Ct. Int'l Trade 1983).
39. Cabot Corp. v. United States, 620 F. Supp. 722 (Ct. Int'l Trade 1985) (*Cabot I*).
40. PPG Indus. Inc. v. United States, 662 F. Supp. 258 (Ct. Int'l Trade 1987), *aff'd*, 928 F.2d 1568 (Fed. Cir. 1991).
41. 19 U.S.C. § 1677(5)(B).
42. *Id.*

> The appropriate standard [for determining the countervailability of domestic benefits] focuses on the *de facto* case by case effect of [such] benefits provided to recipients rather than on the nominal availability of benefits. . . . This definition [of bounty or grant or subsidy] requires focusing only on whether a benefit or "competitive advantage" has been actually conferred on a "specific enterprise or industry, or a group of enterprises or industries". . . . Once it has been determined that there has been a bestowal upon a specific class, the second aspect of the definition of bounty or grant requires looking at the bestowal and determining if it amounts to an additional benefit or competitive advantage. If so, the benefit might fit within one of the illustrative examples of 19 U.S.C. 1677(5)(B).[43]

This case-by-case methodology of determining whether a generally available subsidy, that is, de jure availability, in actual practice results in an advantage to specific entities, that is, de facto specificity, was upheld in *Cabot II*, despite earlier precedents to the contrary.[44] Subsequent to *Cabot I* and *II*, the Department published two proposed regulations that set forth the standards that guide its analysis of de facto specificity.[45] The regulations state:

> (b)(1) *Domestic Programs.* Selective treatment, and a potential countervailable domestic subsidy, exists where the Secretary determines that benefits under a program are provided, or are required to be provided, in law or in fact, to a specific enterprise or industry, or group of enterprises or industries.
>
> (2) In determining whether benefits are specific under paragraph (b)(1) of this section, the Secretary will consider, among other things, the following factors:
>
> (i) The extent to which a government acts to limit the availability of a program;
>
> (ii) The number of enterprises, industries, or groups thereof that actually use a program;
>
> (iii) Whether there are dominant users of a program, or whether certain enterprises, industries, or groups thereof receive disproportionately large benefits under a program; and
>
> (iv) The extent to which a government exercises discretion in conferring benefits under a program.[46]

The first factor highlights de jure selectivity, for example, government action to limit availability of programs. The next three factors, "numbers of users," "dominant users," and "government discretion," provide authoritative guidance to the investigating agency in determining de facto specificity. The regulation on its face, however, makes clear that these are not the only factors that may be taken into account in making the determination. No mention, however, was made of the role of "competitive advantage," which was cited as an important element in *Cabot I*.

Following the issuance of the proposed regulations, the Court of Appeals for the Federal Circuit, in the *PPG* case, sought to establish, for the first time, the

43. 620 F. Supp. at 732.

44. Cabot Corp. v. United States, 694 F. Supp. 949 (Ct. Int'l Trade 1988) (*Cabot II*). *Compare* Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834 (Ct. Int'l Trade 1983) *with* Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237 (Ct. Int'l Trade 1984); *see also PPG Indus. Inc., supra* note 40.

45. *Notice of Proposed Rulemaking and Request for Public Comments,* 54 Fed. Reg. 23,366 (May 31, 1989).

46. Proposed 19 C.F.R. § 355.43(b), 54 Fed. Reg. at 23,379. For an authoritative analysis of the specificity test, see Powell, Giesse, & Jackson, *supra* note 16, at 242.

determining factors for deciding whether a specific industry or group of industries had been given a competitive advantage.[47] The majority opinion noted in approval the ITA's position that:

> the specificity test cannot be reduced to a precise mathematical formula . . . . [W]e must exercise judgment and balance various factors . . . of a particular case . . . .
>
> Among the factors we consider are: (1) the extent to which a foreign government acts to limit the availability of the program; (2) the number of [entities] which actually use a program, which may include the examination of disproportionate or dominant users; and (3) the extent . . . government exercises discretion . . . in determining specificity in a given case.[48]

The precedential value of this ruling was called into question by the dissenting member of the three-judge panel by stating that the decision:

> threatens to unsettle the law . . . . Nor is concern lessened because there is no opinion of the court and hence no opinion with precedential force. Since Senior Judge Smith, while voting to affirm the CIT result, did not join in Chief Judge Nies' opinion, she speaks only for herself, just as I speak only for myself. This jurisprudential truth, however, likely will be lost when the bar reads and cites that opinion. After all, facts and reasons are described and a two-judge result is noted; together, they imply a precedential holding.[49]

A subsequent CIT opinion noted that the CAFC in *PPG,* "was not in accord over the proper specificity test to be applied, and that there is some question of the extent of the controlling effect of the single-judge opinion.[50] Unfortunately, in the absence of a decision with precedential value from the court of appeals, the controversy over the de facto specificity test is likely to continue despite all attempts to settle the issue.

The court of appeals' willingness to defer to the agency determination in these circumstances appears to give the relevant agency wide discretion in choosing which factors it prefers to examine and what weight it will attach to each factor. Such license can be perceived by another government whose programs are under scrutiny as a disincentive to the determining agency's willingness to provide nonbiased, rigorous, and principled analysis. While this should not be read as an accusation that the relevant agencies have not been completely objective, in the context of an FTA it may be a cause for some discomfort.

This discomfort came to the fore in the recent binational panel decision concerning *Live Swine from Canada,*[51] in which the "competitive advantage" test was raised and the Government of Canada argued that the de facto specificity test requires that benefits must be "intentionally targeted" by the government in order to be countervailable. The panel unanimously held that the department "applied the correct legal standard, insofar as it does not have to find intentional

47. PPG Indus. Inc. v. United States, 928 F.2d 1568 (Fed. Cir. 1991).
48. *Id.* at 1576.
49. *Id.* at 1580.
50. Roses Inc. v. United States, 774 F. Supp. 1376, 1379 (Ct. Int'l Trade 1991).
51. In the matter of *Live Swine from Canada,* USA-91-1904-03, at 22 (May 19, 1992).

targeting and it does not have to make a separate determination of competitive advantage."[52]

While the panel found that targeting was not required[53] and no showing of competitive advantage was applicable,[54] it nonetheless found that the department may have applied the correct standard improperly:

> While the test set forth in Commerce's proposed regulations for determining *de facto* specificity (and in Commerce's final determination in the instant proceeding) conforms to law, Commerce may not base its determinations on a purely mechanical analysis. "Commerce does not perform a proper *de facto* analysis if it merely looks at the number of companies that receive benefits under [a] program." *Roses Inc. v. United States*, 774 F. Supp. 1376, 1380 (Ct. Int'l Trade 1991). "It is not the sheer number of the enterprises receiving benefits that dictates whether or not a program is countervailable." *Id.* at 1384. Rather, Commerce must examine all relevant factors to determine whether "if, *in its application*, the program [at issue] results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries." *PPG Industries, supra*, at 1576 (emphasis in original). To fulfill this requirement, Commerce must comply with its own proposed regulations, as expressly approved by the Court of Appeals for the Federal Circuit, in *PPG Industries, Id.*, and it "must exercise judgment and balance various factors in analyzing the facts of a particular case in order to determine whether an 'unfair' practice is taking place." Commerce "must always focus on whether an advantage in international commerce has been bestowed on a discrete class of grantees despite nominal availability, program grouping, or the absolute number of grantee companies or 'industries.' " *Roses Inc. v. United States*, 743 F. Supp. 870, 881 (Ct. Int'l Trade 1990).[55]

3. *Canadian Law*

Canadian economic development is replete with examples of government assistance to the private sector. Historically, this assistance was deemed necessary because the Canadian market was not large enough to provide the returns necessary to attract private investment. While the Canadian market has grown to about twenty-six million people, the benefits of this growth have been unequally distributed. Canada maintains a strong central industrial base and less developed peripheries. In an attempt to equalize the standard of living throughout Canada, the Canadian governments, federal and provincial, have embarked on massive regional development and other social programs. These programs have been subject to countervailing duties under American unfair trade law.[56] In fact, one of the key Canadian objectives in the negotiation of the FTA was the elimination

52. *Id.* at 15.

53. *Id.* at 21. The panel cited as instructive authorities, Saudi Iron & Steel Co. (Hadeed) v. United States, 675 F. Supp. 1362 (Ct. Int'l Trade 1987), *appeal after remand*, 686 F. Supp. 914 (Ct. Int'l Trade 1988); SSAB Svenskt & Staal AB v. United States, 764 F. Supp. 650 (Ct. Int'l Trade 1991).

54. *Id.* at 25, *citing Roses, supra* note 50.

55. *Id.* at 25.

56. The extent of the subsidization that Canadian governments will embark upon is illustrated in Fresh, Chilled or Frozen Pork from Canada, USITC Pub. 2230, Inv. No. 701-TA-798 (Oct. 1990) [hereinafter *Pork*].

of "contingent protection" of U.S. domestic industries through the perceived politicization of the application of U.S. unfair trade laws.[57]

Canada's treatment of subsidies is less complicated than that of the United States, but equally controversial. While Canada has used its countervailing duty laws sparingly, the agencies that administer those laws appear to wield great discretion. Section 2(1) of SIMA[58] describes a subsidy as including:

> any financial or other commercial benefit that has accrued or will accrue directly or indirectly to persons engaged in the . . . export or import of goods as a result of any scheme, program, practice or thing done, provided or implemented by the government of a country other than Canada . . . .[59]

The SIMA further directs that subsidy determinations be guided by Canada's GATT obligations.[60] As described previously, the GATT Subsidies Code does not alleviate the inherent tension between domestic subsidies that achieve a legitimate public purpose and domestic subsidies that may also cause trade distortions. Thus, the sweeping definition of subsidy and the reference to GATT in the Canadian statute led one commentator to note that these laws have: "the potential for being a protectionist weapon in the hands of an overly-aggressive or retaliatory-minded Department of National Revenue."[61]

Despite its aggressive protectionist potential, Canada has only applied countervailing duties to domestic subsidies in one case, the C&E's final determination in *Subsidized Grain Corn in All Forms, Excluding Seed Corn and Popping Corn Originating in or Exported from the United States of America (Grain Corn).*[62] *Grain Corn* held that in determining whether a program confers a countervailable subsidy, the two main criteria to be applied are: first, whether the program provided a financial or other commercial benefit; and second, whether the program was targeted.

Grain Corn distinguished a generally available program, which is not countervailable, from a targeted program, which is countervailable. This standard is similar to the one articulated by the CIT in *Cabot I*: "If a program is available only to certain enterprises or access to the program is limited, either by specifically including or excluding certain enterprises, then the program may be targeted depending on the eligibility conditions or criteria of the program."[63]

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57. D.L. McLachlan, A. Apuzzo & William A. Kerr, *The Canada-U.S. Free Trade Agreement: A Canadian Perspective*, 22 J. WORLD TRADE, No. 4 (Aug. 1988).

58. R.S.C. ch. S-15 (1985) administrative procedures governed by B.B. 19.6.1(b) the Special Import Measures Regulations.

59. R.S.C. ch. S-15, (1985) § 2(1).

60. *See* R.S.C. ch. S-15 (1985) § 42(3)(b), which directs that the Tribunal be guided by Canada's obligation under the GATT, in particular the GATT Subsidies Code.

61. Kevin C. Kennedy, *The Canadian and United States Response to Subsidization in International Trade: Towards a Harmonized Countervailing Duty Legal Regime*, 20 LAW & POL'Y INT'L BUS. 683, 688 (1988-89).

62. CIT 7-86, opinion dated March 6, 1987, *aff'd*, 58 D.L.R.4th 642 (Fed. C.A. 1988), *aff'd*, 74 D.L.R.4th 448 (SCC 1991) [hereinafter *Grain Corn*].

63. *Id.* app. I.

In keeping with Canada's history of supporting regional development, the Canadian Supreme Court (SCC) in *Grain Corn* articulated a standard for the administering authority to use to determine which programs aimed at regional development were to be targeted. It concluded:

> In determining whether a program is regionally targeted . . . consideration is to be given to the reasons why the program is directed only to certain segments of the jurisdiction. If a program is directed to a certain region . . . because that region is the only one which could reasonably benefit from the type of programs or that the region possessed certain characteristics which are unique in the jurisdiction, then the program may not be considered targeted.[64]

This regional approach to evaluating targeting seems to be based on an assumption that Canadian regional subsidization programs are a justifiable instrument of government policy and therefore serve as an appropriate standard against which to measure other countries' subsidy schemes. Moreover, this standard, as applied by the CITT, is broad enough to allow the administering authority great latitude in the determination of whether other countries' programs are specifically provided and targeted and are therefore countervailable.

The CITT appears to have reserved to itself the discretion to determine not only whether one region or another benefits from particular subsidy programs, but also which industry or group of industries within a region derive such benefits. This standard is unlikely to provide meaningful constraints to the finding of countervailability. After all, what region or industry could not stand to benefit, to some extent, from greater levels of government subsidies and therefore fall outside the scope of the limited exception to targeting articulated in *Grain Corn?*[65]

In *Grain Corn* C&E concluded that several U.S. programs were targeted regional programs and, therefore, countervailable because the benefits conferred were not unique to the ten states that received them. That is, other states could have benefitted from such a program. Moreover, C&E concluded that the program was targeted, even within the region, because its benefits were not generally available but targeted to specific crops.[66]

While the standards for determining whether subsidies are generally or specifically available are similar in both nations, there is no consensus in the area of targeting. Canadian agencies enjoy broad latitude to avoid the exception articulated in *Grain Corn*. The Canadian Government remains committed to the use of regional subsidies as a legitimate tool to achieve government objectives outside the realm of international trade. While both countries share a mutual recognition of countervailable subsidies in the abstract, this shared recognition does not transcend its application to regional development, which was a primary reason the two governments failed to negotiate limits on subsidies in the FTA.

64. *Id.* app. I.
65. *See id.*
66. *See id.* app. II.

B. Injury to Domestic Industries

1. *International Law*

GATT article VI[67] authorizes signatory countries to impose antidumping and countervailing duties upon subsidized or dumped products that cause or threaten to cause material injury to, or materially retard the establishment of, a domestic industry. From the inception of the Tokyo Round of multilateral trade negotiations of the GATT in 1973, it was clear that the issue of material injury would dominate the discussion. Many participants espoused the belief that the definition of material injury in the GATT needed to be reaffirmed. Other participants argued for the imposition of a more stringent material injury test, emphasizing the causal link between the injury and the unfair trade practice.[68] The resulting difficult and strained negotiations led to the reluctant adoption of the current material injury test.[69] The implementation in the United States and Canada of the material injury test has resulted in unique national rules.

2. *United States Law*

The Trade Agreements Act of 1979[70] and the Tariff Act of 1930[71] govern the application of the material injury test to imported products. The United States International Trade Commission (ITC) conducts injury investigations[72] in conjunction with antidumping and countervailing duty investigations conducted by the Department of Commerce.[73] ITA must first determine the margin of subsidization or dumping, whereupon the ITC decides whether the domestic industry or industries in question are injured or threatened with material injury by reason of the unfair trade practice. The ITC approaches this task in three phases. First, it defines the relevant domestic industry. Second, it determines whether the relevant industry is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded.[74] Finally, it looks for a causal link between the injury and the unfair trade practice.[75]

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67. GATT, *supra* note 2, art. VI, ¶ 6(a).

68. *See* GATT, ARTICLE 6 AND THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATION: REPORT BY THE DIRECTOR GENERAL OF GATT, (April 1979).

69. The GATT Subsidies Code provides in relevant part:

> It must be demonstrated that the subsidized imports are, through the effects of the subsidy, causing injury within the meaning of the agreement. There may be other factors which at the same time are injuring the domestic industry, and the injuries caused by the other factors must not be attributed to the subsidized imports.
>
> GATT Subsidies Code, *supra* note 10, art. 6(4). The identical standard is contained in the GATT Antidumping Code, *supra* note 11, art. 3(4).

70. 19 U.S.C. § 1671 (1990).

71. 19 U.S.C. §§ 1673-1677, 1303 (1990).

72. 19 U.S.C. § 1671 (1990).

73. *Id.*

74. 19 U.S.C. §§ 1671 & 1673 (1990).

75. For interesting insight on the application of American unfair trade law, see Anne Brunsdale, *An Overview of the International Trade Commission and Its Role in a Possible North American Free Trade Area*, 12 CAN. U.S. L.J. 187 (1987).

The causal link between the injury and the unfair trade practice is arguably the most subjective element in the test, and as Commissioner Brunsdale has pointed out, "frankly, the one in which my colleagues and I most often disagree."[76] This disagreement is particularly prone to flare up in the context of threat of material injury determinations, which are based almost entirely on predictions. The extent to which commissioners can disagree on this issue was exemplified in a review by a binational panel under the FTA involving *New Steel Rail from Canada.*[77] In *New Steel Rail from Canada,* Vice Chairman Cass, in a long and articulate dissent, accused his colleagues of failing to interpret American law consistently with the GATT, especially by ignoring the requirement that the injury be caused by the effects of the subsidy or sale at less than fair value.

New Steel Rail from Canada was instructive in that the ITC split 3-3 in making an affirmative finding of threat of material injury. Under U.S. law,[78] a decision by an evenly divided Commission is deemed to be affirmative. The binational panel that reviewed this determination was also divided on the issue.[79] Four panelists ruled that the ITC's findings that the domestic industry was not materially injured by reason of imports and that the domestic industry was threatened with material injury by imports were supported by substantial evidence on the record and made in accordance with U.S. law. One panelist dissented because he felt that the plurality failed to demonstrate some new element to change a negative injury finding into an affirmative threat finding.

The source of this disagreement is the definition of material injury found in American unfair trade law. Material injury is defined negatively as a harm that is not inconsequential, immaterial, or unimportant.[80] This language is sufficiently abstract to yield varying and perhaps competing interpretations by all GATT Contracting Parties, including FTA partners.

The statute further provides that the threat of material injury determination shall be made on the basis of evidence that the threat is real and the injury is imminent and not on the basis of mere conjecture or supposition. However, there is no clear articulation or quantification of this standard.[81] The statute does nevertheless provide a ten-factor test for the ITC to apply when analyzing the threat of material injury.[82]

Pursuant to the statute, the ITC cannot weigh alternative causes. That is, the imports need not be substantial or the sole source of the injury. Any injury caused by reason of the unfair trade practice will provide grounds for an injury deter-

76. *Id.* at 190.
77. New Steel Rail from Canada, USITC Pub. 2217, Inv. Nos. 701-TA-297 & 731-TA-422 (Sept. 1989).
78. 19 U.S.C. § 1677(11) (1988).
79. In the matter of *New Steel Rail from Canada,* USA-89-1904-09/10.
80. *See* 19 U.S.C. § 1677(7)(A) (1988).
81. 19 U.S.C. § 1677(7)(F)(X)(ii) (1988).
82. *See* 19 U.S.C. § 1677(7)(F) (1988).

mination. Thus, each commissioner is left to pursue levels and trends in attempting to determine whether a domestic industry is suffering or threatened by material injury caused by unfairly traded imports. These determinations of causation, especially in the area of threat of material injury, are, therefore, based upon an elusive standard that permits the potential application of inconsistent standards.[83]

A binational panel review under the FTA involving *Fresh, Chilled or Frozen Pork from Canada*[84] highlighted the lack of consensus within the ITC on what constitutes a threat of material injury. The Commission, with one commissioner recused, found no present material injury, but split (3-2) on the affirmative determination of the existence of a threat of material injury. Upon remand from the panel due to statistical errors, and following the resignation of two commissioners, the Commission again split (2-1) on the question of threat of material injury by using a somewhat different analysis than in its initial determination.[85] Commissioner Newquist articulated the view of the plurality:

> Although it is possible that pork imports from Canada will decrease, it is also likely that production levels in the United States will decrease. Thus, Canadian imports entering at a higher level than would be the case absent the subsidies (even if they are not increasing absolutely) may well, given declines in U.S. production, take an increasing share of the market.[86]

Commissioner Rohr, in joining the plurality decision, confirmed that the threat of material injury was not necessarily the result of the subsidies: "[T]he impact of the subsidized Canadian imports is much smaller than many other factors affecting the industry. But the standard I am legally required to apply is whether the imports will be contributing even minimally . . . to material injury."[87]

3. *Canadian Law*

In Canada, the material injury requirement is traditionally viewed as requiring a higher threshold of injury than the American standard. That is, material injury, in the Canadian trade lexicon, is interpreted as something more than any injury that is not immaterial. Indeed, the recent Canadian Supreme Court decision in

83. For a scathing critique on the growing unilateral use of countervailing duties by the United States, see Sykes, *supra* note 22. *See also* the views of Panelist Whalley outlining the inaccuracies in the basic data and "incompleteness in the analytical logic" linking cause and effect in *Pork, supra* note 56.

84. *Pork, supra* note 56 (Views on Remand).

85. ITC Determination on Remand, 55 Fed. Reg. 39,073 (Sept. 24, 1990). For an analysis of this finding, see Andreas F. Lowenfeld, *Binational Dispute Settlement Under Chapters 18 and 19 of the Canada-United States Free Trade Agreement, An Interim Appraisal*, 24 N.Y.J. INT'L L. & POL. 270 (1991).

86. *Id.* at 318.

87. Commissioner Rohr as quoted in Lowenfeld, *id.* at 317. For the ultimate result of this controversial case in which the ITC reversed its threat finding and the U.S. Government lost an extraordinary challenge proceeding, see In the matter of *Fresh, Chilled or Frozen Pork from Canada*, ECC-91-1904-01USA.

Grain Corn[88] suggests that the administering agency need not be captive to a liberal trade philosophy.

In Canada, once C&E issues a preliminary determination that there has been a subsidy or sale at less than fair market value, the CITT must conduct an inquiry as to whether the practice is causing or likely to cause material injury or retardation.[89] The material injury requirement is broad and may include financial hardship on the government purse.

This wide latitude in decision-making open to the administering agency was at the heart of the Canadian Supreme Court's ruling in *Grain Corn*. On the one hand, the Court achieved unanimity in its decision; on the other hand, irreconcilable differences in the Court's reasoning remain. The issue before the Supreme Court turned on whether the CITT's determination of material injury was so patently unreasonable as to warrant judicial review. In its ruling, the SCC adopted an interpretation of the GATT that is susceptible to protectionist manipulation. The Court referred to, and appears to have adopted, the reasoning followed by the American Court of International Trade in *British SteelCorp*.[90] In adopting this reasoning, the SCC concluded: "Having regard to the broad wording of the GATT provisions, it was not unreasonable and was therefore open to the tribunal to make a finding of material injury even in the absence of an increase in the amount of imports."[91]

Based upon this important Canadian case, the linkage of causation to material injury under the Canadian standard may be viewed as more stringent than the American standard; however, there is room for the CITT to deviate from this standard. While the Canadian standard for material injury traditionally approached the American standard of substantial cause of serious injury,[92] it now appears to be within the CITT's broad range of discretion to vary this standard. Given the SCC's broad interpretation of the GATT and its tacit approval of the CITT's reasoning, it is reasonable to believe that the different standards adopted by both countries will evolve in response to the changing circumstances in international trade, particularly if the Uruguay Round of the GATT is successfully concluded.

C. Public Interest

Another area in which the U.S. and Canadian systems differ involves the identification of a public or consumer interest element in the unfair trade pro-

88. *Grain Corn, supra* note 62.
89. *See* R.S.C. ch. S-15, (1985) § 42(1).
90. British SteelCorp. v. United States, 61 I.T.R.D. (BNA) 1065 (1984).
91. National Grain Corn v. C.I.T., 2 S.C.R. 1324 (at 74 D.L.R. 4th 488) (1990).
92. This is the standard required in section 201 actions codified in 19 U.S.C. §§ 2251, 201(a), 202(c) (1975, amended 1984, 1985).

ceedings. This could add another dimension to a proceeding that would otherwise focus solely on the interests of the complaining domestic producers. Arguably, the inclusion of the consumer interest in unfair trade proceedings would alleviate any claim of latent protectionism inherent in unfair trade proceedings.

Trade policy is determined, to a large extent, through the balancing of governmental, commercial, and consumer interests. Continual tension exists between the interests of consumers, on the one hand, and of domestic producers, on the other hand. Thus, in theory, domestic policymakers attempt to balance these competing interests so that the interests of society, as a whole, may be advanced.

Unfortunately, the built-in advantages of protectionism in the legislative process manifests itself in the articulation of the domestic producers' interests at the expense of the consumer body. That is, well-funded and well-organized producer interests spend large amounts of money to explain and support their points of view to top level decisionmakers and the Congress. These well-funded domestic industry interests can often influence legislation in order to benefit particular industries at the expense of the less specific and less organized interests supporting freer trade and competition.[93]

The benefits of protectionism are often more visible than the benefits of freer competition, including such visible symbols as well-publicized plant closures or increasing imports. In the Leutwiler Report, a comprehensive review of the international trading system endorsed by Arthur Dunkel, Secretary General of the GATT, the authors noted this problem: "Those who stand to gain from a particular trade restriction, the workers or owners of a specific industry, are obviously more visible and vocal than the general body of consumers, workers, taxpayers and shareholders in export industries, all of whom stand to lose."[94]

Furthermore, the costs and benefits of protectionism are generally felt at different times. The benefits of protectionism appear almost immediately, in the form of reduced imports, increased profits, and retention of some jobs in protected sectors. The losses to society caused by protectionism are considerably more diffuse, in the form of higher costs to consumers, slower economic growth, higher inflation, and less competitive industries. The final invisible cost of protectionism manifests itself as international political tension in that deteriorating trade relations usually precede friction at other levels. Both Canada and the United States, through their participation in the Tokyo and Uruguay Rounds, and their current attempt to negotiate a North American Free Trade Agreement with Mexico, have recognized the potential effects of protectionism in the application of unfair trade law.

93. For a comprehensive investigation into the effects of protectionism, see THE LEUTWILER REPORT, *supra* note 2.

94. *Id.* at 31.

Canada has formally enacted specific legislation directed at introducing the public interest element in countervailing and antidumping proceedings.[95] Under the Canadian system, a legislative attempt was made to balance the considerations of the public interest in the unfair trade law process. At least one article, which analyzed the deliberations of the Canadian Parliamentary subcommittee that examined this legislation, takes the position that the introduction of a public interest dynamic into the SIMA was a manifestation of the perceived imbalances favoring domestic producers at the expense of downstream end-users and consumers.[96]

Under the SIMA, when a determination of an unfair trade practice is made and the CITT subsequently believes that the imposition of a duty is contrary to the public interest, the CITT reports this finding to the Canadian Minister of Finance for consideration.[97] If the CITT decides to hold a public interest inquiry, which is not required in all cases, then any interested person may make representations.[98] To date, the CITT has decided to address the public interest dynamic very sparingly.[99]

Despite the potential to add a strong public interest dynamic to the administration of the unfair trade laws, this additional element has not been utilized to any meaningful degree. Canadian legislators likely were not willing to require vigorous public interest advocacy in trade proceedings for fear of deviating too far from the GATT codes.

Further limiting the use of the public interest element in unfair trade proceedings are the strict time limits to which the CITT is compelled to adhere in rendering decisions.[100] Clearly, the addition of more public interest input in the proceedings would have the intended benefit of introducing a new dynamic in the proceeding to counteract the otherwise exclusive focus on domestic producers. Such input, however, would also have the unintended effect of prolonging such proceedings, thereby making such procedures susceptible to, at the very least, the perception of protectionism through delay.

Also worthy of note is that nowhere in the Canadian legislation is the criteria of public interest meaningfully articulated. The few cases that have interpreted this section suggest that the public interest component will be used sparingly and even then will not always result in a report to the Minister of Finance.[101]

95. R.S.C. ch. S-15, (1985) § 45.

96. Alan M. Rugman & Samuel D. Porteous, *Canadian and U.S. Unfair Trade Laws: A Comparison of Their Legal and Administrative Structures*, 16 CAN. BUS. L.J. 1, 10 (1989) and 15 N.C.J. INT'L L. & COM. REG. 67 (1990).

97. R.S.C. ch. S-15, (1985) § 45(1)(a).

98. R.S.C. ch. S-15, (1985) § 45(2).

99. This issue has only been addressed three times. *See, e.g.*, Surgical Adhesive Tapes and Plasters (CIT-8-89) opinion dated Dec. 4, 1985; Fresh Yellow Onions (CIT-1-87) opinion dated Apr. 30, 1987; and *Grain Corn, supra* note 62.

100. An interesting discussion on the public interest component in Canadian Unfair Trade Law can be found in Rugman & Porteous, *supra* note 96, at 11 n.33.

101. Of the three cases decided by the CIT on this issue, *supra* note 99, only once, in *Grain Corn*, was a report delivered to the Minister of Finance. The Minister of Finance had the option to reduce an otherwise hefty duty to accommodate the loosely defined public interest.

This is not to say that the public or consumer interest is left wholly abandoned in the United States. In certain instances, for example, the Federal Trade Commission will intercede in trade matters to raise a public interest component.[102] In addition, the Import Administration may take into account the public interest in deciding whether to settle an investigation (see part IV below).[103] However, the representation of such interests in the unfair trade process remains relatively undisciplined and subject, to a large extent, to the discretion of the administering agencies.

In sum, although Canada has introduced the public interest dynamic into the unfair trade law process through legislation, and the Federal Trade Commission and ITA may consider the public interest in some circumstances in the United States, the public interest is far outweighed by commercial interests in unfair trade matters.

III. Procedural Differences

Although the procedures under which the American and Canadian systems operate are theoretically similar,[104] two deviations deserve mention. The first is related to the manner by which the administering agency votes on particular matters. The other concerns the standing of parties to appear and participate in matters before the administering agency.

When the ITC votes on a particular matter, the vote of all six of its permanent members is recorded.[105] The CITT, on the other hand, votes as tripartite panels, drawing from its complement of nine members.[106] This difference arguably creates an advantage for the American petitioner before the ITC because when the Commission is evenly divided, its decision is deemed to be affirmative, resulting in a victory for the domestic petitioner.[107] No such provision for affirmative injury findings in the event of an "evenly divided" CITT exists in Canadian law.

The question of standing is also handled differently by the respective systems, but results in little appreciable difference in the ability of an interested party to participate in a matter before the respective administering authority. In both Canada and the United States, a petitioner must represent a major proportion of producers of the goods.[108] Different practices have arisen concerning how this standard is applied.

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102. *See* Certain Softwood Lumber Products, 51 Fed. Reg. 37,453 (Dep't of Comm. 1986) (prelim. affirm.), where the Federal Trade Commission made representations concerning the effects of duties.

103. 19 U.S.C. § 1673c(dj); 19 C.F.R. § 353.18 (1990).

104. *See* 19 C.F.R. § 200ff (1991) and R.S.C. ch. S-15 (1985).

105. While this procedure is the usual practice, the Commission may function notwithstanding vacancies. *See* 19 U.S.C. § 1330(c)(6), (d)(3) (1988).

106. While this procedure is the usual practice, the CITT has on one occasion voted as a group of four. *See* Countertop Microwave Ovens, R. 688, opinion dated June 23, 1988.

107. *See* 19 U.S.C. § 1677(11) (1988).

108. *See* R.S.C. ch. S-15 (1985), § 42(3); Tariff Act of 1930, 19 U.S.C. §§ 1671(1)(b), 1677(4)(a) (1990).

In the United States the petitioners enjoy a rebuttable presumption in favor of standing because the ITA assumes that a petitioner represents a major proportion of U.S. producers of the like product.[109] This presumption can be overcome only if the members of the U.S. domestic industry come forward challenging the petition. The effect of this rebuttable presumption is a relative disadvantage for foreign producers who may be forced to defend themselves in trade actions initiated by a substantial minority of domestic producers rather than statutorily required major proportion of producers of the like product.

No such presumption in favor of standing for domestic producers exists in Canadian jurisprudence. However, a complainant in the smaller Canadian market, which has fewer producers, is more likely to represent a major proportion of producers of like goods, even absent the presumption.[110] Thus, the standing requirement, although applied differently by the two systems, may not yield as great a practical difference in the ability of an interested party to initiate or participate in a trade action as would appear based on a bare reading of the relevant statutes and regulations.

IV. Negotiated Settlements

In both the United States[111] and Canada,[112] exporters may negotiate an agreement with the relevant administering authority rather than face unfair trade proceedings. Both the GATT Subsidies Code[113] and the GATT Antidumping Code[114] permit unfair trade proceedings to be suspended or terminated, without the imposition of provisional measures or duties, upon the receipt of satisfactory undertakings. Both countries have limited the flexibility and discretion of their administering agencies to apply such measures.

In Canada, such agreements are called undertakings. The use of undertakings is limited by the statutory requirements that they be negotiated prior to the preliminary determinations and that such undertakings be comprehensive, conclusive, and subject to the scrutiny of importers and Canadian producers.[115] These requirements compel the exporter to contemplate negotiating an undertaking in the face of an allegation before any hearing on the substance of the matter can independently verify the charges. Moreover, the exporter is compelled to cooperate with other exporters so that the undertaking can be sufficiently comprehensive and conclusive to satisfy the statute. Even after satisfying these requirements, the Canadian Deputy Minister of National Revenue for Cus-

109. *See* Rugman & Porteous, *supra* note 96, at 4-5; and Fresh Atlantic Groundfish from Canada, 51 Fed. Reg. 10,041, 10,043 (Dep't of Comm. 1986) (final affirm.).
110. *See* Rugman & Porteous, *supra* note 96, at 4-5.
111. *See* 19 U.S.C. § 1673c.
112. R.S.C. ch. S-15 (1985) §§ 2, 49, 2(11).
113. GATT Subsidies Code, *supra* note 10, art. 5.
114. GATT Antidumping Code, *supra* note 11, art. 7(1).
115. R.S.C. ch. S-15 (1985) §§ 2, 49(1), (2).

toms and Excise still retains the discretion to decide whether the issuance of an undertaking is warranted in a given case.[116]

Under the American system[117] the administering authority has wide discretion with regard to negotiating "suspension agreements."[118] Suspension agreements need not be negotiated prior to the preliminary determinations of dumping or subsidization by ITA, but they must apply to a substantial portion of the imports in a given investigation. This requirement compels the exporter to cooperate with other exporters who may not have identical interests and may prevent the successful negotiation of an agreement.

Negotiated settlements are a more common form of resolution to unfair trade actions in many other countries.[119] Both the United States and Canada are selective in the application of negotiated settlements to resolve unfair trade disputes because the settlements are difficult to administer. The Canadian system appears to be much more restrictive than the American system due to the time limits it imposes. C&E, however, has become increasingly prone to grant undertakings to American exporters since the implementation of the provisions of the FTA.[120]

The consultation and negotiation provisions of chapter 18 of the FTA have permitted both countries to negotiate settlements of trade disputes much more easily than was the case before the implementation of the FTA. This trend appears to have spilled over into the application of the unfair trade laws based upon the relatively high number of binational panel cases involving antidumping duties that have been terminated after negotiation of settlements in 1990 and 1991.[121]

V. Standard of Review

Judicial review is the principal means by which the application of trade law, on both sides of the border, is disciplined. If the courts are overly deferential to the decisions of the administering authorities, the agencies may step beyond their proper roles as administrators of the law. Alternatively, if courts interfere unduly in the administration of the law by the appropriate agency, then the legislative intent to create streamlined and specialized procedures for the administration of the unfair trade laws will be defeated.

116. *Id.* §§ 49(2), 49(2)(c).

117. *See* 19 U.S.C. § 1673(c) (1988).

118. *See* 19 U.S.C. § 1673(b) (1980).

119. *See* ANTIDUMPING LAW AND PRACTICE, *supra* note 15, at 432; Rugman & Porteous, *supra* note 96, at 15.

120. *See* Ellen Beall, Canadian Secretary, Binational Secretariat, *supra* note 85, at 346. This may in part explain the disparity in the number of FTA cases administered by the U.S. Section of the Binational Secretariat relative to the Canadian Section.

121. As of July 31, 1992, out of the nineteen completed chapter 19 matters handled by the Secretariat, seven were terminated before the panel hearing, two were consolidated, and ten resulted in final decisions.

The extent to which the administrators of the law should be subject to the jurisdiction of the courts is not a new question. Rather, the courts on both sides of the border have long grappled with it. One author, recounting the history of this struggle, noted:

> [Judicial review] was designed to ensure that the sovereign will of Parliament was not transgressed by those to whom such grants of power were made. If authority had been delegated . . . to perform certain tasks upon certain conditions, the courts' function was, in the event of challenge, to check that only those tasks were performed and only where the conditions were present.[122]

As the courts on both sides of the border have striven to achieve the proper threshold of deference, they have articulated different standards of judicial review. The Canadian system has articulated its standard of review as whether an agency's determination is "patently reasonable."[123] The U.S. standard of review, on the other hand, is whether the American agencies' determinations are supported "by substantial evidence on the record, or otherwise in accordance with law."[124]

A. Canadian Law

In Canada, parties must exhaust their statutory rights of appeal before resort is made to the remedies of judicial review. Moreover, at times, omnibus legislation will provide rights of appeal. Such legislation may either provide for an appeal by being silent on the issue, or it may explicitly state that no appeal is permitted so that the decision of the administering authority is final and binding. Some legislation will go one step further and explicitly preclude some of the remedies otherwise made available by judicial review. These provisions are known as "privative" or "finality" clauses.

Over time, Canadian courts have developed a very deferential standard in the face of such clauses. The courts have asserted the ultimate residual and historical jurisdiction of the superior courts to review decisions of administering agencies in the face of privative clauses where such agencies have exceeded the jurisdiction granted to them by the legislation. Beyond this assertion of the ultimate review of cases of agency action in excess of their jurisdiction, however, the courts have been reluctant to review the administering agency's decisions unless they are not "patently reasonable" interpretations of the law. One commentator noted: "The courts are entitled to insist upon a minimum standard of rationality as a condition precedent to the valid exercise of decision-making powers."[125]

122. P.P. Craig, *Dicey: Unitary, Self-Correcting Democracy and Public Law*, 106 L.Q.R. 105, 113 (1990).

123. *See* R.S.C. ch. S-15 (1985) and *Grain Corn*, *supra* note 62.

124. 19 U.S.C. § 1516a(b)(1)(A) (1980).

125. J.M. Evans, *Remedies in Administrative Law*, *in* 1981 Law Society of Upper Canada Special Lectures 429, 465 (1981).

The Canadian standard of review in the area of trade law regulation was thoroughly examined recently by the Supreme Court of Canada in *Grain Corn.*[126] Unfortunately, a divided SCC was unable to articulate a clear and unambiguous standard. The SCC's bifurcation turned on a very subtle distinction involving the precise degree of deference to be accorded an administering agency. Four members of the SCC, in an opinion written by Justice Gonthier, ruled that in the presence of a legislative intention that the decision of the agency be final and binding (that is, under a privative clause), a court will only interfere with the findings of a specialized agency where it is found that the decision cannot be sustained on any reasonable interpretation of the facts or law or where the agency exceeded its jurisdiction.[127]

Three members of the Court, in a dissenting opinion written by Justice Wilson, articulated the traditional and more deferential view[128] that asks whether the tribunal so misinterpreted the provisions of the legislation as to embark on an inquiry or answer a question not remitted to it.[129]

Justice Wilson contended that the question to be addressed is not whether the agency's decision should be reviewed if the conclusions reached were not patently reasonable; rather, the narrower question should be whether the agency's interpretation of the provisions of its *constitutive legislation* was not patently reasonable. If the interpretation of the legislation was patently reasonable, then the inquiry should come to an end, and the court should not delve into the patent reasonableness of the conclusions reached by the agency in the administrative process. This distinction is a subtle one, but its effect is to constrain a court's ability to review an agency's determination: "If the Tribunal has not interpreted its constitutive statute in a patently unreasonable fashion, the court must then not proceed to a wide ranging review of whether the Tribunal's conclusions are reasonable."[130]

As a result of the SCC's decision in *Grain Corn,* lower courts and agencies have two lines of authority to follow in the area of standard of review. Under the traditional test the court's review is a two-step process. First, it must determine whether the SIMA confers jurisdiction on the reviewing agency. Secondly, if the finding is positive, the scope of the court's review is limited to a determination of whether the agency's interpretation of its jurisdiction was patently reasonable. If patently reasonable, the review should terminate and the courts should not look to the merits of the decision.

Under the new broader standard of review articulated by the majority in *Grain Corn,* judicial review may extend to deciding whether a conclusion or finding by

126. *Grain Corn, supra* note 62.

127. *See id.* at 468-91.

128. This stricter view has become known as the "rational basis test" and was explicitly accepted by the Supreme Court of Canada in Canadian Union of Pub. Employees, Local 963 v. New Brunswick Liquor Corp, 2 S.C.R. 227 (1979), 97 D.L.R.3d 417.

129. *See Grain Corn, supra* note 62, at 452-68.

130. *Id.* at 464.

an agency is patently reasonable, given the relevant provisions of the SIMA interpreted in the context of Canada's international obligations as manifested in the GATT. The majority concluded: "I do not understand how a conclusion can be reached as to the reasonableness of a tribunal's interpretation of its enabling statute without considering the reasoning underlying it."[131]

While this new standard of judicial review permits closer security of agency determinations, it remains a standard that, in absolute terms, is very deferential. The opinion does not overturn the ingrained judicial deference to specialized agencies protected by privative clauses.[132] The extent of this ingrained judicial deference to an agency protected by a privative clause was articulated by the SCC in an earlier decision:

> The tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation . . . ." The test for review is a "severe test." . . . This restricted scope of review requires the courts to adopt a position of deference . . . .[133]

B. American Law

The American standard of review is set out in section 1516a of the Tariff Act of 1930. This section reads: "The court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law."[134]

At first glance the substantial evidence standard appears to be much broader (that is, requiring less deference) than the Canadian standard. The substantial evidence standard is well established:

> "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459, 95 L. Ed. 456 (1951), *quoted in Penntech Papers, Inc. v. NLRB*, 706 F.2d 18, 22 (1st Cir.), *cert. denied*, 464 U.S. 892, 104 S. Ct. 237, 78 L. Ed. 2d 228 (1983). *Accord* Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 1026, 16 L. Ed. 2d 131 (1966). Taking into account " 'whatever in the record fairly detracts' from the [agency's] fact finding as well as evidence that supports it," *Penntech, supra*, 706 F.2d at 22 (quoting *Universal Camera, supra*, 340 U.S. at 487–88, 71 S. Ct. at 464–65), "[t]he court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo* . . . .' " *Id.* at 22–23 (quoting *Universal Camera, supra*, 340 U.S. at 488, 71 S. Ct. at 465).[135]

131. *Id.* at 491.

132. *See* Canadian Union of Public Employees, 97 D.L.R.3d 417; Caimaw, Local 114 v. Paccar of Canada Ltd., 2 S.C.R. 983 (1989), 62 D.L.R.4th 437.

133. *Caimaw*, 62 D.L.R.4th at 453 (citations omitted).

134. Tariff Act of 1930 (codified as amended at 19 U.S.C. § 1516(b)(1) (1980)).

135. *New Steel Rails from Canada, supra* note 77; *see also, e.g.*, Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984); Granges Metallverken AB v. United States, 716 F. Supp. 17, 21 (Ct. Int'l Trade 1989); National Ass'n of Mirror Mfrs. v. United States, 696 F. Supp.

It means such relevant evidence as a reasonable mind might accept would be adequate to sustain a conclusion, but the possibility of drawing two inconsistent conclusions from the evidence should not disturb an agency's finding from being supported by substantial evidence. Although broadly discretionary to agency fact-finding,[136] this standard is not without limits.

Thus, in determining whether an agency's application and interpretation of a statute is in accordance with the law, a court need not conclude that the agency's interpretation is the only reasonable construction or the one the court would have crafted.[137] The court need only conclude that the agency's interpretation was reasonable.[138]

Courts reviewing agency determinations generally follow the principle that the agency is presumed correct and the burden of proving otherwise is on the party challenging the correctness of the decision.[139] The courts, however, have also proved themselves ready to step in and review the cases where agencies, under the guise of lawful interpretation or discretion, attempt to contravene or ignore the intent of legislation.[140] The courts have also been ready to review where the agency has rendered a decision devoid of any rationality.[141]

Despite legislative language that appears to give the courts a relatively broad scope of review, the courts appear to have constrained their review and remain deferential to the views of agencies.[142] To prevail under the substantial evidence standard, the plaintiff must show that the agency either erred in the law or that the agency's factual findings were not supported by substantial evidence.

The extent to which a court will defer to an agency determination can be gleaned from the U.S. Supreme Court's decision in *Chevron*.[143] *Chevron* articulated a two-part test. In the first part, the court must determine whether congressional intent is clear. If it is, then the court need not review the issue further. If the intent is not clear, then and only then, can the court consider whether the decision is based on a permissible construction of the statute. In doing so the court does not impose its own construction on the statute, as would be the case in the absence of an administrative interpretation. Rather, the court's review is limited to whether the interpretation is reasonable. The Court held: "We have

642, 644-45 (Ct. Int'l Trade 1988); Alberta Pork Producers' Mktg. Bd. v. United States, 669 F. Supp. 445, 449-50 (Ct. Int'l Trade 1987), *op. after remand,* 683 F. Supp. 1398 (Ct. Int'l Trade 1988); Philip Bros., Inc. v. United States, 640 F. Supp. 1340, 1342 (Ct. Int'l Trade 1986).

136. American Permac, Inc. v. United States, 831 F.2d 269, 273 (Fed. Cir. 1987), *cert. dismissed,* 485 U.S. 901 (1988).

137. *See* Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 n.11 (1984).

138. *See id.* at 845.

139. *See* Hannibal Indus. Inc. v. United States, 710 F. Supp. 332, 337 (Ct. Int'l Trade 1989).

140. *See Cabot II, supra* note 44, at 953.

141. *See* American Lamb Co. v. United States, 785 F.2d 994, 1004 (Fed. Cir. 1986).

142. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law,* 1989 DUKE L.J. 511.

143. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. . . .[144]

VI. Conclusion

Although a cursory analysis of the two systems would lead to the conclusion that very different interpretations of the GATT Codes could mandate irreconcilable results, the administration of the two systems, in practice, generally leads to similar outcomes. Both the Canadian and American unfair trade law systems are drawn from the GATT Codes, but have been uniquely interpreted to leave the administering agencies a wide latitude of discretion. Both systems have therefore developed peculiarities in the areas of procedure, subsidy and material injury determinations, public interest, and negotiated settlements. Despite these differences the results remain comparable. The one element that differs between the two countries is the standard of judicial review. The Canadian standard of review is much narrower than the American standard, making the reversal of a Canadian agency determination much less likely than the reversal of a U.S. agency by U.S. courts.

It will be interesting to watch the evolution of the unfair trade laws as the Uruguay Round concludes, the Canada-U.S. Free Trade Agreement reaches maturity, and the two nations embark upon another experiment through the negotiation of a North American Free Trade Agreement with Mexico.

144. *Id.* at 844 (citation omitted).